MARITIME UNION OF AUSTRALIA

Sign in

SYSTEMATIC WAGE THEFT FROM TAXPAYER IN THE NSW CRUISE INDUSTRY EXPOSED

Media Release
14 April 2026

Systematic wage theft from taxpayer in the NSW cruise industry exposed



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The Maritime Union of Australia has today revealed that systematic wage theft from taxpayer funds occuring in and alongside the NSW Cruise industry at publicly owned passenger terminals could potentially be worth millions of dollars.

MUA Sydney Branch Organiser Shane Reside said “we believe that millions of dollars in

wages have been systematically stolen by criminal security companies working under contract to the NSW State Government in the International Cruise Terminals of Sydney Harbour, including at Circular Quay and White Bay. The seedy underbelly of this industry is truly staggering."

The government-owned NSW Port Authority is responsible for managing the security of the international passenger cruise terminals. The Port Authority has contracted out their responsibility for security to Singaporean state-owned multinational 'Certis'.

"After receiving whistleblower reports almost 12 months ago, the MUA has been relentlessly digging through layer after layer of shady outsourced contractors performing security at the international passenger cruise terminals. Every layer is worse than the last, and right at the very bottom you have ordinary, working class people being robbed of their hard earned pay," Mr Reside said.

The MUA brought the Fair Work Ombudsman in to use their investigative powers to start forensically piecing together a case detailing exactly how much in wages had been stolen by these sub-contractors.

After 12 months of investigation, the Fair Work Ombudsman has confirmed that contracted security services at NSW cruise passenger terminals has been further outsourced or subcontracted out to five separate, shady operators. This authorised outsourcing is a blatant breach of the written contract Certis holds with the Port Authority. Of those five sub-contractors, three have been found to be stealing wages, one has gone into liquidation, and the final company is ghosting the Ombudsman and seemingly impossible to find.

"We all know that workers in the security industry in NSW are overwhelmingly drawn from migrant, working class communities. It is an absolute disgrace that these people are being robbed by criminal outfits employed under contract to the NSW State Government."

"Successive governments have outsourced critical infrastructure to multinational corporate interests right across our economy, so it's no surprise that a profit-hungry multinational has overseen a wage heist of this magnitude," Reside said.

MUA Sydney Branch Secretary Paul Keating said "the question we should really be asking ourselves is what else is happening in the international passenger cruise terminals in Sydney Harbour? There is not one, not two, but five separate shady outfits that have been

pulling people off the street, giving them a security uniform and sending them down to manage an international border arrival point".

"If the Port Authority audits haven't picked up wage theft of this magnitude from taxpayer funds, what else have they missed that's going on down at these terminals? What are they going to do to stamp this out?"

"For decades, the MUA has warned that state government outsourcing of security arrangements to private multinationals was a massive risk on every single front. Sadly the NSW Government pursued this risky and unprincipled approach in spite of all sound advice, and their approach has bitten them on the arse," Mr Keating said.

"The MUA has uncovered multiple instances of criminal organisations running security at the international border in our international passenger terminals," Keating explained. "Will Minns step in now and take action to make sure that this never happens again or is he and his government captive to the same multinational criminals who robbed these workers in the first place? I'm waiting for my phone to ring".

ENDS.

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The Seaman's Union of Australia and Waterside Workers Federation merge to create the Maritime Union of Australia (1993). The lead-up to the merger saw the Marine Cooks Bakers and Butchers Association (formed in 1908) amalgamated with the SUA in 1983, and the Federated Marine Stewards and Pantrymen's Association merged in 1988. In 1991 the Professional Divers Association also amalgamated with the S.U.A.

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Senate Standing Committee on Education and Employment Inquiry into corporate avoidance of the Fair Work Act

February 2017

About United Voice

United Voice is a union of workers organising to win better jobs, stronger communities, a fairer society and a sustainable future. Our members work in a diverse range of industries including aged care, early childhood education and care, cleaning, hospitality, healthcare, security, emergency services and manufacturing.

United Voice members works in industries characterised by insecure and low paid work, and are frequently employed by labour hire companies or sham contractors. Our members are disproportionately impacted by employer avoidance the Fair Work Act 2009 ('the Act') and the practices addresses by this inquiry's terms of reference.

Introduction

This inquiry comes at important time for Australia's lowest paid workers, as more and more cases come to light demonstrating how our industrial relations laws are failing Australian workers. United Voice believes an inquiry into some of the most serious problems in our industrial relations and labour market regulations is long overdue.

United Voice has sought to comment on a number of the terms of reference outlined for this inquiry, with a focus on the issues surrounding labour hire, in addition to some of the wider issues around precarious employment, worker exploitation and the undermining by employers of worker rights.

We recognise there are broader policy issues that relate to the effectiveness of the Act that are beyond the scope of this inquiry. Elsewhere, United Voice has advocated for an improved safety net, and has over many years drawn attention to the limitations of bargaining to address the position of the low paid.

We remain committed to working constructively with government, employers and stakeholders to advance the matters concerning this Inquiry, and more broadly, to address stronger protection and a fairer safety net for Australian workers.

For more information on this submission, please contact Jacqui Woods via
or

Jo-anne Schofield
National Secretary

Contents

Executive Summary 4

Labour Hire 7

The use of labour hire and/or contracting arrangements that affect workers' pay and conditions 9

Case study 1: Academy Services 10

Voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions 11

Case study 2: Private Corrections 15

The effectiveness of transfer of business provisions in protecting workers' pay and conditions 18

Protections during transfer of business in similar jurisdictions 20

The avoidance of redundancy entitlements by labour hire companies 21

'The ordinary and customary turnover of labour' **24**

The effectiveness of any protections afforded to labour hire employees from unfair dismissal **28**

The extent to which companies avoid their obligations under the Fair Work At 2009 by engaging workers on visas **30**

Remedies to migrant worker exploitation **33**

The role of unions in improving migrant workers' rights **35**

Approaches to regulating migrant labour **36**

Legacy issues relation to Work Choices and Australian Workplace Agreements 37

Case study 4: Brisbane Executive Security Teams Pty Ltd ('BEST Security') 41

The economic and fiscal impact of reducing wages and conditions across the economy 42

Executive Summary

This submission addresses a number of the inquiry's terms of reference relating to the use of labour hire and other contracting workforce issues and the flaws in the industrial system that allow for the exploitation of workers engaged under these sort of arrangements.

While the primary focus of this submission is on labour hire, we emphasise that the experience of workers engaged under labour hire, contracting and sub-contracting arrangements is often interchangeable. The growth of employment in these markets has resulted in an increase in the exploitation of vulnerable workers, where legal obligations are often unmet and attempts at compliance are ignored or evaded. As a result workers are left insecure and exploited. In many industries, particularly in contracting sectors, this results in a race to the bottom as businesses are forced to compete for work at lower and lower standards.

Contracting and labour hire is no longer used as a temporary supplement to permanent work and is now often used as the permanent workforce, replacing permanent directly engaged employees. The cost competitiveness of these models in comparison with more conventional forms of employment relates to their ability to avoid the usual costs of employment.

The manner in which labour hire firms operate is problematic and there is widespread corporate avoidance of the Act by labour hire. United Voice does not suggest that all labour hire or contracting operators are unscrupulous, but it is clear there are systemic issues which warrant this inquiry. There is also an urgent need for reform. It should not be cheaper to contract out a workforce including via labour hire than to directly employ a worker to perform the same job. At the very least, there should be a 'level playing field'.

Our experience has seen employers exhibit behaviours on a spectrum that can be characterised as ranging from compliant with the Act, questionable, illegal and in some cases criminal. All these behaviours are generally in aid of avoiding or reducing the legal and industrial costs associated with employment so as to make the provision of labour by labour hire companies more competitive. Questionable legal and industrial behaviour becomes acceptable due to competitive pressures.

Furthermore, there are a number of weaknesses in the Australian industrial relations system that unscrupulous employers use to exploit vulnerable workers, especially those on temporary work visas. Addressing many of these weaknesses would have the broader effect of protecting workers from forms of corporate avoidance of the Act not covered by the terms of reference to this Inquiry.

As we outline in this submission, there are a number of discrete practical reforms that are needed. These go to clearer rights and protections for workers to collectively bargain and to take collective action as part of agreement making.

United Voice has made 11 recommendations for reform. These reforms are based on the following principles:

- equality of treatment of all workers doing similar work irrespective of the legal basis of their employment;
- a level playing field across all forms of employment that ensures all employers comply with the industrial system and that one type of employer is not able to avoid costs associated with employment that others cannot; and
- the right of employees to take collective action must be protected and recognised.

These reforms would have the effect of strengthening protections against unfair and exploitative practices.

Rising inequality is a clear consequence of the Government's failure to address growing exploitation associated with labour hire, sham contracting and similar deregulated employment arrangements. Corporate avoidance of our industrial legislation exacerbates that inequality. For this reason, action along the lines proposed in this submission is vital to ensuring a fair, just and equal society.

Summary of Recommendations

Recommendation 1

The Government should create a national licensing scheme covering labour hire and subcontracting operators. Such a scheme should include the capacity to undertake audits regarding compliance with employment standards, taxation and superannuation payments; and to investigate allegations of breaches and impose penalties. It should also include a 'fit and proper' persons test for all operators and directors.

Recommendation 2

An agreement should not be approved if approval of the agreement would undermine the capacity of workers to engage in collective bargaining. In considering whether approval of an agreement would undermine collective bargaining, the Fair Work Commission should be asked to consider the size of the cohort that made the agreement, whether or not the employees who made the agreement are representative of the workforce, whether they were represented by an employee organisation during bargaining and whether or not the employees who voted and approved the agreement were paid in accordance with the minimum terms and conditions of the agreement.

Recommendation 3

The minimum voting cohort required to make an enterprise agreement should be increased to 10 employees.

Recommendation 4

The Committee should review the transfer of business provisions in the United Kingdom and New Zealand with a view to the expanding the Act's provisions based on these standards applying wherever there is change of contract, contracting out, or a business is sold.

Recommendation 5

The words 'except where this is due to the ordinary and customary turnover of labour' should be deleted from section 119 of the Act to provide a universal entitlement to redundancy payments for all employees, including employees of labour hire firms.

Recommendation 6

Consideration should be given to the creation of a civil penalty provision of being involved in an unfair dismissal in terms of section 550 of the Act. The offence should deal with the situation where a finding has been made that an employee has been unfairly dismissed and there is substantial involvement in the termination by a third party.

Recommendation 7

There should be greater scrutiny on the use of Australian Business Numbers (ABNs) in industries where sham contracting is prevalent, including the contract cleaning industry. Employers should be prohibited from engaging visa holders under ABNs in sectors where their use has been found to contribute to avoidance of legal employment obligations and exploitation.

Recommendation 8

The Independent Contractors Act 2006 (Cth) should be amended to include a statutory definition that would make it easier for parties to identify the genuine status of employment and that includes a statutory presumption in favour of an employment relationship.

In determining employment status, the Act should ensure a person is a worker within a business that takes the benefit of the worker's labour ("the employer") if the person meets two or more of the following indicators:

- the person is subject to the control of the employer in relation to how the work is performed;
- the person usually works for the one employer and only that employer;
- the person is treated as, or portrayed to others as, part of the employer's organization;
- the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the employer;
- the person has regularly worked for the employer over a three month period; and
- the person uses equipment or other facilities needed to perform the work provided by the employer (other than the usual tools of trade)and the person does not engage in entrepreneurial activities characteristic of the conduct of a business in relation to the work provided to the employer.

Typically, those characteristics will include exposure to financial risk, the provision of a commercial service (and not merely labour) to a range of customers, the capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others.

Recommendation 9

The Government should work with unions, migrant and community organisations and employers in a tripartite way to address growing exploitation of migrant workers.

This should extend to:

- recognising the role of unions in providing protection and advice to workers;
- bolstering freedom of association provisions and ensuring that all workers are informed of their industrial rights; and
- severing the nexus between a migrant worker's visa status and their employer.

Recommendation 10

The Government should enact a protective rather than a punitive approach to regulating migrant labour. This should include the fundamental principle and expectation that exploitation should not result in deportation. In suspected cases of exploitation:

- a rights-based approach should be taken by government – one that recognises the vulnerabilities of migrant workers to exploitation and puts in place mechanisms for protection against and rectification of exploitation;
- workers on temporary work visas should be granted the right to remain and work in Australia pending the resolution of their claims for underpayment and/or other instances of exploitation regardless of a visa condition breach having occurred in the context of the exploitation alleged to have occurred;
- a communication firewall should be enacted in such a way that the FWO is not required to report visa breaches to the DIBP that could result in the unduly precipitated departure of a visa worker;
- migrant workers should be eligible for all the same worker protections as residents and citizens when an employer defaults on their obligations, namely access to the Fair Entitlements Guarantee (FEG) scheme.

Recommendation 11

Section 226 should be amended to require the Commission to expedite the consideration of any agreement that would at the time of application not pass the better off overall test under section 193. If an employee covered by the agreement would be better off overall if the relevant modern award applied to the employee rather than the agreement, the agreement should be terminated.

Labour Hire

The Fair Work Act 2009 ('the Act') does not differentiate between labour hire and direct employment. The Act maintains the paradigm that construes the employment relationship as one defined by a closed bilateral relationship between the employee and the employer and does not acknowledge practical differences between labour hire-type employment relationships and the more conventional direct engagement of an employee by an employer.

The Act's failure to acknowledge that labour hire represents a departure from the traditional employer/employee relationship permits a user of labour hire to effectively insulate themselves from many of the responsibilities that normally attach to running a workplace.

In labour hire employment arrangements there is a triangular relationship. The labour hire firm has an employment relationship with the employee and a contractual relationship with the host (also referred to in this submission as the 'employer', or 'enterprise') to provide the employee that performs work for the host's benefit. The employee will have no direct legal relationship with the host despite the fact that the employee is performing work for their benefit in the host's workplace and is often under the direct control of the host.

All employees are intended to be covered by the Act's National Employment Standards ('NES') and the law generally. The NES makes no allowance for the different status of an employee engaged via a labour hire arrangement as opposed to an employee that is directly engaged.

For example, a large retailer may be cleaned regularly by cleaners, engaged by a labour hire firm, who are being underpaid or exploited, but ultimately the retailer bears no responsibility for those employees – or that exploitation. In the pursuit of profits and with little to no accountability under the legislation, the retailer can continue to engage low cost firms that engage in dubious behavior – as there are limited or no consequences to the decision to contract with a labour hire provider that will almost certainly be contravening industrial law.

Some real life examples of such behavior are outlined in response to the terms of reference, below. These case studies are generally not exceptional or unusual. A common feature of the conduct of labour hire is that in the absence of competent representation by a union, there is no incentive for the employer or beneficiary of the worker's labour ('the host') to seek to comply with the letter or spirit of the law.

There are no specific provisions in federal industrial law that are directed to labour hire and the system can be properly characterised as unregulated. There are a number of steps the Government could take steps to limit the growing incidence of exploitative work practices arising from the use of labour hire and subcontracting. A national labour hire licensing scheme would be a good starting point to address some of the more unscrupulous behaviours

The adoption of a licensing scheme would require any company supplying labour hire or subcontracting to another party to register for a license and meet set requirements to achieve and maintain this license. Requirements could include the following, which United Voice recommended in the establishment of the Victorian labour hire registration scheme:

a. Payment of a bond and annual license fee to the Australian Government to operate a labour hire or subcontracting company, as occurs in Victoria.
b. Threshold capital requirement to operate a labour hire or subcontracting company in Australia.
c. Core requirements for license holders and related parties that include:
    i. set requirements for the nature of the license;
    ii. a fit and proper persons test for persons operating in the industry;
    iii. on-going minimum capital requirements;
    iv. requirements for the compliance with workplace laws: and
    v. requirements for the provision of annual reports.
d. A dedicated compliance unit.
e. Mandatory OHS, workplace rights and entitlements training.

Such a scheme would ensure those operating labour hire and subcontracting companies have the capacity, and incentive, to meet their legal requirements. A national licensing system would provide a way to maintain basic standards, deter and identify rogue operators and a way for hosts that want to use reputable operators an ability to easily identify labour hire firms that are doing the right thing.

Recommendation 1

The Government should create a national licensing scheme covering labour hire and subcontracting operators. Such a scheme should include the capacity to undertake audits regarding compliance with employment standards, taxation and superannuation payments; and to investigate allegations of breaches and impose penalties. It should also include a 'fit and proper' persons test for all operators and directors.

Other reforms need to be made to the system to ensure that labour hire operators meet their legal obligations. These will be touched on throughout this submission in relation to the relevant term of reference.

The use of labour hire and/or contracting arrangements that affect workers' pay and conditions

We address term of reference (a) of the Committee's terms of reference here.

Contracting out of labour has the general effect of reducing workers' pay and conditions. This reduces the pay and conditions of those engaged through these arrangements and also the pay and conditions generally in sectors where there is significant use of a contracted or labour hire workforce. This is done through a variety of mechanisms.

Many of the avoidance behaviours noted in this submission would not occur where there is an ongoing relationship between the employer and employee. By distorting the legal relationship of employment, labour hire is able to profit from the avoidance of industrial standards.

In the industries which employ United Voice members contracting and labour hire is used precisely because it is prepared to avoid loadings and penalties in contravention of the award and also avoids costs associated with redundancy, and by not 'owning' employees avoids more systemic costs associated with service such as long service leave and the health costs associated with an established permanent workforce.

Case study 1: Academy Services

Academy Services Pty Ltd is a company supplying cleaning services to premises mainly in the Adelaide Central Business District. Academy Services is based in Adelaide but operates interstate.
Academy Services has made a collective agreement with United Voice: the Academy Services and LHMU Cleanstart Union Collective Agreement 2008 ('the Cleanstart Agreement').

Academy Services has a long history of non-compliance and questionable practices, evidenced by numerous interventions by United Voice's South Australian branch. The company's business model involves both the direct employment of employees, and the engagement of entities it regards as "franchisees".

These franchisees are paid a flat rate per hour of about $28 per hour. They are required to have Australian Business Numbers ('ABNs') and engage other persons to perform the work allocated to them, or to part perform that work. The franchisees typically do not provide holiday pay, sick leave or any other employment related entitlements. They are required to provide their own insurance. The franchisees sign contracts identifying them as franchisees with a series of formal terms consistent with a franchise arrangement. The hourly rate is above the base rate of the Cleanstart Agreement and the Cleaning Services Award 2010, but the work the franchisees typically undertake is at times when loadings or penalty rate would be required to be paid.

Despite the pretence that the cleaning work is being performed by an independent contractor, the hours of work, and their work duties, are dictated by Academy Services. Franchisees are required to perform work exclusively for Academy Services. Academy Services provides all the equipment and materials required for the work. Payments are made periodically in a similar pattern as wages and not on invoices submitted per job.

The franchisees do not engage with building owners or occupiers. This is done exclusively by Academy Services. Academy Services controls all records pertaining to the work done by the franchisees. While franchisees engage employees, Academy Services retained the right to terminate the individual workers *'employment'* with the franchisee.

The success of Academy Services' business model is that it has its own employees working during non-penalty periods, and the franchisees work during penalty periods. The flat fee it pays franchisees is above the base rate that should apply but well below the more significant penalty rates at which the work should be paid.

To date, the Fair Work Ombudsman has failed to intervene.. United Voice has taken cases against Academy Services and has ongoing litigation against Academy Services in the Federal Court.

Academy Services' conduct highlights several key issues in relation to labour hire in the cleaning industry. First, cleaning is an industry where labour hire predominates, very few cleaners are directly engaged by the owners of the workplaces that they clean and maintain. Change of contract and turnover of the work force is a regular feature of the sector. The Cleanstart Agreements are an attempt to provide some security of employment in an industry where contracts change frequently; however, these provisions are often ignored.

This is just one example where the intense competitive pressures have created powerful incentives to minimise labour costs by any means.

Critically, contracting and labour hire makes collective bargaining difficult, bargained outcomes harder to maintain and in the majority of cases labour hire is used to undercut the bargained rate in a workplace or sector due to the ability to regularly replace a cohort of workers effectively collapses standards and bargained outcomes.

Contracting, sub-contracting, and labour hire operates as a significant feature of the labour market whose effect is to reduce standards to the award safety net and, frequently, to a standard effectively below the award. This creates a competitive logic that dictates that anything more than the minimum is excessive and decreased labour costs are a reasonable expectation of a user of labour.

United Voice has observed that this has been an important factor in the collapse of pay and conditions in areas such as cleaning, hospitality and security. Our second case study concerns privately managed correctional facilities. In this sector, currently, a number of contracting or facility management companies, are adopting tendering practices which involve the manipulation of agreement making which may in the short term *'win'* these companies work but will destroy long established bargained standards in this sector.

The potential destruction of bargained standards in private correctional facilities will also have an effect of the quality of services. When the pay and conditions of workers in any sector collapses, this inevitably has an effect on other standards within the sector. It is therefore wrong to see labour hire's impact as narrowly drawn to wages and conditions. While we acknowledge this goes beyond this term of reference, the Committee should nonetheless be cognisant of these broader implications.

Voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions

We address term of reference (b) of the Committee's terms of reference here.

The principal object of the Act is to *'provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians'*.[1]

Specific objectives note that this object will be achieved by:

> *(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and*
> *(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.*

Part 2-4 of the Act deals with enterprise agreements and how they are made. Enterprise agreements are intended to be the outcome of collective bargaining between employees at an enterprise level and one or more employers. The role of *'employee organisations'* is clearly recognised in the Part as it is elsewhere in the Act but the critical role of unions is not provided with adequate protection.

1 Section 3.

According to the Act's modern awards objective, modern awards and the NES are intended to provide a *'fair and relevant safety net of terms and conditions.*' A clear distinction between modern awards and earlier awards is that modern awards are a safety net instrument.[2] Modern awards are not bargained in any sense and provide a fixed safety net determined by the Fair Work Commission ('the Commission'). Enterprise agreements made under the Act must place the employees covered by the agreement in a position where they are better off overall than if the relevant modern award applied to the employees by the requirement that agreements must pass the so called *'BOOT'* test.[3]

The Act's agreement making provisions therefore assume that any flexibility or departure from modern awards or the NES standards comes with some uplift in the terms and conditions of the employees covered by the agreement and that this uplift is achieved by collective bargaining. Agreements are intended to be instruments that provide for superior condition as a result of bargaining. It is assumed that the interest of both the employer and the employees will be accommodated within the bargain but agreements are not intended to be entirely captive of the employer and completely divorced from bargaining.

The most significant demonstration of the bargained nature of agreements is the ability of employees and industrial associations to lawfully engage in protected industrial action in bargaining for enterprises agreements. The Act has very clear restrictions that industrial action cannot lawfully take place before the nominal expiry date of an agreement.[4]

Subsection 172(6) of the Act notes that an enterprise agreement cannot be made by a single employee. This provision was inserted into the current Act by the Fair Work Amendment Act 2012 and commenced operation on 1 January 2013. Currently, an enterprise agreement which is not a greenfields agreement can be made by 2 or more employees 'who will be covered it'. Most current concerns about voting cohorts for enterprise agreements arise from the 2015 judgment of the Full Federal Court in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd [2015] FCAFC 16 (24 February 2015) ('John Holland')*. John Holland essentially clarified that it is permissible for agreements to be made under the Act by a small group of employees chosen by the employer and for the group to be 'fairly chosen' irrespective of whether the group that approves the agreement is in any sense representative of the larger group of employees that will be able to be covered by the agreement. These small cohort agreements typically have coverage clauses that allow the agreement to cover a range of classifications nationally and do not specify particular enterprises or workplace. They are designed to be 'rolled out' to unidentified workplaces in the future.

In a practical sense, John Holland, contrary to the object of the Act and commonly held assumptions about agreement making, appears to provide authority for the proposition that agreement making under the Act does not need to involve collective bargaining. Justice Besanko observed that the role of collective bargaining 'is quite a limited one' in determining whether the group of employees covered by an agreement is fairly chosen.[5] The decision has allowed employers to 'capture' bargaining by determining small groups of its employees as the cohort. This loophole is being utilised increasingly and particularly by labour hire.

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2 Shop, Distributive and Allied Employees Association v National Retails Association (No. 2)) [2012] FCA 480, at paragraph [35]; 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Decision [2014] FWCFB 1788, at paragraph [31]

3 Section 193.

4 Section 417,

5 *John Holland*, paragraph 3.

Presciently, Justice Buchannan in John Holland noted [33]:

> *There is no requirement that employees who vote to make an agreement must have been in employment for any length of time, and there is no requirement that they remain in employment after the agreement is made. Presumably, the presently employed members of such a group will act from self-interest, rather than from any particular concern for the interests of future employees. The potential for manipulation of the agreement-making procedures is, accordingly, a real one.*

The now established practice of making agreements with a very small number of employees is fundamentally about excluding unions from the agreement making process and utilising the fact that for the duration of an agreement no bargaining can take place. Agreement making is increasingly becoming a way that employers unilaterally and privately determine the industrial relations within a workplace. In United Voice's view, many of these types of agreements are being made to assist labour hire competitively tender for work. This obviously undermines the basis of collective agreement making envisaged under the Act while also providing labour hire with the ability to represent to potential users of its services that it can provide terms and conditions that cannot be disturbed by any form of collective action.

United Voice's experience is that when we become aware of these agreements prior to the agreement's approval by the Commission, we have no capacity to be classified as a bargaining representative under the Act as we will not have a member covered. The cohort is being chosen by employers for among other reasons because it contains no union members. Also even in small cohort agreements, the employees often appoint bargaining representatives and this appears designed to close the door to any union claiming default bargaining representative status. *'Confected'* is an accurate description of the agreement making process of many of these agreements. There is technical compliance with bargaining rules but no bargaining.

Any attempt to be involved in the pre-approval process is at the discretion of the member of the Commission responsible for approving the agreement. The approach of different members of the Commission varies widely.[6] Despite clear statements in the Act requiring the Commission to perform its function in a manner that is *'just and fair'* and *'open and transparent,'*[7] United Voice has been denied basic information about these agreement often contrary to the privacy policy of the Commission.

A recent Full Bench decision of the Commission has clarified that basic information about agreements should be generally made available as of right to any person.[8] The need for a Full Bench of the Commission in *Mining and Energy Union v Ron Southon Pty Ltd* to essentially say that the Commission should apply it long held published privacy policy is because of the intense pressure for secrecy that has been placed on the Commission by employers.

These agreements almost always have a maximum term of 4 years. These agreements allow, labour hire firms to take on a contract which is a discrete new enterprise and deny the employees engaged to do this work any opportunity to bargain for their terms and conditions. This is the *'innovation'* of the John Holland style coverage clause.

6 Section 590 of the Act provides the Commission with the discretion to allows persons who may not be a party to participate in proceedings before it: Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Ltd [2014] FWCFB 7940.

7 Section 577 of the Act.

8 Mining and Energy Union v Ron Southon Pty Ltd [2016] FWCFB 8413.

Notwithstanding this, the Commission and the Federal Court has clearly stated that the employees who make the agreement need to have some *'stake'* in the agreement being made and if their remuneration is disconnected with the rates within the agreement the agreement is not genuinely agreed.[9]

The recent judgment of the Full Federal Court in *Shop, Distributive & Allied Employees Association v ALD Foods Pty Ltd*[10] *('ALDI Foods')* has provided some limitations on employer manipulation of agreement making. The majority judgment of Justice White in ALDI Foods clearly indicates that the cohort making the agreement must be notionally covered by the agreement during bargaining.[11] On 13 January 2016, Justice Jessup of the Federal Court in Melbourne stayed the orders of the Federal Court in ALDI Foods on the basis that the employer indicted it was seeking leave from the High Court to appeal the decision.

Currently, the effective test appears to be that a union, like United Voice, needs to be able to demonstrate that an agreement (which is supposed to be a product of enterprise bargaining) was made by some sort of fraud or manipulation by an employer in order to show that it is not a proper agreement under the Act although decisions such as ALDI Food do appear to place some boundaries around agreement making and abuses by employers.

The John Holland litigation exposed general problems with reconciling the objects of the Act and Part 2-4 and specific provisions in Part 2-4. The Full Federal Court in John Holland accepted that if an agreement undermined collective bargaining this was not an impediment to the Commission approving the agreement.[12] Similar issues arise in the context of the termination of expired enterprise agreements and the role of collective bargaining in the Aurizon litigation.[13] The recent jurisprudence of the Federal Court and the Commission concerning agreements has been to read down any reference in the Act to collective bargaining.

The Federal Court has clearly stated that the Commission must narrowly apply the statutory criteria contained in the Act in approving agreements.[14] Subsection 187(2) of the Act that ostensibly requires that approval of an agreement not to be inconsistent with good faith bargaining has very limited application and only applies where a scope order is in operation.[15] The Federal Court has said regard cannot be had to the effect that approval of any agreement will have on collective bargaining because the statutory provisions that the Commission must apply do not expressly mention it.[16]

Accordingly, the criteria for the approval of agreements should clearly indicate that a reason for refusing to approve an agreement is that approval of the agreement would undermine collective bargaining. There is nothing unusual about asking an administrative tribunal to make discretionary decisions of this type and there are a number of considerations that the Commission could be asked to consider when determining whether the approval of an agreement would undermine collective bargaining. Relevant considerations should include: the size of the cohort that made the agreement, whether or not the employees who made the agreement were represented by an employee organisation during bargaining and whether or not the employees who voted and approved the agreement were paid in terms of the minimum pay and conditions contained within the agreement.

We make a further recommendation concerning the lifting of the minimum cohort required to make an agreement to 10 employees. This is an arbitrary number but we say would assist in ensuring that there is a critical mass of employees that would be in a position to in fact bargain and also avoid concerns about manipulation by an employer of the group of employees. Having a larger cohort would still not fundamentally take away from employers their ability to choose the group.

9 KCL Industries Pty Ltd [2016] FWCFB 3048.
10 [2016] FCAFC 161.
11 As above, see paragraphs [133] to [135]
12 See the judgment Besanko generally and the judgment of Buchannan at paragraph 67 to 84.
13 See generally, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd [2015] FCAFC.
14 John Holland paragraph 71.
15 Philmac Pty Ltd [2011] FWAFB 2668.
16 John Holland, paragraphs 82 and 83.

Case study 2: Private Corrections

Some recent agreements encountered by United Voice dealing with work covered by the Corrections and Detention (Private Sector) Award 2010 ('the Corrections Award') illustrate some of the behaviours of labour hire discussed above and what we say are abuses of agreement making under the Act to achieve competitive advantages.

United Voice has coverage of employees in private correctional facilities and is the largest union in this sector. Some of the labour hire firms that perform and seek work in private corrections are GEO Group Australia Pty Ltd, G4S, Serco Pty Ltd, Broadspectrum (Australia) Pty Ltd (previously 'Transfield'), Sodexo Pty Ltd and Wilsons Security Pty Ltd. These firms would style themselves as facilities management firms rather than as labour hire. These firms are large and sophisticated transnational corporations.

Private correctional facilities in Australia are almost 100% c bargained agreements with pay and conditions that are consistently 30-40% above the Corrections Award. Many of these jobs are in rural or regional areas and provide secure long term work for local communities.

Recently United Voice has encountered two agreements where firms have sought to have the Commission approve instruments designed to cover correctional workplaces that are clearly not the product of bargaining. Both agreements are made by small cohorts, have John Holland style coverage clauses and both can be fairly described as confected. The principal purpose of both of these agreements appears to be to provide the employer that '*made*' the agreement with a set of wages and conditions to use in tenders for work at established correctional facilities that undercut the bargained rate being paid and that guarantee no industrial action from the moment they take over management.

JBU Enterprise Agreement 2016 – Broadspectrum Pty Ltd

On 12 July 2016, Broadspectrum Australia Pty Ltd ('Broadspectrum") submitted the JBU Enterprise Agreement 2016 ('the JBU Agreement') to the Commission for approval. The JBU Agreement will cover correctional employees employed by Broadspectrum and engaged within their 'Justice Business Unit ... in the Commonwealth of Australia.' The JBU Agreement specifies no particular workplace to which it will apply and is clearly intended to be 'rolled out' nationally in line with Broadspectrum's success in obtaining contracts from governments to manage correctional facilities.

The JBU Agreement has a four year duration. Its rates are above the Corrections Award but about 20% below the established bargained rate. There are extraordinary provisions in the agreement for the employer to pay at its sole discretion above agreement payments. Broadspectrum calls the agreement a 'safety net agreement' and admits it will pay a higher market rate if it has to.

At the time the JBU Agreement was made, Broadspectrum had no private correctional work on mainland Australia.

Case study 2: Private Corrections

United Voice sought to gain information concerning the making of the JBU Agreement from both the company and the Commission. Initially, all our requests for information about the JBU Agreement were refused on the basis we were on a 'fishing expedition'.

On 15 November 2016, Commissioner Riordan approved the JBU Agreement.[17] United Voice did participate in a private conference and was permitted to make a submission. We were informed at the conference that the JBU Agreement covered 4 employees and 3 of these employees voted to approve the agreement. At the time of approval of the agreement by the Commission, there were only 3 employees 'employed under common law contracts underpinned' by the Corrections Award.[18] The decision describes the remaining 3 employees as falling within the agreement's corrections classifications as a prison escort transport officer, 2 correctional officers and a correctional supervisor level 2.[19] These are employees working in the head office of Broadspectrum in North Sydney preparing tenders and related documents when the company had no corrections work but labelled as correctional workers to be eligible to vote up a corrections agreement.

United Voice lodged an appeal to a Full Bench of the Commissioner against the decision of Commissioner Riordan to approve the JBU Agreement. The appeal was heard on 24 January 2017 and we are waiting for a decision from the Full Bench

The first place where the JBU Agreement is being 'rolled out' is on the contract for court and prisoner transport in Western Australia. On 30 October 2016, Broadspectrum signed a contract to provide court security and custodial services to the Western Australian Department of Corrective Services. This was well before the JBU Agreement was approved but after the formal steps demanded by the Act for the agreement to be 'made' had taken place.

The affected workers are member of the Transport Workers Union of Australia ('TWU'). On the face of it, these workers will have to take a drop of over 20% in their remuneration.

On 13 December 2016, during a stay application for the appeal Broadspectrum noted that the WA Department of Corrective Services required Broadspectrum as a term of the contract to have 'an in-term enterprise agreement' and failure to have such an instrument would jeopardise the contract. The Western Australian Government clearly made the contract with Broadspectrum on the basis it sought a change in provider of this service with no possibility of any collective action by the workforce and that pay and conditions would decline.

SXO Custodial Enterprise Agreement 2016 – Sodexo Australia Pty Ltd

On 31 October 2016, the Commission approved the SXO Custodial Enterprise Agreement 2016 ('the SXO Agreement'). United Voice only became aware of the SXO Agreement after its approval. The SXO Agreement covers employees of Sodexo Australia Pty Ltd engaged in all classifications under the agreement. The SXO Agreement has a 4 year term. This agreement can cover any correctional facility in

17 Broadspectrum (Australia) Pty Ltd T/A Broadspectrum [2016] FWC 7936.
18 As above, paragraph [6].
19 As above.

Case study 2: Private Corrections

Australia.

On 29 July 2016, Sodexo was awarded a 5 year contract by the Western Australian Government to manage and operate Melaleuca Remand and Re-integration Facility in Perth.

The SXO Agreement has clear issues with the BOOT test. The pay points for its base rates of pay correspond to minimum rates within the Corrections Award but two of the higher classifications contained within the award are missing from the agreement. A number of the SXO Agreement's terms and conditions are also clearly less beneficial than the Corrections Award.

At the time the SXO Agreement was made it covered 8 employees all of whom voted to approve the agreement. Sodexo in its statutory declaration lodged with the agreement notes that the SXO Agreement contains terms that are less beneficial than the Corrections Award but that this short fall will be compensated by the existence of an ability to pay employees a special site allowance. The special site allowance is an entirely discretionary payment. According to the SXO Agreement an employee's 'eligibility to receive the special site allowance will be determined by the Company on an individual case by case basis' and the Company can withdraw the allowance 'at any time and without cause' and 'may increase or decrease (it) at any time' at its 'discretion'.

None of the 8 employees who voted on the SXO Agreement are members of any union. The Western Australian Prison Officers Union ('WAPOU') is the principal union with coverage of the Melaleuca Remand and Re-integration Facility in Perth and most of the employees who made the agreement have joined the WAPOU and are dissatisfied with the conduct of their employer. The WAPOU raised concerns about the SXO Agreement prior to its approval and the Commission ignored this correspondence completely and admitted that it did.

United Voice and WAPOU both lodged appeals against the approval of the SXO Agreement on the basis that it failed the BOOT. On 29 November 2016, a Full Bench of the Commission by consent upheld our appeals, quashed the agreement and remitted it to Deputy President Kovacic to hear and determine whether the agreement can in some form be approved. This process is ongoing. United Voice's view is that the SXO Agreement falls so far below the award that it cannot be approved no matter what undertakings are made by the employer.

The combined effect of these agreements, if they are maintained, will be to collapse wages and conditions for workers in private corrections generally. There will be obvious consequences for employees in state run facilities as privatisation becomes a more cost effective option. Families in regional areas that depend on this work for a reasonable standard of living with have a 20-30% decline in income.

Recommendation 2

An agreement should not be approved if approval of the agreement would undermine the capacity of workers to engage in collective bargaining. In considering whether approval of an agreement would undermine collective bargaining, the Fair Work Commission should be asked to consider the size of the cohort that made the agreement, whether or not the employees who made the agreement are representative of the workforce, whether they were represented by an employee organisation during bargaining and whether or not the employees who voted and approved the agreement were paid in accordance with the minimum terms and conditions of the agreement.

Recommendation 3

The minimum voting cohort required to make an enterprise agreement should be increased to 10 employees.

The effectiveness of transfer of business provisions in protecting workers' pay and conditions

We address term of reference (d) of the Committee's terms of reference here.

In United Voice's experience, the transfers of business provisions in the Act are not effective at protecting worker's pay and conditions. The critical issue is that the provisions have no application to historically out-sourced service industries.

United Voice represents a wide range of employees in the industries dominated by outsourced contracting arrangements, such as cleaning, catering, housekeeping, laundries and security. These industries are labour intensive and require little investment in assets beyond uniforms and light equipment. It is usual for outgoing contractors to take all assets with them when they lose a contract. Incoming contractors will provide substantially similar services as the outgoing contractor. Employees of the old contractor who accept work with the incoming contractor will often perform an identical function for the same enterprise. It is not uncommon for cleaners or security guards to work in the same location, doing the same job, sometimes for decades and have multiple changes of employer. A 60 year old security guard may have worked at an art gallery or a court for 30 years but on contract change or transfer returns to being a probationary employee. The transfers of business provisions do not protect these employees from losing their entitlements, nor do they provide any means to recognise their service.

The current transfer of business rules are provided for by Part 2-8 of the Act. Section 311 describes the situations where a 'transfer of business' occurs for the purposes of the Act. In summary, a transfer of business occurs where an employee's employment with one employer ('the old employer') has been terminated, the employee is employed by the new employer within three months of being terminated by the old employer and there is a 'connection' between the old employer and new employer.

The Act requires the transfer of 'assets (whether tangible or intangible)'between the old and the new employer. The requirement for such a connection is typically what disentitles employees in a labour hire workplace from any recognition of their past service when the contract changes.

There are a number of other impediments to the transfer of business provisions applying in contract change situations when the contract is transferring from one labour hire provider to another.

First, an employee must be employed by the incoming contractor if they are to have possible recognition of their service. There is no obligation in the Act for an incoming contractor to accept transferring employees. In reality, incoming contractors typically hire the existing workforce as the skill and experience of these workers is critical to the labour hire (or contracting) firm being able to fulfil its contractual obligations. Current regulation allows incoming labour firms to pick and choose from the existing workforce relatively risk free.

Second, as already noted it is unlikely that the transfer of business provisions will apply to employees in the service industries as typically it will be difficult to identify a sufficient connection between the old and the new employer. This is because thee Act requires a 'transfer of assets from the old employer to a new employer.' A business that is focussed on the labour of the worker can easily sit outside this requirement. While it was once common for cleaning contractors to apply stringent rule in terms of not leaving any 'assets' when contracts changed so as to avoid any suggestion of a transfer of business, there is a widespread understanding that the transfer of business rule is ineffectual in contract change so there is less concern about whether old cleaning equipment remains 'on site'.

It is noted the Act transfer provisions do attempt to cover outsourcing (at ss 311(4)-(6)) where the old employer outsources work to a new employer,[20] where an employer ceases to outsource work to the old employer and takes the work in-house,[21] or where the new employer is an associated entity of the old employer.[22]

Thirdly, even if the transfer of business provisions applied to an employee, important documentation will often be lost where there are multiple changes of employer, making it difficult to prove that entitlements are owed. The onus is on the employee to find proof of their entitlement.

Finally, the transfer of business rules in the Act are too focused on the maintenance of above award terms and conditions. The majority of employees in the contracting industries described in this section are award dependent. The vital issue for employees is the recognition of service and the preservation of accrued entitlements.

Where employees have negotiated enterprise agreements, incoming employers will often seek to avoid the transfer of existing industrial instruments. It is common for employers to seek orders under s 318 that a transferrable instrument will not cover the new employer or the transferring employee. There are also large employers with enterprise agreements that have exploited the transfer of business provisions to avoid entitlements in enterprise agreements. At Crown Casino in Perth, hospitality and catering work previously performed under an enterprise agreement has been outsourced to a number of contract service providers.

Where work is outsourced and an agreement follows transferring employees, it is common for the new employer to find a way to avoid the application of the transferring instrument.. In United Voice's experience, contractors often take on transferring employees with their agreement but then replace them with award-reliant employees as soon as possible. In industries with high rates of turnover in employment, such as hospitality, security and cleaning, this will quickly happen by natural attrition.

20 S 311 (4).
21 S 311 (5).
22 S 311 (6).

Protections during transfer of business in similar jurisdictions

The Australian legislation contrasts with the position in New Zealand and the United Kingdom, which have strong protections for workers in the case of contract change.

In New Zealand, there is a legislative scheme to ensure that pay, conditions, recognition of service and accrued entitlements are protected during transfers of business and out sourcing events. Under Part 6A of the Employment Relations Act 2000 (NZ), every employment agreement must contain an employee protection provision to protect the employment of an affected employee in the case of restructuring (where the business is sold, contracted or transferred out). There are additional rules for vulnerable workers such as orderlies in health and aged care, cleaning, catering, laundry and caretaking.[23]

These rules apply where a contractor loses a contract to perform services and the contract is granted to another business, where services are contracted out, or are contracted in.[24] Employees have the right to transfer to the new employer if they will no longer be required to do all or part of their work for their existing employer because of the restructuring and the new employer will perform the same, or substantially similar, types of work. In that case employers must notify the employees whose work will be affected, inform them of their choice to accept work with the new employer and the date by which they must make that choice.[25] The employers must also provide the employees with relevant information about the restructuring so that they can make an informed decision.

The employees may then choose to transfer to the new employer on their existing terms and conditions with full recognition of prior service.[26] The employees may choose not to transfer, but may become redundant. Employers, employees and unions can negotiate alternatives to the transfer.[27] There are also rules regarding the apportionment of liability for the costs of service-related entitlements of the transferring employee between the old employer and the new employer.[28]

In the United Kingdom, all employees are protected during transfer of business by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (UK) ('TUPE'). This is the United Kingdom's implementation of the *European Union Business Transfers Directive.*[29] The TUPE applies where an undertaking or business is transferred or there is a change in the provision of a service (such as outsourcing or a change of contractor).[30] Where such a transfer occurs, the affected employee's employment is not terminated but, subject to certain conditions, is transferred to the new employer, who takes on all the old employer's rights, duties and liabilities.[31] Employees are entitled to notice and information regarding the transfer and their entitlements in the situation.

Where employees are represented by a union, the union must be informed and consulted before the transfer occurs.[32]

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23 See Employment Relations Act 2000 (NZ) ('ER Act'), s 69F, Schedule 1A.
24 ER Act, s 69C, 69E.
25 ER Act, s 69G.
26 ER Act, ss 69I, 69J, 69K.
27 ER Act, s 69H.
28 ER Act, s 69LA.
29 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p 16–20.
30 TUPE, cl 3.
31 TUPE, cl 4.
32 TUPE, cl 13.

The practical consequence of the ineffectiveness of the Act's transfer of business rules is that workers who have long effective periods of service in the same job and workplace but happen to work in an outsourced workplace will repeatedly lose accumulated sick leave, long service leave and unfair dismissal entitlements at each change of contract. Entitlements such as sick leave, which do not accrue, are particularly critical to low paid workers and these are precisely the entitlements lost at contract change. In the case of long service leave, the entitlement is effectively put beyond the reach of low paid workers in contracting service industries as frequent contracts will deny the employee the necessary service.

United Voice has been the main innovator in relation to portable long service leave but more structural change is necessary to avoid what is the unsatisfactory situation where long effective service does not equate with any accumulation of the benefits normally associated with service. The example of portable long service leave schemes demonstrate that there is a role for the Parliament in remedying these deficiencies.

Australia's industrial relations system should move into line with the transfer of business provisions in comparable developed economies. The situation where low paid workers who work in the same workplace doing the same job for decades but have no sick leave or recognition of their 'service' should be remedied.

Recommendation 4

The Committee should review the transfer of business provisions in the United Kingdom and New Zealand with a view to the Act's provisions applying wherever there is change of contract, a contracting out, a contracting in or a business is sold.

The avoidance of redundancy entitlements by labour hire companies

We address term of reference (e) of the Committee's terms of reference here.

The avoidance of redundancy entitlements is common and wide spread in labour hire and in contracting industries covered by United Voice. Indeed, the key competitive advantage of these forms of employment is the ability to '*turn over*' the workforce and avoid the costs normally associated with change.

Redundancy and transfer of business rules are interrelated as their effectiveness determines critical parts of the cost structure of labour hire.

This issue frequently arises in contract change situations. Namely, when a labour hire contract ends and a different labour hire firm is awarded the contract. The outgoing contractor usually terminates the entire existing workforce. It is common for many of the existing workforce to be engaged by the new contractor, but contract changes generally result in the employee losing continuity of service and non-accruing entitlements such as sick leave or long service leave.

United Voice has established industry-based portable long service leave schemes in contract cleaning and security in some states. These schemes have been developed partly in response to the problems of entrenched labour hire in these sectors and the competitive pressures in contracting industries to compete on contract price by not paying employees their proper entitlements.[33]

In United Voice's experience, the established practice during contract changes is that employees do not receive redundancy when their employment is terminated. Anecdotally, United Voice has been informed on several occasions that it is standard practice for firms to exclude the cost of redundancy in its labour costings when bids are made for work.

United Voice contends a termination as a result of a loss of a contract generally qualifies as a redundancy event in terms of the definition applied in the Act's NES and industrial law generally. One of the innovations of the Act was the creation of a universal right to redundancy pay for all permanent employees covered by the Act. The right to redundancy pay is contained in section 119 of the Act. Prior to the commencement of the Act, any right to redundancy was derived from a specific award, agreement or contractual entitlement. There was no general obligation to pay severance in the absence of a specific entitlement in an applicable industrial instrument.

On 1 January 2010, section 119 and related provisions commenced and after this date all terminations were covered by the applicable NES provisions. There was no transitional regime in relation to employment that commenced prior to the commencement of section 119.[34] There were many employees engaged through labour hire or contracting arrangements on the commencement of the NES. The intention of the Parliament was the NES would apply to these employees prospectively irrespective of whether the employer engaged them on the basis that they had an entitlement to redundancy pay.

Many of these workers are low paid and work in sectors such as cleaning and security. Some had extensive continuous periods of service. In relation to this group, where they have been terminated after 1 January 2010 in the context of contract change the denial of redundancy pay by their labour hire employer is particularly problematic.

After 1 January 2010, the more sophisticated labour hire firms have engaged permanent staff for site specific work on the basis that they are hired to work at a particular facility and that their employment will come to an end if their employer loses the contract to provide the service at the particular facility. Such clauses in contracts of employment are designed to defeat the employee's claim to redundancy pay under the NES and clearly demonstrate that labour hire is conscious that redundancy pay is relevant to change of contract situations.

United Voice had a member terminated after 30 years of continuous service and denied redundancy pay.

The ability to avoid its NES obligations concerning redundancy pay is a critical matter and has allowed some employers to gain a competitive advantage in the labour market that is completely unjustified. This issue requires the urgent attention of the Committee.

There are two main legal devices that are employed by labour hire to avoid its NES responsibilities concerning redundancy pay. The manner in which labour hire uses these exceptions demonstrates a culture of avoidance in terms of the recognition of basic employment entitlements.

33 Portable long service leave schemes are legislated in contract cleaning, security and building and construction in many Australian states and territories. These schemes require legislation, for example, Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010 (Cth).

34 See: clause 10, part 2, Schedule 4, Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.

'Obtains other acceptable employment'

Traditionally, if an employer is able to 'obtain acceptable' or 'suitable alternative work' for an employee, the obligation to pay severance was reduced or avoidance. The Act reflects this exception. The justification behind the exemption was that if the terminating employer was able to guarantee the employee's service and the employee's non-transferrable entitlements with the new employer, severance (which is in essence compensation for dislocation occasioned by change) was not justified.

Section 120 of the Act allows an employer, after making an application to the Commission, to pay no redundancy pay or a reduced amount as determined by the Commission where it 'obtains other acceptable employment for the employee'. In contract change situations, this exception is intended to apply when the outgoing contractor obtains employment for the employee with the incoming employer. In theory, the arrangement would involve the new employer recognising the service of the employee and non-transferrable entitlements such as sick leave.

The critical element is that the employer 'obtains' the employment – and the case law did place some emphasis on the fact that the employer had to obtain something for the employee from the new employer.

United Voice has observed a common practice that if the employee obtains a position with the incoming contract that this is taken as avoiding any liability for redundancy pay. This is irrespective of whether the employer has done anything, or, more significantly, whether the employer has obtained for the employee recognition of their service or non-transferrable entitlements with the new employer.

Employees are not infrequently pressured to take work with the incoming contractor even if the work is manifestly inferior because any refusal of a position with the incoming contractor is stated by the labour hire employer as automatically disentitling the employee to redundancy pay. The fact that the exception can only be used subject to an application to the Commission and an order being made is frequently overlooked.

The use by firms of the 'obtaining other acceptable employment' exception to redundancy provides a typical example of the manner in which labour hire abuses legal and industrial standards to avoid paying a cost that is otherwise associated with their conduct.

In circumstances where a firm actually makes an application under section 120, the case law until recently was unclear. That Act clearly stated that the employer had to 'obtain' something for the transferring employee from the new employer. Recognition of the employee's prior service and non-transferrable entitlements such as sick leave were critical and clearly the types of matters that one would assume would be guaranteed. Such arrangements between the outgoing and incoming contractor for the recognition of service generally required payment by the outgoing employer to the new employer in consideration of the entitlements recognised.

Previously, firms commonly relied on the case of Australian Chamber of Manufactures v Derole Nominees Pty Ltd (1990) 140 IR 123, ('Derole Nominees'), which expressed a very loose concept of what the terminating employer needed to do to 'obtain' employment for their soon to be redundant employees.[35]

35 As cited, at 128.

Employers, with and sometimes without the sanction of the Commission, frequently considered the mere fact that the ex-employee was successful in securing work with the incoming contractor as satisfying the exclusion concerning obtaining work. Some labour hire firms consider allowing the incoming contractor on the premises to conduct interviews or placing an advertisement in the tea room as evidence the employer obtained work for their employees. This is in the context that many modern awards and agreements provide time off for employees to search for work in their notice period.

The recent judgment of the Full Federal Court in FBIS International Protective Services v Maritime Union of Australia and Anor [2015] FCAFC 90 ('FBIS') has usefully clarified that facilitation of an opportunity does not constitute obtaining employment in terms of section 120.[36] The Full Federal Court in FBIS clearly stated that 'obtain' means that the employer must acquire or get something for the employee from its new employer.[37]

While this clearer statement in FBIS that 'obtain' means obtain is a positive development, the position of employees in contract change is still precarious as labour hire generally applies the broader exception concerning the 'ordinary and customary turnover of labour' (see below) to disentitle an employee terminated as a result of contract change to redundancy pay.

The following formulation is typical and was used in a termination letter to a member of United Voice employed in a catering position at Perth International Airport with over 10 years continuous permanent service:

> *Should no acceptable alternative employment options be identified with either Spotless or the incoming contractor your employment will be terminated as a consequence of the ordinary and customary turnover of labour on 25 June 2015.*[38]

This brings us to the second legal device by which labour hire avoids its NES responsibilities concerning redundancy pay.

'The ordinary and customary turnover of labour'

Section 119 of the Act provides for a universal entitlement to redundancy pay. Redundancy is defined as when the employer 'no longer requires the job done by the employee' and explicitly notes that this definition does not apply to terminations 'due to the ordinary and customary turnover of labour.'

The ordinary and customary turnover of labour exemption is definitional. Accordingly, the Act leaves the matter for the employer to decide. This is a fundamental problem and enables contracting and labour hire firms to effectively avoid the payment of redundancy in contract change situation.

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36 FBIS, paragragh 22.
37 As above, paragraphs 19 to 20.
38 A copy of the correspondence is available on request.

Once an employer determines that the termination is not a redundancy, the onus is the employee or class of employees to challenge the decision of the employer in a court. The Act effectively gives labour hire a 'head start'. The usual way to challenge such non-payment of redundancy pay is by civil penalty proceedings in the Federal Court. These are complex legal proceedings that without the assistance of a union are beyond the reach of almost all workers.

The phrase, 'ordinary and customary turnover of labour', has a long history as an exemption to the obligation to pay severance in redundancy situations. It appeared in many industrial instruments prior to its incorporation in the definition of redundancy within the National Employment Standards ('NES'). The exemption used apply to work that is of a seasonal or fixed duration (e.g. picking fruit or building a ship), where there was some intermittency in the activity. However the Act now clearly excludes these categories of work and the exemption is increasingly used in change of contract situations where there is a structural change in the provider of the labour without any change in the activity.

The fact that a firm loses a contract and has to terminate employees does not automatically bring the termination within the ordinary and customary turnover of labour exception.

There have been numerous recent, authoritative cases where courts and industrial tribunals have clearly stated that firms are liable in certain circumstances to pay redundancy pay when a long standing permanent employee is terminated as a result of contract change.[39] Where the employee has a reasonably held and settled expectation of continuing employment that employee is entitled to redundancy continues to be the applicable law, and there is no general exclusion for change of contract situations. Despite this, employers habitually adopt a completely dishonest approach to the law and indiscriminately characterises all terminations in contract change situations as due to the ordinary and customary turnover of labour.

United Voice frequently pursues labour firms for the non-payment of redundancy entitlements on behalf of our members. These cases are typically settled 'without admission' with all or a proportion of the redundancy pay paid under a deed of settlement.

39 The following cases are reported instance where it was found notwithstanding that the termination occurred in the context of a change of contract, the employee was entitled to and should be paid redundancy pay and the ordinary and customary turnover of labour exemption did not apply: CFMEU v Quality Coatings and Consultants Pty Ltd [2004] QIRComm 125; Garcia & Ors v Limro Pty Ltd [2003] AIRC 726; Tempo Services Limited v TM Klooger & Ors [2004] AIRC 1150; and Transport Workers' Union v Veolia Environmental Service (Australia) Pty Ltd [2013] NSWIRComm 22.

Case study 3:
United Voice v ISS Security Pty Ltd

ISS Security Pty Ltd ('ISS') is a part of multinational facilities management group. There are various ISS corporate entities in Australia and ISS Australia is a part of the ISS A/S which is headquartered in Copenhagen, Denmark, and one of the largest facilities management companies in the world.

On 1 August 2007, ISS obtained the contract to provide cleaning services at Darwin International Airport. On 16 December 2015, ISS was informed it was unsuccessful in obtaining a further contract for the cleaning work at Darwin Airport and that its contract to provide cleaning services formally ended on 29 February 2016. It was unclear how many times its initial contract had been rolled over although almost certainly ISS would have received further contracts to clean Darwin Airport after initially obtaining the work in 2007.

ISS engaged cleaners as permanent employees from the commencement of its contact and throughout the contract. These workers were engaged as permanent employees and their letters of appointments initially made no reference to their employment being terminated in the event that ISS lost the contract to clean the airport. A number of the employees' contracts of employment indicated that ISS could direct them to work at other ISS sites in Darwin.

On 29 February 2016, ISS terminated the entire cleaning workforce by writing to each employee and indicating that their employment would 'cease at 2359 hours on Monday 29 February 2016'. The final payments made to all employees included only payments for unpaid work and unused accrued leave. ISS made no payment in lieu of notice, no redundancy pay and in relation to a number of the employees no accrued or pro rata long service leave as required under the Northern Territory Long Service Leave Act. The termination letters of 29 February 2016 noted that 'your termination will not involve a severance payment, as this situation relates to the ordinary and customary turnover of labour'.

Among the cleaners, there were 7 United Voice members. Our members were predominately members of the Darwin Filipino community, had limited English and had lengthy periods of permanent service with ISS. A number had over 8 years' service and the average period of continuous permanent service was 5 years and 3 months. ISS relied on the Cleaning Services Award 2010 and did not pay any premium above the award. In effect our members and the rest of the workforce were summarily terminated.

We made a number of written demands to ISS that our members' termination entitlements be paid. We received no reply indicating that ISS was contemplating doing anything. While the payment of redundancy pay was theoretically contentious, the payment of a payment in lieu of notice and long service leave entitlements was unexceptional.

Case study 3:
United Voice v ISS Security Pty Ltd

On 1 June 2016, United Voice commenced civil penalty proceedings against ISS in the Federal Court of Australia alleging contraventions of the Act in relation to the not providing proper notice, not paying redundancy pay and failing to follow the consultation provisions of the Cleaning Services Award. We also sought payment of the owed long services leave. The proceedings concerned the non-payment of about $100,000.00 of entitlements to 7 award reliant low paid workers living in one of the more expensive places to live in Australia.

After the statement of claim was served on ISS, we received notification that it had made some payments to our members as a result of our letters of demands sent but due to an alleged problem with their email system not informed United Voice or their ex-employees that the payments had been made. In correspondence, ISS admitted that pro rata long service leave had not been paid 'due to an administrative error' and in the interest of resolving the dispute paid an amount in lieu of notice to all 7 of our members. The rest of the workforce also terminated was not paid.

After the parties filed evidence, there was a mediation conducted by a registrar of the Federal Court in Darwin. On request from the Committee, United Voice is able to provide particulars the final disposition of these proceedings.

ISS maintained that the termination of an entire longstanding workforce due to its loss of a contract was the result of the ordinary and customary turnover of labour. The company's Director of People and Culture, ISS, in his affidavit, sworn 21 October 2016, for the proceedings noted:

> *In the situation of a loss of contract, where employees engaged for the delivery of services on that contract cannot be redeployed to another client, their employment is terminated. The Respondent (ISS) does not make redundancy payments in these circumstances. It is the Respondent's position that termination s due to the end of a client contract is part of the ordinary and customary turnover of labour in our business. This position is generally accepted by our employees who understand that we can only provide work while we hold the client contract.*

ISS is a major and ostensibly sophisticated labour hire firm. ISS paid our members notice and their long service leave entitlements because we threatened and commenced an industrial prosecution in the Federal Court. The statement of ISS is fairly typical: redundancy pay is not paid when the employer loses a contract and this is irrespective of whether or not the employee have been employed for decades or 12 months.

ISS did more than not pay redundancy pay; it did not pay other entitlements that should have been paid when permanent employees are terminated. Despite ISS paying these amounts to our members, we understand that no additional amounts were paid to the other cleaners who were terminated and not union members. ISS appears to consider it appropriate corporate conduct to essentially deny low paid workers basic entitlements and only pay when forced by the possibility of a finding against it in a court.

If the ordinary and customary turn over exception were not available there would be greater motivation for employers to obtain work for their employees with incoming contractors or engage employees on a basis that accurately reflected their expectation of the continuation of the employment. The argument that this exception should be maintained because contract change in an ordinary part of their business is not consistent with the entitlement to redundancy envisaged in the Act. The exception is anachronistic, provides to labour hire an undeserved cost advantage and should be removed.

Recommendation 5

The words *'except where this is due to the ordinary and customary turnover of labour'* should be deleted from section 119 of the Act to provide a universal entitlement to redundancy payments for all employees, including employees of labour hire firms.

The effectiveness of any protections afforded to labour hire employees from unfair dismissal

We address term of reference (f) of the Committee's terms of reference here.

Protection against unfair dismissal is a longstanding feature of Australian industrial law. The Act (Part 3-2) defines unfair dismissal in terms of a dismissal that is 'harsh, unjust or unreasonable' and directly references in the object of the Part the legal precedent that the Commission should provide to employers and employees '*a fair go all round*'[40, 41].

Rightly or wrongly, many employers perceive the risk of unfair dismissal applications as a significant cost of directly employing labour. This is what makes the use of labour hire so attractive – it effectively insulates users of labour hire from unfair dismissal.

Part 3-2 is intended to, and for many employees does, provide, a 'quick, flexible and informal' process to deal with the termination of employment. The application is a relatively simple one and can be made by an individual without legal assistance. The Commission provides compulsory conciliation and arbitration and is more 'user friendly' than a court.

The maximum amount of compensation that can be awarded where there is a finding that a termination is unfair is 6 months' salary, although consistent with Australian jurisprudence, reinstatement is the principal remedy under the Act.[42] In reality, reinstatement is the exceptional remedy. In the 2015-16 financial years, the Commission received 14,694 unfair dismissal applications.[43] Less than 2% of these applications were arbitrated resulting in only 30 orders that an employee be reinstated.[44]

40 Re Loty and Holloway v Australian Workers' Union [1971] AR NSW 95, Section 381.
41 Section 381.
42 According to subsection 390(3), the Commission must first consider reinstatement if there is a finding that a dismissal is unfair. This is consistent with the long tradition in Australian industrial law of reinstatement as the primary remedy.
43 Annual Report 2015-16, Fair Work Commission, AGP, p. 36.
44 As above p.44.

Part 3-2 makes no reference to labour hire as a distinct category of employment. Unlike the general civil contravention provisions of the Act, there is no possibility for any third party liability in relation to a host being knowingly concerned in a dismissal.[45] Accordingly, the Act allows a user of labour hire to direct a labour hire employer to withdraw its employee from a workplace for any reason, including for no reason. The host bears no responsibility to the employee for its decision.

The labour hire employer must then deal with the consequences of having an employee that is not able to perform the work for which they were engaged. In such situations, the employee is usually terminated and the termination is usually justified by the labour hire employer on the basis that the employment relationship has been frustrated.

The triangular nature of the employment relationship deprives the employee of rights that are intended to be available to all employees under the Act in relation to unfair dismissal. Labour hire employees are often deprived of the possibility of the remedy of reinstatement as an option when their termination is found to be unfair in the common situation where the host refuses to take the worker back.

In cases where the host is in effect entirely responsible for a termination that is subsequently found to be unfair, there should be some capacity under the Act for the host to be responsible and the preferred order of the Commission to have effect.

Section 550 of the Act deems a person involved in a contravention of the Act as taken to have contravened the Act. It applies common law principles of accessorial liability.

Section 550 applies to civil penalty contraventions and is the means by which individuals are made liable for contraventions involving employment when the employer is a company. The person who owns the company or the chief executive officer can personally be liable in circumstances where they are knowingly concerned in the contravention. This provision makes it possible for additional persons to be liable for contravenions of industrial law and prevents the real perpetrator hiding behind the corporate veil.

Section 550 does not apply to unfair dismissals as an unfair dismissal is not a civil contravention of the Act. Some consideration should be given to the creation of a distinct civil penalty contravention of being knowingly concerned in an employee's unfair dismissal. Such an offence would only apply in limited circumstances where there has been a finding that an employee was unfairly dismissed and there is some frustration of the appropriate remedy. The very wide power that the Act gives a court in making order when a contravention has been established would allow for an order of reinstatement to be made and for further compensation to be awarded.[46] There is currently the capacity for a host to completely disassociate themselves from the industrial consequences of their decisions to terminate a workers employment.

45 See section 550.

46 After there is a finding that a civil contravention has occurred, the Federal Court or the Federal Circuit Court 'may make any order the court considers appropriate'; section 545 of Act.

Recommendation 6

Consideration should be given to the creation of a civil penalty provision of being involved in an unfair dismissal in terms of section 550 of the Act. The offence should deal with the situation where a finding has been made that an employee has been unfairly dismissed and there is substantial involvement in the termination by a third party.

The extent to which companies avoid their obligations under the Fair Work At 2009 by engaging workers on visas

We address term of reference (h) of the Committee's terms of reference here.

It is becoming increasing common for employers to avoid both the spirit and the law of the Act by engaging workers on temporary visas. A string of inquiries into various aspects of Australia's visa system has failed to initiate any real legislative change in this area. This inquiry is an opportunity for reform of our industrial system that protects all classes of workers from exploitation and makes it more difficult for employers to avoid their responsibilities under the Act.

It is widely recognised that workers on visas are more vulnerable to workplace exploitation than their local counterparts. They also face higher barriers to accessing remedies. The power asymmetry that exists in any employer/employee relationship is exacerbated in the case of temporary migrant workers, because their right to remain in the country is contingent on them not being found to be in breach of the work conditions on their visa. Any legal irregularity in the employee-employer relationship, whether the fault of the employee or not, can trigger a chain of events that leads to a grievous result for the worker (detention and deportation) that is disproportionate to any negative outcome potentially faced by the employer (a fine).

Temporary migrants face strong incentives to stay silent about contraventions of the Act. Any complaint about working conditions to a Fair Work Ombudsman ('FWO') inspector will always be accompanied by the risk that the matter may be also be reported to the Department of Immigration and Border Protection ('DIBP').

Under the laws as they presently stand, the barriers to exploited temporary migrant workers receiving any sort of protection on a whistle-blower basis are significant: visa-holders must rely on either ministerial discretion or the high evidentiary hurdle presented by the statutory criteria for human trafficking or slavery. In practice, neither of these mechanisms are used with any regularity.

The systemic vulnerabilities that arise from our linked immigration and industrial relations regime are compounded by the range of other impediments commonly faced by temporary migrants in accessing justice, including: language and cultural barriers; economic vulnerability; geographical isolation; young age; lack of access to unions and/or legal services; lack of decent work opportunities; and the threat of more egregious levels of abuse in their home country. Further, the long timeframes for investigation of breaches of the Act mean that visa holders have often left the country before they are in a position to receive back pay or compensation for the losses they have suffered as a result of breaches of the Act.

Despite the powerful structural disincentives for migrant workers to report contraventions of the Act, visa-holders are still statistically over-represented in the matters that are litigated by the FWO. Temporary migrants comprise around 5% of the Australian population, and yet they account for 13% of requests received by the FWO, and 76% of litigations filed. More than one third of all of the FWO's enforcement involves a visa holder.[47] For the reasons described above, as well as the inadequate resourcing of the FWO (which has just 300 inspectors for over 11 million workers in over 2 million workplaces[48]), reported cases of contravention of the Act must be understood as representing only a small fraction of the number of violations that in fact occur.

The industries where the exploitation of visa holders are most prominent are cleaning, horticulture, retail, meat and poultry processing, hospitality and accommodation services.[49] These are also the industries where labour hire, subcontracting and sham contracting are most common, and where union density is low. Detailed academic research into the extent and nature of migrant labour exploitation is, as an inevitable consequence of the subject matter, sparse. Discrete surveys carried out by academics and journalists nonetheless point to the existence of a parallel labour market where migrant workers are compelled to work for rates of pay that are significantly lower than the national legal minimum. For instance, a Sydney Morning Herald and Monash University study in 2015 revealed that 80% of foreign language advertisements offered wages to temporary migrant workers below legal rates, in some cases offering positions blatantly advertised as 'black jobs.[50]'

The migrant workers who are most vulnerable to abuse live a 'grey zone' of undocumented, cash-in-hand labour. Recruitment frequently occurs in the home country, triggering a debt bond that taints the work experience they will have in Australia on arrival. Vulnerability is compounded when migrants do not have work rights and are part labouring illegally on a visitor visa or a bridging visa with no work rights. Migrants undertaking such informal and occasionally unauthorised work are unlikely to come into contact with a union, let alone be in a position to be interviewed by an academic researcher.

Nevertheless, some of the major contours of migrant worker exploitation in Australia are indicated in the range of academic, union and journalistic publications in recent years, including:

47 Fair Work Ombudsman (2016) Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program, October 2016.
48 http://www.smh.com.au/comment/new-visas-threaten-australian-jobs-20160606-gpchab.html
49 The Senate Education and Employment References Committee (2016) A National Disgrace: The Exploitation of Temporary Work Visa Holders, March 2016; United Voice (2013) A Dirty Business: The Exploitation of International Students in Melbourne's Office Cleaning Industry.
50 Schneiders, B. and R. Millar (2015) '"Black jobs": Rampant exploitation of foreign workers in Australia revealed', The Sydney Morning Herald, 1 October 2015, accessible at:http://www.smh.com.au/national/investigations/black-jobs-rampant-exploitation-of-foreign-workers-in-australia-revealed-20150930-gjxz7q.html

Hospitality and retail

- A 2016 academic study found that international students working in Melbourne's café, restaurant and takeaway food services sector were routinely underpaid or indeed in some instances not paid at all.[51]
- In 2015, a survey of international students found that 60% of all those undertaking work were earning less than the then legal minimum wage of $17.29 per hour.[52] 80% of those working in Sydney's restaurants were being underpaid, with 35% being paid merely $12 per hour.[53]
- In 2016, the FWO uncovered so-called "going rates" of $11 per hour for Korean workers on student and working holiday maker visas.[54]
- In 2016, Fairfax journalist Adele Ferguson exposed a wage fraud scheme concerning the service station franchise network Caltex that ran through to the top of top of the supply chain.[55] Caltex head office allegedly tipped off its franchisees to the impending FWO raids, and was well aware that Pakistani and Indian workers on student visas in its service stations and shops were being paid as little as $12 per hour.[56]

Cleaning and security (property services)

- Studies conducted in 2012 and 2013 by United Voice found that international students, who make up half of the cleaning workforce in Melbourne CBD offices, were routinely subject to poor working conditions, sham contracting, and cash-in-hand payments below the rates set in collective agreements and awards.[57] Wage theft of up to $15,000 per year in earnings per worker was found to have occurred, with underpayment estimated to exist in at least one quarter of city office buildings.[58]
- A 2012-13 FWO audit of 578 cleaning businesses found that only one in four were paying wages lawfully. International student workers regularly worked through scheduled breaks and after the completion of shifts in order to complete their allocated tasks, which could not be feasibly or safely completed within the paid time that was allocated.[59]
- In 2016, the FWO found that 1,500 migrants working as housekeepers in the Oaks Hotels and Resorts chain were being robbed of about $2 million in one year. This wage theft has been facilitated by the Oaks' systematic outsourcing of cleaning services to contractors such as Housekeepers Pty Ltd, perpetrating sham contracting, piece rates, and unlawful deductions for such things as 'public liability insurance, "payroll tax", chemicals and equipment, administration fees and uniforms.'[60]
- In 2015, United Voice documented numerous cases of security workers suffering underpayment, excessive working hours, inadequate training, and insecure employment following a change in contract or the use of labour hire companies at the National Gallery of Victoria, Coca Cola Amatil and Tullamarine Airport.[61] The shift away from direct employment and to multiple levels of subcontracting puts workers themselves and members of the public at risk.

51 Campbell, I., M. Boese,& J.-C. Tham(2016) 'Inhospitable workplaces?: International students and paid work in food services' Australian Journal of Social Issues, , 51(3): 279-298. Availability:<http://search.informit.com.au.ezproxy1.library.usyd.edu.au/docu-mentSummary;dn=319460736447436;res=IELHSS> ISSN: 0157-6321. [cited 21 Nov 16].

52 Bagshaw, E. (2016) '80 per cent of international students in restaurants paid below minimum wage, survey finds', The Syd-ney Morning Herald, 21 April 2016, accessible at: http://www.smh.com.au/national/education/80-per-cent-of-international-students-in-restaurants-paid-below-minimum-wage-survey-finds-20160421-gobkzh.html

53 Bagshaw, E. (2016)

54 Fair Work Ombudsman (FWO) (2016) Malaysian restaurant operators penalised almost $300,000 after paying staff $11 an hour, Media release, 19 August 2016; FWO (2016) Korean backpackers short-changed, Media release, 3 August 2016.

55 Ferguson, A. (2016) 'Caltex warned its service station owners of regulator raids', The Sydney Morning Herald, 3 November 2016.

56 Ferguson (2016

57 Victorian TAFE International and United Voice (2012) Taken to the cleaners: Experiences of international students working in the Australian retail cleaning industry, Melbourne, United Voice; United Voice (2013) A Dirty Business: The exploitation of interna-tional students in Melbourne's office cleaning industry, Melbourne, United Voice.

58 United Voice (2013)

59 FWO (2015) National Cleaning Industry Follow-up Campaign 2012-13, Report - February 2015.

60 Hannan, E. (2016) 'Oaks hotel chain cheated migrant workers of $2m', The Australian, 9 November 2016, accessible at: http://www.theaustralian.com.au/national-affairs/industrial-relations/oaks-hotel-chain-cheated-migrant-workers-of-2m/news-story/39859dead630d2e8a80ac369a915e723

61 United Voice Victoria (2015) Submission to the Victorian Inquiry into the Labour hire Industry and Insecure Work.

Agriculture and meatworks

- In 2015, an ABC Four Corners report revealed the extent to which the exploitation of migrant workers was a core part of the business model for many labour hire agencies in agriculture. Migrant workers on Working Holiday Maker visas were recruited to pick the harvest, at illegal rates, and provided with inadequate housing and transport services by the labour hire company. Temporary migrants subcontracted to Baiada chicken processing plants were required to work up to 18 hours a day, 6 days a week, without overtime or penalties, in sub-zero temperatures without appropriate protective clothing, conditions that would leave their fingers freezing in pain.[62]
- A submission from the Australasian Meat Industry Employees Union to the 2015 Senate Inquiry into temporary migrant workers described high levels of exploitation of South Korean and Taiwanese working holidaymakers, employed by labour-hire companies, who would deduct $500 'membership fees' and fees of $300 for 'training courses' and a variety of other fraudulent charges, in addition to chronic underpayment of wages and entitlements.[63]

Remedies to migrant worker exploitation

There are a number of weaknesses in the Australian industrial relations system that unscrupulous employers use to exploit vulnerable workers on temporary work visas. Addressing many of these weaknesses would have the broader effect of protecting workers from forms of corporate avoidance of the Act not covered by the Terms of Reference to this Inquiry. As previously mentioned, the current system allows employers to cut costs by pushing risk down the supply chain so that it is borne by the employee when it should be borne by the employer.

The Government must address the longstanding issue of sham contracting – the wrongful classification of employees as independent contractors in order for employers to avoid paying the legal minimum wage and entitlements. Over one million workers in Australia are employed as independent contractors, but approximately 40% of these admit that, in reality, they are dependent on their employers, with no real authority or control over their own work.[64] Although the Fair Work Act makes it unlawful for employers to knowingly misrepresent an employment relationship as a contracting relationship, the existing provisions are not adequate to stop the practice.

There are a number of measures that would significantly reduce the incidence of sham contracting.

There should be greater scrutiny on the use of Australian Business Numbers (ABNs) in industries where high levels of sham contracting occur, such as the contract cleaning and security industries. In particular, holders of international student and holiday-making visas should be ineligible for ABNs. The purpose of these visas, to facilitate education and extended holiday-making, is not compatible with the establishment of an Australian business, and there should be no legitimate reason why holders of these visas should need to seek an ABN. Removing ABNs as a possibility for international students and Working Holiday Makers is a simple measure that will make it far harder for employers to coerce these migrant workers into sham contracting arrangements.

Recommendation 7

There should be greater scrutiny on the use of Australian Business Numbers (ABNs) in industries where sham contracting is prevalent, including the contract cleaning industry. Employers should be prohibited from engaging visa holders under ABNs in sectors where their use has been found to contribute to avoidance of legal employment obligations and exploitation.

62 http://www.abc.net.au/news/2015-05-04/supermarkets-food-outlets-exploit-black-market-migrant-workers/6441496
63 See The Senate Education and Employment References Committee (2016) A National Disgrace: The Exploitation of Temporary Work Visa Holders, March 2016
64 Lives on Hold, 35

There are also amendments to the Independent Contractors Act 2006 (Cth) relating to the definition of a contractor that would make it easier for parties to identify the genuine status of employment arrangements and a better basis for enforcement. At present there are a variety of common law tests for sham contracting.

Recommendation 8

The Independent Contractors Act 2006 (Cth) should be amended to include a statutory definition that would make it easier for parties to identify the genuine status of employment and that includes a statutory presumption in favour of an employment relationship.

In determining employment status, the Act should ensure: a person is a worker within a business that takes the benefit of the worker's labour ("the employer") if the person meets two or more of the following indicators:

- **the person is subject to the control of the employer in relation to how the work is performed**
- **the person usually works for the one employer and only that employer**
- **the person is treated as, or portrayed to others as, part of the employer's organization**
- **the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the employer**
- **the person has regularly worked for the employer over a three month period**
- **the person uses equipment or other facilities needed to perform the work provided by the employer (other than the usual tools of trade)**
  and the person does not engage in entrepreneurial activities characteristic of the conduct of a business in relation to the work provided to the employer. Typically, those characteristics will include exposure to financial risk, the provision of a commercial service (and not merely labour) to a range of customers, the capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others.

The government should enact greater regulation of supply chains including sub-contracting and labour-hire arrangements which all too frequently result in the exploitation of workers. For several years now, unions, NGOs and academics have called for a national labour hire licensing scheme to prevent rogue recruitment syndicates from continuing to exploit vulnerable workers. It is time the federal government take heed of these calls to mandate ethical recruitment practices, as well as those made by the 2016 Senate report into Australia's temporary work visas (A National Disgrace).

We refer the Committee to our Recommendation 1, above, and reiterate the importance of a national licensing system as a means to curtail the continued exploitation of visa holders.

Greater monitoring and compliance by government authorities is required, and this compliance needs to target employers, including first-tier owners, rather than going after individual workers at the bottom of the chain.

In addition, freedom of association rights in Australian industrial relations law need to be bolstered to ensure that workers are freely able to join their union.

The role of unions in improving migrant workers' rights

The federal government should work with unions and employers in a truly tripartite manner to establish and maintain ethical supply chains where migrant workers' right to lawful wages and conditions are upheld and enforced.

Unions play a key role in monitoring and enforcing workers' rights, including the rights of migrant workers. Unions are embedded in Australian industries, they have a deep understanding of the problems faced by migrant workers, and they are working productively with other stakeholders to ensure that all workers, regardless of their citizenship, are treated lawfully and fairly in our industries. It is disappointing that the Federal government has recently announced a Migrant Workers Taskforce charged with examining protections for overseas workers which excludes unions and workers.[65] It is hard to see how such a body can effectively carry out its task without involving the workers affected by exploitation and their representatives.

Ongoing governmental efforts to stymie the capacity of unions to access workplaces should be stopped, and government should engage in constructive, genuine consultation with unions on matters pertaining to the human rights of migrants at work.

Unions should be supported in their efforts to undertake initiatives to improve conditions in the workplace and effect change throughout the supply chain. One such initiative that United Voice is partnering with industry on is the Cleaning Accountability Framework (CAF) – a multi-stakeholder labour standards accreditation scheme in the cleaning industry that promotes the adoption of best practice procurement approaches and supply chain management, and supports quality-focused cleaning services, fair wages and decent labour standards. United Voice is working with property owners, tenants, contractors, cleaners and other stakeholders in the cleaning industry to shift the operating model that has led to the exploitation of some of our most vulnerable workers.

Recommendation 9

The Government should work with unions, migrant and community organisations and employers in a tripartite way to address growing exploitation of migrant workers.

This should extend to

- **recognising the role of unions in providing protection and advice to workers;**
- **bolstering freedom of association provisions and ensuring that all workers are informed of their industrial rights; and**
- **severing the nexus between a migrant worker's visa status and their employer.**

65 See https://ministers.employment.gov.au/cash/coalition-delivers-election-commitment-protect-migrant-workers.

Approaches to regulating migrant labour

Too often, migrants' rights in the workplace are subordinated by their immigration status. Temporary work visas are regulated in a way that places disproportionate restrictions on the visa holder, rather than on the employer. In turn, the penalties for breaching a visa condition disproportionately affect the worker rather than the employer in a manner that is insensitive to the power dynamics between these two actors. The punitive, rather than protective impetus of visa regulation in regard to workers themselves leads to situations in which exploited workers who have been compelled to breach a condition of their visa can lose the right to remain and work in Australia. A common instance of this is when student visa holders work more than 40 hours per fortnight on the orders of their employer, and are afraid to come forward out of fear that their visa will be terminated. Effectively, temporary migrant workers are punished for the illegal acts of their employers.

Exploitation should not result in deportation. Uphold temporary migrant workers' right to seek justice without fear of deportation by instituting one-way reporting requirements between the Department of Immigration and Border Protection and the Fair Work Ombudsman. A worker on a temporary visa should feel confident that coming forward to report a claim of underpayment or other breach of the Fair Work Act will not result in their having to leave the country or be deported. That workers from overseas are granted the right to remain in the community until civil and/or criminal claims are resolved is especially important when indicators of modern slavery are found.

Recommendation 11

The Government should enact a protective rather than a punitive approach to regulating migrant labour. This should include the fundamental principle and expectation that exploitation should not result in deportation. In suspected cases of exploitation:

- **a rights-based approach should be taken by government – one that recognises the vulnerabilities of migrant workers to exploitation and puts in place mechanisms for protection against and rectification of exploitation;**
- **workers on temporary work visas should be granted the right to remain and work in Australia pending the resolution of their claims for underpayment and/or other instances of exploitation regardless of a visa condition breach having occurred in the context of the exploitation alleged to have occurred;**
- **a communication firewall should be enacted in such a way that the FWO is not required to report visa breaches to the DIBP that could result in the unduly precipitated departure of a visa worker;**
- **migrant workers should be eligible for all the same worker protections as residents and citizens when an employer defaults on their obligations, namely access to the Fair Entitlements Guarantee (FEG) scheme.**

Legacy issues relation to Work Choices and Australian Workplace Agreements

We address term of reference (j) of the Committee's terms of reference here.

A feature of the Act and related legislation passed in 2009 was that a variety of transitional instruments consisting mainly of old 'Work Choices' collective agreements and Australian Workplace Agreements ('AWAs') continued to have legal effect.[66] Many of these instruments are grossly non-compliant with the Act and would not pass the better off overall test applied to agreements made today.

The continuing operation of these transitional instruments is a significant problem. These old collective agreements are colloquially referred to as 'zombie' agreements and are maintained and used by employers because they provide a means to avoid award penalties, loadings and allowances.

In many cases, there are few substantive provisions in the agreement which have any practical effect other than to lock out award entitlements. The interaction of these transitional instruments with the broader Fair Work system is complex. Where an old collective agreement still applies, the relevant modern award does not apply.[67] Many of these agreements have compendious lists of old state and federal awards that they override.

The main reason these 'zombie' agreements are maintained is that they provide an employer with the ability to pay reduced or no penalty rates and loadings for work at unsocial times.

The base rate of pay for any employee is notionally the base rate in the relevant modern award. The Fair Work (Transitional Provisions and Consequential Amendments) Act 2009[68] ('the Transitional Act') provides for a base rate guarantee in relation to employees covered by these transitional instruments in identical terms to section 206 of the Act. In theory, the modern award system sets the base rate of pay for all employees including those covered by 'zombies'.

One of the broader problems with the Act is that section 206 only guarantees that an employee covered by any agreement (including a 'zombie') is paid at or above the base rate of pay within the applicable modern award. It does not extend this guarantee to penalties and loadings.[69]

66 See: Schedule 3, Part 2, Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.
67 As above, Division 2, Item 28.
68 As above Schedule 4, Part 4, rule 13
69 The Act defines 'base rate of pay' at section 16:
(1) The base rate of pay of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:
a. *incentive-based payments and bonuses;*
b. *loadings;*
c. *monetary allowances;*
d. *overtime or penalty rates;*
e. *any other separately identifiable amounts.*

For many low paid workers and members of United Voice working unsociable hours in areas such as cleaning, security and hospitality; penalties and loading make up a substantial part of their overall remuneration. These additions to the base rate of pay have also been determined by the Commission as part of the 'fair and relevant minimum safety net of terms and conditions'.

The main way that these 'zombie' instruments deliver adverse remuneration outcomes is by containing penalties and loadings that are significantly inferior to the modern award standard. The 'usefulness' of these legacy agreements in avoiding penalties, loadings and overtime is illustrated by a comparison of the Brisbane Executive Security Teams Pty Ltd Agreement 2007 ('the Brisbane Security Agreement') and the Security Services Industry Award 2010 ('the Security Award'). The base rates paid under both are deemed to be the base rates in the Security Award by section 206 of the Act.

Where the Brisbane Security Agreement provides a real advantage to the employer is when penalties, loadings and allowances are compared.

Penalty rates and overtime	Security Award	Brisbane Security Agreement
Night span- week days 12am to 6am and 6pm to 12pm	21.7% in addition to the base rate 30% - for permanent night work	Absent
Saturday	50% in addition to the base rate of pay	The agreement provides for a composite rate for a rostered permanent employee that is alleged to 'include penalties that would otherwise be applicable for work at night and weekend penalties'. The highest rate in the agreement is $22.79. An award covered employee would be paid at a minimum $30 per hour and $50 per hour for a public holiday.
Sunday	100% in addition to the base rate of pay.	As above
Public Holidays	150% in addition to the base rate of pay.	As above
Overtime determined by permitted shift length of between 4 and 10 hours and by agreement 12 hour shifts can be permissible	Monday to Friday – first 2 hours 50% and thereafter 100%. Saturday 50% and thereafter 100% All overtime on Sunday is paid at 100% and Public holidays 150%	The Agreement allows for 12 hour shift paid at ordinary hours. Overtime is paid in blocks of 15 minutes at a uniform rate of 25% above the base rate

In security, where much of the work is in the evenings and on weekends, of avoiding penalties and loadings provides a competitive advantage to firms and undermines the award safety net.

While one might expect the Commission to expedite the termination of long expired transitional agreements which clearly undercut minimum standards, in practice the proceedings and processes can be quite time consuming and difficult.

The difficulties arise from employer resistance and the manner in which the Commission is required to deals with these applications and the different approaches taken by individual members of the Commission to termination applications

The Transitional Act applies the same provisions to 'zombies' that applies to expired agreements made under the Act in relation to their termination.[70] These transitional instruments continue to have legal effect until a complex application is made to the Commission, requiring evidence and the Commission to make specific findings and then formally terminate the agreement.

United Voice's experience is that these instruments are difficult to terminate for a variety of reasons, outlined below.

Applications to terminate these agreements by consent will require a vote of the employees covered by the agreement. This is not usually a problem. The main difficulty will be obtaining the consent of the employer. Employers who are benefitting from a 'zombie' will not consent to its termination.

Section 225 of the Act allows for employee organisations, employees and employers to apply to terminate expired agreements. Section 226 sets out the criteria to be applied by the Commission when determining whether or not to terminate an agreement that has passed its nominal expiry date.[71]

70 Items 15 and 16 of Schedule 5, Transitional Act.

71 These are the same criteria that an employer will have to satisfy when applying to terminate an agreement during bargaining that pays a significant premium above the relevant award and where the effect of termination will be to reduce the workforces' remuneration to the award safety net as permitted by the Commission in Aurizon Operations Limited and Ors [2015]FWCFB 540. The effect of the termination of a 'zombie' is to increase employees' remuneration to the award safety net.

Sections 226(a) and (b) requires that the Commission must make specific concerning the public interest and) concerning 'all the circumstances' and the views of the employees, the employer or employers and any industrial organisation covered by the agreement. There is no discretion as the section is phrased in mandatory terms and both subsections are jurisdictional facts that must be established before the Commission can terminate any agreement. Section 226 makes no direct reference to whether or not the instrument is providing remuneration that is superior too or manifestly below the relevant award safety net.

A person covered by the agreement can make an application to terminate the agreement. If a union was covered by the agreement, the union could make an application. Most of these agreements do not cover unions and are referred to as non-union 'zombie' agreements. This adds an additional layer of difficulty as a current employee need to make the application to terminate the agreement usually in the context where their employer will oppose the application.

The Commission does not adopt a standard approach in dealing with these applications. Some applications are subject to more complex directions, with the onus placed on an applicant employee to prepare and place material before the tribunal. Some applications are dealt with by requiring the employer to contact employees or provide contact information for employees, and to file material about the effects on employees. This type of approach is more suitable because it acknowledges that the employer holds the information necessary to assist the Commission take into account the views of employee concerning the effect of the termination on them.

The process of terminating agreements that are providing remuneration below the award safety net should be expedited. Where an agreement cannot be shown to pass the BOOT, in United Voice's view, this is a reason where termination of the agreement should almost always result. Accordingly, section 226 should be amended to reflect that different criteria apply in terminating agreements that are providing remuneration outcomes below the relevant award safety net should apply.

Recommendation 12

Section 226 should be amended to require the Commission to expedite the consideration of any agreement that would at the time of application not pass the better off overall test under section 193. If an employee covered by the agreement would be better off overall if the relevant modern award applied to the employee rather than the agreement, the agreement should be terminated.

Case study 4: Brisbane Executive Security Teams Pty Ltd ('BEST Security')

BEST Security operates under the Brisbane Executive Security Teams Pty Ltd Agreement 2007 ('BEST Agreement') which is noted above and is manifestly inferior to the Security Award and like many of these 'zombies' pays a base rate and no penalty or loadings.

Mitchell Laidley was a casual security guard who worked for BEST Security and is a United Voice member.

The remuneration being paid to our member and others was significantly below the modern award rate for identical work. For example, a casual security guard working a typical roster would earn approximately $800.00 less per fortnight compared with what the worker would be paid if the Security Award applied.

On 12 October 2016, Mr Laidley made an application to terminate the BEST Agreement. Mr Laidley has been assisted and represented by United Voice. On 27 October 2016, Mr Laidley's employment was terminated with BEST Security.

United Voice made application on behalf of Mr Laidley under the general protections provisions of the Act alleging inter alia that the employer terminated Mr Laidley because he had made an application to terminate the BEST Agreement. The employer denies the allegations.

On 30 January 2017, United Voice filed an application in the Federal Circuit of Australia concerning the termination.

The employer is disputing the termination of the agreement and has raised a jurisdictional argument before the Commission that Mr Laidley's application to terminate the agreement cannot proceed because he is no longer an employee of the Company.

The other significant issue in this case study is the extent that the onus rests on Mr Laidley to provide evidence to support the agreement's termination. Amongst other things, Mr Laidley has been directed to provide a range of evidence (such as an explanation of the likely impact of each employee of the termination, notice to all employees, and evidence of the views of employees.

These matters are ongoing and have resulted in separate jurisdictional over many months.

Significantly, Commissioner Spencer has noted in the context of other termination applications for similar agreement that the process can take more than 12 months. This is for agreements that would not pass the BOOT if they were sought to be approved today and are providing demonstrably inferior remuneration below what the Commission has determined as the appropriate award safety net.

The economic and fiscal impact of reducing wages and conditions across the economy

We address term of reference (k) of the Committee's terms of reference here.
There is a strong body of evidence that indicates that rising inequality is a significant threat to the future growth and stability of advanced democratic economies. This finding has been advanced by the Bank of England, the IMF and Nobel laureate Joseph Stiglitz among others. In the words of Andy Haldane, Chief Economist at the Bank of England, excessive 'inequality retards the development of the human, social and physical capital necessary for raising living standards and improving well-being.'[72]

A major 2015 IMF study identified a clear inverse relationship between excessive concentration of wealth and growth. Income increases for the bottom 20% of earners are associated with higher GDP growth, while income increases for the top 20% with lower overall growth: specifically a reduction of 0.08 percentage points in GDP for every 1 per cent increase in the income share that goes to the top 20 per cent.[73] These findings are consistent with numerous other studies that indicate that is crucial to raise the income share of the lower and middle classes in order for there to be sustained economic growth, including:

- A 2011 IMF study that found that 'growth spells' in highly unequal countries were likely to end earlier than they did in their more egalitarian counterparts. 'A rising tide is still critical to lifting all boats. The implication of our analysis is that helping to raise the lowest boats may actually help keep the tide rising.'[74]
- A 2010 study by IMF economists which analysed two periods of financial crisis (1920-1929 and 1983-2008) and found that both were preceded by sharp increases in income and wealth inequality, increases in debt for the poorest and reductions in their relative bargaining power over income.[75]
- A 1994 study that demonstrated that inequality in land, as well as income share, was negatively correlated with subsequent economic growth.
- A 1998 study which found that policies that increase the acquisition of assets by the poorest section of the community were likely to be doubly beneficial in terms of growth and poverty reduction.[76]

Australia has, to date, been fortunate to have avoided the cyclical downturns that have afflicted most developed economies in the last quarter-century. Australia has recently slipped, though, into the bottom half of OECD countries in terms of its levels of inequality, and now exhibits higher levels of inequality than Ireland, Korea and New Zealand. The structural changes on the horizon brought by automation and digital technologies are likely to widen the gap further, hollowing out routine-middle skill and middle-income jobs. We must also brace our economy for a range of resource shocks and increased health costs that are likely attend climate change.

If Australia is to continue to enjoy its fortunate record of atypical growth into the middle years of the 21st century, it is crucial that we introduce policies that ensure that the income share of the poorest quintile rises rather than falls in proportion to the top. That cannot occur without urgently addressing the legislative loopholes and regulatory failures that are enabling corporations to avoid their obligations under the Fair Work Act.

The recommendations made in this submission will help move improve Australia's industrial relations system and lead to fairer wages, more job security and a more prosperous economy.

72 https://www.oxfam.org.au/wp-content/uploads/2014/10/cr-even-it-extreme-inequality-291014.pdf
73 https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf
74 See, for example, A. Berg and D. Ostry (2011) 'Warning! Inequality May Be Hazardous to Your Growth', http://blog-imfdirect.imf.org/2011/04/08/inequalityand-growth
75 MKumhof and R. Rancière (2010) 'Inequality, Leverage and Crises', IMF Working Paper, IMF, http://imf.org/external/pubs/ft/wp/2010/wp10268.pdf
76 AAlesina and D. Rodrik (1994) 'Distributive Politics and Economic Growth', The Quarterly Journal of Economics 109(2):465–90

FAIR WORK OMBUDSMAN PUTS SECURITY ON NOTICE



By **Natalie James**, Fair Work Ombudsman

Operators of security companies are among those being impacted by the Fair Work Ombudsman's increasing focus on ensuring there are clear consequences for organisations and individuals involved in flouting workplace laws. In a recent speech, Fair Work Ombudsman Natalie James outlined her Agency's active and evolving approach to accessorial liability, with a particular focus on the risks and responsibilities for human resources and employee relations advisers. Ms James also touches on the broader risks in the context of the community expectations and the Government's election commitments.

It's a tough job being an adviser. A real balancing act.

It's a tough job, balancing the desires of CEOs and Boards to achieve organisational objectives while managing the risks of the many and varied frameworks we must all operate within.

It's a tough job, getting senior people who are set on a path, to hear the risks, the pitfalls, the possible consequences they may have not identified.

It's an especially tough job when you have to tell someone this sort of thing AFTER a course of action has already been embarked upon.

Or when you've found a problem with something the organisation has done – like a systems error that means people haven't been paid properly. Or when you have to address a less-than-perfect process that is being challenged - like a dismissal. And you suspect the process wasn't quite what it should have been... leading you to wonder, (not for the first time), why did the line area not come to you for advice earlier?!

I've also been an adviser, so I know how that feels!

You need to constantly balance a number of elements: your professional and ethical responsibilities; the need to work with the organisation to help it achieve its strategic goals; the need to broker solutions, not just raise problems.

Tensions can arise when these elements pull you in different directions.

Above all, you must explain the rules, make it clear when the organisation is in danger of breaking them and not become involved in breaches of the law yourself.

To do so risks action not just against the organisation. In the case of workplace laws, if you are involved in facilitating a breach of the law, you are personally at risk of being found to be an accessory.

The Fair Work Ombudsman always carefully considers the role of individuals in breaches of workplace laws, and considers whether any enforcement action should be extended to them.

As an Adviser responsible for keeping the beneficiary of your advice on the right side of the law, there is something else you may wish to consider. The Government has made election commitments to enhance the tools available to the Fair Work Ombudsman to hold people involved in breaches of workplace laws to account.

One might suggest, if you were wanting to keep your organisation out

of the courts and the newspapers, that there has never been a better time to ensure you are giving holistic and sound advice about compliance with workplace laws.

THE LONG ARM OF ACCESSORIAL LIABILITY

So, to turn to the Fair Work Ombudsman's approach to the current framework.

We know that an employer is clearly responsible for making sure workers are paid correctly.

But where does the responsibility for compliance with the law begin and end?

The law also extends responsibility to others who are involved in a contravention. It does this through section 550 of the Fair Work Act.

Provisions extending liability for contraventions of the law to people 'involved' in the relevant conduct have been a feature of workplace relations legislation for a decade now.

Section 550 is a standard, 'bread and butter' accessorial liability provision. There are similar clauses throughout the statute books, including occupational health and safety law, as well as corporations, competition and consumer legislation.

We're increasingly using this mechanism to ensure that someone is held to account when we find deliberate exploitation of vulnerable workers.

We do this to reinforce the critical roles and responsibilities of the key personnel involved in the breach– whether they are company directors or advisers.

There is strong public interest in ensuring that such people inform themselves of the law, and to operate within it.

And we will explore every avenue available to us to ensure that exploited workers receive the wages that they are entitled to.

The accessorial liability provisions are especially important if we think a company might not continue to solvently operate when we commence proceedings against it.

By naming accessories, we can still seek to recoup back-payments and penalties from individuals involved in the breach irrespective of whether the corporate employer is still operative, or has money in the bank.

In fact, last financial year, 46 out of 50 of the matters we filed in court (92%) sought orders against accessories.

This is up from the year before. In 2014-15, 36 out of 50 litigations commenced (72%) involved an alleged accessory.

Unfortunately, not everyone wants to play by the rules or work with us.

We see some operators who think they can short-change their employees and get away with it by liquidating their companies and hiding behind the corporate veil.

These operators are testing the boundaries of what they can get away with under the legal framework.

The Fair Work Ombudsman will not sit passively while these operators avoid the laws that are supposed to hold them to account. We have been adventurously testing the limits of accessorial liability provisions to ensure someone is held responsible for breaches of the Fair Work Act.

We are pursuing employers who cannot or will not pay, using every lever available to us to ensure wages that should have been paid to workers are put back into their hands. And we are striving to ensure those who breached their workplace obligations don't get the chance to do that again.

There must be clear consequences for those in trusted positions, those whose advice is relied upon and those with the responsibility to know better who play a part in undermining workplace laws.

EXTENDING THE LONG ARM: ACCESSORIES CAN BE LIABLE FOR BACK-PAY

We have up until recently confined the orders we sought against accessories to seeking penalties. We had not sought to recover back-pay from an accessory.

Not anymore.

The first person to experience our new approach was Mr Owen Jennings, the former director of now wound-up Gold Coast security operation, Step Ahead Security Services.

The case saw Mr Jennings pay a hefty penalty of $51,400 after he was found to be involved in the underpayment of eight security guards by the employing entity for which he was responsible.

But of even greater significance, he was also ordered to personally repay the eight employees almost $23,000 in lost wages, in what was (for the FWO) a precedent-setting decision.

This case involved the classic criteria we look for when deciding whether to take action against an accessory.

Firstly, the matter involved vulnerable employees.

Secondly, Mr Jennings tried to exploit the legal framework to avoid paying employees their entitlements. We considered it was appropriate to hold Mr Jennings personally liable when he wound-up the company after we initiated proceedings against it. While the employees were left without the payments that they were owed, Mr Jennings was involved in a new company doing exactly the same work, with the same workers, operating from the same address. His son was the director of the new company, and Mr Jennings was a 'consultant' to that company.

Thirdly, Mr Jennings also had an extensive history of non-compliance and his conduct was clearly deliberate. He had been known to us for over a decade through his previous security companies, and had previously deregistered a company when we started investigating. The public interest demands that Mr Jennings should not be in a position to repeat this conduct in the future.

In the Federal Circuit Court in Brisbane, Judge Jarrett found that Mr Jennings had:

...demonstrated calculated and

deliberate conduct which plainly amounts to a blatant disregard for Australia's workplace laws and the rights and entitlements of the first respondent's employees.

Our action against Mr Jennings shows that we will seek to cut off the escape route of winding up a company if the purpose behind that action is to avoid having to back-pay workers.

And it opens the door for us to seek orders to make a range of accessories personally liable in the future – directors, contractors, franchisors and human resources managers included.

And rest assured, we also refer these sorts of examples to the Australian Securities and Investments Commission. You have to ask whether individuals such as Mr Jennings, who blatantly seek to avoid their legal obligations in this manner, should be entitled to continue to act as a Director and benefit from the protection of the corporate veil.

THE FULL REACH OF THE ARM CAN CATCH A RANGE OF ACCESSORIES

A year or two ago, most of the accessories in our proceedings were directors of the corporate employer. The reasons for this are obvious. The director is the person who leads, manages and controls the employing entity. And is intimately involved in, and ultimately responsible for, the decisions of that entity – including decisions to comply (or not to comply) with workplace laws.

Over time we have extended our use of accessorial liability to other persons involved in the contraventions. Accessories have included human resources staff; administration or day to day managers; staff engaged to assist with recruitment and supervision; and other companies or individuals involved through a supply chain or franchise network.

When do we consider such personnel should be held legally accountable? We consider the part they have played, the conduct that has led to underpayment of employees and, as is always case, whether the conduct was deliberate.

Let me give you some more examples to give you a better sense of what this looks like.

In November 2015, we secured tens of thousands of dollars in penalties against national security company Security International Services Pty Ltd for underpaying one of its own employees and turning a blind eye to one of its sub-contractors doing the same thing. The Federal Circuit Court imposed a $40,000 penalty against Security International Services for underpaying a Gold Coast security guard $7632 – and penalised the company a further $20,400 for knowingly allowing one of its contractors to underpay one of its guards $11,189. We took the view that Security International Services was culpable for both underpayments because the company took no action despite being aware that the flat rate being paid by its contractor was not enough to cover minimum Award entitlements.

In December last year, we initiated our first proceedings against a third-party accountancy firm as an accessory. We allege that this firm processed wage payments for workers at a Melbourne fast food restaurant, despite having explicit knowledge that those payments were well below the award rate. The accounting firm now faces penalties of up to $51,000 per breach. Our view is that accountants' professional responsibility demands that they cannot close their eyes to breaches of the law by their clients.

In another matter that we recently filed against the operators of Chinese restaurants in Australia and Shanghai, we have named the director, the restaurant manager and the human resources manager as accessories. We say they were involved in the underpayment of hospitality staff employed by the company.

We allege in this case, that the business presented us with one set of records, purporting to demonstrate that all employees were paid correctly.

However, after engaging legal representation, a different set of records was produced, this time showing a range of underpayments.

When deciding which entities or individuals to include in our action, we were mindful of the serious and deliberate nature of the alleged misconduct.

We say that the individuals involved in the alleged production of the false records or who made use of them by handing them to my Inspectors, ought to be held accountable as accessories for that deceptive and unlawful conduct.

Their external lawyer clearly saw that this was unacceptable, and advised the company to hand over the 'real' records. And if that lawyer hadn't, we'd have considered extending our action to that firm.

THE LONG ARM CAN DEPLOY A RANGE OF TOOLS

Our adventurous approach does not end with the range of accessories we are joining to our actions.

My lawyers have been getting creative about the nature of the orders we are seeking.

The Courts have shown a preparedness to make a range of orders – injunctions against future contraventions of the Act, freezing orders to prevent the shifting of assets to defeat employee creditors, and even orders to compel employers and individuals to commission (at their own expense) audits of their entire payroll and training in respect of workplace obligations.

More than one businessperson is now enjoined from future contraventions of the Fair Work Act as the result of injunctions obtained by the Fair Work Ombudsman. If any of those individuals are caught out again then the consequences for them will include a proceeding for contempt of the Court.

A very recent example shows how we can extend liability beyond individuals to other corporate entities

in a network or supply chain.

You may have read in the media that we are seeking a range of orders against a frozen yogurt outlet, Yogurberry, in the World Square shopping centre in Sydney's CBD. We are alleging that four Korean backpackers were underpaid a total of $17,827. We are taking the employer to court– but we are also seeking orders against accessories through the franchise network – the head company and master franchisor, the payroll company and a manager of the head company for their alleged involvement in the underpayment of subclass 417 visa holders at the World Square outlet.

This builds on our earlier work using accessorial liability in trolley collecting supply chains, where we have used the provisions to hold the beneficiaries of the labour – big supermarkets – accountable for exploitation of their contractors' and subcontractors' workers.

For example, in October 2014, Coles stepped up to accept moral and ethical responsibility for workers in its supply chain, by entering into an Enforceable Undertaking (EU) with us and agreeing to backpay its contractor's employees, conduct broad-ranging compliance audits, re-train its relevant people and ultimately bring its trolley collection services in-house.

And earlier this year we released our Inquiry report into Woolworths' trolley collection supply chain, which exposed a range of entrenched non-compliance. We believe that if Woolworths adopts the recommendations in our report, it will promote and build a culture of compliance in its trolley collector sub-sector.

In July 2016, (in what was one of our earliest supply chain matters), we have secured over $90,000 in penalties against the beneficiaries of the exploitation of vulnerable trolley collectors, in a case where the employing entity, South Jin, had been wound up.

In Yogurberry, we are seeking to leverage the accessorial liability provisions, by asking the court to place some strong obligations on the head company– requiring a professional external audit of all of the stores throughout the entire retail chain. We are also seeking an order requiring head office to commission workplace relations training for their managers.

We have sought these orders because we believe the underpayment problems are more widespread than just the World Square outlet. Action confined to that outlet, on its own, is unlikely to build a culture of compliance in the entire franchise chain.

Seeking a broader range of court orders against accessories as well as corporate employers allows us to tailor our response to the circumstances of each employer and accessory that we take to court.

We are seeking to change behaviour, build sustainable compliance within workplaces. Achieving this in some cases may require more than a penalty and a press release.

IF THE LONG ARM DOESN'T REACH YOU... THE MEDIA MIGHT

And you may have noticed that in some of our press releases, we name parties other than the direct employer of workers.

When we find exploitation of vulnerable workers, it is our standard practice to look up the supply chain to the entity benefiting from that labour, and ask the question: What contribution has that established, profitable company made to what has occurred?

Because the company at the top of the supply chain, or the centre of a franchising network, is often controlling the settings, including how much money is going into the supply chain or network.

For example, the Fair Work Ombudsman is currently working with the Australian Security Industry Association (ASIAL) and United Voice to strengthen the procurement practices of local councils in relation to security services. The Inquiry, commenced last year, aims to pro-actively identify unlawful practices among those companies providing security services to local councils and test whether there are any links between poor governance in the supply chain and non-compliance with workplace laws. The Inquiry has already resulted in the Fair Work Ombudsman identifying that Melnor Security Services Pty Ltd underpaid 10 security guards at last year's Tamworth Country Music Festival almost $6000. Melnor Security Services, , which had been contracted by the Tamworth City Council, has entered into an Enforceable Undertaking (EU) with the Fair Work Ombudsman aimed at encouraging behavioural change and future compliance.

In some parts of our labour market, I'm afraid to say, non-compliance with workplace laws has become a cultural norm. The common characteristics are: low-skilled work, price-driven procurement, a proliferation of entities in the supply chain or network, tight profit margins and vulnerable, often migrant workers.

Think… trolley collecting. Or cleaning or security.

And you may think legally, those workers are not your responsibility. And you may be right…or not. We have taken action against non-employing but benefiting entities in supply chains.

But even if you are, on balance, comfortable with the legal risk your company or client is taking on, that's not the end of it.

Think beyond your narrow legal risks to brand and reputation.

Because the community expects better from established, profitable companies. The community reaction to hearing that such companies are benefiting from black market labour is swift and strong.

It doesn't matter whether the workers, are engaged via franchising, outsourcing or labour-hire arrangements.

The community expects business

to take responsibility for its labour, regardless of where strict legal liability begins and ends.

You may not think that it is your job to give public relations advice. But an organisation that limits their risk analysis to the strictly legal questions about compliance with workplace laws is not considering the real risk.

Every week, my people sit across the table from the Corporate Counsel or Human Resources Managers who are adopting a narrow focus. I sometimes feel that their company would be better represented if they broadened their perspective …and their advice…beyond defending a legal strategy and considered the full set of consequences of what has occurred. Not to mention the moral and ethical part of the picture.

And this becomes even more significant when we consider the Government's election commitments.

EXTENDING THE LONG ARM OF THE LAW – NEW TOOLS

In the recent election campaign, the Government committed to making a range of changes to the Fair Work Act.

To deal with franchisors like 7-Eleven, the Government has committed to new laws that capture franchisors and parent companies that fail to deal with exploitation in their networks.

It is interesting to contemplate what 7-Eleven or Yogurberry might look like had these new laws been in place.

The policy also commits to strengthening the Fair Work Ombudsman's compliance and enforcement powers to allow us to compel employers and other witnesses to produce information or answer questions, subject to appropriate checks and balances. This will greatly assist my agency to get the evidence it needs to take employers and accessories to court.

The Government has also indicated that it intends to increase the penalties that apply to employers who deliberately and systematically underpay workers or fail to keep proper employment records. The increased penalties will be ten times the current maximum, and should strongly deter those employers who might otherwise be tempted to cut costs by underpaying employees.

These proposals have been informed by our experience and we look forward to working with the Government in framing effective and appropriately balanced amendments.

So, in light of the actions of the Fair Work Ombudsman and the intentions of the Government, it's fair to say that employers and advisers who set out to do the wrong thing have cause for concern.

And that is good news for the rest of us. Because bit by bit, my agency is doing what it can to ensure a level playing field, so that compliant businesses that are doing the right thing and seeking the right advice are not at a competitive disadvantage.

AVOID THE LONG ARM OF ACCESSORIAL LIABILITY: GET YOUR HOUSE IN ORDER

We are hopeful that a very welcome boost to our powers in the future will help us to drive cultural change, to enable us to work with others to build a culture of compliance with workplace laws. We know the law is only part of the picture, but it's a critical part.

And as a result, the CEO of your company may be more receptive to the messages that you give them about managing risks holistically when it comes to Australian workplace laws.

If any of you have ever had trouble persuading your Board or your CEO of the merits of your advice, I'm here to give you the new pitch. Compliance with workplace laws is not simply a question of tick and flick.

If it's sitting at the green light end of a risk matrix, you may want to consider what assurance you have put in place, not just with respect to the company's own workers, but with respect to its labour supply chains. Who's emptying the bins or staffing the counter downstairs? Are you sure they are being paid correctly?

Those involved in the decision making around the strategy for and compliance with workplace laws are on notice. You can find yourselves personally liable for the actions or inactions you help the company take.

We are hopeful that employers will accept that it is ultimately their responsibility under the law to do the right thing.

They will know that the Fair Work Ombudsman takes a dim view of deliberate, systemic, exploitative or opportunistic non-compliance and will know that we will tackle that conduct with every tool in our enforcement toolkit.

And just like employers, we expect advisers to take their responsibilities seriously.

If you know that your employer is running two sets of books or keeping false records or not paying the employees their full entitlements, know that the new higher penalties may soon extend to them…and to you.

If someone you are advising is breaching workplace laws, call them out, for their sake and yours.

YOU HAVE A TOUGH JOB AS ADVISERS.

And by working together to build a culture of compliance, we will make your job easier.

By being a member of a professional organisation – such as AHRI or ASIAL – you are taking your professional responsibilities seriously. Taking steps to ensure the businesses you advise stay out of the spotlight for the wrong reasons. You provide them and the community with a valuable service which ultimately contributes to fairer workplaces, a level playing field and employees getting what they are entitled to. And we applaud that service. ***si***

The above is an edited version of a speech Fair Work Ombudsman Natalie James delivered to the Australian Human Resources Institute (AHRI) Employee Relations / Industrial Relations Network NSW on 27 July, 2016.

Australian Government Fair Work OMBUDSMAN

An Inquiry into the procurement of security services by local governments

June 2018

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Table of contents

Table of contents 2
Executive summary 5
Recommendations 7
Background 10
The Inquiry's methodology 11
Preliminary stage: 11
Inquiry stage: 11
The Inquiry's findings 13
A labour supply chain – the contracting of labour 17
FWO's supply chain strategy 18
Market structure 19
Councils 19
Security industry 20
Terms and conditions of employment 21
Enterprise agreements 23
Individual Flexibility Arrangements 25
Independent contractors 26
Environmental settings 28
Geographical differences 28
Security industry culture 28
Hours and physicality of work 29
The relevant industry bodies involved this Inquiry 29
Legal 31
Accessorial liability 31
Brand reputation 32

Conclusion.....33

About the Fair Work Ombudsman.....34

Australian Government Fair Work OMBUDSMAN

LOCAL GOVERNMENT PROCUREMENT INQUIRY

INQUIRY FOCUSED ON:
23 LOCAL GOVERNMENT COUNCILS

WHAT DID WE FIND?

49 security businesses engaged across 57 different contracting arrangements

61% of Councils had non-compliance within their labour supply chain

63% of subcontractors failed to comply with Commonwealth workplace laws

42% of principal contractors failed to comply with Commonwealth workplace laws

Enforceable Undertaking with Melnor Security Services Pty Ltd, the principal contractor engaged by Tamworth City Council for its Tamworth Country Music Festival

Legal proceedings commenced against Gold Coast company VIP Security Services Pty Ltd alleging contraventions affecting 5 employees including adverse action and underpayments of almost $16,000 to three of the employees

464 employee records assessed >>>

$72,250 recovered for 54 employees

COMPLIANCE AND ENFORCEMENT ACTIONS

26	4	15	1	1
FORMAL CAUTIONS	INFRINGEMENT NOTICES	COMPLIANCE NOTICES	ENFORCEABLE UNDERTAKING	LITIGATION

Executive summary

The Fair Work Ombudsman [**FWO**] conducted an Inquiry [**the Inquiry**] in response to industry concerns that security employees were being underpaid in the local government sector by forcing prices to unsustainably low levels.

Following a comprehensive information and awareness campaign, the Inquiry focused on 23 local government councils[1] [**Councils**] and examined the labour procurement arrangements relating to the engagement of security services.

The Inquiry found:

- every state had at least one instance of non-compliance with Commonwealth workplace laws [2]
- 49 security businesses engaged across 57 different contracting arrangements[3]
- security services for Councils are predominantly provided by employees of principal contractors[4] and subcontractors[5], rather than by direct employees of the Councils
- the 'further away' a business was from the Council in the supply chain, the greater the non-compliance; subcontractors had 21% higher levels of non-compliance than the principal contractors who had a direct relationship with the Council:
    - 63% of subcontractors (12 of 19) failed to comply with Commonwealth workplace laws, compared to 42% of principal contractors (16 of 38).
- 14 of the 23 (61%) Councils had non-compliance within their labour supply chain. Of those 14 labour supply chains:
    - four Council labour supply chains had non-compliant subcontractors
    - five Council labour supply chains had non-compliant principal contractors and subcontractors
    - five Councils had non-compliant principal contractors.

[1] The Australian Capital Territory does not have local government councils so it fell outside the scope of this Inquiry - http://www.australia.gov.au/about-government/how-government-works/local-government.
[2] The Northern Territory had no instances of non-compliance as they engaged predominantly direct employees rather than contractors supplying labour.
[3] Some businesses had multiple contracts with one Council or contracts with more than one Council.
[4] For the purpose of this Inquiry, principal contractors are those who contract directly to local government councils to provide security workers.
[5] For the purpose of this Inquiry, subcontractors are those who are engaged by principal contractors to provide security workers to Councils, rather than dealing directly with the Councils.

The Inquiry found a range of breaches of Commonwealth workplace laws:

- total underpayments of $72 250 to 54 (12%) employees from 464 employee records assessed (all of which have since been rectified)
- just over $51 400 was underpaid by nine subcontractors, with the remainder underpaid by five principal contractors
- four Infringement Notices [**IN**] issued to one principal contractor and three subcontractors
- 15 Compliance Notices [**CN**] issued to seven principal contractors and eight subcontractors
- 26 Formal Cautions [**FC**] issued to 15 principal contractors and 11 subcontractors
- one Enforceable Undertaking [**EU**] entered into with Melnor Security Services Pty Ltd, the principal contractor engaged by Tamworth City Council for its Tamworth Country Music Festival[6]
- legal proceedings commenced against VIP Security Services Pty Ltd (in liquidation) and director Adam Marcinkowski alleging contraventions affecting five employees undertaking security work on behalf of the Gold Coast City Council, including adverse action and underpayments of almost $16 000 to three of those employees[7]

The most common reasons for non-compliance related to employees being paid below minimum award hourly rates as well as underpayment and / or non-payment of penalty rates (weekends, public holidays), overtime and issues around regular part-time hours of work.

[6] Copy of EU available at https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/enforceable-undertakings/2016-2017-enforceable-undertakings

[7] https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/july-2017/20170712-vip-security-litigation.

Recommendations

As a result of the findings of the Inquiry, the FWO recommends that Councils review and amend their security services tender documents to:

- enable full visibility and monitoring of the labour supply chain
- reflect best practice as contained in FWO's Guides on contracting labour and supply chains[8]
- include a specific reference that requires principal contractors and subcontractors to comply with the Fair Work Act [**FW Act**]
- require principal contractors seek written permission to subcontract work
- require both principal contractors and subcontractors to regularly report on their compliance with the FW Act (FWO recommends annually)
- ensure that the "schedule of fees" contained in contracting agreements be indexed against the applicable award rates effective every 1 July
- require principal contractors and subcontractors to undertake training on the provisions and obligations of the Security Industry Award
- disclose the input items associated with the total cost of an employee[9]
- ensure that the amounts paid in their contracts are sufficient to allow both principal contractors and subcontractors to cover employee entitlements
- require all principal contractors and subcontractors to sign up to FWO's *My account* service and provide evidence of their knowledge of the wages required to be paid under the relevant industrial instrument including any applicable penalties for weekends, public holidays or overtime
- require the principal contractors to provide evidence that any subcontractors are aware of the distinction between contracts of employment and contracts for service.

That principal contractors and subcontractors:

- sign up to FWO's *My account* online service

[8] https://www.fairwork.gov.au/find-help-for/contracting-labour-and-supply-chains
[9] The 'total cost of an employee' is discussed later in this report and includes direct costs such as ordinary hourly wages, overtime and public holiday rates, casual loadings, allowances (such as first aid) and leave payments (personal or annual). There are also indirect costs in running the business such as cars, parking, insurance, health insurance contributions, communication devices, licenses, training, accommodation and superannuation.

- review and revise all practices to ensure their employees are provided with all of their entitlements under the FW Act and the relevant industrial instrument
- seek independent advice from a professional such as a lawyer, accountant and/or employer organisation prior to entering into an agreement with Councils
- ensure when quoting future tenders, the submission recognises all operating costs including wages and entitlements
- incorporate monitoring measures of subcontractor compliance
- recognise the distinction between an employee and an independent contractor[10]
- reflect best practice compliance[11]
- ensure the offering of Individual Flexibility Arrangements [**IFAs**] to employees meets all the requirements of the FW Act[12].

That principal contractors, where any subcontracting occurs:

- implement regular (six monthly) compliance auditing on subcontractors to ensure their ongoing compliance
- amend their subcontracting agreements to include specific reference to the subcontractors' ongoing obligation to be compliant with the FW Act and the relevant industrial instrument.

That employer and employee organisations:

- ensure they provide their members with education about all required legislation for their businesses including providing information on current wage rates
- provide their members with updates in relation to wage increases as soon as they occur
- promote best practice compliance
- encourage or require their members to subscribe to the FWO *My account* online service
- encourage or require their members to subscribe to the FWO online newsletters and updates

[10] Sham contracting occurs where a worker should be an employee, but is instead engaged as an independent contractor. Further information about these sorts of arrangements can be located on the FWO website https://www.fairwork.gov.au/find-help-for/independent-contractors

[11] https://www.fairwork.gov.au/find-help-for/contracting-labour-and-supply-chains

[12] https://www.fairwork.gov.au/about-us/legislation

- ensure their workplace relations advisers are fully educated in relation to the Fair Work legislation so they can provide their members with the most accurate advice
- educate their members about the use of IFAs
- encourage their members to locate information on the FWO website when they are uncertain about entitlements.

Within 12 months of the publication of this report, the FWO will request the Councils:

- audit their security industry supply chains and provide the FWO with a report on their audit methodology and findings
- provide FWO with an additional report detailing improvements made to their corporate governance framework and procedures for the lawful contracting of security service providers throughout the supply chain.

The FWO will assess these reports to ensure compliance with Commonwealth workplace laws, and:

- conduct follow up audits and/or investigations where non-compliance is identified
- within two years of the publication of this report, survey security employees performing duties for the Councils subject to this Inquiry, to assess whether the subsector has changed its governance arrangements to ensure compliance with the FW Act.

Background

In 2012, the FWO began receiving intelligence that a number of Councils were procuring[13] security services at contract prices that were insufficient to cover the total cost of an employee, thus facilitating non-compliance with Commonwealth workplace laws in a number of security businesses. In the FWO's experience, such instances of insufficient monies from the top of a supply chain being funnelled downwards, lead almost inevitably to workers being underpaid, as businesses are unable to make a profit while still paying all relevant entitlements in these circumstances.

The FWO considered it appropriate to test the intelligence and secure a better understanding of the supply chain arrangements adopted by local government with respect to the security sector by conducting an Inquiry.

Partnering with the Australian Security Industry Association Limited [**ASIAL**] and United Voice, communications and education activities commenced in 2014. In August 2015, the FWO issued a media release[14] formally detailing the terms and objectives of the Inquiry.

The purpose of this communication and education phase was to ensure Councils throughout Australia, particularly those officers with responsibility for procurement, understood the obligations under the FW Act. That phase included a number of presentations across the security, building and local government sector nationally[15].

FWO then embarked on the second phase of the Inquiry, which involved a series of compliance activities examining the various labour supply chain arrangements entered into with security service providers by 23 Councils.

[13] For the purposes of this report, procurement refers to tendering for the provision of security guards for Council sites and events.
[14] https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/august-2015/20150806-spotlight-on-council-tenders
[15] FWO presented to the Regional Procurement Network in VIC, Building Services Contractors Association of Australia in QLD, ASIAL in NSW, Local Government & Public Sector Building Maintenance Conference in NSW, and others.

The Inquiry's methodology

In conducting the Inquiry, the FWO exercised statutory functions as set out in subsections 682(1) (a), (b) and (c) of the FW Act.

During the course of the Inquiry, FWO undertook a number of activities including:

Preliminary stage:

- collaborating with both ASIAL and United Voice in designing the compliance and education elements of the Inquiry
- meeting with four local government associations to outline the rationale for, and objectives of, the Inquiry as well as encourage awareness of the same throughout the association's respective networks
- developing and publishing a range of information and education products relating to local government procurement best practice on www.fairwork.gov.au in late 2014.

Inquiry stage:

- holding meetings in 2015 with representatives from the state-based local government associations to confirm their ongoing cooperation and obtain a deeper understanding of the procurement processes adopted by local governments in their respective states
- securing additional input from United Voice and ASIAL during the course of the Inquiry to ensure FWO interventions were relevant and appropriate
- engaging with 23 selected Councils, both metropolitan and regional:
    - QLD – Brisbane City Council, Logan City Council, Gold Coast City Council
    - NSW – Sydney City Council, Penrith City Council, North Sydney Council, Bankstown City Council, Mosman Council, Wollongong City Council, City of Wagga Wagga, Tamworth Regional Council
    - NT – Alice Springs Town Council, City of Darwin
    - SA – Adelaide City Council, Adelaide Hills Council, Barossa Council
    - WA – City of Perth, Town of Cambridge
    - TAS – City of Hobart, Kingborough Council
    - VIC – Melbourne City Council, Moreland City Council, Ballarat City Council

- interviewing Council procurement officials regarding the terms of their procurement arrangements and requesting records relating thereto
- interviewing the principal contractors who provided the security services regarding their tendering processes, including the nature of their records, direct employee entitlements, and how they engage subcontractors
- interviewing the subcontractors regarding their employment practices and their contracting arrangements with the principal contractors
- conducting visits to the sites that were staffed by security employees of the 49 businesses subjected to audits
- interviewing employees regarding their understanding of their legal entitlements, where relevant
- requesting time and wage records from all principal contractors and subcontractors for a one-month sample period
- reviewing records and information obtained from interviews with labour supply chain participants to identify if employees received the appropriate entitlements
- analysing and testing contractual documentation
- calculating wages for a sample period to determine if employees were paid correctly.

The Inquiry's findings

With regard to Councils, the Inquiry found:

- 14 of the 23 (61%) Councils had a non-compliant labour supply chain
- Councils failed to utilise their respective local government association for procurement support or advice
- the majority of metropolitan Councils had procurement departments which included legal support
- the majority of metropolitan Councils designed and drafted their own procurement processes, policies and contracts
- smaller Councils (mostly in regional areas) did not have procurement departments
- contracts contained generic references requiring principal contractors to be compliant with all relevant State and Commonwealth legislation but silent on any requirement relating to 'real-time' compliance auditing
- some contracts contained generic references to an obligation by principal contractors to seek permission from the relevant Council before subcontracting, although in many instances this wasn't referenced
- an absence of any proactive governance measures or real-time compliance auditing once a principal contractor was engaged
- no evidence of any security workers engaged on ABNs or workers claiming to be independent contractors.

With regard to the principal contractors and subcontractors, the Inquiry found:

- 42% of principal contractors (16 of 38) and 63% of subcontractors (12 of 19) failed to comply with Commonwealth workplace laws, with every state (but not the NT) having at least one instance of non-compliance
- total underpayments of $72 250 to 54 (12%) employees from 464 employee records assessed (just over $51 410 was underpaid by subcontractors, with the remaining having been underpaid by principal contractors), resulting in the following compliance outcomes:
    - four INs issued to one principal contractor and three subcontractors totalling $900
    - 15 CNs issued to seven principal contractors and eight subcontractors
    - 26 FCs issued to 15 principal contractors and 11 subcontractors

- one EU entered into with Melnor Security Pty Ltd
- legal proceedings commenced against VIP Security Services Pty Ltd and Adam Marcinkowski alleging adverse action and underpayments.

Case study - Legal proceedings: VIP Security Services Pty Ltd

The FWO commenced proceedings against VIP Security Services Pty Ltd (in liquidation) and director Adam Marcinkowski alleging contraventions affecting five employees undertaking security work on behalf of the Gold Coast City Council, including adverse action and underpayments of almost $16 000 to three of those employees. Among other things, the FWO is seeking declarations that VIP Security Services Pty Ltd and Mr Marcinkowski terminated one security guard for making enquiries in the course of his employment.

The Inquiry found the non-compliance was attributable to employees being denied:

- their full ordinary hourly rate entitlements
- penalty rates (weekends, public holidays)
- overtime rates.

There were also a number of concerns with regular part-time hours of work, such as employee hours not being set out in writing when they were engaged as part-time, or working more hours than their set hours without receiving overtime pay.

- The NT was the only state/territory where the Inquiry did not identify any non-compliance with Commonwealth workplace laws[16].
- The Inquiry identified the following levels of non-compliance among businesses providing security employees to Councils:
    - QLD - 70% (seven of 10)
    - SA – 60% (three of five)
    - NSW – 53% (nine of 17)
    - TAS – 50% (three of six)
    - VIC – 40% (four of 10)
    - WA – 25% (two of eight).

[16] The majority of Councils audited during this Inquiry in the NT directly employed security workers, and where they didn't, there was only one principal contractor who was fully compliant.

Other findings made by the Inquiry included:

- NSW and QLD Councils had more levels of subcontracting than the other states
- in some instances, principal contractors were subcontracting without the knowledge or consent of the Councils
- in some instances, subcontracting agreements were silent on any requirement to be compliant with the FW Act
- in some instances, subcontracting agreements were silent on any measures relating to proactive governance or compliance auditing on its part
- 28 of 49 (57%) principal contractors/subcontractors were members of an employer association, and of those, 16 of 28 (57%) were found to be non-compliant
- 42% of principal contractors/subcontractors derived their employee entitlements from enterprise agreements, with nearly half of those agreements having been negotiated between unions and the employer
- 57% of these enterprise agreements (encompassing 18% of principal contractors and 16% of subcontractors) were past their nominal expiry dates at the time of the Inquiry occurring.

The following Councils had principal contractors and subcontractors using expired enterprise agreements within their supply chains:

- QLD – Brisbane City Council, Logan City Council, Gold Coast City Council
- NSW – Sydney City Council
- SA – Adelaide Hills Council
- WA – City of Perth, Town of Cambridge
- TAS – City of Hobart
- VIC – Melbourne City Council, Moreland City Council.

IFAs were in place for three (5%) of the 57 principal contractors and subcontractors. Those three IFA arrangements were not compliant with the FW Act. Some were presented as a condition of employment,

others were not entered into voluntarily and others did not meet the specific requirements for making the IFAs, as set out in the relevant industrial instrument or FW Act[17].

With regard to the employees, the Inquiry found:

- 74% of employees (344 of 464 employees) were aged over 21 years of age (national average of all employed workers is 77% - Census 2016)
- 70% of employees were from English speaking backgrounds (national average of all employed workers is 77% - Census 2016)
- security licencing requirements in each state required a qualification ranging from a Certificate II to a Certificate IV (the qualification could be obtained in any state jurisdiction)
- employees were generally unaware of workplace relations legislation including entitlements such as penalty rates of pay for weekend work, overtime and public holiday work.

[17] The FWO assesses the process that is involved in making IFAs to ensure they meet the requirements specified in the Modern Award and FW Act, however as there is no 'better off overall' test legislated for IFAs. The FWO does not assess wages agreed to under such an agreement as this is the responsibility of the employer under the FW Act: https://www.fairwork.gov.au/employee-entitlements/flexibility-in-the-workplace/individual-flexibility-agreements

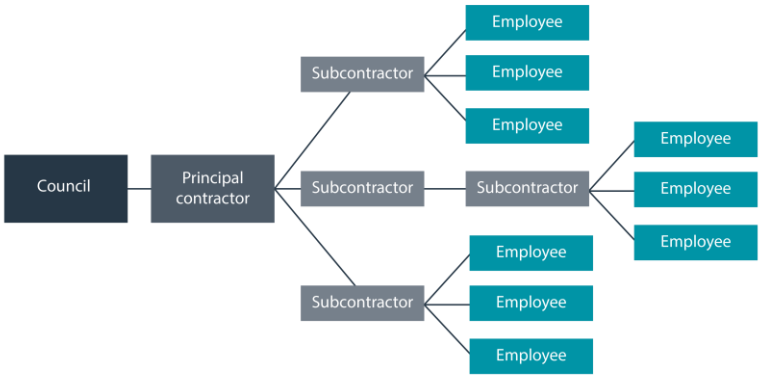
A labour supply chain – the contracting of labour

This Report uses the term 'labour supply chain' to describe the situation where one business contracts another business to provide workers or services. When a business procured to provide labour services further subcontracts that responsibility to another business, this creates a labour supply chain or contracting network. The FWO has guidance material published on www.fairwork.gov.au that helps explain contracting labour and supply chains[18].

The FWO has conducted several Inquiries into labour supply chain arrangements that include the contracting of trolley collection, cleaning and poultry processing services[19]. The findings of these Inquiries have disclosed ineffective governance at the top of the supply chain contributes to a culture of non-compliance by contractors. For the purposes of this Inquiry, the labour supply chains examined involved Councils, principal contractors and subcontractors.

The FWO's experience conducting Inquiries of this nature is that multiple levels of subcontracting can create conditions which allow non-compliance to occur. The reasons for this include pressures of multiple businesses taking a profit as additional subcontractors are added to the contracting chain, and the perceived ability to hide non-compliance within convoluted business structures.

Further, the FWO has identified that those at the top of supply chains must have robust monitoring and governance in place so they have clear visibility of what is occurring throughout their supply chains. Failing to do so risks those at the top being blind to the potential unlawful conduct by those engaging the workers providing them with their services, and could potentially expose those businesses to action under section 550 of the FW Act as accessories to the unlawful conduct.



[18] https://www.fairwork.gov.au/find-help-for/contracting-labour-and-supply-chains
[19] https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports

FWO's supply chain strategy

The FWO's strategic approach to regulating labour supply chains is based on the regulator using **four interconnected levers** in order to proactively influence behaviour change. Those levers are:

- **Market structures** – where we work with businesses to better understand the cost pressures facing labour supply chain participants within a particular market. This information enables us to gather intelligence and map industry sectors so as to identify the drivers of non-compliance and then provide businesses with support tools which promote a culture of compliance.
- **Environmental settings** – by exploring the specific cultural, physical and location factors that labour supply chain participants operate within, we are able to collaborate with community groups, employer and employee associations as well as government agencies to influence compliant behaviours.
- **Legal -** utilising the compliance and enforcement provisions contained within the FW Act as well as the means available to other regulators (under their respective authorising statutory and regulatory regimes) so as to enhance deterrence and ensure compliance.
- **Brand reputation** – by leveraging brand profile, the FWO is able to highlight compliance outcomes in the public domain so as to improve transparency and accountability within a labour supply chain.

Applying all four levers enables the FWO to identify and address the causes of non-compliance within the relevant labour supply chains and help build a culture of compliance.

Market structure

Councils

In Australia, around 537 Councils attend to a range of community needs. The majority of Councils (60 – 70%) are regional or rural, and they can differ greatly in size. For instance, '*…the largest local government authority by population is the Brisbane City Council with 1,052,458 residents (and) …the largest council by area is the Shire of East Pilbara in WA covering 371,696 square kilometres*.'[20]

Councils spend in excess of $32 billion each year providing services to community residents and employ around 188 900 staff.

Local government revenue comes from three main sources; rates, user charges and grants from Federal and state/territory governments. Local government assets have a net worth of more than $333 billion (2012-13)[21].

The Australian Local Government Association advises[22] that roles and responsibilities of Councils vary by state, and include functions such as:

- infrastructure and property services, including local roads, bridges, footpaths, drainage, waste collection and management
- provision of recreation facilities such as parks, sports fields and stadiums, golf courses, swimming pools, sport centres, halls, camping grounds and caravan parks
- health services such as water and food inspection, immunisation services, toilet facilities, noise control, meat inspection and animal control.

Councils are required under various procurement guidelines and legislation to tender when entering into a contract for services (such as security). When tendering, Councils are required to act in the best interests of the Australian public. They must be open, transparent and accountable in their dealings, ensure they promote fairness, and obtain the best value for public monies[23]. This does not necessarily mean the lowest price, but instead considering all aspects of a tender bid such as reliability, level of service, experience as well as cost.

[20] http://www.australia.gov.au/about-government/how-government-works/local-government
[21] http://alga.asn.au/?ID=42#
[22] http://alga.asn.au/?ID=59&Menu=41,83
[23] https://www.olg.nsw.gov.au/sites/default/files/Tendering-Guidelines-for-NSW-Local-Government.pdf

Security industry

The security industry in Australia generates around $6 billion in revenue[24]. There are in excess of 6000 security businesses around the country, with over 54 000 workers.

The industry is forecast to grow by a further 1.6% by 2020, with over 60 000 workers to be employed[25].

The sector includes several major companies as well as a large number of smaller operators. It is not uncommon for a number of the smaller operators in the industry to have commenced as security guards themselves. QLD, NSW and VIC account for approximately 78.8% of industry revenue due to higher population and business numbers[26].

The industry is predominantly male, and the majority of workers work in excess of 40 hours per week (72.6%). The most common level of education is a Certificate III or Certificate IV, with many states and territories requiring at least a Certificate II as an entry requirement to obtain a security licence. The main age group is 25 – 34 years, and the median age is 41. In all states, workers are required to be at least 18 to obtain a licence[27].

While the sector accounts for only around 0.5% of total employment and 0.4% of businesses in Australia, the security industry has consistently represented more than 2% of requests for assistance involving a workplace dispute lodged with the FWO.

In the 2015-16 financial year, at the time the compliance activity component of the Inquiry commenced, the security sector was ranked ninth-highest in terms of workplace disputes requiring FWO intervention. The most common age group lodging requests for assistance with the FWO in the security industry is the 40 – 49 age cohort (28.7%).

Within the security industry, a Council or other government contract is highly sought after, as they provide a larger degree of ongoing work than other contracts. This has created a highly competitive playing field, with some businesses tendering bids lower than would be required to pay the total cost of the employee just to win a contract and some councils awarding contracts based on the price without conducting due diligence.

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[24] https://www.ibisworld.com.au/industry-trends/market-research-reports/public-administration-safety/investigation-security-services.html
[25] CPSISC Security Sector – Snapshot http://www.cpsisc.com.au/resources/CPSISC/Industry%20Snap%20Shot/Security%20Industry%20Snapshot.pdf
[26] Ibid
[27] Ibid

Terms and conditions of employment

The terms and conditions of employment for security services are regulated by the FW Act and the Fair Work Regulations 2009 [the **FW Regulations**].

The relevant modern award for the purpose of this Inquiry was the *Security Services Industry Award 2010* [the **Security Award**][28].

The Inquiry found that employees performed duties listed for a Security Officer Level 1 or a Security Officer Level 2. At the time of the compliance phase of the Inquiry, the ordinary hourly pay rate for a full-time/part-time Security Officer Level 1 was $19.42 and for a full-time/part-time Security Officer Level 2 was $19.98[29].

The 'total cost of an employee' comprises both direct and indirect costs.

Direct costs may include:

- minimum ordinary hourly wage rates
- overtime and public holiday rates
- shift and weekend penalties
- casual loadings
- allowances (including first aid)
- leave payments, e.g. personal leave or annual leave
- annual leave loading.

Indirect costs may include two categories:

- cost of items that provide a benefit to the individual employee, or
- cost of items that are a part of running a business and a consequence of employing staff.

'Benefits' cover a very wide range of items in the security sector, for instance, cars, parking, insurance, health insurance payments or contributions, mobile phones, laptops/other computers, education expenses, cost of licenses and training and accommodation.

The value of superannuation contributions should also be counted as an indirect cost because they are paid

[28] Security Award found on FWO website http://awardviewer.fwo.gov.au/award/show/MA000016
[29] Pay and Conditions Tool, FWO website https://calculate.fairwork.gov.au/FindYourAward

directly to a fund rather than as cash to the employee. Superannuation contributions are compulsory, and if they are not paid the employer must pay the Superannuation Guarantee [**SG**] Levy. The SG charge should be added to indirect costs.

Other common indirect costs include workers compensation premiums and payroll tax. Workers compensation premiums vary quite widely according to the industry and type of employment, as well as the employer's past history. Payroll tax is a state tax and typically does not apply to small businesses, but the rates vary from state to state.

The total cost of employing an employee includes:

- base salary and wages
- other direct cash payments such as penalty rates, leave loading, allowances etc.
- cash value of employee benefits provided to the employee, including superannuation contributions
- Fringe Benefits Tax payable on these benefits
- value of any incentive and bonus payments
- workers compensation premium (per employee)
- payroll tax (per employee)
- SG charge, where payable
- other miscellaneous costs such as cost of training courses.

It is not normal practice in the security sector to include the cost of items such as the provision of uniforms for employees to wear or office equipment because these items are regarded as tax deductible business expenses.

Industry sources estimate on-costs to be around 35-40% of direct costs, however, it is agreed there are possible variables:

- the percentage will be higher than average if there are many supervisory employees as they are usually paid at a higher rate;
- the percentage will be higher than average if the business has high workers compensation premiums due to their workers compensation claims experience, or because it operates in a high-risk sector of the security industry; and
- costs such as workers compensation and payroll tax vary from state to state.

Enterprise agreements

Employees of a business may derive their entitlements from an enterprise agreement, which has been lodged with, and approved by, the Fair Work Commission[30]. Where an enterprise agreement exists, employee entitlements come from the enterprise agreement and the modern award does not apply. However, the ordinary hourly base rate of pay cannot be less than the modern award rate, and the National Employment Standards also apply[31].

During the Inquiry it was identified that 20 of the businesses audited (42%) derived their employee entitlements from an enterprise agreement rather than the Security Award. Of the 21 agreements in place (one business had two agreements for different types of security employees), nine (43%) were negotiated in conjunction with one of the relevant employee associations.

Depending on when an enterprise agreement was lodged, there were various assessments that it may have undergone prior to approval. The table below details the history of the enterprise agreement approval process for those businesses subject to the Inquiry:

Table 1: History of the enterprise agreement approval process for businesses subject to the Inquiry

Timeframe when agreement was lodged/approved	# of Inquiry agreements lodged during this timeframe	Assessment agreement was subject to at time of lodgement	Organisation that assessed and/or approved the agreement
Up to 26 March 2006	1	No Disadvantage Test	Australian Industrial Relations Commission or relevant state industrial relations department
27 March 2006 (Workchoices) to 6 May 2007	3	No Assessment – agreement applied on lodgement exactly as written	Office of the Employment Advocate
7 May 2007 to 27 March 2008	3	Fairness Test	Workplace Authority
28 March 2008 to 30 June 2009 (Forward with Fairness)	3	No Disadvantage Test	
1 July 2009 (Fair Work Act)	-	No Disadvantage Test	

[30] https://www.fwc.gov.au/awards-and-agreements/agreements/make-agreement
[31] https://www.fairwork.gov.au/awards-and-agreements/agreements

Timeframe when agreement was lodged/approved	# of Inquiry agreements lodged during this timeframe	Assessment agreement was subject to at time of lodgement	Organisation that assessed and/or approved the agreement
1 January 2010 (Fair Work Act)	1	Better Off Overall Test	Fair Work Australia
1 January 2013 (Fair Work Act)	10	Better Off Overall Test	Fair Work Commission

Once an agreement is approved it continues to apply until terminated or replaced, with agreements made prior to 1 January 2010 (pre-Fair Work Agreement) potentially providing entitlements lower than the modern award as they were assessed under previous legislation. Such agreements must provide at least the base ordinary hourly rate of pay from the modern award, but do not have to match the various penalty rates such as weekend, public holiday, overtime, and night shift. In this Inquiry, the FWO found that four of the 21 agreements (19%) were approved prior 7 May 2007, and were therefore not subject to assessment against the full award entitlements (compared to the remaining 81% which were compared to the relevant awards before approval).

Case study of a pre-Fair Work Agreement

One of the audited businesses, Securecorp VIC Pty Ltd [SCV] contracted directly to Melbourne City Council (MCC). The inspector conducting the audit identified that SCV pays their security employees under the Securecorp (VIC) Workplace Agreement 2007 [**the SCV Agreement**]. The legal rates SCV had to pay at the time of the Inquiry under the SCV Agreement were as follows:

SCV Agreement rates per hour:

- Security Officer Level 1, ordinary hours $19.42
- Security Officer Level 1, Saturday $21.27
- Security Officer Level 1, Sunday $21.27
- Security Officer Level 1, Public Holiday $27
- Security Officer Level 1, Night Shift $19.42

The Inquiry found that SCV was fully compliant with the FW Act and the SCV Agreement, and paid their employees correctly. SCV's subcontractors Global Manpower Solutions Pty Ltd [**GMS**] and ACS Services Pty Ltd [**ACS**], who were engaged and paid by SCV to assist in providing security services to MCC, were required to pay their security employees the legal rates specified in the Security Award:

SCV Agreement rates per hour:

- Security Officer Level 1, ordinary hours $19.42
- Security Officer Level 1, Saturday $29.13
- Security Officer Level 1, Sunday $38.84
- Security Officer Level 1, Public Holiday $48.55
- Security Officer Level 1, night shift $23.63

The inspectors conducting the audits of GMS and ACS found that they had both underpaid their employees. Both businesses fully cooperated with the FWO and rectified the underpayments, and have committed to continuing to pay correct entitlements.

This MCC supply chain demonstrates that a contractor with an older agreement may have a financial advantage when tendering for a contract, however if they then subcontract to businesses who pay under a modern award, there may not be enough money to pay the total cost of workers and for businesses to make a profit further down the supply chain.

Individual Flexibility Arrangements[32]

An IFA can be used to vary specific modern award or enterprise agreement terms for an individual at the request of the employer or the employee[33]. IFAs can be beneficial to both parties as they allow certain terms to be varied to meet the needs of both. For example, under an IFA an employee may choose to work longer hours two days per week as 'ordinary hours' so their employer doesn't have to pay overtime, and in return, the employer allows them to finish early two days per week and pick their children up from school.

The FWO does not have a role in assessing the entitlements under an IFA. Under the FW Act it is the obligation of the employer to make sure the employee is better off overall compared to the relevant award. An employee does not have to sign an IFA if they believe they are not better off overall.

The Inquiry identified that three businesses had employees on IFAs, and for all three businesses, the IFAs failed to fully meet the award flexibility requirements set out in clause seven of the modern award[34]. Once an IFA is made it still applies even if it doesn't meet these requirements, but it is also still considered to have breached the legislation. The FWO has taken enforcement action against all three businesses as a result. Two businesses have been issued Letters of Caution, and the third is the subject of legal action in relation to IFA and other contraventions[35].

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[32] https://www.fairwork.gov.au/employee-entitlements/flexibility-in-the-workplace/individual-flexibility-agreements

[33] FW Act section 144 http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fwa2009114/s144.html and section 202 http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fwa2009114/s202.html

[34] http://awardviewer.fwo.gov.au/award/show/MA000016

[35] Refer to footnote 7.

It is important that businesses entering into IFAs with their employees ensure they meet all the requirements set out in the FW Act and the relevant modern award/enterprise agreement.

Independent contractors

Another element of engaging security workers that was of interest to the Inquiry relates to independent contractors performing security work. An independent contractor's remuneration is not governed by the terms of a modern award or enterprise agreement, rather a contractor is able to agree upon any price point. There is therefore an incentive by some businesses to engage independent contractors rather than employees as the price of labour can be lower.

Independent contractors are workers who have their own Australian Business Number [**ABN**], run their own business, and are responsible for their own tax (including goods and services tax) and superannuation. They usually negotiate their own fees and working arrangements, and can work for more than one client at a time[36].

Councils, principal contractors and subcontractors need to ensure they are educated about the difference between a genuine independent contractor and an employee, to avoid sham contracting[37].

The nature of work in the security industry means it is unlikely that an individual security worker would be a genuine independent contractor running their own business. This is due to a range of factors including:

- no specialist skills required
- commercial risks are borne by the principal contractor rather than the individual security worker
- the work that they perform promotes the brand/reputation of the principal contractor rather than the individual security worker
- guards provided with, and required to wear, the uniform specified by the principal contractor or the Council
- guards required to perform work as prescribed by the principal contractor or Council
- guards are paid an hourly rate of time based on the number of hours worked rather than being paid for specific tasks/projects

[36] https://www.fairwork.gov.au/find-help-for/independent-contractors
[37] 'Sham contracting' is where an employer deliberately attempts to disguise an employment relationship as an independent contracting arrangement: https://www.fairwork.gov.au/find-help-for/independent-contractors

- guards are unable to subcontract work out.

The evidence gathered during this Inquiry through discussions with workers, reviews of records provided by employers and discussions with Councils did not identify any evidence of sham contracting. This finding appears to be due to the higher level of awareness by Council procurement officers as well as contractual requirements to notify Councils and/or seek permission to subcontract.

Environmental settings

Councils typically source security services for the following types of work:

- static guarding of infrastructure
- CCTV monitoring
- remote monitoring of infrastructure and events.

Geographical differences

The Inquiry found security employees in metropolitan councils generally perform more remote monitoring of infrastructure and CCTV and carpark monitoring than event work. Contracts with metropolitan Councils tend to be for longer durations, around two to three years. In regional areas, security monitoring involves smaller distances, and work tends to be more sporadic in nature with event work or shorter contract durations.

It is often easier to move from one security business to another within a metropolitan area, whereas in regional areas there are less businesses operating. This can create a situation where employees are potentially more reluctant to voice concerns about their working entitlements, as there may not be many other work opportunities, or they may get a reputation for being a difficult staff member within the industry.

Security industry culture

Security is an industry requiring certifications, from the Certificate II to the Certificate IV level, for registration as a security worker. No specialist skills are required, with registration in all states mainly focusing on potential criminal records. Many security business owners started as security workers themselves and then progressed to starting their own businesses. As a result, there is a lack of awareness and education regarding employer obligations and employee entitlements, with businesses instead doing things “the way they were done” when the business owner used to do similar work for someone else.

There are also many small businesses competing for contracts against both small and large businesses, and businesses may cut their profit margin to win a contract.

Case study – security employee becomes business owner

A business owner audited during this Inquiry, 'Thomas', advised the FWO that he was a security guard for around 10 years, and then decided to run his own company to spend more time with his family. However, he advised he has instead found that he spends even less time with his family as a business owner, as he has to operate close to his profit line and do more of the work himself. He is also based in a regional area which makes it harder to attract employees and to win contracts. Thomas indicated to the FWO that he finds himself both time and cash poor in running his business, so even though he wants to do the right thing by his staff, he doesn't have time to fully educate himself across all relevant legislation.

Security licencing is not standard throughout Australia, and the requirements to hold a licence can vary considerably. In NSW, VIC and WA the police are responsible for licencing, while in other states it is the responsibility of various state government departments. QLD requires all security firms to be a member of an approved association to hold a licence; VIC requires either association membership or a Certificate IV in Security & Risk Management, while no other states appear to have a requirement relating to association membership.

Hours and physicality of work

The Inquiry observed that security employees tend to work late at night, particularly on weekends. They are more likely to be classified as 'shift workers', with disrupted sleep patterns that can have an impact on their health. The work is highly physical, with static guards required to be on their feet the majority of the time. Security guards are also more likely to encounter higher risks to their safety than in other industries, due in part to the physicality of the work, as well as their interactions with members of the public who may be intoxicated, highly emotional, or irrational[38].

The relevant industry bodies involved in this Inquiry

ASIAL is a registered organisation, and they indicate on their website that their members "…*account for approximately 85 per cent of the Australian security industry*."[39] The FWO has a Memorandum of Understanding (**MoU**) with ASIAL which provides a framework for both parties to enhance existing relationships and work together to improve compliance with Commonwealth workplace laws through the

[38] Article detailing one of the risks faced in the workplace by security guards: https://www.brisbanetimes.com.au/national/queensland/teen-charged-over-alleged-nurse-assaults-20160516-gow1ko.html
[39] Australian Security Industry Association Limited, About Us Platform, http://www.asial.com.au/about-us/our-association, accessed 4 May 2016.

exchange of accessible, reliable and credible information to workplace participants. In 2013, ASIAL raised concerns with the FWO following member feedback about the lack of transparency and fairness in the awarding of local government tenders to private security companies, often at the lowest price[40].

United Voice is a registered organisation representing over 120 000 workers across a wide range of industries including security, as well as hospitality, health and aged care, manufacturing, mining and miscellaneous, property services and children's services[41].

[40] Security Insider Magazine, August 2014, https://issuu.com/asial/docs/aug2014-insiderweb/37

[41] There are two additional employer associations relevant to this industry, the Building Services Contractors Association of Australia (BSCAA) and the Security Providers Association of Australia Limited (SPAAL). BSCAA is Australia's peak industry representative body for the building services industry, with members including contractors for cleaning, security, facilities management and ground maintenance. SPAAL is an approved national industry association. Membership is open to all security providers in Australia. SPAAL is a member of the Construction and Property Services Industry Skills Council, in addition to Standards Australia.

Legal

Accessorial liability

Participants (such as Councils) within a labour supply chain may be held legally responsible if their principal contractors or subcontractors are not complying with the Fair Work legislation where it can be demonstrated that they had a role to play in those breaches of the law.

That is, it is not just employers who can be held liable for contraventions such as underpayments but also any persons knowingly involved in contraventions may also be found legally responsible. A range of accessories have been held liable in actions taken by the FWO including individuals (accountants, managers, directors, lawyers) or businesses involved in the supply chain. This is known as accessorial liability[42], and falls under section 550 [**s550**] of the FW Act, which provides that a person who is 'knowingly involved in' a contravention of a civil remedy provision is taken to have contravened that provision, and is exposed to penalties and other orders flowing from that contravention. A person is 'involved in' a contravention if they:

- aided, abetted, counselled, procured or induced the contravention
- conspired with others to effect the contravention
- were in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.

The FWO uses s550 to commence court proceedings against alleged 'accessories' to contraventions. The outcomes of FWO legal proceedings that resulted in penalties against directors in supply chains in industries such as cleaning[43], security[44] and trolley collection[45] demonstrate the importance of ensuring there is full compliance with workplace laws at all levels. This includes maintaining an awareness of the supply chain and ensuring that measures are in place to avoid non-compliance. While it was reassuring that we did not find evidence of accessorial liability during the course of the Inquiry, it is important to note that all participants within any labour supply chain are exposed to potential legal proceedings if they 'turn a blind eye' to contraventions of the FW Act.

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[42] https://www.fairwork.gov.au/about-us/news-media-releases/newsletter/august-2016/what-is-accessorial-liability https://www.fairwork.gov.au/about-us/our-policies FWO Guidance Note 1 – Litigation Policy
[43] https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180529-iss-penalty-mr
[44] https://www.fairwork.gov.au/about-us/news-and-media-releases/2013-media-releases/november-2013/20131119-safecorp-security-litigation
[45] https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/march-2016/20160310-trolley-trifecta-presser

Brand reputation

A contracted provider found to be engaging in underpayment of wages or exploitation presents a key risk to the reputation of a Council. Ratepayers expect Councils to deliver cost effective services. But the community has also shown little tolerance for those at the top of supply chains failing to take responsibility for vulnerable workers. The desire to deliver value for money needs to be balanced with the moral and ethical dimensions of how those services are delivered and the impact that a publicly funded entity such as a Council may have in influencing prices and behaviour in a highly competitive sector. The reality is likely to be that security providers will be primarily motivated by commercial considerations in a market where price is often the key driver to whether they will be successful in securing work.

Case study – potential brand damage mitigated

Melnor Security Service Pty Ltd [**Melnor**] was contracted by Tamworth City Council to provide security services at the Country Music Festival in 2015. Two security guards at the festival were underpaid more than $6000, with their rates of $26 to $28 per hour not enough to meet minimum entitlements under the Security Award. Depending[46] on their classification, they should have been paid up to $43.85 per hour for night, weekend and overtime work.

When the Inquiry identified this underpayment, Melnor cooperated with the FWO, promptly reimbursed the guards, and entered into an EU with the FWO to ensure future compliance.

Council procurement officers are balancing these tensions in deciding who to engage and what sort of monitoring arrangements to put in place. Unless they manage these tensions carefully and conscious of the dynamics in the sector, Councils risk being seen to have contributed to underpayment of workers 'down the chain' just as much as the security providers, with damage to their reputation and standing in the community.

[46] https://www.fairwork.gov.au/about-us/news-media-releases/2016-media-releases/august-2016/20160823-melnor-eu-release

Conclusion

The findings and recommendations within this Inquiry provide an opportunity for Councils (and all heads of supply chains) to effect change within their industry from the top down. This starts with Councils having full awareness of the total cost of the worker when they assess tenders, and ensuring they award their security contracts to businesses that are ethical, pay their workers correctly, and provide value for money, not necessarily the lowest price. Once the contracts are in place, Councils can then ensure they continue to impact this industry-wide change by putting measures in place to monitor ongoing compliance within their supply chains. Making these changes will also ensure businesses don't benefit from winning contracts by underpaying staff and discourage such behaviour from occurring as the consequence will be to lose out on the highly desirable Council contracts.

The FWO will continue to monitor the issues identified in this report and may conduct further enquiries.

The FWO has guidance materials on contracting labour and supply chains available at www.fairwork.gov.au/supplychain.

About the Fair Work Ombudsman

The FWO is an independent statutory agency, created by the *Fair Work Act 2009* (FW Act) on 1 July 2009.

The FWO supports compliant, productive and inclusive Australian workplaces.

The FWO ensures compliance with Australia's workplace laws by:

- offering people a single point of contact to receive accurate and timely advice and information about Australia's workplace relations system
- educating people working in Australia about their workplace rights and obligations
- monitoring compliance with, inquiring into and investigating any act or practice that may be contrary to workplace laws, awards and agreements
- litigating to enforce workplace laws and to deter people from not complying with their workplace responsibilities.

For further information and media enquiries please contact FWO media (media@fwo.gov.au).

Our Strategic Intent as well as our Compliance and Enforcement Policy can be located at www.fairwork.gov.au/about-us/our-vision.

If you would like further information about the FWO's compliance and enforcement activities please contact Lynda McAlary-Smith, Executive Director – Compliance and Enforcement (lynda.mcalary-smith@fwo.gov.au).

united voice

Media Release

31 July 2017

Security Officers Underpaid by Private Contractor

Security officers at defence bases, hospitals, universities, government departments and manufacturing sites have been underpaid for months, according to security officers' union, United Voice.

The union has lodged an underpayment of wages case with the Fair Work Commission against private security firm MSS who have been underpaying workers since July.

United Voice Security Co-ordinator Damien Davie said MSS have been paying staff below the modern award.

"This is absolutely disgraceful. For the past four months, our members have been paid less than they are legally entitled to," said Mr Davie

"Wages are low enough in the security industry, without officers being paid even less. Our members make sure people are safe at our hospitals, our universities and government buildings. They also ensure our defence bases are secure. They deserve to be paid properly."

The underpayment case comes as MSS security officers prepare to work overtime in the lead up to and during the G20 Summit and have been denied any annual leave during this period.

Mr Davie said: "The police service has been allocated additional money and resources for the G20, yet security staff at the G20 designated hospital, the PA, have been reduced. Our members are constantly trying to do more with less."

"Security officers perform an extremely difficult job with limited resources and low pay. They deserve to be paid what they are entitled to."

For further information contact Susan Butler on [redacted]

20 April 2017

Zombie Agreements wreak havoc on workers' rights

'Zombie agreements' are wreaking destruction on workers' rights across the country, according to three workers who'll front a Senate Inquiry hearing in Brisbane today.

The workers, members of union United Voice, will talk about the impact out-dated and destructive workplace agreements are having on their rights and conditions.

"Zombie agreements are agreements that should have been buried years ago," said Samarah Wilson, one of the workers who'll speak to the inquiry.

"They contain old pay rates and conditions that are far inferior to what the relevant modern award contains, but they limp on because of the difficult and time consuming process required to kill them off.

"Today, I'll be speaking about my own employment under a dodgy agreement with a labour hire company in the hospitality sector, which contained a clause that completely removed my penalty rates."

Other United Voice speakers include Bruce Lillywhite and Mitchell Laidley, both of who fell victim to zombie agreements in their workplaces.

"I was employed as a crowd controller in September 2014, by a company called Brisbane Executive Security Teams (BEST)," Mitchell said.

"BEST's agreement, which dates back to 2007, contains lower pay rates and far lower conditions than the relevant workplace award, so I worked to have the agreement overturned.

"Shortly after, I lost my job. It left me upset, annoyed, angry and confused."

Bruce had a similar experience, when his employer Assetlink was taken over by Trident Security, who re-employed him through a labour hire company using a zombie agreement that left him $180 a fortnight worse off.

"Letting these zombie agreements stumble on is putting at risk all the modern conditions that Australian workers have fought so hard to keep, and that's not acceptable," Samarah said.

The public hearing for the Senate Inquiry into Corporate Avoidance of the Fair Work Act will be held today in the McLeod/Waldorf Rooms, at Novotel Brisbane Airport, The Circuit.

The QCU submission, at which the United Voice workers will speak, will start at 12:10pm.

For more information, contact Amanda Rowen on [redacted]

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Parliamentary Committees





A fair day's pay for a fair day's work?
Exposing the true cost of wage theft in Queensland

Report No. 9, 56th Parliament
Education, Employment and Small Business Committee
November 2018

Education, Employment and Small Business Committee

Chair Ms Leanne Linard MP, Member for Nudgee

Deputy Chair Mrs Jann Stuckey MP, Member for Currumbin

Members Mr Bruce Saunders MP, Member for Maryborough

Mrs Simone Wilson MP, Member for Pumicestone

Mr Michael Healy MP, Member for Cairns

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Acknowledgements

The committee acknowledges the contributions of Mr Don Brown MP, who participated in a number of the committee's hearings and meetings during the inquiry, including many of the committee's hearings in various regional locations across Queensland.

The committee also acknowledges the assistance provided by the Queensland Office of Industrial Relations, the Queensland Parliamentary Library and Research Services, the Fair Work Ombudsman, the Australian Taxation Office, and the Australian Securities and Investments Commission.

Contents

Abbreviations **iv**
Glossary **vii**
Chair's foreword **ix**
Recommendations **x**
1 Introduction **1**
1.1 Role of the committee 1
1.2 Inquiry referral and process 1
1.3 Submissions 2
1.4 Online survey 2
1.5 Briefings and hearings 2
1.6 Parliamentary privilege and the right of reply 3
1.7 Inquiry material 3
1.8 Inquiry background 4
1.9 Report structure 7
2 Current regulatory framework **9**
2.1 Queensland industrial relations system 9
2.1.1 Office of Industrial Relations 11
2.1.2 Queensland Industrial Relations Commission 12
2.1.3 Labour hire licensing 12
2.2 The Fair Work System 13
2.2.1 The safety net and other protections 14
2.2.2 Fair Work Ombudsman 16
2.2.3 Fair Work Commission 17
2.3 Superannuation Guarantee 17
2.3.1 Australian Taxation Office 18
2.4 Insolvency 19
3 Defining wage theft **21**
3.1 Forms of wage theft 22
3.2 Other concerning practices 23
4 Incidence of wage theft **25**
4.1 Available statistics 26
4.2 Reported wage theft 26
4.2.1 Office of Industrial Relations 27
4.2.2 Fair Work Ombudsman 27
4.2.3 Australian Taxation Office 30
4.2.4 Other reports and findings 31
4.3 Vulnerable cohorts 33
4.3.1 Migrant workers and visa holders 34
4.3.2 Young workers 36
4.4 Vulnerable industries and sectors 37
4.4.1 Accommodation and food services 39
4.4.2 Horticulture 40

4.4.3 Food processing 41
4.4.4 Construction 41
4.4.5 Cleaning and security 42
4.5 Regional variation 43
4.6 Further research 45
5 Survey results – What Queenslanders said 46
5.1 Survey sample 46
5.2 Experiences of wage theft 47
5.2.1 Time of experience 47
5.2.2 Location of wage theft 47
5.2.3 Employment status 47
5.2.4 Types of wage theft 48
5.2.5 Industries affected by wage theft 50
5.3 Reporting of wage theft 53
5.4 Summary 55
6 Impacts of wage theft 56
6.1 Impacts on individuals and families 57
6.1.1 Financial impacts 57
6.1.2 Emotional and health impacts 60
6.2 Impacts on businesses and the economy 62
7 Forms of wage theft experienced 67
7.1 Underpayment of wages 67
7.1.1 Unpaid trials 69
7.2 Unpaid superannuation 70
7.3 Unpaid penalty rates 72
7.4 Unreasonable deductions and withholding of other entitlements 73
7.5 Sham contracting 75
7.6 Insolvency 76
8 Reasons why wage theft occurs 77
8.1 An honest mistake 77
8.2 Commercial gain – a business model? 79
8.3 Lack of worker awareness 84
8.4 Power imbalance 85
8.5 Lack of documentation 86
8.6 Worker non-reporting 87
8.6.1 Intimidation and reprisals 90
8.7 Cash economy 92
9 Promoting compliance 94
9.1 Education and awareness 94
9.1.1 Current education and awareness services 94
9.1.2 Stakeholder proposals 97
9.2 Proactive compliance measures 104
9.2.1 Licensing and registration 104

9.2.2 Business registration – the Australian Business Register 108
9.2.3 Procurement and supply chain policies 110
10 Role of industrial organisations 113
10.1 Unions 113
10.2 Employer and industry associations 119
11 Reporting and recovery 123
11.1 Claims process 123
11.2 Reporting and interactions with agencies 125
11.2.1 Mediation processes 126
11.2.2 Court processes 128
11.3 Insolvency 135
11.3.1 Access to the Fair Entitlements Guarantee 137
11.4 Community service providers and other organisations 143
12 Enforcement and deterrence 147
12.1 Enforcement actions 147
12.1.1 Fair Work Ombudsman 147
12.1.2 Australian Taxation Office 158
12.1.3 Office of Industrial Relations 161
12.1.4 Australian Securities and Investments Commission 163
12.1.5 Agency Collaboration 164
12.2 Fair Work Commission 165
12.3 Sham contracting 166
12.4 Civil penalties 169
12.5 Criminalisation 171
12.6 Naming and shaming 175
13 Other jurisdictions 177
13.1 Australian jurisdictions 177
13.2 International jurisdictions 179
14 Exploitation of legal framework 181
14.1 Workplace agreements 181
14.1.1 Termination of workplace agreements 181
14.1.2 'Zombie agreements' 183
14.2 Precarious employment and the gig economy 187
14.2.1 Casualisation of the workforce 187
14.2.2 Gig economy 188
14.3 Illegal phoenixing activity 191
15 Other concerns 195
Appendix A – Submitters 197
Appendix B – Officials at public departmental briefing 199
Appendix C – Witnesses at public hearing 200
Appendix D – Survey Questions 205
Statement of Reservation 212

Abbreviations

ABC	Australian Broadcasting Corporation
ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
Ai Group	Australian Industry Group
ALHR	Australian Lawyers for Human Rights
AMIEU	Australian Meat Industry Employees' Union
AMWU	Australian Manufacturing Workers Union
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BFVG	Bundaberg Fruit and Vegetable Growers
BOOT	Better Off Overall Test
CEO	Chief Executive Officer
CFMEU Queensland	Construction, Forestry, Mining and Energy Industrial Union of Queensland
Commissioner	Commissioner of Taxation
Committee	Education, Employment and Small Business Committee
Corporations Act	*Corporations Act 2001* (Cth)
Department	Department of Education (includes the Office of Industrial Relations)
EBA	Enterprise Bargaining Agreement
EERC	Education and Employment References Committee
ELICOS	English Language Intensive Courses for Overseas Students
ETU	Electrical Trades Union
FEG	Fair Entitlements Guarantee
FEG Act	*Fair Entitlements Guarantee Act 2012* (Cth)
FWA	*Fair Work Act 2009* (Cth)

FWC	Fair Work Commission
FWO	Fair Work Ombudsman
GST	Goods and services tax
HIA	Housing Industry Association
IEU	Independent Education Union
IGT	Inspector General of Taxation
Inquiry	Inquiry into wage theft in Queensland
IR Act	*Industrial Relations Act 2016* (Qld)
IR Claims	Industrial Relations Claims
JobWatch	JobWatch Inc.
LHLCU	Labour Hire Licensing Compliance Unit
MEA	Master Electricians Australia
National Temporary Migrant Work Survey	Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey,* University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017.
NES	National Employment Standards under the *Fair Work Act 2009* (Cth)
NRA	National Retail Association
NSW	New South Wales
NUW	National Union of Workers
OIR	Office of Industrial Relations
POQA	*Parliament of Queensland Act 2001* (Qld)
QAI	Queensland Advocacy Incorporated
QCA	Queensland Community Alliance
QCAT	Queensland Civil and Administrative Tribunal
QCU	Queensland Council of Unions
QIRC	Queensland Industrial Relations Commission
QLS	Queensland Law Society

QNMU	Queensland Nurses and Midwives' Union
QTIC	Queensland Tourism Industry Council
ROC	Registered Organisations Commission Entity
R&CA	Restaurant & Catering Australia
Senate EERC	Senate Education and Employment References Committee (Parliament of Australia)
SG	Superannuation Guarantee
SGA Act	*Superannuation Guarantee (Administration) Act 1992* (Cth)
SGC	Superannuation Guarantee Charge
Standing Orders	Standing Rules and Orders of the Legislative Assembly
TWU	Transport Workers Union
US	United States
VET	Vocational Education and Training
Work Choices	*Workplace Relations Amendment (Work Choices) Act 2005* (Cth)
YWAS	Young Workers' Advisory Service
YWH	Young Workers Hub

Glossary

Better Off Overall Test (BOOT)	A test applied by the Fair Work Commission to determine whether to approve a proposed enterprise agreement or other registered agreement. For the agreement to be approved, the award-covered employee must be better off overall under the registered agreement than they would be under the relevant modern award. See page 15.
Enterprise agreements	Enterprise agreements are agreements between employers, employees and employee representative organisations (such as unions) which set out mutually accepted terms and conditions of employment. Most enterprise agreements set out: • wage rates • employment conditions (e.g. hours of work, meal breaks, overtime) • a consultation process • dispute resolution procedures • deductions from wages for any purpose authorised by an employee. To be approved by the FWC, enterprise agreements must pass the 'better off overall' test (BOOT).
Enterprise bargaining	Enterprise bargaining is the process of negotiation generally between the employer, employees and their bargaining representatives with the goal of making an enterprise agreement.
Fair Entitlements Guarantee (FEG)	A safety net scheme established under the *Fair Entitlements Guarantee Act 2012* (Cth) that provides financial assistance to eligible employees who lose their jobs due to, or within six months of, the liquidation or bankruptcy of their employer. See page 19.
Gig work and the gig economy	Where employers engage workers through a series of micro-contracts mediated through an online platform. Examples of gig work include making an earning from Airbnb, Whizz, Airtasker, Freelancer and care.com; ridesharing platforms such as Uber; food delivery services like Deliveroo. See page 188.
Illegal phoenix activity (phoenixing)	The practice of deliberately liquidating a company and creating a new company in its place, with the intention of avoiding paying debts including employee entitlements. See pages 12 and 191 for further details.
Minimum wage	An employee's base rate of pay for ordinary hours worked, generally dependent on the modern award or a registered agreement.
National minimum wage order	An outline of the minimum wage for employees not covered by an award or an enterprise agreement. See page 17.
Modern award	A document that establishes the minimum wages and working conditions for employees in a particular industry or occupation. See page 13.

National Employment Standards (NES)	A set of ten minimum terms and conditions of employment that must be provided to all employees, as set out in part 2-2 of the FWA. See page 14.
Registered agreement	An agreement between an employer and their employees regarding employment conditions, which must be approved by and registered with the Fair Work Commission.
Superannuation Guarantee	Compulsory superannuation contributions made by employers on behalf of eligible employees as set out under section 16 of the *Superannuation Guarantee (Administration) Act 1992* (Cth). See page 17.
Wage theft	The underpayment or non-payment of wages or entitlements to a worker by an employer, encapsulating any of a range of activities that deny workers their legal/entitlements. See page 21.

Chair's foreword

A fair day's pay for a fair day's work, is an ideal deeply rooted in Australia's labour history and egalitarian values. To most, it is an indisputable right that a worker is fairly and duly remunerated in accordance with their effort and the law. Yet recent public high-profile cases of significant worker exploitation, federal inquiries, and academic studies have found that wage theft is prevalent and going largely unanswered.

The task given to the committee was to inquire into the incidence, forms and impacts of wage theft in Queensland. To let Queenslanders tell their story. And, to report on the effectiveness of the current regulatory framework at state and federal level in dealing with wage theft, and recommend options for eradicating the practice into the future.

The committee travelled across Queensland, holding 24 hearings, receiving evidence from more than 100 witnesses, 360 survey respondents, and 49 written submitters.

Overwhelmingly, the committee heard that wage theft is imposing significant costs on Queensland workers, their families, businesses and the economy. Conservative estimates suggest 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. 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.

The committee heard that affected workers feel powerless to reclaim their lost wages and entitlements, and have been largely left alone to do so by an under resourced federal regulatory system. We can and must do more.

It is my hope that this report will shine a light on the issue in a Queensland context and build on a growing body of work nationally that is making the case for real change on behalf of affected workers.

I would like to take this opportunity on behalf of the committee, to thank those individuals and organisations who made written submissions and participated in the committee's online survey and as witnesses in the committee's public and private hearings. For many, it took great courage to come forward and tell their stories. Some who did so acknowledged their fear of reprisals in the workplace.

I would like to also acknowledge the great contribution made by industrial organisations, both unions and employer registered bodies, to the inquiry. Both shared their insights and expertise, and facilitated others coming forward. Addressing wage theft will be a collective effort.

I also thank our Committee Secretary Lucy and Inquiry Secretary Erin, Parliamentary Service staff and the Queensland Office of Industrial Relations, the Fair Work Ombudsman, the Australian Taxation Office, and the Australian Securities and Investments Commission.

Finally, I thank my committee colleagues for their time and contributions to this inquiry.

I commend the report to the House.



Leanne Linard MP
Chair

Recommendations

Recommendation 1 **103**

The Committee recommends the Queensland Government conduct a public education campaign to assist in the fight against wage theft, including outlining information on the findings from this inquiry and the measures the Queensland Government is taking in response, and how and where affected workers can go for help to recover their lost wages.

Recommendation 2 **103**

The committee recommends the Queensland Government re-establish the tripartite Industrial Relations Education Committee under the auspices of the Office of the Industrial Relations to conduct visits to schools, TAFE and VET providers, and universities. The visits would be conducted on an opt-in basis and provide information focusing on the rights and responsibilities of both workers and employers.

Recommendation 3 **103**

The committee recommends the Queensland Government, through the Department of Education, work with the higher education sector in Queensland to ensure international students have access to relevant information and advice on their workplace rights in Australia, including the right to join a union and where to go for further information.

Recommendation 4 **108**

The committee recommends the Federal Government introduce a national labour hire licensing scheme so the benefits of the Queensland scheme can apply across the country.

Recommendation 5 **112**

The committee recommends the Queensland Government ensure its current procurement policies allow for appropriate and proportionate action to be taken against companies that have underpaid workers.

Recommendation 6 **119**

The committee recommends the Federal Government consider measures to improve worker access to representation in the workplace and ensure compliance with industrial instruments, using the model of the *Industrial Relations Act 2016* (Qld).

Recommendation 7 **135**

The committee recommends the Federal Government appoint additional Federal Circuit Court Judges in Queensland, and ensure Queensland retains its proportionate share of Federal Circuit Court judges.

Recommendation 8 **135**

The committee recommends the Queensland Government review and take actions available to it, to ensure that wage recovery processes for Queensland workers are simple, quick and low-cost. This should include further investigation of the following options:

a) establishing a dedicated industrial division within the Queensland Magistrates Court, in line with the example in Victoria

b) investigating the inclusion of the Queensland Industrial Relations Commission or Industrial Court as an eligible state court under the *Fair Work Act 2009* (Cth)

c) reviewing relevant forms and processes to ensure the legal process is simple and user friendly for workers and their representatives

d) waiving or reducing current court filing fees for wage theft matters.

Recommendation 9 **143**

The Committee recommends unpaid superannuation be included as a recoverable entitlement under the Fair Entitlements Guarantee scheme and the Fair Entitlements Guarantee scheme be extended to temporary overseas visa workers who are currently denied access.

Recommendation 10 **146**

The committee recommends that the Federal Government fund a workplace rights information and support service based in Queensland, as is funded for other Australian jurisdictions and was formerly the case, up until the removal of funding in 2016 by the then Federal Government.

Recommendation 11 **157**

The committee recommends the Federal Government take immediate steps to appoint additional Fair Work inspectors in Queensland under the *Fair Work Act 2009* (Cth).

Recommendation 12 **158**

The committee recommends the Federal Government establish a full, independent review into the performance, resourcing and culture of the Fair Work Ombudsman to ensure that it can respond to wage theft and support affected workers in an effective and timely fashion.

Among other things, the review should consider the findings and recommendations of the Best Practice Review into Workplace Health and Safety Queensland which have driven a cultural shift from education to compliance.

Recommendation 13 **161**

The committee recommends superannuation be included as an industrial entitlement in the National Employment Standards.

Recommendation 14 **169**

The committee recommends the Fair Work Commission be given the power to assess the status of an employment contract similar to that available to the Queensland Industrial Relations Commission under the *Industrial Relations Act 2016* (Qld), and, further consideration be given to removing the 'reckless defence' from the offence of sham contracting under section 357(2) of the *Fair Work Act 2009* (Cth) and introducing a new 'reasonable person' test for determining whether an employer has engaged in sham contracting.

Recommendation 15 **175**

The committee recommends the Queensland Government legislate to make wage theft a criminal offence, where the conduct is proven to be deliberate or reckless.

The Queensland Government should consider the variety of models and approaches for criminalising wage theft that were presented to the inquiry and consult further with stakeholders in regard to a preferred model.

Recommendation 16 **186**

The committee recommends an automatic termination date be legislated for remaining *Work Choices* 'zombie' agreements, with consideration given to necessary transitional arrangements and protections to ensure no workers are disadvantaged as a result.

Recommendation 17 **191**

The committee recommends reform of the *Fair Work Act 2009* (Cth) to more adequately accommodate emerging forms of non-traditional employment.

This should include consideration of law reform to broaden the definition of worker and provide broader access to the benefits of collective bargaining, minimum standards for pay and conditions, and access to the Fair Work Commission.

1 Introduction

1.1 Role of the committee

The Education, Employment and Small Business Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* (POQA) and the Standing Rules and Orders of the Legislative Assembly (Standing Orders).[1]

The committee's primary areas of responsibility include:

- Education
- Industrial Relations
- Employment and Small Business, and
- Training and Skills Development.

Section 92 of the POQA provides that, in addition to performing a general legislative scrutiny and parliamentary oversight role in relation to its primary areas of responsibility, a portfolio committee is also responsible for dealing with any issue referred to it by the Legislative Assembly or under another Act.[2]

1.2 Inquiry referral and process

On 17 May 2018, the Queensland Legislative Assembly passed a motion that the committee conduct an inquiry into and report on the problem of wage theft in Queensland (inquiry).[3]

In undertaking the inquiry, the committee was required to consider:

- the incidence of wage theft in Queensland, with reference also to evidence of wage theft from other parts of Australia
- the impact of wage theft on workers, families, law-abiding businesses, the economy and community
- the various forms that wage theft can take, including through unpaid super, the misuse of Australian Business Numbers (ABNs) and sham contracting arrangements
- the reasons why wage theft is occurring, including whether it has become part of the business model for some organisations
- whether wage theft is more likely to occur in particular industries, occupations or parts of the state or among particular cohorts of workers
- the effectiveness of the current regulatory framework at state and federal level in dealing with wage theft and supporting affected workers, and
- options for ensuring wage theft is eradicated, including consideration of regulatory and other measures either implemented or proposed in other jurisdictions interstate, nationally or internationally and the role of industrial organisations, including unions and employer registered bodies in addressing and preventing wage theft.

The committee was required to report to the Legislative Assembly by 16 November 2018.

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1 *Parliament of Queensland Act 2001* (POQA), s 88; Standing Rules and Orders of the Legislative Assembly (Standing Orders), Order 194.

2 POQA, s 92(2).

3 Hon Annastacia Palaszczuk MP, Premier and Minister for Trade, Queensland Parliament, *Record of Proceedings*, 17 May 2018, pp 1364-1370.

1.3 Submissions

On 11 June 2018, the committee invited stakeholders and subscribers to make written submissions addressing the inquiry terms of reference.

Public submissions could be made for a period of seven weeks, with submissions closing on 30 July 2018. The committee accepted 49 submissions. A list of submitters is provided at **Appendix A.**

1.4 Online survey

The committee conducted an online survey, using the platform *Survey Monkey,* over the period from 11 June to 30 September 2018, via link from the committee's website.

The survey consisted of 20 questions to capture:

- demographic information (to aid identification of vulnerable cohorts
- information about the form of wage theft experienced and the industry, location and timeframe in which it occurred
- information about whether the respondent reported the wage theft, and interactions with regulatory agencies.

A free text field allowed respondents to provide additional information relevant to the inquiry terms of reference.

The survey was promoted on the committee website, via correspondence with stakeholders, and in subscriber updates and media releases about the inquiry. Stakeholders who received information about the survey included educational institutions, unions and employer and industry organisations, community groups (including, migrant and refugee organisations), community legal centres and legal practices.

The survey had several limitations:

- a self-selected sample is not able to provide definitive or statistically significant data. Rather, the survey results illustrate key issues and trends in workers' experiences of wage theft.
- an individual could attempt to complete the survey on multiple occasions. This risk was reduced by requiring an email address to be provided, however the risk of multiple completions was not removed.
- there was no mechanism by which to verify respondents' identity or the accuracy of the information they reported.

The committee received 360 survey responses. Further information about the survey is provided in chapter 5 of this report.

1.5 Briefings and hearings

The committee received a written briefing from the Office of Industrial Relations (OIR) on the current regulatory framework and other matters in the inquiry terms of reference, ahead of a public briefing on 11 June 2018. A list of officials who appeared at the briefing is provided at **Appendix B**.

The committee held a total of 24 hearings for the inquiry, comprised of:

- five public hearings in Brisbane, held on 16 and 20 August 2018, 3 and 17 September 2018 (two hearings)
- three private hearings in Brisbane

- ten regional public hearings, held in Cairns (27 August 2018), Townsville (28 August 2018), Mackay (29 August 2018), Rockhampton (30 August 2018), the Gold Coast (10 September 2018), Toowoomba (10 September 2018), Ipswich (11 September 2018), the Sunshine Coast (11 September 2018), Maryborough (12 September 2018) and Bundaberg (12 September 2018), and
- six private hearings in regional locations.

Over the course of these hearings, the committee received evidence from more than 100 witnesses. A list of the witnesses who provided public evidence is available at **Appendix C**.

1.6 Parliamentary privilege and the right of reply

Section 8 of the POQA establishes the important protection of 'parliamentary privilege', which ensures that the proceedings of the parliament—including information provided to committees in written or oral evidence[4]—cannot be subject to civil or criminal action or examination in legal proceedings. This legal immunity is recognised as essential for allowing free and open evidence and thorough inquiry into matters without fear of interference, but can lead to adverse comments, whether fairly or not, being made about persons or corporations.[5]

In such circumstances, in the interests of fairness, the Standing Orders seek to balance the application of parliamentary privilege by specifying that where evidence is given which reflects adversely on a party and that evidence is made public, a committee shall provide reasonable opportunity for the affected party to respond to the adverse evidence.[6]

The nature of this inquiry and its terms of reference, which called for submitters and witnesses to share their insights into and experiences of wage theft and its impacts, inevitably invited evidence that singled out certain businesses, employers and affiliated individuals for various untoward practices and conduct.

In keeping with the relevant provisions of the Standing Orders, the committee provided an opportunity for parties named in adverse evidence to provide a written response to that evidence. All such responses were taken into consideration by the committee in the preparation of this report.

1.7 Inquiry material

Copies of the material published in relation to the inquiry—including information from OIR and other regulatory agencies, transcripts of the public briefing and hearings, documents tabled at the hearings, responses to questions taken on notice, and public submissions—can be found on the inquiry webpage.[7]

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4 Section 9 of the POQA defines the meaning of the 'proceeding in the Assembly' to which parliamentary privilege applies.

5 Parliament of Australia, *No. 13 – Rights and Responsibilities of Witnesses before Senate Committees*, Senate Brief No. 13, July 2017.

6 See Standing Orders, Schedule 3, (k)-(m).

7 See: Education, Employment and Small Business Committee, Queensland Parliament, http://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/current-inquiries/Wagetheft. All web references in this report were accessed on 12 November 2018.

1.8 Inquiry background

'Wage theft', or underpayment of workers, is not a new feature of the national employment landscape. Historical assessments of non-compliance with employment standards in Australia—some dating back to the 1970s—have revealed evidence of 'significant and sustained' underpayment of workers.[8]

However, wage theft appears to be growing both in prevalence and prominence.[9]

While once conceptualised as being confined largely to less visible small businesses and informal economy operators,[10] in recent years there have been a series of public scandals and reports of non-compliance that have affected a number of large, high profile companies.

Media investigations have exposed instances of significant worker exploitation in the supply chains and franchises of nationally recognised brands of the likes of Myer, Woolworths, Coles, Aldi, 7-Eleven, Pizza Hut, Domino's Pizza, Caltex, United Petroleum, and others.[11]

With regard to 7-Eleven in particular, just over two years after the joint *Four Corners* and Fairfax Media investigation that uncovered the systematic underpayment of wages and doctoring of payroll records; the bill for the repayment of wages had climbed to more than $150 million for over 3,600 workers—at an average of roughly $41,000 per worker.[12]

According to Clibborn and Wright, media reports of instances of underpayment increased ten-fold from 2013 to 2017.[13]

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8 Miles Goodwin and Glenda Maconachie, 'Unpaid entitlement recovery in the federal industrial relations system: Strategy and outcomes 1952–95', *Journal of Industrial Relations,* vol 49, no. 4, 2017, p 523; Glenda Maconachie and Miles Goodwin, 'Employee Evasion of Workers' Entitlement 1986-1995: Why, What and Whose?', *Journal of Industrial Relations,* vol 52, no. 4, 2010, pp 419-437.

9 Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 3; Louise Thornthwaite, 'The living wage crisis in Australian industrial relations', *Labour & Industry: a journal of the social and economic relations of work,* vol 27, no. 4, 2017, p 261.

10 Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 22; Associate Professor John Howe, Tess Hardy and Professor Sean Cooney, 'The transformation of enforcement of minimum employment standards in Australia: A review of the FWO's activities from 2006-2012', Centre for Employment and Labour Relations Law, University of Melbourne, July 2014, p 50.

11 Sarah Kaine, Emmanuel Josserand and Martin Boersma, 'How to stop businesses stealing from their employees', *The Conversation,* 8 September 2017, https://theconversation.com/how-to-stop-businesses-stealing-from-their-employees-83363

12 Queensland Government, Office of Industrial Relations (OIR), written briefing, 7 June 2018, p 20.

13 Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Relations Review*, vol. 29, no. 2, 2018, p 212.

This increased public attention has coincided with the publication of a number of scholarly studies[14] and Fair Work Ombudsman (FWO) reports.[15] Combined, they paint a picture of widespread non-compliance, prompting concerns about the normalisation of various forms of underpayment, including suggestions that it may have become 'endemic' and part of the business model in some sectors.[16]

The seriousness of the problem has also attracted the attention of legislators and policymakers, who have sought to better understand and address the various dimensions of wage theft in a series of federal reviews and inquiries, and their resulting reports. Most recently, this has included:

- the November 2015 Productivity Commission report on its inquiry into the workplace relations framework, which highlighted the higher risks of exploitation for permanent and temporary migrant workers due to factors including their 'lower proficiency in English skills, lack of awareness of their rights in the workplace and a reluctance to reveal exploitation in circumstances where the migrant is working in breach of the *Migration Act 1958* (Cth), for example, by exceeding the prescribed limits on hours'[17]
- the March 2016 Senate Education and Employment References Committee (EERC) report on its inquiry into temporary work visa programs, tellingly titled *A National Disgrace: The Exploitation of Temporary Work Visa Holders*[18]

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[14] See, for example: Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017; Stephen Clibborn, 'Multiple frames of reference: Why international student workers in Australia tolerate underpayment', *Economic and Industrial Democracy*, 2018, pp 1-19; Unions NSW, *Lighting up the black market: enforcing minimum wages,* July 2017, http://www.wagethieves.com.au/wp/wp-content/uploads/2017/07/UNSW-wage-thieves-report.pdf

[15] See, for example: Australian Government, Fair Work Ombudsman (FWO), *National Hospitality Industry Campaign (Wave 3) – Takeaway Foods*, March 2016; Australian Government, FWO, *National Hospitality Industry Campaign (Wave 2) – Restaurants, Cafes and Catering*, June 2015; Australian Government, FWO, *National Hospitality Campaign 2012-2015 Accommodation pubs, taverns and bars*, November 2013; Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program,* October 2016; Australian Government, FWO, *Fair Trades: Outcomes from the Fair Work Ombudsman's National Apprenticeship Compliance Monitoring Campaign*, March 2017, p 3; Australian Government, FWO, 'Fair Work Ombudsman Inquiry uncovers rampant exploitation of Woolworths cleaners', media release, 14 February 2018, https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/february-2018/20180214-ww-cleaners

[16] In November 2017, in reporting the results of the landmark *National Temporary Migrant Work Survey*, Berg and Farbenblum advised that the study confirmed that 'wage theft is endemic among international students, backpackers and other temporary migrants' and that 'for a substantial number of temporary migrants, it is also severe'. The Senate Education and Employment References Committee (Senate EERC) also reported in September 2017 that 'corporate avoidance of obligations to workers has become a business model taking many forms'; and in March 2016 that unscrupulous operators have '…built the systematic exploitation of visa workers into their business models'. See: Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 48; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 3; Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, p 324. See also: Louise Thornthwaite, 'The living wage crisis in Australian industrial relations', *Labour & Industry: a journal of the social and economic relations of work*, 2017, pp 261-269.

[17] Australian Government, Productivity Commission, *Workplace Relations Framework: Final Report,* no. 76*,* vol. 1, November 2015, p 48.

[18] Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, pp 1-5.

- the May 2017 Senate Economics References Committee inquiry report *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, which highlighted the pervasive impacts of the 'unacceptable' non-payment of what is a 'vital component of an employee's remuneration' and which 'should be categorised as deferred wages that rightfully belong to an employee'[19]
- the September 2017 Senate EERC report on its inquiry into corporate avoidance of the *Fair Work Act 2009* (Cth) (FWA), which cited the 'large volume of evidence describing ways in which some employers circumvent the letter and/or spirit of the FWA', and concluded that the legislation has not kept pace with the increasingly sophisticated commercial arrangements in the labour market and 'is no longer fit for purpose',[20] and
- the Commonwealth Black Economy Taskforce, which handed down its final report in October 2017, noting that 'underpayment has emerged as a key aspect of the black economy' and also highlighting the 'blatant exploitation' associated with sham contracting arrangements.[21]

These inquiries have made a significant series of recommendations for reform, with further recommendations also expected to result from current joint parliamentary and senate inquiries into:

- the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies, due for report by 13 November 2018,[22] and
- the operation and effectiveness of the Franchising Code of Conduct, due for report by 6 December 2018.[23]

In response to these inquiries and recommendations, certain amendments to Commonwealth legislation have been implemented, including:

- the introduction of a higher scale of penalties for 'serious contraventions of payment-related workplace laws' and increased penalties for record-keeping and payslip contraventions
- holding franchisors and holding companies responsible for underpayments by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions, and failed to take reasonable steps to prevent them

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19 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, p ix.

20 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, pp 2-3.

21 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 2.

22 Parliament of Australia, Senate EERC, *The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies,* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners

23 Parliament of Australia, Parliamentary Joint Committee on Corporations and Financial Services, *The operation and effectiveness of the Franchising Code of Conduct,* https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising

- expressly prohibiting employers from unreasonably requiring their employees to make payments in relation to the performance of their work (e.g. demanding a proportion of their wages be paid back in cash), and
- strengthening the evidence-gathering powers of the FWO and prohibiting the hindering or obstructing of the FWO or an inspector in the performance of their functions of powers, or the giving of false or misleading information or documents.[24]

However, the issue of wage theft remains widespread and widely unaddressed.

Within state and territory jurisdictions, steps have been taken to address the underpayment of workers in the labour hire sector. Queensland, Victoria and South Australia have all established licensing schemes over the past year; though the recently-elected South Australian government has since announced its intention to repeal its scheme.[25]

Citing the need for broader action to stem the proliferation of wage theft, and the ongoing shortcomings of federal efforts and resourcing to address the issue, in 2018 the Victorian Labor government and Labor oppositions in New South Wales, South Australia and the Australian Capital Territory all committed to criminalising wage theft by establishing a criminal offence and associated penalties, including jail terms.[26]

In Queensland, at a Labour Day rally on 7 May 2018, Premier Annastacia Palaszczuk and Minister for Education and Minister for Industrial Relations the Hon Grace Grace MP, announced the government's intention to launch a parliamentary inquiry into allegations of wage theft, and 'take action' following the inquiry to address the problem.[27]

It was within the context of these developments that this inquiry was established, providing the opportunity for a thorough examination of the nature and extent of wage theft in Queensland and system responses to it, to support an informed assessment of both the current state of affairs and possible options to better address this serious problem.

1.9 Report structure

This report first outlines the industrial relations frameworks in Australia and in Queensland that provide for workers' minimum wages and entitlements (Chapter 2).

Chapter 3 seeks to define wage theft, with Chapter 4 examining the incidence of wage theft in Queensland and Australia, drawing on available statistics and the results of the committee's own survey of Queenslanders. This includes considering whether the problem is more prevalent in certain industries and/or experienced differently amongst particular employee cohorts.

Chapter 5 presents information from the committee's survey.

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[24] *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth). See also: Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Explanatory Memorandum, p i.

[25] 'Labour hire laws targeting workforce exploitation to be scrapped by SA Government', *ABC News* (online), 21 September 2018, http://www.abc.net.au/news/2018-09-21/state-government-seek-to-repeal-labour-hire-licensing-laws/10287832

[26] Noel Towell and Ben Schneiders, 'Labor promises to jail bosses over wage theft', *The Sydney Morning Herald,* 25 May 2018, https://www.smh.com.au/business/workplace/labor-promises-to-jail-bosses-over-wage-theft-20180525-p4zhko.html; NSW Labor, *A new law to criminalise wage theft,* 2017, https://www.nswlabor.org.au/a_new_law_to_criminalise_wage_theft; ACT Labor, *ACT Labor Platform 2017-18,* p 146 (General Resolution 6); AAP, 'SA Labor promises crackdown on wage theft', *SBS News,* 18 February 2018, https://www.sbs.com.au/news/sa-labor-promises-crackdown-on-wage-theft

[27] Felicity Caldwell, 'Wages inquiry will examine bosses who rip off their employees', *Brisbanetimes.com.au*, 7 May 2018, https://www.brisbanetimes.com.au/politics/queensland/wages-inquiry-will-examine-bosses-who-rip-off-their-employees-20180507-p4zdto.html

Chapter 6 explores the impact of wage theft for the individual experiencing it, for their families, and for businesses and the broader economy.

Drawing on stakeholder experience, chapter 7 explores the different forms wage theft can take.

Chapter 8 of the report seeks to identify the reasons why wage theft occurs.

Chapters 9, 10, 11 and 12 collectively evaluate the effectiveness of different aspects of current system responses to wage theft and its impacts, respectively considering:

- proactive measures to support compliance – including education and engagement activities, licensing and registration, and procurement and supply chain policies
- the role of industrial organisations in helping to address and prevent wage theft and support those affected
- systems for reporting wage theft and recovering amounts owed – including interactions with regulators, court processes and other access to remedies, and
- enforcement and deterrence mechanisms – including agency monitoring and compliance activities and penalties for non-compliance.

Chapter 13 considers regulatory and other measures either implemented or proposed elsewhere in Australia and internationally.

Chapter 14 considers exploitative practices occurring within the legal framework which merit further attention.

Lastly, chapter 15 provides a summary of issues raised by stakeholders that were beyond the scope of the committee's inquiry terms of reference, but of no less importance to those who raised them.

2 Current regulatory framework

In 2006, the commencement of the majority of provisions of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices) saw the Commonwealth use its constitutional 'corporations' powers to expand its industrial relations jurisdiction to cover all trading corporations in the private sector (excluding not-for-profits).[28] The jurisdictional takeover, which was resisted by the states and territories,[29] saw the majority of the employers and employees brought under the federal industrial relations system.[30]

In 2009, following the repeal of the Work Choices legislation and enactment of the *Fair Work Act 2009* (Cth), all states and territories other than Western Australia subsequently referred their residual private sector powers to the Commonwealth to avoid ambiguity for workers, creating a national system.[31]

As a result, the Commonwealth is now responsible for the industrial relations framework for the private sector, an estimated 87 percent of the workforce.[32]

Federally, the national framework of laws that sets out enforceable minimum terms and conditions of employment and associated enforcement agencies is referred to as the Fair Work System, the primary instrument of which is the FWA, which took effect on 1 July 2009.[33]

Queensland retains regulatory responsibility in relation to the public service, local governments and other related bodies.[34]

2.1 Queensland industrial relations system

Employees who remain in the state industrial system have their pay and conditions set under the *Industrial Relations Act 2016* (Qld) (IR Act).[35] The state retains responsibility for all sectors, including the private sector, in respect of long service leave entitlements and the employment of children (people under 18 years of age).[36]

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28 Industrial Relations Bill 2016, explanatory notes, p 1.

29 See: Submission on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory to the Parliament of Australia, Senate Employment, Workplace Relations and Education Committee inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005*, submission 160. See also *State of New South Wales & Ors v Commonwealth (Workplace Relations Challenge) [2006]*, High Court of Australia, transcripts 235, 11 May 2006.

30 Australian Bureau of Statistics (ABS), 'Workplace Relations', *6102.0.55.001 – Labour Statistics: Concepts, Sources and Methods, Feb 2018*, 12 February 2018, http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/6102.0.55.001~Feb%202018~Main%20Features~Workplace%20Relations~12

31 Fair Work (Commonwealth Powers) and Other Provisions Bill 2009, explanatory notes, p 1; Fair Work Ombudsman, *Australia's industrial relations timeline,* https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system/australias-industrial-relations-timeline

32 ABS, 'Workplace Relations', *6102.0.55.001 – Labour Statistics: Concepts, Sources and Methods, Feb 2018*, 12 February 2018, http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/6102.0.55.001~Feb%202018~Main%20Features~Workplace%20Relations~12

33 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 5.

34 Australian Government, FWO, 'Australia's industrial relations timeline', https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system/australias-industrial-relations-timeline

35 Queensland Government, OIR, written briefing, 7 June 2018, p 6.

36 Queensland Government, Business Queensland, 'Industrial relations', 15 March 2017, https://www.business.qld.gov.au/running-business/employing/employee-rights/ir

During the public briefing on 11 June 2018, the OIR advised that approximately 250,000 workers are covered by the state industrial relations system.[37]

The IR Act is the cornerstone of the state's system, and provides protections for wages and conditions which include:

- establishing a state 'safety net' for wages and entitlements by providing for the setting of a minimum wage, modern awards, and the Queensland Employment Standards; and requiring employers to provide at least these baseline employment conditions[38]
- setting out bargaining process requirements for certified agreements and bargaining awards, including a requirement to negotiate in good faith,[39] and
- specifying that to grant an application for a certified agreement or bargaining award, the Queensland Industrial Relations Commission (QIRC), must be satisfied that the bargaining instrument passes the 'no-disadvantage test',[40] such that if there is an applicable modern award it must not result in a reduction in the employee's entitlements and protections under the award.[41]

The state regulator seeks to encourage early correction and/or resolution of an issue of non-payment or underpayment where possible by contacting the complainant 'to verify the substance of the claim and to clarify any details about the claim, before contacting the employer to advise them of the claim in an attempt to resolve the matter without formal investigation'.[42] If the claim remains unresolved, inspectors will then make an appointment with the employer for a formal record of interview to gather evidence and make a formal claim on the employer for any assessed unpaid amounts. [43]

Where the claim is refused by the employer, the process for the recovery of wages in the state system is through the courts (either via an employee claim or a claim made on their behalf).[44]

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37 Dr Simon Blackwood, Deputy Director-General, OIR, public briefing transcript, Brisbane, 11 June 2018, p 3.

38 *Industrial Relations Act 2016* (IR Act), Chapter 2, Part 3.

39 IR Act, ss 169-174, 193, 195.

40 IR Act, s 199.

41 IR Act, ss 210-213.

42 Queensland Government, OIR, written briefing, 7 June 2018, p 2.

43 Queensland Government, OIR, written briefing, 7 June 2018, p 2.

44 QIRC, 'Information Sheets: Recovery of unpaid wages and superannuation', 28 September 2018, http://www.qirc.qld.gov.au/prod_form_leg/factsheets/fs_recovery.htm

An application may be made for recovery of an identified underpayment within six years after the amount became payable, to:

- the QIRC, if the total amount of the claim does not exceed $50,000[45] (including via a wage recovery process where appropriate[46]),or
- an Industrial Magistrate.[47]

The non-payment of wages is a civil offence under the IR Act, and attracts a maximum fine of up to 200 penalty units ($25,230). Other civil offences and maximum penalties apply in relation to contraventions of industrial instruments and modern awards (27 penalty units or $3,525), and with respect to sham contracting (90 penalty units or $11,750).[48] These maximum penalties increase five-fold where the employer is a corporation.[49]

The QIRC and Industrial Magistrate are authorised to order the repayment of any wages and to impose penalties, and may also award costs.[50]

The two bodies responsible for the administration of the IR Act are the OIR and the QIRC. These agencies perform equivalent roles at the state level to the FWO and FWC respectively.

2.1.1 Office of Industrial Relations

In Queensland, the OIR is responsible for promoting and enforcing compliance with respect to the state's industrial relations jurisdiction. Its role includes providing:

- advocacy, advice, and support to government agencies, including government owned corporations, on public sector industrial relation matters and bargaining
- policy, legislation and research advice on state and national industrial relations matters

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45 QIRC, 'Information Sheets: Recovery of unpaid wages and superannuation', 28 September 2018, http://www.qirc.qld.gov.au/prod_form_leg/factsheets/fs_recovery.htm

46 The QIRC advises that 'under certain circumstances it may not be practical to allocate a conference and in these circumstances, the applicant or the applicant's agent may request the conference be waived'. Such circumstances may include: (i) where an applicant (or the applicant's agent) has had discussions with the respondent prior to the application being filed and the applicant (or the applicant's agent) believes a conference before the Commission is unlikely to settle the matter; or (ii) where discovery is required in order to finalise the claim. See: QIRC, 'Information Sheets: Recovery of unpaid wages and superannuation', 28 September 2018, http://www.qirc.qld.gov.au/prod_form_leg/factsheets/fs_recovery.htm

47 Applications to an Industrial Magistrate may be made for amounts up to $150,000. For amounts in excess of this, and applicant must seek recovery of wages through the District or Supreme Court. See: Queensland Courts, *Money disputes under $150,*000, 2 July 2018, https://www.courts.qld.gov.au/going-to-court/money-disputes/money-disputes-up-to-150000; Queensland Courts, *Money disputes $150,000 to $750,000,* 15 August 2018, https://www.courts.qld.gov.au/going-to-court/money-disputes/money-disputes-150000-to-750000; Queensland Courts, *Money disputes over $750,000,* 15 August 2018, https://www.courts.qld.gov.au/going-to-court/money-disputes/money-disputes-over-750000

48 IR Act, Schedule 3.

49 IR Act, s 575.

50 IR Act, ss 397(4), 479(1); Queensland Government, OIR, written briefing, 7 June 2018, p 7.

- compliance and information services on Queensland's industrial relations laws for state and local government, long service leave, child employment, trading hours and holidays (online information and resources, responses to telephone and written enquiries)
- licensing and compliance services to protect vulnerable labour hire workers and promote the integrity of the labour hire industry in Queensland.[51]

With respect to compliance activities, the chief inspector in the state's industrial relations system is appointed by the Governor in Council under section 899(1) of the IR Act, who in turn appoints other inspectors under section 899(2). The chief inspector and other inspectors form the core of the Regulation and Compliance Branch of the OIR (the inspectorate).[52]

The inspectorate conducts investigations using a wide range of powers set out in the IR Act, and can initiate enforcement action through the Industrial Magistrates Court and QIRC.[53]

2.1.2 Queensland Industrial Relations Commission

The functions of the QIRC, which are set out in section 447 of the IR Act, include:

- providing a general ruling about the Queensland minimum wage for all employees at least once each year[54]
- establishing modern awards with 'fair and just' minimum wages and conditions (and reviewing these awards and other modern award conditions under section 156 of the IR Act)
- supervising the bargaining of agreements and certifying agreements and making bargaining awards (subject to their passing the no-disadvantage test)[55]
- resolving industrial disputes by conciliation and where necessary by arbitration
- resolving disputes over union coverage
- determining claims for unpaid wages and superannuation contributions (where the total claims is $50,000 or less; and dealing with reinstatement applications (unfair dismissal claims).[56]

2.1.3 Labour hire licensing

Queensland has legislated to address wage theft and other unscrupulous practices in the labour hire industry by establishing a mandatory labour hire licensing scheme, under the *Labour Hire Licensing Act 2017*. During introduction of the legislation, the Minister stated that the scheme was intended to promote the integrity of the industry and better protect workers from exploitation, citing cases of wage theft including underpayment, unauthorised deductions, sham contracting, and avoiding worker entitlements through phoenixing[57]—that is, the practice of deliberately liquidating a company and creating a new company in its place, to avoid paying debts including employee entitlements.[58]

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51 Queensland Government, OIR, 'Industrial Relations', 6 September 2018, https://www.oir.qld.gov.au/industrial-relations; Queensland Government, OIR, written briefing, 7 June 2018, p 2.

52 Queensland Government, OIR, written briefing, 7 June 2018, p 1.

53 Queensland Government, OIR, written briefing, 7 June 2018, p 1.

54 IR Act, s 458.

55 IR Act, ss 142-143.

56 IR Act, s 447.

57 Hon Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, Queensland Parliament, *Record of Proceedings*, 25 May 2017, pp 1445-1446.

58 Australian Government, Australian Taxation Office (ATO), 24 July 2018, 'Illegal phoenix activity', https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/

Wage theft
Submission 5 - Attachment 1

Under the scheme, which took effect from 15 June 2018, all labour hire providers are required to be licensed and users of labour hire are also required to only engage licensed providers. In order to be licensed, labour hire providers must meet certain standards including:

- being a fit and proper person to supply labour
- being financially viable
- complying with relevant laws.[59]

There are strong penalties for operating without a licence and for using an unlicensed provider – up to 1,034 penalty units ($134,988) or three years' imprisonment for individuals, and up to 3,000 penalty units ($391,650) for a corporation.[60]

Members of the OIR inspectorate are also appointed as inspectors under the *Labour Hire Licensing Act 2017* (Qld) and assist the OIR's recently formed Labour Hire Licensing Compliance Unit (LHLCU) in enforcement and audit activities. The LHLCU also take complaints from labour hire workers which may involve complaints about the underpayment of wages; and can refer the matter to the relevant federal agency. If a labour hire provider is found not to be compliant with their time and wages record keeping or the payment of wages or other workplace legislation, the LHLCU may consider action to suspend or cancel the provider's labour hire licence.[61]

2.2 The Fair Work System

Under the Commonwealth's Fair Work System, minimum conditions at work are set out in registered agreements, awards, or legislation.

The promotion of collective bargaining between employers, employees and other representatives such as unions is one of the stated objectives of the FWA.[62] Employees are most likely to be covered by an enterprise agreement or other agreement registered with the Fair Work Commission (FWC), negotiated specifically for a particular enterprise and stipulating certain minimum employment conditions.[63]

Where there is no agreement in place, a modern award is likely to apply. The majority of awards pertain to specific industries or occupations, with 122 modern awards currently in place.[64]

Where an employee is not covered by an award or agreement, they will have their minimum wage set by the national minimum wage orders.

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59 Queensland Government, Labour Hire Licensing Queensland, 'About the licensing scheme', 18 June 2018, https://www.labourhire.qld.gov.au/about-the-licensing-scheme

60 Queensland Government, Labour Hire Licensing Queensland, 'Penalties and offences', 3 July 2018, https://www.labourhire.qld.gov.au/i-provide-labour-hire/laws-and-compliance/penalties-and-offences

61 Queensland Government, OIR, written briefing, 7 June 2018, p 3.

62 *Fair Work Act 2009* (Cth) (FWA), s 3(f).

63 Fair Work Commission (FWC), 'Minimum wages and conditions', 5 April 2016, https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions#field-content-1-heading

64 For a list of modern awards, see: FWC, `Modern awards list', 27 September 2018, www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list

The minimum wages and conditions in agreements and awards for all employees are underpinned by the National Employment Standards (NES) —a set of ten minimum terms and conditions of employment that must be provided to all employees, as set out in part 2-2 of the FWA, as follows:[65]

1. *Maximum weekly hours of work – 38 hours per week, plus reasonable additional hours*
2. *Requests for flexible working arrangements – in certain circumstances employees can request a change in their working arrangements*
3. *Parental leave and related entitlements – up to 12 months unpaid leave for each employee, and a right to request an additional 12 months' unpaid leave, plus other forms of maternity, paternity and adoption-related leave*
4. *Annual leave – four weeks' paid leave per year, plus an additional week for certain shift workers.*
5. *Personal/carer's leave (includes sick leave) and compassionate leave – 10 days' paid personal/carer's leave (includes sick leave), 2 days' unpaid carer's leave as required, and 2 days' compassionate leave (unpaid for casuals) as required*
6. *Community service leave – unpaid leave for voluntary emergency activities and up to 10 days of paid leave for jury service (after 10 days is unpaid)*
7. *Long service leave – paid leave for employees who have been with the same employer for a long time*
8. *Public holidays – a paid day off on each public holiday, except where reasonably requested to work*
9. *Notice of termination and redundancy pay – up to 4 weeks' notice of termination (plus an extra week for employees over 45 years of age who have been in the job for at least 2 years), and up to 16 weeks' severance pay on redundancy, both based on length of service, and*
10. *The Fair Work Information Statement – a statement that must be provided by employers to all new employees, and which contains information about the NES, modern awards, agreement making, freedom of association and workplace rights, termination of employment, individual flexibility arrangements, right of entry, transfer of business, the role of compliance agency the FWO, and the role of national industrial tribunal the Fair Work Commission (FWC).*[66]

2.2.1 The safety net and other protections

The combination of modern awards, the national minimum wage, and the NES are commonly referred to as the three instruments that establish the legislative 'safety net' that sets the price floors to workers' wages and conditions.[67]

While registered agreements may vary the pay rates, penalty rates and other conditions in an underpinning award, section 206 of the FWA specifies that the base rate of an employee must be at least equal to the modern award.[68] Section 55 provides that an agreement can include additional terms to the NES, but cannot exclude any of those terms.[69]

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65 FWC, `National employment standards', 4 October 2017, https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/national-employment-standards

66 FWA, s 61(2); FWC, `National employment standards', 4 October 2017, https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/national-employment-standards

67 Australian Government, Productivity Commission, *Workplace Relations Framework: Final Report,* no. 76, vol. 1, November 2015, p 14.

68 FWA, s 172(1).

69 FWA, s 55.

The FWA also prescribes a range of additional requirements for the process to finalise and approve an agreement. They include stipulating that employees have the right to representation during bargaining and must be given a copy of a proposed enterprise agreement,[70] and that bargaining must be conducted in good faith, with an explicit set of 'good faith bargaining requirements' specified in section 228.

Further, once negotiations have concluded and an agreement has been reached; it can be approved by the FWC, which is responsible for approving agreements, only if it passes the 'better off overall test' (BOOT).[71] Section 193 of the FWA, stipulates that an agreement passes the BOOT, if the FWC is satisfied:

> *… as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.*[72]
>
> *These safety net and associated provisions do not apply to independent contractors, who are separately regulated under the Independent Contractors Act 2006 (Cth), which sets out rights and entitlements for contractors, including defining what is an 'unfair contract' and providing for courts to order that the terms of an unfair contract be changed, or set aside all or parts of the contract.*[73]

In relation to circumstances of sham contracting, in which an employee is mischaracterised as an independent contractor, the FWA seeks to protect those affected by prohibiting employers from:

- deliberately disguising an employment relationship as a contract for services
- making false statements to convince an employee to become an independent contractor, and
- dismissing an employee and then re-hiring them as an independent contractor to do the same work.[74]

Regulators have a variety of compliance processes and mechanisms for early correction and/or resolution of an issue of non-payment or underpayment identified through an employee complaint or monitoring and investigation. This may include providing advice and information to assist the employee to resolve the issue directly with their employer; facilitating mediation or in-house facilitation; undertaking further investigation or auditing; and issuing a findings letter or ruling, or a formal caution to the employer.[75]

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70 FWA, s 180.

71 FWA, s 186(2)(d). Note: Section 189 does allow for the FWC to approve an enterprise agreement that does not pass the BOOT if, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest. FWA, s 180.

72 FWA, s 192. See also: FWC, 'Agreements', 23 May 2016, https://www.fwc.gov.au/awards-and-agreements/agreements

73 Queensland Government, Department of Industry, Innovation and Science, 'Unfair contracts and sham contracts', 5 April 2018, https://www.business.gov.au/people/contractors/independent-contractors/unfair-contracts-and-sham-contracts

74 FWA, ss 357-359.

75 Australian Government, FWO, *Compliance and Enforcement Policy,* October 2018, pp 11-12, 24-25; Australian Government, ATO, *Disputes Policy,* 20 December 2018, https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/disputes-policy/#Taxandsuperannuationdisputes; Australian Government, ATO, *Alternative Dispute Resolution,* 31 March 2017, https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Options-for-resolving-disputes/Alternative-Dispute-Resolution-(ADR)/

Other available enforcement mechanisms include the issuing of an infringement notice or equivalent administrative penalties, the issuing of a compliance notice; or entering an enforceable undertaking or compliance partnership with the employer.[76]

However, if an employer who has not met their legal obligations declines to address the issue or comply with the conditions of any notice or undertaking, to enforce payment a matter must be taken (within six years), to either:

- the small claims tribunal, if owed under $20,000, or
- the Federal Circuit Court, if owed more than $20,000.[77]

The underpayment of wages is a civil offence under sections 45, 50 and 293 of the FWA, depending on whether the underpayment contravenes a modern award, an enterprise agreement or the national minimum wage order, respectively; and sham contracting behaviours constitute civil offences under sections 357(1), 358 and 359 of the FWA.[78] In relation to proceedings brought to a federal or state court with respect to such matters, under sections 545-546 of the FWA, a court may make any order it deems appropriate, including repayment of wages to the affected employee(s), and a penalty of up to 60 penalty units ($12,600) for individuals, or 300 penalty units ($63,000) for corporations.[79]

In relation to offences for underpayment, the penalties increase tenfold in the case of deliberate and systematic underpayment.[80]

There are two key bodies responsible for the administration of the Fair Work System with respect to wage theft – the FWO and the FWC.[81]

2.2.2 Fair Work Ombudsman

The FWO is the body responsible for promoting and monitoring compliance with the FWA and fair work instruments. Established in Part 5-2 of the Act and an independent statutory agency, the FWO objectives, as set out in section 682 of the FWA, include:

- promoting harmonious, productive and cooperative workplaces that are compliant with the FWA and fair work instruments, including by 'providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices'
- monitoring compliance and inquiring into and investigating any act or practice that may be contrary to the FWA, a fair work instrument or a safety net contractual requirements
- commencing proceedings in a court, or making applications to the FWC, to enforce the FWA

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76 Australian Government, FWO, *Compliance and Enforcement Policy,* October 2018, pp 26, 28-31.

77 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 71.

78 FWA, Part 4-1.

79 Queensland Government, OIR, written briefing, 7 June 2018, p 7; Australian Government, FWO, 'Litigation', https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation

80 Queensland Government, OIR, written briefing, 7 June 2018, p 7. See also FWA, s 539.

81 The Australian Building and Construction Commission performs a role equivalent to the FWO, as a dedicated regulator within the building and construction industry. See: Australian Government, Australian Building and Construction Commission, 'Overview', https://www.abcc.gov.au/about/what-we-do/overview

- referring matters to relevant authorities, and
- representing employees who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC 'if the FWO considers that representing the employees or outworkers will promote compliance' with the FWA or a fair work instrument.[82]

2.2.3 Fair Work Commission

The FWC is the national workplace relations tribunal, established under the FWA.[83] Functions of the FWC include:

- setting the safety net of minimum wages and employment conditions, by setting national minimum wage orders (reviewed annually) and making modern awards (every four years)
- facilitating good faith bargaining and approving enterprise agreements (subject to their passing the BOOT)
- dealing with applications in relation to unfair dismissal
- administering the regulation of industrial action
- resolving a range of collective and individual workplace disputes through conciliation, mediation and in some cases public tribunal hearing, and
- other functions in connection with workplace determinations, equal remuneration, transfer of business, general protections (including ruling in relation to sham contracting), right of entry, and stand down.[84]

2.3 Superannuation Guarantee

Superannuation is a supplemental component of employees' remuneration, payable under section 16 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (the SGA Act).

Generally, if an employee is over 18 years of age and earning over $450 per month, their employer is required to make superannuation guarantee (SG) contributions on their behalf.[85] Since 1 July 2014, the amount payable under the SGA Act is equal to 9.5 percent of the total wages or salary paid to an employee each quarter.[86]

If an employer does not pay the correct SG contribution to an employee's nominated fund by the quarterly payment due date, they may be liable for the SG charge (SGC), payable to the Australian Taxation Office (ATO).[87]

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82 FWA, s 682.

83 FWA, s 575.

84 FWA, s 576; FWC, 'About us', 24 April 2018, https://www.fwc.gov.au/about-us; Queensland Government, OIR, written briefing, 7 June 2018, p 6; FWC, *General Protections Benchbook: Misrepresenting employment*, 15 June 2018, https://www.fwc.gov.au/general-protections-benchbook/sham-arrangements/misrepresenting-employment

85 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017*,* p 5.

86 Queensland Government, OIR, written briefing, 7 June 2018, p 6.

87 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017*,* p 6.

The SGC comprises:

- SG shortfall amounts
- interest on those amounts (currently 10 percent), and
- an administration fee of $20 per employee, per quarter.[88]

The ATO can impose a number of administrative penalties under Part 4-25 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).[89] Penalties include issuing director penalty notices (DPNs), which impose a penalty equal to the SGC on the director of the company. The intent of DPNs is to reinforce the SGC's deterrent against non-compliance, discourage phoenix practices (as a director of a phoenix company remains responsible), and enhance the ATO's ability to recover the SGC debt after a company has been wound up.[90]

An individual can also seek recovery of their unpaid super through courts, under the Fair Work System or Queensland Industrial relation system (depending on the jurisdiction).[91]

2.3.1 Australian Taxation Office

The Commissioner of Taxation is responsible for the day-to-day administration of the SG Act, and the role of the ATO is to 'support employers to comply with their superannuation guarantee obligations and identify and deal with those who do not.'[92]

Under the SGA Act, the ATO has a range of functions associated with its role of ensuring employees receive their minimum superannuation payment from employers. They include:

- educating employers and employees about their responsibilities for SG
- monitoring employer compliance with SG obligations
- receiving and redistributing the SGC, under Part 8 of the SGA Act, and
- investigating employers for possible breaches of the SG legislation (including imposing administrative penalties where appropriate).[93]

The ATO carries out audits and reviews in response to both employee notifications of a contravention by their employers; and contraventions identified by the ATO, including through referrals from other agencies or super funds.[94]

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88 Australian Government, ATO, 'The super guarantee charge', 11 October 2018, https://www.ato.gov.au/business/super-for-employers/paying-super-contributions/missed-and-late-payments/the-super-guarantee-charge-(sgc)/

89 See also: Australian Government, ATO, 'Penalties, amendments and objections', 8 October 2018, https://www.ato.gov.au/Business/Super-for-employers/Paying-super-contributions/Penalties,-amendments-and-objections/

90 Parliament of Australia, Tax Laws Amendment (2012 Measures No. 2) Bill 2012, Revised Explanatory Memorandum, p 4.

91 Australian Government, ATO, 'Other ways to obtain your unpaid super', 30 January 2018, https://www.ato.gov.au/Individuals/Super/In-detail/Growing/Unpaid-super/?page=2

92 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, p 7.

93 Australian Government, ATO, correspondence, 19 July 2018, p 4.

94 Queensland Government, OIR, written briefing, 7 June 2018, p 9.

Wage theft
Submission 5 - Attachment 1

2.4 Insolvency

Where an employee is not provided with their due wages and entitlements because their employer goes into liquidation or becomes bankrupt, separate protections and recovery options apply.

In recognition of the special vulnerability of employees of insolvent employers, provisions in the *Corporations Act 2001* (Cth) (Corporations Act) assign them priority ahead of other creditors in the company's liquidation, ranking behind the costs of the liquidator.[95]

Financial assistance is also available to eligible employees under the Commonwealth Government's Fair Entitlements Guarantee (FEG), or the former General Employee Entitlements and Redundancy Scheme (GEERS), if the relevant events occurred before 5 December 2012.

Established under the *Fair Entitlements Guarantee Act 2012* (Cth) (FEG Act), the FEG scheme provides assistance to employees who have lost their job due to, or less than six months before, their employer's liquidation or bankruptcy. It covers:

- unpaid wages (up to 13 weeks)
- unpaid annual leave and long service leave
- payment in lieu of notice (up to 5 weeks), and
- redundancy payments (up to 4 weeks per full year of service).[96]

The FEG scheme does not cover unpaid superannuation contributions, which must be pursued separately through the ATO.[97] Scheme payments are subject to a capped weekly amount.[98]

Once entitlements are paid under FEG, the Commonwealth stands in the shoes of the employee as a subrogated creditor and is entitled to claim in the liquidation and is given priority over other unsecured creditors under the Corporations Act.[99]

Where a director has abandoned a company without paying employee entitlements, but employees are unable to access an advance through the FEG scheme because the company has not been put into liquidation; an employee can lodge a request with the Australian Securities and Investments Commission (ASIC) to wind up the company. ASIC's power to wind up a company is provided for in section 489EA of the Corporations Act.[100]

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95 See, for example: *Corporations Act 2001* (Cth), ss 556, 551.

96 LawRight, submission 028, p 12.

97 Australian Government, Department of Jobs and Small Business, 'Fair Entitlements Guarantee', 3 September 2018, https://www.jobs.gov.au/fair-entitlements-guarantee-feg

98 The FEG maximum weekly wage is $2,451.00 from 1 August 2013 to 30 June 2021. If an employee earned more than the FEG maximum weekly wage, the Department of Jobs and Small Business advises that it calculates employment entitlements as though the employee earned the FEG maximum weekly wage at the time their employment ended. See: Australian Government, Department of Jobs and Small Business, *FEG Information for Insolvency Practitioners,* updated 21 September 2018, https://www.jobs.gov.au/fair-entitlements-guarantee-information-insolvency-practitioners-0

99 Australian Government, Department of Jobs and Small Business, *Fair Entitlements Guarantee Recovery Program*, fact sheet, February 2018, https://docs.jobs.gov.au/system/files/doc/other/feg_recovery_program_fact_sheet_v2_february_2018.pdf

100 Australian Government, Australian Securities and Investments Commission (ASIC), *Regulatory Guide 42: ASIC's power to wind up abandoned companies,* January 2013, https://download.asic.gov.au/media/1247117/rg242.pdf

Section 596AB of the Corporations Act also imposes criminal liability on directors who enter into a relevant agreement of transaction with the intention of, or with intentions including the intention of:

- preventing the recovery of the entitlements of employees of a company, or
- significantly reducing the amount of the entitlements of employees of a company that can be recovered.

3 Defining wage theft

There is no universally accepted definition of 'wage theft'. First coined in the United States, the term has recently gained wider currency in Australia, but remains subject to a degree of debate regarding both its scope and its use.[101]

'In its simplest form', the OIR advised the committee that wage theft 'is when an employer fails to provide their employees with the full wage or salary to which they are entitled'.[102] Broad definitions were also nominated by the Young Workers Hub (YWH) and the Queensland Council of Unions (QCU), who respectively said the term describes 'the underpayment or non-payment of wages or entitlements to a worker by an employer',[103] and encapsulates 'a range of activities that deny workers their legal/entitlements'.[104]

Some stakeholders opposed the general use of the term in this manner, arguing its broad application to describe all instances of wage non-compliance is 'misleading', 'unfair', and not conducive to 'balanced community discussion' on the issue.[105] Master Electricians Australia (MEA) highlighted the scope for the misinterpretation of awards and other unknowing non-compliance among members of industry, suggesting that application of the criminal term 'theft' implies an intent that may not be present in many instances of non-compliance.[106] The National Retail Association (NRA) offered the alternative expression 'wage non-compliance', noting that 'wage theft' is 'primarily a rhetorical device'.[107]

To a certain extent, these comments reflected a position among these stakeholders on the appropriate definitional thresholds for the application of criminal sanctions, should a criminal offence of wage theft be established. The committee wishes to emphasise that in this respect, the committee agreed with the view of a majority of stakeholders that any criminal sanctions should apply only in relation to the deliberate and/or reckless conduct of an employer; with further comment in this regard provided in chapter 12.5 of this report.

However, to conceptualise the problem and support exploration of the matters in the terms of reference, the committee did not wish to limit its investigation in this manner, noting:

- the difficulties in determining or ascribing intent and the inability of most datasets to make such a distinction (between circumstances of intent or accident), and
- that the impacts of non-compliance are the same irrespective of intent.

The committee noted Dr Tess Hardy's comments about the implications of the definition employed for the way the problem is addressed:

> *The definition of 'wage theft' is important, as it has implications for analysis of the extent and breadth of the problem as well as the subsequent assessment of which regulatory responses are most appropriate and effective. For example, enhanced information and educational initiatives*

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101 Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 19; Housing Industry Association (HIA), submission 043, p 5.

102 Queensland Government, OIR, written briefing, 7 June 2018, p 17.

103 Young Workers Hub (YWH), submission 019, p 2.

104 Queensland Council of Unions (QCU), submission 034, p 4. See also Queensland Law Society (QLS), submission 040, p 1.

105 Mr Shane Rodgers, Head – Queensland, Ai Group, public hearing transcript, Brisbane, 16 August 2018, p 49.

106 Mr Jordon Carlisle, Workplace Relations Adviser and Mr Jason O'Dwyer, Manager Advisory Services, Master Electricians Australia (MEA), public hearing transcript, Brisbane, 20 August 2018, p 27.

107 National Retail Association (NRA), submission 021, p 3.

> *directed towards employers are likely to be futile in relation to firms that are systematically seeking to avoid their legal obligations and evade enforcement efforts. These initiatives are also problematic when it may be the case that lead firms—franchisors, for example, in franchise systems—may be driving or influencing the compliance behaviour of the direct employer.*[108]

Recognising that a comprehensive consideration of ways to address this serious issue should examine the full spectrum of circumstances in which it may occur, the committee thus adopted a broad definition of wage theft as: the underpayment or non-payment of wages or entitlements to a worker by an employer, encapsulating a range of activities that deny workers their legal entitlements.

3.1 Forms of wage theft

While there was debate around the issue of intent when defining wage theft, there was generally consensus about what constitutes wage theft.

In keeping with research and data from regulators on workplace issues, witnesses and submitters generally pointed to one or more of the following broad means by which employers may fail to provide workers' minimum wages or entitlements:

- unpaid hours or underpayment of hours
- unpaid penalty rates
- unreasonable deductions
- unpaid superannuation
- withholding of other entitlements, and
- sham contracting and the misuse of Australian Business Numbers (ABNs).[109]

Unpaid hours or underpayment of hours may involve being paid below the minimum wage or relevant award or not being paid for higher duties, for all hours worked, and for time spent training and in work meetings. This may include a person undertaking trials of unreasonable length.[110]

Most industry awards contain **'penalty rates'**—additional rates of wages for persons who work overtime, late or early morning shifts, weekends and public holidays. Workers may be denied their due compensation through non-payment or underpayment of applicable penalty rates.[111]

Employees may be subject to **unreasonable deductions.** Unreasonable deductions involve withholding part of a person's pay, or unlawfully requiring an employee to pay back an amount. This could include for example, an employee being required to pay for breakages, returned meals, and order mistakes.

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[108] Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 19.

[109] See for example: YWH, submission 019, p 2; Maurice Blackburn Lawyers and joint submitters, submission 033, pp 4-5; QCU, submission 034, p 31; Australian Lawyers for Human Rights (ALHR), submission 051, p 3; Queensland Government, OIR, written briefing, 7 June 2018, p 17; Australian Council of Trade Unions (ACTU), correspondence, 21 August 2018; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, chapter 6, pp 59-75; Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, p ix; Fiona Macdonald, Eleanor Bentham and Jenny Malone, 'Wage theft, underpayment and unpaid work in marketized social care', *The Economic and Labour Relations Review,* vol 29, no. 1, 2018, p 81.

[110] See, for example: Independent Education Union of Australia – Queensland and Northern Territory Branch (IEU), submission 007, p 2; Queensland Tourism Industry Council (QTIC), submission 22, p 7; Maurice Blackburn and joint submitters, submission 033, pp 4-5; QCU, Submission 034, p 6.

[111] See for example: Sevegne Newton, submission 001, p 1; YWH, submission 019, pp 5-7; MEA, submission 030, p 6; The Services Union, submission 046, p 2; Franchise Redress, submission 049, pp 9-11.

Previous inquiries have also highlighted related exploitation through mandated use of employer-provided staff accommodation and transport with associated deductions from wages for residential rental and transport costs at inflated rates, to 'claw back wages'.[112]

Unpaid superannuation is another commonly recognised form of wage theft. This includes complete non-payment of superannuation, or payment below the superannuation guarantee (SG).[113]

The **withholding of other entitlements** can include not being paid for breaks, leave, and other entitlements, and workers' compensation to which the person is entitled.[114]

Sham contracting refers to the deliberate mischaracterisation of an employment relationship as an independent contracting arrangement. By engaging a person as an independent contractor rather than an employee, employers are able to avoid obligations under the FWA, such as the payment of minimum wage rates, various leave entitlements and penalty rates.[115] The NRA submitted that 'the misuse of ABNs goes hand-in-hand with sham contracting, as unscrupulous entrepreneurs seek to take advantage of the mere fact that an employee has an ABN—regardless of whether that employee is actually operating a bona fide business'.[116]

In addition to these various illegal activities, which are examined further in chapter 7, there is also a range of other concerning practices that have been acknowledged in the research literature and various inquiries, and which were also highlighted by stakeholders as serving to diminish the wages and entitlements a worker would ordinarily expect to receive.

3.2 Other concerning practices

The Senate Standing Committee on Education and Employment, in its 2017 inquiry report on *Corporate Avoidance of the Fair Work Act 2009*, reported that 'it quickly became clear over the course of this inquiry that avoidance of the legal obligations set out in the FWA occurs in two distinct ways':

- firstly, through the overt forms of avoidance by way of 'breaches of the FWA, such as underpayment'; and
- secondly, through 'exploitation of legislative loopholes and shortcomings which serve to inadvertently limit the protections offered by the FWA'.[117]

As was the case for the Senate EERC, during the course of this inquiry, the committee heard concerning evidence about the latter type of 'exploitative' practices with respect to wages and entitlements. This included commentary regarding the exploitation of the enterprise bargaining system, casualisation of the workforce, illegal phoenix activity, and other means of circumventing the legal framework.

Stakeholders also raised concerns about the continued operation and effects of 'zombie agreements' – expired employment agreements made prior to 2009 under Work Choices legislation, which remain in

112 See for example: Maurice Blackburn and joint submitters, submission 033, p 4; QCU, submission 034, p 18.

113 See for example: IEU, submission 007, p 4; IR Claims, submission 013, p 47; QCU, submission 034, p 23.

114 See for example: IEU, submission 007, pp 3-4; IR Claims, submission 013, p 7; Maurice Blackburn and joint submitters, submission 033, pp 4-5; QCU, submission 034, p 31.

115 MEA, submission 030, p 6; IEU, submission 007, pp3-4; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 75.

116 NRA, submission 021, p 8.

117 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 2.

effect today. Such agreements are characterised by the ongoing use of pay rates and conditions that may be inferior to those in the relevant modern award.[118]

Additionally, some stakeholders discussed the related issue of the gig economy—that is, where employers engage workers through a series of micro-contracts (e.g. for food delivery or transport), mediated through an online platform.

Stakeholders considered that gig economy employment arrangements can sometimes be a form of sham contracting, and therefore, an avenue for wage theft.[119] However, the committee notes that gig economy workers have taken legal action in several jurisdictions in an attempt to win recognition as employees of platforms, without success. The OIR advised in this regard:

> *Uber drivers have twice been found not to be employees by the Fair Work Commission (FWC) (in Mr Michail Kaseris v Raiser Pacific VOF [2017] FWC 6610 and Janaka Namal Pallage v Rasier Pacific Pty Ltd [2018] FWC 2579). In its decisions, the FWC noted that the current rules for determining the existence of an employment relationship developed prior to the emergence of the gig economy, and no longer reflect the current economic circumstances. It has taken the position, however, that developing the law in this area is a matter for the legislature.*[120]

While concerning, as the aforementioned range of 'exploitative practices' may not be considered strictly unlawful, they did not meet the committee's definition of wage theft in a technical sense, and accordingly were not a primary focus of the committee's inquiry.

However, the committee agrees with the comments of the Senate EERC, that to the extent that these practices are contrary to the spirit of the FWA, the question of their lawfulness is moot.[121] Their impact is to allow some employers to 'drive down wages and strip workers of the conditions to the greatest extent possible', undermining the regulatory floor on minimum wages and entitlements, and disadvantaging businesses adhering to both the letter and spirit of the law.[122]

These issues are further explored in chapter 14 of this report.

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118 See for example: Executive Security Group, submission 029, p 6; Maurice Blackburn and joint submitters, submission 033, p 30; Ms Taylor Bun, Food Manufacturing Worker, public hearing transcript, Gold Coast, 10 September 2018, pp 4-5; Ms Mele-Otufale Tulimaiau, Food Manufacturing Worker, public hearing transcript, Gold Coast, 10 September 2018, pp 4-5; Mr Jeffrey Jones, public hearing transcript, Brisbane, 17 September 2018, pp 8-11; Mr Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018, pp 25-28; Private hearing transcript, regional hearing, 2018.

119 Maurice Blackburn and joint submitters, submission 033, pp 9-10, 16; Queensland Government, OIR, written briefing, 7 June 2018, p 19.

120 Queensland Government, OIR, written briefing, 7 June 2018, p 19.

121 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, pp 5-6.

122 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 109.

Wage theft
Submission 5 - Attachment 1

4 Incidence of wage theft

Despite a lack of conclusive data on the incidence of wage theft in Australia, there are a host of available statistics that reveal enough to cause serious alarm.

Key statistics

- FWO audits of Australian businesses have regularly found that up to a third or more are underpaying workers. Of the 4,752 audits completed in 2017-18, the FWO reported that contraventions of hourly payment rates were identified in 39 percent of businesses, with 11 percent of businesses contravening requirements relating to penalty rates for weekend work.[123] Within these results, significantly higher levels of non-compliance were identified in particular industries and among particular worker cohorts.
- With respect to superannuation contributions, levels of non-compliance have been estimated at between 11 and 21 percent (ATO), or up to 33.4 percent (Industry Super Australia) nationally.
- On 12 November 2018, just prior to the finalisation of this report, the McKell Institute published Queensland-specific FWO data demonstrating that of 6,371 Queensland businesses audited between 2009 and 2018, 28.2 percent of these businesses were found to be non-compliant overall.[124] For the workforce, the authors extrapolated the results of these audits to estimate that around 17.56 percent of workers in Queensland – some 437,323 workers – likely are not receiving their full wages; and over 580,000 workers, or 23.4 percent of the workforce are likely to be underpaid superannuation, or not paid at all.[125]
- Wage theft appears to be widespread across many industries, and for a small and particularly vulnerable cohort of the workforce, the extent of the exploitation is so severe that is has been described as bordering on modern slavery.[126]

In sum, the committee's findings were consistent with previous studies and inquiries – including, most recently, the Senate EERC inquiry into corporate avoidance of the FWA, which reported:

> *On the basis of evidence presented, the committee concludes that underpayment of wages is a far bigger problem than isolated non-compliance or inadvertent oversight. In some sectors, such as the hospitality industry and jobs involving workers on temporary visas, wage theft is rampant.*[127]

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123 Australian Government, FWO and Registered Organisations Commission Entity (ROC), *2017-18 Annual Report,* 2018, pp 12, 17.

124 Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy,* The McKell Institute, November 2018, p 14.

125 Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy,* The McKell Institute, November 2018, pp 8, 23, 41.

126 Reporting the interim findings of the FWO's three-year Harvest Trail Campaign, Ms Jennifer Crook, the FWO's assistant director in compliance advised the FWO had 'encountered situations where a person is virtually bonded like a slave to a particular [labour hire] provider' and that backpackers have been lured to regional centres and ripped off 'to the tune of hundreds – and sometimes thousands – of dollars per person'. See: Marty McCarthy, 'Bonded like a slave': Workplace watchdog investigation into labour exploitation reveals poor conditions', *ABC News*, 27 June 2018, https://www.abc.net.au/news/rural/2018-06-27/workplace-watchdog-investigation-into-labour-exploitation/9911710. See also: Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 7.

127 Parliament of Australia, Senate EERC, *Corporate avoidance of the Fair Work Act 2009*, September 2017, p 69.

Further work to address existing data gaps and better assess the prevalence of wage theft at an aggregate level, would serve to enhance our understanding of the true scale of this problem.

4.1 Available statistics

There is no concrete or comprehensive data available on the incidence of wage theft in Australia.[128] This is owing to a wide range of factors, including:

- the deliberate nature of wage theft on the part of some employers and their significant efforts to hide it
- challenges associated with identifying many of the different forms of wage theft, some of which can be subtle and difficult to detect, particularly where employees may lack awareness of their entitlements and receive false or inadequate documentation
- 'chronic' underreporting of the problem even where workers are aware of their entitlements and the shortfall in those provided, due to worker resignation to the practice for various reasons (including for fear of losing their job, and a lack of alternative employment options); reticence to interact with authorities; and other factors (see further discussion at chapter 8)
- the necessarily fragmented nature of much of the available information, due to the many and complex ways in which wage theft can manifest, and the interface with multiple agencies and actors at different points in time
- the use of confidentiality agreements in wage theft settlements, preventing disclosure of the issue, and
- the limitations of agency datasets with respect to the both the information collected and the transparency and availability of that information.

Generally speaking, available statistics have been drawn primarily from:

- administrative data from regulators, providing counts of received reports of non-compliance with employee entitlements and associated compliance actions; and the results of specific investigations or compliance audits (and associated enforcement actions), and
- interviews and surveys of employees or businesses, often conducted within specific workforce populations and/or geographical regions.

None of these sources of information are definitive, with Berg and Farbenblum noting that 'service providers and policy makers have not had access to an evidence-based big picture of the context and extent of wage theft' across the country.[129] However, collectively, this information can provide significant insights into the extent of the problem, both at an aggregate level and within particular industry sectors, regions and cohorts, as necessary to inform appropriately targeted regulatory and other policy interventions.

4.2 Reported wage theft

Regulator statistics on reports of non-compliance stand to offer the most systematic barometer of levels of wage theft, as they can capture identified incidents and associated agency actions that cut

[128] Queensland Government, OIR, written briefing, 7 June 2018, p 19; Ms Tricia Rooney, Director, Industrial Relations Strategic Policy, OIR, public briefing transcript, Brisbane, 11 June 2018, p 6; Maurice Blackburn Lawyers, response to a question taken on notice at the public hearing on 16 August 2018, pp 1-2.

[129] Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 8.

across industries and geographical boundaries.[130] However, there are considerable limits to their utility as an indicator of incidence, due to both the lack of detail provided in published figures, and the significant rate of underestimation as a result of under-reporting.[131] In the latter respect, Berg and Farbenblum, in their October 2018 report on the results of a survey of 2,250 underpaid migrant workers, noted that only 3 percent of these workers contacted the FWO for assistance.[132]

4.2.1 Office of Industrial Relations

The OIR advised that in 2017, the inspectorate's Infoline service received approximately 11,324 enquiries related to the state jurisdictional matters of long service leave and arrears of wages from local government or parents' and citizens associations.[133] As a result of subsequent investigations and legal proceedings, the OIR reported adjustments to wages in the order of $1.32 million and $33,887 respectively.[134]

4.2.2 Fair Work Ombudsman

At a national level, in 2017-18 the FWO reported receiving 15,138 anonymous reports and resolving 28,275 requests for assistance involving workplace relations matters[135] through education, dispute resolution and compliance actions.[136] As a result of these employee-driven interactions and other FWO-initiated audits and inquiries, the FWO advised that it recovered over $29.6 million in unpaid wages nationally for 13,367 workers across the financial year.[137]

In 2016-17, the FWO:

- received 10,535 anonymous reports
- resolved 26,917 requests for assistance involving workplace relations matters, and
- recovered $30.6 million nationally for more than 17,000 employees.[138]

The FWO advised the committee that of the 10,535 anonymous reports received in 2016-17, over 2,200 related to Queensland businesses.[139] Of the 26,917 resolved workplace relations matters, 5,427

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130 For example see: Maurice Blackburn Lawyers, response to a question taken on notice at the hearing on 16 August 2018, pp 1, 3; Queensland Government, OIR, written briefing paper, 7 June 2018, pp3-5; Restaurant and Catering Australia (R&CA), submission 017, p 3.

131 Job Watch Inc (JobWatch), submission 016, p 3; IR Claims, submission 013, p 28; Maurice Blackburn Lawyers, response to a question taken on notice at the hearing on 16 August 2018, p 1.

132 Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 6.

133 The OIR advised that in 2017, '747 enquiries were received by the inspectorate in relation to wages, conditions and unfair dismissal matters under the FW Act'. See: Queensland Government, OIR, written briefing, 7 June 2018, p 3.

134 Queensland Government, OIR, written briefing, 7 June 2018, p 1.

135 The workplace relations matters the FWO can assist with are not limited to 'wage theft'. The FWO also deals with matters concerning discrimination and other protections; union membership and right of entry; and non-monetary matters relating to ending employment (e.g. notice, etc.). See: Australian Government, FWO, *Step 1: Find out what we can help with*, https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/step-1-find-out-what-we-can-help-with

136 Australian Government, FWO and ROC, *2017-18 Annual Report,* 2018, p 11.

137 Australian Government, FWO and ROC, *2017-18 Annual Report,* 2018, pp 11, 13.

138 Australian Government, FWO and ROC, *2016-17 Annual Report,* 2017, p 13.

139 Australian Government, FWO, submission 044, p 2.

related to employees working in Queensland.[140] Over one third of these Queensland matters related to underpayment or non-payment of wages, with 18 percent of employees alleging underpayment of their hourly rate and 17 percent alleging non-payment for time worked.[141]

The resolution of these matters contributed to the FWO's recovery of $5.4 million in unpaid wages and entitlements for employees in Queensland in 2016-17.[142]

While these figures provide some indication of the scale of employee interactions with the agency and of wage recoveries, the results of workplace audits carried out as part of FWO campaigns, inquiries and other compliance activities provide more specific information on rates of non-compliance, albeit in relation to particular industries, regions and cohorts targeted in these activities.

In 2017-18, the FWO completed 4,572 campaign audits across Australia. Contraventions relating to hourly rate underpayments were identified in 39 percent of businesses, with 11 percent contravening requirements relating to penalty rates for weekend work, and 25 percent failing to provide payslips in their prescribed forms.[143]

Examples of results from campaigns and inquiries that included Queensland business and which have been published over the past two years also point to significant rates of non-compliance across multiple sectors and areas. These include:

- July 2018 – a campaign report on audits of food precincts in three locations, one of which was Fortitude Valley in Brisbane. Of 73 Fortitude Valley businesses audited over a three-day period, 60 percent were found to be non-compliant, with 76 breaches identified. The top three sources of the breaches were the underpayment of the hourly rate (33 percent), failure to provide payslips in the prescribed form (14 percent) and breaches of weekend penalty requirements (12 percent). A total of $64,941 was recovered for 180 employees from 25 businesses.[144]
- June 2018 – the FWO's report on an inquiry into the procurement of security services by 23 local governments, including three Queensland councils (Brisbane City Council, Logan City Council and the Gold Coast City Council), revealed 14 of the 23 councils (61 percent) had a non-compliant labour supply chain. The inquiry found 42 percent of principal contractors (16 of 38) and 63 percent of subcontractors (12 of 19) failed to comply with Commonwealth workplace laws. Total underpayments of $72,250 to 54 employees (12 percent) were identified.[145] In Queensland, 70 percent (7 out of 10) of the businesses providing security employees to councils were non-compliant, and one business undertaking security work for the Gold Coast City Council was found to have underpaid three employees almost $16,000 (from April 2015 to June 2016).[146]

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140 Australian Government, FWO, submission 044, p 2.

141 Australian Government, FWO, submission 044, p 2.

142 Australian Government, FWO, submission 044, p 2.

143 Australian Government, FWO and ROC, *2017-18 Annual Report,* 2018, pp 12, 17.

144 Australian Government, FWO, *Food Precincts Activity Report*, July 2018, pp 6, 21.

145 Australian Government, FWO, *Inquiry into the procurement of security services by local government,* June 2018, pp 11, 13.

146 Australian Government, FWO, *Gold Coast security operator penalised $115,668*, media release, 24 July 2018, https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/july-2018/20170724-vip-security-penalty

- March 2018 – a campaign report on audits of 25 franchise operated Caltex businesses located in Brisbane, Sydney, Adelaide and Melbourne that were audited in October 2016. The FWO found 76 percent of businesses to be non-compliant due to issues including non-award rates, non-payment of penalties, and record keeping and pay slip deficiencies, with the FWO identifying underpayments of $9,329 over a month for 26 employees. Of the Brisbane franchises, 60 percent (3 of 5) were non-compliant.[147]
- November 2017 – a national campaign report on audits of 696 health care and social assistance employers, in which 15 percent were identified as having errors relating to pay rates or a combination of pay rates and records and pay slip errors. A total of $142,953 was recovered for 136 employees from 38 businesses. Queensland had the equal lowest rate of non-compliance of the states (with South Australia) at 17 percent, of which only a third of contraventions related to underpayment. For Queensland, $8,445 was recovered for 11 employees. [148]
- July 2017 – the FWO reported on the results of audits of 266 Far North Queensland businesses. The audits found 21 percent of businesses were not paying their employees correctly. A total of $109,295 was recovered for 136 employees from 38 businesses. [149]
- March 2017 – in a national audit of 822 businesses employing apprentices,[150] with a total of 2,266 apprentices checked, the FWO found 32 percent of businesses were not paying their apprentices correctly and 22 percent were not compliant with pay slip and record keeping obligations.[151] Queensland had the highest compliance rate (68 percent), with 49 percent of errors made in relation to the base rates provided to apprentices, and $25,597 recovered for 29 apprentices.[152]

In addition to these recent reports, in July 2016 the FWO published the results of a Central Queensland audit of 232 businesses in Rockhampton/Yeppoon, Gladstone/Biloela and Emerald and Blackwater, conducted 'in response to an increase in requests for assistance from employees' in these areas.[153] Of the 232 businesses audited, the FWO found that 31 percent of businesses were not paying their employees correctly. As a result of the audits, a total of $110,087 was recovered from 51 businesses on behalf of 316 employees; and one formal caution was issued.[154]

The Senate EERC, in reviewing audit results for its inquiry into corporate avoidance of the FWA, concluded that these campaign audits are also likely to be 'a very conservative reflection of the bigger picture', given employers are often 'contacted well in advance of FWO audits' and 'have every

147 Australian Government, FWO, *Caltex Compliance Activity,* March 2018, pp 6-8.

148 Australian Government, FWO, Health Check: Outcomes from the Fair Work Ombudsman's National Health Care and Social Assistance Campaign, November 2017, pp 4, 22.

149 Australian Government, FWO, *Outcomes from the Fair Work Ombudsman's Far North Queensland Regional Campaign 2015,* July 2017, p 4.

150 The campaign focused on employers with apprentices undertaking the following apprenticeships: automotive; electrical services; manufacturing; hair and beauty; and retail service industry.

151 Australian Government FWO, *Fair Trades: Outcomes from the Fair Work Ombudsman's National Apprenticeship Compliance Monitoring Campaign,* March 2017, p 3. The campaign focused on employers with apprentices undertaking the following apprenticeships: automotive; electrical services; manufacturing; hair and beauty; and retail service industry.

152 Australian Government, FWO, *Fair Trades: Outcomes from the Fair Work Ombudsman's National Apprenticeship Compliance Monitoring Campaign,* March 2017, p 19.

153 Australian Government, FWO, 'Central Queensland regional campaign results', media release, 22 August 2016, https://www.fairwork.gov.au/about-us/news-media-releases/2016-media-releases/august-2016/20160822-central-qld-reg-campaign-mr

154 Australian Government, FWO, *Central Queensland Regional Campaign,* March 2017, p 4.

opportunity to examine their practices and make necessary changes before an audit takes place'.[155] Dr Laurie Berg also noted that 'audits are generally undertaken on the basis of employment records that are prepared by the employer', which as the 7-Eleven case has shown, may not have been kept or may include 'manufactured records which mask the true underpayments that have occurred'.[156]

4.2.3 Australian Taxation Office

With respect to unpaid superannuation, the ATO advised the committee that in 2017-18, it actioned 31,954 cases across Australia relating to the non-payment of SG, of which 7,548 involved Queensland-based employers. Of these 7,548 Queensland cases, an SG shortfall was identified in 4,740 cases (62.79 percent).[157]

In addition to these reported non-compliance statistics, the ATO produces an SG 'gap' estimate. The estimate is based on the difference between contributions paid and contributions expected, drawing on Australian Bureau of Statistics (ABS) compensation of employee data, with certain adjustments (including to take account of estimated unpaid superannuation within the cash economy).[158] For the year 2015-16, the SG payment gap was estimated at approximately $3.26 billion or 5.7 percent of the estimated $56.77 billion in SG payments that employers were required to pay for the financial year.[159] The ATO gap estimates include an adjustment (to the tune of $799 million in 2015-16) to take account of unpaid superannuation within the cash economy. For the six years from 2010-11 to 2015-16, gap estimates suggest a cumulative $19.55 billion of super contributions lost to employees (see table below).[160]

Super guarantee gap, 2010-11 to 2015-16

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Gross gap (%)	6.8%	7.6%	6.4%	6.2%	5.9%	5.7%
Net gap (%)	5.6%	5.6%	5.6%	5.6%	5.6%	5.6%
Gross gap (dollar value - $m)	2,971	3,596	3,150	3,294	3,283	3,262
Net gap (dollar value - $m)	2,483	3,088	2,623	2,763	2,774	2,790

***Source**: ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018,* https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

In its inquiry report on non-compliance with the SG, the Senate Economics References Committee noted advice that the ATO methodology for estimating the SG gap does not identify the level of non-

155 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 69.

156 Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 21.

157 Australian Government, ATO, correspondence, 19 July 2018, p 1.

158 Australian Government, ATO, 'Super guarantee system', 26 October 2018, https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/tax-gap/superannuation-guarantee-gap/?anchor=Methodology#Methodology

159 Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

160 Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

compliance among employers (e.g. the proportion of non-compliant employers), nor does it support analysis of characteristics of non-compliance.[161] However, the Australian National Audit Office has noted that the ATO's internal risk assessment indicates that 'as many as 11 to 20 percent of employers could be non-compliant with their SG obligations, and that non-compliance is 'endemic',[162] especially in small businesses and industries where a large number of cash transactions and contracting arrangements occur'.[163]

Industry Super Australia, which conducts research on behalf of industry super funds, believes the size of the annual superannuation gap is significantly larger than the ATO estimates. In an October 2018 report, *Unpaid Super: Getting Worse While Nothing is Done*, Industry Super Australia reported that it estimates that 2.98 million Australians – approximately 33.4 percent of SG eligible employees – were 'short-changed $5.9 billion in super entitlements in 2015-16'.[164] Industry Super Australia reported that the size of the average underpayment per year is $1,994 – the equivalent of $77 per fortnight.[165]

For Queensland, the reported result was only marginally better. Industry Super Australia estimated that approximately 33.0 percent of SG eligible employees in Queensland – or 583,150 people – were underpaid superannuation (including non-payment) in 2015-16. The overall estimated gap in underpayments for the state was $1.12 billion, with an average underpayment of $1,915 per person (close to $74 per fortnight).[166]

4.2.4 Other reports and findings

In addition to regulator statistics (and associated estimates), stakeholders cited various reports and figures drawn primarily from workforce surveys and interviews, which present benefits in terms of:

- capturing practices in the informal sector that may escape the attention of authorities, and
- providing an opportunity for participants to report their experience with the security of anonymity and/or without the formality of interactions with regulators.

Perhaps the most comprehensive of the cited reports (and the most widely referenced by stakeholders)[167] is the first report of Berg and Farbenblum's National Temporary Migrant Work Survey, published in November 2017. While the study is confined to temporary visa holders, it 'draws on responses from 4,322 temporary migrants across 107 nationalities of every region of the world,

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161 The Inspector-General of Taxation Mr Ali Noroozi noted that this would require the different approach of extrapolating the results of a sizeable and representative sample of random audits to calculate a population estimates. See: Parliament of Australia, Senate Economics References Committee, *Superbad: Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee,* May 2017, p 20.

162 'Endemic' is defined by the ATO as pervasive through time and/or populations.

163 Parliament of Australia, Australian National Audit Office, *Report No. 39, 2014-15: Promoting Compliance with Superannuation Guarantee Obligations*, June 2015, pp 18-18.

164 Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done,* October 2018, p 3.

165 Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done,* October 2018, p 5.

166 Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done,* October 2018, p 10.

167 See: Dr Stephen Clibborn, submission 011; IR Claims, submission 013; Job Watch Inc (JobWatch), submission 016; QTIC, submission 022; MEA, submission 030; Dr David Morrison, submission 032; Dr Laurie Berg and Bassina Farbenblum, submission 042; Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050; ALHR, submission 051.

Wage theft
Submission 5 - Attachment 1

working in a range of jobs in all states and territories'.[168] Dr David Morrison noted that it 'is the most authoritative in terms of surveying and collecting information'.[169]

Most of the survey respondents were international students (55 percent) or working holiday makers (backpackers – 33 percent), with the remaining participants holding temporary skilled (457 class) work visas (seven percent) and tourist visas without work rights or other temporary visas (five percent).[170] The survey found 30 percent of survey participants earned $12 per hour or less – a figure approximately half the minimum wage for a casual employee in many of the jobs in which temporary migrants work.[171] Almost half (46 percent) of respondents earned $15 per hour or less (excluding 457 visa holders).[172]

The authors reached the conclusion:

> *… wage theft is endemic among international students, backpackers and other temporary migrants in Australia. For a substantial number of temporary migrants, it is also severe.*[173]

Dr Laurie Berg advised the committee that twelve percent of survey respondents (almost 400) had worked in Queensland, and that the results for the state were 'about the same as the national average'.[174] The three jobs most frequently reported as the lowest paid jobs for the respondents who had worked in Queensland were fruit/vegetable picker or packer or farm worker (31 percent), shop assistant/retail job/sales (25 percent), and cleaner (9 percent).[175]

In announcing the results of a follow up-study on non-reporting amongst this survey population, Ms Farbenblum said the scale of unclaimed wages for this 'silent underclass of underpaid migrant workers' is 'likely well over a billion dollars'.[176]

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168 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 5.

169 Dr David Morrison, Associate Professor, University of Queensland, public hearing transcript, Brisbane, 20 August 2018, p 20.

170 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 12.

171 At the time of the survey, the statutory minimum wage for all workers was $17.70 per hour. The legal minimum wage for a casual worker was $22.13 per hour. Berg and Farbenblum noted that many temporary migrants would have been entitled to higher rates based on penalty rates and entitlements under relevant awards: 'For example, a 21 year old standard fast food employee should have earned at least $24.30 per hour, and $29.16 on a Saturday'. Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 5.

172 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 6.

173 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 7.

174 Dr Laurie Berg, Senior Lecturer, Univeristy of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 18.

175 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 51.

176 Anna Patty, 'Unclaimed wages likely to top one billion dollars', *Sydney Morning Herald*, 29 October 2018, https://www.smh.com.au/business/workplace/unclaimed-wages-likely-to-top-one-billion-dollars-20181025-p50c02.html?fbclid=IwAR1dztfEtQKTF52HX-VkJvAsTtJuz_LMMVYBu9MCcfa749soLsfwkuRAVpY

These results are consistent with a series of other surveys and studies of this employee cohort, which are examined further in the next section of this chapter.

In terms of other economy-wide or cross-industry findings, the QCU cited analysis of entries to an online 'Fair Pay Campaign Calculator',[177] over a three-week period from October to November 2016. The analysis revealed:

> *Of the 20, 000 Australian workers who checked their pay through an online wage calculator in 2016, one in four of them found they were receiving less than minimum rates. Approximately 60% of submissions in the restaurant industry showed underpayments (Toscano 2016). Other industries affected by wage theft include agriculture, food processing, poultry processing and journalism.*[178]

In relation to the practice of sham contracting, the Construction, Forestry, Mining and Energy Industrial Union of Queensland (CFMEU Queensland) submitted:

> *On the basis of official figures, the CFMEU (2011) has estimated that the number of sham contracting arrangements in the building and construction industry as being between 92,000 and 168,000. This represents between 26-46% of all "independent contractors" in the industry. Accordingly, in 2011 the CFMEU estimated that $2.5 billion of tax revenue is lost in the construction industry alone through the abuse of sham contracting arrangements.*[179]

The CFMEU sham contracting figures are consistent with broader ABS figures providing details of the characteristics of employment for independent contractors across all industries, as at August 2016. That is, for the estimated 1 million independent contractors in Australia as at August 2016, a significant 36 percent indicated they did not have authority over their own work, and 42 percent indicated they were unable to subcontract their work.[180] These employment characteristics are possible indications that a contractor should be an employee and entitled to all the benefits and rights that accrue to other permanent employees.

4.3 Vulnerable cohorts

Evidence provided to the committee – both empirical and anecdotal – confirmed that the problem of wage theft is particularly pronounced in certain segments of the labour market. Peetz has reported:

> *The businesses that want to steal pay from workers will focus on the most vulnerable, those who are most likely to be afraid, or tolerant or least likely to complain… where the employer has the upper hand in making it not worthwhile – very not worthwhile – to complain.*[181]

Stakeholders particularly highlighted the higher risks of exploitation amongst migrant workers and visa holders, and young people – two broad employee groupings or 'cohorts' which have been the focus of much academic study and regulator attention.

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177 The Fair Pay Campaign Calculator was an online tool launched by the National Union of Workers, Australian Meat Industry Employees Union and United Voice to compares pay rates to the federal minimum wage scale and awards in eight different industries. See: Nick Toscanco, 'Thousands of workers find out they're being ripped off', *Sydney Morning Herald,* 25 November 2016, https://www.smh.com.au/business/workplace/thousands-of-workers-find-out-theyre-being-ripped-off-20161125-gsxnp7.html

178 QCU, submission 034, p 5.

179 Construction, Forestry, Mining and Energy Industrial Union of Queensland (CFMEU), submission 039, p 7.

180 ABS, *6333.0 - Characteristics of Employment, Australia, August 2016*, 2 May 2017, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6333.0Main%20Features4August%202016?opendocument&tabname=Summary&prodno=6333.0&issue=August%202016&num=&view=

181 David Peetz, 'Debt in paradise: On the ground with wage theft', *Griffith Review,* no. 61, 2018, p 187

Within these vulnerable cohorts, the OIR noted that 'there is an underpinning gender pay gap', with women more likely to be affected by wage theft;[182] and Queensland Advocacy Incorporated (QAI) highlighted the heightened vulnerability and insecurity for people with disabilities, 'who are at the fringes of the labour market' and are often subject to employment discrimination.[183]

4.3.1 Migrant workers and visa holders

Migrant workers and visa holders have been increasingly the focus of attention for researchers, policymakers and regulators, as evidence of their significant overrepresentation among workers who experience wage theft has come to light. This employee cohort includes international students, backpackers, other temporary visa holders, new residents, and undocumented workers.[184]

The FWO notes that migrant workers make up six percent of the Australian workforce but in 2017-18 featured in 20 percent of the workplace disputes FWO assists with; and 63 percent of the court cases commenced throughout the year.[185] The FWO has stated that their ongoing status as 'one of the most vulnerable worker cohorts… potentially reflects their unique situation':

> *… being new to the Australian labour market, not having baseline knowledge about workplace rights and entitlements, and potentially experiencing language and cultural barriers. Some migrant workers may also be reluctant to speak with public officials and may be concerned about their visa status if they raise issues. These factors can make migrant workers particularly vulnerable to exploitative practices from unscrupulous employers.*[186]

The following case study, provided by a member of the Queensland Community Alliance (QCA), highlights the ways in which such factors may play out.

> ***Case study***
>
> *'I met a lady—she is from Bolivia—through the church and she told she was working for just $50 per week. I said, 'You are a slave. Why are you doing that?' I was trying to help her to get her out of the situation, but the people where she used to live brought her out and paid for her ticket and everything. They brought her out to Australia on a tourist visa and the agreement was that she had to work as a nanny with them for $10 per day, so $50 a week. She was scared to tell me her situation. Finally, when they knew I was following her, they told me to get out when I was trying to visit her. They knew she had to get in some support. They sent her back to her country, but that happened for a year here. She was living on $50 a week'.*[187]

As previously noted, the National Temporary Migrant Work Survey identified that 'wage theft is endemic among international students, backpackers and other temporary migrants in Australia', with approximately 30 percent of surveyed workers reporting the earned approximately half the minimum wage, and 46 percent indicating they earned $15 per hour or less (excluding 457 visa holders).[188]

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182 Queensland Government, OIR, written briefing, 7 June 2018, p 21.

183 QAI, submission 026, p 7.

184 Queensland Government, OIR, written briefing, 7 June 2018, p

185 Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, pp 17, 18.

186 Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, p 17.

187 Ms Luz Mosquera, Member, Queensland Community Alliance (QCA), public hearing transcript, Brisbane, 3 September 2018, p 2.

188 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 7.

Wage theft
Submission 5 - Attachment 1

While the legal minimum wage at the time was $17.70, and most award rates were over $22 per hour (not including penalty rates), the survey found:

- 28 percent of workers in cafes, restaurants and takeaway food shops were paid $12 an hour or less, and 49 percent were paid $15 per hour or less
- 15 percent of workers in fruit and vegetable picking and farming were paid $5 per hour or less and 31 percent were paid $10 an hour or less
- 20 percent of workers in convenience stores and petrol stations earned $10 an hour or less, and an overwhelming majority (82 percent) were paid $17 per hour or less
- 56 percent of cleaners were paid $15 an hour or less.[189]

This research followed a similarly large-scale survey of 4,044 working holiday visas conducted by the FWO, as part of an inquiry into the working conditions of these visa holders. Reporting the results of the survey in October 2016, the FWO noted that 28 percent of working holiday visa holders indicated that they did not receive payment for some or all of the work they did, and further:

- 35 percent stated they were paid less than the minimum wage
- 14 percent revealed they had to pay in advance to get regional work, and
- 66 percent felt employers take advantage of people on working holiday visas by underpaying them.[190]

In a previous, 2016 survey of 1,433 international students, Clibborn found that of those working at the time of the survey, 35 percent were paid $12 or less (well under the minimum wage). All respondents working as waiters and shop assistants were paid under the prevailing minimum legal weekend wage rates.[191] Clibborn and Wright have also cited:

> *Underhill and Rimmer's (2016) survey of 278 horticulture workers, the majority of whom held working holidaymaker visas, found mean hourly wages well below applicable minima. In Howe et al.'s (2017: 35) survey of 332 employers of horticulture workers, the majority of whom were temporary migrants, 17% of employers admitted to paying under minimum weekday wage rates and 74% to paying under minimum weekend wage rates. Nyland et al. interviewed 200 international students, 62 of whom reported their hourly pay. About 58% earned AUD7–AUD15 per hour, which the authors assessed as below the applicable minimum wages (Nyland et al., 2009).*[192]

Reporting in July 2017 on the results of two separate audits of 200 Australian job advertisements on Chinese, Korean and Spanish websites carried out in 2016 and 2017, Unions New South Wales revealed 78 percent of the 200 advertisements examined were offering pay rates below minimum award levels.

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189 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, pp 30-31.

190 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act*, September 2017, p 65.

191 Stephen Clibborn, 'Multiple frames of reference: Why international student workers in Australia tolerate underpayment', *Economic and Industrial Democracy*, March 2018, pp 7, 9.

192 Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, p 213.

The lowest rates discovered included $4.20 per hour for a nanny and $9 per hour for an office clerk, both advertised in Chinese. The minimum legal rate for both jobs is more than $18 per hour.[193]

Further, in 2015, a joint investigation by Fairfax Media and Monash University surveyed more than 1,000 foreign-language job advertisements and found that 80 percent targeted overseas-born workers and advertised wages well below the legal minimum rates in Australia.[194]

4.3.2 Young workers

The OIR advised that young people 'are notably vulnerable for similar reasons to those of many migrant workers: a lack of understanding of workplace laws and culture, a lack of marketable skills, especially among students still completing tertiary study, and little or no bargaining power'.[195]

While workers under the age of 25 account for 15 percent of the Australian working population, the FWO reported that in 2016-17, they were involved in 28 percent of the workplace disputes the FWO assisted with. Further, the FWO advised:

> *… young workers were involved in 44% of the court cases commenced. We recovered over $1.4 million in underpayments for 723 young workers.*[196]

Research has highlighted that high rates of youth unemployment have increased competition for paid positions,[197] and young people have reported a willingness to tolerate wage theft and other unlawful treatment in order to remain in employment.[198] IR Claims submitted that young workers 'are often keen to get their foot-in-the-door, whether it be their first casual job, an apprenticeship, or their first paid employment after graduating college or university', and that this leaves them vulnerable to exploitation.[199]

In relation to apprentices in particular, as previously noted, the March 2017 report on the FWO's national apprenticeship campaign revealed that 32 percent of the 822 businesses audited nationally were not paying their employees correctly. Included in this number were 100 businesses in Queensland, 32 percent of which were identified as non-compliant, with 49 percent of identified errors involving the base rates provided to apprentices and $25,597 recovered for 29 apprentices.[200] East Coast Apprenticeships submitted that there is 'a 'hidden' iceberg of theft' where apprentices are concerned.[201]

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193 Jackson Gothe-Snape, 'Chinese, Korean and Spanish speakers subjected to 'wage theft on massive scale'', *SBS News,* 17 July 2017, https://www.sbs.com.au/news/chinese-korean-and-spanish-speakers-subjected-to-wage-theft-on-massive-scale

194 Schneiders and Millar cited in Queensland Government, OIR, written briefing, 7 June 2018, p 18.

195 Queensland Government, OIR, written briefing, 7 June 2018, p 24.

196 Australian Government, FWO and ROC, *Annual Report 2016-17,* p 20.

197 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 7; Brotherhood of St Laurence, *Generation Stalled: Young, underemployed and living precariously in Australia,* March 2017.

198 Queensland Government, OIR, written briefing, 7 June 2018, p 24; Stephen Clibborn, 'Multiple frames of reference: Why international student workers in Australia tolerate underpayment', *Economic and Industrial Democracy,* 2018, pp 13-14.

199 IR Claims, submission 013, p 21.

200 Australian Government, FWO, *Fair Trades: Outcomes from the Fair Work Ombudsman's National Apprenticeship Compliance Monitoring Campaign,* Australian Government, March 2017, p 19.

201 East Coast Apprenticeships, submission004, p 2.

IR Claims provided the following example of wage theft experienced by a young apprentice plumber.

Case study

After completing six weeks of unpaid work experience with a Brisbane plumbing company, 21 year-old Aiden was offered a plumbing apprenticeship with the company.

Two weeks after commencing work, Aiden checked the Fair Work Ombudsman website and discovered he was being underpaid. He was receiving $11.67 an hour when he should have been paid $19.07 an hour.

'The fact that they were charging me out as a fully qualified tradesman, at $90 an hour, and I was only seeing $11 of that, and the fact that I was putting in the hard yards every day - it was pretty draining - it was hard to keep any form of positive relationship with those guys.'

Aiden decided not to approach his bosses about the underpayments until after he had completed his three month probation period.

'I walked into the shed and [his employer] was like, 'how long you been working for us now?', and I said, 'ah, just over three months,' and he said, 'ah, well you must be finished your probation'. I asked if there was any paperwork to fill out and he said there wasn't, and he said, 'you're one of the family now', those were his exact words - they've stayed in my mind ever since.'

About a week after being told his probation period was over, Aiden asked to have a meeting with his employer and raised his concern that he was not being paid according the award rate.

'[His employer] said, 'is this the avenue you want to go down?' and I said, 'yeah it is', I said, 'I'm 21, that's what I'm supposed to be on - that's what I'm going to get.'

'And he said, 'we'll have another meeting soon' - so I hassled them a few weeks after that, and they sat me down for another meeting, and that's when they sacked me'.[202]

The OIR stated that young workers often make up a significant portion of the workforce in industries that have higher levels of non-compliance. The OIR noted that the scheduling requirements of tertiary students can make some of these industries – and 'notably the hospitality industry', attractive for young job seekers.[203]

The FWO reported that in 2016-17, 44 percent of the hospitality workers assisted by the FWO to resolve workplace disputes were under the age of 26.[204]

The committee heard from the YWH that 'the enforcement of current laws does not deter wage theft and is more often than not complicated and inaccessible for young workers'.[205]

4.4 Vulnerable industries and sectors

Dr Laurie Berg advised the committee that risks of exploitation are higher in labour market segments 'where there is a concentration of low-skilled work, thin profit margins, limited union presence and fragmented employment arrangements', which may include franchise networks, labour hire arrangements, supply chains, and subcontracting.[206] These are characteristics that are common to a number of industries that have been singled out as having 'systemic' problems with wage theft. It is no coincidence that the vulnerable cohorts discussed above feature prominently in the workforces of these industries.

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202 IR Claims, submission 013, pp 22-23.

203 Queensland Government, OIR, written briefing, 7 June 2018, p 24.

204 Australian Government, FWO and ROC, *Annual Report 2017-18,* 2018, p 20.

205 Ms Imogen Barker, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 22.

206 Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 20.

IR Claims submitted:

> *In Queensland, hospitality, food services, retail, farming and fruit & vegetable picking industries are rife with underpayments because they create "a perfect storm" for exploitation.*
>
> *The "wage theft recipe" is simple:*
>
> - *The insecure nature of the work*
> - *High numbers of migrant workers and young people*
> - *Staff already being paid low wages*
> - *People desperate for the work*
> - *A lack of knowledge of workplace rights*
> - *Absence of strong unionisation.*[207]

In 2017-18, the FWO reported that of all the anonymous reports of non-compliance received by the agency, the accommodation and food services industry (hospitality) 'was by far the most reported industry, amounting to 37% of all anonymous reports. The next highest industries were retail (13%), and building and construction (5%)'.[208] The FWO also received the most enquiries from the accommodation and food services industry (12 percent), followed by health care and social assistance (10 percent), professional, scientific and technical services (10 percent) and retail trade (9 percent).[209]

Further, the FWO highlighted its work to target 'industries and geographic regions with high or emerging levels of non-compliance such as hospitality and cleaning',[210] including reporting on 'how key industry sub-sectors (security and cleaning services) rely on multi-level labour supply arrangements and the correlation with non-compliance'.[211]

In the committee's own survey on experiences of wage theft, the largest number of responses received similarly related experiences of wage theft in the accommodation and food services industry (23.17 percent), followed by other services (14.94 percent), and retail trade and construction (both 8.23 percent).[212]

The QCU reported that of 169 responses to a wage theft survey conducted on its website, the industries of incidence most commonly nominated were accommodation and food services (17.2 percent); agriculture, forestry and fishing (14.2 percent); other services (11.8 percent); manufacturing (9.5 percent); and retail trade (8.9 percent).[213] The QCU stated that the high proportion of responses from the accommodation and food services industry is 'unsurprising' and noted that responses for the other services industry grouping 'includes responses for contract cleaning and security'.[214] The QCU stated in this regard:

> *It would be unsurprising that these industries would also be over represented compared to their proportion of the work force… whilst contract cleaning represents 1.2 percent of the total workforce (ABS 2016) it represents 4.7 percent of responses to the QCU web site. Likewise,*

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207 IR Claims, submission 013, p 18.

208 Australian Government, FWO and ROC, *Annual report 2017-18,* 2018, p 16.

209 Australian Government, FWO and ROC, *Annual report 2017-18,* 2018, p 14.

210 Australian Government, FWO and ROC, *Annual report 2017-18,* 2018, p 10.

211 Australian Government, FWO and ROC, *Annual report 2017-18,* 2018, p 10.

212 See chapter 5.

213 QCU, submission 034, p 14.

214 QCU, submission 034, p 15.

security represents 0.4 percent of the total workforce but 3.6 percent of responses to the QCU web site.[215]

Job Watch Inc. (JobWatch) and LawRight respectively submitted that the Queenslanders who contact JobWatch's information service and access LawRight's legal self-representation service to recover unpaid entitlements mostly worked in accommodation and food services, retail trade, construction, and other services.[216]

The IEU and Transport Workers Union also highlighted issues in their sectors,[217] and IR Claims emphasised that while rates of non-compliance may vary, 'it is our experience that wage theft occurs in almost every industry, including medical, legal, transport, trades, construction and childcare.[218]

4.4.1 Accommodation and food services

According to 2016 Census data, 156,672 workers were employed in the accommodation and food services industry in Queensland. If one were to extrapolate the rate of wage non-compliance detected in the recent audit of Fortitude Valley bars and cafes, to the number of employees engaged in the accommodation and food services industry, the QCU stated that it would be 'in the order of 94,000 employees within that industry alone [who] would not be in receipt of their proper entitlements'.[219]

The FWO has reported that its 'operational data has consistently indicated this industry is over-represented in non-compliance with workplace laws':[220]

Despite it only making up around 7% of Australia's workforce, the hospitality industry accounted for the highest number of disputes the FWO assisted with both in 2016-17 (17%) and 2017-18 (18%). We also made over $4.8 million in recoveries from this sector - 19% of all our recoveries.

It is the industry in which a significant proportion of vulnerable workers (in particular young workers and migrant workers) seek our assistance, accounting for 33% of all formal disputes we assisted migrant workers with, and 29% of all formal disputes we assisted young workers with. Thirty-seven percent of all anonymous reports received were in relation to the hospitality industry.

The industry is also over-represented in our compliance and enforcement outcomes. It makes up almost a third of all of our litigations in the last two years, and had the highest number of compliance notices (34%), infringement notices (36%) and letters of caution (30%) issued in 2017-18.[221]

Chef David Carter told the committee:

Every single person I know who has spent a reasonable amount of time working in hospitality has wage theft stories—from being worked well and truly over your salaried hours to penalty rates not being paid and superannuation not being paid. I do not know anyone who has spent more than a few years or has worked in a number of establishments who does not have wage theft stories...

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215 QCU, submission 034, p 15.

216 JobWatch, submission 016, pp 6-7; LawRight, submission 028, p 9.

217 See: IEU, submission 007; Mr Peter Biagini, Secretary, Transport Workers Union (TWU), public hearing transcript, Brisbane, 16 August 2018, pp 38-39.

218 IR Claims, submission 013, p 7.

219 QCU, submission 034, p 28.

220 Australian Government, FWO and ROC, *Annual report 2017-18,* 2018, p 19.

221 Australian Government, FWO and ROC, *Annual report 2017-18,* 2018, p 19.

It is ingrained. It is indoctrinated… If you try to make an issue of it, in the hospitality industry everyone knows everyone else within a few degrees of separation. The intimidation factor they use is that you will be badmouthed and you will never get another job in this industry again.[222]

4.4.2 Horticulture

Issues with exploitation of horticultural workers have been highlighted in a number of previous inquiries, including the Senate EERC inquiry into the exploitation of working holiday visa holders and the Queensland parliamentary inquiry into the practices of the labour hire industry in Queensland in 2016. As noted by Berg and Farbenblum, in the National Temporary Migrant Work Survey, 'underpayment was widespread across numerous industries but… especially severe in fruit and vegetable picking'.[223] The survey also found 53 percent of fruit and/or vegetable pickers or packers and farm workers, were paid $15 or less.[224]

The FWO highlighted the incidence of wage theft in the horticulture industry, in its inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program. The inquiry was established after an escalation in the number of requests for assistance received by the FWO from temporary visa holders.[225] In its report, the FWO noted 'locally sourced labour was often either reluctant or unwilling to undertake the labour-intensive and low skilled work involved in the horticulture and agriculture sectors'.[226] It was reported that:

… a 417 visa holder's desire for a second year extension and the requirements to undertake specified work can have the unintended consequence of driving vulnerable workers to agree to work for below minimum entitlements and in some circumstances enter in to potentially unsafe situations.[227]

The inquiry identified instances of underpayment and/or non-payment of wages and an increased dependency on the employer by the visa holder seeking employment to fulfil the 88-day specified work requirement of the 417 visa program, in order to secure a second year visa and stay in Australia.[228]

Ms Rachel Mackenzie of Growcom spoke of the incidence of wage theft in the horticulture industry, but noted:

It is very difficult to track workers who are illegally working in the horticulture sector because they are not putting up their hands…a lot of money flows through horticulture, but the profit margins are not particularly high. When you have commodities where really growers are being

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222 Mr David Carter, Worker/chef, QCU, public hearing transcript, Brisbane, 16 August 2018, p 4.

223 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 5.

224 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 31.

225 Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program,* October 2016, p 3.

226 Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program,* October 2016, p 16

227 Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program,* October 2016, pp 49-50.

228 Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program,* October 2016, p 3.

Wage theft
Submission 5 - Attachment 1

paid less than the cost of production, it is very tempting to cut corners. Nobody for one minute is excusing that, but it does create an environment where that happens.[229]

4.4.3 Food processing

The committee heard from the Australian Meat Industry Employees Union (AMIEU), representing workers in the meat processing industry. It was stated that the meat processing industry 'contributes $16 billion a year to our national economy and $5 billion here in Queensland'.[230] The AMIEU advised that it had been involved in 'many blatant cases of wage theft' and provided evidence to the committee, as a 'snapshot of what has been happening within our industry'.[231] It stated that instances of wage theft in the meat processing industry commonly included labour hire arrangements, and involve overseas visa workers. The AMIEU told the committee that it had assisted members to reclaim hundreds of thousands of dollars over the last five years.[232]

4.4.4 Construction

As previously noted, the CFMEU estimated that sham contracting in the construction industry cost the public almost $2.5 billion in 2011.[233] In its report on its inquiry into the corporate avoidance of the FWA, the Senate EERC stated that 'the construction industry has been plagued by sham contracting for many years'.[234]

At the public hearing on the Gold Coast, Mr Beau Malone of the ETU stated that 'we are seeing an escalation, in our view, in this space of underpayments due to the insecure work that exists out in that industry at the moment'.[235]

At the hearing in Toowoomba, Mr Dan McGraw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of the ETU, stated:

Locally as well, the ETU has dealt with companies that have gone into receivership where employees were not paid their entitlements. A company would set up a holding company, transfer all of their assets, transfer all of their finances, make all of their employees redundant and say, 'We've got no money to pay your entitlements. See you later.' We have to deal with that a lot as well.[236]

Dr David Morrison stated that the practice of illegal phoenixing is recognised 'to be rife in the construction industry for example, where various trades are able, by use of a company structure, to avoid payment to various creditors including subcontractor trades and the ATO'.[237]

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229 Ms Rachel Mackenzie, Chief Advocate, Growcom, public transcript hearing, Brisbane, 17 September 2018 (morning), p 4.

230 Mr Ronald Weston, Queensland Branch**,** AMIEU, public hearing transcript, Ipswich, 11 September 2018, p 1.

231 Mr Ronald Weston, Queensland Branch**,** AMIEU, public hearing transcript, Ipswich, 11 September 2018, p 1.

232 Mr Ronald Weston, Queensland Branch**,** AMIEU, public hearing transcript, Ipswich, 11 September 2018, p 1.

233 Construction, Forestry, Mining and Energy Union, submission to the Parliament of Australia, Senate EERC*, Corporate Avoidance of the Fair Work Act 2009,* September 2017, Submission 200, p. 11.

234 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 75.

235 Mr Beau Malone, State Organiser, Electrical Trades Union, Queensland and Northern Territory Branch, public hearing transcript, Gold Coast, 10 September 2018, p 20.

236 Mr Dan McGraw Branch President, Queensland Council of Unions Toowoomba Branch; State Organiser (South West Queensland), Electrical Trades Union, public hearing transcript, Toowoomba, 10 September 2018, p 7.

237 Dr David Morrison, submission 032, p 14.

4.4.5 Cleaning and security

In 2014, the FWO commenced an inquiry into cleaning arrangements in Tasmanian supermarkets, and specifically targeted the labour procurement contracting arrangements adopted at Woolworths stores. The inquiry was established 'in response to intelligence received by the Fair Work Ombudsman that supermarket cleaners in the state were being significantly underpaid',[238] and the FWO's 'experience of a correlation between multiple levels of subcontracting and non-compliance with the Fair Work Act 2009'.[239] The FWO found 'an alarming non-compliance rate of 90% by contractors and sub-contractors at these sites, and underpayments of over $64,000.' As a result of the findings, referrals were made to the ATO, two litigations were initiated by the FWO, and as of August 2018, Woolworths has publicly committed to monitoring its network of cleaning contractors through a new compliance partnership with the FWO.[240]

During its inquiry, the committee heard evidence of wage theft occurring in the cleaning and security industries. Mr Dermot Peverill of United Voice stated:

> *I think what comes out in that is the two points … vulnerable workers and transient workers. When you get those two together in a low-paid contracting industry like the members I represent—contract cleaning and contract security—as Giri says, it is inescapable.*[241]

Mr Brian McCarrick, Director of Ardent Security, told the committee that 'wage theft has been a constant problem' in the security industry since he started work in the industry in 1985.[242]

As previously noted, in June 2018, the FWO conducted an inquiry into the procurement of security services by 23 local governments. The FWO found that 14 councils (61 percent) had a non-compliant labour supply chain, and that 42 percent of principal contractors and 63 percent of subcontractors failed to comply with Commonwealth workplace laws. The FWO identified total underpayments of $72,250 to 54 employees.[243] It was also noted that in Queensland, 70 percent of the businesses providing security employees to three councils were non-compliant, and one business undertaking security work for the Gold Coast City Council was found to have underpaid three employees almost $16,000 (from April 2015 to June 2016).[244]

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238 Australian Government, FWO, 14 February 2018, https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/february-2018/20180214-ww-cleaners

239 Australian Government, FWO, *An inquiry into the procurement of cleaners in Tasmanian supermarkets,* February 2018, p 2.

240 Australian Government, FWO, 14 February 2018, https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/february-2018/20180214-ww-cleaners

241 Mr Dermot Peverill, Industrial Officer, United Voice, public hearing transcript, Brisbane, 16 August 2018, p 43.

242 Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 7.

243 Australian Government, FWO, *Inquiry into the procurement of security services by local government,* June 2018, pp 11, 13.

244 Australian Government, FWO, *Gold Coast security operator penalised $115,668*, media release, 24 July 2018, https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/july-2018/20170724-vip-security-penalty

4.5 Regional variation

Key statistics

- Responses to the committee's survey, while predominantly from Brisbane (66.16 percent), included responses from across the state, including the Gold Coast region (8.54 percent), Central Coast region (7.93 percent), Ipswich region (4.88 percent), and North Queensland (including Townsville and Cairns) (4.57 percent).
- LawRight submitted that of the clients seeking assistance for wage theft claims through its self-representation service, 43.98 percent were from Brisbane, 37.25 percent were from parts of South East Queensland outside Brisbane, and 15.13 percent were from remote or regional areas.[245]
- a Brisbane—specific campaign audit of Fortitude Valley bars and cafes found 60 percent of businesses were non-compliant, with 33 percent of breaches involving underpayment of the hourly rate and 12 percent of breaches relating to the payment of weekend penalty rates,[246] and
- two multi-industry regional campaigns carried out by the FWO in Central Queensland and Far North Queensland, the results of which were reported in 2016, revealed wage non-compliance rates of 31 percent and 21 percent respectively.[247]

As previously noted, three regional campaigns carried out by the FWO in recent years, in Brisbane, Central Queensland and Far North Queensland, identified varying levels of non-compliance. Given the FWO's campaigns are informed by an intelligence-led approach, which focuses on regions (and industries) from which there have been a concentration of reports, inquiries and identified incidents,[248] it is fair to conclude that FWO data pointed to a higher risk of non-compliance in these regions. However, as the YWH noted, without specific audit data available for other parts of the state, it is difficult to determine incidence: 'we would say that wage theft in the regions is not measured'.[249]

Despite a lack of regional audit data, evidence provided by stakeholders at regional hearings highlighted a range of regional wage theft issues, many of which tended to be characterised by the confluence of particular high risk industries and high risk workers within the local area. When questioned about regional issues in Toowoomba, Mr Dan McGraw, Branch President of the QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, stated:

> *Straightaway I think of the Lockyer Valley and the fresh produce industry. There are a lot of foreign workers down there. I know that Immigration does raids down there regularly, but the problem is: how do we get access to these workers to talk about it? They do not know their rights. If a worker does not know their rights, they do not know they are getting ripped off, and it is hard for us to get on sites and talk to these workers. They are bundled up in houses and put all over the place so it is very hard. That is one industry that comes to mind.*[250]

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245 LawRight, submission 028, p 5.

246 Australian Government, FWO, *Food Precincts Activity Report*, July 2018, pp 6, 21.

247 Australian Government, FWO, *Outcomes from the Fair Work Ombudsman's Far North Queensland Regional Campaign 2015,* Australian Government, July 2017, p 4; Australian Government, FWO, *Central Queensland Regional Campaign,* March 2017, p 4.

248 Australian Government, FWO and ROC, *Annual report 2017-18,* 2018, p 16.

249 Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 24.

250 Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 8.

In Bundaberg, one of the largest horticultural production regions in Australia, former Salvation Army worker and local businessman Mr Moe Turaga highlighted a history of systemic problems with the exploitation of backpackers and seasonal workers from the South Pacific by rogue labour hire operators, including acknowledging three deaths in the industry in Bundaberg.[251] While noting apparent improvements since the introduction of the state's labour hire licensing scheme, Mr Turaga advised:

> *Over the last couple of years we have been trying to provide pastoral care to seasonal workers who are coming here from the South Pacific… They are living on about $50 a week and it is not the best thing for a big, round Tonga man to be living on noodles and rice.*
>
> *…. If they speak up… their labour hire contractor, who is from their own nationality for most of those source countries, will punish them; they will not come back; they will not be able to go through the program again the year after or the following year… They should be making $23 an hour. Half of them are making $7 an hour in this modern day of 12 hours or 13 hours—it is not the farmer's fault. I will say that openly because most of the farmers I spoke to in Bundaberg are paying the right wages to the labour hire companies... It is the labour hire company that is the problem where the money is not flowing through to the workers or the seasonal workers.*[252]

In Mackay, the committee heard from locals that they had often heard the term 'Whitsunday wages' used locally – a term which they understood to be synonymous with the imposition of a flat rate of pay, with no payment of penalty rates for weekends, overtime hours and public holidays.[253]

> *Some of the restaurants close of a public holiday, especially Easter Monday ... Some of them open. The ones that close say, 'We have to pay penalty rates, so we will not open.' The ones that are open have been there long term and they say, 'No, we don't pay penalty rates'.*[254]

In Cairns, the committee heard of problems in the local tourism industry, which engages a significant backpacker workforce. It was suggested to the committee that some business owners may fail to account for seasonal fluctuations and seek to cut costs by reducing workers' wages:

> *We are really subject to tourism and people. We have a fluctuating industry. Just after Chinese New Year there are three or four months where hardly anyone visits the town and then in July all of a sudden people come again. There are people who live here who are business owners who have not necessarily worked in the tourism industry before. They do not expect there to be such a big gap of income. If they do not account for that, they see half a year where they make profits and they do not see that for the other half of the year they need the profits they made to save up …for those bad months. They did not expect that and all of a sudden they cannot pay. What is the business cycle here for small businesses? It is as long as the lease is, which is usually three to five years, and then people give up…*
>
> *I have seen businesses here shortcutting wherever they can—half an hour from everyone—but what do people say? People say, 'Oh well, it is only half an hour'.*[255]

Finally, the largest turnout of stakeholders and members of the public at all regional hearings was at the hearing on the Gold Coast (also the region that was the second largest source of responses to the committee's survey). Noting that construction, retail trade and accommodation and food services

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251 Mr Moe Turaga, private capacity, public hearing transcript, Bundaberg, 12 September 2018, p 9.

252 Mr Moe Turaga, private capacity, public hearing transcript, Bundaberg, 12 September 2018, p 9.

253 Private hearing transcript, regional hearing, 2018.

254 Private hearing transcript, regional hearing, 2018.

255 Private hearing transcript, regional hearing, 2018.

feature among the top few industries of employment in the Gold Coast region,[256] the reports of problems with wage theft in the region were consistent with evidence regarding the high risk nature of these industries.

4.6 Further research

Stakeholders regularly commented on the need for more comprehensive data and improved transparency in regulator reporting, to support informed and appropriately targeted responses to wage theft.[257] While acknowledging that wage theft 'is very difficult to measure', the YWH stated:

> *The statistics that we have right now are shocking. The statistics that are unreported could be even more so... The statistics that we referred to in our submissions are what we have available to us, but there is a lack of organisations out there that are able to measure those statistics.*[258]

Dr David Morrison submitted:

> *Australian regulatory agencies generally are opaque when it comes to sharing data about their operations. There is an urgent need for a more transparent landscape with respect to accessing the data held by various government agencies.*[259]

Senate committees have also commented on the limits of available data in recent reports.[260] In particular, the Senate Economics References Committee, in its report on non-compliance with the SG, noted the 'data gaps' which make it difficult to accurately estimate the extent of non-payment of the SG,[261] and recommended 'the ATO and ASIC work together to collect data on abandoned companies to produce a comprehensive picture on the levels of unpaid SG contributions left by such companies'.[262]

Committee comment

While there are limits to available statistics, those that are available consistently show that wage theft is endemic across Queensland and Australian workplaces. Further, it is 'systemic' in some industries and amongst the vulnerable cohorts who work in them.

The cumulative picture painted by available datasets, and responses to the survey of workers carried out by the committee as part of our inquiry, is sufficient to allow identification of the key ways in which wage theft is occurring, and to help pinpoint common conditions and variables that are allowing it to occur, with responses to be targeted accordingly. These forms of wage theft and underlying factors are explored further in chapters 7 and 8.

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256 .id, *Gold Coast City, Industry sector of employment* (2016 Census data), https://profile.id.com.au/gold-coast/industries

257 See, for example: Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, pp 21-22; Dr David Morrison, Associate Professor, University of Queensland; public hearing transcript, Brisbane, 20 August 2018, p 21; Maurice Blackburn Lawyers, response to a question taken on notice at the public hearing on 16 August 2018, pp 1-3; Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 24.

258 Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 24.

259 Dr David Morrison, submission 032, p 17.

260 The Senate EERC acknowledged the likelihood that actual rates of non-compliance far exceed those suggested by regulator statistics. See: Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, submission 205, p 69.

261 Parliament of Australia, Senate Economics References Committee, *Superbad – Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee,* May 2017, p x.

262 Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee,* May 2017, p xiv.

5 Survey results – What Queenslanders said

The following outlines the results of the committee's survey on experiences of wage theft in Queensland. Information about the survey methodology is provided at Chapter 1.

5.1 Survey sample

The committee received 360 survey responses. The committee excluded 32 responses from consideration as the respondent reported that the incident occurred in another jurisdiction (26 responses) or did not specify a postcode (6 responses).

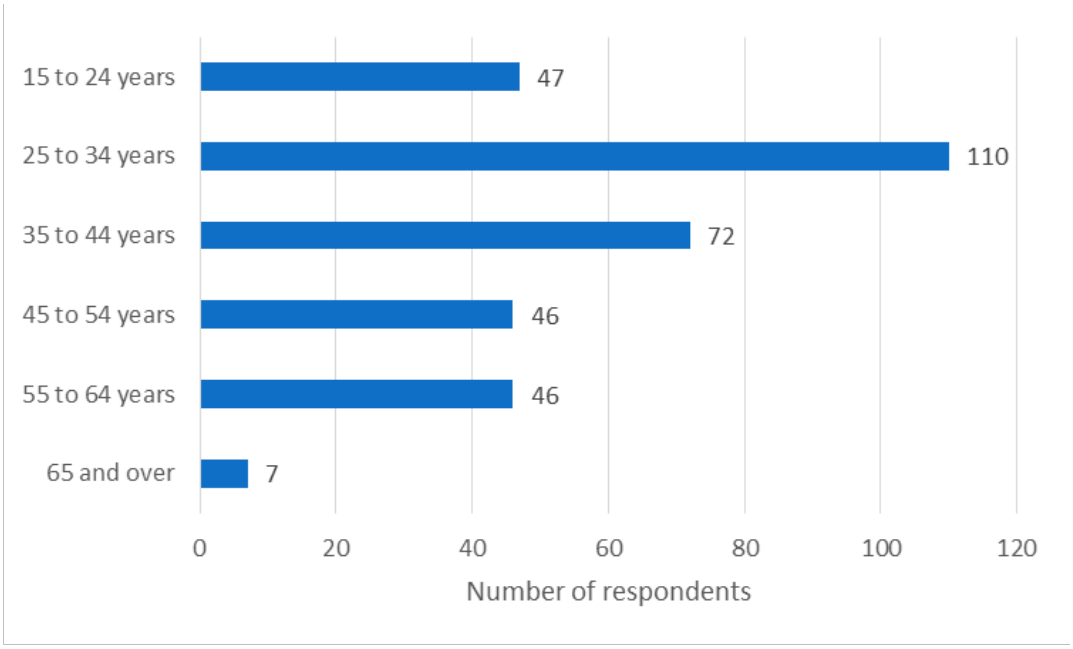
Data from the remaining 328 responses was analysed. Respondents worked in a range of industries, and had experienced varying levels of wage theft, in a range of locations.

Of the 328 respondents, 259 identified as Australian residents (79.0 percent) and 69 (21.0 percent) as visitors to Australia. Three respondents identified as Aboriginal (0.91 percent) and one respondent (0.30 percent) identified as a Torres Strait Islander.

Approximately half of the respondents identified as male (50.91 percent) or female (48.48 percent) and two respondents (0.61 percent) indicated their gender was other. Seventy-five of the 328 respondents (22.87 percent) stated they were a member of an industrial organisation such as a union or employer registered body at the time of the wage theft issue.

The age group most highly represented was that of people aged 25 to 34 years (33.54 percent) followed by those aged 35 to 44 (21.95 percent), as shown in Figure 1 below.

Figure 1: Number of respondents experiencing wage theft by age group



***Source**: Inquiry into wage theft in Queensland, survey data.*

Ninety-five respondents (28.96 percent) spoke a language other than English at home. Of the 60 respondents who specified the language spoken at home, 43 respondents (71.67 percent) identified that they spoke Spanish.

Of the 328 respondents, 26 (7.93 percent) reported an ongoing disability.

5.2 Experiences of wage theft

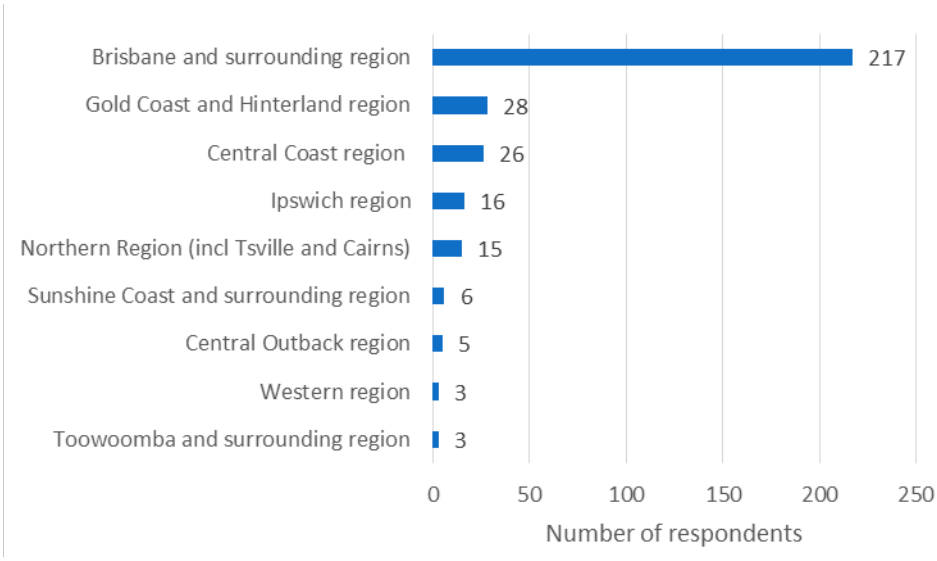
5.2.1 Time of experience

Most respondents reported they had experienced wage theft within the last year (178 responses), with 136 responses indicating the wage theft occurred more than a year ago but within the last six years. The least number of participants responded that the issue had occurred more than six years ago (43 responses). Participants could choose multiple responses (noting that the person may have experienced multiple instances of wage theft).

5.2.2 Location of wage theft

Of the 319 respondents that identified a region in which their wage theft issue took place, 217 (68.03 percent) selected areas within the Brisbane region. This was followed by the Gold Coast and Hinterland Region with 28 respondents (8.78 percent) and the Central Coast Region (including Bundaberg and Wide Bay, Mackay and the Whitsundays, and Rockhampton) with 26 respondents (8.15 percent).

Figure 2: Regional locations of wage theft



Source: *Inquiry into wage theft in Queensland, survey data.*

5.2.3 Employment status

Most respondents recorded their employment status at the time of the issue as being casual employment (126 respondents or 38.41 percent), followed by permanent full-time (101 or 30.79 percent).

The majority of respondents reported they were employed directly by the employer (252 respondents or 76.83 percent), with 40 respondents recording their employment was undertaken as an independent contractor (12.20 percent). Nineteen respondents were employed through an agency/labour hire arrangement, and 17 were not sure of their employment status at the time of their wage theft issues.

One respondent who reported that their issues occurred during employment through an agency/labour hire arrangement, commented:

> *I was a casual worker employed through labour hire [*employer name*] as a packer. All packers could not earn a reasonable salary. We were paid on piece rates per punnet of berries. The faster packers could earn $12-14 au per hour before tax. The slower earn $5-6 au per hour before tax (even when working in the peak season)... I only could earn $5-10 au per hour from second trays.*

We spent a lot of time to sorting fruits, but were not paid for this, only the amount of punnets. With the low wages, most of us could only afford food and accommodation. Some of packers wanted to take a day off, but the response is 'if you have a day off and you would lose this job'.

5.2.4 Types of wage theft

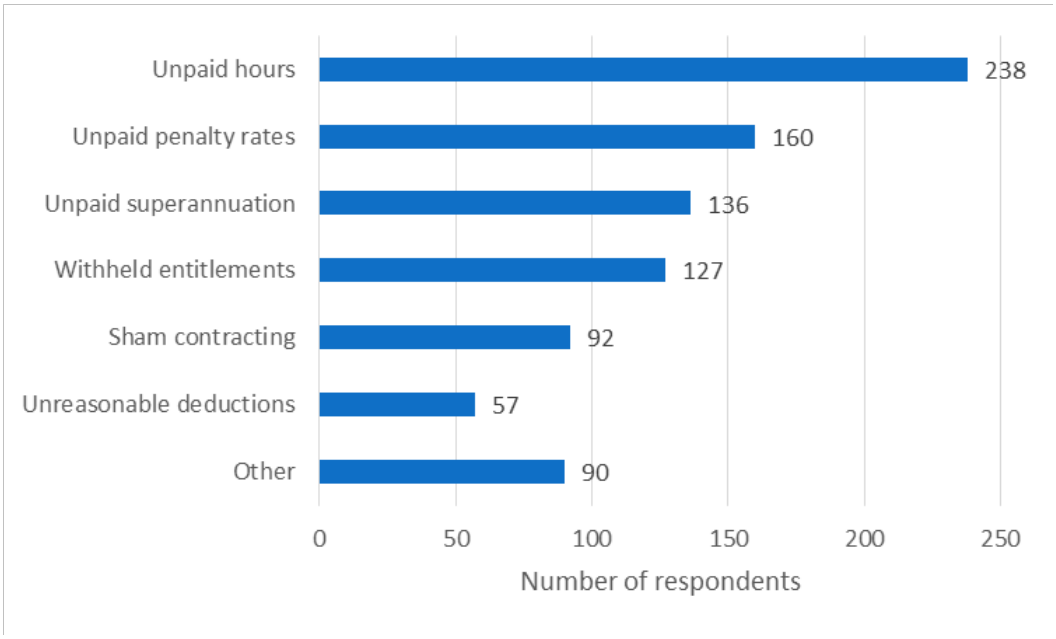
The survey asked respondents to choose one or more of the types of wage theft they had experienced:

- unpaid hours (including not being paid for all hours worked, for time spent training and in work meetings, and unreasonable length trials; or being paid less than the agreed wage)
- unpaid penalty rates
- unpaid superannuation
- unreasonable deductions
- withholding other entitlements (including not being allowed to take breaks, or not being paid leave to which you are entitled)
- sham contracting (where employees have been made to use an ABN and act as a contractor, when they should have been considered as an employee), and
- other (respondents were asked to specify other types of wage theft in 'further information').

Unpaid hours were reported by 238 respondents (72.56 percent); 160 respondents (48.78 percent) reported unpaid penalty rates; 136 respondents (41.46 percent) reported unpaid superannuation; and 127 respondents (38.72 percent) reported other entitlements had been witheld. (Figure 3).

Sham contracting was reported by 92 respondents (28.05 percent), and unreasonable deductions were reported by 57 (17.38 percent). 'Other' was selected by 90 respondents (27.44 percent) and included unpaid redundancy payments, unpaid unused annual leave, unpaid termination, and payments on a lower payscale than required of the duties they performed.

Figure 3: Types and reported incidence of wage theft



***Source**: Inquiry into wage theft in Queensland, survey data.*

5.2.4.1 Unpaid hours and unpaid penalty rates

Respondent comments about their experience of unpaid hours and unpaid penalty rates included:

- *I was with them from 4.30 am until 3.30 pm. They paid for hours worked doing cleaning, discounted transportation minutes. However, they paid between 4 to 6 hours per day, which was not consistent with the hours actually worked. At the time when I asked them in detail for the hours worked, they fired me…*
- *I was employed from the age of 18 to 19 at a local cafe in New Farm, Brisbane. I was paid $14.50/hour, a rate that did not changed after I turned 19. I was not paid weekend penalty rates or any superannuation. My employer made no efforts to inform me of my rights in this area. I accepted my pay rate without question and did not realise that it was lower than the legal minimum.*
- *I was told I would be fired for asking for breaks. I worked every public holiday and most weekends and never once received penalty rates. How was your Xmas, I worked 15 hours straight and got nothing for it.*

5.2.4.2 Unpaid superannuation

Comments from respondents about their experiences of unpaid superannuation included:

- *I work at a water bottling plant in [employer name]. Since the new owners took over in 2015, myself and other workers have not had our superannuation paid properly. Despite working full time hours over the last two years, I've received hardly any contributions. When confronted about this management have said they 'have a deal with the ATO'.*
- *While working for two separate IT companies in Rockhampton, myself and work colleagues were not paid our superannuation. Despite the figures being displayed on our fortnightly pay slips, both employers failed to make these contributions. This happened to multiple members of staff and not just myself. Failure to pay these contributions occurred at two separate family owned IT businesses that I was employed by.*
- *During that time [employer name] owed me over $30,000 in unpaid superannuation and when I reported it to the ATO she sacked me…I am not the only one she owes Superannuation to as I know at the time she shut down there was at least 4 of us she hasn't paid… She walked away from it all by shutting the business down. It worked then so she kept doing it with every business and she's doing it again. How is this fair? I am now 52 years old and have $25,000 superannuation to retire on. I honestly don't know how I'll survive.*

5.2.4.3 Withheld entitlements and unreasonable deductions

Respondents' comments included:

- *I work a 12 hour day, yet my employer will only pay me 10hrs per day during sick days and annual leave. There is also no portable long service. So when the anniversary date for long service comes close the employer terminates our contracts and a new employer takes over the contract.*
- *The wage theft included no pay for some employee meetings, no breaks (paid or unpaid) during long shifts, and tip theft (which is not illegal in Australia apparently, but should be). I and my co-workers didn't complain to our employers or the Fair Work Ombudsman because we were scared to lose our jobs - it is exceedingly difficult to find work while on a Working Holiday visa due to the 6-month rule, even if you intend to stay put and live in one city, and I couldn't afford to spend another month looking for a job without income. The amount of time, struggle with the employer, and bureaucracy involved in going to the Fair Work Ombudsman would not be worth it.*

- *In a job as a barista, working 9 hour days we were prevented from taking our breaks as the owner would not hire enough staff to cover time spent on breaks. He thought he could pay for lunch every day to make up for it.*

5.2.4.4 Sham contracting

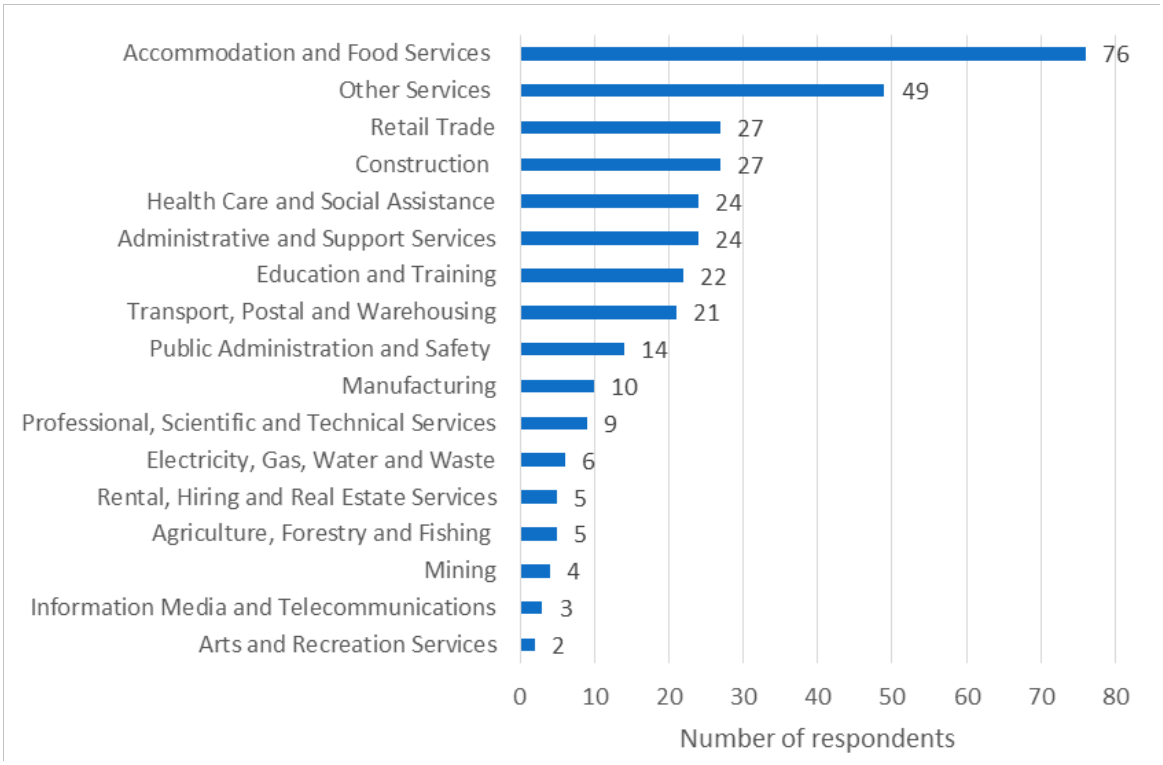
Comments from respondents about their experience of sham contracting included:

- *The company hired me more than a year ago as a subcontractor (ABN) to clean four sites which are at the same places, times and days every week in Brisbane… My supervisor gave me a T-Shirt with the company logo I must use at all times [sic]. The company did not provide me any equipment as vacuum, dust mop, mops, cleaning products, clothes, buckets, etc. (I understood that I was a subcontractor so I must have bought them) and to have a car. Even though after six months working for this company, my supervisors asked me to buy an extra equipment (flat mop), because some people had had some problems using a normal mop so they suggested one which costs more than hundreds of dollar and also suggested to buy it as soon as possible since they could finish my agreement. After, the trainers explained to us (all the subcontractors) with an email the importance of having this "new mop" they remembered to us that whole responsibility if something happens (accident or incident) it will be our responsibility. Furthermore, the company stated to control the work time two months ago with an app which we must to register the entrance and exit of each site. To be honest, I do not have clear the conditions of a casual job. However, I feel that the company has us as subcontractors for paying less money (around $20 - $22 p/h, but most of times, the time is not enough and we do not get the Payment for that) and skipping taxes and superannuation.*
- *For many years I have been driving tourists in Cairns and for the last few the employment basis offered is as a subcontractor at below award wages. It is as if many companies in the same sector collude to all offer similar below award employment conditions. They do not pay penalty rates for odd hours, public holidays or weekends. They do no pay superannuation. They do not provide WorkCover. They do not recognise minimum callout hours. If you complain you get your hours cut. The company is the worst I have ever worked for. There is no focus on human resources.*

5.2.5 Industries affected by wage theft

The largest number of reported wage theft experiences were in the accommodation and food services industry (76 respondents or 23.17 percent). No other industry accounted for more than ten percent of responses except for other Services, which was reported by 49 respondents (14.94 percent). Other Services includes a broad range of personal services including; religious, civic, professional and other interest group services; selected repair and maintenance activities; and private households employing staff (Figure 4).

Figure 4: Industries and incidence of wage theft



Source: *Inquiry into wage theft in Queensland, survey data.*

2.5.1 Incidence within industries

In the top five industries of incidence, the four most commonly reported types of wage theft were unpaid hours, unpaid penalty rates, unpaid superannuation and withholding of entitlements.[263]

Accommodation and food services

Seventy-six respondents reported issues in the accommodation and food services industry (including hospitality and hotel workers). 76.31 percent (58 respondents) reported unpaid hours, 60.53 percent (46 respondents) reported unpaid penalty rates, 39.47 percent (30 respondents) reported withholding of entitlements, and 36.84 percent (28 respondents) reported unpaid superannuation.

Comments from respondents about experiences of wage theft in the accommodation and food services industry included:

- *I was doing 50+ hours week and getting paid for 38h. Every week. In the end I was making less than the minimum wage. I called the Ombudsman and was told to talk with my employer. As I was afraid of losing my job I didn't talk with them. It's a standard practice in hospitality industry. We have no support from the agencies that supposed to support the people.*
- *I was employed from the age of 18 to 19 at a local cafe in [suburb], Brisbane. I was paid $14.50/hour, a rate that did not change after I turned 19. I was not paid weekend penalty rates or any superannuation. My employer made no efforts to inform me of my rights in this area. I accepted my pay rate without question and did not realise that it was lower than the legal minimum.*

[263] Note that respondents were able to select multiple types of wage theft. 'Other Services' were excluded from the top five industries in this summary.

- *Over many years in the hospitality industry I have experienced just about every possible kinds of wage theft. In my current position as a full time chef working for a catering company in the Coal Seam Gas industry I am currently in dispute with my employer who has on many occasions left me sitting at home without notice due to "not having any work available", we are treated like casuals even though we are permanent full time employees. They are also paying below award wages, not paying for travel time from Point of Hire, usually Toowoomba or Brisbane, to the remote camps in which we work. Sometimes these travel days are in excess of 12 hours and we get paid nothing. They are also not paying overtime at overtime rates….*

Retail trade

Of the 27 respondents who reported issues in the retail trade industry, 96.30 percent (26 respondents) reported unpaid hours, 59.30 percent (16 respondents) reported unpaid penalty rates, 48.15 percent (13 respondents) reported unpaid superannuation, and 44.44 percent (12 respondents) reported entitlements were withheld.

Respondents' comments about experiences of wage theft in the retail trade industry included:

- *My employer often made mistakes with the payment of wages, so I decided to use Excel spreadsheet to work out my annual leave balance, as I did not trust my pay slip. During this process, I decided to work out if my pay was in line with the applicable award, and this lead to the discovery that my employer had significantly underpaid me by about $10,000 over the 3 years since I started working for them… Knowing that I am at least $10,000 short of pay for the 3 years I have worked for this employer, made me feel physically sick.*
- *As it was part of the culture at that workplace to work additional hours I felt as if I couldn't report it and if I did I would be seen as a trouble maker and let go.*

Construction

Of the 27 respondents who reported issues occurring in the construction industry, 51.85 percent (14 respondents) reported an experience of unpaid hours, 44.44 percent (12 respondents) reported withholding of entitlements, 40.74 percent (11 respondents) reported unpaid penalty rates and unpaid superannuation.

Comments from respondents about experiences of wage theft in the construction industry included:

- *Working in excess of 100 hours some weeks. Never less than 60 hours. Only paid 40 hours and they make me put 40 hours on timesheet. Competition has up to four guys doing my job. My company just has me. Culture is suck it up and do it. Other staff have complained and either been fired shortly after or verbally harassed as having no commitment to the company.*
- *For 12 months I was not paid my travel allowance ($9 a day which is a lot of money as a third year apprentice) I was employed by a group training organisation. After contacting fair work I was told they couldn't do anything. The employer would not answer my calls or return emails. It wasn't until the electrical trades union had to get involved on my behalf was this issue resolved. I know I wasn't the only one but I was the only one to pursue the issue and receive a back pay.*

Health care and social assistance

Of the 24 respondents who reported issues occurring within the health care and social assistance industry, 75 percent (18 respondents) reported an experience of unpaid hours, 45.83 percent (11 respondents) reported withholding of entitlements, and 20.83 percent (5 respondents) reported unpaid superannuation.

Respondents' comments about experiences of wage theft in the health care and social assistance industry included:

- *[employer name] underpaid my holiday pay for years. I brought it to their attention and they ignored me. I brought it to the attention of my union and [employer name] would repeatedly assure them the back pay was "in the next pay cycle". This went on for 9 months. I had to tell [employer name] was taking it to Fair Work Australia for them to finally pay me what was owing. I was also warned verbally to "keep quiet about it" as there was countless others who were unaware of the EA terms.*
- *I was a full time Physiotherapy employee paid on a commission basis. I noticed certain patients and other billable items were being back dated into past pay periods which meant I didn't receive my portion of the payment. When comparing my pay to the corresponding weekly billing reports it seemed accurate. Upon auditing previous pay periods, the loss totalled > $8000 over the 4 years. I brought this to my employers attention. It was agreed that my calculations were correct however they were angry with me, told me I didn't understand the billing process and that it was my fault for not noticing this earlier. For 2 months I worked with them to try to resolve the issue with no success. Eventually I resigned. Upon resigning I was sent home immediately. Instead of paying me my base wage during my 4 weeks' notice period, they just paid me a portion of what I was owed. By my calculations I am still owed >$5000. This does not include the hours of unpaid work I was required to do to audit my pay nor does it include a review of the first 4 years of my employment with them.*

Administrative and support services

Of the 24 respondents who reported issues occurring in the administrative and support services industry, 87.50 percent (21 respondents) reported an experience of unpaid hours, 45.80 percent (11 respondents) reported unpaid superannuation, 37.50 percent (9 respondents) reported unpaid penalty rates, and 25 percent (6 respondents) reported withholding of entitlements.

Comments from respondents about experiences of wage theft in the administrative and support services industry included:

- *Being employed at a flat hourly rate. With no penalties on weekends and public holidays etc. Where the employers contract was not a registered agreement with Fair Work Australia.*

5.3 Reporting of wage theft

Of the 328 respondents who experienced wage theft, 36.28 percent (119 respondents) reported it to their employer, 25 percent (82 respondents) reported wage theft to the Fair Work Ombudsman (FWO) and 10.06 percent (33 respondents) reported wage theft to the Australian Taxation Office (ATO). Some respondents reported the issue to more than one body, and 143 respondents did not report the issue.

Thirty respondents reported their wage theft issue had been resolved, however, most respondents who said their issue was resolved were not satisfied with the outcome. Five out of the six respondents who reported their case to the ATO were not satisfied; nine out of thirteen respondents were not satisfied with the outcome from the FWO; and three out of eight respondents were not satisfied with the resolution offered by their employer.

A small number of respondents commented on their experience of reporting their wage theft matter, which included:

- *Yes I persisted to argue the case for severance pay and eventually won. I was awarded some severance pay.*

- *His response was to shrug his shoulders and say "sometimes you have a win, sometime we have a win."*
- *They simply stated that is how it is! Your hands are tied when you need an income and this is how they operate! Bullying you into submission!*

On reporting to the FWO:

- *I called the Ombudsman to report excess of reasonable hours, nothing was done. I was told to talk with my employer. Zero support from the government.*
- *Was not paid holiday pay or superannuation. Also was never given the opportunity to take lunch breaks. Reported to my employer and Fair Work. Fair Work advised I could take the employer to court. I did not want to go through the stress so just left.*
- *…The most disappointing thing was the attitude of officials to this exploitation. We went to Fair Work to for ask some information two times. The first time, we went to the office with our landlord who is local. The staff said this problem happened everywhere and didn't want to talk to us. He just wanted to pass the buck. The attitude was awful. After few days, we sent our complaints to Fair Work. A month later we got a call from an inspector, although not everyone who made a complaint was called. The Inspector said the farm could not provide the information such as: our working hours, pay slips etc to him. Most of us offered our own records and pay slips to him but we felt he just wanted to finish this case but never tried to help us. He did not ever contact other complainants. This made us very angry and disappointed. We wanted to leave, but we need the 2nd visa and most of the workers did not have a car. Most of farms in this area do not even pay the tax to government!*
- *I am 16 years old and started full time employment with a small business, I was very committed and loyal to my employer. I had been working for one year and trusted my employer had been paying me correctly. It has taken both myself and parents a lot of work and stress to try and receive the entitlements I am owed. We are now having to prepare for court so I can try and get my unpaid wages and because when I asked my employer to pay me correctly I was fired. We have supplied information to both the ATO and QLD Treasury as the employer had provided conflicting information in relation to my unpaid superannuation and grants the employer received throughout my employment. We have worked with The Fair Work Ombudsman and The Fair Work Commission and have found the process to be stressful and strenuous.*
- *When I contacted the fair work ombudsmen they were excellent. They provided me with the correct hourly rates and I contacted my employer who paid what I was due. However the employer received no fine or punishment.*

On reporting to the ATO:

- *They told me that they didn't have the resources to investigate my situation.*
- *I followed through with the ATO from 2008 till now and they tell me that the "debt has been established" however I have seen no sign of any money paid towards it. I believe it is now in the hands of the receivers which means lawyers will eat up any money left and of course I will get nothing. Furthermore this woman has gone on to buy one agency after another in this area using different ABN and TFN to do so. She racks up the debts, owing people thousands of dollars and then shuts them down with no way for these people to get their money owed to them. The ATO tell me they are aware this happens and they call it "phoenixing" however they can't seem to deliver justice or punishment for her doing it time and again.*

Wage theft
Submission 5 - Attachment 1

5.4 Summary

The survey data illustrated that people are experiencing many different types of wage theft in Queensland. These experiences cut across a variety of industries, locations, and age groups.

Respondents most commonly experienced unpaid hours. The accommodation and food services industry was the industry in which wage theft was reported by the largest number of respondents.

Respondents who reported wage theft to the FWO and ATO did not always have their issues resolved, or not resolved to their satisfaction.

6 Impacts of wage theft

As noted in chapter 4, the direct economic impacts of wage theft in Queensland and nationally, likely figure in the billions of dollars every year.

Key figures

- On 12 November 2018, just prior to the finalisation of this report, the McKell Institute published projections estimating that conservatively, total lost wages in Queensland are at least $156.5 million annually. Assuming these workers lost just one percent of their wages, this cost grows to $244 million; and the loss of five percent of their income would see the cost rise markedly to $1.22 billion in lost earnings. [264]
- Nationally, the shortfall in superannuation payments in 2015-16 alone has been estimated at between $3.26 billion and $5.9 billion by the ATO and Industry Super Australia respectively, with the ATO pointing to a cumulative $19.55 billion deficit for the period from 2010-11 to 2015-16. [265]
- In Queensland, for 2015-16, estimates from Industry Super Australia put the annual loss in unpaid superannuation for the state at up to $1.12 billion annually, and approximately $1,915 for an individual.[266]
- In addition, the McKell Institute report stated that conservative wage theft estimates would see consumer spending reduced in Queensland by more than $100 million per year, with at least $60 million in federally levied taxes being forgone in the state as a result of unpaid wages.[267]

These staggering amounts do not include all of the micro and macro multiplier effects of this serious problem on individuals and their livelihoods; on their families' ability to access services; on business competition and wage growth; and on tax income, superannuation balances and the cost of social security and pensions – all of which go to the productivity, wealth and wellbeing of the community and economy generally. Further, these are effects that may compound and intensify over time.

The McKell Institute report concluded that 'wage theft is a serious problem, a major economic liability for individual workers, federal and state governments, and a manifestly unfair scourge that is widespread through Queensland and Australia, demanding serious policy intervention at both state and federal levels'.[268]

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264 Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy,* The McKell Institute, November 2018, p 7.

265 Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings; Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done,* October 2018, p 3.

266 Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

267 Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy,* The McKell Institute, November 2018, p 7.

268 Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy,* The McKell Institute, November 2018, p 7.

Wage theft
Submission 5 - Attachment 1

6.1 Impacts on individuals and families

6.1.1 Financial impacts

The committee heard incidents of underpayments and direct financial losses experienced by individuals ranging from thousands and tens of thousands of dollars, up to $261,715 in one instance.[269]

For example, some of the direct losses cited included:

- $18,000 (for a hospitality worker)[270]
- $25,000 (for a real estate sales employee)[271]
- $34,000 including superannuation (for a tourism industry employee)[272]
- $40,000 (for a service station attendant)[273]
- $60,000 (for an IT and communications professional),[274] and
- $261,715 for a motorcycle service manager.[275]

The Services Union submitted that it is currently pursuing 'an underpayment of $150,000 for three workers who were employed by a medium sized community sector organisation from 2012 to 2017'.[276] IR Claims stated that in the past two years, 'our small team has helped recover $1.8 million in stolen wages for our clients, ranging in individual amounts of $6,000 up to $80,000'.[277]

The OIR noted that as wage theft may be episodic or systematic and prolonged, the effects will vary depending on the circumstances.[278] However, regardless of the size of the reported underpayments, the committee heard that the immediate impact of the financial loss associated with wage theft cannot be underestimated, noting the overrepresentation of low-income, vulnerable workers among those affected; and the scope for resulting pressures on 'basic things like rent, bills and groceries'.[279]

Experiences of wage theft conveyed to the committee put a very human face on this insidious issue. For example, hospitality worker Ms Kate Hamburg estimated she had been underpaid at least $100, and noted that although this amount may seem insignificant to some, it meant 'a lot of money' to her as a student: 'That is the difference in being able to afford to travel to uni on public transport—the basics and the necessities of life. It was a substantial amount of money to me at the time'.[280]

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269 IR Claims, submission 013, p 12.

270 Ms Sivaiala Lemisagele, Food manufacturing worker, public hearing transcript, Brisbane, 16 August 2018, p 23.

271 Dr Jennifer Fraser, private capacity, public hearing transcript, Sunshine Coast, 11 September 2018, p 17.

272 Private hearing transcript, regional hearing, 2018.

273 IR Claims, submission 013, pp 7, 12.

274 Mr Jason Spectre, private capacity, public hearing, Gold Coast, 10 September 2018, p 33.

275 IR Claims, submission 013, p 12.

276 The Services Union, submission 046, pp 1-2.

277 IR Claims, submission 013, p 4.

278 Queensland Government, OIR, written briefing, 7 June 2018, p 20.

279 IR Claims, submission 013, p 10.

280 Ms Katherine Hamburg, Hospitality worker, public hearing transcript, Brisbane, 16 August 2018, p 29.

Describing the impact of $3,600 in amounts owed for completed work, Tim Dunne, a gyprocker, stated:

> *My son's education rides on this money. I've got a special needs son, he's got autism, and he goes to a very expensive school – it's $300 bucks a week - and because I didn't get paid for those weeks - those payments didn't go through.*[281]

Some workers indicated that they had been forced to take out high interest cash loans[282] or borrow money from family members just to get by.[283]

At the Gold Coast hearing, the committee was moved by Mr Ben Hargreaves' testimony of his own experience in this regard:

> ***Mr Hargreaves:*** *Just with this situation in general where I have not been paid my redundancy, as a result of that, the way it has been done, I had to go and get a cash loan to pay my bills and now if I do not keep the payments up on that cash loan it is slowly drawing my credit back so my credit is now screwed for any future loans that I might get as a result of this. …Everything just mounts up. I have had to sell personal possessions. I have had to sell things I have had for 20 years just to get by because these people refuse to do the right thing and they just keep doing it, mate.*
>
> ***Mr BROWN:*** *How many more things can you sell?*
>
> ***Mr Hargreaves:*** *I have got nothing left, mate. This is my last avenue. If something does not happen soon I am done.*[284]

IR Claims also highlighted a recent case before the Federal Circuit Court involving a delivery driver who worked at a 'Pizza Hut' outlet, and was paid a flat rate of $16 an hour under a sham contract. Judge Michael Jarrett said the underpayments were 'significant' to the worker, an Indian man in his 20s:

> *According to the evidence, he was the sole breadwinner for he and his wife and was responsible for their daily living expenses, rent, groceries and his wife's tuition fees.*
>
> *Partly as a result of being underpaid, he needed to borrow about $1,500 from his cousin in Melbourne and about $20,000 from his father in India, which he says was culturally shameful and embarrassing. (The driver's) evidence was that he was constantly anxious and stressed about their low bank balance and at time felt pressured and humiliated.*[285]

For some stakeholders, the theft of their wages meant significant delays in paying off a mortgage,[286] with one survey respondent noting that 'we also had to pay more interest over 6 years than we needed to'.[287] For others, the security of their housing was more directly under threat as a result of their experience:

> *I had to give up the unit that I was renting and I ended up with my 80-year-old father supporting me because we were not paid out.*

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281 IR Claims, submission 013, p 72.

282 IR Claims, submission 013, p 84.

283 IR Claims, submission 013, p 71.

284 Mr Ben Hargreaves, Food processing worker, public hearing transcript, Gold Coast, 10 September 2018, pp 17-18.

285 Judge Michael Jarrett, cited in FWO, '$216,700 penalties after Pizza Hut franchisee engages in sham contracting', media release, 15 June 2018, https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180615-skyter-penalty

286 Name suppressed, submission 014, p 1.

287 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, survey respondent.

Wage theft
Submission 5 - Attachment 1

> *Between my assistant manager and I, there was about $70,000-odd worth of long service leave and annual leave accrued. He did eventually pay the redundancy under much protest. Had it not been for my dear old dad, I would have probably been living on the streets or in my car. It was just so traumatic.*[288]

The impact of wage theft on financial independence and living standards can also increase the strain on formal systems of support (e.g. Centrelink and other forms of social welfare), and on broader social networks.[289] At the public hearing in Brisbane on 3 September 2018, Reverend Pauline Harley of the QCA shared a story from her community.

> ***Case study***
>
> *'All I can do is give you an example of a lady who came to me just last week. She is in the cleaning industry. She has an ABN but that ABN has been submitted twice to the authorities. She has been socially cut off—she is not from an ethnic group; she is an everyday Australian. She had her Centrelink payments cut off as well. She is now facing homelessness because she cannot pay her rent. She came to me wanting me to pay her rent, but as a church we cannot pay thousands of dollars in rent because of her situation. She has discovered that her tax is now thousands of thousands of dollars, not by her own doing but by her employer or the person she was contracted with has done the wrong thing. For her and her family, she is going to lose her home. She has no way of providing food, so she comes to the church looking for food and looking for a way for us to help her keep her home. There are a number of people who come like that. We give out so much. It will affect her children in school. She is a single mum. That is just one example of an experience I had from last week. There are impacts that go on beyond the individual; it affects families'.*[290]

Where unpaid superannuation is concerned, IR Claims submitted that the effects of wage theft can be particularly 'insidious', with far-reaching effects on a person's financial wellbeing:

> *Not only does the worker miss out on regular contributions, but they also lose the investment returns on those contributions, and the compounding interest that results…*
>
> *Make no mistake, employers who don't pay super are stealing from their worker's retirement.*[291]

Mr David Carter, a chef, who appeared before the committee with the support of the QCU, stated that as a result of the non-payment of his superannuation in close to half of his workplaces in the last 20 years, 'I am now in a position where I am seriously concerned about what I am going to do come retirement'.[292]

As noted in chapter 4.2.3, Industry Super Australia has estimated that for 2015-16, the size of the average superannuation underpayment for SG eligible employees in Queensland was $1,915 per person.[293]

Industry Super Australia has also reported that a one-off, $2,000 underpayment of this nature can grow to a $24,000 shortfall in investment returns by retirement.[294]

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288 Ms Kay Clifton, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 9.

289 Queensland Government, OIR, written briefing, 7 June 2018, p 20.

290 Reverend Pauline Harley, Anglican Priest, QCA, public hearing transcript, Brisbane, 3 September 2018, p 5.

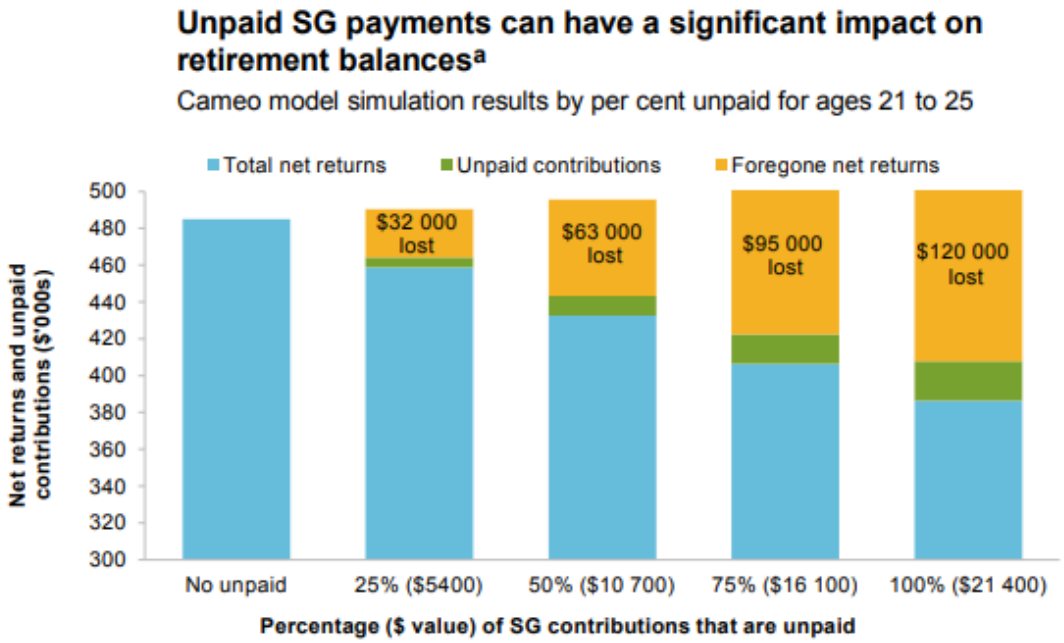
291 IR Claims, submission 013, p 11.

292 Mr David Carter, Worker/chef, public hearing transcript, Brisbane, 16 August 2018, p 8.

293 Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done,* October 2018, p 10.

294 Industry Super Australia, cited in IR Claims, submission 013, p 11.

Productivity Commission modelling, based on more modest underpayment estimates applied over a longer period of time, similarly confirms the significant impact of unpaid contributions and associated foregone compound returns. For example, the Commission's modelling estimates indicate that a person on a $50,000 full time starting salary, whose employer does not pay 50 percent of due contributions during the early years of the person's career (while they are aged 21 to 25) would have a retirement balance 7.6 percent ($63,000) lower than a peer who received all their contributions (see figure below).[295]



***Source**: Australian Government, Productivity Commission, Superannuation: Assessing Efficiency and Competitiveness, Productivity Commission Draft Report, April 2018, p 264.*

Once identified, the cost of recovering entitlements duly owed can have a further significant financial impact on individuals. Recovery through a court process can include application fees, filing fees, costs of legal advice and representation (see Chapter 11.2.2 for more information on the court process).

6.1.2 Emotional and health impacts

Workers who appeared before the committee, advised that their experience of wage theft invariably also took a significant toll on their emotional and physical wellbeing.[296]

The OIR noted that accounts from victims of wage theft 'frequently mention their feeling powerless, exploited and undervalued', and that 'a positive link has been demonstrated between low-paid work and insecure work (of which wage theft is an exacerbating factor) and poorer health outcomes, particularly in relation to mental health'.[297]

Mr Chris McCoomb stated that the process also 'requires vast amounts of time and effort and can result in anger, frustration and a sense of being worthless and insignificant',[298] together with the

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295 Australian Government, Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness,* Productivity Commission Draft Report, April 2018, p 264.

296 See, for example: Justin Cobbett, submission 003; Julie Riding-Hill, submission 006;IR Claims, submission 013, pp 5, 11-13, 18; Mr Michael Rickards, Member, TWU, public hearing transcript, Brisbane, 16 August 2018, p 37-38; Mr Lucas Halkeas, Hospitality worker, public hearing transcript, Gold Coast, 10 September 2018, pp 9-10.

297 Queensland Government, OIR, written briefing, 7 June 2018, p 21.

298 Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 14.

Wage theft
Submission 5 - Attachment 1

danger of 'being sacked for raising the issue or people refusing to employ you because you have previously taken action against them'.[299]

IR Claims submitted that the clients they represent who have experienced wage theft 'often report feeling extreme stress, frustration, anxiety and even depression':

> *They first have to deal with the reality that they have been cheated or robbed by their boss, often after having put their heart and soul into a business, and then they are left to manage the financial pressure that results'.*[300]

The 'daunting prospect of commencing legal action' can then intensify the pressure workers can feel.[301]

Ms Kay Clifton stated of her own experience that 'the stress and the mental anguish you are going through at that time is just deplorable';[302] and for a survey respondent similarly, 'the stress has been immeasurable'.[303] In one case, a submitter advised that the stress resulting from bullying by their employer following the lodgement of their complaint for incorrect wages, led to a substantiated WorkCover claim for compensation.[304]

The YWH submitted that for young people, who are often in one of their first jobs, the experience can damage their confidence levels, and impact on their independence and self-worth.[305] Apprentice plumber Aiden Martin submitted in this regard:

> *With all the effort that I had to go to to retrieve my money and all the hard work I put into the apprenticeship, for it to be taken off me because they didn't want to pay me an extra $8 an hour … it was appalling. How I felt for those few months - I wouldn't wish it upon anyone.*[306]

Maurice Blackburn also listed a range of feelings often reported by clients arising from their experience of wage theft:

- fear – including, for vulnerable workers with limited alternative employment options, a feeling of being stuck and unable to see a way toward a better future
- shame or embarrassment – 'victims of wage theft often report feeling that they have done something wrong – that they have somehow put themselves and their families in this situation'
- isolation – many victims of wage theft feel like they are alone, and may not know the supports available to them through various avenues
- anger and frustration – 'negative feelings generated in the workplace are often ventilated in inappropriate ways, having dreadful consequences on families, peer groups and communities', and
- Desperation – 'feelings of inadequacy can sometimes lead to tragic consequences'.[307]

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299 Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 14.

300 IR Claims, submission 013, p 11.

301 IR Claims, submission 013, p 5.

302 Ms Kay Clifton, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 8.

303 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, survey respondent.

304 Name suppressed, submission 036, pp 10-22.

305 YWH, submission 019, p 9.

306 IR Claims, submission 013, p 13.

307 Maurice Blackburn and joint submitters, submission 032, p 7.

In addition to these significant emotional impacts, the OIR advised that workload intensification, whether directed by employers or performed 'voluntarily' by employees to compensate for reduced hourly incomes, has been associated with poorer workplace health and safety, particularly when coupled with bullying by employers and threats to job security. The OIR stated that insecure workers have been 'noted as being more willing to accept dangerous tasks in the workplace, and to avoid reporting injuries or illness (both physical and mental) in order to retain their income'. Further, an increase in the number of hours of jobs worked to compensate for wage theft:

> *… may, in turn, decrease time available to spend with family or in leisure. The same phenomenon has been noted in the context of insecure work, where it has been shown to inhibit the capacity for workers to build and contribute to family and community relationships, leading to stressed and dysfunctional families.*[308]

6.2 Impacts on businesses and the economy

Beyond the serious and harmful impacts on the workers and families affected by wage theft, evidence provided to the committee highlighted that the problem can be equally 'devastating' for compliant businesses and for the communities in which it is occurring.[309]

Businesses that engage in wage theft can generate significant cost savings, allowing them to undercut compliant businesses on price and generate an illegitimate competitive advantage.[310] In imposing penalties on a Gold Coast restaurant owner who underpaid overseas workers $60,000 in just four months, Judge Vasta highlighted the extent of the competitive advantage gleaned by the business in that circumstance:

> *If one extrapolated that to the course of a year, it would mean that a business such as the ones being run by the First Respondent and the Second Respondent, would have a saving to them of about $180,000.*
>
> *When one is looking at a small business, the temptation is great that such a saving to them would give them a competitive edge of all the other businesses in their area.* [311]

The impact is often magnified, IR Claims noted, in sectors where competition is fierce and margins are small:

> *Businesses engaged in wage theft have greater scope to offer cheaper prices than their competitors, they can afford to open on public holidays, and they have a better chance of pocketing a bigger profit.*[312]

Mr Paul Wessel of Wessel Petroleum stated in relation to his industry:

> *For a competitor to get an advantage over us is pretty easy. The award wage is $27.55 and $35 weekends, and I have heard of plenty in the industry that are paying $15 to $20 an hour. If you do your sums on that over $7 million a year, it does not take long to put us way out of the game as far as being competitive.*[313]

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308 Queensland Government, OIR, written briefing, 7 June 2018, p 21.

309 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 7.

310 NRA, submission 021, p 6.

311 IR Claims, submission 013, pp 13-14.

312 IR Claims, submission 013, p 13.

313 Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 13.

Within the security industry, Mr Andrew Bourke, managing director of Executive Security Group, advised the committee:

> *The impact of wage theft on my business and my personal health has had a devastating impact on me, my company and the employees through unfair tendering.*
>
> *ESG has tendered for many contracts to only be rejected by clients… who want the cheapest rate and are not worried what the Security Companies pay their employees or the quality of the security officers provided.*
>
> *For example I lost a major contract solely on my tender price, whereas a major multinational Security Company won the contract only to have them outsource to a company that employ individual sub-contract staff required to hold their own Australian Business Number (ABN).*[314]

A survey respondent similarly stated that 'it is demoralising and heart breaking to constantly lose work and tenders to companies who underpay their workers for commercial gain'.[315]

Within regional communities, stakeholders highlighted that reduced local wages can have flow-on effects on spending in the community. At the public hearing in Toowoomba, Mr Lloyd Abbott of Together Union noted that 'when people have got the money they spend it', and 'if they have not got the money circulating in the community, if those funds are being held from it, that could impact on the local shop or the local service station'.[316]

In Bundaberg, Mr Allan Mahoney, Chairman of Bundaberg Fruit and Vegetable Growers (BFVG), stated of the local economic impact:

> *If you look at the numbers, it is very easy to see. At any given time I think there are 375,000 backpackers here over a 12-month period. If you start adding up the dollars, what is it doing to the economy? … We have proven that 75 percent of a worker's wage is put back into the region where they are working.*[317]

Stakeholders also pointed to specific sectoral damage, with the Queensland Tourism Industry Council (QTIC), for example, submitting that the record of poor pay and conditions in the tourism and hospitality industry, 'damages the industry's reputation and Australia's global competitiveness as a place to live and work'[318] and negatively influences 'the perception of career opportunities in the industry and the potential to engage in the hospitality industry as a long-term career opportunity.'[319] The connection between wage theft and international students has also been identified as a significant reputational risk for the international education sector[320] – cause for concern given international education is Australia's third biggest export earner after sales of iron ore and coal, and worth over $30

314 Executive Security Group, submission 029, p 2.

315 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, survey respondent.

316 Mr Lloyd Abbott, South West Organiser, Together Union, public hearing transcript, Toowoomba, 10 September 2018, p 15.

317 Mr Allan Mahoney, Chairman, Bundaberg Fruit and Vegetable Growers (BFVG), public hearing transcript, Bundaberg, 12 September 2018, p 5.

318 QTIC, submission 022, p 6.

319 QTIC, submission 022, pp 6-7.

320 Study Queensland, correspondence, 10 September 2018.

billion annually.[321] In Queensland, international education is the state's second largest service export, and was worth $4.13 billion in 2016-17.[322]

Within the construction industry, as previously noted, the CFMEU estimated in 2011 that $2.5 billion of tax revenue is lost annually through the abuse of sham contracting arrangements.[323]

More broadly, submitters considered that wage theft also serves to 'drive down overall actual wages in an industry' as part of a race to the bottom,[324] and to thereby contribute to low wage growth and wage stagnation.[325] The OIR advised:

> *Pressure to under-pay wages to remain competitive has been observed in the cleaning, horticulture, hospitality and retail industries in Australia (Laurie and Farbenblum, 2017) and the hospitality, children's services, agriculture, construction, cleaning, and clothing and footwear industries internationally (Howe and Owens, 2016). As the industries identified in Australia account for over 20% of all employees (Australian Bureau of Statistics, 2018), it is not unreasonable to conclude that wage theft may have contributed to the historically low rates of overall wage growth in recent years (see, e.g. Australian Nursing and Midwifery Federation, 2015).*[326]

The OIR noted that policymakers, including the Reserve Bank, have expressed considerable concern about the persistence of low rates of wage growth in Australia, and the negative social and economic consequences[327] associated with the low wage 'crisis'.[328]

The Senate EERC, in its report on the corporate avoidance of the FWA, acknowledged stakeholder testimony in this regard, which highlighted that:

> *… reducing wages reduces consumer spending, thereby reducing public financing through taxation—from the goods and services tax, income tax and tax on profits. This equates to decreasing public spending and investment, further reductions in consumer spending, slowing employment and falling productivity in the longer term. This is the view of the Organisation for Economic Co-operation and Development (OECD), which reports that rising wage differentials and inequality will only serve to inhibit economic growth.*[329]

Ardent Security director Mr Brian McCarrick also sought to highlight other 'knock-on effects', including:

> *… less revenue to both state and federal governments through PAYG taxes and payroll taxes and less GST revenue to the state as the employee has less to spend. It also affects business costs to other businesses through less workers compensation payments making the workers compensation pot smaller so attracts higher premiums for businesses. Greater pension payments*

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321 Australian Government, Department of Foreign Affairs and Trade, *Australia's Top 10 Goods & Services Exports, 2017 (a), ($A million*), https://dfat.gov.au/trade/resources/trade-at-a-glance/Pages/top-goods-services.aspx

322 Hon Kate Jones MP, Minister for Innovation and Tourism and Industry Development and Minister for the Commonwealth Games, 'International students continue to embrace Queensland', media release, 23 April 2018, http://statements.qld.gov.au/Statement/2018/4/23/international-students-continue-to-embrace-queensland

323 CFMEU, submission 039, p 7.

324 Queensland Government, OIR, written briefing, 7 June 2018, p 20; QCU, submission 035, pp 29-30; Mr Alan Sparks, CEO, East Coast Apprenticeships, public hearing transcript, Brisbane, 20 August 2018, p 14.

325 QCU, submission 034, pp 3, 29, 30; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 109-112.

326 Queensland Government, OIR, written briefing, 7 June 2018, pp 20-21.

327 Queensland Government, OIR, written briefing, 7 June 2018, p 21.

328 QCU, submission 034, p 2. See also: Louise Thornthwaite, 'The living wage crisis in Australian industrial relations', *Labour & Industry: a journal of the social and economic relations of work,* vol 27, no. 4, 2017, p 261.

329 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 111.

because of the loss of superannuation. In the mid-1990s the director or owner of a local security firm, after being chased by employees for their superannuation, left the country with the superannuation not paid. Those affected persons were all around my age and are now entering retirement so the loss of many tens of thousands of dollars will now have to be paid by the federal government in pensions.[330]

Further, impacts of wage theft are magnified for particular cohorts such as migrant workers.

As previously noted, some limited estimates of aggregate impacts have been provided by Farbenblum in relation to the unpaid wages of temporary migrant workers – that is, 'likely well over a billion dollars';[331] and by the ATO and Industry Super Australia in relation to unpaid superannuation. The ATO estimates the super 'gap' at $3.26 billion for 2015-16, and a total of $19.55 billion for the six years from 2010-11 to 2015-16.[332] Industry Super Australia has estimated the super gap at $5.9 billion for 2015-16.[333]

Industry Super Australia previously produced forward estimates from 2013-14 (for which it estimated an underpayment of underpayment of $5.6 billion) through to 2023-2024, suggesting that if the rate of underpayment of superannuation estimated for 2013-14 were to continue to occur in the workforce for each year of the forward estimates, the cumulative impact on retirement savings growth would be $102 billion.[334] The projection, included in the Senate Economics References Committee's *Superbad* report and also illustrated in the table below, assumed consistent wage growth and accounted for a scheduled rise in the SG rate and 5 percent returns.

Growth in the impact on retirement savings over a decade

Year ending June	Cumulative gap
2014	5.59 billion
2015	$11.84 billion
2016	$18.62 billion
2017	$25.98 billion
2018	$33.98 billion
2019	$42.68 billion
2020	$52.16 billion
2021	$62.45 billion
2022	$74.09 billion
2023	$87.21 billion
2024	$101.95 billion

***Source**: Industry Super Australia projections based on wage growth consistent with the forward estimates, ABS projected population growth, the scheduled rise in the SG rate and 5 percent returns. Cited in Parliament of Australia, Senate Economics References Committee, Superbad – Wage theft and non-compliance of the Superannuation Guarantee, May 2017, pp 14-15.*

330 Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 7.

331 Anna Patty, 'Unclaimed wages likely to top one billion dollars', *Sydney Morning Herald*, 29 October 2018, https://www.smh.com.au/business/workplace/unclaimed-wages-likely-to-top-one-billion-dollars-20181025-p50c02.html?fbclid=IwAR1dztfEtQKTF52HX-VkJvAsTtJuz_LMMVYBu9MCcfa749soLsfwkuRAVpY;

332 Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

333 Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done,* October 2018, p 3.

334 Industry Super Australia, supplementary submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, supplementary submission 7.1, p 7.

Beyond this savings effect, Industry Super Australia also submitted to the Senate Economics References Committee that the $5.6 billion underpayment it estimated for 2013-14:

> *…implies a contributions tax loss of $838 million in a single year (and a cumulative contributions tax loss over the Forward Estimates of approximately $4 billion). By 2023-24 ISA [Industry Super Australia] projects that the annual contributions tax lost on unpaid contributions will reach $1.5 billion.*[335]

Additionally:

> *We know from [the 2013-14 estimates] that a single year's underpayment is associated with a lower balance of $23,860 for 60-64 year olds, but we do not have direct information on historical underpayment. In the absence of longitudinal data, it might be useful to note that a balance difference of $23,860 would imply $1,200 less per year in an allocated pension payment and $388 per year more in age pension (if assessed at the higher income test deeming rate of 3.25 percent). If there are 250,000 current retirees affected (about double a single year impact for 60-64 year olds), this would imply a $300 million loss in private retirement drawdown and $97 million more in age pension payments. As the underpayments accumulate, these impacts will become larger.*[336]

Committee comment

The committee received a large amount of verbal and written testimony and evidence throughout the inquiry of the significant, direct and indirect costs of wage theft on Queensland workers, their families, businesses and the economy. While the lost earnings and adverse impacts on economic activity estimated to be in the billions of dollars each year are sufficient cause for concern, it is the emotional and health impacts on workers and their families that may impose the greatest cost.

Workers deserve to be paid what they are legally entitled to, and businesses equally so to operate on a level playing field. Given the evident prevalent nature of incidences of wage theft in Queensland, and across Australia, it is hard to imagine that most have not had some experience with this issue.

The committee concurs with the findings of the McKell Institute report, that 'wage theft is a serious problem, a major economic liability for individual workers, federal and state governments, and a manifestly unfair scourge that is widespread through Queensland and Australia, demanding serious policy intervention at both state and federal levels'.[337]

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335 Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee,* May 2017, pp 14-15.

336 Industry Super Australia, Supplementary submission to the Senate Economics Committee, `Inquiry into Superannuation Guarantee non-payment', March 2017, p 7.

337 Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy,* The McKell Institute, November 2018, p 7.

7 Forms of wage theft experienced

Over the course of the inquiry, individuals, businesses, industrial and employer organisations, and community stakeholders generously shared their personal experiences with circumstances of wage theft, in each case providing the committee with a distinct perspective on the problem and the forms it can take. Member organisations and community stakeholders often played an important facilitative role in this regard, collecting and presenting the accounts of their members or clients, and supporting member witnesses through the sometimes emotional and difficult process of recounting the circumstances of their exploitation. The committee was very grateful for the facilitative role played by these organisations.

This wide-ranging evidence provided the committee with many and varied insights into the different ways in which wage theft can manifest, helping to develop a deeper insight into this complex problem.

7.1 Underpayment of wages

The form of wage theft most commonly identified in evidence to the committee was the underpayment of wages. This was reported by 72.56 percent of respondents to the committee's survey, and was also the primary form of wage theft identified in survey and other data submitted by stakeholders.[338] This included reports of being paid below the minimum wage, relevant award or agreement, or not being paid for all hours worked.

Mr Jamie Gardiner-Hudson shared his story with the committee:

Case study

Mr Gardiner-Hudson was employed as a service station attendant for approximately seven years. When the business was sold to new owners, they did not pay Mr Gardiner-Hudson his correct wages.

'If they had to give me a pay rise, they would simply say that they could not afford to do that and that they would fire me instead. They finally gave me a pay rise from $14.50 an hour to $16 an hour, and I stayed on that rate up until 2014 until after they sold it to someone who I believe was a distant cousin of theirs. He told me one day that he was interested in keeping me to help him run the company, and then I got a phone call on my way home from work and I was told that I was being fired—not because of anything I had done wrong, but simply because he could not afford to keep me on.'

'I contacted the Fair Work Ombudsman and I gave them a complete detailed listing of everything. They asked me if I had pay slips or any other evidence to back it up, and I said that I was not given pay slips, that they did not believe in giving any. I went through the list of how much my wages should be increased every year and I did my own calculations. It was approximately $40,000 that I was owed in back wages.'[339]

[338] Legal services provider LawRight reported that for its self-representation service, 'unpaid salary components' was type of unpaid employment entitlements most frequently cited by clients seeking assistance (66 percent). The QCU also noted that respondents to a survey conducted on its website most commonly reported their experience of wage theft having involved being underpaid the hourly rate (34.9 percent). LawRight, submission 028, p 10; QCU, submission 034, p 22. See also JobWatch, submission 016, p 6.

[339] Mr Jamie Gardiner-Hudson, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 9.

Stakeholders highlighted the experiences of workers who are are consistently paid below the minimum wage,[340] highlighting the experiences of workers in the retail,[341] horticulture[342] and tourism industry[343] in particular.

> ***Case study***
>
> *An employee working in a business at North Lakes shopping centre was told she would be paid $300 per week in wages.*
>
> *After calculating her own wage rate, the employee discovered she was getting paid less than $10 an hour.*
>
> *'I worked there for a while and every week I had to ask for my weekly pay which he would give to me out of the till. If I didn't ask for it or the till didn't have the money, I didn't get it, or I would get a response implying that next week I would get paid. The week would end and I would feel bad about asking for the current week of pay let alone the previous week's pay. By the end, he owes me over $1500'.*[344]

In some instances, the denial of entitlements extended to total non-payment for work performed.[345] LawRight detailed the experience of 'Jun', a Chinese national employed as a food and beverage attendant on a casual basis:

> *Jun had entered into an oral employment agreement with the restaurant owner and agreed to be paid $15 per hour, with no casual loading, overtime or penalty rates. Jun worked for 3 months at the restaurant and never received any payment for the performance of his work. Jun told us the employer gave him different excuses every fortnight, when he was supposed to be paid.* [346]

The committee also heard numerous accounts of underpayment of wages occurring due to the misapplication of modern awards.[347] Within the retail sector, the NRA submitted that the underpayment of employees subject to the awards system is most commonly associated with employers applying the wrong modern award, classifying the employee at too low a level under a

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340 See for example, Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 18; Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017; QCU, submission 034, p 18.

341 QCU, submission 034, p 20.

342 QCU, submission 034, p 18.

343 Private hearing transcript, regional hearing, 2018.

344 QCU, submission 034, p 20.

345 JobWatch noted that of 912 calls to its legal information service received from Queensland since 1 January 2017, 33 of those calls involved complete non-payment of wages during the last six years. The OIR advised that such non-payment of wages is 'more properly considered modern slavery if it occurs over an extended period,' noting: 'For example, a foreign national employee of a restaurant in northern Adelaide reported working without pay for two and a half years under threat of deportation (Ferguson, 2017). Cases have also been reported where employees never received their final pay or severance entitlements'. See: JobWatch, submission 016, p 6; Queensland Government, OIR, written briefing, 7 June 2018, p 18.

346 LawRight, submission 028, p 11.

347 See, for example: IR Claims, submission 013, pp 14, 22, 24, ; NRA, submission 021, pp 8-9; Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 2; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 7; Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, p 13.

Wage theft
Submission 5 - Attachment 1

modern award, or instances of 'classification creep'.[348] A worker in the hospitality industry told the committee he had been underpaid approximately $9,000, as a result of being misclassified under the relevant award as a junior staff member, rather than an adult.[349]

The QTIC reported underpayments due to 'All inclusive wages', where other 'benefits' were provided rather than correct wages, for example 'including high cost rent or the opportunity to work with high profile chefs,' as part of the remuneration package.[350]

Other stakeholders highlighted practices such as paying workers at apprentice rates despite not having registered their apprenticeships,[351] and various other more direct forms of wage theft involving non-payment for services rendered.

For example, the committee heard reports of half-pay scams, where a worker is only paid for half the time worked, and the employer only records half the hours actually worked.[352] A half-pay scam occurred during systemic underpayments of employees by 7-Eleven, with workers reporting they worked 40 hours a week but were only paid for 20 hours.[353]

Mr Giri Sivaraman of Maurice Blackburn Lawyers noted this practice and stated:

> *… what I saw through the 7-Eleven case was that the absolute worst case was that someone was getting paid 47 cents an hour. That is when you actually added up how much they got paid for the number of hours they worked…*[354]

7.1.1 Unpaid trials

Unpaid trials can be unlawful where the period of the trial extends unreasonably past what is required to demonstrate the skill necessary for the job.[355] In this regard, Franchise Redress submitted that workers they had spoken to reported that their employer required them to work for free during a trial period, however the 'training' period would 'seemingly never end and sometimes go on for a month or more, until the franchisee would tell them that they weren't successful'. It was submitted that this was a systematic process and that 'the franchisee would then put another worker on this free trial and the cycle would continue'.[356]

An individual submitted to the committee regarding the experience of his daughter, who had undertaken an unpaid trial in which she was required to perform tasks she was not aware would form the regular duties of the position. It was submitted that 'trial runs' were 'a common practice for many other students at [employer name], each giving many hours for no payment'.[357]

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348 NRA, submission 021, p 8.

349 Private hearing transcript, regional hearing, 2018.

350 QTIC, submission 022, p 7.

351 East Coast Apprenticeships, submission 004, p 2.

352 Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network,* Australian Government, April 2016, p 7; Franchise Redress, submission 049, p 6.

353 Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network,* Australian Government, April 2016, p 7; Alison Bradley, '7-Eleven staff work twice as long at half pay rate, investigation reveals', *ABC News,* 29 August 2015, https://www.abc.net.au/news/2015-08-29/7-eleven-half-pay-scam-exposed/6734174

354 Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 43.

355 Australian Government, FWO, *Unpaid Trials*, https://www.fairwork.gov.au/pay/unpaid-work/unpaid-trials

356 Franchise Redress, submission 049, p 6.

357 Name suppressed, submission 002 supplementary, p 1.

The MEA submitted that not being paid for work completed, including time spent training and in work meetings and unreasonable length trials, 'can be the hallmark of exploitative practices'.[358]

Maurice Blackburn and joint submitters cited research into unpaid internships, which has raised concerns that some employers may be seeking to cut costs by replacing paid, entry-level positions with a revolving roster of unpaid interns.[359] IR Claims submitted the below experience of a young lawyer.

Case study

Tomy was a graduate lawyer, and was offered unpaid work experience with a legal practice in July 2017. The initial arrangement was for Tomy to undergo a one-month probationary period, with the possibility of a paid position after that.

'When I had the interview with [the employer], he said, 'let's have a look at you for one month, and after one month, if you perform well, we'll likely hire you'. But then he sent me an email, and it said three months probation.'

At the end of the three months, Tomy inquired about his future, and the possibility of a paid position with the firm.

'They said, 'oh yes, we've got a contract waiting for you, it's just getting prepared', but they just kept extending it basically - three months became four months, and then five months. They said, 'yep, we're going to hire you at the start of January', and I was like, okay, I've waited five months, one additional month should be okay, but suddenly I got cut off. They just said, 'oh no, we don't know, you're not doing well, you haven't done the right thing', and then they dumped me.'

After six months working at the firm without pay - one of the directors - gave Tomy a cheque for $500, and told him it was a 'Christmas gift'.

'I was just passionate about becoming a lawyer, but when they got rid of me, I was feeling disgusted, betrayed, depressed, you know, just sad that this kind of thing happened. I felt used, and I felt like this isn't fair and it shouldn't happen to other people - so I thought I would take action.'

At conciliation, the employer agreed to pay Tomy $18,000 in general damages.

7.2 Unpaid superannuation

As cited earlier in this report, unpaid superannuation is a widespread form of wage theft, with estimates of between $3.26 billion[360] and $5.9 billion[361] nationally per year in unpaid superannuation entitlements. A worker can have their superannuation underpaid or not paid, as its own form of wage theft, or may suffer from an underpayment of superannuation as a result of an underpayment of wages. Unpaid superannuation can also result from sham contracting, where a worker does not realise their employer is responsible for paying their superannuation.

358 MEA, submission 030, p 5.

359 Maurice Blackburn and joint submitters, response to a question taken on notice at the hearing on 16 August 2018, pp 11-12.

360 Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

361 Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done,* October 2018, p 3.

Unpaid superannuation was reported by 41.46 percent of respondents to the committee's survey, and was one of the four most commonly reported types of wage theft within the top five industries of incidence.[362]

The committee heard numerous reports of underpayment of superannuation in the accommodation and food services industry in particular.[363]

> ***Case study***
>
> *An employee working as a cook/manager, received notification from his superannuation company after working for his employer for 12 months, that no contributions had been made during that year.*
>
> *After contacting the ATO it began an investigation. The cook resigned and told the employer the reason was unpaid superannuation.*
>
> *After initially denying the allegation, the employer later wrote to the cook to advise that superannuation had not been paid as a 'happy work environment' was a better idea.*[364]

Hospitality worker and chef Mr David Carter told the committee that non-payment of superannuation contributions is 'common' in the hospitality industry.[365]

> ***Case study***
>
> *Like most chefs, David has moved from job to job in different restaurants over more than 20 years.*
>
> *A financial adviser went through David's superannuation and found that only about half of the restaurants David has worked in have paid the required superannuation contributions. Many of those restaurants have since closed, so it is unlikely the missed superannuation contributions could ever be covered.*
>
> *After decades of work, David found he had only $33,000 in superannuation.*

The Independent Education Union – Queensland and Northern Territory Branch (IEU) highlighted instances of unpaid superannuation in the education and training industry, reporting in a case study that an ATO audit had identified over $2 million in non-payment and underpayment of superannuation in a school south of Brisbane.[366]

Stakeholders also cited instances of underpayment of superannuation for apprentices,[367] and migrant workers, including workers engaged in the horticulture industry.[368]

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362 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018.

363 See, for example: Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 5; Mr David Carter, Worker/chef, public hearing transcript, Brisbane, 16 August 2018, p 8; QCU, submission 034, p 25; LawRight, submission 028, pp 10, 12, 15.

364 QCU, submission 034, p 25.

365 Mr David Carter, Worker/chef, public hearing transcript, Brisbane, 16 August 2018, p 8.

366 IEU, submission 007, p 4.

367 Julie Riding-Hill, submission 006, pp 1, 3, 4.

368 Mr Joe Moro, President, Mareeba District Fruit and Vegetable Growers Association, public hearing transcript, Townsville, 28 August 2018, p 2.

The OIR advised that an employer 'may pay the required amount to an entity controlled by the employer, which then fails to meet the relevant regulatory requirements'.[369]

A former worker in the tourism industry told the committee his employer did not pay the superannuation of an employee for the entire 18 months the worker was employed. When questioned about the underpayments the employer's response was 'He won't live long enough to make retirement.'[370]

Dr David Morrison noted that the flow-on effects of the underpayment of wages include the underpayment of superannuation, given the SG is calculated as a percentage of ordinary time earnings.[371] More directly, Dr Morrison noted that it typically involves 'employees who are paid correctly but their employer either under-contributes their superannuation entitlement or makes no contribution to their superannuation entitlement'.[372]

The Australian Council of Trade Unions (ACTU) has highlighted that unpaid superannuation is often associated with cash in hand payment arrangements (which may also avoid be used to avoid taxation and other employer responsibilities), and 'independent' contracting arrangements in which there may be uncertainty about whether genuine liability exists, and if so, who should pay it.[373]

7.3 Unpaid penalty rates

Non-payment of applicable penalty rates was another form of widespread wage theft reported by stakeholders, with employees from the accommodation and food services industry figuring prominently amongst those affected.[374] It was the second most common form of wage theft reported by 48.78 percent of respondents to the committee's survey.[375]

The YWH stated that a 'number of studies have found this form of underpayment to be the most common';[376] and noted the case of a 21-year-old hospitality worker, who was 'paid a flat rate of $11.81 an hour', '… irrespective of weekends or late hours of work between 7pm and 9pm'.[377] The YWH further clarified:

> *That is, a flat rate which disregards entitlements such as penalties, overtimes and loadings, which ought to be paid under the relevant industrial instrument.*
>
> *When [employee] raised her situation with the Ombudsman, she was advised: As a class 2 under the award the minimum wage for a casual at 18 was $15.76 an hour. On Saturdays with penalty rates this becomes $18.92 an hour and on Sunday $22.07.*[378]

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369 Queensland Government, OIR, written briefing, 7 June 2018, p 17.

370 Private hearing transcript, regional hearing, 2018.

371 Dr David Morrison, submission 032, p 10.

372 Dr David Morrison, submission 032, p 2.

373 Australian Council of Trade Unions (ACTU), cited in Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, p 29.

374 See, for example: Sevegne Newton, submission 001, p 2; Julie Riding-Hill, submission 006, p 1; IR Claims, submission 013, pp 14-16, 36, 40; Name suppressed, submission 014, p 1; Mr Lucas Halkeas, Hospitality worker, public hearing transcript, Gold Coast, 10 September 2018, p 3; LawRight, submission 028, p 11.

375 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018.

376 YWH, submission 019, p 6. See also: Australian Government, FWO, *National Hospitality Industry Campaign: Restaurants, Cafés and Catering (Wave 2) Report*, June 2015, p 7.

377 YWH, submission 019, pp 5-6.

378 YWH, submission 019, p 6.

LawRight submitted the case study of 'Emily':

> ***Case study***
>
> *Emily was an English-speaking migrant worker employed on a casual basis pursuant to an oral employment contract, who was paid $18 per hour and received no overtime or penalty rates. Emily asked the employer about her entitlements under the Restaurant Industry Award 2010 and was told that she was correctly paid the minimum wage. The employer ignored Emily's requests for adequate payment and Emily's employment was terminated after the employer was invited to participate in conciliation proposed by the Fair Work Ombudsman.*[379]

According to Mr Alan Sparks, Chief Executive Officer (CEO) of East Coast Apprenticeships, unpaid entitlements, overtime, and penalty rates are also forms of wage theft most likely to affect apprentices.[380]

IR Claims submitted the experiences of their client Thomas, a service manager at a motorcycle dealership; and Mr Kym Rake, a former waste truck driver:

> *Over the course of his entire employment, Thomas was paid for a standard 38 hour week, but worked much longer hours. He was not paid the correct hourly award rate, and he was not paid overtime – except for a short period when he was given $100 cash-in-hand when he worked late on Thursday nights. "They just claimed that because I was on salary, they didn't have to pay it – no overtime at all. We were getting paid for 38 hours, but we were working 47/48 hours a week." Thomas was also not allowed to take meal or crib breaks, as outlined under the award.*[381]

Further:

> *Instead of being paid overtime, Kym was told to "bank" the extra hours that he worked each week, and take that time off on another day. This had the effect of cheating him out of higher overtime rates of between $37 and $50 an hour that he should have been paid for the work.*[382]

Ms Isabella Morosan of Working Women Queensland told the committee that from the stories relayed by her, she found that not being paid for overtime is common across all industries, including 'health, hospitality, accommodation, financial, insurance and clerical and administration'.[383]

7.4 Unreasonable deductions and withholding of other entitlements

Evidence from inquiry stakeholders highlighted that there is a range of different ways in which employees can be subjected to unreasonable deductions and have other entitlements withheld. This included reports of cash back schemes, workers not being allowed to take meal breaks, and misuse of staff tips. Withholding of other entitlements was reported by 38.72 percent of respondents who completed the committee's survey, with unreasonable deductions reported by 17.38 percent.

The committee heard reports of cash back schemes 'where employers make the appropriate payments, but then require the worker to pay a proportion of that back to the employer in cash', which were recently associated with practices of 7-Eleven.[384]

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379 Lawright, submission 028, p 11.

380 Mr Alan Sparks, CEO, East Coast Apprenticeships, public hearing transcript, Brisbane, 20 August 2018, p 13.

381 IR Claims, submission 013, p 35.

382 IR Claims, submission 013, p 29.

383 Ms Isabella Morosan, Industrial Officer, Working Women Queensland, public hearing transcript, Brisbane, 17 September 2018, p 22.

384 ALHR, submission 051, p 3. See also: IR Claims, submission 013, pp 15, 20; private hearing transcript, regional hearing, 2018.

IR Claims noted the results of the National Temporary Migrant Work Survey revealed '112 respondents to the survey said they had been asked to pay money back to their employer in cash after receiving their wages'.[385]

Within the food and accommodation services industry, the QCU submitted:

> *Some employers believe they can make a staff member pay for a broken plate. Or replace the money a till may be out by, by raiding tips. The second point, regarding tips is very common place.*[386]

An inquiry survey respondent reported that their employer had taken staff tips, claiming it was payment for breakages from staff.[387]

The committee heard from Mr Glenn Bergin, an employee in the real estate industry, who reported his entitlements were withheld as his employer had unlawfully withheld his sales commission.[388]

The committee also heard of an employer using an employees' personal leave without consent, when the business was relocating.[389] This suggests the employer unreasonably deducted from the employees' accrued leave entitlements.

A client represented in IR Claims' submission described her experience as an apprentice hairdresser, stating that she was not paid superannuation, was being underpaid for her hours, and was not provided meal breaks.[390] Another client described her story to the committee as follows:

> ***Case study***
>
> *Ms Clifton was employed as a practice manager in a medical practice. When the practice was sold and bought by a new owner, the responsibility of her leave entitlements were transferred to the new owner.*
>
> *Ms Clifton and an assistant practice manager were made redundant, however her leave entitlements were not paid by the owner….*
>
> *'Between my assistant manager and I, there was about $70,000-odd worth of long service leave and annual leave accrued. He did eventually pay the redundancy under much protest. …*
>
> *You cannot imagine that is suddenly going to happen 16 years on, after you think you are going to retire from a job like that'.*[391]

385 IR Claims, submission 013, p 20.

386 QCU, submission 034, p 16.

387 Education, Employment and Small Business Committee, Survey for the inquiry into wage theft in Queensland, 2018, survey respondent.

388 Mr Glenn Bergin, public hearing transcript, Sunshine Coast, 11 September 2018, pp 1-9; Clare and Glenn Bergin, submission 009, pp 1-2.

389 Mr Ben Hargreaves, Food processing worker, public hearing transcript, Gold Coast, 10 September 2018, p 13.

390 IR Claims, submission 013, p 70.

391 Ms Kay Clifton, public hearing transcript, Brisbane, 3 September 2018, pp 8-9.

7.5 Sham contracting

The committee heard reports of sham contracting across multiple industries, including in the accommodation and food services industry,[392] transport industry,[393] security industry,[394] and among cleaners.[395] Sham contracting was reported by 28.05 percent of respondents who completed the committee's survey, and was one of the four most commonly reported types of wage theft within the top five industries of incidence.[396]

Ms Saskia Lawrence detailed her experience in seeking employment, in which employers insisted she would require an ABN, although the position was advertised as a casual vacancy. Ms Lawrence submitted:

> *Despite my indicating to them that to apply for an ABN in order to obtain employment is not legal, the general attitude was one of indifference and needless to say I was unable to secure a job with them. Most recently, the prospective employer was in fact willing to offer employment on the basis of an employee but upon realising the rates of remuneration as set out under the Hospitality Award, the offer was withdrawn before even starting for reasons of not being able to afford the rate commensurate with the employment classifications of the Award.*[397]

Other employment arrangements appeared to include a more deliberate misclassification of employees as independent contractors. JobWatch outlined the case of 'Rick':

> ***Case Study***
>
> *Rick was hired as an independent contractor; though the characteristics of his employment suggested he was actually an employee.*
>
> *Rick was driving his employer's truck, wore his employer's uniform and transported goods depending on his employer's needs. Rick was being paid around $19 per hour and also had to pay his own tax, superannuation and $50 a week to insure his employer's truck. Once Rick resigned, his employer withheld his pay. Rick was probably at law an employee and so was entitled to the relevant minimum award rate and other employment entitlements.*[398]

Mr Brian McCarrick of Ardent Security told the committee the security industry 'is turning to sham contracting now to employ security providers on ABNs to circumvent the payment of award wages, superannuation contributions and appropriate public liability insurances'.[399]

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392 Saskia Lawrence, submission 010, p 1.

393 JobWatch, submission 016, p 10; Mr Michael Rickards, Transport Workers Union, public hearing transcript, Brisbane, 16 August 2018, pp 37-38.

394 Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Brisbane, 28 August 2018, p 7.

395 Private hearing transcript, regional hearing, 2018.

396 Education, Employment and Small Business Committee, Survey for the inquiry into wage theft in Queensland, 2018.

397 Saskia Lawrence, submission 010, p 1.

398 JobWatch, submission 016, p 10.

399 Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Brisbane, 28 August 2018, p 7.

In another instance, an employer 'fraudulently' registered a young man for an ABN:

> ***Case Study***
>
> *A 15 year old commenced work as a local pool builder and was asked to obtain an ABN. His mother however, worked for the ATO and did not believe him to be employed as an independent contractor. She provided this advice to his employer.*
>
> *The employer fraudulently registered the young man for an ABN and demanded a tax invoice for the work performed over the previous month at a rate of approximately $10 per hour.*
>
> *It is believed the employer did the same thing to other employees.*[400]

7.6 Insolvency

The committee heard evidence of unpaid entitlements due to a company becoming insolvent. This included reports of employees who arrived at their workplace, only to find the business has closed.[401] For example, LawRight cited the case of 'Angelo', a food and beverage attendant, who arrived at his employer's restaurant and 'found a notice on the front door saying the restaurant had closed down and the company went into liquidation'.[402] Angelo had not been paid his recent wages, and later discovered his employer had not paid superannuation contributions for years. [403]

In another case, 'Bianca', a bartender, approached her employer when she realised she was being paid under the relevant award rate. Her employer responded that the business was in the process of going into liquidation and so did not pay her the entitlements owing.[404]

[400] QCU, submission 034, p 24.

[401] JobWatch, submission 016, p 17; LawRight, submission 028, pp 12-13.

[402] LawRight, submission 028, pp 12-13.

[403] LawRight, submission 028, pp 12-13.

[404] LawRight, submission 028, p 13.

Wage theft
Submission 5 - Attachment 1

8 Reasons why wage theft occurs

Research and evidence gathered during the inquiry suggests there is a range of factors that can contribute to an employer engaging in, and an employee experiencing, wage theft. From an employee's perspective such conduct may go undetected, or may be recognised but not raised or reported for a variety of reasons. Understanding the factors that contribute to wage theft and responses to it is critical to addressing the problem and its impacts.

8.1 An honest mistake

It was widely acknowledged by stakeholders, including employers and industry associations that wage theft can and is occurring in a purposeful and calculated fashion.[405]

However, over the course of the inquiry, some stakeholders also emphasised that not all instances of wage theft are deliberate. Ms Jo Sheppard, CEO of the Toowoomba Chamber of Commerce said that over 25 years in the South East Queensland business community, she had found 'the vast majority of businesses that I work with want to do the right thing'. Citing the example of a member who recently discovered they had paid employees incorrectly, Ms Sheppard said underpayments can result from 'a genuine mistake', and can be confronting and stressful for all involved.[406] Ai Group considered that 'many instances of incorrect payment are a result of misunderstanding or error'.[407] The HIA argued there were in fact no instances of deliberate wage theft in their industry, and underpayment of wages and entitlements arose only from mistake or error.[408]

Ms Lindsay Carroll, NRA Legal Practitioner and Director, submitted that 'the types of non-deliberate errors that we see on a reasonably regular basis' are:

> *… the application of the wrong modern award, misclassification of employees under a modern award and employers not understanding the circumstances when allowances, loadings and penalties are to apply and be paid.*[409]

A number of stakeholders noted that underpayments which result from genuine mistakes and oversights are often immediately corrected upon their discovery,[410] contrary to the experience of many workers' from whom the committee received evidence.

Recent media coverage highlighted the actions of cosmetics company Lush Australia, which proactively identified, then apologised for and undertook to rectify the underpayment of staff wages. It was reported that Lush had underpaid over 5,000 of its staff over eight years by approximately $2 million, as it had 'not correctly calculated staff payments accurately according to Modern Awards'.[411] The company self-reported to the FWO, engaged the NRA to review its payroll system, and developed its own repayment scheme to assist current and former staff to recover their unpaid wages. Lush referred to an error in its payroll infrastructure and internal systems, and stated that its conduct was

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405 See for example, NRA, submission 021, p 54; MEA, submission 030, pp 5-8, Executive Security Group, submission 029.

406 Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 2.

407 Ai Group, submission 038, p 3.

408 HIA, submission 043, pp 4-6.

409 Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 54.

410 See, for example: R&CA, submission 017, p 4; NRA, submission 021, p 7; QTIC, submission 022, p 9; MEA, submission 030, p 4.

411 Lush Cosmetics Australia, 'A letter to our staff', https://lushbackpay.com.au/customer-contact/

not deliberate.[412] The committee considered this to be a clear example of when a genuine error had occurred and been rectified in good faith.

Ms Sheppard (Toowoomba Chamber of Commerce) commented on the effect of complex regulation for small businesses in particular.[413] Compliance by small businesses was noted in the FWO *Annual Report 2017-18*, which stated:

> *Our intelligence indicates that, due to their comparable lack of resources, small businesses have more difficulty understanding and complying with workplace laws. In 2017-18, 46% of small businesses we audited as part of our campaigns were non-compliant, compared to 36% of larger businesses. Of all formal disputes we finalised, 63% involve small business.*[414]

The complexity of the awards system and enterprise bargaining was raised as an exacerbating factor of accidental underpayments. For example, East Coast Apprenticeships noted: 'While not an excuse but perhaps an explanation in some of these cases, is the complexity of industrial relations and, the complicated features for wages and allowances'.[415] Simplification of the awards system was suggested by a number of stakeholders.[416]

However, other stakeholders considered the argument that awards are complex, to be an insufficient excuse.[417] For example, IR Claims stated:

> *When they talk to you about this being a complicated area, I would ask you to take a fairly cynical view because of the resources that the ombudsman dedicates to that process. It is very easy for them to understand compliance. You have heard from restauranteurs and child-care centres. These people have to understand child safety and the complications of food hygiene and cross-contamination, yet they cannot understand the basic financial components of how to employ their staff. It is nonsense; it is not that complicated.*
>
> *There is a modern award. Twenty years ago, there were 16 awards for an industry in Queensland. We have one award nationally now. That argument 20 years ago had some legs, but today as a result of the nationalisation of the laws we say that it really is an inexcusable area. The Fair Work Act came in in 2009, and award transitional provisions existed over five years from 2010. Perhaps up until 2015, there may have been an argument that awards converting from a state environment to a federal might have been tricky, but it is 2018.*[418]

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412 See, for example: Nick Toscano and Maddison Leach, ''Deeply sorry': Cosmetics chain Lush admits to underpaying thousands of staff', *Sydney Morning Herald*, 17 July 2018, https://www.smh.com.au/business/workplace/deeply-sorry-cosmetics-chain-lush-admits-to-underpaying-thousands-of-staff-20180717-p4zrwf.html; Michael McGowan, 'Lush cosmetics payroll error underpaid staff by $2m', *The Guardian*, 17 July 2018, https://www.theguardian.com/australia-news/2018/jul/17/lush-cosmetics-payroll-error-underpaid-staff-by-2m.

413 Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 2.

414 Australian Government, FWO, *Annual Report 2017-18*, p 17.

415 East Coast Apprenticeships, submission 004, p 3.

416 See for example: R&CA, submission 017, p 4; MEA, submission 030, p 1; Mr Noel Ambler, private capacity, public hearing, Townsville, 28 August 2018, p 24; Mr Brian Carrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 10.

417 See for example: Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 9; private hearing transcript, regional hearing, 2018.

418 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

Wage theft
Submission 5 - Attachment 1

The view that the awards system is not overly complicated was also expressed by a private witness in Townsville, who told the committee:

> *When you go through the modern award… that is written quite well. It clarifies the job, the duties, and what they should be paid—penalty rates and all of that sort of thing. That is pretty simple. I am finding that lawyers, on behalf of the employer, are trying to hide behind this complexity and it is not. It is really annoying me. Fair Work has said, 'Yes, it's very complex.' No, it is not. I think the big problem is that they are allowing the legal system to make it complex.*[419]

The Senate EERC, in its inquiry into corporate avoidance of the FWA, was not persuaded by evidence suggesting underpayments are 'usually a result of oversight, or that the law is too complex for employers to understand'.[420] It concluded:

> *Although there may well be employers who do not take the time to acquaint themselves with the relevant awards, ignorance of the law should not be an acceptable defence. Put simply, if you want people to work for you, you have a legal and ethical responsibility to work out what they should be paid, and then pay them correctly.*[421]

Similarly, the OIR cautioned the committee about the extent of underpayments being reported as employer mistakes, stating:

> *It has been noted, however, that the mistakes identified by the FWO have consistently favoured employers, and that genuinely innocent errors could be expected to include some proportion of overpaid employees. The absence of any evidence of widespread overpayments casts a certain amount of doubt over claims of inadvertent underpayments.*[422]

8.2 Commercial gain – a business model?

Evidence suggests that deliberate wage theft occurs in a wide range of industries and employment arrangements, including large organisations and company franchises. The committee heard numerous reports of employers engaging in deliberate forms of wage theft to increase profits and gain advantage over competitors.[423] In some cases the conduct was of such a systemic nature it was included in the employers' business model. Some employers were reported as appearing to treat wage theft as a usual business practice, and having little fear of being caught.[424]

A recent Senate committee inquiry stated: 'Underpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm'.[425]

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419 Private hearing transcript, regional hearing, 2018.

420 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 72.

421 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 72.

422 Queensland Government, OIR, written briefing, 7 June 2018, p 25.

423 See, for example: JobWatch, submission 016; QCU, submission 034; Mr Michael Fraser, Investigator and Researcher, Franchise Redress, public hearing transcript, Gold Coast, 10 September 2018.

424 See, for example: JobWatch, submission 016; YWH, submission 019; QCU, submission 034; Mr David Carter, Worker/chef, public hearing transcript, Brisbane, 16 August 2018, p 4; Ms Taylor Bun, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018; Ms Mele-Otufale Tulimaiau, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018.

425 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 59.

An indicator that wage theft is part of a business model was said to be repeated and deliberate conduct. One of the main reasons for businesses to engage in deliberate wage theft is to lower the costs of running a business. NRA noted this motivation in the retail industry, submitting:

> *In NRA's view, deliberate non-compliance occurs out of a desire to increase profitability. Since labour costs are the most significant cost of doing business for a retail operator, it naturally makes sense to try and decrease this cost.*[426]

Recent case law involving a Brisbane 7-Eleven operator, similarly made this point, with Federal Circuit Court Judge Salvatore Vasta stating: 'Not only is it blight upon the system for workers to be exploited this way, it also enables a business such as that of the Respondents to unfairly profit.'[427]

In another case, a Gold Coast restaurant owner who had allegedly underpaid workers $60,000 over four months highlighted 'the true extent of the competitive advantage wage theft'.[428] It was reported that the employer 'did say to the Fair Work Ombudsman that he felt that he had to underpay so as to stay competitive'.[429] Judge Vasta stated: 'Whilst one applauds persons trying to stay competitive, this cannot be done at the expense of the employees and in breach of the FW Act'.[430]

The National Union of Workers (NUW) told the committee that within the food manufacturing industry, the NUW has assisted workers to recover $2 million in unpaid wages, which were 'taken from workers due to systemic miscalculation of shift penalties and hourly rates for workers as well as through either non-payment or underpayment of superannuation'.[431]

In its recent report on compliance activities in food precincts such as Fortitude Valley, the FWO stated that 'businesses operating in high-density hospitality precincts may be adopting non-compliant practices to remain competitive'.[432]

A respondent to the committee's survey commented:

> *Any periods of trading that do bring sufficient revenue are so fleeting and at odd times that it is clear that the business model has been deliberately designed to evade the costs of appropriately remunerating labour.*[433]

Mr Brian McCarrick, Director of Ardent Security, stated:

> *The ever-increasing pressure of competition is driving down prices and business owners desperate to stay in business have to cut expenses to match revenue. The easiest target is to cut wages through underpaying the employees or non-payment of superannuation. Wage theft in the security industry is so far embedded that unfortunately it is becoming a business model.*[434]

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426 NRA, submission 021, p 9.

427 *Fair Work Ombudsman v S & A Enterprises Pty Ltd (QLD) & Anor* [2017] FCCA 3332 (11 December 2017), [17]; IR Claims, submission 013, p 13.

428 IR Claims, submission 013, p 13.

429 *Fair Work Ombudsman v Samurais Paradise Pty Ltd & Anor* [2017] FCCA 2013 (9 August 2017), [17].

430 *Fair Work Ombudsman v Samurais Paradise Pty Ltd & Anor* [2017] FCCA 2013 (9 August 2017), [17].

431 Ms Karthika Raghwan, Organiser, National Union of Workers, public hearing transcript, Gold Coast, 10 September 2018, p 12.

432 Australian Government, FWO, *Food Precincts Activities – a report on compliance activities undertaken by the Fair Work Ombudsman*, July 2018, p 6.

433 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018, survey respondent.

434 Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8.

The YWH submitted:

> *Perhaps the key indicator of wage theft as a business model is when it affects several workers and is not an isolated incident. This submission's worst case of underpayment relates to this at Appendix E. Siva was underpaid at a famous food manufacturing company between July 2016 and May 2018, along with nearly 400 of her co-workers.*
>
> *Again, Siva experienced the most common form of underpayment – a flat rate of $22 per hour, ignoring overtime rates, shift loadings and other legal obligations:*
>
> *Some of us had worked 22 hour long shifts with no breaks. We all just thought this was normal…*
>
> *Following an audit of the site by the National Union of Workers, it was found Siva was underpaid $17,616.82. The company did not provide Siva's pay slips in the legal timeframe and cases of underpayment are still ongoing at the site.*[435]

The YWH submitted that 'the severity of wage theft at this famous manufacturer is wage theft as a business model'.[436]

The committee received evidence from a technical support officer in the healthcare sector, who stated that his employer 'has been using the lack of employment opportunities against the staff in the form of offering low wages & minimum wage increases over the years as they tell us that 'we are free to find employment elsewhere'. The committee was provided with a copy of a spreadsheet from the employer's payroll area, in which the employer (or designated officer) had calculated the difference in the wages being paid to staff compared to the award rate. This suggested the employer was aware of the exact entitlements owed to staff. The spreadsheet was saved in a common folder on the company server, where it was accessed by the employee in question.[437]

An intention to deprive workers of entitlements becomes clear when businesses make active attempts to cover up forms of wage theft, such as by deliberately misreporting wages and superannuation to both employees and the ATO, and ignoring advice provided by regulatory agencies.

An individual submitted to the committee that his daughter's employer did not pay her superannuation entitlements, however had falsely indicated on her pay slips that the contributions were being paid.[438]

Another individual provided evidence in a private hearing, that his employer had an employee 'employed on the books who does not work for the company' who was paid via the employers' bank account but then returned the money in cash. It was stated that the employer 'submits fraudulent documents to her immigration agent when requested'. [439]

The committee heard of an employer who had ignored a FWO request to back-pay an employee who had been found by the FWO to have entitlements owing;[440] and an employer who had received advice from the ATO that they were misclassifying employees as independent contractors, however ignored the advice and continued to provide employee entitlements on the basis staff were independent contractors.[441]

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435 YWH, submission 019, p 7.

436 YWH, submission 019, p 7.

437 Mr Brad Davidson, correspondence, 18 October 2018, p 1.

438 Name suppressed, submission 002, p 1.

439 Private hearing transcript, regional hearing, 2018.

440 Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 13.

441 Private hearing transcript, Brisbane, 2018.

Wage theft
Submission 5 - Attachment 1

The visibility of regulators and levels of enforcement may impact on an employers' decision to engage in wage theft, or an employee's decision not to report it. Enforcement activities reach a small proportion of businesses. One example is the FWO's National Hospitality Campaign in the restaurants, cafes and catering sector, the last phase of which audited 565 businesses across NSW, the ACT and Victoria.[442] When compared to the estimated number of businesses operating in the cafe and restaurant sector in NSW, ACT and Victoria at the time (just under 24,000 businesses), there was less than a two percent chance of being audited by the FWO, as part of this campaign.[443]

IR Claims commented on the lack of risk of being caught by the FWO, stating:

> *There is no risk. Even if you interact with the Ombudsman, the Ombudsman's own annual report says that they recovered money for 17,000 people, yet their own document says only 1,500 of those were subject to enforcements. Even when they catch you with your hand in the cookie jar, you have less than a 10 percent chance of even getting a breach notice. Of that 17,000, which we say is grossly underestimated, only 33 were prosecutions involving only underpayments and of those, 75 percent involved a migrant worker. When you look at those numbers, that means that you are 25 percent of 33—so in other words a handful—six are likely to go to prosecution or civil remedy claims if you employ a wholly Australian workforce. They run the gauntlet and then you have all the pressures of the applicant bearing all the costs and all of the risk, and the employer can sit back and know that this is a significant hurdle for an employee to chase. There is no risk.*[444]

The committee was told some employers appeared to have decided to engage in wage theft, based on a cost/benefit analysis, believing it to be worth the risk and impacts on the workers.[445] JobWatch stated:

> *That is, the financial benefit of illegally reducing wage costs which in turn provides the employer with a competitive advantage over other like businesses far outweighs the risk of being reported to the FWO. This is particularly the case given the current recovery process usually allows the chance for voluntary compliance and/or private mediated settlements rather than judicial adjudications, which allows employers to negotiate a private settlement with no prospects of additional penalties being attached.*[446]

Clibborn and Wright reported that the lack of an effective enforcement regime 'allows employers to calculate the minimal chance of being caught breaching employment laws against the considerable savings available through underpayment'.[447]

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442 Australian Government, FWO, *National Hospitality Industry Campaign 2012-15: Takeaway Foods (Wave 3)*, March 2016, pp 4-5.

443 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 60; Tess Hardy and John Howe, `Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman', *Sydney Law Review*, 2017, 39(4), p 483.

444 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 11.

445 JobWatch, submission 016, pp 8-9; ACTU, correspondence, 21 August 2018.

446 JobWatch, submission 016, p 9.

447 Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, p 216.

JobWatch stated that when calculating risk, some employers factor in the low rate of prosecution and enforcement by regulators, including the FWO and ATO.[448] A similar conclusion was reached by the Senate EERC in its inquiry into corporate avoidance of the FWA, which suggested:

> *Because unions have reduced power to inspect wages records, the union and the FWO is unlikely to deploy its limited resources to undertake a prosecution where penalties might be imposed and the ATO is unlikely to discover underpaid superannuation contributions then the most likely consequence for being found out is that they have to repay the wages—it follows that the potential rewards are significant and the risk is low*.[449]

Business structures can also impact on the degree to which wage theft is enabled. Research suggests worker exploitation may be perpetuated by 'fissured' businesses which have complex and fractured structures (as may be found in some labour hire and franchise networks), [450] and may provide further barriers to effective enforcement.[451] While these structures may assist in productivity and efficiency of the running of a business, they may also assist employers to avoid obligations and shift liability to smaller business entities or third-party intermediaries.[452]

FWO campaigns and investigations have reported on franchises' wage theft activities, which appeared to be facilitated by business models and spread through the franchise networks.[453] A well-known example is the FWO's inquiry into 7-Eleven, which investigated allegations of significant underpayment of wages and falsification of employment records across the franchisee network.[454] The investigation found that the 7-Eleven business model meant the cost of wages and risk of underpayment, settled on the franchisee rather than the franchisor,[455] and that 'controlling labour costs was possibly the only lever available to franchisees to significantly reduce their costs and increase net profit'.[456] It also reported that the franchisees showed a tendency to adopt practices from other stores, even though they were aware the wages were below the legal minimum wage.[457]

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448 JobWatch, submission 016, p 12.

449 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 85.

450 David Weil, 'The Fissured Workplace Why Work Became So Bad for So Many and What Can Be Done to Improve It', *The Economic and Labour Relations Review,* vol. 22, no. 2, 2011, p 36.

451 See, for example: Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, p 214; Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?', *Australian Journal of Labour Law*, vol 29, no. 2, 2016, pp 82-83.

452 David Weil, 'The Fissured Workplace Why Work Became So Bad for So Many and What Can Be Done to Improve It', *The Economic and Labour Relations Review,* vol. 22, no. 2, 2011, 2011, p 37.

453 See, for example: Australian Government, FWO, *Domino's Compliance Activity Report*, September 2018, pp 12, 16: The FWO noted 'ongoing systemic issues within the Domino's network'; Australian Government, FWO, *Caltex Compliance Activity,* March 2018, p 9: The FWO noted that the auditing conducted 'suggests broader, more systemic issues, within the Caltex franchise network that could be contributing to promoting or enabling noncompliance throughout the network'. See also: Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network,* April 2016.

454 Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network,* April 2016, p 4.

455 Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network,* Australian Government, April 2016, p 39.

456 Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network,* Australian Government, April 2016, p 41.

457 Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network,* Australian Government, April 2016, p 45.

The NRA stated:

> *It has been mooted in various forums that the franchising sector is particularly rife with wage non-compliance, thanks in large part to the case of 7-Eleven, due to the segregation between franchisor and franchisee [89] This is not however the case; the Fair Work Ombudsman, in its report into the 7-Eleven case, noted that the 7-Eleven franchise model was unique in the franchise sector for the extremely limited areas in which the franchisee had any direct control over their business, with wages being one of these few areas*.[458]

Franchise Redress told the committee that wage theft by employers can be 'learned', and reported that in one case franchise owners were 'taught to keep workers back one to two hours each shift to clean after clocking them off'.[459]

8.3 Lack of worker awareness

Lack of workers' awareness of their correct wage and entitlements is a factor which assists to perpetuate wage theft. If a worker is unaware of their entitlements, they are unable to enforce their rights and hold their employer accountable, should the need arise.

Several organisations reported that a significant number of employees were not aware they were being underpaid, or lacking entitlements.[460]

JobWatch submitted:

> *In JobWatch's experience, wage theft is often a secondary or unknown issue for many who call the JobWatch TIS – and is often only identified by the TIS worker rather than the actual caller. For example, a caller will often call the JobWatch TIS after being dismissed in order to obtain information about challenging their dismissal and it is in the course of that conversation that it becomes apparent that recovery of underpayments is also an option for the caller.*[461]

The significance of worker awareness in the hospitality industry was noted by the NRA in their submission:

> *The Fair Work Ombudsman noted, during the National Hospitality Industry Campaign, that although people aged between 15-25 in the café and restaurants sector were the largest single group of employees, they were the least likely to make a complaint or inquiry about their rights at work.[50] In NRA's view, this is due to a lack of awareness of this group of workers about their rights and entitlements in the workplace.*
>
> *Further, the Fair Work Act 2009 (Cth) and the processes under it are designed to allow workers to more readily take matters into their own hands. Workers cannot do this if they are not aware that those systems exist, or indeed that there is any reason to activate them.*[462]

Some stakeholders made connections between worker awareness and membership rates of unions or registered employer organisations.[463] One stakeholder group stated that 'worker exploitation and wage theft is always lowest in workplaces with the highest union membership', referring to a union's role as a source of information, involving workers in employment bargaining processes, and its ability

458 NRA, submission 021, p 10.

459 Mr Michael Fraser, Investigator and Researcher, Franchise Redress, public hearing transcript, Gold Coast, 10 September 2018, p 25.

460 See also: ALHR, submission 051, p 4; IR Claims, submission 013, pp 18, 19, 21.

461 JobWatch, submission 016, p 7.

462 NRA, submission 021, p 13.

463 These are registered organisations under the FWA or the IR Act.

Wage theft
Submission 5 - Attachment 1

to take action.[464] The QCU supported this view, suggesting 'union members are less likely to be underpaid and more likely to be willing and able to enforce their legal entitlements'.[465]

There is some evidence that suggests particular employee groups are generally aware they are being underpaid or not treated fairly, however are either unaware of the existence of the FWO and its aims,[466] or do not wish to report their concerns. For example, the findings of the *National Temporary Migrant Work Survey* reported that the majority of temporary migrants, being 78 percent of working holiday makers and 73 percent of student visa holders, who earned $15 or less in their lowest paid job, knew that they were being paid under the minimum wage,[467] but showed a level of acceptance, for want of a better word, and perceived 'that few people on their visa can expect to receive minimum wages under Australian labour law, with at least 86% believing that many, most or all other people on their visa are paid less than the basic legal minimum wage'.[468]

In response to a question of the committee regarding ability of workers to recover lost wages, Mr Dan McGaw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, told the committee:

> *I guarantee you could walk out into the street right now and people would not know what the Fair Work Commission is or the Fair Work Ombudsman is. If a person or employee does not know where to go for help, they are probably limited and they will probably bite their tongue and think, 'This is the norm. This is what I have to do.*[469]

8.4 Power imbalance

The power imbalance in the relationship between employers and employees can facilitate wage theft, as employees may be less likely to advocate for their entitlements if they feel they are in a position of weakness.[470] This is particularly likely in vulnerable populations such as young workers, and those whose first language is not English, and where workers are unaware or unable to obtain assistance in understanding and enforcing workplace rights.

The ACTU stated it believed that 'many workers are in a weak position to ask for decent wages (i.e. they are casual or temporary visa workers, labour hire or sham contracts) and therefore will "accept" a wage that is under the legal minimums for their industry'.[471]

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464 Maurice Blackburn and joint submitters, submission 033, p 8.

465 QCU, submission 034, p 10.

466 Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, p 6.

467 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 6,

468 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 48.

469 Mr Dan McGaw, Branch President, QCU Toowoomba Branch; State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 13.

470 Maurice Blackburn and joint submitters, submission 033, p 5; YWH, submission 019, p 8; ACTU, correspondence, 21 August 2018.

471 ACTU, correspondence, 21 August 2018, p 7.

The YWH suggested young people are particularly vulnerable:

> *Young people who experience wage theft are often in one of their first jobs and can find it hard to speak up or raise issues related to wages with their boss. This can have a number of effects on young people, ranging from their confidence levels to their economic position.*[472]

A power imbalance is apparent where employers have extensive resources at their disposal, compared to those of employees. In response to a committee question regarding workers' ability to recover lost wages, Mr Dan McGaw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, responded:

> *Very little hope, particularly if they are dealing with a big company that has not unlimited resources but access to hordes of lawyers and solicitors. There are industrial relations experts on one side and the HR manager on another side and then you have a barrister and a solicitor, compared to poor old Joe Blow with his solicitor from down the road. There is not much hope for those workers.*[473]

Another individual stated:

> *Companies have the ability to scare individuals or provide them information such as by saying, 'This is the agreement you are under.' Employees have no ability to go and check it because the organisations they go to just do not know or just do not care or they are too incompetent to do some investigation.*[474]

The committee heard from an individual in a private hearing in Brisbane, who had experienced wage theft in the cleaning industry, and told the committee: 'the company has many people and they have money to pay good lawyers, and I do not have any kind of support'.[475]

Case study

Alannah was employed as an apprentice hairdresser. She was underpaid $22,415 by her employer, including underpayments in wages and overtime. When Ms West approached her employer about the underpayments, her employer 'verbally abused her, and offered her an ultimatum – either resign or be sacked'.

'They made me feel like I was the smallest person in the world and they were the biggest people.

They made me feel tiny - and that I was useless - and that I didn't have any say in what was going on'.[476]

8.5 Lack of documentation

Employers' avoidance of legal requirements to provide payslips[477] and other documentation, was consistently raised during the inquiry. This not only hinders detection of wage theft by regulatory agencies and the worker, but may also factor into a person's decision to report their underpayments.

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472 YWH, submission 019, p 8.

473 Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 7.

474 Private hearing transcript, regional hearing, 2018.

475 Private hearing transcript, Brisbane, 2018.

476 IR Claims, submission 013, pp 21, 24.

477 Under section 536 of the FWA, an employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

Wage theft
Submission 5 - Attachment 1

If a worker is not receiving any, or correct, payslips, it becomes extremely difficult for the worker to realise and accurately calculate the extent to which they are being underpaid. [478]

The YWH submitted:

> *Without detailed, regular pay slips young workers aren't given the opportunity to understand their entitlements. This leaves young workers powerless when it comes to ensuring they are being paid correctly.* [479]

The YWH told the committee about the impact of lack of documentation on a worker when their wages were reduced:

> ***Case Study***
>
> *Kate worked in the hospitality industry and did not receive payslips. Prior to broader reductions in penalty rates, Kate's weekend rate was reduced from $23 per hour to $16.62 per hour, with no information or discussion from her employer.*
>
> *Without payslips Kate worked out her pay rate from discussion with colleagues and calculation of her pay and hours worked. She was nervous about questioning the pay reduction in case her employer said her previous pay was an accidental overpayment and attempted to recover money from her.*
>
> *When Kate raised her concern about reduced wage rates, her employer said he would get back to her. He failed to do so, despite Kate following up. Kate said without proof of her original and reduced wage rate, she wasn't empowered to question the changed rate.*[480]

The committee also heard from Mr Sergio Duran, a cleaner, who stated:

> *I was working part time and they never gave me a pay slip so I did not know how much they used to pay me, I did not know about our taxes and I did not know about my superannuation. They just said, 'We are upgrading our system,' and that was it.* [481]

In a recent case before the Federal Circuit Court, a 7-Eleven operator was found to have breached record keeping practices. Judge Vasta noted the effect this had on the relevant FWO investigation, and stated:

> *The record keeping was an appalling breach of the standards that are needed for businesses to operate fairly in this country. But not only did that mean that there were false records that were kept, it meant that when the Fair Work Ombudsman wanted those records, they were given false records, which, as I have already pointed out, has meant that the investigation was a lot more arduous and tedious than it should have been.* [482]

8.6 Worker non-reporting

As cited above, there are many reasons why a worker who is aware that they have been, or are being, subjected to wage theft may choose not to report the activity. The committee heard multiple reasons why employees did not report their concerns, ranging from the cost and time to recover wages, to fear

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478 See, for example: Mr Moe Turaga, private capacity, public hearing transcript, Bundaberg, 12 September 2018, p 11; Ms Katherine Hamburg, Hospitality worker, public hearing transcript, Brisbane, 16 August 2018, p 22; YWH, submission 019, p 6; QCA, submission 035, p 2.

479 YWH, submission 019, p 6.

480 YWH, submission 019, p 15.

481 Mr Sergio Duran, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 2.

482 *Fair Work Ombudsman v S & A Enterprises Pty Ltd (QLD) & Anor* [2017] FCCA 3332, 11 December 2017, [23].

of damage to reputation and employment prospects. Other workers simply felt unable to do anything about it.

Of the 328 respondents who completed the committee's online survey, 36 percent (119 respondents) reported wage theft to their employer, 25 percent (82 respondents) reported wage theft to the FWO and 10 percent (33 respondents) reported wage theft to the ATO. Some respondents reported the issue to more than one authority.[483]

East Coast Apprenticeships submitted this reluctance can extend even beyond the employment period, with young people 'often reluctant to report such matters even when they have left that employment'.[484]

JobWatch suggested tight market conditions and 'poor employment prospects across Australia' were factors in under reporting wage theft, and:

> *…vulnerable and disadvantaged employees often feel they have little option but to accept their below minimum wage rates as there are few legally compliant employers in their industry or, if they complain and are dismissed, will be unable to find another job let alone find another job with a compliant employer.* [485]

In a case example of an employee who was underpaid $5,000 in salary, $13,000 in superannuation and $2,500 in other payments, JobWatch stated:

> *The failure to pay the correct legal entitlement forces workers to resolve difficult questions whether having any job or having a good reference is worth being paid less than their legal entitlements… Kaled decided to take proactive steps to find a new employer rather than challenge his current employer's inability to pay.*[486]

Some stakeholders did not report due to their belief that the situation was not better elsewhere,[487] or that their situation would not be improved by reporting.[488]

Franchise Redress outlined reasons workers do not report wage theft, and in addition to fear of consequences, stated: 'Workers also often don't believe that they have enough evidence to show that they were underpaid and feel that reporting wage theft would be a waste of their time'.[489]

The FWO's investigations into 7-Eleven stores in 2016, reported employees feeling resigned to a lower rate of pay and unlawful conditions, including unpaid training and excessive hours.[490] Workers told the

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483 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018.

484 East Coast Apprenticeships, submission 004, p 2.

485 JobWatch, submission 016, p 7.

486 JobWatch, submission 016, p 11.

487 See for example: JobWatch, submission 016, p 8; Dr Stephen Clibborn, submission 011; Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017; Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland,* 2018 (see chapter 5.3)

488 See, for example: JobWatch, submission 016; Franchise Redress, submission 049, p 12; Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, pp 6, 59.

489 Franchise Redress, submission 049, p 12.

490 Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network,* Australian Government, April 2016, p 49.

FWO they did not report the wage and conditions due to inability to find other employment, and pressures such as student loans and visa working conditions.[491]

The National Temporary Migrant Work Survey found, 'international students and backpackers were aware of the Australian minimum wage and knew they were being underpaid, but believed that few people on their visa can expect to receive that wage'.[492] Dr Laurie Berg stated:

> *Instead, the more significant reason they declined to make complaints about underpayment was that they do not know what to do or that it seems too hard or too much work. Of this vast majority—almost 90 percent—who had not attempted to report their underpayment, around half of those said that they would be open to doing so.*[493]

The length of time required to recover wages, compared to the time a person intends to stay in Queensland also affects reporting. For example, the QCA explained:

> *… a lot of the different migrant communities and international students are not here for a really long period of time as well. Sometimes we have people coming forward saying, 'I'm owed this amount of money,' but by the time they are able to go through the right process it will be months in order to get that back and they might be moving on or going somewhere else. It is quite a transient community as well.*[494]

Some international workers feel it necessary to work more than the stipulated hours, in breach of their visa conditions, resulting in fear of visa cancellation and deportation.[495] The FWA also does not apply once a visa condition has been breached.[496]

As highlighted by Mr Palani Thevar, an employee's cultural background may influence reporting:

> *Often if people come from some part of the world they are very scared of authority, so anyone who is an authority figure they do not really feel comfortable telling. They do not understand that people can maintain confidentiality when they share. It is often themselves they are worried about but also friends and other people as well.*[497]

The results of the National Temporary Migrant Work Survey, outlined in the report *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia,* revealed that of 2,250 survey participants who had acknowledged they had been underpaid, 91 percent 'suffered wage theft in silence'.[498] The majority (97 percent), did not contact the FWO for assistance. Of the 194 participants who pursued recovery of unpaid wages, 67 percent did not receiving anything, and only 16 percent

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491 Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network,* April 2016, pp 50-51.

492 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017.

493 Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 19.

494 Ms Elise Ganley, Community Organiser, QCA, public hearing transcript, Brisbane, 3 September 2018, p 4.

495 Private hearing transcript, Brisbane, 2018; Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 8.

496 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 8.

497 Mr Palani Thevar, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 4.

498 Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 5.

received the full amount owed.[499] Of those employees who pursued recovery with the FWO's assistance, 58 percent did not receive any amount, and 21 percent recovered the full amount owed. Ten participants pursued recovery with the assistance of a union; 30 percent recovered all entitlements owed, and 40 percent recovered some of their unpaid amount.[500]

A report commissioned by the FWO about international students' interactions with the FWO also highlighted a reluctance to approach the FWO among the 766 international students who participated in the survey.[501] Reasons for not reporting to the FWO included that 'respondents doubted that approaching FWO would improve their situation',[502] and indicated they would be more inclined to report if they knew the FWO 'had successfully helped other students'.[503]

This view, that the FWO could or would not help employees recover stolen wages if they formally reported the incidence, was consistently expressed by stakeholders during committee hearings. The reasons cited for this view were that employees were advised when calling the FWO for assistance that they would have to do their own investigations, calculations of estimated lost entitlements, approach the employer for mediation, and take the matter to court should mediation be unsuccessful. Most witnesses and submitters advised that following this advice, or lack of response from the FWO, they felt that reporting was futile, or that should they wish to pursue any reimbursement of lost entitlements, they were on their own. This issue is addressed in more detail in chapter 11.

8.6.1 Intimidation and reprisals

The committee heard numerous reports of workers who feared loss of employment or being allocated reduced hours within casual rosters, or who had experienced intimidation or reprisals after raising their wage theft issues. Concerns about employment security were raised in a range of industry sectors including in relation to the food-processing industry, group-training organisations representing apprentices, and workers in the tourism industry.[504]

One survey respondent stated:

> *I worked as an ESL teacher for twenty-four years in Brisbane and if you want to keep your job, you do not try to enforce your rights as an individual or as a union member.*[505]

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499 Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 6.

500 Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 6.

501 Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, p 56.

502 Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, pp 6, 59.

503 Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, p 6.

504 See, for example: YWH, public hearing transcript, Gold Coast, 10 September 2018, p 4; Mr Alan Sparks, CEO, East Coast Apprenticeships, public hearing transcript, Brisbane, 20 August 2018, p 12; private hearing transcript, regional hearing, 2018; private hearing transcript, Brisbane, 2018.

505 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018, survey respondent.

Such concerns were also reflected in the comments of another survey respondent, identified as a worker in the security industry. The respondent said they and dozens of other guards:

> *… feel as though we are being taken for a ride but none of us can speak up for fear of our jobs and our reputation within the industry nobody will hire somebody that took on their own company.*[506]

JobWatch detailed a case study of a couple who spoke to their employer when they realised they were earning under the minimum wage, and requested copies of their timesheets. The employer agreed and at first appeared conciliatory; however late cancelled their shifts and did not engage any further. It was then unclear whether they had been dismissed, or whether they would receive their legal entitlements.[507]

Casual employees were particularly concerned about loss of employment. A survey respondent, employed in a medical practice stated: 'many staff are casual and fear being left off the roster if they complain to employer so just put up with it.'[508]

Mr Beau Malone, state organiser for the Queensland and Northern Territory Branch of the Electrical Trades Union, told the committee:

> *…at the moment, labour hire and insecure employment are the main issues that we are seeing around wage theft, because people are not prepared to raise the issue for fear of losing their job. There are no alternative permanent employment opportunities out there that give them the ability to pay down loans and put food on the table for their families. They are going out there knowing that they are getting their wages stolen off them.*[509]

In a private hearing, a migrant worker spoke of the general fear of making a claim with FWO, and that workers in the cleaning industry feel scared to talk or provide information.[510]

A member of the QCA told the committee of people's fear in coming forward to share their story, and stated:

> *There is a bit of fear—fear of losing some kind of income and fear of identification about themselves, so someone will be finding them.*[511]

Bullying and intimidation was reported by clients of IR Claims,[512] and by Maurice Blackburn and joint submitters.[513]

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506 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018, survey respondent.

507 JobWatch, submission 016, p 15.

508 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018, survey respondent.

509 Mr Beau Malone, State Organiser, ETU Queensland and Northern Territory Branch, public hearing transcript, Gold Coast, 10 September 2018, p 21.

510 Private hearing transcript, Brisbane, 2018.

511 Mr Palani Thevar, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 4.

512 IR Claims, submission 013, pp 5, 37, 89.

513 Maurice Blackburn and joint submitters, submission 035, p 21.

Case Study

A service station attendant was underpaid $261,715 by his employer.

After approaching his employer, and initiating dispute resolution, he was subjected to intimidation and bullying by his employer. He was threatened, harassed, and intimidated by his bosses, and according to his wife, his reputation in the industry was also damaged.

'They even tried with me when I told them I was taking it through to court, and they kept threatening me and saying I would lose everything - just to try and get me to drop it'.[514]

A survey respondent also reported bullying by their employer, and stated: 'I was also warned verbally to "keep quiet about it" as there was countless others who were unaware of the EA terms'.[515]

The National Temporary Migrant Work Survey reported a case study about an employee who reported intimidation from his employer through direct messages and legal correspondence seeking cost orders in the case of any action taken by him against his employer. The YWH noted that this correspondence would have been difficult to understand and affected the employee's confidence to pursue his rights. The YWH considered this to be 'deliberate intimidation by employers to discourage actions being brought in relation to wage theft'.[516]

8.7 Cash economy

Wage theft may be facilitated by employers who pay cash-in-hand and avoid complying with relevant reporting, documentation and legal entitlements.

Cash-in-hand payments were explored by the Black Economy Taskforce, which identified the practice was used to systematically 'avoid paying minimum wages, avoid paying taxes, reduce compliance costs and allow under-reporting of income by the recipient of the payment'.[517] In its report, the Black Economy Taskforce noted broader drivers of the black economy, including high tax and regulatory burdens, and low profit margins. It reported that the black economy 'is fuelled by a combination of commercial opportunity and poor transparency'.[518]

The Black Economy Taskforce Report recommended mandating the payment of salaries and wages into bank accounts to improve transparency and provide further protections for workers.[519] The Federal Government agreed in principle that 'the payment of salary and wages into bank accounts is preferable to the payment of cash' and advised that 'consultation will be held with industry on options to encourage the electronic payment of salary and wages, noting the particular impact on small business'.[520] The Black Economy Taskforce also noted that cash-in-hand payments for wages is sometimes instigated by employees.[521]

514 IR Claims, submission 013, p 73.

515 Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland,* 2018, survey respondent.

516 YWH, submission 019, pp 8-9.

517 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 12.

518 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 15.

519 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 58.

520 Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report,* May 2018, p 13.

521 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 59.

Wage theft
Submission 5 - Attachment 1

The Restaurant and Catering Australia (R&CA) submission stated that employees in the hospitality sector sometimes requested cash payments:

> *The main manifestation of the black economy as it relates to the hospitality sector is the payment of workers' wages in cash. R&CA notes that this practice is, in many cases, driven by employees asking their employers to be paid in cash. In a survey of R&CA members, roughly one-quarter (26.9 percent) of hospitality sector businesses indicated that their staff members had requested cash-in-hand payments at some point in time. When asked to provide the reasons why staff requested cash-in-hand payments, the most commonly reported answers were to avoid tax or losing Centrelink payments and other Government benefits. Businesses also reported that some staff made requests to receive cash-in hand payments due to specific restrictions on their visas*.[522]

[522] R&CA, submission 017, p 3.

9 Promoting compliance

Any system response to a regulatory issue inevitably draws on a mix of proactive and reactive strategies, in order to both:

- deliver appropriate regulatory interventions and support after an issue has been reported or detected by authorities, and
- seek to address the enabling factors that allow the issue to arise in the first place and encourage early identification and reporting, to minimise its effects.[523]

This chapter considers the effectiveness of current proactive approaches to addressing wage theft, focussing on:

- education and awareness programs, and
- other proactive compliance mechanisms in the form of licensing regimes, business registration and procurement policies, all of which serve to increase oversight and establish additional obligations and incentives for parties to operate within the legislative framework.

9.1 Education and awareness

As highlighted in Chapter 8, a lack of awareness or understanding of workplace rights and responsibilities can leave employers at higher risk of non-compliance; and employees, ill-placed to question their wages and entitlements or recognise whether they meet minimum legislative standards.

Educational and awareness initiatives are critical for addressing these shortfalls in knowledge and understanding, thereby reducing scope for employer errors and ensuring workers are equipped to identify circumstances in which they may not be receiving their minimum entitlements.

However, the committee wishes to acknowledge at the outset that these initiatives are likely to have limited impact on those employers who deliberately seek to evade their employment obligations. Equally, they do not address the disincentives for reporting wage theft arising from the cost and inaccessibility of recovery processes and from broader shortcomings in enforcement. Accordingly, the measures outlined here will address only a subset of the issues that are contributing to the prevalence of wage theft in Queensland.

9.1.1 Current education and awareness services

The FWO and ATO both provide detailed information and resources about workplace rights and obligations, chiefly as online content on their respective websites. This includes information on workplace laws in an array of different formats and targeted to different industries and audiences, as well as a number of self-service tools.

The FWO's online and mobile content includes:

- factsheets and guides, including information tailored to specific industries or audiences
- an online learning centre, including a recently launched 'small business showcase'

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523 New South Wales Government, Department of Finance, Services and Innovation, *Guidance for regulators to implement outcomes and risk-based regulation,* October 2016, p 44; Meredith Minkler et al., 'Wage Theft as a Neglected Public Health Problem: An Overview and Case Study from San Francisco's Chinatown District', *American Journal of Public Health*, vol. 104, no. 6, 2014, pp 1010-1020; Associate Professor John Howe, Dr Tess Hardy and Professor Sean Cooney, 'The transformation of enforcement of minimum employment standards in Australia: A review of the FWO's Activities from 2006 to 2012', Centre for Employment & Labour Relations Law, Melbourne Law School, University of Melbourne, July 2014, p 56.

- a Pay and Conditions tool, including a 'Find my Award' search facility
- the smartphone app 'Record My Hours', to assist workers to keep their own log of hours worked, and
- the 'My account' online portal for online enquiries or to save tailored information based on user preferences.[524]

The ATO provides online information and resources including:

- online fact sheets, brochures, videos and guidance
- an 'Estimate my super' tool for employees
- a 'Super guarantee private health check' resource for employers
- various small business webinars and a free Small Business Superannuation Clearing House which allows small businesses to make a single electronic payment and distributes the payments to each employees' super fund
- the SuperStream system - the 'standardised electronic payment and information sharing system for employers and super funds',[525] and
- online enquiry and live chat facilities.[526]

The OIR provides a full information service on its website, though its approach is primarily 'to be a conduit' with federal regulators.[527] All three regulators also operate telephone information services.[528]

Usage statistics from the FWO and OIR indicate that their informational resources and services are well utilised. The FWO has reported that in 2017-18, over 9.5 million users viewed its website, with staff answering over 376,200 calls and 64,533 online enquiries.[529] The OIR advised it receives approximately 11,000 enquiries each year about state and federal wage matters.[530]

The FWO and ATO also seek to promote their online resources and provide associated updates in newsletters and alerts issued through email subscription services and social media platforms (including, for the ATO, issuing SG payment reminders).[531] The FWO advised that it has recently

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524 Australian Government, FWO and ROC, *Annual Report 2017-18,* 2018, pp 1-2, 13-14.

525 Australian Government, ATO, '*Commissioner of Taxation Annual Report 2016-17*, 2017, p iii.

526 See: Australian Government, ATO, 'Small Business Superannuation Clearing House', 24 September 2018, https://www.ato.gov.au/business/super-for-employers/paying-super-contributions/small-business-superannuation-clearing-house/; Australian Government, ATO, 'Key webinar topics for small business', 24 October 2018, https://www.ato.gov.au/general/webinars/small-business-webinars/?sbnquicklink; Australian Government, ATO, 'Estimate by super', 21 December 2016, https://www.ato.gov.au/calculators-and-tools/estimate-my-super/; Australian Government, ATO, correspondence, 19 July 2018, pp 7-8.

527 Ms Natalie Wakefield, Director, Labour Hire Licensing Unit, OIR, public briefing transcript, Brisbane, 11 June 2018, pp 4-5.

528 Ms Natalie Wakefield, Director, Labour Hire Licensing Unit, and Mr Tony Schostakowski, Chief Inspector, Industrial Relations Regulation and Compliance, OIR, public briefing transcript, Brisbane, 11 June 2018, p 4.

529 Australian Government, FWO and ROC, *Annual Report 2017-18,* 2018, pp 13-15.

530 Queensland Government, OIR, written briefing, 7 June 2018, pp 1, 3.

531 Australian Government, FWO, correspondence, 5 October 2018, p 3; Australian Government, ATO, correspondence, 19 July 2018, p 8.

released social media campaigns and content to reach vulnerable employee groups and their employers, including:

- general campaigns about tools and resources available to assist employees and employers to understand their rights and obligations under Australian workplace law
- a targeted campaign for international students, and
- a targeted campaign promoting the FWO's apprenticeship guides.[532]

All three agencies also undertake targeted engagement initiatives with key industry stakeholders through various events and campaigns, to collaborate on efforts to promote compliance in their industries.

For the OIR, these campaign activities have been focussed on the labour hire industry.[533] For the ATO, outreach and engagement activities include:

- discussing SG obligations at tax agent forums and presentations to ensure advisors are aware of recent developments and changes in approach
- holding regular small business seminars to assist new businesses to understand their obligations and requirements, and
- conducting school visits to engage students in discussions about tax and super to assist them to prepare for employment and further education (In its 2016-17 annual report, the ATO advised that it had conducted 'almost 270 school visits, delivering face-to-face talks and webinars' which 'engaged over 19,500 students in discussion', and noted that 600 schools had registered for its *Tax, Super and You* online teaching resource, which had been updated during that financial year to map it to the national school curriculum for Years 7 to 10). [534]

The ATO also reported that it is expanding its network of community partners so it can assist them in helping new people to Australia, recognising that 'engaging through trusted community leaders is one of the most effective means of communicating with this audience'.*[535]*

The FWO advised the committee that in Queensland, it 'has funded Growcom, an employer organisation in the horticulture industry, though the Community Engagement Grants program to educate Queensland growers about issues such as labour procurement and employment law'.[536]

As part of its International Student Engagement Strategy, the FWO provides information for distribution through more than 20 international student community stakeholders in, or responsible for Queensland. It also 'partners with the Department of Education and Training to distribute information nationally to 8,000 registered providers of education to overseas students. Those providers include tertiary institutions, vocational education providers and English language educators.[537]

The FWO reports it has also formed relationships with community organisations, such as community legal centres and universities, 'to more effectively reach at risk workers' through these intermediaries'. This includes engaging with these community partners to highlight a visa assurance protocol with the

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532 Australian Government, FWO, correspondence, 5 October 2018, p 3.

533 Ms Natalie Wakefield, Director of the Labour Hire Licensing Unit, OIR, public briefing transcript, Brisbane, 11 June 2018, p 4.

534 Australian Government, ATO, correspondence, 19 July 2018, p 8; Commissioner of Taxation, *Annual Report 2016-17,* p 17, updated 30 October 2017, https://www.ato.gov.au/misc/downloads/pdf/qc53532.pdf

535 Australian Government, ATO, Commissioner of Taxation, *Annual Report 2016-17,* 2017, p 17.

536 Australian Government, FWO, submission 044, pp 3-4.

537 Australian Government, FWO, correspondence, 5 October 2018, p 3.

Department of Home Affairs that allows migrant workers 'to seek our assistance without the fear of having their visa cancelled'.[538]

In 2017-18, the FWO launched a tool that automatically translates its website content into 40 different languages, consolidating existing foreign language resources (translated material on key topics in 30 different languages).[539]

9.1.2 Stakeholder proposals

Stakeholder feedback on existing regulator education and engagement activities was generally positive. IR Claims director Mr Miles Heffernan stated of the FWO in particular:

> *'For your $110 million, the ombudsman does an exceptional job of education. They have a great website; they have great information which employers can find on what they need to do to comply with the laws.*[540]

Ms Lindsay Carroll, NRA Legal Practitioner and Director, stated:

> *… the Fair Work Ombudsman has a number of fantastic resources that are available online—pay calculators, resources that assist with identifying which award applies. The Fair Work Ombudsman operates a great hotline where people can go for general advice.*[541]

However, many stakeholders saw room for improvement in the general approach to education and awareness activities, citing the persistence of low levels of awareness of employee rights and the options for employees to access information and pursue remedies, particularly amongst vulnerable cohorts (see chapter 8.6).

There was support for a broad public education campaign to support the cultural change necessary to empower workers and highlight the seriousness of wage theft.[542] The QNMU considered that such a campaign should be funded to:

- increase workers' awareness of workplace rights and entitlements and the action they can take to remedy wage theft, and
- increase employers' awareness of their workplace obligations to comply with industrial laws and keep accurate time and wages records.[543]

IR Claims submitted that the campaign should be also highlight the impact of wage theft on its victims.[544]

Other suggested improvements from stakeholders' focussed on enhancing approaches to education for three vulnerable cohorts – international students, migrant workers and young people.[545]

Of these groups, the largest amount of education-related commentary was directed towards the education of young people on their employment rights and responsibilities.

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538 Australian Government, FWO and ROC, *Annual Report 2017-18,* 2018, p 2.

539 Australian Government, FWO and ROC, *Annual Report 2017-18,* 2018, p 1.

540 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

541 Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 59.

542 IR Claims, submission 013, p 57; JobWatch, submission 016, pp 3, 11; YWH, submission 019, p 11; QNMU, submission 023, pp 4, 8, 10.

543 QNMU, submission 023, pp 4, 8, 10.

544 IR Claims, submission 013, p 57.

545 JobWatch, submission 016, p 1; QTIC, submission 022, p 11; Dr Laurie Berg and Bassina Farbenblum, submission 042, p 5; Ms Debra McPherson, private capacity, public hearing transcript, Cairns, 27 August 2018, p 11.

Wage theft
Submission 5 - Attachment 1

Stakeholders generally acknowledged that the current approach to engaging with this cohort does not appear to extend much beyond making information available, notwithstanding the efforts of some institutions. Notably, the 600 schools signed up to the ATO's online program and 270 schools visited by the ATO throughout 2017, represent only a very small fraction of the 9,444 schools nationally, as reported by the ABS in 2017.[546] Further, while the Queensland Government previously provided joint funding for a Young Workers' Advisory Service (YWAS) for young people under 25 years of age, and an associated education and outreach program; this funding, and accordingly, the provision of the service, ceased in 2012.[547] YWAS activities had included visits to schools and sessions at Brisbane Youth Service and Get Set for Work agencies, as well as a telephone helpline and casework services.[548]

The NRA submitted:

> *We are aware that many schools provide a basic education with respect to the necessity of having a tax file number, and some schools go so far as provide some education in workplace skills. However, we know of no formalised attempt to educate young people about their rights under the Fair Work system, even in formal traineeships and apprenticeships…*[549]

Mr Martin de Rooy, YWH stated:

> *In our experience, schools focus a lot on careers, university and degrees, which is great, but they do not focus on jobs. A lot of senior secondary school students and TAFE students already have jobs. They are not being prepared for the jobs they currently have and they are not being prepared for the jobs they may have in the future… We think young workers definitely need to be taught their rights at work in TAFEs and schools. Similarly, if those young people would like to run businesses, this will be helpful for them as well.*[550]

Gold Coast-based teacher Ms Jessica Prouten stated:

> *…. I teach business and legal studies and in those subjects we have an opportunity to discuss workplace law and what happens in the workplace broadly under the HR banner, but not every student does those and there needs to be some space provided for a group that actually have training in what happens in workplaces to come in and talk to the students. Whilst I have the training to teach business and legal studies, I am not an expert in industrial relations law and some of the questions that students raise at times are questions that I have to go away and look up answers to because I am not an expert. So it would be really great to have experts come in—in the same way that we would get in experts to talk to them about how to set up a business—to talk to them about what they can do when they find themselves in difficult situations…* [551]

Ms Helen Wood, Executive Manager, Client Relationships, Hostplus stated with regard to superannuation in particular:

> *There is a need for financial education as part of either the national curriculum but certainly education for adults… I do think it is important, particularly in superannuation. People start their*

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546 Australian Government, ABS, '*4221.0 – Schools, Australia, 2017',* http://www.abs.gov.au/ausstats/abs@.nsf/mf/4221.0

547 Working Women Queensland, correspondence, 26 October 2018.

548 Queensland Working Women's Service Inc, 'Annual report 2011/2012, 1 July 2012', pp 17-19, http://wwq.org.au/wp-content/uploads/2015/01/QWWS-2011-2012-Annual-Report.pdf

549 NRA, submission 021, p 12.

550 Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, pp 24-26.

551 Ms Jessica Prouten, private capacity, public hearing transcript, 17 September 2018 (evening), p 4.

Wage theft
Submission 5 - Attachment 1

> *first jobs at times when they are 14 or 15. They walk into a café and do some waitressing on a Saturday, and they literally have no idea whether they are eligible for super.*[552]

Ms Prouten further stated:

> *…. even if we just bring in a guest speaker on a day to allow students to raise some of these issues. You can find time to do that for an hour, as long as it is allowable, and I think that is the question. When I have spoken to co-workers in other schools, they are not sure that they are allowed to do that because of the political climate.*[553]

Calls for investment in formalised, structured education for secondary school students had strong support across all stakeholder groups.[554] IEU industrial officer Ms Vaishi Rajanayagam considered such education could be easily incorporated into existing workplace education in VET courses;[555] and IR Claims submitted that such education programs should be comprehensive and compulsory, and accompanied by the introduction of similar programs for TAFE, university and college students.[556] With regard to TAFE institutions, IR Claims director Mr Miles Heffernan, noted that 'we do a lot with apprentices who are faced with exploitation' and as 'obviously Queensland helps write the curriculum', 'during TAFE courses there is a role to play'.[557] The YWH recommended that:

> *…the Queensland government allow senior secondary schools and TAFEs to opt in to programs that educate years 11 and 12 students on their rights at work, noting that non-government schools and RTOs can also opt in.*[558]

Beyond addressing shortfalls in awareness, the YWH submitted that 'issues of ignorance and intimidation young workers face can be dealt with in these sessions', including discussions of how to go about raising a matter.[559] Ms Prouten also noted that young people tend not to question their circumstances and assume a manager and employer will know and do the right thing, and may need the reassurance of discussing matters openly in this way, to be empowered to speak up.[560] The QTIC emphasised the importance of communication including 'not only what legal entitlements are but also the grievance process if individuals have been subject to wage theft'.[561] The QCA submitted that as 'trusted institutions', schools and universities are well placed to educate students directly so they are better able to navigate such issues.[562] In this respect, the NRA also emphasised that the FWA 'and the processes under it are designed to allow workers to more readily take matters into their own hands'.[563]

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552 Ms Helen Wood, Executive Manager, Client Relationships, Hostplus, public hearing transcript, Brisbane, 17 September 2018 (morning), p 11.

553 Ms Jessica Prouten, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 6.

554 See for example: Ms Debra McPherson, private capacity, public hearing transcript, Cairns, 27 August 2018, p 11; Mr Lloyd Abbott, South West Organiser, Together Union, public hearing transcript, Toowoomba, 10 September 2018, p 15; Ms Jessica Prouten, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening); Ms Vaishi Rajanayagam, Industrial Officer, IEU, public hearing transcript, Brisbane, 17 September 2018 (morning), p 35; IR Claims, submission 013, p 57; YWH, submission, p 10; NRA, submission 021, p 12.

555 Ms Vaishi Rajanayagam, Industrial Officer, IEU, public hearing transcript, Brisbane, 17 September 2018 (morning), p 35.

556 IR Claims, submission 013, p 57.

557 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 14.

558 Mr Martin de Rooy, Founder, Young Workers Hub public hearing transcript, Brisbane, 16 August 2018, p 22.

559 YWH, submission 019, p 10.

560 Ms Jessica Prouten, private capacity, public hearing transcript, 17 September 2018 (evening), pp 1-3.

561 QTIC, submission 022, p 11.

562 QCA, submission 035, p 3.

563 NRA, submission 021, p 13.

The YWH advised that it has been developing a draft program to help inform students about their rights at work, in line with the Australian Curriculum of Work Studies and Civics and Citizenship, and with funding from the QCU.[564] Ms Jessica Prouten also highlighted a workplace readiness curriculum developed by the Australian Curriculum, Assessment and Reporting Authority, which can be implemented from year 10.[565]

Regardless of the program employed, the consensus amongst submitters and witnesses was that government, unions and business should all have input to, and play a role in this education process.[566]

Previously, Queensland had a formal mechanism for the collaboration and cooperation of industry stakeholders in this respect, in the form of a tripartite Industrial Relations Education Committee.[567] While this tripartite committee is no longer in operation, the committee considers that the Queensland Government could serve to facilitate such collaboration in the future.

With respect to the other two key cohorts of concern, in international student and migrant workers, stakeholders acknowledged the broad availability of information and stated regulator efforts to disseminate information to this audience through various channels and outreach activities. However, the committee heard consistent calls for more direct and frequent engagement with those affected, to support their uptake of the information.

Ms Lindsay Carroll of the NRA noted that while a wide range of helpful resources exist, you 'have to know where to look', in what can seem like a sea of information.[568] Reverend Pauline Harley from the QCA also highlighted informational challenges for her community:

> *My community, in particular, is quite multicultural. It is about education in languages that people can understand. It is about resources. At times even I do not know where to go to help these people. I find myself chasing all sorts of channels to figure out where I am going to be able to help these people. It is about having a simpler process to know where you can send people to get help when help is needed.*[569]

The QTIC emphasised 'the value of strategic communication' and need for 'highly developed methods of outreach'.[570] Clibborn, in previous research on the international student sector, reached the conclusion that 'providing information through traditional passive means will have limited impact on workplace outcomes'.[571] Noting that international students take their cues from peers rather than host country laws, he suggested that regulators 'need to reassess their provision of information regarding minimum employment standards and avenues available to pursue recovery of unpaid wages':

> *… regulators might benefit from examining interventions aimed at disrupting current information flows in peer networks. At the least, employment and immigration authorities could consider providing information to all temporary migrants with work rights on arrival – that is, before they are exposed to advice from peers. Education institutions are also well placed to*

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564 Mr Martin de Rooy, Founder, Young Workers Hub, public hearing transcript, Brisbane, 16 August 2018, p 25.

565 Ms Jessica Prouten, private capacity, public hearing transcript, Brisbane, 17 September 2018, p 3.

566 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 4; NRA, submission 021, p 13; QCA, submission 035, p 3.

567 Hon Grace Grace MP, Minister for Education and Minister for Industrial Relations, public hearing transcript (Estimates Hearing), Brisbane, 2 August 2018, p 6.

568 Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 59.

569 Public hearing transcript, Brisbane, 3 September 2018, p 6.

570 QTIC, submission 022, p 11.

571 Stephen Clibborn, 'Multiple frames of reference: Why international student workers in Australia tolerate underpayment', *Economic and Industrial Democracy,* 2018, p 15.

Wage theft
Submission 5 - Attachment 1

> *provide information to international students on workplace rights and to influence opportunities for widening their peer interactions.*[572]

A QCA member Ms Lus Mosquera called for the provision of education for international students on arrival in the country as part of their student orientation, including suggesting they be provided with referrals to compliant job service providers.[573] Dr Laurie Berg and Bassina Farbenblum recommended supporting a 'sector-wide response among universities, ELICOS and VET providers to deliver appropriate information and support services to assist international students to avoid and address wage theft, including legal assistance'.[574]

In this respect, the second report of Berg and Farbenblum's National Temporary Migrant Work Survey, highlighted that of those international students who tried to recover their unpaid wages, only one percent approached the FWO, while 34 percent contacted someone at their university of college: 'This included 38 percent of university students and 27 percent of vocational and English language students'.[575]

Similar recommendations were made in relation to migrant workers, with Mr Giri Sivaraman from Maurice Blackburn Lawyers highlighting that:

> *… when you come into Australia you are told to not bring any plant food and other products or drugs, but you are not told what your rate of pay should be or anything like that. There is no education in terms of your employment rights.*[576]

Mr Sergio Duran, himself a migrant worker and also a member of the QCA, gave evidence in this respect:

> *It is about training people. Let us know what we have to do. For example, when many people come to Australia they do not have any idea what is a phone number and what is an ABN. It is as simple as that. You see people working with an ABN and they receive a payment of $15 per hour. Who is paying their insurance? Who is paying their superannuation? Who is paying their tax?* [577]

Mr Duran stated that migrants would benefit from receiving information before they arrive in Australia:

> *I think it is much better to get it before you come to Australia and even when you are in Australia. Sometimes the agency sells you the package, inviting you to come to Australia. They tell you how Australia is really rich and how when you arrive in Australia you are going to a get job instantly. You say, 'Okay, I am going to go there.' When you arrive here you see another situation. Of course we came with money but that money is not going to support us for a year. It will support you for a maximum of six months or three months and you hope to find a job to support yourself after that.* [578]

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572 Stephen Clibborn, 'Multiple frames of reference: Why international student workers in Australia tolerate underpayment', *Economic and Industrial Democracy,* 2018, p 15.

573 Ms Lus Mosquera, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 3.

574 Dr Laurie Berg and Bassina Farbenblum, submission 042, p 5.

575 Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 5.

576 Mr Giri Siravaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 43.

577 Mr Sergio Duran, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 4.

578 Mr Sergio Duran, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 5.

His suggestion was welcomed by IR Claims director Mr Miles Heffernan:

> *I was really impressed by the last submitter referring to migration and getting them before they come over here. I thought that was a really impressive way to go as part of your welcome to Australia pack… give them that Fair Work information statement in their language explaining what a modern award is and these are your starting points.*[579]

The NRA also agreed that formalising education for new arrivals to Australia – 'through co-operation between the Fair Work Ombudsman, industrial organisations and the Department of Immigration; will have a significant effect in improving the effectiveness of the current legislative provisions'.[580]

The Senate EERC, in its 2016 report *A National Disgrace: The Exploitation of Temporary Work Visa Holders,* also made general recommendations in this regard. The Senate committee recommended:

> *Recommendation 27*
>
> *The committee recommends that universities consider how best they might develop proactive information campaigns for temporary visa workers around workplace rights.*
>
> *Recommendation 28*
>
> *The committee recommends that the Department of Immigration and Border Protection provide funding on a submission basis for non-governmental organisations, registered employer organisations, trade unions, and advocates to provide information and education aimed specifically at improving the protection of the workplace rights of temporary migrant workers.*[581]

Further to these suggested improvements, the QCA called for more in-depth engagement with community groups, noting that vulnerable workers often turn to familiar organisations when they need support, positioning civil society organisations to play a role in educating workers about their rights:[582]

> *… the people we have with us today are part of existing communities. We are advocating that if we were able to better equip these communities and community leaders—people like Palani, who has been here for 20 years, and Father Ignacio, who is the Catholic priest in Sergio's community—if we were able to better educate the leaders and give them the tools to teach their communities—because people will go to their existing community leaders, whether it be Columbian community or the Nepalese or Indian community—about their rights, that will go a really long way.*[583]

Committee comment

Given the seemingly endemic nature of wage theft in many parts of the workforce, it was clear to the committee that there is a need to raise public consciousness of this insidious problem, to enhance social pressures on employers to comply and help empower workers to identify and report their issues.

For the most vulnerable cohorts, it is apparent that broad public education must necessarily be accompanied by more targeted and systematic approaches to communicating information about their employment rights and where to go to seek assistance.

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579 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 14.

580 NRA, submission 021, p 13.

581 Parliament of Australia, Senate EERC*, A National Disgrace: The Exploitation of Temporary Work Visa Holders,* March 2016, p 318.

582 QCA, submission 035, p 3.

583 Ms Elise Ganley, Community Organiser, QCA, public hearing transcript, Brisbane, 3 September 2018, p 5.

Although our schools and training providers do a great job of preparing students for the world of work, any steps taken to educate students on workplace rights and obligations are discretionary, and appear to be far from widespread.

These educational 'gaps' may be leaving young workers vulnerable to exploitation, and as the YWH noted, to expect them to learn their rights at work 'by osmosis'[584] is impractical and unrealistic.

Accordingly, the committee considers that there is a compelling argument for the Queensland Government to engage closely with the higher education sector on these issues, and to establish a workplace rights education program for implementation in Queensland schools, TAFE and VET facilities.

Noting stakeholder agreement that government, businesses, and unions all have a role to play in this educative process, the committee considers that the re-establishment of the former Industrial Relations Education Committee would provide an appropriately structured and robust mechanism for collaborative engagement on this important issue.

Further, the committee considers that there is a role for the higher education sector in making information and support available to international students in a more structured way, perhaps as part of their student orientation. Noting students are more likely to approach their university or college with concerns about their employment conditions than they are to approach a regulatory agency, these relationships and avenues of advice need to be supported.

Recommendation 1

The Committee recommends the Queensland Government conduct a public education campaign to assist in the fight against wage theft, including outlining information on the findings from this inquiry and the measures the Queensland Government is taking in response, and how and where affected workers can go for help to recover their lost wages.

Recommendation 2

The committee recommends the Queensland Government re-establish the tripartite Industrial Relations Education Committee under the auspices of the Office of the Industrial Relations to conduct visits to schools, TAFE and VET providers, and universities. The visits would be conducted on an opt-in basis and provide information focusing on the rights and responsibilities of both workers and employers.

Recommendation 3

The committee recommends the Queensland Government, through the Department of Education, work with the higher education sector in Queensland to ensure international students have access to relevant information and advice on their workplace rights in Australia, including the right to join a union and where to go for further information.

584 Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 26.

9.2 Proactive compliance measures

9.2.1 Licensing and registration

Licensing and registration schemes can serve to level the playing field for competition and enable growth for legitimate businesses. These schemes help to remove non-compliant competitors through pre-screening and auditing requirements (including renewal processes), which create barriers to entry for rogue operators and encourage ongoing compliance.[585] They also serve as important signposts for purchasing entities and for suppliers (including workers) as to the legitimacy of operators in the supply chain.[586]

This form of labour market regulation has often been used to address issues of exploitation and poor conduct in industry sectors characterised by a significant degree of 'fissuring' – that is, the shifting of responsibility for workers' employment standards and other workplace requirements to smaller business units or labour intermediaries operating in highly competitive markets.[587]

9.2.1.1 Labour hire licensing scheme

In Queensland, the introduction of a labour hire licensing scheme to address extensive exploitation in that sector has added to a suite of existing industry licensing regimes,[588] and was widely commended by witnesses and submitters to the inquiry.[589]

As outlined at chapter 2.1.3, in order to be eligible for a licence, an applicant must meet a fit and proper person test and provide proof of financial viability. A licence can be cancelled at any time if a licensee does not comply with workplace laws – including by engaging in wage theft of any kind. Given the scheme makes it an offence to engage an unlicensed provider, with significant penalties attached, there is a strong incentive for all players to conduct their business within the legal framework.

While Ai Group expressed concern that the scheme may impose an excessive regulatory burden on employers and that the concept of 'labour hire' in the *Labour Hire Licensing Act 2017* is too broad and not sufficiently defined,[590] most stakeholders considered the scheme to be 'definitely a good thing and a positive move'.[591] Whilst acknowledging that the licensing reform is 'responding to a limited sphere of wage theft'[592] and is not a complete solution to sectoral problems, Maurice Blackburn and its joint

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585 Gangmasters Licensing Authority, *The Preventative Impact of Licensing on Labour Exploitation,* United Kingdom, June 2015, p 1.

586 Mick Wilkinson, Gary Craig and Aline Gaus, *Forced Labour in the UK and the Gangmasters Licensing Authority,* Wilberforce Institute for the Study of Slavery and Emancipation, University of Hull, 2010.

587 Tess Hardy, 'Reconsidering the Notion of 'Employer' in the Era of the Fissured Workplace: Traversing the Legislative Landscape in Australia', in Hiroya Nakakubo and Takashi Araki, eds., *The Notion of Employer in the Era of the Fissured Workplace*: *Should Labour Law Responsibilities Exceed the Boundary of the Legal Entity?*, Kluwer Law International, 2017; David Weil, 'Enforcing Labour Standards in Fissured WorkPlaces: The US Experience', *The Economic and Labour Relations Review,* vol 22, no. 2, 2011, pp 33-54.

588 Queensland Government, Fair Trading, 'Licensing and registration', 1 September 2016, https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/fair-trading-services-programs-and-resources/fair-trading-services-and-contact-information/contact-us/licensing-and-registration#industry-licences

589 See, for example: Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 42; Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, pp 1-2; Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

590 Ai Group, response to a question taken on notice at the hearing on 16 August 2018, pp1-2.

591 Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 42.

592 JobWatch, submission 016, pp 11-12.

Wage theft
Submission 5 - Attachment 1

submitters considered that the scheme will likely help 'at least... in terms of stamping out the really dodgy labour hire operators, the fly-by-night operations and so on'.[593] Growcom's Rachel Mackenzie also considered that the scheme will address some of the industry's issues:

> *… When I met with the department recently I was pleased to hear that they are actually undertaking audits… We had a few issues with some of the earlier iterations of that legislation, but I think as it has come out in the end it seems to be doing the right thing.*[594]

Ms Cherry Emerick of Bowen Gumlu Growers Association stated that 'the fact there is an onus on the growers to ensure the contractors they engage with are registered and doing the correct processes, which they are audited for' was a significant factor in observed improvements in her growing region.[595] Ms Emerick stated: 'I would not say that it has eradicated the problem, but the standard has definitely lifted'.[596]

The HIA also considered that 'the [Labour Hire Licensing Act] will provide the OIR with extensive scope to investigate labour hire companies, impact their ability to operate and refer any behaviours they believe, or suspect to be in breach of any relevant laws'. HIA stated that the current framework for responding is appropriate, and need not be accompanied by further legislative reform.[597]

Stakeholders did, however, call for harmonisation of labour hire licensing laws nationally, noting slight differences in schemes in other jurisdictions:

> *Contractors travel interstate seasonally, so they do not just reside in Queensland. You will find that they go to Victoria or New South Wales. In order to have that level of consistency, it would be really good. That way, growers would know that when they employ contractors they are doing the right thing by all their workers and everything is adhered to.*[598]

Mr Allan Mahoney, Chair of BFVG, stated:

> *It is great to see that Queensland, South Australia and now Victoria have come on board with labour hire contractor registration, but this was always a federal matter. To deal with this in the most efficient way is to have a federal panel up here.*[599]

The Queensland Government has been consistent in emphasising its preference for a national licensing scheme, with the Minister for Education and Industrial Relations, Hon Grace Grace MP having acknowledged as much on introduction of the Labour Hire Licensing Bill 2017,[600] and in subsequent commitments to progressing the matter through Council of Australian Governments meetings.[601]

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593 Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 42.

594 Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

595 Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, p 2.

596 Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, p 1.

597 HIA, submission 043, pp 11-12.

598 Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, p 2.

599 Mr Allan Mahoney, Chairman, BFVG, public hearing transcript, Bundaberg, 12 September 2018, p 4.

600 Hon Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, 'Introduction: Labour Hire Licensing Bill', Queensland Parliament, *Record of Proceedings,* 25 May 2017, p 1445.

601 Queensland Government, Response to Queensland Parliament, Finance and Administration Committee, *Report No. 25 on the Inquiry into the Practices of the Labour Hire Industry in Queensland,* 2016.

More recently, in a submission to the Senate Select Committee on the Future of Work and Workers in February 2018, the Queensland Government once more called for 'a national labour hire licensing scheme, modelled on Queensland's *Labour Licensing Act 2017*'.[602]

Further, since March 2016, the establishment of a national scheme has also been recommended by no less than five federal parliamentary committee inquiry reports (see below).

Year	Committee	Inquiry	Recommendation
2018	Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade	Inquiry into establishing a Modern Slavery Act	No. 48: The Federal Government establish a uniform national labour hire scheme, consistent with recommendations of previous committees; and incorporating random audits and unannounced inspections to ensure compliance
2017	Parliamentary Joint Committee on Law Enforcement	Inquiry into human trafficking, slavery and slavery-like practices	No. 12: The Federal Government establish a labour hire licensing regime.
2017	Senate Education and Employment References Committee	Corporate Avoidance of the Fair Work Act	No. 2: Federal and state governments work together to establish labour hire licensing authorities in each state.
2016	Joint Standing Committee on Migration	Seasonal change: Inquiry into the Seasonal Worker Program	No. 9: Implement recommendation 32 of the EERC report (see below).
2016	Senate Education and Employment References Committee	A National Disgrace: The Exploitation of Temporary Work Visa Holders	No. 32: Establish a national licensing regime for labour hire contractors.

Looking beyond the labour hire industry, some stakeholders saw scope for similar regulatory interventions in other industry sectors.

9.2.1.2 Franchise industry regulation

In relation to the franchise industry in particular, Maurice Blackburn and joint submitters proposed that a licensing scheme 'similar to the Queensland labour hire licensing scheme' be established, with the following proposed features:[603]

- *Require a franchisor to hold a license to operate in Queensland, issued by a licensing body;*
- *Require a franchisor to pay for that license by way of annual fee, in line with the size of the business;*
- *Be based on a 'fit and proper person' test to ensure operators have a history of compliance; and*
- *A contravention of the scheme incurs civil penalties.*[604]

602 Queensland Government, submission to the Parliament of Australia, Senate Select Committee on the Future of Work and Workers, inquiry into the impact of technological and other change on the future of work and workers in Australia, 2018, submission 132, pp 5, 10.

603 Maurice Blackburn and joint submitters, submission 033, pp 18, 32.

604 Maurice Blackburn and joint submitters, submission 033, p 18.

It was suggested the proposed licensing body could 'be funded via the licensing fees from franchisors and be responsible for license registration, including termination, prosecuting contraventions and enforcing license conditions'.[605]

In addition, Maurice Blackburn and joint submitters called for a change to the Franchising Code of Conduct, which is established under the *Competition and Consumer Act 2010* (Cth), and regulates the conduct of franchising participants towards each other, usually through franchise agreements.[606] It was noted that:

> *Maurice Blackburn has previously argued:*
>
> - *That a positive obligation should be placed on the franchisor to ensure its franchisees are upholding the legislative requirements of workplace law. This positive obligation should be articulated in the Code of Conduct; and*
> - *That a Funder of Last Resort process should be embedded and mandated in the Code of Conduct.*
>
> *It is clear that any solution should be based on catching the conduct of franchisors, not franchisees or workers who are left largely powerless under the status quo.*[607]

Following the September 2017 commencement of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), which means that franchisors can now be held responsible for contraventions by a franchisee; options for franchise industry reform are now being considered by the federal Parliamentary Joint Committee on Corporations and Financial Services, as part of its inquiry into the operation and effectiveness of the Franchising Code of Conduct. The joint committee is due to report by 6 December 2018.

9.2.1.3 Other industry regulation

Other licensing proposals made during the inquiry included:

- regulation of the massage/sports massage industry with a licensing scheme similar to the labour hire licensing scheme, to address problems of exploitation in the industry[608]
- strengthening Queensland's existing security licensing scheme, including enhancing the education provided to licence applicants and licensees by the Office of Fair Trading on the obligations of licence holders, and improving monitoring of licensee compliance,[609] and
- introducing a licensing or registration system for cleaning companies.[610]

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605 Maurice Blackburn and joint submitters, submission 033, p 18.

606 Maurice Blackburn and joint submitters, submission 033, p 17.

607 Maurice Blackburn and joint submitters, submission 033, pp 17-18.

608 Confidential submission 005.

609 Executive Security Group, submission 029, p 8. See also: Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville 28 August 2018, p 8. Mr Brian McCarrick stated: 'I believe that the state government has the capacity under the security contractor's act and labour hire act already to prevent wage theft by policing the fit and proper person clause'.

610 Ms Elise Ganley, Community Organiser, QCA, public hearing transcript, Brisbane, 3 September 2018, p 6.

Committee comment

Noting the evidence from the inquiry of the positive impact of the Queensland labour hire licensing laws since their commencement, the committee calls on the Federal Government to introduce nationally consistent labour hire licensing, to ensure the benefits of the Queensland scheme apply equally to workers, employers and labour hire providers across the country.

Recommendation 4

The committee recommends the Federal Government introduce a national labour hire licensing scheme so the benefits of the Queensland scheme can apply across the country.

9.2.2 Business registration – the Australian Business Register

Obtaining an ABN is a relatively quick and easy process. A quick internet search reveals countless third-party service providers promising to 'get you an ABN' within five to 15 minutes.

While the system was intended to be accessible and straightforward, to support simple dealings with government and the administration of the Goods and Services Tax (GST);[611] a shift in the function of ABNs and the rise of sham contracting and other related fraudulent and dishonest practices has raised serious questions about its integrity. Although 'an ABN has become a de facto 'licence to do business','[612] the system has significantly fewer checks and balances than most licensing schemes – a factor described in the Black Economy Taskforce report, in October 2017 report, as an 'important enabler':

> *In the absence of proper identity checks, there are many fraudulent and inappropriate ABN holders, including those on tourist visas and apprentices, who may not be entitled to use them. There are significant numbers of ABN holders who have never lodged a tax return. The perception among some in the community is that holders view the ABN as something they own rather than something as carrying both rights and responsibilities.*[613]

To address some of these issues, the Black Economy Taskforce recommended:

> *The Government should adopt a number of measures to strengthen the ABN system, including: banning people on certain visas and apprentices from getting ABNs; requiring periodic renewal of ABNs (which would be conditional on meeting tax obligations); and providing for real-time verification of ABNs.*[614]

The shortcomings of the ABN system and accompanying need for system improvements were also raised by stakeholders.

Reverend Pauline Harley from the QCA highlighted the lack of appropriate system checks:

> *So many of the people who do the cleaning work are not well educated. They are told to get an ABN or they are told to do it this way and they simply do it without understanding the implications of that.*[615]

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611 Australian Government, *Tackling the Black Economy - Designing a modern Australian Business Number system: Consultation paper*, 20 July 2018, p 2; Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 85.

612 Australian Government, *Tackling the Black Economy - Designing a modern Australian Business Number system: Consultation paper*, 20 July 2018, p 3.

613 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 85.

614 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 5.

615 Reverend Pauline Harley, Anglican Priest, QCA, public hearing transcript, Brisbane, 3 September 2018, p 6.

Describing the application process as a 'set and forget' application and granting of an ABN, Dr David Morris submitted that sham arrangements are also facilitated by 'the lack of tax reporting required around contractors, as distinct from the tax reporting required for employees'.[616]

Dr Morrison and Executive Security Director Mr Andrew Bourke acknowledged the efforts of the ATO in seeking to crack down on the misuse of ABNs.[617] Dr Morrison noted that the Black Economy Taskforce reported on:

> *… the cancellation by the Australian Taxation Office of over 2 million ABNs for not lodging tax returns associated with those numbers; and, the improper arrangement of ABNs to a variety of people including: employees (usually trades apprentices); unemployed people, elderly people; and, other professionals willing to be 'straw' directors of companies (often multiple companies).*[618]

However, Dr Morrison also noted that there is 'room for improvement from the regulatory side', submitting:

> *Such improvement ought to increase transparency of data for all users, but in the very least, a reduction of duplication will reduce the opportunity for wage theft.*[619]

IR Claims Director Mr Miles Heffernan stated more specifically:

> ***Mr Heffernan:*** *… It is almost that as a threshold of getting that ABN a step needs to be put in place. You file it, what is the purpose of it? Is it cleaning services or contracting or security?*
>
> ***Mr DAMETTO:*** *Alarms should go off, yes.*
>
> ***Mr Heffernan:*** *And what steps can then alert whatever is the correct body and it could be a combination of ASIC and the Fair Work Ombudsman*.[620]

The committee notes these matters are currently the subject of a federal 'Monitoring Business Registers Program' review. As part of this review, the Commonwealth Treasury issued a discussion paper and invited public submissions up to 17 August 2018 on possible reforms to the ABN system. The consultation paper noted that the proposals on which views were sought included 'adjusting ABN entitlement rules, imposing conditions on ABN holders, and introducing a renewal process including a renewal fee'. Stakeholders have also been encouraged to 'make comments or provide insights on any other aspects of the ABN system'.[621] The consultation paper further advised:

> *Following this consultation period, the Government will consider stakeholder views and develop a coordinated package of ABN reforms. Further consultation is planned to occur on the details of these reforms and how they should be implemented. Consideration of reforms to the ABN system is not occurring in isolation. There are currently a number of related reforms occurring across Government. Reforms to modernise business registers, implement a digital identity framework, introduce director identification numbers, and reduce phoenixing activity will all contribute to improving business identity and verification.*[622]

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616 Dr David Morrison, submission 032, pp 10-11.

617 Mr Andrew Bourke, Managing Director, Executive Security, public hearing transcript, Brisbane, 17 September 2018 (morning), p 29.

618 Dr David Morrison, submission 032, pp 10-11.

619 Dr David Morrison, submission 032, pp 10-11.

620 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 20 August 2018, p 15.

621 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 2.

622 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 2.

The committee looks forward to seeing the proposals for reform and subsequent system improvements that result from the reform process. Responses to illegal phoenixing activity are considered in more detail at chapter 14.3.

9.2.3 Procurement and supply chain policies

In addition to strict regulatory schemes; institutions and businesses engaged in procurement and purchasing through supply chains are increasingly using their market power to influence the terms and conditions under which workers are employed. [623]

For government procurement, expectations are well established. In their submission, Dr Tess Hardy, Ms Melissa Kennedy and Professor John Howe stated:

> *Indeed, there is an ILO convention and recommendation on the subject of labour-specific criteria in procurement contracts dating from the post-Second World War era: Labour Clauses (Public Contracts) Convention 1949 (No, 94) and Recommendation (No. 84). The Convention and Recommendation provides that public authorities entering into contracts which require the employment of workers must include clauses requiring that minimum employment standards are observed, thus preventing competition among bidders for government contracts on the basis of labour costs. In addition, the convention requires that public contracts provide for employment at prevailing wages and conditions, that is, 'hours of work and other conditions that are not less favourable than those established for work of the same character … in the district where the work is carried on' whether by collective agreement, award or legislation.*
>
> *… The growth in public procurement has only increased the pressure on government to ensure that government contractors are subject to social performance criteria such as the observance of minimum labour standards and progressive employment practices. Where governments purchase goods and services from the private sector using taxpayer funds, it is argued that government should use its purchasing power to ensure that its suppliers follow decent employment practices.* [624]

In Queensland, the government has recently introduced a new procurement policy. The policy requires that 'the government take into account a range of economic, environmental and social matters when considering whether the relevant purchase of goods and services represents 'value for money''. Dr Hardy, Ms Kennedy and Professor Howe submitted:

> *While the current policy is an important step forward, and does broadly take into account whether a firm adheres to 'best practice industrial relations', it could be further enhanced. In particular, the policy could be amended to make clear that any contractor or supplier who has deliberately failed to comply with employment laws will not be eligible to apply for government contracts. It could also set out the specific consequences that may flow if an existing contractor is found to have engaged in wage theft (i.e. termination of the relevant contract)…*
>
> *… The Queensland Government would need to determine whether these requirements apply to all contractors, or only to larger contracts, and/or contracts in particular industries or types of procurement. There would need to be thought given to implementation of the program, to ensure there is a structure and process for effective assessment of contractor eligibility for the program, and for ongoing monitoring of compliance with the program requirements.* [625]

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623 Dr Tess Hardy, Melissa Kennedy, Professor John Howe, submission 050, p 10; Mark Anner, 'Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains,' *Politics and Society*, vol 40, no. 4, 2012, p 609.

624 Dr Tess Hardy, Melissa Kennedy, Professor John Howe, submission 050, pp 10-11.

625 Dr Tess Hardy, Melissa Kennedy, Professor John Howe, submission 050, p 11.

Queensland's procurement policy requires the application of 'best practice principles for all major projects valued at $100 million and above and declared projects.'[626] These principles include best practice industrial relations, and history of compliance with procurement, tendering and other government policy.[627] Best practice industrial relations involves a demonstrated history of and commitment to positive industrial relations, including requiring declarations in relation to the FWA, such as any convictions of an offence, enforceable undertakings, or infringement notices issues (in the last five years). [628]

Mr Andrew Bourke of Executive Security also considered that any contractor found to be underpaying their employees should have their contract terminated, and highlighted scope for the Queensland Government to impose minimum standards with respect to qualifications and eligibility requirements for tenders.[629] Mr Jason O'Dwyer from MEA stated that the inclusion of benchmarks in tenders, including 'looking at their industrial relations situation':[630]

> *… demonstrates for those who are paying appropriately that they have a leg up in terms of the tender process. Those who are not will know that they are not going to be able to get that sort of work.*[631]

In response to a question about the administrative burden associated with including such explicit terms, MEA Workplace Relations Adviser Mr Jordon Carlisle stated:

> *If you are already tendering it would not be that big a step. People are already supplying things like employment contracts if they have to show compliance with the Building Code 2016 as it stands. They are already supplying a lot of that. If they work for a primary contractor in different areas they often need to supply evidence that they are contributing to super and those sorts of things. I would not say that it is a big extra piece of red tape. It might be a little bit longer.*[632]

Dr Hardy, Ms Kennedy and Professor Howe noted that such factors can also be taken into account at different stages of the tender process – including during assessment and with respect to the contractual requirements imposed on the successful tenderer.[633]

Outside procurement processes, the QCU and IEU submitted that the government's provision of funding to service providers should be contingent on the organisation demonstrating that they operate in compliance with industrial laws. The IEU submitted that service providers should 'lose this funding in the event of non-compliance'.[634]

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626 Queensland Government, Office of the Chief Advisor – Procurement, *Queensland Procurement Policy bridging guide – 2018 updates*, 2018, p 2, http://www.hpw.qld.gov.au/SiteCollectionDocuments/QPPBridgingGuide.PDF

627 See: Queensland Government, Office of Industrial Relations and Office of the Chief Advisor – Procurement, *Best Practice principles: Quality, safe workplaces,* 2018, http://www.hpw.qld.gov.au/SiteCollectionDocuments/QualitySafeWorkplaces.pdf

628 Queensland Government, Office of Industrial Relations and Office of the Chief Advisor – Procurement, *Best Practice principles: Quality, safe workplaces,* 2018, p 13.

629 Executive Security Group, submission 029, p 7; Mr Andrew Bourke, Managing Director, Executive Security, public hearing transcript, Brisbane, 17 September 2018 (morning), p 28.

630 MEA, submission 030, p 19.

631 Mr Jason O'Dwyer, Manager Advisory Services, MEA, public hearing transcript, Brisbane, 20 August 2018, p 11.

632 MEA, public hearing transcript, Brisbane, 20 August 2018, p 11.

633 Dr Tess Hardy, Melissa Kennedy, Professor John Howe, submission 050, p 11.

634 QCU, submission 034, p 37; IEU, submission 007, p 6.

Noting that the state government is only responsible for a limited sphere of procurement, some stakeholders also referred to the importance of large companies with complex supply chains having ethical sourcing policies in place, as part of their corporate social responsibility program.[635]

Industry bodies highlighted the important work they are doing to lead the market in this regard, developing certification schemes which offer practical market recognition that the employment practices of the certified business comply with Australian laws and industry standards. Such schemes are discussed further in chapter 10.2.

Recommendation 5

The committee recommends the Queensland Government ensure its current procurement policies allow for appropriate and proportionate action to be taken against companies that have underpaid workers.

[635] See, for example: ALHR, submission 051, p 2; Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

Wage theft
Submission 5 - Attachment 1

10 Role of industrial organisations

While primary responsibility for monitoring and enforcing minimum employment standards rests with government, both employer organisations and trade unions play an important role in supplementing regulator enforcement activity.[636] These organisations provide support and advice to employers and employees to help them to better understand their rights and obligations, and can act as 'gatekeepers' or 'connectors' to regulatory agencies.[637] Dr Tess Hardy suggested that they can also 'address calculated and social motivations by imposing sanctions different from those employed by the state, including shame, moral persuasion, protest, and withdrawal of friendly cooperative relations', which can be mutually reinforcing and in some cases 'far more exacting than direct government intervention'.[638]

This chapter considers the ways in which these key system actors can help to address and prevent wage theft.

10.1 Unions

As noted at chapter 8.6, workplaces with the highest degree of union membership tend to have the lowest level of worker exploitation and wage theft.

Maurice Blackburn Lawyers and joint submitters considered that the reasons for this 'are self-evident':

- the union is a source of information for workers on their rights, conditions and entitlements
- the union will involve workers in bargaining processes with the employer, and
- the union will take action if it finds that workers are being exploited and hold the employer accountable.[639]

A number of workers gave evidence that it was only through union involvement that they came to discover they were being underpaid;[640] and that were it not for their union's intervention, they would not have raised the matter with their employer, let alone pursued it further.

The story of Ms Siva Lemisagele was illustrative in this regard:

> ***Ms Lemisagele:*** *Because I came from another country, this was my first job in Brisbane. I would not have a clue what goes on. I started on $16 where I came from but in coming here it was $22 an hour, which was big to me. I thought it was normal because it is big money for me. I thought everything was normal. I am working hard—at least 60 hours a week just to have my target that I need. Then the union came in. That is when I learned that I was paid differently. It was a massive gap from what I am meant to be owed hourly. I learned that I am entitled to something else instead of just $22 an hour.*

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636 Dr Tess Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards', *The Economic and Labour Relations Review,* vol. 22, no. 3, 2011, p 118.

637 Stephen Clibborn, 'It takes a village: civil society regulation of employment standards for temporary migrant workers in Australian horticulture', (accepted for publication in) *University of New South Wales Law Journal,* vol. 41, no. 1, 2019.

638 Dr Tess Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards', *The Economic and Labour Relations Review,* vol. 22, no. 3, 2011, p 123.

639 Maurice Blackburn and joint submitters, submission 033, p 8.

640 Ms Taylor Bun also gave evidence to the committee that: 'It was not until the union came onsite and they educated us on our rights that we realised just how poorly we were being treated and the basic penalty rates and things we were missing out on'. Ms Taylor Bun, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018, p 2.

When I used to leave home the sun had not come out, and then I would come back home and the sun was down. I would work really long hours. I never had a 10-hour turnover. Sometimes when I finished work I would come back home and have a shower and then have an hour sleep and then go back to work, because I was rostered on.

***CHAIR:** Just to clarify… if the union had not been involved in your case in helping you to advocate to your employer, would you have approached your employer? Do you feel that you would have been able to recoup that money?*

***Ms Lemisagele:** No, I would not, because I would not have had the guts. It is my job. It is my only income that I am getting. I know that if I would have spoken to the boss about it I would have lost my job already.*[641]

Ms Lemisagele also submitted:

Just to discover how much I had been underpaid was a fight that I could not have won on my own. I did not have the time to go through all my payslips and timesheets from the past year to calculate how much my employer owed me. And I wasn't in the financial position to hire an accountant or lawyer to do it for me. Neither were my colleagues. But as a union member I had the support and expertise to get this done! The only problem was trying to get my records from my employer to the union without upsetting my boss and getting my shifts cut or losing my job. So, what we did was, a large group of us, with the assistance of the NUW, all handed in pay audit forms that authorised the union to review all of our timesheets and payslips. My employer failed to provide our payslips to the union in the legal timeframe. The NUW had to take them to the Fair Work Commission. Once the union was finally able to access our payslips they calculate how much I have been underpaid during my time working for my company. I had been underpaid almost $18,000 and I lived pay cheque to pay cheque... Prior to the NUW coming out to my workplace I knew very little about my entitlements at work and never thought something like this would happen to me.[642]

Ms Lemisagele's experience illustrates the important role unions play in addressing power imbalances and advocating for workers' legal minimum rights. An employee might be resigned to unfolding circumstances of wage theft due to a fear of being labelled a difficult worker or of losing their job should they protest.[643] A union taking up a matter and advocating on the employee's behalf can take the pressure off that individual and shift the employer's attention onto the union.[644]

If an employer fails to rectify underpayments, the committee heard that union intervention can be key to achieving a result for affected workers. At the public hearing on the Gold Coast, ETU representative Mr Beau Malone spoke of his own union's experience:

The ETU became aware that an employer of a business in the construction industry had not being paying superannuation contributions for many months. After almost a year of assurances from

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641 Ms Sivaiala Lemisagele, Food manufacturing worker, public hearing transcript, Brisbane, 16 August 2018, p 25.

642 YWH, submission 019, p 15.

643 Hospitality worker Ms Katherine Hamburg said of the employee-employer dynamic: 'That is the person who determines when I get my next shift, if I get my income. If I am labelled a difficult worker, I lose my income. There is a lack of support in going up against your employer to demand what you know your rights are'. See: Ms Katherine Hamburg, Hospitality worker, public hearing transcript, Brisbane, 16 August 2018, p 26.

644 IR Claims submitted in this regard: 'Union members tend to be better educated about their entitlements. They will likely have a delegate onsite who will know what their entitlements are and the delegates will be able to go and talk to the employer to make sure that the right thing is being done if they hear that the right thing is not being done. Generally, workers feel more empowered to take up those issues. Where you do not have union membership then people do not feel empowered and … feel intimidated about raising issues…' See: IR Claims, submission 013, p 6.

Wage theft
Submission 5 - Attachment 1

> *owners about paying the required superannuation contributions at the correct time, the union decided to formalise the process. The union encouraged all of its members to contact the ATO and raise the underpayment of superannuation, which was outside of ATO requirements. The ETU does not, by law, have the ability to do this on behalf of members. It must be carried out on an individual basis. The union then gathered information from members and sent a detailed letter of demand to the employer. In the absence of any reply, the union filed a dispute with the Fair Work Commission. Before the listing was heard, the ETU was contacted by Fair Work, which outlined that the employer had entered into a payment plan with the ATO. We believe that, without the union's persistence, the employer would not have entered into discussions with the ATO at all.*[645]

A number of stakeholders emphasised, that union membership is now at an 'all-time low',[646] suggesting liberalisation and 'casualisation' of the labour market contributed to the decline.[647] In its written briefing to the committee, the OIR stated:

> *… many workers in casual work or temporary visa workers, labour hire or operating under sham contracts are neither members of unions nor in a position to request award rates of pay (Clibborn and Wright, 2018).*[648]

Similarly, Mr Dan McGaw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, explained:

> *Workers are not joining unions because they are made casual. They do not have full-time hours. They do not know if they are going to have a job next week. It is difficult to organise workers when they are casuals...*[649]

The extent of the effect, Clibborn and Wright have noted, is that 'union density has dropped from its height of 65% in 1948 to 16% of full-time workers overall and only 9% in the private sector in 2016'.[650]

Clibborn and Wright also pointed to the 'marginalisation of unions in recent decades', as having further weakened trade unions' traditional status as a co-regulator, alongside the state.[651] According to Hardy and Howe, most commentators argue that unions conducted much of the enforcement of award standards up until the 1990s, the monitoring and enforcement of compliance with awards was been a key aspect of their regulatory function.[652] With the introduction of the *Workplace Relations Act 1996* (Cth), union rights of entry and the capacity to seek recovery of wages were restricted. A federal

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645 Mr Beau Malone, State Organiser, ETU, Queensland and Northern Territory Branch, public hearing transcript, Gold Coast, 10 September 2018, p 20.

646 Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 8.

647 QCU, submission 034, p 10; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 8; Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, pp 213-214.

648 Queensland Government, OIR, written briefing, 7 June 2018, p 10.

649 Mr Dan McGaw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, public hearing transcript, Toowoomba, 10 September 2018, p 11.

650 Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, pp 213-214.

651 Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, pp 208-209.

652 Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia', *Australian Journal of Labour Law,* vol 22, 2015, p 2.

enforcement agency – currently the FWO – was entrusted with the business of enforcement.[653] The QCU noted that those union powers have not been returned, and submitted that inadequate resourcing of the FWO raises questions about the effect of their removal over the longer term:[654]

> *We do not think it is a coincidence that we have seen an increase in the incidence of wage theft that has coincided with a reduction in union rights to enforce people's entitlements.*[655]

Many unions and other stakeholders called for the pre-1996 powers to be reinstated,[656] citing several ways in which the restrictions have limited unions' capacity 'to operate in the sphere of enforcement' and may 'have contributed to the spread of wage theft'.[657]

Currently, under federal right of entry laws, unions are limited to investigating the records of their members.[658] QCU Assistant Secretary Mr Michael Clifford noted with respect to this restriction:

> *Where you have 100 percent union membership you will not find instances of wage theft. You will not find deliberate attempts by the employer to rip their workers off. The workers in those places are well educated and well supported, and they simply would not let it happen. We find it most often happens where you have no union members or where you might have one or two union members. Where you have one or two union members, those people would be very reluctant to stick up their hand and say, 'I'm the person that's going to report this,' because they know they will not have a job tomorrow if they do. When you say that a union can only investigate the records of union members, it really exposes people who are union members. You can go through a legal process to try and inspect the records of non-union members in the federal jurisdiction, but, again, it is a legal hurdle which is not simple to overcome. It puts another barrier in the way of us being able to properly address wage theft.*[659]

Also cited as an obstacle, was the requirement for unions to have a reasonable suspicion that a contravention has occurred, or is occurring in order to exercise their rights of entry.[660] Mr Clifford stated that this causes 'the first legal hurdle, because often employers can use legal resources to prevent unions from even investigating records with arguments about whether it is a reasonably suspected breach or not'.[661] The OIR noted that the ACTU has also identified that this means unions are largely reliant on complaints from employed members to trigger enforcement action, and therefore that this process can be of limited effectiveness in resolving issues.[662] In addition:

> *… the advance notice required before physically entering premises must be granted before union officials can legally require the records to be provided. Records are frequently held off site. The ACTU has also found that in practice, a worker who is the subject of a prima facie case can be*

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653 QCU, submission 034, p 11.

654 QCU, submission 034, p 11. See also: JobWatch, submission 016, pp 12-13.

655 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

656 QNMU, submission 023, p 4; Maurice Blackburn and join submitters, submission 033, p 12; QCU, submission 034, p 2; CFMEU, submission 039, pp 12-13; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, pp 7- 8.

657 QCU, submission 034, p 40.

658 FWA, ss 481(1) and 482(1)(c).

659 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 3.

660 QCU, submission 034, p 41; Mr Michael Clifford, Assistant Secretary, QCU public hearing transcript, Brisbane, 16 August 2018, p 3.

661 Mr Michael Clifford, Assistant Secretary, QCU public hearing transcript, Brisbane, 16 August 2018, p 3.

662 ACTU, cited in Queensland Government, OIR, written briefing, 7 June 2018, pp 10-11.

Wage theft
Submission 5 - Attachment 1

> *dismissed in order to defeat the Union's right to investigate a complaint and attain the appropriate document.*[663]

The QCU also submitted that 'we think that unions need the capacity, as we used to pre-1996, to go around and talk to workers individually to get their stories'.[664] The QCU explained that as the legislation currently stands:

> *The employer can put out an email and say, 'Anybody who wants to complain about the fact that you have not been paid properly or paid overtime, let us know and you can talk to the union official.' Of course, most workers will not do that. You would be put in a lunch room or a place that is fairly visible. Again, you are being seen to dob in the boss. It makes it very difficult for workers to tell their story truthfully in those circumstances.*[665]

Mr Clifford considered the implications of this restriction to be significant given the identified importance of workers' interviews in many circumstances, and particularly where the employer has generated false documents:

> *The Fair Work Ombudsman … particularly when they were investigating the 7-Eleven wage theft … said that the interviews were the most valuable tool they had and it was important that they be able to get truthful submissions from workers when they spoke to them. We agree with that and we think it is vitally important that that change.*[666]

In response to these suggestions, the HIA submitted that it considered that current 'expansive' right of entry provisions are more than adequate, and that any move to extend them would be misconceived.[667] The HIA argued that the presence of a union on a construction site can be 'incredibly disruptive' and impose significant burdens and costs on employers when exercised frequently. The HIA submitted that statutory authorities 'such as the FWO, an independent non-partisan body, are the appropriate entities to take action regarding underpayments'.[668]

The HIA further stated that it did not expect that greater union involvement would lead to substantial improvements in addressing and preventing wage theft.[669]

In contrast, unions contended:

> *If employers know they could be caught as unions are empowered to inspect records and recover stolen wages, this becomes a deterrent itself. At the moment employers know the chances of being caught are low so it is worth the risk…*
>
> *There are 12 million workers across Australia. Australian unions have thousands of trained officers and staff, yet the Fair Work Act now restricts unions from conducting workplace checks on businesses suspected of underpaying and exploiting workers.*[670]

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663 Queensland Government, OIR, written briefing, 7 June 2018, p 11.

664 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 3.

665 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 3.

666 Mr Michael Clifford, Assistant Secretary, QCU public hearing transcript, Brisbane, 16 August 2018, p 3.

667 HIA, submission 043, p 14.

668 HIA, submission 043, p 14.

669 HIA, submission 043, p 14.

670 ACTU correspondence, 21 August 2018.

Another union said:

> *In our view, improving workers' rights through greater union access is a better alternative to reliance on the powers and resources of the FWO to monitor and enforce regulation.*[671]

Further:

> *Unions provide a cost effective way of ensuring workers have their rights and entitlements honoured. In doing so, it is more likely that appropriate tax and superannuation will be paid, lessening pressure on the public purse.*[672]

The QCU noted that the stated restrictions on right of entry have already been removed from Queensland's IR Act, and advised: 'we are unaware of any concerns from employers within the Queensland jurisdiction following the removal of restrictions on union activities such as right of entry'.[673]

In its report on *Corporate avoidance of the FWA*, the Senate EERC also recommended that the FWA 'be amended to allow unions greater access to workplaces and workers in order to address the need for increased monitoring and random checks to ensure compliance'.[674]

Beyond these right of entry provisions, Maurice Blackburn and joint submitters and IR Claims called for industrial organisations (and legal firms, for IR Claims) to be 'given standing to prosecute wage theft', and to be able to seek costs from an employer on a successful prosecution.[675]

IR Claims also recommended that non-registered industrial organisations be accredited to bring wage theft claims as the claimant on behalf of multiple victims of wage theft, so that non-trade union members can 'enjoy the cost saving and efficiency of claims brought on their behalf by non-registered industrial organisations'.[676]

Further, a number of submitters sought to highlight the educative work of unions, and the importance of their contribution towards the education of young people and vulnerable workers.[677] The OIR advised that responding to wage theft has spurred innovation among trade unions:

> *United Voice, for example, has recently launched an online-only service branded as 'Hospo Voice' for Victorian hospitality workers. Hospo Voice members receive access to online tools to check pay rates, record hours worked or incidents of harassment and rate employers (Hospo Voice, 2018).*[678]

IR Claims submitted that in just its first few weeks of operation, Hospo Voice managed to

- *Recruit more than 300 members*
- *Expose a number of businesses engaged in systematic wage theft*
- *Organise snap public naming and shaming protests*

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671 QNMU, submission 023, pp 9-10.

672 QCU, submission 034, p 42.

673 QCU, submission 034, p 42.

674 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 72.

675 Maurice Blackburn and joint submitters, submission 033, p 12.

676 IR Claims, submission 013, p 58.

677 See, for example:; Maurice Blackburn and joint submitters, submission 033, p 8; QCA, submission 035, p 3; Ms Sivaiala Lemisagele, Food manufacturing worker, public hearing transcript, Brisbane, 16 August 2018, p 25; Ms Taylor Bun, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018, p 2. Ms Sivaiala Lemisagele, Food manufacturing worker, public hearing transcript, Brisbane, 16 August 2018, p 25.

678 Queensland Government, OIR, written briefing, 7 June 2018, p x.

- *Run guerilla-style social media campaigns targeting dodgy businesses*
- *Attract widespread mainstream media coverage about wage theft cases*
- *Shame the Fair Work Ombudsman into launching investigations.*[679]

Committee comment

The committee recognises the critical role unions play in educating, advising and advocating for their members with respect to their workplace rights; and the role they have and continue to play in maintaining industry standards. The benefits of these activities extend beyond just their members to also deliver beneficial outcomes for workers more broadly engaged in those workplaces and industries.

Evidence provided by workers highlighted the importance of union support to enable them to successfully recover wages and entitlements. They were able to engage directly with their employer, and where relevant, be represented in negotiations and obtain entitlements without fear of reprisal.

The committee acknowledges the concerns raised by unions in regard to worker access to representation in the workplace.

Recommendation 6

The committee recommends the Federal Government consider measures to improve worker access to representation in the workplace and ensure compliance with industrial instruments, using the model of the *Industrial Relations Act 2016* (Qld).

10.2 Employer and industry associations

Employer and industry associations perform a similar role for their members as unions in education on the legal framework under which they operate.[680] Hardy has noted that the FWO recognises their importance in this respect, because the expertise and advisory services they can offer to members are 'greater and more personalised than government agencies can ever offer'.[681]

Associations can also serve as important regulatory intermediaries, helping members to identify and address issues early.[682] In addition, evidence provided to the committee indicated that these organisations are taking a more active role in self-regulation, through industry certification and quality assurance frameworks.[683]

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679 IR Claims, submission 013, p 58.

680 Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 57.

681 Wilson, cited in Tess Hardy, 'Enrolling non-state actors to improve compliance with minimum employment standards', *The Economic and Labour Relations Review,* vol. 22, no. 3, 2011, p 131.

682 Neilsen and Parker have argued that in respect of largely 'reactive regulators' their role grows in importance 'since they are able to act as a kind of fire alarm'. Neilsen and Parker, cited in Tess Hardy, 'Enrolling non-state actors to improve compliance with minimum employment standards', *The Economic and Labour Relations Review,* vol. 22, no. 3, 2011, p 131.

683 MEA, submission 030, pp 19-20; Mr Allan Mahoney, Chair, BFVG, public hearing transcript, Bundaberg, 12 September 2018, p 1; Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 14. Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

FWO audit data shows that employers who are a member of an industry association are far less likely to face wage compliance issues.[684]

Evidence from several business owners and employer and industry bodies illustrated the ways in which these various activities helped to support compliance among members. For example, with respect to education and training, Toowoomba Chamber of Commerce CEO Ms Jo Sheppard stated that this is a 'big role for us', 'particularly for the smaller businesses that potentially do not have the in-house capability to educate or upskill on certain matters that are affecting their business':[685]

> *Often the business owner wears about 15 different hats. Because of their margins and whatever, they cannot get consultants in. That is why the Queensland chamber service is very valuable to a lot of businesses, because they are at least able to access that baseline help at a reasonable price. I think they are time poor. If you talk to the businesses down the main street, most of them are working six days a week minimum.*[686]

Mr Shane Rodgers from Ai Group stated:

> *At the moment there is so much happening in the industrial relations space. It is continuous. Every month there are lots and lots of things we need to update employers on... and we are constantly trying to keep people informed about what is going on… if you are in an individual business, trying to keep up with all of that is very difficult.*[687]

By ensuring that businesses are provided with the correct industrial relations information in this way, it was considered the scope for errors in the provision of employee wages and entitlements can be dramatically reduced.[688]

A number of industry bodies provided examples of the way they communicate and engage with their members. For example, BFVG Chairman Mr Allan Mahoney said that to keep his organisation's 4,000 members updated on their legal requirements and unfolding developments in the industrial relations space:

> *… There are several electronic newsletters that go out. That is the main form now… We have very few members now who do not have an iPhone, but we cater for those who do not. We still send faxes. Some of our growers still want their fax every Friday, so that is what they get. All the industry groups send those out. All that information is sent out as it comes in.*[689]

The R&CA also outlined its 'proactive approach towards informing and educating individual businesses as to their various workplace obligations and responsibilities towards their staff':

> *The Association maintains a workplace relations advisory service staffed by industrial relations specialists which assists members in interpreting and applying the Fair Work Act as well as correcting any errors which may have occurred. The enquiries fielded by R&CA's workplace relations advisory service cover a wide range of workplace relations issues relating to correct pay*

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684 Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 54.

685 Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 41

686 Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 4.

687 Mr Shane Rodgers, Head- Queensland, Ai Group, public hearing transcript, Brisbane, 16 August 2018, p 50.

688 Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 55-56; Mr Jason O'Dwyer, Manager Advisory Services, MEA, public hearing transcript, Brisbane, 20 August 2018, pp 8-9; Mr Noel Ambler, private capacity, public hearing transcript, Townsville, 28 August 2018, p 22.

689 Mr Allan Mahoney, Chair, BFVG, public hearing transcript, Bundaberg, 12 September 2018, p 4.

rates under the Awards, entitlements such as annual leave, personal leave and superannuation and penalty rates on Sundays and Public Holidays. R&CA estimates that its workplace relations advisory service fields over 1,200 calls from hospitality operators with enquiries in any given year. In addition to this, R&CA constantly stresses the vital importance of businesses complying with their relevant legal and regulatory obligations, including workplace relations legislation, through its various communication channels with members and the industry more broadly. R&CA's communication channels include direct members emails distributed on a weekly basis, bespoke newsletters and EDMs [electronic direct mail], company website updates and the publication of a monthly industry trade magazine.[690]

Ms Jo Sheppard said the Toowoomba Chamber of Commerce:

… run a range of workshops and educational opportunities to keep businesses up to speed on a range of matters. IR legislation is always very topical, because often businesses find it very complex, particularly, as I said, for SMEs [small and medium-sized enterprises]. That is something that we do. We also run an annual business excellence program, which is very well engaged in by the local business community. Again, it is really about striving for excellence. We award businesses that do really well and use them as a showcase piece for the rest of the business community.[691]

With respect to the regulatory 'intermediary' function industry bodies can serve, Ms Sheppard submitted that they can 'play a really proactive role in educating businesses and helping them to come forward if they do feel worried that they have made an error'. Citing 'an element of fear', and noting that 'it can send a business broke if they have been paying under the wrong award for two or three years…'; Ms Sheppard submitted that 'the chamber is a trusted partner for business' and that through providing a supportive environment in which to address issues 'we can then move forward in a positive way together'.[692]

Townsville business owner Mr Noel Ambler stated:

I also think it is very important that each of those people should be a member of the industry body. That should be almost compulsory—the fact that they should be a member of the industry body—and then they have someone to go to and they know there will be no repercussions if they tell them exactly what they have done.[693]

Commenting on industry self-regulation or self-auditing, Mr Paul Wessel of Wessel Petroleum advised that the Australasian Convenience and Petroleum Marketers Association was conducting compliance audits for industry members, submitting 'we think compliance audits through your industry bodies is one way to eradicate it [wage theft]'.[694]

The committee heard that in some instances, auditing processes can be part of a formal certification process, with industry associations seeking to establish processes for members to demonstrate their compliance credentials and provide market differentiation for consumers.

In the cleaning industry for example, MEA submitted that stakeholders have responded to industry issues by creating a 'Cleaning Accountability Framework':

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690 R&CA, submission 017, p 2.

691 Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, Public hearing transcript, Toowoomba, 10 September 2018, p 1.

692 Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 4.

693 Mr Noel Ambler, private capacity, public hearing transcript, Townsville, 28 August 2018, p 22.

694 Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 14.

> *In the cleaning industry 21.5% of businesses were engaging in sham contracting by misclassifying employees as contractors. The industry is also characterised by high-rates of underpayment and denial of entitlements.*
>
> *The new program has building owners, key tenants, facility managers and cleaning contractors verify standards concerning wages and entitlements, workplace health and safety, and working conditions are being met. This process actively involves the onsite cleaning workforce, and is ensured by an independent auditor. After the required standard is verified, certification is awarded for that particular building.*
>
> *Over time, as this certification becomes established, being socially responsible will become a competitive feature in the cleaning industry. Not complying with the standards will result in potential reputational risk for building owners and investors. Cleaning companies that don't comply won't be competitive when bidding for contracts.*[695]

Horticulture industry stakeholders also highlighted the development of the Fair Farms Initiative as one way of trying to `stamp out exploitation within the industry'.[696] Delivered by Growcom, the scheme comprises information and training for farmers, a risk assessment process in relation to employment practices, and a resulting certification that 'will bring into effect that the supply chain will not be able to use substandard paid workers'.[697]

Growcom Chief Advocate Ms Rachel Mackenzie explained:

> *The problem at the moment is that because Woolworths and Aldi et cetera cannot tell who is a 'goody' and who is a 'baddy', we are saying, 'Here is a mechanism to enable that differentiation.' I am pleased to say that we have really strong buy-in from the retailers… This is recognising that the issue is real but also saying that this is something that we are doing as a sector.*[698]

The QTIC submitted that there are opportunities for the state government to work in partnership with industry groups to showcase such initiatives as positive outcomes of operating within legislative requirements, and to promote case-studies of best practice.[699]

Committee comment

Evidence provided to the committee affirmed the important role employer organisations play in supporting and educating their members about responsibilities, obligations, and navigating the industrial relations system. Small employers in particular benefit from a trusted source of advice about the most straightforward ways to implement their obligations.

The committee commends those employer organisations that are proactive in supporting their members to meet regulatory requirements through auditing and quality assurance processes. Employer associations create an important nexus with regulators and support early identification and rectification of inadvertent non-compliance.

Interactions with regulators across the reporting and recovery process, together with regulators' accompanying compliance actions and approach, are addressed in the next two chapters of this report.

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695 MEA, submission 030, pp 19-20.

696 Mr Allan Mahoney, Chair, BFVG, public hearing transcript, Bundaberg, 12 September 2018, p 1.

697 Mr Allan Mahoney, Chair, BFVG, public hearing transcript, Bundaberg, 12 September 2018, p 1.

698 Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

699 QTIC, submission 022, p 2.

11 Reporting and recovery

Options for recovering unpaid entitlements can range from informal interactions with the employer, to dispute resolution and/or litigation. A person may require legal assistance in understanding the options available, and to pursue their claim.

The committee heard that the recovery process for wage theft matters is inaccessible, complex, costly, and sometimes results in unenforceable outcomes.

Consistent criticism of the recovery process was raised, with claims that 'the system is broken'.[700] The limited chance of successfully recovering entitlements combined with difficult processes and lack of support, means in a lot of cases, is does not seem worth the worker's time and money to pursue the matter.

Concerns raised about claims to recover unpaid entitlements included a lack of communication or response from the FWO; difficulties in obtaining documents to confirm unpaid entitlements when employers do not provide payslips as required; and private mediated settlements in which employees felt little choice but to accept only part of their unpaid entitlements. As mediation is voluntary, employers may choose not to participate. If both parties participate and agreement is reached, it is not enforceable.

Actions to recover employee entitlements through the Federal Circuit Court and its small claims process were also described by stakeholders as arduous and inaccessible. While the FWO may assist with small claims, its activity in this regard is limited.

The recovery of unpaid wages and superannuation when a business becomes insolvent was similarly of significant concern.

In addition to stakeholders' experience of these recovery processes, this chapter outlines proposals to make procedures to recover unpaid entitlements more accessible, and proposes that additional non-government support services be funded by the Commonwealth Government.

11.1 Claims process

The committee heard significant evidence about claims processes for recovery of unpaid entitlements, particularly in relation to the FWO.

If a person believes they are subject to underpayment of wages or entitlements, the person could be expected to take the following steps:

1. Engage with the employer – speak to the employer to determine whether an error has been made, and / or if the dispute can be resolved
2. Contact the Fair Work Ombudsman – seek advice including about the correct EBA or award, and the wage rates and entitlements that apply
3. Calculate the estimated underpayment – noting there may be challenges, such as a lack of pay slips or record keeping

[700] Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, University of NSW Law, 'New report claims 'broken system' fails migrant workers suffering wage theft', 29 October 2018, http://www.law.unsw.edu.au/news/2018/10/new-report-claims-broken-system-fails-migrant-workers-suffering-wage-theft

4. Contact the FWO – request assistance in resolving the dispute. The matter may then proceed to mediation or be addressed with FWO enforcement/compliance activities
5. If the dispute has not been resolved, the person may make an application to the court.[701]

Workers are usually expected to calculate their estimated underpayment and contact their employer about the dispute, before seeking the FWO's assistance in resolving the matter and recovering amounts outstanding.[702]

The FWO can assist workers to recover unpaid entitlements through dispute resolution (which may include correspondence with the employer, providing advice, and facilitating mediation), compliance activities (such as targeted inquiries and campaign audits) and enforcement action (including compliance notices, infringement notices and litigation).

If a person seeks to recover unpaid superannuation, a claim may be directed to the ATO. In 2015, the ATO reported it recovered $8 million in superannuation entitlements from South Australia and Victoria labour-hire companies who had engaged in phoenix behaviour and not paid staff entitlements.[703] In its submission to the Austraian Parliamentary inquiry into wage theft and non-compliance with the superannuation guarantee, the ATO stated that it had transferred almost $2 billion in SG entitlements to superannuation funds, on behalf of 1.4 million employees, in 2015-16.[704]

JobWatch commented on the recovery process, stating:

> *… the current recovery process usually allows the chance for voluntary compliance and/or private mediated settlements rather than judicial adjudications, which allows employers to negotiate a private settlement with no prospects of additional penalties being attached. Unfortunately, this process often also results in the employee settling their claim for less than their actual minimum entitlements because proceeding to court is too complex, costly, risky, stressful, time consuming and protracted.*[705]

The committee heard from an individual whose attempts to recover unpaid entitlements resulted in them accepting $3,000 from the owing employer, after paying approximately $9,000 in legal fees.[706]

Stakeholders consistently expressed frustration at the processes of recovering their entitlements.

The Services Union submitted:

> *The options to pursue an underpayment in Queensland are difficult to navigate, onerous, time consuming and costly for individuals. Quite often this is a deterrent for individuals to pursue underpayments.*[707]

Clare and Glenn Bergin submitted:

> *Again the issue we have is the only way for us to have this enforced is to sue the employer in a civil matter. Why does the Government not charge and sue these employers. We understand that these are individual employers but we believe that once a few of them are sued and fined then it*

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701 JobWatch, submission 016, p 14.

702 JobWatch, submission 016, pp 13-14.

703 Australian Government, ATO, 'ATO uses new powers to recover superannuation entitlements from phoenix operators', 9 January 2015, https://www.ato.gov.au/Media-centre/Media-releases/ATO-uses-new-powers-to-recover-superannuation-entitlements-from-phoenix-operators/

704 ATO, submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 006, p 23.

705 JobWatch, submission 016, pp 8-9.

706 Private hearing transcript, Brisbane, 2018.

707 The Services Union, submission 046, p 2.

Wage theft
Submission 5 - Attachment 1

would perhaps make others stop and think twice about ripping off their staff. Something should be done to stop these failings.[708]

The Senate EERC, in its inquiry into corporate avoidance of the FWA, held the view that:

… it would be more efficient and effective if the recovery processes for underpaid wages and underpaid superannuation were simplified and combined and made directly available to workers and their unions rather than separated between workers/unions/FWO and the ATO.[709]

Allegations of unpaid entitlements under the Queensland industrial relations framework (such as long service leave), can be reported to the OIR. The OIR can refer the matter to the relevant human resource area for appropriate action, or can undertake its own compliance and enforcement including the conduct of investigations and enforcement action through the Industrial Magistrates Court and Queensland Industrial Relations Commission.[710]

11.2 Reporting and interactions with agencies

Numerous stakeholders advised the committee that they reported their workplace concerns to various regulatory bodies including the FWO and ATO, however, satisfaction levels with these agencies were generally low.

Common complaints about the reporting process were about lack of communication by the agencies, and the level of assistance provided.[711]

An individual told the committee of his frustration when his numerous requests to the FWO for an update on his claim prompted no response from FWO officers.[712]

The Fair Work Ombudsman is slowly going through it, but there are simple things again that demonstrate a level of incompetence and a systemic problem with the Fair Work Ombudsman: they do not provide you with any feedback.[713]

The committee further heard from stakeholders who were not satisfied with the level of assistance provided by the FWO. Further, the OIR advised that it received correspondence from people who had made a complaint to the FWO but were dissatisfied with the outcome.[714]

The YWH submission contained an example of an individual who contacted the FWO for assistance with his claim for underpayment, and 'Fair work advised to take my ex employer to the small claims court or federal circuit court and didn't provide any further assistance'.[715]

The QLS described FWO's assistance as limited, telling the committee:

These days, practically, certainly my experience is that the Fair Work Ombudsman's assistance is limited to giving some assistance in working out what a claim may be—that can become problematic sometimes—and offering to mediate with employers. That mediation, as I understand it, is a voluntary process— employers do not have to participate—but good results

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708 Clare and Glenn Bergin, submission 009, p 3.

709 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 71.

710 Queensland Government, OIR, written briefing, 7 June 2018, p 1.

711 See, for example: Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 11; Queensland Government, OIR, written briefing, 7 June 2018, p 9; YWH, submission 019, p 7; private hearing transcript, regional hearing, 2018.

712 Private hearing transcript, regional hearing, 2018.

713 Private hearing transcript, regional hearing, 2018.

714 Queensland Government, OIR, written briefing, 7 June 2018, p 9.

715 YWH, submission 019, p 7.

can occur. However, generally speaking the Fair Work Ombudsman will not themselves then take up the fight and seek civil penalties or payment orders against employers. They give the employees, I understand, a kit and refer them back to the civil process to help themselves.[716]

Another individual, appearing at a private hearing on the Gold Coast, expressed similar frustration, telling the committee:

The lawyer advised that taking legal action would probably succeed but would be expensive and not financially viable. There was no guarantee of success. She suggested I approach both the Fair Work Ombudsman and the ATO and seek assistance with underpayment of wages and super.

Since 2015 I have been in contact with both. They both seem to agree that I was an employee entitled to employee benefits but neither is prepared to pursue the matter on my behalf. I perceive the problem to be one of lack of resources, but they appear to be reluctant to admit this. They have each suggested I seek legal advice to pursue the matter myself.[717]

One private witness, who wished to retain his anonymity, informed the committee that the FWO:

…very much dissuaded me from speaking to other employees at my workplace about what they had found … they chose not to act any further apart from requesting that my employer make up my underpayments, which I felt was very disappointing.[718]

With respect to the ATO, IR Claims submitted that 'it is our experience that workers who request assistance from the ATO often encounter a difficult, time-consuming and frustrating process'.[719]

11.2.1 Mediation processes

Mediation is one of the mechanisms used by the FWO for wage theft disputes. The FWO facilitates mediation, using accredited mediators to provide a free and confidential service.[720] The FWO advised that in 2017-18, $6.5 million was returned to workers via FWO-facilitated mediations, with an average settlement of $5,000;[721] and in 2016-17 it resolved 3,716 disputes through its mediation service, recovering approximately $5.51 million in back-payments.[722]

The FWO mediation was criticised by submitters who noted that the voluntary nature of mediation, means some employers simply choose not to participate.[723] A QLS representative stated in their experience they believed that only approximately 50 percent of employers are willing to participate constructively in a mediation process.[724]

Mr Jamie Gardiner-Hudson told the committee the FWO had contacted his employer about $40,000 of unpaid wages, but 'Fair Work contacted them and asked for mediation, and they said that they believed they did not owe me any money and that was it'.[725]

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716 Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, pp 9-10.

717 Private hearing transcript, regional hearing, 2018.

718 Name suppressed, private hearing transcript (published), Ipswich, 11 September 2018, p 5.

719 IR Claims, submission 13, p 47.

720 Australian Government, FWO, *Mediation Checklist*.

721 Australian Government, FWO, correspondence, 5 October 2018, p 6.

722 Australian Government, FWO and ROC, *Annual Report 2016-17*, 2017, p 16.

723 Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, pp 9-10; JobWatch, submission 016, p 8.

724 Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, p 11.

725 Mr Jamie Gardiner-Hudson, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 9.

The committee heard of the frustrations when an employer does not agree to participate in mediation. Dr Jennifer Fraser, whose employer refused to proceed to mediation, said her matter 'could not be taken any further because Fair Work says they have 30,000 cases of a similar nature to deal with'.[726]

Other evidence to the committee suggested a significant power imbalance, appeared visible when employers engaged senior legal representation at a mediation, intimidating the worker and using skills and experienced negotiation tactics that the worker did not possess. This was captured by a worker who explained:

> *… one thing that I found very unfair was that I had to represent myself before the commissioner in that mediation process and my employer was able to get a very experienced advocate to represent them… It is very clear asymmetry where there is a huge balance in favour of the employer and you as the employee do not have access to that kind of experience to back you up.*[727]

IR Claims held a strong view on the mediation process, believing it is not appropriate:

> *In terms of their mediation department, it actively encourages workers to bargain against their own. The employer comes there voluntarily and then they say that, if they do not settle, they will have to go to either small claims division or line up in the federal circuit court behind, interestingly, the refugee matters and the family law issues. Then you are in a highly stressed and highly over worked federal court system for them to recover the money.*[728]

IR Claims also said:

> *The FWO employs "accredited mediators" - whose very role is to seek compromise. A worker should never be asked to bargain and compromise on their wages that have been stolen - and the FWO should not have a unit dedicated to facilitating this.*[729]

Such compromise during mediation, was outlined by a witness who provided evidence in a private hearing, who calculated his underpayments owed by his employer to be about $30,000. He accepted a settlement of $3,000 from his employer, and had to pay $8,000 for his legal representation during the dispute resolution and mediation process.[730] He was therefore not only unsuccessful in recovering his unpaid entitlements but was left out-of-pocket due to legal fees.

Concerns about the FWC mediation process were raised by JobWatch, which stated:

> *One of the problems with the process is that, at the mediation stage with the Fair Work Ombudsman, employers will sometimes say things like, 'I don't care if it was $26 an hour. You weren't worth it. I'll offer you half of what you are owed.' The employee has the option then. They can have the money in their hand within seven days or they could have a four-month court case, so, yes, they do often settle for less than they are entitled to.*[731]

Even if a settlement is agreed at mediation, there is no legal avenue for a person to enforce the settlement. The FWO website confirms 'We can't force employers and employees to take any specific action, including pay money'.[732]

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726 Dr Jennifer Fraser, public hearing transcript, Sunshine Coast, 11 September 2018, p 16.

727 Name suppressed, private hearing transcript (published), Ipswich, 11 September 2018, pp 5, 8.

728 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 8.

729 IR Claims, submission 013, p 38.

730 Private hearing transcript, Brisbane, 2018.

731 Mr Ian Scott, Principal Lawyer, JobWatch, public, hearing transcript, Brisbane, 16 August 2018, p 20.

732 Australian Government, FWO, 'Step 4: Ask for our help', https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/step-4-ask-for-our-help

Some stakeholders suggested FWO mediation should not continue.[733] IR Claims suggested the resources would be better spent on enforcement. It also argued that 'you should not have to mediate your own money. You should not be the subject of mediation'.[734]

The ATO dispute resolution activities also includes mediation, which it refers to as 'in-house facilitation'. Similar to FWO mediation, the process is voluntary, and can result in a 'statement of expectations' between the parties. Likewise, this is not legally enforceable.[735]

In contrast, the QLS noted that under the Queensland industrial relations framework, where a conference is held as a dispute resolution mechanism, the conciliator may require the parties to participate in the process. If the parties do not comply with the conciliator's request, sanctions may be imposed on them by a Magistrates Court.[736]

Committee comment

The committee noted with concern, the issues raised by stakeholders and witnesses in regard to mediation processes used by the FWO, including non-participation of employers, and the inability of the FWO to enforce outcomes.

In particular, the committee is concerned that employees are required to negotiate the amount of their unpaid entitlements, particularly when an employer has admitted to underpayments. This does not reflect a fair or just system for workers who are only trying to recover what they are legally and duly owed, and can even leave workers worse off if they have sought legal representation or advice during the process.

The committee notes that the mediation processes of the QIRC, in contrast, can require employers to participate, and can result in enforceable and binding outcomes.

11.2.2 Court processes

If dispute resolution fails and assistance is not provided by regulators, legal action may be a person's last avenue to pursue their unpaid entitlements.

The committee heard from a number of stakeholders who discussed the court process, and raised issues regarding its inaccessibility, particularly due to the cost and complexity of the system.[737]

The OIR advised:

> *Figures from the FWO show that matters involving its compliance and enforcement powers took an average of 136 days to resolve (FWO and Registered Organisations Commission Entity, 2017). By the FWO's own admission, resolution through the courts can ultimately take years.*[738]

The committee heard, for individuals in particular, that 'accessing the court system is a difficult and overwhelming prospect'.[739]

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733 IR Claims, submission 013, p 57.

734 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, 3 September 2018, p 15.

735 Australian Government, ATO, 'In-house facilitation', 29 September 2017, https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Options-for-resolving-disputes/In-House-Facilitation/?anchor=Resolve_tax_disputes_more_quickly_using_in_house_facilitation#Resolve_tax_disputes_more_quickly_using_in_house_facilitation – better reference?

736 QLS, response to questions taken on notice at the hearing on 16 August 2018, p 2.

737 See, for example: LawRight, submission 028, p 8; Ms Michelle Lovett, private capacity, private hearing transcript (published), Maryborough, 12 September 2018, p 11; IEU, submission 007, p 4.

738 Queensland Government, OIR, written briefing, 7 June 2018, p 26.

739 LawRight, submission 028, p 8.

Wage theft
Submission 5 - Attachment 1

Ms Michelle Lovett, who is not legally trained and is representing her son in an ongoing court case against her son's employer for underpayment of wages and entitlements, told the committee:

> *Even though I have an interest, it is still very difficult. Obviously, without formal training, I am still climbing walls, but I am trying to get through.*
>
> *… we have found it very difficult. We have applied for Legal Aid. We keep getting a yes and a no, because they do not have a lot of employment funding. They have given us some advice, but very little. I have not managed to find any pro bono or anything to get any form of assistance to even help write an opening statement, and all of that sort of stuff.*[740]

11.2.2.1 Federal Circuit Court of Australia

A person may apply to have their matter heard by the Federal Circuit Court of Australia, which has jurisdiction to hear matters relating to enforcement of workplace entitlements.

Costs of dealing with a matter in the Federal Circuit Court can include filing an application ($665), mediation by a court officer attendance ($535 for each attendance), and daily hearing fees ($795 per day of a trial).[741]

A person may represent themselves during a Federal Circuit Court matter, however this may be difficult, particularly in complex cases involving sham contracting.

The difficulty in accessing and progressing a claim, was outlined by the Independent Education Union, which submitted:

> *Another failing of the current regularly framework derives from the inaccessibility of the claims process. Wage theft cases involving under-payment of wages and sham contracting, are firstly brought before the Federal Circuit Court, which is intended to allow for self-representation. However, conceptualising and proving a case of sham contracting is often a very complex matter, making it difficult and unlikely for workers to bring cases without legal representation.*[742]

The time taken for a matter to progress through the court system was also raised as a concern.[743]

As the primary courts with jurisdiction for hearing matters relating to enforcement of workplace entitlements, the QLS expressed concern that 'Queensland has historically had fewer Federal Circuit Court judges with employment and industrial relations experience as compared with other States and Territories',[744] and calculated that in Queensland the ratio of Federal Circuit Court judges who predominately deal with employment matters, per one million residents, was 0.403, compared with 4.819 in the ACT and 2.315 in South Australia.[745]

Jurisdiction to hear matters relating to breaches of the NES and modern awards, is also provided to the Queensland Magistrates Court, [746] which is an 'eligible State or Territory court' under the FWA. As an eligible court, the Queensland Magistrates Court can hear a relevant FWA matter as an 'Employment Claim'. The QLS noted, however, that this process is not often utilised as an avenue to

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740 Ms Michelle Lovett, private capacity, private hearing transcript (published), Maryborough, 12 September 2018, p 11.

741 Federal Circuit Court of Australia, *General Federal Law Fees*, 29 June 2019, http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl/fees-gfl

742 IEU, submission 007, p 4.

743 IR Claims, submission 013, p 12; QCU, submission 034, pp 34, 40; QCA, submission 035, p 4; QLS, submission 040, p 3; private hearing transcript, regional hearing, 2018.

744 QLS, submission 040, p 2.

745 QLS, submission 040, p 2.

746 QLS, submission 040, p 3; FWA, ss 12, 539, 545(3), 546**.**

progress claims relating to wage theft;[747] and IR Claims submitted that its attempts at having matters heard through this process had not succeeded.[748]

Although the QIRC can hear matters regarding breaches of Queensland industrial laws, it is not considered an 'eligible State or Territory court' under the FWA so cannot hear matters relating to breaches of the FWA.

11.2.2.2 Small Claims

A person may choose to apply to have a matter heard through the Federal Circuit Court small claims process, if their claim is to recover entitlements of less than $20,000. During a small claims proceeding, the court is not bound by the usual rules of evidence and procedure and may conduct proceedings in an informal manner.[749]

The cost of having a matter heard through the small claims process are less than Federal Circuit Court general matters, such as the costs of filing an application which reduce from $665 to $235 for claims less than $10,000; and $385 for claims between $10,000 and $20,000.[750] However, these costs can still be significant for some people. The YWH noted: 'It is reasonable to assume most young workers who are being underpaid are not in a position, financial or otherwise, to pursue a claim according to the Ombudsman's advice'.[751]

The FWO states it can provide assistance to people pursuing their entitlements through the small claims process, by 'directing them to tools and resources that explain the small claims process and help them to calculate minimum employment entitlements'.[752]

The FWO has an Assisted Small Claims team which may also provide assistance during the application process. The level of assistance is determined on a case-by-case basis.[753] The FWO assisted over 800 people to pursue their small claims in 2017-18, which resulted in the recovery of $1,224,145 in unpaid entitlements.[754]

The committee however, heard of the difficulties in navigating the court processes.

LawRight submitted:

> *While the small claims specialist jurisdiction is designed to be user-friendly, lawyer-less and inexpensive, with procedures that are simplified and relatively informal, the complex legal regime governing employment in Australia presents an ever-present challenge.*[755]
>
> *… This raises difficult evidentiary issues for claimants in circumstances where there is only an oral employment contract or where the claimant has no access to employment records, payslips or other forms of documentary proof that will be required by the court to establish their claim.*[756]

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747 QLS, submission 040, p 3.

748 IR Claims, submission 013, p 50.

749 FWA, s 548(3).

750 Federal Circuit Court of Australia, *General Federal Law Fees*, 29 June 2019, http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl/fees-gfl

751 YWH, submission 019, p 8.

752 Australian Government, FWO, *Compliance and Enforcement Policy,* October 2018, p 18.

753 Australian Government, FWO, correspondence, 5 October 2018, p 6.

754 Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, p 16.

755 LawRight, submission 028, p 9.

756 LawRight, submission 028, p 8.

The report of the National Temporary Migrant Work Survey also suggested the small claims process remains inaccessible to the majority of migrant workers, revealing:

> *… the very small number of migrant workers who use the courts are almost always assisted by trade unions or legal service providers because the complexity of applications still renders litigation inaccessible to this group. For example, even in the small claims division a self represented litigant must correctly identify the legal entity of their employer as well as the legal instrument the employer has breached. They must also prepare necessary affidavits and execute formal legal service of relevant documents on the employer. Among participants in the NTMW Survey, 1 in 12 (8%) did not even know who paid their wages, let alone the correct name of the employer's formal legal entity. In the context of an acute power imbalance in court between most migrant workers and their employers, even those few migrant workers who are able to file a claim have an understandably bleak view of the risks and likelihood of success.*[757]

IR claims noted that there is no avenue for pecuniary penalties through the mediation or small claims process, and suggested 'there is no meaningful deterrence for employers who don't want to comply with workplace laws - even when they interact with the FWO after it receives an underpayment complaint.'[758]

11.2.2.3 Queensland Industrial Relations Commission

For matters which fall within the Queensland industrial relations framework, claims to recover unpaid entitlements may be made through the QIRC. This may be used for example, to recover unpaid long service leave entitlements, and arrears of wages from local governments and parents and citizens' associations.[759]

A person may apply to the QIRC if their claim of unpaid wages or superannuation amounts to less than $50,000, within six years of the amount becoming payable.[760] After lodging an application, the person may be required to attend a conciliation conference held by a QIRC member. The purpose of the conference is for the parties to agree to a settlement of the matter.[761] It was suggested by the ALHR that the QIRC conciliation processes could be an example of how to deal more broadly with wage theft matters in Queensland.[762] The QCU also noted the arbitration powers of the QIRC.[763] For some matters where conciliation is unsuccessful, a matter may be referred to arbitration process under the IR Act, for determination by the QIRC.[764] The decision is binding on all parties.

The Queensland Magistrates Court may refer matters to the QIRC for mediation. If mediation is unsuccessful, the matter is referred back to the Magistrates Court for determination.

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757 Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 15.

758 IR Claims, submission 013, p 38.

759 Queensland Government, OIR, written briefing, 7 June 2018, p 1.

760 IR Act, ss 475-476; QIRC, Information Sheets: Recovery of unpaid wages and superannuation, 28 September 2018, http://www.qirc.qld.gov.au/qirc/prod_form_leg/factsheets/fs_recovery.htm

761 QIRC, Information Sheets: Recovery of unpaid wages and superannuation, 28 September 2018, http://www.qirc.qld.gov.au/qirc/prod_form_leg/factsheets/fs_recovery.htm

762 AHLR, submission 051, p 12.

763 QCU, submission 34, p 40.

764 IR Act, s177, 179.

The QIRC can also be used to assist in dispute resolution of matters under the *Work Health and Safety Act 2011* (Qld).[765]

11.2.2.4 Enforcement of court orders

If a person is successful in a court matter, they may still encounter issues having a court order enforced, and their entitlements repaid.

Such reservations were outlined by an individual about seeking recovery of her entitlements through the court:

> *I thought what is the point? I am owed about $3½ thousand gross in leave entitlements on my final pay, but I would have to spend more money to get that money and I know jolly well he will spend a fortune on lawyers to argue not to pay it. Also even if I get a court settlement I have friends who do bookkeeping, payroll and stuff who have worked for people who say that they will not pay the court settlement. Where does that leave me? I have not got the money to keep going to court. Basically this money is sitting there owed to me and I am in no man's land.*[766]

JobWatch outlined issues with enforcement of court orders, stating:

> *There is a whole other area of law which no-one really likes talking about which comes after the case is finished. With underpayments, usually the employer does not have a defence… There is a high level of success in going to the hearing and getting an order in the employee's favour for the amount of the claim. In those cases, probably the employer has not showed up and then you are into the next stage which is called enforcement. That is what we were talking about briefly before, where insolvency issues arise. Sending the sheriff around to seize property when it is a business that has one computer or something is fruitless. Those employees are not in a position to commence insolvency proceedings. It costs thousands of dollars to get the ball rolling and there may not be anything in the end.*[767]

LawRight similarly submitted:

> *Unfortunately, sometimes an employer does not participate in proceedings or comply with court orders. The employee claimant must then commence separate enforcement proceedings which requires the claimant to self-represent twice – once to obtain an order in their favour and another to enforce these orders. This, and other factors discussed further later in this submission, pose added barriers to many people enjoying their legal entitlements.*[768]

Fair Work Employment Lawyers raised the issue of Management Liability Insurance, whereby a company's insurance policy extends to legal costs associated with conduct, such as underpayment of wages, however the insurance does not extend to the underpayment that is owed.[769] This means the employer may be able to fund litigation through their insurance policy but may not be in a financial position to pay any back-pay found owing.[770]

11.2.2.5 Stakeholder Proposals

A number of suggestions were made by stakeholders, as to how to improve aspects of the court process for people seeking to recover their entitlements.

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765 Queensland Government, 'Dispute resolution', 2 July 2018, https://www.worksafe.qld.gov.au/laws-and-compliance/dispute-resolution; *Work Health and Safety Act 2011* (Qld), Part 5, Division 7A of the

766 Ms Sara Bartrum, private capacity, public hearing transcript, Maryborough, 12 September 2018, p 2.

767 Mr Ian Scott, Principal Lawyer, JobWatch, public hearing transcript, Brisbane, 16 August 2018, p 20.

768 LawRight, submission 028, pp 7-8.

769 Fair Work Employment Lawyers, submission 020, p 1.

770 Fair Work Employment Lawyers, submission 020, p 1.

Submitters generally supported simplified processes and procedures.[771] This included the Queensland Law Society, which proposed changes to the filing processes and forms, such as the establishment of a pro forma employment claim forms, lower filing fees and a presumption in favour of employees.[772] The QLS compared the forms and process of having a matter heard under the state industrial framework, to the forms and processes of the Commonwealth courts. It submitted that the application form used by the Federal Circuit Court is a pro forma application and prompts applicants to provide relevant details, whereas the application form of the Magistrates Court require the applicant to identify and articulate the basis for their claim.[773] The QLS also noted the limited number of guides and resources available to assist applicants pursue their claim through the Magistrates Courts, compared to the resources available for the Federal Circuit Court. [774]

Further, the QLS noted recent changes to the Commonwealth jurisdiction by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) which 'reversed the onus of proof in proceedings involving allegations of unpaid entitlements if the employer failed to maintain proper employment records'.[775] It was suggested this reversal of the onus of proof should similarly apply to Employment Claims in the Magistrates Court.[776]

IR Claims noted that under the Queensland industrial relations framework, the process is more timely and does not require filing fees.[777] It recommended filing fees for all wage theft claims to be waived, and facilitation of a pro-bono legal service to assist workers in recovery of their unpaid entitlements.[778]

Similarly, JobWatch submitted that the Queensland Government should consider amendment of the Magistrates Court's rules and procedures to improve access to justice, including a potential to waive filing fees and make changes to service requirements.[779]

Reforms to the Magistrates Courts' were proposed, including proposals to further utilise the ability of the Magistrates Court to hear wage theft matters which currently fall within the Commonwealth jurisdiction.[780] For example, proposals included a designated Queensland Industrial Magistrate or industrial division of the Magistrates Court and magistrates specifically trained in industrial relations laws.[781] This could allow for a more accessible and timely process in comparison to the federal court system.[782]

The QCU suggested Queensland develop a legal framework similar to Victoria, which establishes an industrial division of the Magistrates Court under the *Magistrates Court Act 1989* (Vic).[783] The Industrial Division of the Victorian Magistrates Court 'has such of the powers of the Court as are necessary to enable it to exercise its jurisdiction.'[784] This division operates in a less formal manner than

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771 See for example: IEU, submission 007, p 6; JobWatch, submission 016; QLS submission 040, pp 3-8.

772 QLS, submission 040, pp 3-8.

773 QLS, submission 040, p 4.

774 QLS, submission 040, p 4.

775 QLS, submission 040, p 5.

776 QLS, submission 040, p 5.

777 IR Claims, submission 013, p 51.

778 IR Claims, submission 013, p 55.

779 JobWatch, submission 016, p 14.

780 IR Claims, submission 013, pp 56; JobWatch submission 016, p 13; YWH, submission 019, p 10.

781 IR Claims, submission 013, pp 50, 56; QCU, submission 034, pp 2, 34; Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

782 IR Claims, submission 13, p 50.

783 QCU, submission 034, p 34.

784 *Magistrates Court Act 1989* (Vic), s 4(2B).

the general Magistrates Court, with 'minimum of legal form and technicality.'[785] This is designed to 'encourage inexpensive recovery of wages'.[786]

Maurice Blackburn and joint submitters recommended the relevant rules under the IR Act be streamlined and simplified, and suggested 'the development of a dedicated, low-cost user friendly underpayment and wage recovery jurisdiction'[787] within the Industrial Division of the Magistrates Court, to consider matters within the IR Act.[788]

The CFMEU Queensland recommended legislation be introduced to refer the jurisdiction of the Queensland courts to the Queensland Industrial Relations Commission, suggesting it would 'enable workers to more readily recover their wages and seek penalties that deter employers from engaging in wage theft'.[789] This could be achieved by making the QIRC an 'eligible State or Territory court' under the FWA. This could utilise the expertise of the QIRC in hearing industrial relations matters and using dispute resolution processes including conciliation, mediation and arbitration of matters. The Committee understands however, that there may be some constitutional limitations on the ability of the QIRC to perform this role, which would require further investigation.

The committee notes that the QIRC already has the ability to mediate matters which are initiated in the Queensland Magistrates Court.

The QLS also recommended the appointment of more Federal Circuit Court judges in Queensland,[790] suggesting this would assist workers' 'to access the court system and pursue wager and other entitlement matters in a timely manner'.[791] QLS stated that by continuing to have matters heard by Federal Circuit Court judges (opposed to other approaches such as increasing the role of magistrates), this approach would 'promote consistency of approaches and limit complexity for litigants and practitioners'.[792]

Committee comment

Accessibility to, and delays in, the court process are clearly a significant barrier to workers' recovery of unpaid entitlements resulting from wage theft. The committee noted that an increase in Federal Circuit Court judges in Queensland, to hear wage theft matters which fall within the Commonwealth jurisdiction (including the FWA) with expertise in industrial relations laws, could improve accessibility and decrease delays for persons' seeking recovery of unpaid entitlements.

Further, the committee noted the difficulties in navigating the court process, particularly in regard to the structure of court forms and the cost of filing fees.

While the committee noted that filing fees under the small claims process were significantly less than filing fees for other matters heard by the Federal Circuit Court, the cost can still be unaffordable to workers who are already financially impacted by unpaid entitlements. It was further noted that there are no filing fees for wage theft matters under the Queensland industrial relations jurisdiction.[793]

An alternative avenue for increasing accessibility and reducing delays was also sought, in the form of establishing a dedicated industrial division within the Queensland Magistrates Court to hear wage theft

785 *Magistrates Court Act 1989* (Vic), s 4(3C).

786 QCU, submission 034, p 36.

787 Maurice Blackburn and joint submitters, submission 033, p 19.

788 Maurice Blackburn and joint submitters, submission 033, p 19.

789 CFMEU, submission 039, p 15.

790 QLS, submission 040, p 3.

791 QLS, submission 040, p 2.

792 QLS, submission 040, p 3.

793 IR Claims, submission 013, p 51.

matters, or to utilise the QIRC or Industrial Court, by increasing its jurisdiction. An industrial division of the Queensland Magistrates Court could operate in a less formal manner than the Federal Circuit Court, and provide a cheaper and faster process for hearing matters. This could also utilise existing resources of the Magistrates Courts throughout Queensland, including the ability of the Queensland Magistrates Court to refer matters to the QIRC for mediation.

Recommendation 7

The committee recommends the Federal Government appoint additional Federal Circuit Court Judges in Queensland, and ensure Queensland retains its proportionate share of Federal Circuit Court judges.

Recommendation 8

The committee recommends the Queensland Government review and take actions available to it, to ensure that wage recovery processes for Queensland workers are simple, quick and low-cost. This should include further investigation of the following options:

a) establishing a dedicated industrial division within the Queensland Magistrates Court, in line with the example in Victoria

b) investigating the inclusion of the Queensland Industrial Relations Commission or Industrial Court as an eligible state court under the *Fair Work Act 2009* (Cth)

c) reviewing relevant forms and processes to ensure the legal process is simple and user friendly for workers and their representatives

d) waiving or reducing current court filing fees for wage theft matters.

11.3 Insolvency

Where an employee is denied their due wages and entitlements as a result of their employer ceasing trade, the path to recovering their wages is slightly different.

After an employer goes bankrupt or into liquidation, employees and other 'unsecured creditors' cannot commence or continue legal action against the company, unless the court permits.[794]

Dr Hardy, Melissa Kennedy and Professor John Howe lamented that an insolvency event can often occur prior to the final determination of court proceedings, such that 'the effectiveness of civil remedy litigation is severely compromised'.[795]

While enforcement litigation, and the imposition of pecuniary penalties, is ostensibly designed to provide redress and deliver deterrence, these objectives are foiled by the fact that the direct employer can easily arrange their affairs so as to render themselves 'judgment-proof'.[796]

In other circumstances, employers may seek to exploit insolvency processes post-judgement, to avoid complying with a court direction (i.e. a repayment order). The FWO has intervened on some occasions by applying to the court to request the issuing of a freezing order on the assets of the company, to prevent an employer redirecting funds to trigger insolvency, as a means of avoiding paying penalties

[794] Australian Government, ASIC, 'Liquidation: A guide for creditors', 1 September 2017, https://www.asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/liquidation-a-guide-for-creditors/#purpose

[795] Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 5.

[796] Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 5.

or amounts owed to employees.[797] A recent example was the freezing order imposed in the case of Cairns-based tourism operator Leigh Alan Jorgensen, who had failed to pay a $12,000 penalty and to arrange for his company to pay a $55,000 penalty and back pay to five backpackers by a specified date, and suggested to FWO officers that he was prepared to 'bankrupt'[798] his company to avoid paying the penalties and back-pay.[799] Mr Jorgensen subsequently contravened the freezing order against his company by transferring a total of $41,035 from two frozen accounts into his family trust account and was found in contempt of court for the contravention, receiving an $84,956 fine and a 10 days imprisonment (and a further suspended jail term).[800]

As noted at chapter 2.4, where a company has been declared insolvent and liquidators appointed, employees have preferential rights against other unsecured creditors (under section 556 of the Corporations Act). This means employees have the right, if there are funds left over after the payment of the fees and expenses of the liquidator, to be paid their outstanding entitlements in priority to other unsecured creditors.[801]

In recognition that prospects of recovery through the liquidators' distribution of funds can be limited,[802] some affected employees are able to access the legislative safety net of last resort provided by the FEG scheme, which is administered by the federal Department of Jobs and Small Business. The scheme provides eligible employees with financial assistance in the form of monetary advances in respect of their owed wages and entitlements.[803]

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797 Australian Government, FWO, 'Jail term imposed in Fair Work Ombudsman's first contempt of court case', media release, 14 May 2018, https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180513-jorgensen-contempt-penalty-media-release

798 Bankruptcy only applies to individuals, and is a legal declaration that a person is unable to pay their debts. Liquidation only applies to companies. When a company can't pay its debts and goes into liquidation, it stops operating, with company assets sold in an attempt to pay off the debts. See: Australian Government, Department of Industry, Innovation and Science, *Bankruptcy,* updated 21 August 2018, https://www.business.gov.au/closing/bankruptcy

799 Australian Government, FWO, 'Jail term imposed in Fair Work Ombudsman's first contempt of court case', media release, 14 May 2018, https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180513-jorgensen-contempt-penalty-media-release

800 Australian Government, FWO, 'Jail term imposed in Fair Work Ombudsman's first contempt of court case', media release, 14 May 2018, https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180513-jorgensen-contempt-penalty-media-release

801 Australian Government, ASIC, *Liquidation: a guide for creditors*, information sheet 45, 30 January 2012, p 1. https://download.asic.gov.au/media/1340240/Liquidation_guide_for_creditors.pdf. For superannuation, the employee's priority status as an unsecured creditor applies only to amounts up to a limit of $2,000 prescribed in section 556 (1A) of the Corporations Act, with any amounts exceeding $2,000 ranking alongside those of unsecured creditors. See: Australian Government, ATO, Superannuation and insolvency, 11 May 2018, https://www.ato.gov.au/tax-professionals/your-practice/insolvency-practitioners/superannuation-and-insolvency/

802 Al Bhadily and Hosie have stated that 'priority in the event of insolvency has not effectively protected employee entitlements because there are invariably insufficient assets available for distribution after secured creditors have recovered their entitlements'. See: Mohammad Al Bhadily and Peter Hosie, 'Australian employee entitlements in the event of insolvency: is an insurance scheme an effective protective measure?,' *Adelaide Law Review,* vol 26, 2016, pp 247-248.

803 Australian Government, Department of Jobs and Small Business, 'Fair Entitlements Guarantee', 3 September 2018, https://www.jobs.gov.au/fair-entitlements-guarantee-feg

Wage theft
Submission 5 - Attachment 1

To qualify for an advance under the FEG scheme, the end of the person's employment must have been due to the insolvency event, or occurred within six months of the event (six month threshold). The scheme places the following limits on employee claims:

- unpaid wages—up to 13 weeks
- unpaid annual leave and long service leave
- payment in lieu of notice—up to five weeks
- redundancy pay—up to four weeks per full year of service.[804]

Submitting to the Senate Economics References Committee inquiry into non-compliance with the SG, the former Commonwealth Department of Employment (now Department of Jobs and Small Business) advised that 'over the total life of FEG and its forerunner schemes from 2000 to 30 June 2016, $2.1 billion has been paid to 180,148 people'.[805] In 2016-17, a total of $186.02 million was paid to 12,354 claimants under the FEG scheme, with the department's FEG hotline handling 24,940 telephone calls and responding to 12,179 emails about the scheme.[806]

Whilst acknowledging this important assistance, submitters considered that the FEG provides only 'a semblance of protection for Australian workers',[807] because the scheme's limits render many workers ineligible, leaving them without any 'safety net' to depend on.[808]

11.3.1 Access to the Fair Entitlements Guarantee

11.3.1.1 Abandoned companies and the six-month threshold

In a recent journal article, Anderson emphasised that both 'the statutory priority and FEG are only available to employees of companies in liquidation, and do not cover companies in voluntary administration or for which no external administrator has been appointed'.[809] Directors of such corporate employers may frequently have very little incentive to voluntarily wind up their company's operations.[810]

An employee can engage in 'cumbersome and costly court processes seeking the winding up or bankruptcy of their employer'; though the QLS noted:

> *Even putting aside the complexity that self-represented employees, who may frequently come from lower economic backgrounds, must overcome in this regard, the expense and time that a Court-ordered wind-up required risks the employee potentially falling short of meeting the six month threshold.*[811]

Part 5.4C of the Corporations Act gives ASIC the power to order the winding up of a company subject to notice requirements. This mechanism was introduced 'as a means by which employees of

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804 Australian Government, Department of Jobs and Small Business, 'Fair Entitlements Guarantee', 3 September 2018, https://www.jobs.gov.au/fair-entitlements-guarantee-feg

805 Australian Government, Department of Employment, submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 024, pp 5-6

806 Australian Government, Department of Employment, *Annual Report 2016-17*, 2017, p 54.

807 JobWatch, submission 016, p 17.

808 IEU, submission 07, pp 4-6; JobWatch, submission 016, p 17; LawRight, submission 028, pp 13-14; QLS, submission 04, pp 6-9.

809 Helen Anderson, 'Understanding the phoenix landscape for employees', *Australian Journal of Labour Law,* vol. 29, no. 3, 2016, p 259.

810 QLS, submission 040, p 6.

811 QLS, submission 040, pp 6-7.

abandoned corporate employers could access the predecessor to the FEG scheme without themselves having to apply for the winding up of their employer'.[812] In correspondence to the committee, ASIC advised that 'since the [FEG] program's inception in 2012, ASIC has funded the winding up of 110 abandoned companies to help approximately 266 employees recover entitlements exceeding $5.5 million'.[813] This includes:

- in 2014–15, exercising powers to appoint liquidators to 31 abandoned companies that owed 98 employees more than $995,000 in entitlements[814]
- in 2016-17, using wind up powers in relation to six abandoned companies owing four employees more than $242,000 in entitlements,[815] and
- in 2017-18, winding up 17 abandoned companies owing at least 32 employees more than $570,000.[816]

Critics have highlighted that this represents only a small proportion of the total number of abandoned companies. For example, Anderson noted:

> *In 2014-15, 7,044 companies entered liquidation; 6.2% of the 112,714 companies that were deregistered in that year. In that same period, about 37,600 companies were deregistered by ASIC for failure to return documents and pay fees. The latter are known as dormant or abandoned companies and there are potentially thousands of employees of such companies who are not paid their entitlements and who have no access to FEG… but between July 2014 and June 2015, ASIC only applied for the winding up of 31 abandoned companies.*[817]

Anderson states that this limited use of the wind up power raises questions about whether it 'is exercised sufficiently to achieve its objective' of affording employees access to the FEG.[818] Highlighting the impact on those individuals who lose entitlements at the hands of such abandoned companies, JobWatch told the committee about a worker who lost entitlements at the hands of an abandoned company.

> ***Case study***
>
> *Chad worked as an apprentice for approximately two years. One Monday he arrived at work to find his employer had disappeared, and was not contactable. Chad is owed $14,000 in underpayments, and has lost his annual leave and superannuation entitlements.*
>
> *His former employer did not go into liquidation; they simply disappeared. Consequently Chad cannot make a claim under the Fair Entitlements Guarantee Act 2012 (Cth).*
>
> *Chad filed an unfair dismissal claim, but is unlikely to be able enforce any order against the uncontactable employer for unfair dismissal or underpayment.* [819]

812 QLS, submission 040, p 6.

813 Australian Government, ASIC, correspondence, 17 October 2018, p 3.

814 Australian Government, ASIC, *Annual Report 2014-15,* 2015, p 56.

815 ASIC, *Annual Report 2016-17,* 2017, p 66.

816 Australian Government, ASIC, '18-312MR ASIC winds up 17 abandoned companies owing more than $570,000 in employee entitlements', media release, 18 October 2018, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-312mr-asic-winds-up-17-abandoned-companies-owing-more-than-570-000-in-employee-entitlements/

817 Helen Anderson, 'Understanding the phoenix landscape for employees', *Australian Journal of Labour Law,* vol. 29, no. 3, 2016, p 259.

818 Helen Anderson, 'It's all about the money', *Federal Law Review,* vol 46, no. 2, 2018, p 293.

819 JobWatch, submission 016, p 17.

Wage theft
Submission 5 - Attachment 1

LawRight further shared the experience of one of their clients:

> *"Bianca" was employed as a bartender and paid below the relevant rate under the Hospitality Industry (General) Award 2010 during the entire term of her employment. Bianca became aware of the underpayment and raised the issue with the employer, at which point the employer company informed Bianca that it was in the process of going into liquidation. Bianca contacted the Fair Work Ombudsman and was advised to make a claim via the FEG scheme. However, Bianca's claim was rejected because the employer company had not yet gone into liquidation. LawRight offered to help Bianca commence proceedings in the Federal Circuit Court to try to recover her unpaid entitlements before the employer company went into liquidation. However, Bianca desisted from pursuing her rights.*[820]

The committee also heard from a number of individuals who had found themselves just outside of the six-month threshold, and were therefore unable to access the FEG scheme. This included one private witness who missed accessing the scheme by one month, after only having discovered the underpayment at the six-month mark.[821]

The QLS recommended that consideration be given to giving ASIC broader powers to order the winding up of a company. The QLS submitted:

> *To achieve the policy aims referred to above, such a power could be limited to where an employee has served a valid statutory demand seeking the repayment of qualifying entitlements (i.e. wages, annual leave, termination and redundancy payments), with which the employer has failed to comply or which they have not applied to be set aside. Similarly, the Society recommends that consideration be given to the Secretary of the Department or their delegate being conferred standing under the Bankruptcy Act 1966 (Qld) to seek a sequestration order where an individual employer has failed to comply with a bankruptcy notice given by an employee or has not applied to set it aside. Under the proposal, the trigger for a person to qualify for an advance under the FEG Scheme would not change, and the Secretary would have the same subrogation rights as they do at present.*[822]

The QLS also proposed that the six month threshold be extended:

> *… to allow employees additional time to directly pursue remedies themselves either through negotiating a payment plan with their employer, and any other persons involved in the employer's contraventions of workplace laws (most commonly this will be the company's directors).*[823]

11.3.1.2 Exclusion of temporary visa holders

Some submitters highlighted the lack of access to the FEG scheme for foreign nationals,[824] who tend to be more highly represented among those who experience wage theft (see chapter 4.4). JobWatch cited the example of a 457 class (temporary skilled work) visa holder who worked for the same employer for four years, and in a permanent position for two of those years:

> *For the past 16 months, Gin was not paid his superannuation entitlements. Gin requested payment but was told the company was being liquidated. Gin received advice from a lawyer that*

820 LawRight, submission 028, p 13.

821 Private hearing transcript, regional hearing, 2018.

822 QLS, submission 040, p 7.

823 QLS, submission 040, p 7.

824 Section 10(g) of the FEG Act specifies that a person is eligible for the FEG only if, 'when the employment ended, the person was an Australian citizen or, under the *Migration Act 1958*, the holder of a permanent visa or a special category visa' (class 444 temporary visa for a New Zealand citizen).

> *his prospects are poor: the Fair Entitlements Guarantee Act 2012 (Cth) does not extend to foreign nationals and an action against the directors of company is prohibitively expensive.*[825]

The ability of temporary visa workers to access the FEG was considered by the Senate Legal and Constitutional References Committee in its inquiry into the framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements. That committee's 2013 report found the omission of 457 visa workers from the FEG to be 'on its face, discriminatory, given that there is no coherent policy basis justifying the distinction between the entitlements of local and 457 visa workers in such circumstances'.[826] Accordingly, the report recommended the FEG Act be amended to make temporary visa holders eligible for entitlements under the FEG.

While the recommendation was not supported by the Government,[827] it was subsequently reaffirmed by the Senate EERC in its March 2016 inquiry report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*. Citing evidence that many working holiday makers and international student visas effectively work full-time and have on occasions lost thousands of dollars when an employer has gone broke, the 2016 report stated:

> *The committee concurs with the position of the Senate Legal and Constitutional References Committee report on this matter and, accordingly, is of the view that under principles of fairness and equal treatment, this situation should be rectified so that temporary visa workers are afforded the same protection as Australian workers.*[828]

More recently, in the second report of the National Temporary Migrant Work Survey, Berg and Farbenblum also argued:

> *The Fair Entitlements Guarantee Act 2012 (Cth) should be amended to provide for the non-discriminatory application of the Fair Entitlements Guarantee to all workers in Australia, including temporary migrant workers. This would ensure that, like Australian workers, migrant workers would be entitled to recover unpaid wages if their employer goes into liquidation.*[829]

The authors noted that this is particularly important 'in the absence of effective systematic enforcement' and given only a single participant (of 4,253 migrant workers in the National Temporary Migrant Work Survey) reported they had gone to court to recover amounts owed.[830]

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825 JobWatch, submission 016, p 12.

826 Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements,* June 2017, p 57.

827 In its response to the recommendation, the government noted the possible cost implications of such an amendment and highlighted that the restrictions on residence requirements were tested when the FEG legislation passed the parliament in 2012 and are consistent with broader social security legislation. See: Australian Government, *Australian Government response to the Senate inquiry report: The Framework and operation of subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements*, July 2014, pp 6-7.

828 Senate EERC, *A National Disgrace: The exploitation of temporary visa holders,* March 2016, pp 159-160

829 Laurie Berg and Bassina Farbenblum, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, October 2018, p 44.

830 Laurie Berg and Bassina Farbenblum, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, October 2018, p 44.

11.3.1.3 Exclusion of superannuation

ASIC external administrator reports reveal that over the three years from 2014-15 to 2016-17, unpaid superannuation featured in about 41 percent of insolvencies.[831]

The QLS noted that because employees are not eligible to recover unpaid superannuation contributions through the FEG scheme, claims must be pursued through the ATO or by the employee in Court proceedings. In its submission to the Senate Economics Reference Committee, the ATO reported that debt collection is unlikely for cases where the employer is displaying an insolvency indicator, such that the ATO is generally unable to collect any SG payment for these employees. For 2015-16, the ATO reported that as a result of insolvency, $113.2 million in SGC debt was irrecoverable at law.[832]

Further, JobWatch principal lawyer Mr Ian Scott advised that generally, 'employees are not in a position to commence insolvency proceedings. It costs thousands of dollars to get the ball rolling and there may not be anything in the end'.[833]

In sum, without the inclusion of superannuation in the FEG safety net, in cases of insolvency, the chances of recovery of unpaid superannuation may be slim.

The IEU submitted that the failure of the FEG to protect employees' superannuation entitlements and the regularity of employers in the VET and ELICOS sectors becoming insolvent, means that employees are particularly vulnerable to losing their superannuation. Citing the example of ten of its members, the IEU noted:

> *Ten IEUA-QNT members were employed by an RTO on the Sunshine Coast, when it went into liquidation. These members lost over $38,000 in employer guaranteed superannuation between them. The members had little recourse as the FEG does not protect superannuation entitlements.*[834]

LawRight submitted a number of cases involving hospitality workers, which highlighted the impacts of excluding the SG from the FEG scheme.[835]

The QLS submitted that the separation of the recovery process for general entitlements and for superannuation entitlements respectively between the Department of Jobs and Small Business and the ATO is not practical and that it 'may be extremely difficult for action to be taken by the ATO'.[836] The QLS further stated:

> *There is no good policy reason for the continued strict division of responsibility between the Department and ATO. The Society recommends that superannuation be added to the group of entitlements that are recoverable through the FEG Scheme, and that the Department be given subrogation rights in respect of those entitlements.*[837]

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831 Australian Government, ASIC, *Australian insolvency statistics, Series 3: External administrators' reports (3.3 – External administrators' reports time series for 1 July 2004 – 30 June 2017),* December 2017, table 3.3.10.6 – initial external administrators' reports by unpaid employee entitlements (superannuation), *Annual.*

832 Australian Government, ATO, cited in Parliament of Australia, Senate Economics References Committee, *Superbad – Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee,* May 2017, p 71.

833 Mr Ian Scott, Principal Lawyer, JobWatch, public hearing transcript, Brisbane, 16 August 2018, p 20.

834 IEU, submission 007, p 5.

835 LawRight, submission 028, pp 12-13; JobWatch, submission 016, p 12.

836 QLS, submission 040, p

837 QLS, submission 040, p

Wage theft
Submission 5 - Attachment 1

The IEU and QCU also called for the inclusion of superannuation in the FEG[838] – a proposal that attracted support from numerous submitters to the Senate Economics References Committee.[839]

The former Commonwealth Department of Employment advised that senate committee that the exclusion of the SG from the scheme reflected its policy genesis as a scheme of protection aligned to those entitlements an employer is obligated to provide under the NES.[840] However, Industry Super Australia has noted that GEERS, the predecessor to FEG, whilst not covering unpaid SG, did fund three months of superannuation contributions.[841]

The QLS submitted that whilst acknowledging that the loss of superannuation benefits is different to the more immediate effect of the loss of wages of other entitlements, QLS's view is that there is an entitlement and there ought to be an available remedy where they are not paid'.[842]

This was echoed by Mr Michael Clifford of the QCU, who called for the recognition of superannuation as a form of deferred wages and therefore as an industrial entitlement that 'should be treated as such' (see further discussion regarding the treatment of the SG in this regard at chapter 12.1.2).[843]

Anderson has suggested that denying employees access to the immediate safety net of FEG with respect to their unpaid superannuation increases reliance on the later safety net of the aged pension.[844] Given the compounding effect of unremitted superannuation, the impact on this secondary safety net may be significant – Stanford estimated 'that a present loss of $10,000 will result in $57,000 less superannuation in 30 years' time'.[845]

The committee notes that the Senate Economics Reference Committee, in its *Superbad* report, recommended 'that the relevant government agencies undertake further research into the fiscal and legislative impacts of an expansion of the current scheme'.[846] The Inspector General of Taxation (IGT), in his 2010 review into the ATO's administration of the SGC, also supported the expansion of the then GEERS scheme, to cover unpaid SG liabilities.[847] The IGT reported:

> *The review findings confirm that the employees missing out when employers become bankrupt or insolvent are those that are the most reliant on compulsory superannuation for retirement support.*

838 IEU, submission 007, p 5; Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

839 Parliament of Australia, Senate Economics References Committee, *Superbad: Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, pp 71-72.

840 Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, p 78.

841 Industry Super Australia, *Unpaid super: Getting worse while nothing is done,* October 2018, p 11.

842 QLS, response to questions taken on notice at the hearing on 16 August 2018, pp 2-3.

843 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

844 Helen Anderson, 'Insolvency – It's all about the money', *Federal Law Review,* vol. 46, no. 2, 2018, p 292.

845 Stanford, cited in Helen Anderson, 'Insolvency – It's all about the money', *Federal Law Review,* vol. 46, no. 2, 2018, p 292.

846 Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee,* May 2017, p xiii.

847 Australian Government, IGT, *Review into the ATO's administration of the Superannuation Guarantee Charge: A report to the Assistant Treasurer,* March 2010, pp 15, 92-93 (recommendation 11).

Wage theft
Submission 5 - Attachment 1

… An expansion of GEERS to cover unpaid SGC will also allow government to quantify higher future age pension outlays and act as a driver for improvements in the SG system to minimise employers defaulting on their SG obligations.[848]

The Association of Superannuation Funds of Australia has estimated it will cost up to $150 million per year to include unpaid SG payments in the FEG scheme, with up to 55,000 affected individuals likely to benefit from the initiative annually.[849] The Department of Employment has also conducted its own modelling, projecting an estimated 70 percent increase in scheme payments, together with an additional $45 million in administration expenses (equivalent to a $175 million increase on 2016-17 scheme payments of $186.02 million).[850] On the back of the department's estimates, the Cross Agency Superannuation Guarantee Taskforce recommended that the scheme not be extended to include the SG at this time. Neither estimates included any estimation of pension pay off.[851]

Committee comment

For workers affected by the insolvency of their employer, prospects of recovering unpaid amounts are often poor. The FEG scheme may be the only avenue for workers to recoup their duly owed entitlements, but the current limits of the scheme mean that it is inaccessible to many workers, at a significant cost to these individuals and their families, and with longer-term implications for reliance on social services and the age pension.

Superannuation is a compulsory and vital part of an employee's remuneration and should not be treated any differently from the other entitlements appropriately covered by the scheme. Further, the exclusion of temporary migrant workers from the scheme heightens the effects of the exploitation of these workers, noting they are unable to access social security or other assistance in many instances. These are workers who pay tax, are entitled to superannuation contributions and have access to unfair dismissal and all other protections of the FWA, and who make important contributions to our businesses and economy.

Recommendation 9

The Committee recommends unpaid superannuation be included as a recoverable entitlement under the Fair Entitlements Guarantee scheme and the Fair Entitlements Guarantee scheme be extended to temporary overseas visa workers who are currently denied access.

11.4 Community service providers and other organisations

The committee received evidence that affected workers are seeking help from private organisations and community legal centres (including consultants, law firms and NGOs), to assist in the recovery of unpaid wages and entitlements, and are sometimes being referred to such organisations by the FWO itself.[852]

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848 Australian Government, IGT, *Review into the ATO's administration of the Superannuation Guarantee Charge: A report to the Assistant Treasurer,* March 2010, p 92.

849 Association of Super Funds of Australian, 'Unpaid super – workers deserve better', media release, 22 March 2017, https://www.superannuation.asn.au/media/media-releases/2017/media-release-22-march-2017

850 Superannuation Guarantee Cross Agency Working Group, *Interim Report,* Australian Government, January 2017, p 34; Department of Employment, submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 24.

851 Superannuation Guarantee Cross Agency Working Group, *Superannuation Guarantee Non-compliance: A report to the Minister for Revenue and Financial Services,* Australian Government, 31 March 2017, p 39.

852 Ms Kay Clifton and Ms Catherine Black, private capacity, public hearing transcript, Brisbane, 3 September 2018, pp 11-12.

The Committee received detailed information and individual accounts from consultancy firm IR Claims representatives and clients. IR Claims had, over the last two years, assisted in the recovery of '1.8 million in stolen wages for our clients, ranging in individual amounts of $6,000 up to $80,000.'[853] While it worked on a 'low-cost model' to be accessible to clients, it acknowledged that it is unable assist all affected people who seek assistance, pursuing approximately eight cases out of 80 calls it receives each week.[854] IR Claims told the committee that to run a commercially viable case, it would need to pursue claims of at least $20,000.[855]

Stakeholders proposed that funding be directed to community legal services to provide assistance and representation on behalf of workers,[856] with Dr Tess Hardy noting:

> *… we also support additional funding for specialist community legal centres at the state level. Given that underpaid workers have little access to legal aid and the cost of bringing enforcement proceedings is often prohibitive, assistance from community legal centres is critical in allowing underpaid workers to seek redress. This supplements the processes that are available at the federal level via the Fair Work Ombudsman.*[857]

Dr Berg noted the need for designated support services in Queensland for migrant workers, stating:

> *There are no dedicated state based, statewide services for low-wage migrant workers in Queensland—unlike, for instance, in Victoria, where there is a community legal centre known as JobWatch, which provides advice to workers there. JobWatch is resourced by the Fair Work Ombudsman to provide telephone advice to workers in Queensland, but my point was simply about further resources for workers to be able to come forward and receive a fair amount of assistance—to receive advice, to ventilate their claim and to understand what the extent of the underpayment might be. As both David and Tess have outlined, it is a very difficult process to understand what the correct wage is and then to calculate what the extent of the underpayment might have been, based on when the work was undertaken. For workers to understand their claim and then be able to pursue it is something that I think there is a need for in Queensland and other states.*[858]

This was further outlined in the results of the second report of the National Temporary Migrant Work Survey, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia,* which concluded that:

> *Among underpaid participants who had not tried to recover their unpaid wages, 42% reported that they did not know what to do. This indicates both the importance of accessible information*

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853 IR Claims, submission 013, p 4.

854 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 10.

855 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 10.

856 See, for example: IR Claims, submission 013, p 55; JobWatch, submission 016, pp 4, 9; Dr Laurie Berg and Bassina Farbenblum, submission 042, pp 4, 12; Mr Ken Taylor, President, QLS, public hearing transcript, Brisbane, 16 August 2018, p 9; Dr Tess Hardy, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 20.

857 Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 20.

858 Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 23.

Wage theft
Submission 5 - Attachment 1

> *on wage recovery processes and where and how migrant workers can seek help, and the depth of the need for legal advice and representation...*[859]

The report recommended resources be directed to 'establishing adequate services to advise and represent migrant workers in relation to employment claims' and that such services 'must also involve ensuring that trade unions, community organisations and legal service providers have substantially expanded capacity to provide targeted advice and representation to assist migrant workers to recover unpaid wages'.[860]

JobWatch provides information and referrals to Victorian, Tasmanian and Queensland workers, through its free and confidential telephone information service.[861] It had provided 'tailored legal information to 3,914 Queenslanders as at 3 July 2018'.[862] JobWatch advocated for funding to 'an employment rights community legal centre to engage in community legal education and to advise and represent vulnerable and disadvantaged employees in prosecuting their own wage recovery claims,' noting 'we have three lawyers and 11,000 calls a year. It is not possible to help everyone, unfortunately'.[863]

The committee also heard from Working Women Queensland (WWQ), a not-for-profit organisation which provides services to vulnerable workers in Queensland, including advice regarding industrial relations matters. WWQ assisted workers to receive over $840,000 in payments in 2017, which included wages, superannuation and compensation for discrimination.[864] WWQ received funding from both the Queensland and Federal Governments up until 31 December 2016, at which time the Federal Government ceased all funding.[865] The Palaszczuk Government then stepped in to fill the funding gap, providing necessary funding to WWQ.[866] WWQ called for more funding, stating 'we are the only organisation it funds to assist workers and $230,000 will not do it for the state of Queensland'.[867]

The FWO advised that it provides funding through its Community Engagement Grants Program to organisations based in Victoria (JobWatch), New South Wales (Redfern Legal Centre Limited), South

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859 Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 45.

860 Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 43.

861 JobWatch, submission 016, p 3.

862 JobWatch, submission 016, p 5.

863 Mr Ian Scott, Principal Lawyer, JobWatch, public hearing transcript, Brisbane, 16 August 2018, p 19.

864 Ms Lee Matahaere, Senior Industrial Officer, Working Women Queensland, public hearing transcript, 17 September 2018, p 18.

865 Emilia Terzon, 'NT and SA women's centres saved by federal grant funding as Qld sister service faces closure', *ABC News*, 16 December 2016, https://www.abc.net.au/news/2016-12-16/nt-sa-women-legal-centres-saved-queensland-facing-closure/8126862; Felicity Caldwell, Queensland Working Women's Service faces closure with funding cut', *Brisbanetimes.com.au*, 22 December 2016, https://www.brisbanetimes.com.au/national/queensland/queensland-working-womens-service-faces-closure-with-funding-cut-20161222-gtgq5c.html

866 Hon Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, 8 March 2017, http://statements.qld.gov.au/Statement/2017/3/8/funding-boost-for-queensland-working-womens-service-after-lnp-cuts; Queensland Government, *Budget Statements: Delivering for Women,* Queensladn Budget 2018-19, June 2018, p 3, https://budget.qld.gov.au/files/Budget2018-19_BudgetStatements_Women.pdf

867 Ms Lee Matahaere, Senior Industrial Officer, Working Women Queensland, public hearing transcript, 17 September 2018, p 19.

Australia (Working Women's Centre SA Incorporated), the Northern Territory (NT Working Women's Centre Incorporated) and Western Australia (Employment Law Centre of WA).[868] The FWO provides funding to Growcom in Queensland, through the Community Engagement Grants Program. However, Growcom is the peak body representing the horticultural industry, as opposed to a general legal advisory body and specialist support service.

Queensland, the ACT and Tasmania are the only Australian jurisdictions that do not receive funding from the Federal Government to provide state-based advice and assistance in respect of employment matters under the FWA.

Committee comment

It is clear that private organisations and community legal centres provide an invaluable role in assisting and sometimes representing, workers who are seeking to pursue the recovery of unpaid entitlements.

It is unclear why the federal government does not fund a general advisory body based in Queensland, to assist the state's workers; instead, Queenslanders must rely on services provided in other states and territories of Australia, which though delivering an important service, are under-resourced to meet the demand in regard to worker complaints of wage theft.

The federal government should be providing the information and assistance necessary for individuals to understand and pursue their legal entitlements under its jurisdiction, including the FWA.

Recommendation 10

The committee recommends that the Federal Government fund a workplace rights information and support service based in Queensland, as is funded for other Australian jurisdictions and was formerly the case, up until the removal of funding in 2016 by the then Federal Government.

868 FWO, correspondence, 5 October 2018, p 8.

Wage theft
Submission 5 - Attachment 1

12 Enforcement and deterrence

This chapter outlines the approaches to enforcement by relevant regulatory agencies. It also discusses civil penalties in the Commonwealth and Queensland statutory frameworks, and stakeholders' views about criminalisation of wage theft in response to their view that the current system does not deter deliberate or reckless wage theft.

Active enforcement by the FWO was reported to be limited, particularly in the context of the frequency of unpaid wages or withholding of entitlements

Lack of resourcing of the FWO was of substantial concern, with stakeholders believing it contributed significantly to the ineffectiveness of the FWO's enforcement.

The FWO compliance and enforcement policy emphasises its role in providing advice, support and information, resolution at the workplace level or in mediation, and specific enforcement campaigns.[869] In contrast, workers and their representatives emphasised their fear of loss of employment if they raised underpayment with their employer. They also raised difficulties in negotiating repayment of wages and entitlements if they had already left employment.

12.1 Enforcement actions

12.1.1 Fair Work Ombudsman

The FWO has a variety of activities in which it engages to enforce compliance with workplace laws. These activities range from providing information and advice and conducting audits and investigations, through to implementing a continuum of enforcement mechanisms that end in litigation.[870] However, the FWO has increasingly been the subject of criticism regarding the extent of its activities and the frequency with which enforcement mechanisms are used. Stakeholders generally considered the enforcement actions of the FWO to be insufficient to deter employers from engaging in wage theft. Some suggested the risk of detection combined with low levels of enforcement can provide limited incentive for compliance.[871]

The FWO conducts regular audits and investigations as part of its compliance activities. The focus of these activities are informed by intelligence, anonymous tip offs, research and requests for assistance.[872] The FWO conducted 4,572 audits of workplaces in 2017-18, including targeted campaigns in the hospitality industry and audits of supply chain networks.[873]

Audits usually target a particular geographic location or industry and can extend over multiple states and territories. For example, in July this year the FWO released its 'Food precinct activities report', which contained the results of a campaign focusing on food precincts in Victoria, New South Wales and Queensland (in Fortitude Valley in Brisbane).

As a result of these activities the FWO recovered $471, 904 for 616 workers, over the three locations.[874]

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869 Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018.

870 Australian Government, FWO, submission 044, p 1.

871 See, for example: Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 11; JobWatch, submission 016, pp 8-9; Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, p 216.

872 Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 8.

873 Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, pp 17, 19.

874 Australian Government, FWO, *Food Precincts Activities – a report on compliance activities undertaken by the Fair Work Ombudsman*, July 2018, p 6.

In Fortitude Valley, 73 audits were completed, with 60 percent of businesses found to be non-compliant with workplace laws. A total of $64,941 was recovered for 180 employees, and the FWO issued one compliance notice, seven formal cautions and 21 infringement notices.[875]

The FWO reports on its activities in relation to allegations of serious non-compliance, asserting that the public nature of these reports may act as a form of education and deterrence.[876] While the results of such audits and investigations, published on the FWO's website, are highly valuable, the relatively small number of such audits and enforcement action taken when viewed in context of the number of complaints made and businesses operating are very small.

FWO policies advise that monitoring and compliance activities by the FWO may be initiated as a result of reports by employees and employers, as well as self-initiated and proactive measures such as investigations and strategic audits.[877] In response to detected instances of wage theft, the FWO may engage a range of mechanisms to enforce compliance. These include compliance notices, infringement notices, enforceable undertakings and litigation.

Compliance notices can be issued by the FWO, requiring a person to take specific action to fix an alleged breach of the FWA.[878]

Infringement notices can be issued by FWO Inspectors for breaches of the FWA including obligations in relation to pay slips.[879]

Enforceable undertakings are agreements between the FWO and a person (usually an employer), where the person agrees to fix a breach of the FWA, and can commit to future compliance measures.[880] These agreements are enforceable by a court.[881]

In 2017-18 the FWO issued 615 infringement notices, 220 compliance notices, seven enforceable undertakings, and commenced 35 court cases.[882] Court-issued penalties of $7.2 million were issued, with another 85 matters before the courts yet to be decided.[883]

Fifty court matters were decided in 2016-17, which resulted in $4,864,925 in court-ordered penalties, and $3,942,314 worth of underpayments recovered.[884] The FWO states it is committed to commencing court proceedings in 'the most serious cases of non-compliance' and working with industries to improve compliance.[885]

875 Australian Government, FWO, *Food Precincts Activities – a report on compliance activities undertaken by the Fair Work Ombudsman,* July 2018, p 6.

876 Australian Government, FWO, 'Activity reports', www.fairwork.gov.au/about-us/access-accountability-and-reporting/activity-reports.

877 Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 8.

878 FWA, s 716.

879 FWA, s 536; Fair Work Regulations 2009 (Cth), s 4.04.

880 FWA, s 715.

881 FWA, s 715(6).

882 Australian Government, FWO and ROC, *Annual Report 2017-18*, p 21.

883 Australian Government, FWO and ROC, *Annual Report 2017-18*, p 21.

884 Australian Government, FWO and ROC, *Annual Report 2016-17*, p 23.

885 Australian Government, FWO, *Food Precincts Activities – a report on compliance activities undertaken by the Fair Work Ombudsman*, July 2018, p 6.

IR Claims commented on what it viewed to be low numbers of 'breach notices' (compliance notices), stating:

> *In dedicating 75 percent of enforcement resources to the migrant space, that means if you only employ Australians who are born here, as an employer you have got literally a two percent chance of interacting with the ombudsman if you are dodgy. On 17,000 times, the ombudsman knew that the employer underpaid because in their own annual report they recovered 17,000 times. Not one of those got a breach notice.*[886]

The FWO advised the committee:

> *The FWO enforces compliance through more serious and costly avenues such as litigation only when it is in the public interest to do so. Serious incidences of exploitation are addressed through litigation, where court action will send a strong message of deterrence about the need for businesses to comply with the law*.[887]

Dr Laurie Berg noted the resource intensiveness of the FWO's compliance activities:

> *Certainly the FWO has stepped up its compliance activity especially in relation to temporary migrant workers, but in certain industries like food services and horticulture, which are dominated by small businesses and which also have very low rates of immunisation, compliance activities including by the FWO are very resource intensive.*[888]

12.1.1.1 Compliance and enforcement policy

The FWO's *Compliance and Enforcement Policy* outlines its principles and processes to seek to ensure compliance with the FWA. It explains the FWO's role 'to promote harmonious, productive and cooperative workplace relations, and to monitor, inquire into, investigate, and enforce compliance with relevant Commonwealth workplace laws.'[889] The policy details compliance and enforcement activities, including investigations, campaigns, and enforcement actions ranging from dispute resolution to providing infringement notices and engaging in litigation.

The FWO provided further information regarding its compliance and enforcement activities, explaining:

> *In fulfilling our role under the Fair Work Act 2009, the FWO adopts a compliance model built on a mix of risk-based regulation and strategic enforcement, which is set out in our Compliance and Enforcement Policy and Litigation Policy. Key to this approach is that we remain proportionate in our response to non-compliance and direct our resources to where they will have the greatest impact*.[890]

On its website, the FWO states it is 'unlikely to get involved in workplace issues which happened more than 2 years ago',[891] even though the legal timeframe for initiating a claim is six years.

The committee consistently heard dissatisfaction about the rates of enforcement, and the FWO's tendency to focus on larger organisations.

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886 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 8.

887 Australian Government, FWO, correspondence, 5 October 2018, p 2.

888 Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 3 September 2018, p18.

889 Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 4.

890 Australian Government, FWO, correspondence, 5 October 2018, p 1.

891 Australian Government, FWO, 'Step 1: Find out what we can help with', https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/step-1-find-out-what-we-can-help-with

In a private hearing on the Gold Coast, an individual expressed disappointment with the FWO: 'In the beginning I thought Fair Work was a government body that could intervene and force employers to pay the award, but since speaking to them they have told me that that is not the case'.[892]

Mr Dan McGaw, suggested the FWO 'is more like a call centre or a hotline. They cannot make a binding decision. It is more general, broad advice. It is tough for an individual worker'.[893]

In some cases workers who had not received significant multiple entitlements were unable to obtain assistance from the FWO.[894]

Mr Joe Moro, President of the Mareeba District Fruit and Vegetable Growers Association outlined his concerns with the FWO's enforcement to the committee, stating:

> *Enforcement seems to be the area where there seems to be a problem. I know that some of the employees seem to get a quicker response when they put in a complaint, but it is generally in regard to noncompliance with the award. We are talking about the more complicated situations where there are systemic processes in place where the employees are not coming forward with the evidence and the allegation is coming from a third party—normally someone who is witnessing it and seeing that this business is doing the wrong thing and it is causing unfair advantage. You have to understand that usually this occurs when farmers are seeing their prices very low and the margins are very tight, and they see certain businesses doing certain things that are giving them an unfair advantage so they generally put a complaint in but nothing seems to occur.*[895]

Mr Kym Rake, told the committee his story.

Case study

Mr Kym Rake was a waste truck driver who discovered he was being underpaid. After failed attempts at resolving the issue directly with his employer, he contacted the FWO' for assistance.

'I rang the ombudsman, and they gave me the pay rate for three years previous to 2016 and said, "Work it out and then come back to us if you think you're underpaid." I said to the bloke at the time, "I know I'm underpaid but we've got to get something sorted." They gave me the pay rate for three years previous and I worked all of that out myself and I rang them back. They said, "For the previous three or four years to that, we have to look it up in the archive and we'll get back to you." I waited and waited and waited, so I rang them again and I got some lady who said, "If you've made a complaint, you're in the queue. Just wait." That was it. I have not heard another word. That was three years ago'.[896]

892 Private hearing transcript, regional hearing, 2018.

893 Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 13.

894 IR Claims, submission 013, p 16.

895 Mr Joe Moro, President, Mareeba District Fruit and Vegetable Growers Association, public hearing transcript, Townsville, 28 August 2018, p 5.

896 Mr Kym Rake, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 9.

It was noted in the findings of the National Temporary Migrant Work Survey:

> *… the FWO's core functions are not directed to the large-scale provision of individual remedies. Rather, they are oriented to strategic enforcement, systemic deterrence of noncompliance, and the promotion of harmonious workplaces.*[897]

The FWO's performance target for 2017-18 was that no more than 10 percent of complaints be dealt with through compliance and enforcement tools.[898] IR Claims commented on this target, arguing 'the employer is always going to win when the Fair Work Ombudsman sets its own goal of enforcement at "no more than 10%",'[899] and stated:

> *If you were to go to the telecommunications ombudsman or the financial ombudsman, they are the big stick department; they are not the education department. You have gone to your provider first, and you have sought their help. If they do not help you, you then go to the ombudsman who brings a regulatory and enforcement process. The Fair Work Ombudsman brags about having under 10 percent enforcement. In fact, in their annual report, as though it was a badge of honour, they say there were only six percent prosecutions or enforcements. We say that that is at the heart of the problem.*[900]

IR claims stated it 'should not have a business model', noting that its clients were 'pushed' into using its services, due to their disappointing interactions with the FWO. [901] IR claims further stated:

> *There should be no place for the private sector to be enforcing someone's minimum wage and their award minimum conditions. Out of desperation, these people have all had to pay for a service that should have been out of the $110 million that went to the ombudsman. Instead, the ombudsman prioritise them being an education department rather than an enforcement department. We say that they have got the balance wrong.*[902]

Conversely, the NRA's view of the FWO's approach to prosecution and regulation was that 'the generally high level of compliance is a testament to that office's effectiveness'.[903]

The Melbourne University Law School and FWO investigated the knowledge and perceptions of enforcement risks of the FWO, through a survey of 643 businesses across ACT, NSW and Victoria in the cafe and restaurant industry and the hair and beauty services industry. [904] It was reported that half of the respondents thought it would be highly likely (24 percent) or likely (20 percent) that the FWO would discover a breach of the FWA, with a third of businesses (31 percent) believing it would have a 50/50 chance of being caught.[905] Businesses were overrating the effectiveness of the FWO's proactive detection measures 'given that the number of audits undertaken by the FWO represents a very small

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897 Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 15.

898 Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, p 9.

899 IR Claims, submission 013, p 5.

900 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

901 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

902 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

903 NRA, submission 021, p 11.

904 Tess Hardy and John Howe, `Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman', *Sydney Law Review*, vol. 39, no. 4, 2017.

905 Tess Hardy and John Howe, `Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman', *Sydney Law Review*, vol. 39, no. 4, 2017, p 491.

slice of all businesses in operation at any given time'.[906] As of 2016-17, the ABS estimated that there were 2,238,299 actively trading businesses.[907] In the same year, the FWO reported that it conducted 5,645 campaign audits and inquiry activities.[908] This constituted approximately 0.25 percent of all businesses.

The NRA commented on the Melbourne University Law School and FWO report, stating: '… although somewhat limited in its scope, this study demonstrates the 'ripple' effect of the actions of the Fair Work Ombudsman and its ability to utilise its limited resources to be an effective regulator'.[909] However, that over half of the businesses did not think discovery of their conduct by the FWO would be likely, suggesting the FWO's enforcement activities are not always contributing to deterrence.

The YWH noted the complexity of the process for recovery of unpaid entitlements, particularly for young workers and suggested 'the current lack of enforcement has contributed to the prevalence of wage theft, particularly among young workers who cannot easily access remedies in the courts'.[910]

The QCU drew parallels between workplace health and safety compliance and wage theft, by referring to the best practice review of Workplace Health and Safety Queensland (Best Practice Review).[911] The Best Practice Review reported a need of WHSQ to re-balance priorities 'in favour of "hard" compliance work…, with a view to increasing on the ground visibility and activity of the inspectorate'. [912] The review found insufficient emphasis had been placed on 'hard' compliance and enforcement, and that there was an 'ongoing need to ensure that the balance between "directing compliance" and "encouraging and assisting compliance" is appropriate'.[913]

Hall Payne Lawyers used examples from the *Work Health and Safety Act 2011* (Qld), in its exploration of potential offence provisions for wage theft in Queensland.[914]

Mr John Payne, of Hall Payne Lawyers, referred to the Robens Inquiry in England,[915] which inquired into 'the provisions made for the safety and health of person in the course of their employment'[916] and supported a more self-regulating system as well as cautioning against the practical limits of

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906 Tess Hardy and John Howe, `Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman', *Sydney Law Review*, vol. 39, no. 4, 2017, p 491.

907 Australian Government, ABS, *8165.0 – Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017*, 20 February 2018, http://www.abs.gov.au/ausstats/abs@.nsf/mf/8165.0

908 Australian Government, FWO and ROC, *Annual Report 2016-17*, 2017, p 14.

909 NRA, submission 021, p 11.

910 YWH, submission 019, p 8.

911 QCU, submission 034, p 3.

912 Queensland Government, WorkCover Queensland, *Best practice review of Workplace Health and Safety Queensland*, 2017, p 8.

913 Queensland Government, WorkCover Queensland, *Best practice review of Workplace Health and Safety Queensland*, 2017, p 7.

914 Mr John Payne, Principal Lawyer, Hall Payne Lawyers, submission 027, pp 11, 12, 15, 16.

915 Parliament of the United Kingdom, Secretary of State for Employment, Chairman Lord Robens, *Safety and Health at Work – Report of the Committee 1970-72*, 1972.

916 Parliament of the United Kingdom, Secretary of State for Employment, Chairman Lord Robens, *Safety and Health at Work – Report of the Committee 1970-72*, 1972, p 469.

Wage theft
Submission 5 - Attachment 1

negative regulation by external agencies.[917] With a view that it was analogous to the problem of wage theft, Hall Payne Lawyers stated:

> *What came out of that inquiry is that you cannot fix the problem by inspection and you cannot deal with the problem by monitoring; workplace health and safety is far too big a regime covering too many workplaces to conduct an enhanced workplace health and safety system. It went more to a proposition of self-auditing. Underpinning that is deterrence.*[918]

The committee heard evidence that the FWO's approach to compliance, 'seems to be if we can catch a big fish and get all the penalties against them, the little fish will all be scared'.[919]

In response to these claims, the FWO stated:

> *The evidence provided to the Committee regarding the agency's enforcement strategy (point 5 in your letter) is inaccurate and oversimplifies a complex issue. The FWO operates a nuanced compliance model that includes a range of activities tailored to address the behaviour we come across. Putting pressure on decision makers at the top of industry structures to take more responsibility for compliance is part of our approach…*
>
> *By engaging directly with the 'big fish', we secured commitments from companies with actual capacity to effect meaningful and system-wide change. Our efforts have resulted in compliance for employees up and down the supply chain and all around the nation.*[920]

Mr Justin Cobbett submitted that the FWO 'said they usually only investigate issues when they have received complaints from a number of employees'.[921] Another individual told the committee he was confused by the FWO's process, stating:

> *Even though one person in that company might know that they are being underpaid, every individual has to pursue their own claim. That makes no sense to me at all.*[922]

Stakeholders raised issues with enforcement once an underpayment has been acknowledged. The committee heard of an employer who had agreed underpayment had occurred, but took no action to rectify the underpayment, and ignored the worker:

> *My daughter called and texted [her employer] more than seventeen times in regards these issues. She received promises to correct the situation but never received any of these payments. I also called her and was guaranteed that my daughter would be paid what she was owed. When this did not occur and I pursued the issue, she would hang up on me or not answer (in the same manner as she treated [my daughter's] calls).*[923]

Even if found to be at fault and owing entitlements, the committee heard 'there are no laws around how long a company has to repay their workers the money they're owed. So, we have to keep fighting to receive the money that belongs to us.'[924]

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917 Parliament of the United Kingdom, Secretary of State for Employment, Chairman Lord Robens, *Safety and Health at Work – Report of the Committee 1970-72*, 1972, p 492; Hall Payne Lawyers, response to questions taken on notice at the hearing on 16 August 2018, p 2.

918 Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 30.

919 Mr Ian Scott, Principal Lawyer, JobWatch, public hearing transcript, Brisbane, 16 August 2018, p 20.

920 Australian Government, FWO, correspondence, 5 October 2018, p 4.

921 Mr Justin Cobbett, submission 003, p 1.

922 Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 17.

923 Name suppressed, submission 002, p 2.

924 YWH, submission 019, p 15 (Case Study E, Siva).

Most proposals for increasing the effectiveness and enforcement of the FWO's activities focused on the resourcing of the FWO, which is discussed in detail below.

Other suggestions included the monitoring of job advertisements[925] or Facebook sites to identify employers that are not compliant,[926] with the QTIC stating:

> *There is support for investigative tools like stakeouts, new methods of reconstructing payrolls, interviewing workers as methods to contribute to enhanced enforcement capacities. These studies are important where employer records are incomplete or non-existent. With more social media highlighting non-compliance there are opportunities to utilise these conversations as a basis for where further investigation should be focused.*[927]

IR Claims suggested enforcement could be improved if the FWO appointed Queensland industrial inspectors[928] as 'Fair Work Inspectors' under section 700 of the FWA.[929] This could provide an ability to have inspectors which jointly administer the IR Act and FWA. IR Claims stated this would meant 'that no matter what happens at a federal level, Queensland workers will have greater protection from wage theft'.[930]

The Senate EERC inquiry into corporate avoidance of the FWA, concluded:

> *… there is a need for increased monitoring and random checks to ensure compliance. The FWO has neither the resources nor the interest in regular engagement with these workplaces specifically on behalf of the workers.*[931]

12.1.1.2 Inadequate resourcing

An underlying theme in commentary on compliance and enforcement in relation to the FWO, was a lack of resourcing to effectively undertake its role as a national regulator.[932] The majority of stakeholders who commented on the FWO's activities, suggested its functions could be improved by further resourcing. Some stakeholders indicated a lack of resourcing, particularly of Fair Work Inspectors, is limiting the effectiveness of deterrence provided by legislated penalties and other actions.[933]

JobWatch submitted its concerns about FWO resourcing:

> *… the FWO's ability to fully investigate and prosecute on behalf of individuals is limited as a result of its inadequate budget allocation and, taking this into account, JobWatch's opinion is that the FWO does an excellent job as regulator with the resources at its disposal. For instance, the result of FWO's inadequate budget is that the 250 inspectors it employs (93 of which investigate for compliance with the Fair Work Act) are responsible for 11.6 million workers who work in over 2.1 million workplaces. This amount of funding may be appropriate if there were alternative*

925 Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 15.

926 QTIC, submission 022, p 11.

927 QTIC, submission 022, pp 10-11.

928 IR Act, s 899.

929 IR Claims, submission 013, p 55.

930 IR Claims, submission 013, p 55.

931 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 72.

932 See, for example: JobWatch, submission 016, p 14; NRA, submission 021, p 12; Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 6; Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Relations Review*, vol. 29, no. 2, 2018, p 214.

933 IR Claims, submission 013, p 27.

accessible methods via which an individual could enforce their legal entitlements. However, the reduction of a union presence and the complexity of the legal process mitigates against this.[934]

Views on compliance were influenced by stakeholder perceptions that the FWO is under-resourced, and that a lack of adequate resourcing impacted on the FWO's ability to conduct its enforcement activities.[935]

The Queensland Council of Unions stated 'The Fair Work Ombudsman does not have the resources to deal with the extent of the problem. That is for certain'. [936]

The FWO was reported to be 'understaffed and under-resourced', [937] with reports of 'common stories of people being told to go and talk to a lawyer, people being told that it will take many months to resolve their issue—many stories of frustration where, after many months, nothing has been done'.[938]

Ms Rachel Mackenzie of Growcom, noted the FWO is 'massively under-resourced' and that:

… there have been numerous occasions where we have raised issues with Fair Work and part of the issue is that they are just not Fair Work issues; they are often visa issues, tax issues, all of those things. By the time Fair Works comes in—the seasons are so short—they are gone, they are back offshore, they are back in Taiwan. There is no-one there. Fair Work is like, 'Nothing to see here', when we know that there is a lot to see here.[939]

The number of FWO inspectors relative to businesses was highlighted by stakeholders. IR Claims submitted that:

According to the Australian Bureau of Statistics, at the end of 2016-17, there were 868,248 employing businesses in Australia with 12,471,000 workers. We understand that the FWO has approximately 250 inspectors, or one inspector per 3,473 employing businesses, or one inspector for every 50,000 employed persons

With those odds, why wouldn't you take the risk?[940]

The NRA commented on staffing levels of the FWO, stating that 'a staff of approximately 745 people to regulate 2.2 million businesses across the country is pretty light on',[941] and questioning 'how can

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934 JobWatch, submission 016, p 14.

935 See, for example: JobWatch, submission 016, p 14; R&CA, submission 017, p 3; NRA: submission 021, p 12; QTIC, submission 022, p 10; QNMU, submission 023, p 9; QCU, submission 033, p 33; .Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 55; Mr Joe Moro, President, Mareeba District Fruit and Vegetable Growers Association, public hearing transcript, Townsville, 28 September 2018, p 5; Ms Elise Ganley, Community Organiser, and Reverend Pauline Harley, Anglican Priest, QCA, public hearing transcript, Brisbane, 3 September 2018, pp 4-5; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 13; Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Relations Review*, vol.29, no. 2, 2018, p 214.

936 Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 6.

937 Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 10.

938 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 5.

939 Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 1.

940 IR Claims, submission 013, p 27.

941 Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 55.

any side of Parliament expect the Fair Work Ombudsman to operate effectively when it has less than one enforcement officer for nearly every 3,000 businesses?'.[942]

The OIR outlined concerns about the number of FWO inspectors, particularly in regional Queensland. It estimated that 38 FWO inspectors regularly operate in Queensland, including 13 in regional areas.[943] It submitted:

> *… the scarcity of regional offices means that the coverage of FWO inspectors is severely limited outside of Brisbane, Cairns, the Gold Coast, Rockhampton and Toowoomba (FWO, 2018b). These inspectors cover 2,238,299 federal system employers, and 12,471,000 workers, (Australian Bureau of Statistics, 2018) though not all of these will be direct employees.*[944]

In comparison, the OIR had 71 inspectors prior to the industrial relations transition to the federal government in 2005.[945] When service agreements with the FWO ceased in late 2012, inspectorate enforcement numbers dropped to approximately an inspectorate of 15.[946] The OIR advised the committee it believed the Queensland industrial relations system applied to approximately 10 to 11 percent of Queensland workers,[947] and that it is confident of its capabilities under existing resources.[948]

The OIR also commented on the FWO's resourcing, noting a decrease in funding to the FWO for its compliance activities, since its establishment in 2008. [949]

The Queensland Minister for Industrial Relations wrote to the former Commonwealth Minister for Small and Family Business, the Workplace and Deregulation, on 18 May 2018, seeking assurance of the FWO's capacity to investigate complaints, following reports of workers who contacted the FWO and were not satisfied with the assistance provided. In his response, the Hon Craig Laundy MP, then Minister for Small and Family Business, the Workplace and Deregulation, reiterated the FWO performance data from its 2016-17 annual report, and stated:

> *With over 2.2 million businesses and around 12.5 million workers across Australia, the FWO is strategic and flexible in its approach to ensure it has a serious impact on compliance in these workplaces. The agency carries out its responsibilities in line with its Compliance and Enforcement Policy which can be found on the FWO's website.*[950]

Resourcing of the FWO was an area of concern to the Senate's EERC during its inquiry into temporary work visas. The EERC noted that many stakeholders had noted the smallness of the network of FWO inspectors and had expressed views that the FWO was under-resourced for its role. The EERC reported that it was 'left in no doubt that many groups viewed the FWO as woefully under-resourced',[951] and recommended the appointment of an independent panel to review the resources and powers of the FWO by 30 June 2016. The EERC also recommended the review consider the 'penalty, accessory

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942 NRA, submission 021, p 12.

943 Queensland Government, OIR, written briefing, 7 June 2018, p 8.

944 Queensland Government, OIR, written briefing, 7 June 2018, pp 8-9.

945 Queensland Government, OIR, written briefing, 7 June 2018, p 9.

946 Queensland Government, OIR, written briefing, 7 June 2018, p 9.

947 Dr Simon Blackwood, Deputy Director-General, OIR, public briefing transcript, Brisbane, 11 June 2018, p 3; Queensland Government, OIR, written briefing, 7 June 2018, p 3.

948 Dr Simon Blackwood, Deputy Director-General, OIR, public briefing transcript, Brisbane, 11 June 2018, p 4; Queensland Government, OIR, written briefing, 7 June 2018, p 1.

949 Queensland Government, OIR, written briefing, 7 June 2018, p 8.

950 Queensland Government, OIR, response to a question taken on notice at the briefing on 11 June 2018.

951 Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, p 322.

liability, and sham contracting provisions under *the Fair Work Act 2009*'.[952] It was proposed that this review make recommendations on matters including the powers of the FWO, appropriateness of penalties under the FWA, accessory liability provisions and sham contracting provisions.[953] No such review has occurred.[954]

Increased resourcing to support the prevention of wage theft in Queensland, was proposed by a number of stakeholders.[955] The NRA and R&CA strongly advocated for extra resourcing of the FWO, suggesting this would increase the efficiency of the regulator. [956] The NRA submitted that 'the key impediment to the Fair Work Ombudsman being an even more effective regulator is not the current state of the law, but the resources provided to the enforcement agency'.[957]

The QNMU recommended resourcing be provided by the Federal Government to the FWO.[958]

Some stakeholders did not agree that resourcing the FWO would on its own, sufficiently address the problem of wage theft in Queensland. The QLS stated:

> *Certainly, on the one hand, greater funding for enforcement agencies would go a long way, but there is the perennial problem of funding versus outcomes. Inevitably, I suspect that public enforcement is only part of the answer.*[959]

Committee comment

The committee received extensive evidence indicating that the FWO is inadequately resourced to effectively undertake its role in compliance and enforcement of wage theft matters in Queensland. Of particular concern were reports about the FWO's compliance approach and comparatively low level of enforcement activities.

The minimal number of FWO inspectors in Queensland was noted by various submitters, and is of particular concern.

The lack of action by the FWO is leaving workers in Queensland to pursue matters on their own. It is clear that there is a need for increased on the ground visibility and activity of the FWO, particularly in regional Queensland; and a move to a stronger compliance and enforcement model is necessary.

The committee notes it has been almost ten years since the establishment of the FWO, with no comprehensive review of its performance since that time.

Recommendation 11

The committee recommends the Federal Government take immediate steps to appoint additional Fair Work inspectors in Queensland under the *Fair Work Act 2009* (Cth).

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952 Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders,* March 2016, p xiv.

953 Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders,* March 2016, p xiv.

954 Queensland Government, OIR, written briefing, 7 June 2018, p 9.

955 See, for example: R&CA, submission 017, p 3; NRA, submission 021, p 11; QNMU, submission 023, p 4; Dr Laurie Berg and Bassina Farbenblum, submission 042, p 4.

956 R&CA, submission 017, p 3.

957 NRA, submission 021, p 11.

958 QNMU, submission 023, p 4.

959 Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, p 14.

Recommendation 12

The committee recommends the Federal Government establish a full, independent review into the performance, resourcing and culture of the Fair Work Ombudsman to ensure that it can respond to wage theft and support affected workers in an effective and timely fashion.

Among other things, the review should consider the findings and recommendations of the Best Practice Review into Workplace Health and Safety Queensland which have driven a cultural shift from education to compliance.

12.1.2 Australian Taxation Office

The ATO may recover unpaid amounts it is entitled to, through powers such as using future refunds or credits, external collection agencies, issuing garnishee notices, director penalty notices, and statutory demands.[960]

The ATO considers litigation to be appropriate where:

- *there is a contentious or uncertain point of law that requires clarification and it is in the public interest to seek law clarification through litigation*
- *the behaviour involved is such that we need to send a strong message to the community*
- *there is a longstanding unresolvable debt*
- *the dispute is intractable, alternative means of resolving the dispute have been attempted but have not produced an acceptable outcome.*[961]

The ATO's compliance action in 2015-16 resulted in $670.4 million SG charge raised (including penalties and interest), $341.3 million SG charge collected, 2,997 default assessments raised, and 877 Director Penalty Notices issued for SG debt of $130 million.[962]

The ATO reported a rate of 75 percent community satisfaction with its performance in 2016-17,[963] with a rate of 56 percent for perception of fairness in disputes.[964]

The ATO advised the committee of its increased capacity to focus on SG debt collection activities, and intention to continue to issue Director Penalty Notices where appropriate.[965] It noted, however, that it can take up to 14months for employer contributions to be reported to the ATO, and that 'this delay reduces the effectiveness of the ATO's compliance work and ability to monitor non-payment of SG'.[966]

Further, the ATO advised:

> *The ATO does not currently have any real time visibility over an employer's SG obligations to their employees. As indicated there are reporting reforms that will commence in late 2018 that will increase the regularity of reporting from superannuation funds on the payment of SG payments*

960 Australian Government, ATO, 'If you don't pay', 14 June 2018, https://www.ato.gov.au/General/Paying-the-ATO/If-you-don-t-pay/#Strongeraction.

961 Australian Government, ATO, 'Options for resolving disputes', 6 August 2018, www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Options-for-resolving-disputes/.

962 Australian Government, ATO, submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 006, p 23.

963 Australian Government, ATO, *Commissioner of Taxation Annual Report 2016-17*, 2017, pp 75, 76.

964 Australian Government, ATO, *Commissioner of Taxation Annual Report 2016-17*, 2017, p 19.

965 Australian Government, ATO, correspondence, 19 July 2018, p 6.

966 Australian Government, ATO, correspondence, 19 July 2018, p 10.

Wage theft
Submission 5 - Attachment 1

> *to their members. However, currently the ATO only receives information on superannuation guarantee payments received by superannuation funds on an annual basis.*[967]

The IGT, in a 2016 report on a *Review into the ATO's Employer Obligations Compliance Activities*, raised concerns about the ATO's reliance on reporting by employers and employees to identify non-compliance.[968] The IGT recommended the ATO undertake random audits as part of its non-compliance activities.[969]

The committee heard that although the ATO may secure money through fines, it does not directly secure money for workers:

> *I made a verbal complaint to the Australian Tax Office before they went to receivership, about the company not paying the superannuation payments by Telephone and was advised that if I was to make a formal complaint the Australian Tax Office would fine the company but could not guarantee that the company would pay the superannuation payments. The money that was the fine would go to the ATO not to the persons who were owed the money.*[970]

The QLS highlighted the difficulties this creates for employees when pursuing recovery of unpaid superannuation, stating:

> *As stated, currently, the options for an employee to recover superannuation benefits are not practical. If the employer is insolvent or bankrupt, it may be extremely difficult for action to be taken by the ATO. Compulsory superannuation entitlements arise independently of the obligations to pay wages and entitlements pursuant to minimum National Employment Standards or an award/enterprise agreement or contractual entitlement. The benefit of the superannuation entitlement is a deferred one for employees and some contractors, which is difficult to privately enforce. There is a policy issue to be considered as to whether the taxpayer (through the government) should cover the loss of compulsory superannuation contributions. However, whilst we acknowledge that superannuation benefits are different to a loss of wage or other entitlement, QLS's view is that there is an entitlement and there ought to be an available remedy where they are not paid.*[971]

The QCU raised concerns about the process to recover unpaid superannuation, and proposed a recommendation to the Federal Government to 'ensure superannuation is treated as an industrial entitlement'. [972] It suggested this could be implemented by including superannuation as part of the National Employment Standards in the FWA, so that 'it can be pursued and prosecuted for like any other industrial entitlement.' [973] The QCU noted this would also mean 'unions would be able to investigate stolen super' and 'be able to prosecute to make sure that superannuation is returned to workers'.[974]

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967 Australian Government, ATO, correspondence, 19 July 2018, p 10.

968 Australian Government, Inspector-General of Taxation, *Review into the ATO's employer obligations compliance activities: A report to the Minister*, 2016, p vii.

969 Australian Government, Inspector-General of Taxation, *Review into the ATO's employer obligations compliance activities: A report to the Minister,* 2016, pp x, 76-77 (recommendation 4.20).

970 Susan Stapleton, submission 008, p 1.

971 QLS, response to question taken on notice at the hearing on 16 August 2018, pp 2-3.

972 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

973 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

974 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

The QNMU suggested stronger powers be provided to the ATO to penalise non-compliant employers and recover unpaid contributions.[975]

IR Claims recommended the ATO introduce random audits of business in high risk industries, and more regular payments of superannuation contributions (suggesting alignment with payment of regular wages).[976]

The Senate Economics Reference Committee, in its inquiry into non-compliance of the SG, recommended the ATO consider more proactive SG initiatives such as random audits,[977] and review ATO resource levels to ensure its effectiveness in compliance activities.[978] Other recommendations for the SG systems included removal of the $450 monthly threshold on SG eligibility,[979] and an increase in frequency of SG payment requirements so that SG is be paid at least monthly.[980]

The QNMU submitted:

> *The implementation of new technologies has already been improving efficiencies within the default superannuation process. The introduction of SuperStream and Single Touch Payroll have been suitable mechanisms for streamlining and simplifying the interaction with super funds. The 2018/9 federal budget announced new powers for the ATO to proactively reunite lost and low balance inactive super accounts. This is a welcome move to address Australia's $16 billion lost superannuation problem, however the ATO must be resourced adequately to implement this initiative. The QNMU supports the proposed policy changes that will promote SG payment compliance….*[981]

The Single Touch Payroll system was also noted by other submitters.[982] Mr Brian McCarrick, director of Ardent Security, commented that the system 'goes a long way to preventing the non-payment of superannuation because of the automated reporting from every company's payroll system straight to the ATO of each employees' PAYG and superannuation entitlements'.[983]

Stakeholders also raised concerns about the under-resourcing of the ATO. The Senate Economics References Committee's report *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee* described the ATO's approach to SG compliance activities as 'reactive rather than proactive',[984] and highlighted evidence which suggested resourcing levels contributed to delays in

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975 QNMU, submission 023, p 16.

976 IR Claims, submission 013, p 57.

977 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, recommendation 12, p xii.

978 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, recommendation 13, p xii.

979 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, recommendation 3, p xi.

980 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, recommendation 5, p xi.

981 QNMU, submission 023, p 16.

982 See, for example: MEA, submission 030, p 19; Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8; Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, p 2.

983 Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8.

984 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, p 54.

investigations and lack of communications with complainants.[985] The report recommended a review of ATO resource levels to ensure the agency could engage in effective and comprehensive compliance activities.[986]

Similarly, the QCU stated:

> *When it comes to superannuation, of course the Australian Taxation Office is responsible for pursuing stolen super. We do not think they are properly resourced to do that, nor do we think they are properly motivated to do that.*[987]

The QNMU recommended further resourcing for the ATO 'to carry out the initiatives making superannuation payments more transparent and employers accountable and to enforce compliance with the *Superannuation Guarantee (Administration) Act 1992*'.[988]

The committee notes the ATO has received funding to establish a Superannuation Guarantee Taskforce, which is intended to operate for three years, and complement the ATO's compliance activities.[989]

Committee comment

The committee notes with concern, the issues raised in regards to the ATO's compliance and enforcement activities, and frustrations expressed by many individuals with the process to recover unpaid superannuation.

Incorporation of the superannuation guarantee as a statutory national minimum entitlement under the FWA would allow for a clear process of recovery of unpaid superannuation entitlements.

Recommendation 13

The committee recommends superannuation be included as an industrial entitlement in the National Employment Standards.

12.1.3 Office of Industrial Relations

The OIR's compliance and enforcement activities include investigations (including powers to enter premises and require information), and resolving issues through conciliation and arbitration in the QIRC, and litigation.[990]

In 2017, the OIR visited 32,816 workplaces and homes, recovered more than $1.6 million in long service leave due to workers, [991] and completed 478 wage complaint investigations, which resulted in just over $1.3 million in adjustments.[992] As a result of its activities, four wage recovery conferences were

985 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, pp 57 – 61.

986 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, recommendation 13, p 62.

987 Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

988 QNMU, submission 023, p 16.

989 Australian Government, ATO, correspondence, 19 July 2018, p 6.

990 Queensland Government, OIR, written briefing, 7 June 2018, pp 1-3.

991 Queensland Government, OIR, 'Office of Industrial Relations', 19 June 2018, https://www.oir.qld.gov.au/sites/g/files/net5141/f/5873-oir overview.pdf?v=1533595818

992 Queensland Government, OIR, written briefing, 7 June 2018, p 1.

completed in the QIRC, and one legal proceeding was undertaken, with an adjustment of wages of $33,887 in legal proceedings.[993]

The OIR reported client satisfaction levels of 94 percent in its 2017 client satisfaction survey of employers and employees.[994]

Ms Sara Bartrum, who initiated claims through both the FWO for underpayment of wages and the OIR for long service leave, outlined her interactions with both agencies, and noted that while the FWO was initially helpful, after being unable to gain a response by the employer, suggested the only avenue was to proceed through a court process. The OIR was successful in recovering Ms Bartrum's long service leave entitlements, which Ms Bartrum attributes in part to the OIR's physical presence, and ability and willingness to approach her employer at his business residence.[995] Ms Bartrum stated:

> *The lady at Industrial Relations was wonderful. The whole thing was great. It took her time but she got there. But she could go and see him and I think that made a big difference. She said jokingly to me one day, 'I think the only reason he paid you is to get rid of us,' and I said 'Yes, probably because you keep turning up in his office.' She said, 'Yes and he can't ignore me when I am sitting in front of him.'*[996]

The QCA suggested an increase in labour hire inspectors may assist in identifying exploitative practices.[997]

Some submitters proposed further powers and resourcing be provided to the OIR to allow it to recover workers' entitlements, working collaboratively in enforcement action with the FWO.[998] For example, Dr Tess Hardy stated:

> *Although the inspectorate may not be able to institute enforcement proceedings under the Fair Work Act, in our view there are limited constitutional barriers for such an inspectorate engaging in educational activities that may be directed towards vulnerable workers.*[999]

IR Claims suggested:

> *We would strongly recommend that inspectors be employed by Queensland and not caught up in the Ombudsman's bureaucracy. The problem with the Ombudsman is it is big, fat and expensive and is not doing its job in enforcement. Queensland inspectors—and I am old enough to remember the old section 666—were something to be feared and they did their job. They have a real role to play because once an inspector is involved, we are no longer in the education division; we are in the enforcement division.*[1000]

Other stakeholders went further to suggest a new state-based regulatory authority should be developed. The ALHR suggested this could be based on a model similar to the FWO, and include a role of education and provision of advice, as well as undertake compliance activities and enforcement

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993 Queensland Government, OIR, written briefing, 7 June 2018, p 1.

994 Queensland Government, OIR, written briefing, 7 June 2018, pp 2-3.

995 Ms Sara Bartrum, private capacity, public hearing transcript, Maryborough, 12 September 2018, p 2.

996 Ms Sara Bartrum, private capacity, public hearing transcript, Maryborough, 12 September 2018, p 2.

997 QCA, submission 035, p 3.

998 Maurice Blackburn and joint submitters, submission 033, pp 19, 32.

999 Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, 20 August 2018, p 20.

1000 Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 11.

action.[1001] The Services Union suggested establishment of a new agency would assist in reducing resolution time for underpayment claims.[1002]

However, other stakeholders did not feel that a state-based regulatory authority would be appropriate or effective. The MEA stated:

> *A State regulatory agency for dealing with wage theft issues will be considerably hamstrung by the State's referral of powers resulting in all private employers in Queensland are subject to the national employment system under the Fair Work Act.*[1003]

Ai Group agreed, and stated: 'The last thing we need is an even more complex system through the state government going alone on new wage compliance measure'.[1004]

12.1.4 Australian Securities and Investments Commission

ASIC's primary role with respect to wage theft relates to its responsibilities for registering and de-reregistering companies and regulating insolvency proceedings.

A number of provisions under the Corporations Act can be used by ASIC to take action against company controllers whose behaviour has denied employees their entitlements. The first group of provisions is broad directors' duty provisions, such as the duty of care, the duty to avoid conflicts of interest, and the duty to act in good faith for a proper purpose. The second group is two provisions inserted in 2000, to capture transactions that deprive employees of their entitlements.[1005]

Over the last five years, ASIC reported outcomes against stakeholders as: commenced court proceedings against two registered liquidators (seeking a Court inquiry), and four company directors for breaching their legal obligations or engaging in fraudulent conduct.[1006] It does however, have higher prosecution rates against individuals for offences of failing to keep appropriate books and records, with prosecution of 382 individuals for 734 offences in 2017-18, and prosecution of 50 individuals for 99 offences in 2018-19 to 1 September 2018.[1007]

The Black Economy Taskforce recommended new and strengthened penalties for phoenixing, ABN fraud and sham contracting, including 'more visible and efficient prosecutions and fewer confidential settlements'.[1008]

Mr Beau Malone, state organiser for the ETU Queensland and Northern Territory Branch, commented on the activities of ASIC, telling the committee:

> *Just quickly, ASIC sounds wonderful. They do not give a … if it is to do with a company that is going broke, owing workers' entitlements, even if they have done it once or twice before, using their wife or their partner's name to start up a new business, because it is too small for them to take a vested interest in. While I say that, you can make application to try to raise it if you like so that they do deal with it, but they are not dealing with it. The general concept that we find as an*

1001 ALHR, submission 051, pp 2-3, 12.

1002 The Services Union, submission 046, p 3.

1003 MEA, submission 030, p 20.

1004 Mr Shane Rodgers, Head – Queensland, Ai Group, public hearing transcript, Brisbane, 16 August 2018, p 45.

1005 Helen Anderson, 'Corporate insolvency and the protection of lost employee entitlements: Issues in enforcement', *Australian Journal of Labour Law,* vol. 26, 2016, p 78.

1006 Australian Government, ASIC, correspondence, 17 October 2018, p 10.

1007 Australian Government ASIC, correspondence, 17 October 2018, p 10.

1008 Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 6.

outcome is nothing, because they do not have the time or the resources to put into that end of town, which is where workers are having their wages stolen all the time.[1009]

Resourcing of ASIC was also commented upon by Dr David Morison, who stated:

…the amount of funding that you put behind the law, and there are too many laws to administer at the moment so there is insufficient funding for the people who are responsible to ensure that they are complied with. ASIC is a classic example Australia-wide.[1010]

12.1.5 Agency Collaboration

Stakeholders noted the importance of collaboration by relevant Commonwealth and Queensland agencies in identifying and addressing wage theft.

The NRA commented on existing collaboration efforts, stating:

We commend the Queensland government's engagement with the Fair Work Ombudsman's office to date. We think ongoing collaboration between the states and that office is essential to effective enforcement outcomes.[1011]

The OIR advised that although there is a cooperative relationship between the OIR and FWO, there is no formal information-sharing policy or procedure, or reporting relationship regarding wage theft issues.[1012] In most cases, if concerns are raised to the OIR regarding Commonwealth industrial relations matters, individuals are directly referred to the FWO, ATO or relevant Commonwealth agency.[1013]

In its written brief to the committee, the OIR advised that it received 747 enquiries in 2017 which were in relation to matters falling within the FWA, such as wages, employment conditions and unfair dismissal.[1014] The OIR noted it had also referred approximately 20 emails a year and refers formal ministerial correspondence to the Commonwealth Government in relation to matters received from 'the general public, Queensland and Commonwealth parliamentarians, concerning underpayments, wage theft, bullying and sexual harassment'.[1015]

The OIR told the committee:

The Fair Work Ombudsman and the Office of Industrial Relations enjoy a fairly close relationship in terms of sharing information and checking on compliance histories as required. We do have dedicated contacts in their office.[1016]

The FWO in its submission, stated:

The FWO welcomes referrals and intelligence from the Queensland Office of Industrial Relations, and works closely with a range of State and Federal Government agencies to achieve whole of

[1009] Mr Beau Malone, State Organiser, ETU Queensland and Northern Territory Branch, public hearing transcript, Gold Coast, 10 September 2018, p 20.

[1010] Dr David Morrison, Associate Professor, University of Queensland, public hearing transcript, Brisbane, 20 August 2018, p 24.

[1011] Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 55.

[1012] Queensland Government, OIR, written briefing, 7 June 2018, p 4.

[1013] Queensland Government, OIR, written briefing, 7 June 2018, p 4.

[1014] Queensland Government, OIR, written briefing, 7 June 2018, p 3.

[1015] Queensland Government, OIR, written briefing, 7 June 2018, p 3.

[1016] Mr Tony Schostakowski, Chief Inspector, Industrial Relations Regulation and Compliance, OIR, public briefing transcript, Brisbane, 11 June 2018, p 5.

Wage theft
Submission 5 - Attachment 1

> *Government priorities and outcomes, including responding to the exploitation of vulnerable workers*.[1017]

The OIR advised that implementation of the recently introduced labour hire licensing scheme will include information sharing between agencies including the Queensland Government and the FWO and ATO, and that the LHLCU is finalising a memoranda of understanding with the FWO and Department of Home Affairs.[1018] Instances of wage theft may be identified through the activities of the LHLCU, and the OIR has stated 'future compliance activities are likely to involve joint engagement and field investigation activities with these agencies'.[1019]

ASIC advised the committee that it engages with other regulatory and enforcement agencies, including the FWO, ATO and state-based government revenue agencies, and that it works with key government agencies through the Phoenix Taskforce, Black Economy Taskforce and Serious Financial Crime Taskforce 'to share intelligence and reduce and deter IPA [illegal phoenixing activity]'.[1020]

Stakeholders stressed the use of collaboration to address wage theft, such as through development of formal information-sharing and other collaborative arrangements across other state and national agencies, including the FWO.[1021]

Dr David Morrison summarised:

> *… the problem and drivers of wage theft in Queensland, is in broad terms, identical with the issues faced by other states and territories. Even if verifiable evidence as to the nature and extent of wage theft was available for Queensland, it does not change the way forward for dealing with the problem: namely a collaborative effort on the part of all government stakeholders.*[1022]

In relation to unpaid superannuation, Hostplus suggested

> *… perhaps greater proactive powers of the ATO and better collaboration between the ATO, ASIC and the Fair Work Ombudsman will also go a long way towards improving or supporting this issue.*[1023]

12.2 Fair Work Commission

The Fair Work Commission has a limited role in enforcement and deterrence of federal industrial obligations, as the FWO is primarily responsible for compliance and enforcement of most matters under the FWA.

This is in contrast to the Queensland industrial relations framework, with the QIRC able to hear matters and make orders regarding the payment of an employee's unpaid wages and superannuation, under the IR Act.[1024] The QIRC can require the parties to attend a conciliation conference, and if the matter

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1017 Australian Government, FWO, submission 044, p 3.

1018 Queensland Government, OIR, written briefing, 7 June 2018, pp 4-5.

1019 Queensland Government, OIR, written briefing, 7 June 2018, pp 4-5.

1020 Australian Government, ASIC, correspondence, 17 October 2018, p 5.

1021 Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 8.

1022 Dr David Morrison, submission 032, p 15.

1023 Ms Helen Wood, Executive Manager, Client Relationships, Hostplus, public hearing transcript, Brisbane, 17 September 2018 (morning), p 10.

1024 IR Act, ss 475-477.

remains unresolved, can conduct a formal hearing.[1025] Decisions of the QIRC are binding and enforceable by a court.[1026]

This process can be used as an alternative to seeking recovery of unpaid wages through a Magistrates Court, under section 379 of the IR Act. If a person has sought recovery under section 379 of the IR Act, the matter can still be referred back to the QIRC for conciliation.

The FWC does not have powers to hear and decide matters regarding the recovery of wages and superannuation, unlike the QIRC.

12.3 Sham contracting

The committee heard from workers affected by 'sham contracting', where an employer deliberately misclassifies its workers as independent contractors, instead of 'employees' of the business. Sham contracting enables an employer to avoid many statutory requirements under the FWA including minimum wage, penalty rates, leave entitlements and superannuation.

The FWA includes penalties for employers who engage in sham contracting by: misrepresenting an employment as an independent contracting arrangement (section 357 of the FWA); dismissing employees in order to engage the worker as an independent contractor (section 358 of the FWA); and making misleading or false statements to persuade or influence a person to be engaged as an independent contractor (section 359 of the FWA).

However, the FWA includes a defence for an employer who misrepresents employment as independent contracting; for an employer who can prove that they did not know and were not reckless as to whether the contract was a contract of employment rather than a contract for services (section 357(2)). An employer is only in breach of the legislation if they have been found to have deliberately misrepresented an employment arrangement as a contracting arrangement.

This defence has been criticised, including during the 2012 review of the FWA,[1027] which recommended the removal of the 'reckless defence' from the provisions of the FWA.[1028] An inquiry into the workplace relations framework in 2015 by the Productivity Commission also found that the sham contracting provisions in the FWA mean it is 'too easy under the current test for an employer to escape prosecution for sham contracting'[1029] and recommended the test be amended to replace the recklessness component with one of 'reasonableness'.[1030] The Productivity Commission report stated:

> *Changing from a test of 'recklessness' to a test or 'reasonableness' would help discourage sham contracting, including through the regulators' out-of-court actions. Such a change is also an important measure to limit the greater incentives for sham contracting that would arise when*

[1025] QIRC, Information Sheets: Recovery of unpaid wages and superannuation, 28 September 2018, http://www.qirc.qld.gov.au/qirc/prod_form_leg/factsheets/fs_recovery.htm

[1026] Decisions under s 380 of the IR Act are enforceable under the *Justices Act 1886* (Qld) as an order for payment of money.

[1027] Professor Emeritus Ron McCallum AO, Hon Michael Moore and Dr John Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation,* Australian Government, 2012.

[1028] Professor Emeritus Ron McCallum AO, Hon Michael Moore and Dr John Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation,* Australian Government, 2012, p 243.

[1029] Australian Government, Productivity Commission, *Workplace Relations Framework Inquiry Report,* no. 76, vol. 1*,* 2015, p 3.

[1030] Australian Government, Productivity Commission, *Workplace Relations Framework Inquiry Report,* no. 76, vol. 1*,* 2015, p 47.

terms in enterprise agreements that excluded subcontractors were prohibited (as recommended by the Productivity Commission).[1031]

The Senate EERC also raised concerns regarding the reckless defence, and reported stakeholder concerns that the 'burden of proof effectively rests with the employee, because no statutory presumption exists in the Act presuming the worker to be an employee in the event of a dispute',[1032] which makes the enforcement of the provisions difficult. The Senate EERC noted 'with concern that the Act permits employers the opportunity to prove that mischaracterisation of employees as independent contractors was not done knowingly or recklessly'.[1033] It further noted that 'the civil remedy for sham contracting established by the FWA is virtually powerless in dealing with employers who engage in the practice', and that: 'the regime is, as described by the ETU, 'manifestly weak', and contains broad loopholes for employers and corporations to reduce or avoid their obligations under the Act entirely'.[1034]

The EERC, in its inquiry into avoidance of the FWA, reported inadequacies in the legislation to address sham contracting, suggesting it is made easier 'by inadequacies within provisions of the FWA which apply to the practice' and 'is also inadvertently encouraged by taxation laws which provide a financial incentive for employment arrangements to be hidden in some cases'.[1035]

The CFMEU, in its submission to the Senate EERC inquiry into avoidance of the FWA, explained its views about the structure of the offence provision:

… the mere fact that an employment relationship exists but the employee is nonetheless treated as a contractor, does not establish a breach of the section. Whilst the High Court has recently determined that it is immaterial that the misrepresentation was as to the relationship between the employee and the employer or a labour hire company, the misrepresentation requirement is still central to the operation of the section.[1036]

Maurice Blackburn Lawyers and the Electrical Trades Union of Australia also provided evidence to the Senate EERC inquiry,[1037] expressing concern with 'the "problematic" nature of sham contracting provisions as they stand under the FWA'[1038] and that 'no definitive test exists at common law differentiating an employee from an independent contractor'.[1039]

The Senate EERC noted these concerns, and the presumption in the FWA that workers are independent contractors unless the workers prove otherwise.[1040] The Senate EERC concluded:

The committee is firmly of the view that the existence of economic incentives encouraging sham contracting over employment and these must be addressed as the root cause of the growth of sham contracting, the Act must be amended to clearly set out a statutory definition of 'employee'

1031 Australian Government, Productivity Commission, *Workplace Relations Framework Inquiry Report,* no. 76, vol. 1*,* 2015, p 47.

1032 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p, 79.

1033 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p, 80.

1034 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p, 80.

1035 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 78.

1036 CFMEU, submission to the Parliament of Australia, Senate EERC, inquiry into corporate avoidance of the *Fair Work Act 2009,* 2017, submission 200, p 12.

1037 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 79.

1038 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 79.

1039 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 79.

1040 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 80.

and 'contractor'. This would provide clarity and 'enable individuals to determine the nature of their employment without recourse to the Common Law test.[1041]

The QIRC can make an order declaring that persons working under a contract for services are employees, under section 465(1) of the IR Act. In considering the appropriateness of such a declaration, the QIRC can consider the following matters:

(a) the relative bargaining power of the class of persons; or

(b) the economic dependency of the class of persons on the contract; or

(c) the particular circumstances and needs of low-paid classes of persons; or

(d) whether the contract is designed to, or does, avoid the provisions of an industrial instrument; or

(e) whether the contract is designed to, or does, exclude the operation of the Queensland minimum wage; or

(f) the particular circumstances and needs of particular classes of persons including women, persons from a non-English speaking background, young persons and outworkers; or

(g) the consequences of not making an order for the class of persons.[1042]

The FWC does not have a similar power to assess and determine the status of employment contracts under the federal jurisdiction.

Under the federal jurisdiction, determination as to whether a worker is an independent contractor or employee is a common law test, and so a matter for the court. Factors a court may consider when making a determination of employment status include the degree of control over work, hours of work, ability to delegate, basis of payment, provision of equipment and tools, responsibility of tax and superannuation payments, and leave.[1043]

Committee comment

Sham contracting was consistently raised as an issue of concern during the inquiry.

The committee noted the additional powers of the QIRC compared with the FWC, including the ability to declare a worker under an employment contract to be an 'employee'. This can provide a more efficient and accessible avenue for workers who have been misclassified by their employer as an independent contractor, than undergoing a court process for a determination which is required in the federal jurisdiction. Although there are a number of provisions within the FWA to protect workers from sham contracting arrangements,[1044] these focus on deterrence rather than facilitating timely resolution of disputes regarding an employers' classification of workers.

Criticism of the sham contracting provisions in the FWA is of concern to the committee. Not only does the burden of proof rest with an employee to prove the employment relationship, the 'reckless defence' for contraventions of the FWA which can be used by employers, raises substantial concern.

[1041] Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 80.

[1042] IR Act, s 465(3).

[1043] Australian Government, FWO, 'Independent contractors and employees', https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/independent-contractors-and-employees ; *Stevens v Brodribb Sawmilling Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Limited* (2001) HCA 44, 207 CLR 21.

[1044] See, for example: FWA, ss 357-359.

The committee notes a change in defence under section 357 of the FWA, from one based on recklessness, to a test of reasonableness, could assist to discourage and limit the incentives of sham contracting.

Recommendation 14

The committee recommends the Fair Work Commission be given the power to assess the status of an employment contract similar to that available to the Queensland Industrial Relations Commission under the *Industrial Relations Act 2016* (Qld), and, further consideration be given to removing the 'reckless defence' from the offence of sham contracting under section 357(2) of the *Fair Work Act 2009* (Cth) and introducing a new 'reasonable person' test for determining whether an employer has engaged in sham contracting.

12.4 Civil penalties

An employer found to have conducted wage theft can be subject to a range of penalties. Under the Queensland industrial relations framework, the IR Act contains penalties for breaches of employer obligations such as keeping time and wages records and providing pay advices to employees.[1045] It also contains various general offence provisions covering issues such avoiding the IR Act's obligations, non-payment of wages and accepting reduced wages.[1046] These can be enforced in a Magistrates Court.

Breaches of the FWA can also incur penalties. For example, the current maximum penalties for a breach of a record-keeping or pay slip requirement are: $1,260 for an individual or $6,300 for a body corporate for breaches of the FWA; and $420 for an individual or $2,100 for a body corporate for breaches of the Regulations.[1047] A failure to comply with a compliance notice issued by the FWO can result in penalties of up to $6,300 for an individual and $31,500 for a company.[1048]

Penalties for non-compliance under the FWA were increased in 2017, by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth). This included a tenfold increase in penalties for serious breaches involving evidence of deliberate and systematic underpayment of entitlements, and an increase in penalties for record-keeping failures.[1049] It has been noted however, that the new maximum penalty 'is only applicable when an employer 'knowingly' and 'systematically' underpays (s 557A(1)), likely requiring an employer to be caught by the FWO for multiple contraventions over a long period'.[1050]

The reason for increasing civil penalties under the FWA was 'so the threat of being fined acts as an effective deterrent to potential wrongdoers'.[1051]

Effectiveness of penalties as a deterrence mechanism was discussed by a number of stakeholders. Some stakeholders believed the civil penalties to be ineffective at deterring wage theft,[1052] including

[1045] IR Act, ss 339-343.

[1046] IR Act, ss 927, 539, 929; Queensland Government, OIR, written briefing, 7 June 2019, p 2.

[1047] Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 28.

[1048] Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 29.

[1049] Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, explanatory notes, p 3.

[1050] Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Relations Review*, vol. 29, no. 2, 2018, p 217.

[1051] Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, explanatory notes, p ii.

[1052] See, for example: IEU, submission 007, p 5; JobWatch, submission 016, p 16; ALHR, submission 051, p 11.

the IEU which suggested: 'Repeated non-payment of superannuation and underpayment of wages makes it clear that current penalties do not act as a deterrent'.[1053]

Similarly, JobWatch submitted:

> *Evidently, the penalties imposed for wage theft are not acting as a deterrent and there is evidence that employers are intentionally underpaying workers. The risk of prosecution by the FWO is remote and often when a regulator does become involved, prosecution is the last resort.*[1054]

In contrast, the FWO promoted its use of civil penalties as a means of deterrence, stating:

> *Court action and penalties send a strong message of deterrence, which is leveraged through the media and the agency's stakeholder networks to encourage small business to check their compliance.*[1055]

The NRA supported the use of civil penalties as an effective means of deterrence, submitting that 'the threat of significant penalties and a compliance system geared towards employee self-representation generally act as a suitable deterrent against deliberate non-compliance'.[1056]

In contrast, the OIR highlighted:

> *… academic findings that small business operators were likely to be unaware of the scope of potential penalties for breach of workplace conditions, and that the penalties levied by the courts tended to achieve little in the way of general deterrence. Critically, the study found that 40% of the employers who reported the most awareness of the FWO's compliance activities believed that a hypothetical wage theft would go undetected, compared with 17% of those less familiar.*[1057]

A number of proposals were made to increase penalties for breaches of the FWA,[1058] including by Australian Lawyers for Human Rights, which submitted:

> *It is also recommended that consideration is given to a strengthened regime of penalties which will act as a deterrent and utilising the existing legislative regime, including criminal prosecution in appropriate cases, more effectively.*[1059]

The introduction of aggravated damages was suggested by the QCU, to 'provide greater incentive for compliance'.[1060]

Other submitters disagreed that increasing penalties would act as effective deterrence. For example, Tess Hardy, Melissa Kennedy and Professor John Howe submitted:

> *…recent survey research undertaken to explore the deterrence-effects of the FWO's enforcement activities, including civil remedy litigation, reveals that the relationship between higher penalties and perceptions of deterrence is not clear-cut. Rather, we found that businesses often could not*

1053 IEU, submission 007, p 5.

1054 JobWatch, submission 016, p 12.

1055 Australian Government, FWO, correspondence, 5 October 2018, p 5.

1056 NRA, submission 021, p 9.

1057 Queensland Government, OIR, written briefing, 7 June 2018, p 25.

1058 See, for example: The Services Union, submission 046, p 3; ALHR, submission 051, p 12; QTIC, submission 022, p 11.

1059 ALHR, submission 051, p 12.

1060 QCU, submission 034, p 40.

> *recall the target or amount of the penalty and could not therefore weigh this up against the costs associated with compliance.*[1061]

IR Claims suggested the FWA be amended so that penalties could be made payable directly to workers, to cover the costs of progressing a claim.[1062]

The committee noted a recent increase in penalties available for non-payment of superannuation, including 12 months imprisonment for employers who ignore orders to pay back super.[1063]

12.5 Criminalisation

Criminalisation of wage theft, that is to make wage theft a criminal offence, was supported by a large number of stakeholders, [1064] and was the subject of significant commentary, including its effectiveness as a deterrent.

The proposal to criminalise wage theft was acknowledged as a potential means by which to 'disincentivise wage theft' by correcting or re-balancing incentives for compliance.[1065] In this regard, JobWatch noted, 'by increasing the cost of non-compliance to an employer, committing wage theft therefore becomes less attractive and so the rate of wage theft should diminish'.[1066]

The QCU, ETU, Hall Payne Lawyers and Maurice Blackburn and other submitters supported the criminalisation of wage theft where it is deliberate and or reckless. [1067] The QCU explained:

> *We have had a look at that [criminalisation of wage theft] within the QCU, and we have come to the conclusion that that is certainly worthy of consideration and we are advocating for that. Why is that the case? It is to bring some balance to the employment relationship. If a worker steals from their employer, not only is it treated as theft but it is actually an aggravated offence under the Queensland Criminal Code. The thought that it is an aggravated offence for an employee to steal from the employer but it is dealt with as an administrative matter from the point of view of an employer stealing from an employee is fairly well stuck in the 18th century, from our point of view.*[1068]

Maurice Blackburn and joint submitters advocated for the development of a 'Wage Theft Act', as 'a separate legislative scheme' to be 'implemented to criminalise wage theft, balancing the needs of business and the rights of workers'.[1069] It submitted that this legislation could include strict liability offences, tiered levels of conduct amounting to wage theft, and tiered levels of penalty.[1070]

1061 Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 6.

1062 IR Claims, submission 013, p 55.

1063 IR Claims, submission 013, p 48.

1064 See, for example: Justin Cobbett, submission 003, p 2; JobWatch, submission 016, p 16; Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 1; Mr Beau Malone, State Organiser, ETU Queensland and Northern Territory Branch, public hearing transcript, Toowoomba, 10 September 2018, p 10; Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn, public hearing transcript, Brisbane, 16 August, p 37; Hall Payne Lawyers, submission 027, pp 5, 18.

1065 JobWatch, submission 016, p 16.

1066 JobWatch, submission 016, p 16.

1067 Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 1; Mr Beau Malone, State Organiser, Electrical Trades Union, Queensland and Northern Territory Branch, public hearing transcript, Toowoomba, 10 September 2018, p 10; Maurice Blackburn, public hearing transcript, Brisbane, 16 August, p 37; Hall Payne Lawyers, submission 027, pp 5, 18.

1068 Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August, p 2.

1069 Maurice Blackburn and joint submitters, submission 033, p 2.

1070 Maurice Blackburn and joint submitters, submission 033, pp 13-14.

The QCU qualified their call for the criminalisation of wage theft, explaining:

> *In our submission it would not be intended to criminalise simple mistakes but rather the more egregious and deliberate actions on the part of an employer who is fully aware of the breach and continues regardless. Repeated behaviour might also give rise to the necessity to impose more significant sanctions against a recalcitrant employer.*[1071]

The QCU further noted:

> *… we are not talking about situations of oversight. We are not talking about simple mistakes that are made, which we know occurs. This is to get to those employers who deliberately do not pay their workers.*[1072]

IR Claims supported the criminalisation of wage theft, commenting that the FWO 'are an exceptional educator but they are not an enforcer, so we must bring enforcement to the table if the ombudsman will not'.[1073]

Criminalisation was also supported by employers and industry bodies.[1074] Mr Allan Mahoney, Chairman of BFVG, supported criminalisation of wage theft, stating:

> *To me it is criminal. We have spoken to everyone from the assistant commissioner of police right through to the Australian Federal Police. They put labour exploitation down as a victimless crime. There are victims every day. Just because that victim might get done for $1,000 this week or $500 next week—it is not good enough. We should see this as a crime and treat it as the billion dollar industry that it is...*[1075]

> *… Repeat offenders or repeat noncompliance needs to be taken as criminal. If someone is going to do it once, and unfortunately it happens, you make the sentence fit the crime. This is a criminal act and if it is a repeated criminal act it has to be treated as such. It does not take long.*[1076]

Mr Paul Wessel, Managing Director of Wessel Petroleum, when asked about his views on criminalisation of wage theft where the conduct is intentional, stated: 'I think they should go to jail because the person who steals the money is stealing for themselves out of the till. These guys are making other workers suffer'.[1077]

The NRA stated it would 'support criminalisation of wage theft only if it was limited to circumstances where the employer knowingly and deliberately declined to pay employees of all of their entitlements'.[1078]

[1071] QCU, submission 034, p 36.

[1072] Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 6.

[1073] Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 8.

[1074] See, for example: Mr Allan Mahoney, Chairman, BFVG,, public hearing transcript, Bundaberg, 12 September 2018; Mr Paul Wessel, Managing Director and Ms Amanda Coates, Finance and IT Manager, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 18; Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 54.

[1075] Mr Allan Mahoney, Chairman, BFVG, public hearing transcript, Bundaberg, 12 September 2018, p 2.

[1076] Mr Allan Mahoney, Chairman, BFVG, public hearing transcript, Bundaberg, 12 September 2018, p 6.

[1077] Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 18.

[1078] Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 54.

On a number of occasions, submitters put forward the valid argument that it is inequitable that there is a specific criminal offence for employees who steal from their employers ('stealing by a servant'),[1079] but no equivalent offence for an employer who steals from its employees.[1080] IR Claims suggested that 'this is fundamentally an unfair playing field, weighted heavily in the employer's favour, and offers no deterrence, and allows them to commit wage theft with impunity'.[1081]

Avenues for criminalising wage theft were discussed in detail by Hall Payne Lawyers, who not only recommended criminal offences for intentional or reckless conduct of an employer to pay the entitlements of an employee, but also included a suggested criminal offence for 'the intentional concealing or falsification of records relating to wage theft'.[1082] Hall Payne Lawyers proposed these offences be subject to the defence of 'mistake of fact', as provided in the Criminal Code.[1083] They clarified their intention that mistaken or reasonable conduct should not be captured in a criminal offence, however may still be subject to pecuniary penalty under the FWA.[1084]

Hall Payne Lawyers' analysis noted potential constitutional issues if Queensland legislated a criminal offence for wage theft, as the jurisdiction for industrial relations laws are a matter for the Commonwealth. However, they argued these issues have 'limited prospects of success 'and cannot rationally or sensibly be described as legitimate reasons for not legislating to criminalise wage theft'.[1085] In contrast, Master Builders Queensland did not believe it was within the state government's jurisdiction to act to 'fix, enforce or recover wages'.[1086]

The committee heard suggestions for the maximum penalty that should apply if offence/s of wage theft were introduced. IR Claims suggested a reciprocation of the penalty for the existing offence of stealing by a servant, which carries a maximum penalty of 10 years imprisonment.[1087] Hall Payne Lawyers suggested treating wage theft as a serious criminal offence, which would therefore include a term of imprisonment 'that adequately reflects the public's denunciation of such conduct', and suggested penalties in the *Work Health and Safety Act 2011* could provide guidance. [1088] The QCU suggested a higher penalty be imposed for repeated behaviour.[1089]

The committee heard proposals that existing penalties be strengthened, in combination with the introduction of criminal penalties.[1090]

MEA suggested that if wage theft is criminalised, it should be so in the federal jurisdiction rather than a Queensland provision.[1091]

1079 *Criminal Code 1899* (Qld), s 398.

1080 QCU, submission 034, p 1, Maurice Blackburn and joint submitters, submission 033, p 12 ; Hall Payne Lawyers, submission 027, p 5; Mr Shane Rodgers, Head – Queensland, Ai Group, public hearing transcript, Brisbane, 16 August 2018, p 50.

1081 IR Claims, submission 013, p 6.

1082 Hall Payne Lawyers, submission 027, pp 5, 18.

1083 Hall Payne Lawyers, submission 027, p 10; *Criminal Code 1899* (Qld), s 24.

1084 Hall Payne Lawyers, submission 027, p 10.

1085 Hall Payne Lawyers, submission 027, pp 7-8.

1086 Master Builders Queensland, submission 045, p 2.

1087 IR Claims, submission 013, p 55.

1088 Hall Payne Lawyers, submission 027, p 15; *Work Health and Safety Act 2011*(Qld), ss 31-33.

1089 QCU, submission 034, p 36.

1090 See, for example: IEU, submission 007, p 6; YWH, submission 019, p 7; QTIC, submission 022, p 11..

1091 Mr Jason O'Dwyer, Manager Advisory Services, MEA, public hearing transcript, Brisbane, 20 August 2018, p 5.

JobWatch expressed concerns about the proposal to establish a criminal offence provision in relation to wage theft, which involved concerns about 'adequate funding and a willingness and capacity to prosecute':

> *The amount of funding required may be high given the increased burden of proof on the prosecution in criminal trials and the general issues that the FWO currently faces in gathering evidence. Further, the evidence gathered will be incidental to the FWO's work which raises questions of priority funding – particularly whether the disincentive to employers of any new criminal law is greater than the current civil penalties under the Fair Work Act should these be better enforced and/or, if wage theft is criminalised in Queensland, whether the FWO would focus its attention and resources elsewhere.*[1092]

HIA and Ai Group disagreed that criminalisation of wage theft was appropriate.[1093] Ai Group submitted that 'exposure to criminal penalties, including imprisonment, for underpayments would discourage investment and employment in Queensland.'[1094]

Dr Laurie Berg cautioned against the introduction of a wage theft offence, suggesting it may not provide effective deterrence:

> *We would not want to criminalise inadvertent underpayments or mistakes which are made. There is also ample evidence that the introduction of criminal sanctions does not necessarily lead to greater enforcement and is not a silver bullet in terms of deterrence either. For instance, in a vaguely related field of criminalising employers of unauthorised migrants—employers who are employing workers contrary to their visa conditions or who have overstayed a visa—the introduction of criminal sanctions in 2007 was not broadly enforced at all and is unlikely to have changed behaviour in that sphere.*[1095]

In an article exploring workplace contraventions and liability, Hardy commented on deterrence of penalties, particularly in relation to franchise networks, stating:

> *… it is no longer readily apparent that punishment of the putative employer will be effective in addressing some of the key drivers of compliance behaviour, which may be determined by more powerful firms positioned higher in the supply chain or at the apex of the franchise network.*[1096]

In response to the Black Economy Taskforce Report, the Commonwealth Government committed to review:

> *… the current provisions that provide civil, criminal and administrative penalties for black economy activity to ensure sanctions available reflect the harm done. As part of this process, consideration will be given to developing more effective prosecution processes and introducing new criminal offences, civil penalties or administrative penalties.*[1097]

Committee comment

Throughout inquiry hearings, witnesses repeatedly raised concerns in regard to the relative ineffectiveness of civil penalties to deter deliberate cases of wage theft.

[1092] JobWatch, submission 016, p 16.

[1093] HIA, submission 043, p 4; Ai Group, submission 038, p 3.

[1094] Ai Group, submission 038, p 3.

[1095] Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 23.

[1096] Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?', *Australian Journal of Labour Law*, vol 29, no. 2, 2016, p 6.

[1097] Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report,* May 2018, p 10.

Evidence regarding the lack of enforcement by the FWO for breaches of the FWA, was also consistently raised as a key issue in addressing the prevalence of wage theft.

There is a clear need for further deterrence, to stop employers engaging in forms of wage theft.

While some stakeholders suggested increasing civil penalties, the committee noted that this approach has been criticised by a number of stakeholders who believe a financial penalty is insufficient to provide the level of deterrence necessary.

While acknowledging that such a recommendation signals a move from punitive measures traditionally contained in the civil, to the criminal space, the committee noted that almost all stakeholders (including employer organisations and industry bodies) supported criminalisation of wage theft in Queensland where conduct is proved to have been deliberate or reckless.

Further, such a move provides a strong statement in regard to the weight that Parliament applies to the seriousness of deliberate and/or reckless cases of wage theft perpetrated against Queensland workers.

The committee believes criminalising wage theft is an appropriate way to deter the very worst and deliberate instances of wage theft by employers, to protect workers' entitlements. An offence/s with tiered penalties, based on the seriousness of the conduct, would provide a proportionate response to employers' conduct.

The Queensland government should note and consider the different models for criminalisation raised through this inquiry, including any resource implications.

Recommendation 15

The committee recommends the Queensland Government legislate to make wage theft a criminal offence, where the conduct is proven to be deliberate or reckless.

The Queensland Government should consider the variety of models and approaches for criminalising wage theft that were presented to the inquiry and consult further with stakeholders in regard to a preferred model.

12.6 Naming and shaming

Some submitters proposed the introduction of a public register which names employers who have been found to engage in wage theft, as a means of deterrence, and to assist workers in choosing employers. Support was provided by the IEU which suggested 'details of employer misconduct should be recorded on a public register so that employees can make informed decisions regarding where they apply for employment'.[1098]

The threshold for listing on a register was not commented on extensively, however, IR Claims proposed the register be used for 'employers who have been given breach notices under the Fair Work Act, and who have been fined with pecuniary penalties for wage theft.'[1099] It also suggested the register be available on a dedicated website, similar to the 'Rate My Boss' website in Victoria.[1100]

The QTIC noted that social media is already used as a way to 'name and shame employers that are underpaying or committing other forms of wage theft', and that this provides an avenue for employees to speak up about their employers and unfair work conditions. It argued that the potential reputational damage provides deterrence for employers.[1101]

[1098] IEU, submission 007, p 5.

[1099] IR Claims, submission 013, p 57.

[1100] IR Claims, submission 013, p 57.

[1101] QTIC, submission 022, p 10.

The committee heard from an individual in Townsville who suggested public naming of non-compliant employers, explaining:

> *When people apply for a job, employers usually want two or three contactable work referees, yet for the prospective employee, they have no idea what the company they are going to go to work for is like. Why can it not go both ways? Why should we not be able to find out whether this company has a dodgy track history and they have a record of underpayment or anything like that? That needs to be out there so that people can make an informed decision as to whether that would be a company they would want to work for in the first place.*[1102]

Dr David Morrison noted that a process of 'naming and shaming' exists in England, 'where employer's details are published in the press, where they are identified by the business name and the amount'.[1103]

This already occurs in Queensland to an extent, as the media often report instances and allegations of wage theft, including publishing the names of companies and individual employers. The FWO also publishes news and campaign reports online, and judgments of the Federal Circuit Court are generally publicly available.

Dr Morrison's submission referred to the 'Wage Thieves Register' created by Unions NSW, which lists businesses in NSW that have advertised jobs with wages below the minimum award rate.[1104] Dr Morrison cautioned, however, that:

> *…the name and shame tactic is useful only where it can be accessed and known by as many people as possible. There is no evidence of a name and shame strategy that is universally applied and/or used in Australia. Further, were one created, it is not clear how the message would reach those most in need.*[1105]

The name and shame tactic was discussed by the Black Economy Taskforce in regard to its recommendation for a targeted, stronger and more visible enforcement strategy.[1106] The Taskforce considered the creation of a public central register which publishes details of deliberate tax evaders, however, it concluded that this approach was not necessary if its other proposals for increasing visibility of enforcement were accepted.[1107] These proposals included increased multi-agency cooperation and information sharing, greater publicity of actions and outcomes, and enhanced collaboration with industry to improve education and compliance.[1108]

[1102] Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 17.

[1103] Dr David Morrison, submission 032, p 18.

[1104] Unions NSW, 'Wage Thieves Register', http://www.wagethieves.com.au/wp/wage-thieves-register/

[1105] Dr David Morrison, submission 032, p 18.

[1106] Australian Government, *Black Economy Taskforce*, Final Report, October 2017, pp 181 – 185.

[1107] Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 185.

[1108] Australian Government, *Black Economy Taskforce*, Final Report, October 2017, pp 181 – 185.

13 Other jurisdictions

13.1 Australian jurisdictions

Recent regulatory developments aimed at addressing wage theft in other Australian jurisdictions have largely centred on efforts to enhance deterrence by strengthening enforcement powers, and imposing stronger sanctions for non-compliant employers, including through criminalisation.

In July 2017, the NSW Labor party announced its intention to criminalise deliberate wage theft if elected at the 2019 state election. The proposal, which was the centrepiece of a package of reforms to address the underpayment of workers in NSW, would see the *Crimes Act 1900 No 40* (NSW) amended to introduce criminal penalties, including fines and the possibility of imprisonment for up to 14 years, 'for individuals who are found guilty of systematic, ongoing and widespread failure to pay wages and other employee entitlements'.[1109] In addition, the party announced an intention to also widen the powers of workplace inspectors to undertake wage audits.[1110]

In May 2018, the Victorian Government announced plans to introduce new laws to create an offence for employers who deliberately underpay or don't pay their workers, with a maximum penalty of 10 years imprisonment.[1111] The proposed laws would cover 'employers who deliberately withhold wages, superannuation or other employee entitlements, falsify employment records, or fail to keep employment records' and include penalties of fines of $190,284 for individuals, $951,420 for companies, and up to 10 years imprisonment.[1112] The proposal also included reforms to expedite the process of wage recovery, making it 'faster, cheaper and easier' for employees to recover money owed by an employer, such that claims of up to $50,000 would be heard within 30 days.[1113] The current Andrews Government plans to pursue the criminalisation of wage if re-elected at the state election on 24 November 2018,[1114] following consultation with employer groups and unions on the proposed bill.[1115]

[1109] NSW Labor, 'A new law to criminalise wage theft', www.nswlabor.org.au/a_new_law_to_criminalise_wage_theft

[1110] NSW Labor, 'A new law to criminalise wage theft', www.nswlabor.org.au/a_new_law_to_criminalise_wage_theft

[1111] Hon Daniel Andrews MP, Premier of Victoria, 'Dodgy employers to face jail for wage theft', media release, Victorian Government, 26 May 2018, https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/; See also: Ben Knight, `Victorian Government vows to crack down on wage theft, with penalties of up to 10 years in jail', *ABC News,* 26 May 2018, https://www.abc.net.au/news/2018-05-26/victorian-government-vows-to-crack-down-on-wage-theft/9802072

[1112] Hon Daniel Andrews MP, Premier of Victoria, 'Dodgy employers to face jail for wage theft', media release, Victorian Government, 26 May 2018, https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/

[1113] Hon Daniel Andrews MP, Premier of Victoria, 'Dodgy employers to face jail for wage theft', media release, Victorian Government, 26 May 2018, https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/

[1114] Ben Knight, `Victorian Government vows to crack down on wage theft, with penalties of up to 10 years in jail', *ABC News,* 26 May 2018, https://www.abc.net.au/news/2018-05-26/victorian-government-vows-to-crack-down-on-wage-theft/9802072

[1115] Ben Smee and AAP, `Victorian government pledges to introduce jail terms for wage theft, *The Guardian*, 26 May 2018, https://www.theguardian.com/australia-news/2018/may/26/victorian-government-pledges-to-introduce-jail-terms-for-wage-theft

The Victorian Government has allocated $22 million in the 2018-19 Budget for the establishment of the 'Victorian Wage Inspectorate' with investigation and enforcement powers, including oversight of labour hire licencing and enforcement.[1116]

The former South Australian Labor government announced on 17 March 2018 that amendments to the *Criminal Law Consolidation Act 1935* (SA) would be introduced to criminalise wage theft if Labor was elected in the state election, however the SA Labor party was unsuccessful in the election.

Developments at a federal level include the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* which commenced on 15 September 2017 and includes increased financial penalties for serious contraventions of the FWA, and granted the FWO new powers of investigation (as mentioned in chapter 12). Other actions by the federal government to deter and reduce wage theft have resulted from inquiries and reports, such as those outlined in the final report of the Black Economy Taskforce.

In response to the work of the Black Economy Taskforce, the Commonwealth Government announced changes to the Single Touch Payroll System, to assist reporting to the ATO. From 1 July 2019, the system will be expanded to cover three new industries, those being: security providers and investigative services, road freight transport, and computer system design and related services. These industries were identified as high risk of non-reporting or under-reporting. Businesses within these industries will be required to report to the ATO about payments made to contractors. The goal is to assist the ATO in ensuring compliance of contractors with their tax obligations.[1117]

In its response to the Black Economy Taskforce report, the Commonwealth Government committed to consultation on a new ABN framework, including the potential introduction of an ABN renewal scheme.[1118]

ASIC advised the committee that the legislating of a Director Identification Number by the Commonwealth Government is a 'major Government reform initiative to assist ASIC, other agencies and the wider market combat IPA [illegal phoenix activity] involves',[1119] and that the 'Government aims to deliver this reform via its Registry Modernisation initiative'.[1120]

The impact of these reforms is yet to be evaluated.

Activities to assist in compliance and enforcement also include the establishment of a cross-agency Migrant Workers' Taskforce established in October 2016 to 'identify further proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify any cases of migrant worker exploitation'.[1121] Further, 'Taskforce Cadena' is a Joint Agency Taskforce established in 2015 comprising the Department of Immigration and Border Protection, Australian Border Force and the Fair Work Ombudsman aiming to 'detect and disrupt criminal syndicates that profit from the criminal exploitation of foreign workers and Australia's migration system'.[1122]

1116 Hon Daniel Andrews MP, Premier of Victoria, 'Dodgy employers to face jail for wage theft', media release, Victorian Government, 26 May 2018, https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/

1117 Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report,* May 2018, p 7.

1118 Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report,* May 2018, p 6.

1119 Australian Government, ASIC, correspondence, 17 October 2018, p 6.

1120 Australian Government, ASIC, correspondence, 17 October 2018, p 6.

1121 Australian Government, Department of Jobs and Small Business, 'Migrant Workers' Taskforce', 3 September 2018, https://www.jobs.gov.au/migrant-workers-taskforce.

1122 Australian Government, Australian Border Force, *Taskforce Cadena*, https://www.abf.gov.au/about-us/taskforces/taskforce-cadena

Other legislative changes include recent proposals by the Commonwealth Government to amend legislation, including the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018, which proposes 'reforms that will increase visibility, transparency; accountability and fairness of the superannuation guarantee system'.[1123] It was noted that the Bill was yet to be considered by the parliament.

The federal government has not responded to a number of significant reports regarding wage theft matters by the Australian Parliament, although it is required to respond to Senate committee reports within three months of the report being tabled.[1124] Responses are outstanding for the 2017 Senate EERC *Corporate Avoidance of the Fair Work Act*; the Senate Economics References Committee's 2017 inquiry report *Superbad – Wage theft and non-compliance of the Superannuation Guarantee;* and the Senate EERC's 2016 report *A National Disgrace: The Exploitation of Temporary Work Visa Holders*. [1125] The federal government's response to the Select Committee on the Future of Work and Workers' report *Hope is not a strategy – our shared responsibility for the future of work and workers* is due in December 2018.

13.2 International jurisdictions

Wage theft is not unique to Australia, and has been reported in countries around the world, with recent changes to policy and regulation in attempts to address the issue.[1126] Limited commentary about recent developments in other jurisdictions however, was provided to the committee during the inquiry, with comments focused on deterrence and penalties

Mr Stevenson of the QLS suggested a possible *'*general trend towards the criminalisation of extreme conduct of any sort' throughout international jurisdictions'. [1127]

In the UK, the *National Minimum Wage Act 1998 (United Kingdom)*, sets out the statutory framework for workplace conditions and entitlements including the national minimum wage, record keeping and enforcement action for underpayments, and penalties for non-compliance.[1128] Dr Hardy noted that the UK framework includes criminal proceedings of a broad nature, with statutory defences available for employers who have underpaid workers inadvertently or accidentally.[1129] Dr Morrison commented on the UK government's 'name and shame' strategy, whereby the UK Department for Business, Energy

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[1123] Australian Government, ATO, correspondence, 19 July 2018, p 9.

[1124] Parliament of Australia, *President's Report to the Senate on the status of government responses to parliamentary committee reports as at 30 June 2018*, August 2018, p 1.

[1125] Parliament of Australia, *President's Report to the Senate on the status of government responses to parliamentary committee reports as at 30 June 2018*, August 2018, pp 5, 6.

[1126] For example, In New Zealand in 2017, changes were introduced to immigration systems which prevents employers from recruiting migrant workers if the employers have been found to breach its employment laws, including the underpayment of employee wages. In the US, a Bill introduced to the Commonwealth of Massachusetts, entitled *An Act to Prevent Wage Theft and Promote Employer Accountability*, is being considered by the Senate. See: New Zealand Government, Ministry of Business, Innovation and Employment, *Employers who have breached minimum employment standards,* 7 November 2018, https://www.employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/employers-who-have-breached-minimum-employment-standards/; Commonwealth of Massachusetts, *An Act to Prevent Wage Theft and Promote Employer Accountability,* https://malegislature.gov/Bills/190/S2327

[1127] Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, p 12.

[1128] United Kingdom Government, History of National Minimum Wage and Overview of Legislation: The National Minimum Wage Act 1998', November 2016, https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm01020

[1129] Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 23.

and Industrial Strategy publish names of businesses who have failed to pay employees the national minimum wage or national living wage. [1130]

Mr John Payne of Hall Payne Lawyers spoke about the frameworks in Seattle and Colorado in the US, which he described as 'more of a code for the police to prosecute on'.[1131] The US and Australian legal systems are vastly different, with Mr Payne cautioning against the drawing of parallels from the state and federal jurisdictions of the US in regards to wage theft matters.[1132]

Mr Payne also made reference to the legal system in Canada, whose Criminal Code previously included a criminal offence for employment obligation non-compliance, including wage payment of employees at less than the minimum wage.[1133] The offence was however, repealed in 1955, with only one record of attempted prosecution, which was unsuccessful.[1134]

[1130] Dr David Morrison, submission 032, p 18.

[1131] Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 32.

[1132] Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 32.

[1133] Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 32; Hall Payne Lawyers, response to questions taken on notice at the hearing on 16 August 2018, p 3.

[1134] Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 32; Hall Payne Lawyers, response to questions taken on notice at the hearing on 16 August 2018, p3.

14 Exploitation of legal framework

Inquiry stakeholders sought to highlight a range of activities which, while not unlawful, were a form of exploitation of the legal framework. Workers reported that employers had taken advantage of flexibilities in the statutory framework, and engaged in conduct which adversely affected the employee.

Issues were raised with the difficulties in terminating EBAs, and the use of zombie agreements which do not meet minimum employment entitlements and conditions under the FWA, and can substantially disadvantage both the employees covered by the agreement, and the businesses which operate under modern awards and agreements that meet stricter tests of fairness.

Evidence was also provided regarding workplace conditions and lack of protection of workers in less traditional forms of employment such as gig economy work.

This chapter also outlines illegal phoenix activity, whereby employers are deliberately avoiding tax and other statutory obligations at the expense of workers, businesses and the broader economy. It has been noted that there has been a 'massive increase' in such activity, with the costs being absorbed by taxpayers.[1135]

14.1 Workplace agreements

14.1.1 Termination of workplace agreements

The termination of EBAs is an issue which has previously been the subject of various reports, including by Australian parliamentary committees. As stipulated by the FWA, enterprise agreements must contain a nominal expiry date of up to four years. The agreements continue to remain in effect after the expiry date, until new agreements have been approved, or they are terminated by the FWC.

The decision to terminate an agreement is made by the FWC, which must approve the termination request if it is satisfied that it is not contrary to the public interest to do so, and the FWC considers it appropriate, taking into account all circumstances, including the likely affect the termination will have on employees, employers and organisations.[1136]

The QNMU highlighted the practice of terminating EBAs during the inquiry, stating that employers sought termination so that 'workers revert to lower award wages', which they considered tantamount to 'legal' wage theft, and often made possible 'when they exploit a labour market with high rates of insecure jobs, low wages growth, a hamstrung union movement and limited institutional enforcement':

> *The current characteristics of the labour market and its regulation work to create an environment where employers have many means of deceitfully denying workers their lawful entitlements yet also have the capacity to act within the regulatory framework to reduce wages and conditions. For these reasons, the QNMU, like other affiliated unions, supports the Australian Council of Trade Union's (ACTU) Change the Rules campaign.*[1137]

[1135] Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 13.

[1136] FWA, s226.

[1137] QNMU, submission 023, p 5.

The effects of termination of EBAs was raised in the Senate EERC inquiry into corporate avoidance of the FWA. The Senate EERC heard various cases 'where employers have seemingly sought to unilaterally terminate enterprise agreements that have passed their nominal expiry date' and stated:

> *It is apparent that this is done by employers in order to significantly reduce employee wages and conditions, often for the purpose of obtaining an advantage in negotiations for a replacement agreement.*[1138]

Frustration with the FWC's powers in relation to enterprise agreements, was expressed by Ms Sevegne Newton, who detailed the experience of a young man in her care who worked in the hospitality industry and was paid what appeared to be unusually low wages under a workplace agreement. Ms Newton contacted the FWO and FWC regarding the issue, and provided the following commentary on their powers in relation to EBAs:

> *Yesterday I … [was informed] that the Fair Work Commission did not have the power to enforce Employers to pay the rates in Agreements that they had ratified and there was nothing they could do for me. As I didn't think I had heard correctly, I reiterated that the Ombudsman couldn't do anything because it was an Agreement not an Award and the Commission could do nothing because they had no power to enforce Agreements that Employers had entered into with them. His reply was "yes" When I asked what I should do next he said "take it up with Parliament".*
>
> *So we have the case of a National Chain of Restaurants taking advantage of young workers by not paying them the wages they had gone to the trouble of going to the Fair Work Commission and do a legally binding Agreement with, yet the same organisation is completely powerless to make Employers comply. The Fair Work Commission says no employee will be worse off under an agreement than under an award, well this is quite clearly not true as young workers are being exploited.*[1139]

Under the Queensland industrial relations framework, disputes about certified agreements are heard by the QIRC. The QIRC assists the parties to come to an agreement through its conciliation conferences, and then to a formal hearing if required. Matters heard by the QIRC include the proposed termination of certified agreements.[1140] Under the IR Act, an employer may apply to the QIRC to terminate the agreement if the agreement has not yet expired, however, after the expiry date of an agreement, applications for termination can be made by a 'valid majority of the relevant employees'[1141] or employee organisation 'to which the agreement or determination applies and that has at least one member who is a relevant employee'.[1142] The QIRC must approve the termination of the agreement if:

- all persons to whom the agreement applies have been provided notice of the intention to terminate the agreement,[1143]
- the parties to the agreement agree to it being terminated, and
- termination of the agreement or determination is not contrary to the public interest[1144]

[1138] Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009,* September 2017, p 27.

[1139] Sevegne Newton, submission 1, pp 1-2.

[1140] IRA, ss 227, 228.

[1141] IRA, s 228(1)(b).

[1142] IRA, s 228(1)(c).

[1143] IRA, s 228(2).

[1144] IRA, s 228(2),(3). Note, if the agreement provides that it may be terminated if particular conditions are met, section 228(3)(a) applies instead.

14.1.2 'Zombie agreements'

The committee heard negative commentary by stakeholders regarding the use of EBAs made before the introduction of the FWA and the significant changes it made to industrial relations laws,[1145] colloquially known as 'zombie agreements'. The use of zombie agreements was reported by a range of stakeholders including unions, business owners and workers in the security and hospitality industries.[1146]

Zombie agreements are nominally expired agreements which were made under the *Workplace Relations Act 1996* (Cth) after amendments in 2006 by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) *('Work Choices')*. The Work Choices legislation removed the 'no disadvantage test'[1147] under which no workplace agreement could be approved if it provided in effect that there was a less favourable net outcome for employees under the proposed workplace agreement than under a relevant award.

These EBAs created before commencement of the FWA ('pre-2010 EBAs') were transitioned to the FWA in their original form (not required to be renewed or terminated),[1148] and so have not been subject to an equivalent minimum standards test such as the BOOT, or the NES and other requirements under the FWA.

As the Work Choices agreements had a five-year nominal expiry date, even if an agreement was lodged in 2009 it still should have expired in 2014. Workers on these agreements could be losing significant amounts in wages and superannuation over the longer term.

It is legal for companies to be operating under zombie agreements, as provided by the FWA. However, the committee heard that 'zombie agreements are a legal form of wage theft which allows the person who has the zombie agreement to then undercut everyone else in that playing field and that market'.[1149]

In the recent FWO inquiry into the procurement of security services by local governments, the FWO reported that four of the 21 agreements (19 percent), 'were approved prior to 7 May 2007, and were therefore not subject to assessment against the full award entitlements'.[1150]

Melbourne's Young Workers Centre has reported that there were about 4000 agreements struck between 2006 and 2009 under Work Choices in Australia, many of which have not been terminated, particularly at franchise stores.[1151] Accordingly, it has been estimated that 'tens of thousands of Australian employees are still unwittingly trapped in so-called "zombie" workplace contracts written

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1145 Note, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, contains a transition provision which provides that agreements made under previous legislation continue to have effect.

1146 YWH public hearing transcript, Gold Coast, 10 September 2018, pp 4 - 5; CFMEU Queensland, submission 039, Executive Security Group submission 029, Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 7

1147 Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), explanatory memorandum.

1148 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

1149 Mr Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), p 25.

1150 Australian Government, FWO, *An inquiry into the procurement of security services by local governments,* June 2018, p 24.

1151 Nick Toscano, 'Thousands stuck on WorkChoices deals: analysis', *The Sydney Morning Herald*, 2 January 2017, https://www.smh.com.au/business/workplace/thousands-stuck-on-workchoices-deals-analysis-20170102-gtkt6y.html

Wage theft
Submission 5 - Attachment 1

during the Work Choices era'.[1152] Then federal Minister for Jobs and Small Business, Hon Craig Laundy MP, has previously advised that the Department of Jobs and Small Business' Workplace Agreements Database could not confirm how many zombie agreements remained in place.[1153]

In a hearing of the Senate EERC during its inquiry into corporate avoidance of the FWA, Ms Keelia Fitzpatrick, Coordinator of the Young Workers Centre described exploitation of young workers as a result of zombie agreements, and stated:

> *… the Fair Work Commission and the Fair Work Ombudsman cannot give you a concrete number of how many of these agreements still exist today. As a result, we see this loophole, meaning that hundreds of young people, who may not be completely familiar with our employment law and industrial system, are simply not understanding that they are missing out on pay and entitlements...*[1154]

In a submission to the Senate EERC inquiry into corporate avoidance of the FWA, the Australian Services Union noted it had encountered numerous examples of zombie agreements including in the contract call centre, and that these agreements:

> *…have the effect of denying workers important employment conditions such as penalty rates, overtime and public holiday rates in the relevant Modern Award. By never renewing these pre-reform agreements, employers are denying their workforce the higher safety net available under the Fair Work Act and unfairly undercutting their competitors.*[1155]

The committee also heard that zombie agreements provide an unfair advantage in commercial competition.[1156] Mr Andrew Bourke, Managing Director of Executive Security Group, stated in this regard:

> *I have lost multimillion-dollar contracts to multinational companies that gain these contracts through quoting cost and then using zombie agreements or ABN holders as part of their method of operation. They then sublet a quarter of that contract or half that contract or the whole contract to the zombie agreement holder or a company that engages ABN… If you look at corporate Australia, there are some major companies that have been caught such as Caltex, which was recently in the paper regarding a $5.7 million back pay. When major companies like that are engaging in wage theft, it is hard for a family business like mine to operate and compete in the marketplace*.[1157]

Security industry operator Mr Jeffrey Jones, spoke to the commercial impacts of zombie agreements, stating:

[1152] Nick Toscano, 'Thousands stuck on WorkChoices deals: analysis', *The Sydney Morning Herald*, 2 January 2017, https://www.smh.com.au/business/workplace/thousands-stuck-on-workchoices-deals-analysis-20170102-gtkt6y.html

[1153] Stephen Smiley, 'Employees stuck in 'outdated', 'zombie' contracts of WorkChoices era', *ABC News*, 16 April 2018, https://www.abc.net.au/news/2018-04-16/employees-stuck-in-zombie-contracts-of-workchoices-era/9660988

[1154] Ms Keelia Fitzpatrick, Coordinator, Young Workers Centre, testimony to the Parliament of Australia, Senate EERC, inquiry into corporate avoidance of the FWA, public hearing transcript, Melbourne, Wednesday 15 March 2017, p 56.

[1155] Australian Services Union, submission to the Parliament of Australia, Senate EERC, inquiry into corporate avoidance of the FWA, 2017, submission 205, p 10.

[1156] Mr Andew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), p 25.

[1157] Mr Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), p 25.

Wage theft
Submission 5 - Attachment 1

> *Someone can be on $25 an hour working on a Sunday or a public holiday and the award rate for a casual is something like $56 an hour. What hope is there for an employer who has to pay by the award—they cannot do anything other than pay by the award—to compete against somebody who has a zombie agreement or employers who are using ABN holders?*[1158]

EBAs can be terminated under section 226 of the FWA, on application to the FWC by an employer, employee or employee organisation. In considering the termination of an EBA, including a pre-2010 EBA, the FWC considers the public interest, views of employees, employers and employer organisations; and the likely effect of termination of the agreement on employees, employers and employer organisations.[1159]

Stakeholders submitted that it is extremely difficult to terminate zombie agreements,[1160] and that the process can take years.[1161] For example, Mr Andrew Bourke stated:

> *… they have no expiry date on them, so then they just keep going until a staff member puts in a complaint to terminate that agreement… It is a very daunting process and you have to face up to the boss. It is not an easy process, so those agreements just keep going. There is no expiry date.*[1162]

Ms Mele Tulimaiau, a food-manufacturing worker, told the committee that even though she and other employees knew of their employer's zombie agreement and wanted it replaced:

> *…there is very little we can do to change it. The only way we are going to be able to receive our entitlements is through a majority support petition with our union or by allowing our company to concoct a new and improved agreement that benefits all its employees. The likelihood of that taking place is minimal. Why would they want to update our agreement and bring us all up to the award minimum and improve the pay conditions for all employees when they can legally pay us a flat rate of $21.50 forever?*[1163]

Mr Jeffrey Jones, drawing on his experience as a union official and industrial consultant, also highlighted the challenges of the termination process and explained that the decision not to pursue termination, even where it is recognised the zombie agreement provides for inferior remuneration and conditions, may be a practical one:

> *I actually supported not terminating the agreement for the simple reason that this employer had 600-odd security officers and once that agreement was terminated we knew what would happen to the security officers: most of them lost their job. The process of doing that took around 18 months. The union sent a letter to the company to terminate the agreement. Then it just went on and on. The process was unbelievably long. We went to the commission about three or four times before it was eventually terminated by consent.*
>
> *In the process it would have cost the union—it certainly cost the employer—quite a bit of money to get that agreement terminated.*[1164]

1158 Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

1159 *Fair Work Act 2009,* s 226.

1160 Executive Security Group, submission 029, p 7; YWH, public hearing transcript, Gold Coast, 10 September 2018, pp 4, 8-9; Mr Jeffrey Jones, public hearing transcript, Brisbane, 17 September 2018

1161 Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

1162 Mr Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), p 26.

1163 Ms Mele-Otufale Tulimaiau, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018, p 3.

1164 Mr Jeffrey Jones, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

If a zombie agreement is terminated, it has been reported that the employer will just 'shop around' for another zombie agreement which is still in force.[1165]

Stakeholders proposed an end to these outdated agreements,[1166] with Mr Jeffrey Jones suggesting 'the only way for it to be fair is for all zombie agreements to be terminated at the same time',[1167] and recommending a sunset clause in the FWA which terminates new agreements six months after their expiry date.[1168] Mr Jones stated:

> *We have written to the federal government several times going back many, many years now—2014—to put a sunset clause in the Fair Work Act so that all agreements must be terminated six months after their nominal expiry date. That would put everybody on an even keel. At the moment it is very unfair because there are three classes of contractors out there: one that pays the award, one that uses a zombie agreement and one that uses ABN holders. The people paying the award have no hope of tendering for contracts, and this includes state government contracts and local government contracts, and I have had issues with one council. That is the only way you are going to get a fair system, particularly with the employers and the employees, for them all to be on an equal rate of pay.*[1169]

An individual told the committee in a private hearing:

> *… that would certainly be a very strong recommendation—that any agreements that have not been made since the Fair Work Act came in, because that is the current legislation, be cancelled and be replaced with an updated EBA, or the modern award apply.*[1170]

Committee comment

The committee heard accounts of zombie agreements across a wide range of industries. These appear to be facilitating employment conditions that do not meet minimum employment entitlements and conditions under the FWA. The committee noted the significant adverse impacts on workers under these agreements, the commercial effect of the agreements which allows undercutting of competitors by unfairly reducing staffing costs, and the difficulties in terminating the agreements. The practice may not strictly be in contravention of the FWA, but it is undoubtedly in contravention of both the intent and spirit of the law.

An appropriate timeframe should be provided for businesses to develop new EBAs which comply with legal requirements, potentially through the introduction of a sunset clause in the FWA.

The committee noted an apparent lack of action by the Fair Work Ombudsman and Fair Work Commission to address this issue.

Recommendation 16

The committee recommends an automatic termination date be legislated for remaining *Work Choices* 'zombie' agreements, with consideration given to necessary transitional arrangements and protections to ensure no workers are disadvantaged as a result.

1165 Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

1166 Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8; Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), pp 25-26; private hearing transcript, regional hearing, 2018.

1167 Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

1168 Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

1169 Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

1170 Private hearing transcript, regional hearing, 2018.

14.2 Precarious employment and the gig economy

14.2.1 Casualisation of the workforce

The 'casualisation' of the workforce can be used to describe the increasing proportion of workers employed on a casual or fixed term basis. A more limited range of NES entitlements apply to casual employees, who are not entitled to permanent employee benefits such as leave entitlements.

The Australian Parliament's research into characteristics and use of casual employees in Australia, found there were just under 2.5 million casual employees in Australia in August 2016 and that , casual workers are 'much more likely to face irregular and insufficient hours of work and fluctuations in earnings'.[1171]

Mr Brian McCarrick of Ardent Security spoke to the committee about the differences in entitlements and protections he sees in the security industry between his employees at Ardent Security and the labour hire employees employed on a casual basis by other security companies:

> *The impact of wage theft to the economy is much greater than you would think. In doing a comparison between a labour hire employee and the employees of my business, a labour hire employee … would be on a flat rate of $24 an hour. Over a 40-hour week that is $960 gross. At Ardent, an employee's average over the roster is $28.20 an hour for a 40-hour week which is $1,128 gross, a difference of $168 per week. However, when a labour hire employee has a day off sick then there is a difference of $326.40. If the labour hire employee takes one week's leave, the difference for the week is $1,325.40 as the labour hire employee has no leave entitlements... Add to this the difference in superannuation payments of $16.80 per week less, then over the working life of the employee this runs into many tens of thousands of dollars. Not only are employees affected by this theft as the economy is all about money; the effect is far reaching.* [1172]

QAI suggested intentional classification of a worker as a casual rather than a permanent employee 'can also be a form of wage theft as it can deprive people of industrial entitlements including sick, annual and long service leave' and that 'the payment of casual loading is not sufficient to negate the disadvantage associated with this form of employment'.[1173]

A number of stakeholders suggested correlations between increased casualisation of the workforce and wage theft.[1174] It was suggested to the committee that workplace instability contributes to difficulties in maintaining accurate records (for both employees and employers) and can contribute to incorrect or vague employment classification.[1175]

The IEU reported issues in the education sector, stating:

> *The norm of casualisation has become so pervasive that employers have been known to advertise for 'permanent casuals'. Under these conditions, professionals can expect to work for years on a casual basis for the same employer with no job security or leave benefits associated with ongoing contracts of employment. Yet, for these 'permanent casuals', fear of losing their job prevents*

1171 Geoff Gilfillan, 'Characteristics and use of casual employees in Australia', Australian Parliamentary Library, Research Paper Series, 2017-18, 19 January 2018, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/CasualEmployeesAustralia

1172 Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 7.

1173 QAI, submission 026, p 7.

1174 See, for example: IEU, submission 007, p 3; Dr David Morrison, submission 032, p 4; Maurice Blackburn and joint submitters, submission 033 p 10; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 22.

1175 IEU, submission 007, p 3.

many from taking time off if they are sick, need to care for a family member or simply to take a break from teaching.[1176]

A related issue was raised by the ETU, when speaking to the committee about local issues in Toowoomba, which stated '…with casualisation of workers, workers are scared to join unions when they are casual because they can get sacked with four hours notice'.[1177]

To address casualisation of the workforce, stakeholders submitted that employees should be entitled to a permanent position at some threshold to prevent exploitation of casual employment conditions and job insecurity. The IEU specified:

Businesses should no longer be allowed to deny people basic rights by denying them permanent positions. Education professionals, their families, communities and the wider economy will all benefit from secure work and fair wages and conditions.[1178]

Mr Dan McGaw, branch president of QCU Toowoomba, and ETU state organiser (South West Queensland) clarified the issue, stating:

There is always going to be a place in businesses for labour hire and casual workers, but as unions we believe that casual workers should be used for peaks in work, not the whole way through. If there is a big push to finish your job for the next six weeks, well let's get 20 labour hire guys in on casual rates to do that for that specific time, but not using them for nine months to build a solar farm.[1179]

14.2.2 Gig economy

The term 'gig economy' refers to employment arrangements where individuals work independently on a task-by-task basis. It is a type of freelance work where workers are usually attached to a digital platform, linking the worker with the employer and the tasks.[1180] Examples of gig economy jobs include those making an earning from Airbnb, Whizz, Airtasker, Freelancer and care.com; ridesharing platforms such as Uber; food delivery services like Deliveroo; and other platforms for sourcing workers to complete jobs such as graphic design and cleaning.[1181]

While this is not a new type of employment, flexible working arrangements in the digitally-enabled marketplace are becoming increasingly popular, especially amongst young Australians.[1182]

Gig employment methods are similar to independent contracting in that the worker is not generally considered an employee, and does not get paid leave, insurance, or have any security as to income or hours, as well as being responsible for their own superannuation. Workers in the gig economy generally work outside of regulatory frameworks, such that the worker is not covered by a federal award, or the national minimum employment standards.

[1176] IEU, submission 007, p 2.

[1177] Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 22.

[1178] Independent Education Union, submission 007, p 5.

[1179] Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 11.

[1180] Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, September 2018, p 73.

[1181] Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, September 2018, p 73-74.

[1182] See Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, September 2018, p 17; Ai Group, *The Emergence of the Gig Economy*, August 2016, pp 3-6.

Maurice Blackburn and joint submitters raised concerns that current legislative frameworks are not sufficiently flexible to accommodate the changes to the employment landscape associated with the operation of the gig economy,[1183] submitting that:

> *Gig-economy entities have leveraged new technology and exploited out-of-date legislative frameworks to circumvent industrial laws and have sought to engage workers as independent contractors in the delivery of services previously performed by employees.*[1184]

Maurice Blackburn and its joint submitters suggested the prevalence of gig economy work is increasing every year,[1185] and that action is required to address the circumstances which allow gig economy operators to 'structure the arrangements by which they engage workers to circumvent an employment relationship'.[1186] It suggested 'the Federal Government has demonstrated no intent to regulate or to address the systemic worker exploitation and market distortion caused by the advent of "gig-economy" entities'.[1187] In its submission to the inquiry it made a number of proposals including that the QIRC be provided powers to make determinations regarding food delivery services, similar to the New South Wales Industrial Relations Commission, which has a determination for 'contracts for carriage' which place obligations on local delivery owner drivers.[1188] It also recommended amendment to provisions of the *Independent Contractors Act 2006* (Cth) to allow for state regulation of independent contractors, [1189] and suggested options for regulation of the ride-sharing industry. [1190] In particular, Maurice Blackburn and joint submitters recommended that options be investigated at state and federal levels for workers of the gig economy food delivery services to be considered employees.[1191]

Ms Helen Wood of Hostplus stated that the 'rise of the gig economy and those working highly casualised and multiple jobs' would affect the estimated unpaid super gap, suggesting if action is not taken that it could 'more than double by 2027'.[1192]

The ACTU, in its submission to the Senate Economics Reference Committee's inquiry into non-compliance with the superannuation guarantee, suggested SG non-payment is likely to occur in employment in the gig economy, due to reasons including uncertainty as to whether SG liability arises, and the responsible party for ensuring compliance.[1193] It suggested compliance could be improved by a specific co-ordinated approach by the ATO and FWO, including representation from superannuation industry bodies. [1194]

[1183] Maurice Blackburn and joint submitters, submission 033, p 8; Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 39.

[1184] Maurice Blackburn and joint submitters, submission 033, pp 7-8.

[1185] Maurice Blackburn and joint submitters, submission 033, p 7.

[1186] Maurice Blackburn and joint submitters, submission 033, pp 14-15.

[1187] Maurice Blackburn and joint submitters, submission 033, p 16.

[1188] Maurice Blackburn and joint submitters, submission 033, pp 16 - 17.

[1189] Maurice Blackburn and joint submitters, submission 033, pp 18.

[1190] Maurice Blackburn and joint submitters, submission 033, pp 18 - 19.

[1191] Maurice Blackburn and joint submitters, submission 033, p 32.

[1192] Ms Helen Wood, Executive Manager, Client Relationships, Hostplus, public hearing transcript, Brisbane, 17 September 2018, p 8.

[1193] ACTU, submission to the Parliament of Australia, Senate Economics Reference Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 51, p. 6.

[1194] ACTU, submission to the Parliament of Australia, Senate Economics Reference Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 51, p. 6.

The OIR highlighted decisions by the FWC regarding gig economy workers being considered independent contractors rather than employees, and noted:

> *In its decisions, the FWC noted that the current rules for determining the existence of an employment relationship developed prior to the emergence of the gig economy, and no longer reflect the current economic circumstances. It has taken the position, however, that developing the law in this area is a matter for the legislature.*[1195]

The Senate Select Committee on the Future of Work and Workers was established on 19 October 2017 to `inquire and report on the impact of technological and other change on work and workers in Australia'.[1196] Evidence provided to the Select Committee during the inquiry included arguments for regulation of the gig economy and strengthened protections in industrial laws.[1197] The Select Committee made 24 recommendations in its final report *Hope is not a Strategy – Our shared responsibility for the future of work and workers* (Hope is not a Strategy Report), including that 'the Australian Government make legislative amendments that broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system' (recommendation 10).[1198]

Similarly, the Senate EERC, in its inquiry into corporate avoidance of the FWA, recommended that 'the government, as a matter of priority, bolster the employment conditions of workers engaged in the gig economy by requiring platform providers to verify all platform users comply with minimum standards',[1199] and that:

> *… the Fair Work Act be amended to ensure that all workers have the protections of the Act and access to the labour standards, minimum wages and conditions established under the Act, so that these rights accrue to dependent and on demand contracting, preventing those arrangements from being disguised as independent contracting. These amendments should capture the dependant contractor who is dependent upon a labour hire company, a company using a work allocation platform or a major corporation using a relationship power imbalance to exercise control over the worker.*[1200]

Committee comment

While not directly captured by the committee's definition of the term 'wage theft', the committee acknowledges the concerns raised by stakeholders regarding the gig economy, increased casualisation of the workforce, and the changing employment landscape.

The committee notes employment conditions of workers engaged in the gig economy and other insecure or uncertain employment, is a topical issue, and one which requires action.

The committee accordingly supports the Commonwealth's consideration of recommendations made by the Senate Select Committee on the Future of Work and Workers in its Hope is not a Strategy

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1195 Queensland Government, OIR, written briefing, 7 June 2018, p 19.

1196 Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, 19 September 2018, p 1. See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FuturFofWork/Report

1197 Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, September 2018, pp 73-81, 91.

1198 Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, 19 September 2018, Recommendation 10, pp 8, 92.

1199 Recommendation 27, pp xiii, 106.

1200 Recommendation 25, pp xiii, 70.

Report[1201] and the Senate EERC'S report, *Corporate avoidance of the Fair Work Act 2009.* In particular, the committee supports amendment of legislation to ensure workers all workers, regardless of their employment type, are provided protections under Australia's industrial relations system.[1202]

Recommendation 17

The committee recommends reform of the *Fair Work Act 2009* (Cth) to more adequately accommodate emerging forms of non-traditional employment.

This should include consideration of law reform to broaden the definition of worker and provide broader access to the benefits of collective bargaining, minimum standards for pay and conditions, and access to the Fair Work Commission.

14.3 Illegal phoenixing activity

In addition to reports by workers who were left unpaid by employers due to insolvency, the committee received evidence of illegal phoenix activity.

Phoenix activity involves the registration of a new company to take over the failed or insolvent business of a previous company.[1203] This process can be a legitimate corporate action, for example where a company fails despite the responsible operation of its director. It can also, however, be an illegal activity used to avoid payment of creditors and other legal obligations.[1204]

Illegal phoenix activity can be described as:

> *… the deliberate and systematic liquidation of a corporate trading entity which occurs with the illegal or fraudulent intention to*
>
> - *avoid tax and other liabilities, such as employee entitlements*
> - *continue the operation and profit taking of the business through another trading entity.*[1205]

When a company engages in illegal phoenix activity, employees are often not only left without their employment with little to no notice, but are not paid their entitlements, including annual leave and superannuation, as well as unpaid wages.[1206]

Similar to forms of wage theft, illegal phoenix activity impacts on industry, providing an unfair advantage over other businesses who are required to pay employees their entitlements pay taxes and

[1201] Parliament of Australia, Select Committee on the Future of Work and Workers*, Hope is not a strategy – our shared responsibility for the future of work and workers*, 19 September 2018, pp 9, 92.

[1202] Parliament of Australia, Select Committee on the Future of Work and Workers*, Hope is not a strategy – our shared responsibility for the future of work and workers*, 19 September 2018, pp 9, 92, Recommendation 10, pp 9, 92; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, Recommendation 25, p xii.

[1203] Australian Government, ASIC, *Illegal phoenix activity,* information sheet 212, 1 September 2017, https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/

[1204] Australian Government, ASIC, *Illegal phoenix activity,* information sheet 212, 1 September 2017, https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/

[1205] PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, p ii.

[1206] PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, p ii.

creditors, has a detrimental effect on suppliers or creditors who may no longer receive what they are owed by the business, and creates lost revenue to the government.[1207]

According to the Commonwealth Minister for Revenue and Financial Services, phoenixing costs the Australian economy up to $3.2 billion per year.[1208]

A report commissioned by the FWO in 2012 notes a lack of significant data but suggests the impact of illegal phoenix activity costs between $1.78 and $3.19 billion per annum.[1209] This figure includes cost to employees, business and government revenue, with the cost to employees estimated to be between $191 and $655 million.[1210]

ASIC advised the committee that `for the five years to November 2017, more than 3,700 individuals, controlling over 12,000 insolvent entities', were identified as being involved in phoenix activity.[1211]

Dr David Morrison noted the prevalence of illegal phoenix activity, suggesting that it is widespread and 'particularly phoenixing by some small businesses, is firmly entrenched as part of "usual" business practice within Australia'.[1212]

A person may report phoenix activity to both ASIC and the ATO (if superannuation entitlements have not been received).

ASIC has powers to disqualify directors and commence court proceedings against directors, however it states it does not 'act on behalf of individuals to help them recover lost money, including money lost through illegal phoenix activity'.[1213]

ASIC advised the committee that it undertakes activities to deter and prevent illegal phoenix activity, such as:

- writing to directors of companies 'that become subject to winding up applications warning them about untrustworthy advisers',
- using data and intelligence to identify directors that are likely to engage in future illegal phoenix activity, including by conducting approximately 60 surveillances each year, and
- appointing a reviewing liquidator under the Corporations Act,[1214] 'to inquire, investigate and report on suspected illegal phoenix activity including the conduct of the appointed external administrator where the external administrator appears to facilitate or has facilitated the activity through a lack of independence, or by not conducting adequate investigations and reporting both to creditors and ASIC'.[1215]

1207 PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, pp ii, 15.

1208 Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, 'A comprehensive package of reforms to address illegal phoenixing', media release, 12 September 2017, http://kmo.ministers.treasury.gov.au/media-release/090-2017/

1209 PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, pp ii, iii.

1210 PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, p iii.

1211 Australian Government, ASIC, correspondence, 17 October 2018, p 4.

1212 Dr David Morrison, submission 032, p 8.

1213 Australian Government, ASIC, *Illegal phoenix activity,* information sheet 212, 1 September 2017, https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/

1214 Corporations Act, Schedule 2, s 90-23.

1215 Australian Government, ASIC, correspondence, 17 October 2018, p 4.

Dr Morrison noted the difficulties in proactively identifying phoenix behaviour. [1216]

ASIC relies on a number of sources to report instances of illegal phoenix activity, including liquidators, creditors, employees and other Government agencies,[1217] however advised the committee that 'this information does not provide conclusive data'.[1218]

It uses education programs to assist the market to 'identify companies potentially at risk of engaging in phoenix activity to ensure they are aware of their legal obligations'[1219] and engages with industry representatives in order to raise awareness of phoenix activity.

There is no specific offence for illegal phoenix activity,[1220] however, other legislative provisions may be used against employers where phoenixing has taken place. This includes section 596AB of the *Corporations Act 2001*, which 'imposes criminal liability on directors who enter arrangements with the intention of depriving employees of their entitlements'.[1221] This section of the Corporations Act has however, been criticised 'because of its requirement that the directors' intention be assessed subjectively and proved beyond reasonable doubt, and no cases, successful or otherwise, have been pursued by ASIC [1222]

The CFMEU commented on the use of section 596AB of the Corporations Act in its submission to the Senate Economics References Committee's inquiry into insolvency in the Australian building and construction industry, noting that 'there has not been a single prosecution taken under s 596AB of the Corporations Act – a section directed to agreements or transactions that prevent the recovery, or reduce the amount of, recoverable employee entitlements'.[1223]

ASIC is a member of the Phoenix Taskforce, which is comprised of 29 commonwealth, state and territory government agencies, including the ATO, FWO, and the Commonwealth Department of Jobs and Small Business. According to the taskforce's website, its 'strategies include early intervention work, targeting specific industries, and working with key supply chain entities to close off opportunities and temptation'.[1224]

[1216] Dr David Morrison, submission 032, p 8.

[1217] Australian Government, ASIC, correspondence, 17 October 2018, p 3; ASIC, *Illegal phoenix activity,* information sheet 212, 1 September 2017, https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/.

[1218] Australian Government, ASIC, correspondence, 17 October 2018, p 4.

[1219] Australian Government, ASIC, *Illegal phoenix activity,* information sheet 212, 1 September 2017, https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/

[1220] Australian Government, ASIC, correspondence, 17 October 2018, pp 3, 4.

[1221] Helen Anderson, 'Understanding the phoenix landscape for employees', *Australian Journal of Labour Law,* vol 29, no. 3, 2016, p 260.

[1222] Helen Anderson, 'Understanding the phoenix landscape for employees', *Australian Journal of Labour Law,* vol 29, no. 3, 2016, p 260.

[1223] CFMEU, submission to Parliament of Australia, Senate Standing Committees on Economics, inquiry into insolvency in the Australian construction industry, 2015, submission 15, p 3.

[1224] Australian Government, ATO, *Phoenix Taskforce,* 3 September 2018, https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/

Data reported by the taskforce provides that from 1 July 2017 to 31 March 2018:

- seven criminal convictions were obtained
- 263 audits and review cases were conducted, and
- $240 million in liabilities was raised.[1225]

Illegal phoenix activity was explored as part of the Black Economy Taskforce which acknowledged phoenixing as a rising problem in the black economy, and recommended strengthened penalties and 'better early detection and asset clawbacks'.[1226]

The Commonwealth Government recently announced a package of reforms to combat phoenix activity, including the introduction of a Director Identification Number (DIN) to provide directors with a unique identification number, allowing for more transparent and easier monitoring of the relationship between individuals and companies, new offences and extended penalties, stronger powers for the ATO to recover from phoenix operators, and establishment of a phoenix hotline as a means of reporting phoenix activity.[1227]

[1225] Australian Government, ATO, *Phoenix Taskforce,* 3 September 2018, https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/

[1226] Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 6.

[1227] Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, 'A comprehensive package of reforms to address illegal phoenixing', media release, 12 September 2017, http://kmo.ministers.treasury.gov.au/media-release/090-2017/; Australian Government, ASIC, correspondence, 17 October 2018,pp 5-6.

Wage theft
Submission 5 - Attachment 1

15 Other concerns

Other issues were raised by stakeholders during the inquiry which were considered to be beyond the direct scope of the committee's inquiry terms of reference, but were recognised as exerting influence on the employment environment and remuneration of workers within it.

The QNMU raised issues with employers deliberately contracting-out services and changing the nature of the employment relationship, which then erodes wage rates and employment conditions and provides less protections for employees. [1228]

The QNMU also reported exploitation of the superannuation threshold to avoid requirements to pay compulsory superannuation contributions, providing:

> *To be eligible for superannuation guarantee (SG) contributions from an employer, an employee must be aged 18 or over and earning over $450 a month in ordinary time earnings (OTE). This threshold excludes a potentially significant number of employees and can easily be exploited by employers to avoid their SG obligations. For example, an employer may deliberately roster staff in ways to keep them under the $450 threshold.* [1229]

The Association of Superannuation Funds of Australia has argued that the $450 per month earnings threshold for superannuation penalises low income earners, permanent part-time workers and people with multiple jobs. It has estimated that 'about 365,000 individuals, 220,000 women and 145,000 men, are having their retirements compromised by the threshold', and noted that the more people engage in gig economy work, 'the more likely they are to lose out because of this threshold'.[1230] The Senate Economics References Committee in its inquiry into the impact of non-payment of the Superannuation Guarantee, recommended the Commonwealth Government consider the removal of the $450 monthly threshold,[1231] noting stakeholder concerns in particular to cohorts such as employees who work in multiple, low paid jobs.[1232]

Some stakeholders raised concerns with their relevant award,[1233] with the IEU claiming the Educational Services (Post-Secondary Education) Award which applies to most casual practitioners in the Vocational Education and Training (VET) and English Language Intensive Courses for Overseas Students (ELICOS) sectors, 'is deficient due to the lack of specific provisions for teachers, in particular casual teachers' and that 'shortcomings in the Award, together with privatisation of the two sectors, continue to erode workplace conditions'.[1234]

Mr Brian McCarrick told the committee there is an issue with the improper use of greenfields agreements (agreements registered for a particular enterprise, before employees are employed), which are then being used by an employer for other purposes when its services extend to other business activities. [1235] He also noted the use of unregistered agreements, stating:

1228 QNMU, submission 023, p 9.

1229 QNMU, submission 023, p 15.

1230 Association of Super Funds of Australia, 'ASFA calls for gig economy super solutions', media release, 2 February 2018, https://www.superannuation.asn.au/media/media-releases/2018/media-release-2-february-2018

1231 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, recommendation 3, pp xi. 33.

1232 Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee,* May 2017, p 33.

1233 IEU, submission 007, p 1; private hearing transcript, Brisbane, 2018.

1234 IEU, submission 007, p 1.

1235 Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8.

Companies make an employment document and then have their employees sign. These documents all have rates or entitlements that are not in line with the award and employees think they have signed a binding agreement.[1236]

In addition to the matters discussed above, other matters raised by witnesses and submitters that were considered to be outside the committee's terms of reference, included:

- broader commentary about the exploitation of migrant workers, including instances of employers holding workers' passports and engaging in intimidation and abuse, workers being forced to live in overcrowded accommodation for exorbitant rents, employers providing fewer hours than promised with impacts on the workers' financial wellbeing, and other various practices[1237]
- employees being unfairly dismissed from their employment, as a tactic by an employer to avoid paying accrued employee entitlements,[1238] including just prior to 10 years' service in order to avoid long service leave obligations.[1239] In this regard the committee heard of a worker who was dismissed after nine years and 10 months for 'failure to attend a cake ceremony' which her employer classed as 'serious misconduct'[1240]
- in addition to concerns about the suppressive effect on industry wages of the lack of recognition of gig economy workers as employees, concerns were raised about other associated financial impacts associated with the rise of gig economy employment arrangements, including the de-regulation of the taxi industry[1241]
- stolen wages amongst first nations Queenslanders[1242]
- the development of a Human Rights Act or Bill of Rights, to provide further protections for vulnerable persons,[1243] and
- various reforms to address structural barriers to employment for people with a disability, including improved engagement of disabled people in the workforce.[1244]

1236 Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8.

1237 See, for example: Mr Ronald Weston, Queensland Branch**,** AMIEU, public hearing transcript, Ipswich, 11 September 2018, p 11; Mr Allan Mahoney, Chairman, BFVG, public hearing transcript, Brisbane, 12 September 2018, p 6; Maurice Blackburn and joint submitters, submission 033, p 22.

1238 Dr David Morrison, submission 032, pp 3-4.

1239 Ms Jayne Carter, Industrial Officer, Working Women Queensland, public hearing transcript, Brisbane, 17 September 2018 (morning), pp 18-20.

1240 Ms Jayne Carter, Industrial Officer, Working Women Queensland, public hearing transcript, Brisbane, 17 September 2018 (morning), p 20.

1241 See for example, Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 37; Dr David Morisson, submission 032.

1242 Mr Ken Taylor, President, QLS, public hearing transcript, Brisbane, 16 August 2018, p 9.

1243 ALHR, submission 051, pp 3, 12. It is worth noting that the Human Rights Bill 2018 was introduced in the Queensland Parliament on 31 October 2018, enshrining 23 human rights. The aim of the Bill is to better protect and preserve Queenslanders' fundamental human rights, including requiring courts to `interpret legislation in a way that is compatible with human rights, along with requiring the Parliament, including Parliamentary Committees, to consider whether bills are compatible with human rights' (Hon Yvettte D'Ath, Attorney-General and Minister for Justice, `Human rights bill honours another Palaszczuk Government election commitment', media release, Queensland Government, 31 October 2018, http://statements.qld.gov.au/Statement/2018/10/31/human-rights-bill-honours-another-palaszczuk-government-election-commitment)

1244 QAI, submission 26, pp 3, 7-9.

Appendix A – Submitters

Sub#	Submitter
001	Sevegne Newton
002	Name suppressed
	Name suppressed – supplementary
003	Justin Cobbett
004	East Coast Apprenticeships
005	Confidential
006	Julie Riding-Hill
007	Independent Education Union – Queensland and Northern Territory
008	Susann Stapleton
009	Clare and Glenn Bergin
010	Saskia Lawrence
011	Dr Stephen Clibborn
012	*Number not allocated*
013	Industrial Relations Claims
014	Name suppressed
015	Lisa Morse
016	Job Watch Inc.
017	Restaurant & Catering Australia
018	*Number not allocated*
019	Young Workers Hub
020	Fair Work Employment Lawyers
021	National Retail Association
022	Queensland Tourism Industry Council
023	Queensland Nurses and Midwives' Union
024	Confidential
025	Serena Swan
026	Queensland Advocacy Incorporated
027	Hall Payne Lawyers
028	LawRight
029	Executive Security Group Pty Ltd
030	Master Electricians Australia
031	Name suppressed
032	Dr David Morrison

033 Maurice Blackburn, Australian Manufacturing, Workers Union Queensland, the Australian Meat Industry Employees Union Queensland, the Together Union Queensland, the Transport Workers Union Queensland, United Voice Queensland and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia – Plumbing Division Queensland

034 Queensland Council of Unions

035 Qld Community Alliance

036 Name suppressed

037 Number not allocated

038 Australian Industry Group

039 CFMEU Queensland

040 Queensland Law Society

041 Confidential

042 Dr Laurie Berg and Bassina Farbenblum

043 Housing Industry Association

044 Fair Work Ombudsman

045 Master Builders Queensland

046 The Services Union

047 Number not allocated

048 Confidential

049 Franchise Redress

050 Dr Tess Hardy, Melissa Kennedy and Professor John Howe

051 Australian Lawyers for Human Rights

052 Confidential

053 Name suppressed

Appendix B – Officials at public departmental briefing

Office of Industrial Relations, 11 June 2018

- Dr Simon Blackwood, Deputy Director-General
- Ms Tricia Rooney, Director, Industrial Relations Strategic Policy
- Mr Tony Schostakowski, Chief Inspector, Industrial Relations Regulation and Compliance
- Ms Natalie Wakefield, Director, Labour Hire Licensing Unit

Appendix C – Witnesses at public hearing

Brisbane, 16 August 2018

Queensland Council of Unions

- Mr Michael Clifford, Assistant Secretary
- Dr John Martin, Research and Policy Officer
- Mr David, Carter, Worker/Chef

Queensland Law Society

- Ms Kate Brodnick, Senior Policy Solicitor
- Mr Rob Stevenson, Member, Industrial Law Committee
- Mr Ken Taylor, President

JobWatch Inc

- Mr Ian Scott, Principal Lawyer

Young Workers Hub

- Ms Imogen Barker, Founder
- Mr Martin de Rooy, Founder
- Ms Katherine Hamburg, Hospitality Worker
- Ms Sivaiala Lemisagele, Food Manufacturing Worker

Hall Payne Lawyers

- Mr John Payne, Principal Lawyer
- Ms Ellie Bassingthwaighte, Solicitor

Maurice Blackburn Lawyers and joint submitters

- Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers
- Ms Kelly Fiedler, Industrial Officer, Australian Manufacturing Workers' Union
- Ms Shannon Fogarty, Industrial Officer, Communications, Electrical, Plumbing Union
- Mr Dermot Peverill, Industrial Officer, United Voice
- Mr Peter Biagini, Secretary, Transport Workers Union
- Mr Michael Rickards, Member, Transport Workers Union
- Mr Ken McKay, Advocate, Together Union

Australian Industry Group

- Mr Shane Rodgers, Head – Queensland
- Mr Stewart Rinkevich, Workplace Relations Lawyer

National Retail Association

- Ms Lindsay Carroll, Legal Practitioner and Director

Brisbane, 20 August 2018

Queensland Advocacy Inc.

- Mr Nick Collyer, Systems Advocate
- Ms Emma Phillips, Senior Lawyer

Master Electricians

- Mr Jordon Carlisle, Workplace Relations Adviser
- Mr Jason O'Dwyer, Manager Advisory Services

East Coast Apprenticeships

- Mr Alan Sparks, Chief Executive Officer

Academic panel

- Dr Laurie Berg, Senior Lecturer, University of Technology Sydney
- Dr Tess Hardy, Senior Lecturer, University of Melbourne
- Dr David Morrison, Associate Professor, University of Queensland

Cairns, 27 August 2018

Private capacity

- Ms Debra McPherson
- Reverend Karen Hawthorne

Townsville, 28 August 2018

Mareeba District Fruit and Vegetable Growers Association

- Mr Joe Moro, President

Ardent Security

- Mr Brian McCarrick, Director

Private capacity

- Mr Chris McCoomb
- Mr Noel Ambler

Mackay, 29 August 2018

- Bowen Gumlu Growers Association
- Ms Cherry Emerick, Industry Development Officer

Rockhampton, 30 August 2018

- Private capacity
- Mr Bruce Craig
- Member for Rockhampton
- Mr Barry O'Rourke MP

Brisbane, 3 September 2018

Queensland Community Alliance

- Mr Sergio Duran, Member
- Ms Elise Ganley, Community Organiser
- Reverend Pauline Harley, Anglican Priest
- Ms Luz Mosquera, Member
- Mr Palani Thevar, Member

Industrial Relations Claims

- Mr Miles Heffernan, Director
- Ms Catherine Black
- Ms Kay Clifton
- Mr Jamie Gardiner-Hudson
- Mr Kym Rake

Gold Coast, 10 September 2018

Young Workers Hub

- Ms Imogen Barker, Founder
- Ms Taylor Bun, Food Manufacturing Worker
- Mr Martin de Rooy, Founder
- Mr Lucas Halkeas, Hospitality Worker
- Ms Mele-Otufale Tulimaiau, Food Manufacturing Worker

National Union of Workers

- Mr Ben Hargreaves, Food Processing Worker
- Mr Amandio Nunes, Food Processing Worker
- Ms Karthika Raghwan, National Union of Workers Organiser

Electrical Trades Union, Queensland and Northern Territory Branch

- Mr Beau Malone, State Organiser

Franchise Redress

- Mr Michael Fraser, Investigator and Researcher
- Ms Maddison Johnstone, Investigator and Researcher

Private capacity

- Mr Jason Spectre

Toowoomba, 10 September 2018

Toowoomba Chamber of Commerce

- Ms Jo Sheppard, Chief Executive Officer

Queensland Council of Unions and Electrical Trade Unions

- Mr Dan McGaw, Branch President, Queensland Council of Unions Toowoomba Branch; State Organiser (South West Queensland), Electrical Trades Union

Together Union

- Mr Lloyd Abbott, South West Organiser

Ipswich, 11 September 2018

Australasian Meat Industry Employees Union

- Mr James Cottrell-Dormer, Queensland Branch
- Mr Ronald Weston, Queensland Branch

Private capacity

- Name suppressed

Sunshine Coast, 11 September 2018

Private capacity

- Ms Clare Bergin
- Mr Glenn Bergin
- Mr Peter O'Hanlon
- Dr Jennifer Fraser

Maryborough, 12 September 2018

Private capacity

- Ms Sara Bartrum
- Mr Blade Clark
- Ms Michelle Lovett

Bundaberg, 12 September 2018

Bundaberg Fruit and Vegetable Growers

- Mr Allan Mahoney, Chairman

Private capacity

- Mr Moe Turaga

Wessel Petroleum

- Ms Amanda Coates, Finance and IT Manager,
- Mr Paul Wessel, Managing Director

Brisbane, 17 September 2018

Growcom

- Ms Rachel Mackenzie, Chief Advocate

Hostplus

- Ms Helen Wood, Executive Manager, Client Relationships

The Services Union

- Mr Lee Wordsworth, Member

Working Women Queensland

- Ms Jayne Carter, Industrial Officer
- Ms Lee Matahaere, Senior Industrial Officer
- Ms Isabella Morosan, Industrial Officer

Executive Security Group

- Mr Andrew Bourke, Managing Director

Independent Education Union

- Ms Vaishi Rajanayagam, Industrial Officer
- Mr Aaron Watson, Growth Organiser

Brisbane, 17 September 2018

Private capacity

- Ms Jessica Prouten
- Mr Jeffrey Jones

Appendix D – Survey Questions

Inquiry into wage theft in Queensland

Survey for the Inquiry into wage theft in Queensland

This survey is being conducted by the Queensland Parliamentary Education, Employment and Small Business Committee (committee). The committee is investigating the problem of wage theft in Queensland and has developed this survey as one way to find out more about Queenslanders' experience of wage theft.

Wage theft may take various forms such as underpayment of wages, having entitlements such as leave and penalty rates withheld, and an employer not making required superannuation contributions on an employee's behalf.

Survey responses will be used to inform the committee's investigation, and collated data as well as quotes from survey input may be published in the committee's report. Names and email addresses will not be published. To understand how your data will be collected and used, please read the following privacy disclaimer.

This survey is intended to provide us with a snapshot from the perspective of affected individuals. Substantive written submissions are also invited, from any interested party. To make a written submission to the committee, please follow the steps on the committee website at http://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/current-inquiries/Wagetheft.

Privacy Disclaimer

By completing the survey, you are acknowledging and agreeing to the following:

Survey results will only be published in a de-identifying format, and your survey answers will not be published with your name or email address.

Survey answers may be used to inform the committee regarding its inquiry into wage theft in Queensland, and may also be used for subsequent reporting or analysis. This may be for an unlimited amount of time and survey content may be distributed or supplied by the committee in its de-identified format, during and after the inquiry.

The survey is being conducted using SurveyMonkey which is based in the United States of America. Information you provide on this survey will be transferred to SurveyMonkey's server in the United States of America. By completing this survey, you agree to this transfer. The committee accesses the data collected through the survey in accordance with the survey policy and terms of use provided by SurveyMonkey. You can access SurveyMonkey's terms of use here.

* 1. Please provide a valid email address.
Note: all surveys will be treated anonymously and data provided will not be used to identify particular persons

* 2. Please indicate if you would like to receive updates on the inquiry, including notice of any public hearings.

- Yes, I would like to receive updates through my email address
- No, I would not like to receive updates through my email address

* 3. Would you be interested in talking to the committee about your experience?
Note: the committee may conduct private hearings to receive informationconfidentially

- Yes
- No

* 4. Do you identify yourself as:

- Aboriginal
- Torres Strait Islander
- Aboriginal and Torres Strait Islander
- None of the above

* 5. What is your age?

- under 15 years
- 15 to 24 years
- 25 to 34 years
- 35 to 44 years
- 45 to 54 years
- 55 to 64 years
- 65 and over

* 6. What is your gender?

- Female
- Male
- Other

* 7. Do you have an ongoing disability?

- ( ) Yes
- ( ) No

* 8. Do you speak a language other than English at home?

- ( ) Yes
- ( ) No
- ( ) Yes (please specify)

* 9. Please indicate if you have experienced any of the following types of wage theft (select multiple if appropriate):

- [ ] Unpaid Hours
  This might include not being paid for all hours worked, including for time spent training and in work meetings, and unreasonable length trials; or being paid less than the agreed wage.
- [ ] Unpaid penalty rates
- [ ] Unpaid superannuation
- [ ] Unreasonable deductions
  This might include having part of your pay unlawfully withheld, or being unlawfully required to pay back an amount.
- [ ] Withholding of other entitlements
  This might include not being allowed to take breaks, or not being paid leave to which you are entitled.
- [ ] Sham contracting
  Where you have been made to use an ABN and act as a contractor, when you should have been considered as an employee.
- [ ] Other (please specify in 'further information')

Further information:

* 10. Please indicate whether you were hired:

- ( ) Directly by the employer as an employee
- ( ) Through an agency/labour hire arrangement
- ( ) As an independent contractor
- ( ) Not sure

* 11. Please indicate in which industry the employment took place:

- ( ) Agriculture, Forestry and Fishing (including horticulture and aquaculture)
- ( ) Mining
- ( ) Manufacturing
- ( ) Electricity, Gas, Water and Waste Services (for example, persons engaged in the collection, treatment and disposal of waste materials)
- ( ) Construction (including those mainly engaged in the construction of buildings and other structures, demolition or wrecking of buildings and other structures, landfill, levelling, earthmoving, excavating, land drainage and other land preparation)
- ( ) Wholesale Trade
- ( ) Retail Trade
- ( ) Accommodation and Food Services (including hospitality and hotel workers)
- ( ) Transport, Postal and Warehousing (including Uber drivers and food delivery riders)
- ( ) Information Media and Telecommunications
- ( ) Financial and Insurance Services (including persons in banking, investment)
- ( ) Rental, Hiring and Real Estate Services
- ( ) Professional, Scientific and Technical Services (including scientific research, architecture, engineering, computer systems design, law, accountancy and veterinary science)
- ( ) Administrative and Support Services (including recruitment, cleaning services, pest control services and gardening services).
- ( ) Public Administration and Safety (including persons working in State or Local Government, executive and judicial activities; persons working in security services)
- ( ) Education and Training
- ( ) Health Care and Social Assistance
- ( ) Arts and Recreation Services
- ( ) Other Services (includes a broad range of personal services including; religious, civic, professional and other interest group services; selected repair and maintenance activities; and private households employing staff)

12. In what location did the issue/s occur? Please provide a postcode.
Note: all surveys will be treated anonymously and data provided will not be used to identify particular persons

[ ]

* 13. Please indicate the closest time frame for the issue/s occurring:

- [ ] Within the last year
- [ ] More than a year ago but within the last 6 years
- [ ] More than 6 years ago

* 14. At the time of the issue/s were you:

- ( ) An Australian resident
- ( ) A visitor to Australia

* 15. What was your employment status at the time of the issue/s:

- ( ) Permanent full-time
- ( ) Permanent part-time
- ( ) Not sure
- ( ) Casual
- ( ) Contract

Other information (optional)

* 16. Did you report your issue?

- [ ] No
- [ ] Yes, to the Fair Work Ombudsman
- [ ] Yes, to the employer or business owner
- [ ] Yes, to the Australian Taxation Office
- [ ] Yes, to another entity (please specify)

* 17. If yes to question 16, was your issue resolved?

- ( ) Yes
- ( ) No
- ( ) N/A

* 18. If yes to question 17, were you satisfied with the resolution?

- ( ) Yes
- ( ) No
- ( ) N/A

* 19. At the time of your issue, were you a member of an industrial organisation such as a union or employer registered body?

- ( ) Yes
- ( ) No

20. If you wish to tell us more about your story, please provide further information (optional).
Note: this response may be quoted in publications or other committee activities. Responses will be treated anonymously and will not be published alongside personal details.

This survey is intended to provide us with a snapshot from the perspective of affected individuals. Substantive written submissions are also invited, from any interested party. To make a written submission to the committee, please follow the steps on the committee website at http://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/current-inquiries/Wagetheft.

Statement of Reservation

LNP Non-Government members Statement of Reservation Wage Theft Inquiry 2018

The LNP fundamentally believes that workers deserve to be paid what they are entitled to. No one wants to see workers being ripped off.

However, the motivations behind this inquiry have been spurious to say the least, since the very beginning.

When the terms of reference were first moved, the LNP attempted to include workers and contractors under direct control of the Queensland Government.

The Palaszczuk Government voted down sensible amendments that would have compelled the inquiry to investigate Labor's on-going health payroll debacle, as well as the underpayment of security guards and other contractors at the Commonwealth Games and the use of contractors in the public service – an issue that has been consistently raised by the Together Union.

The LNP put forward sensible amendments to address the problems faced by thousands of Queensland workers – but Labor can't stand scrutiny of its own record.

We maintain that the inquiry is a wasted opportunity because it ignored the plight of current and former nurses who are still suffering from Labor's health payroll disaster.

Bizarrely, the inquiry focussed on federal employment issues over which the state Labor Government ceded jurisdiction to Canberra in 2009.

The Queensland Government is only responsible for industrial relations of state public servants and local government workers. The remainder of Queensland's workforce is governed by Julia Gillard's Fair Work Act.

It was Cameron Dick as the former Industrial Minister who introduced legislation in the Bligh Government to refer most of our industrial relations jurisdiction. It was passed in November 2009, with the LNP opposing the Bill.

We maintain that Labor should clean up its own employment record before it looks at every other employer.

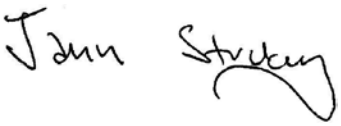
There was a series of regional public hearings, however a number of these had extremely poor turnouts with witnesses recanting and redacting their statements.

The LNP strongly maintains our opposition to union activism being taught in Queensland schools. Our schools are places for learning, not union recruitment drives.

We have concerns about recommendations for a national labour hire licensing approach, given there has been no review of the effectiveness of Queensland's new laws.

We also have concerns about making wage theft a new criminal offence as there are already existing criminal code offences that are sufficient and should be enforced. Anyone who deliberately underpays workers needs to face the consequences of their actions.

As we said from the outset, the LNP fundamentally believes that workers deserve to be paid what they are entitled to, however this inquiry was politically motivated and not inclusive of workers controlled by the Queensland Government.





Jann Stuckey MP

Simone Wilson MP

THE AGE

NATIONAL VICTORIA CORONAVIRUS PANDEMIC

How hotel quarantine let COVID-19 out of the bag in Victoria

For our free coronavirus pandemic coverage, learn more here.



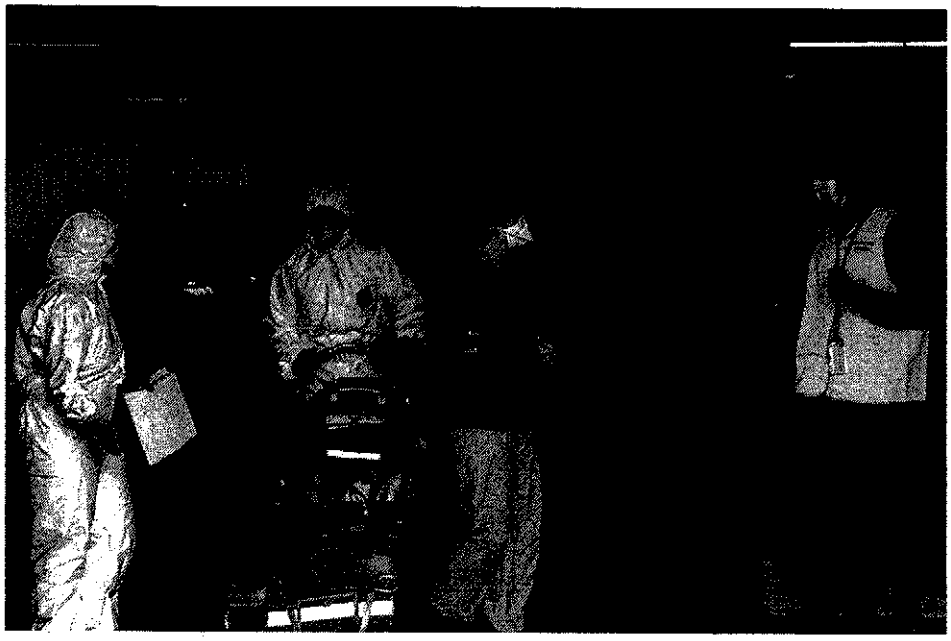
By **Ben Schneiders**
July 3, 2020 — 11.17pm

A A A

60 View all comments

When the Victorian government decided in late March to put private security contractors in charge of hotel quarantine in Melbourne, it was putting the lives of its constituents in the hands of an industry known for shady operators, wage theft and opaque contracting practices.

The lightning decision was made during the first alarming spread of COVID-19 and just 24 hours after the national cabinet on March 27 had decided to detain returning travellers in hotels for two weeks. From then on three private security operators – selected without a tender – would guard the people at the highest risk of carrying the coronavirus.



Hotel quarantine breaches at the Rydges in Carlton (pictured) and the Stamford Plaza in the CBD have been identified as sources of outbreaks. PENNY STEPHENS

Victoria's decision was different to that in NSW, the other state where a significant number of travellers also returned to compulsory hotel quarantine. In that state, police and the defence forces were heavily involved alongside private security. The system has had far fewer problems with outbreaks.

In Victoria, just two months after quarantine began, in late May, the first infection of a security guard was made public. The guard had worked at Rydges on Swanston in Carlton. Now at least 19 guards and their contacts are infected from that outbreak. Even larger issues emerged from another quarantine hotel, the Stamford Plaza in Melbourne's CBD, where an outbreak via security guards had by Friday grown to at least 35 people.

The ramifications are now being felt across the working-class and ethnically diverse northern and western suburbs of Melbourne, where more than 300,000 people have now been locked down for a second time to try to prevent the spread.

The government confirmed this week that genomic sequencing – a form of testing that outlines which specific variety of the virus is spreading in which clusters – shows that much of the latest outbreak has emerged from those original cases in hotel quarantine.

While further outbreaks of the virus in Australia were always likely, the high level of community transmission in Melbourne's suburbs is enough to have the Chief Health Officer Brett Sutton declaring himself "nervous" for what's next.

'Three minutes' training'

Until now Australia and Victoria's response has been an overwhelming public health success with far fewer deaths per capita than nearly every comparable country. And despite the recent outbreak, the virus in Victoria is still not out of control.

But the northern suburbs lockdown has led to tough questions of both the government and the security industry it relied upon.

A key issue, according to industry insiders, was training. Guards were being expected to work with difficult, potentially infectious people, to use personal protective equipment and have a working knowledge of infection control techniques.



In NSW, police escorted people to hotel quarantine. EDWINA PICKLES

But for some, according to Kazim Shah, a United Workers Union organiser who has worked with Melbourne quarantine hotel guards in recent months, the preparation was severely inadequate.

"Some guards are saying they had no training," Shah said. "Some were saying they had three minutes' training."

One trainer had a background in managing security for car parks, Shah said. Until recently security guards had been working at multiple quarantine hotels, adding to infection spread risks.

Details have since emerged of the lax hygiene standards in some Melbourne quarantine hotels and significant breaches of quarantine. Premier Andrews has drawn attention to guards sharing a cigarette lighter, and having "carpooling arrangements".

More lurid rumours have also emerged, but a common story is that there was too little personal protective equipment or it was being worn wrongly or for too long; there was a lack of medical waste bins and that there was insufficient medical oversight.

So bad were the practices in some places that one returned traveller from New Zealand who stayed at a Crown hotel, said he felt more at risk in quarantine than going home.

"I noticed a lot of guards, they'd hug each other or give each other a pat on the shoulder," returned traveller Patrick Enright told *The Age*.

"They were definitely in their personal space. One guard escorted me outside with the mask over his mouth but not his nose."



Patrick Enright (left) finishes his two-week hotel quarantine at the end of June. JUSTIN MCMANUS

Andrews has admitted there has been "unacceptable infection control breaches in hotel quarantine."

Then the virus spread. Security workers acquired infections from travellers and then took it home to family members and contacts – an event that will now be

subject to a new government-ordered inquiry amid fierce scrutiny on the Andrews government.

Low pay, insecure work

The pandemic has seen government work at warp speed. Decisions that would normally take months are being made in days. Corners are being cut and mistakes are inevitable.

In Victoria, the Andrews government has moved more than 20,000 people – many from places with major coronavirus outbreaks – through the hastily constructed hotel quarantine system, guarded by three security industry players MSS, Wilson and Unified.

The problem that emerged from those contracts has not been one of money. Victoria has already spent tens of millions of dollars on hotel quarantine alone as it hired out more than a dozen hotels to provide rooms for returned travellers.

Rather the problems are similar to those in some other Australian workplaces and industries – insecure work, exploitation of temporary migrants, inadequate training and decades of de-unionisation.

Recent research from the Fair Work Ombudsman said the private security industry had disproportionate levels of workplace disputes, including issues of contractors bidding down tenders to below the cost of paying employees lawfully.

Some of the quarantine contracts were sub-contracted to smaller operators, a practice that drives down wages and muddles responsibility. A former guard himself, Shah said workers employed directly by big companies typically were paid legal rates and penalties and overtime, but they would then pass off work to sub-contractors that regularly paid migrant workers flat rates of $20 an hour.

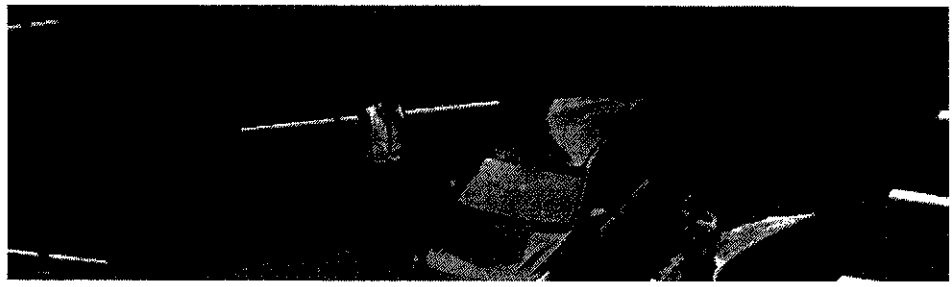
"They don't have contracts and sometimes they don't get paid at all," he said. "This is an ongoing issue for the security industry."

This week *The Herald Sun* reported claims of taxpayers being charged by security firms for "ghost shifts" – shifts that were never worked. Workers in the industry are not surprised.

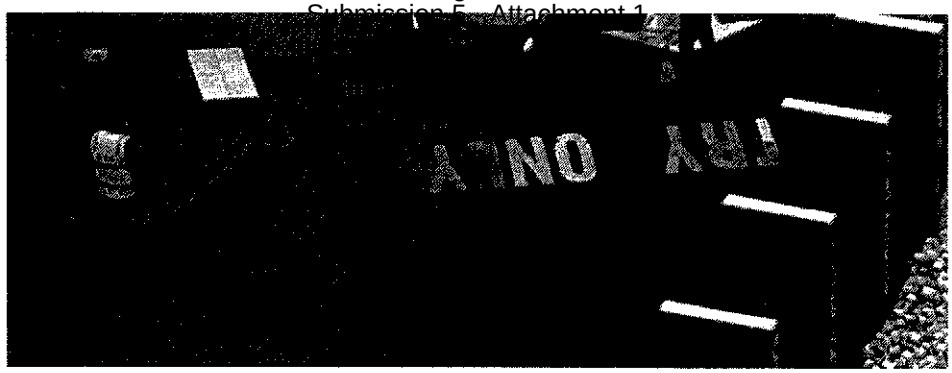
The problems with the industry are well documented. Unions affiliated to the ALP have spoken out about it for years, and the Australian Centre for Corporate Responsibility's director of workplace rights, Dr Katie Hepworth, said investors and companies needed to urgently review the use of sub-contractors in high-risk areas during the pandemic.

"The failure to provide proper training and personal protective equipment to subcontractors is common practice," she said.

"It is the result of years of outsourcing in the security industry, that has seen the hollowing out of wages and conditions, and seen experienced workers locked out of the industry in favour of inexperienced, lower-paid workers."



Wage theft
Submission 5 - Attachment 1



Guards and police at the entry of Crown Promenade hotel late in June.

Buck passing and an inquiry

What occurred in the hotels and why the private security industry was selected will be key questions for the new $3 million inquiry ordered by the Andrews government and headed by retired judge Jennifer Coate.

Among the issues to be examined include the "decisions and actions of government agencies, hotel operators and private contractors" along with contractual arrangements and the training provided to staff. The report is due to be completed by September 25.

The state opposition health spokeswoman Georgie Crozier wants the inquiry to be public and extended to include the earlier Cedar Meats cluster, while state opposition leader Michael O'Brien called for the health minister, Jenny Mikakos, to be sacked.

"This has been a complete and utter debacle," Mr O'Brien said. "There has to be accountability for this, and this means the health minister has to go."

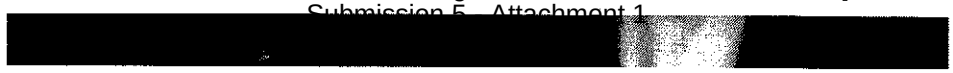
On Friday Mr Andrews said Ms Mikakos had his support and said as leader he took responsibility for "these and all matters".

"I absolutely acknowledge this is unacceptable what has gone on here."

Ms Mikakos said she welcomed the judicial inquiry and said she had "no concerns whatsoever" about the role of her department. She said the decision to award the contracts was not made by her Department of Health and Human Services.

"I'm deeply frustrated by what has happened here," she said. "We have managed this before (virus spread) and we will manage it again."





Victorian Health Minister Jenny Mikakos and Premier Daniel Andrews on their way to a COVID-19 press conference on Friday. JOE ARMAO

Despite days of questions of the government, it remains unclear who made the call to outsource quarantine to the private security industry. Victoria's Chief Health Officer Brett Sutton said on Thursday the decision to use private security was not his.

"But it was jointly oversighted by emergency management within the Department of Health and Human Services, Emergency Management Victoria and Department of Jobs Precinct and Regions," he said.

The 'reset'

A significant overhaul has already begun in what the premier has called a "reset".

No international travellers will arrive in Melbourne for two weeks. Andrews said diverting flights would allow the government to focus on existing cases rather than worry about new returning ones. The state government has also moved to toughen the rules for those in hotels, cancelling outside walks for everyone except those with mental health problems.

The move mirrors the more stringent lockdown already in NSW for quarantine hotels.

At the start of the pandemic, there was a major debacle in NSW over the virus spreading from passengers disembarking from cruise ships. But their hotel quarantine program has had far fewer issues than Victoria's and has been run using a different model.

A NSW Police spokeswoman said they were responsible for that state's hotel quarantine operation along with the Australian Defence Force, NSW Health and a private contractor. People who have stayed in quarantine in Sydney describe strictly enforced rules. This is the model Victoria is now moving to.

On Thursday Police Minister Lisa Neville said that the private security program at 15 quarantine hotels would be stopped by the end of next week.

Corrections Victoria, which runs the state's jails and parole system, recently took over supervision of the quarantine program and will work with the Australian Defence Force to manage the hotels.

The Age has reported that MSS had been guarding the Stamford Plaza hotel in Melbourne's CBD. Unified Security had been responsible for the Rydges on Swanston in Carlton.

The Andrews government said that the security companies "were bound by the standards of their service agreement with the Victorian government" and staff were required to complete training programs".

That may be the case. But given the well-known state of the industry, it still required a leap of faith to believe it could deliver. Now the government is advertising for parole and prison officers, sheriffs and other authorised officers not already deployed to fill hundreds of new quarantine jobs.

The new roles will pay a base rate of $54 an hour. That's more than double what one former guard said he was paid. "I was on a $25 set flat rate, that didn't [move] whether you were on a day or night shift," former guard Sebastian Porter said.

He said guards he worked alongside from other security firms "were on way less than that".

Professor Sutton has conceded there has been "some concern about the distancing between those contracted security guard staff". He also confirmed some of the staff spaces where security guards and healthcare workers were gathering at the quarantine hotels "were too close together".

"Sometimes it was clear that there wasn't as robust an understanding that was required among contractor staff" about social distancing," he said.

"Sometimes it was a case of not having embedded all of the procedures for hand hygiene."

Professor Sutton said he was now confident the system had been "strengthened" in recent weeks to a point where they do not expect to see more outbreaks.

The public and the government will be hoping he's right.

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Ben Schneiders

Ben Schneiders is an investigative journalist at The Age and has reported extensively on the underpayment of wages, corruption, business, politics and the labour movement. His reporting has won a number of major honours including Walkley awards. He has been part of The Age's investigative unit since 2015.