



Submission to

The Education, Employment and Small Business Committee

Inquiry into wage theft in Queensland

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I. Introduction:

A. About JobWatch

Job Watch Inc (JobWatch) is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation that is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

- a) provide information and referrals to Victorian, Tasmanian and Queensland workers via a free and confidential telephone information service (TIS);
- b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- c) represent and advise vulnerable and disadvantaged workers; and
- d) conduct law reform work with a view to promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected approximately 200,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. JobWatch currently responds to over 10,000 calls per year.

The contents of this submission are based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified Queensland callers to JobWatch's TIS.

JobWatch welcomes this opportunity to make a submission to the Education, Employment and Small Business Committee (the Committee) Inquiry into Wage Theft in Queensland.

1. Summary of recommendations
 - a. **Provide 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.**
 - b. **Investigate ways in which the Magistrates Court's rules and processes could be simplified to allow better access to justice for vulnerable and disadvantaged employees prosecuting their own wage recovery claims.**
 - c. **Consider the criminalisation of 'deliberate' incidents of wage theft.**

B. Reasons for this submission

JobWatch notes that wage theft, being the deliberate underpayment of minimum employment entitlements, is an issue that is, justifiably, receiving increased media and legislative attention. A Commonwealth report into *Corporate Avoidance of the Fair Work Act* published in September 2017 (the Report) devoted a chapter to the prevalence and effect of wage-theft in Australia.¹ The Report estimated that 50% of workers in the areas of hospitality, retail, beauty and the fast-food sector were underpaid.² It is also recognised that wage theft often correlates with underpayment of superannuation, compounding the harm to the employee and, by extension, to society.³ The problems outlined in the Report are not unique: having added to earlier reports such as *A National Disgrace: the Exploitation of Temporary Work Visa Holders*⁴ and confirmed more recently by *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*.⁵

JobWatch routinely observes the prevalence and effects of wage theft. Since 1 January 2017 when JobWatch received funding from the Fair Work Ombudsman (FWO) to provide tailored legal information to workers based in Queensland, JobWatch has provided tailored legal information to 3914 Queenslanders as at 3 July 2018. Of these 3914 callers,

¹ Education and Employment References Committee, the Senate, 'Corporate avoidances of the Fair Work Act 2009' September 2017, chapter 6.

² Education and Employment References Committee, the Senate, 'Corporate avoidances of the Fair Work Act 2009' September 2017, [6.5].

³ Education and Employment References Committee, the Senate, 'Corporate avoidances of the Fair Work Act 2009' September 2017, [6.52].

⁴ Education and Employment References Committee, the Senate, 'A national disgrace: the exploitation of temporary work visa holders' 17 March 2016.

⁵ Laurie Berg and Bassina Farbenblum *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, November 2017.

underpayment is a pervasive issue and has been raised 912 times. These may not be always be discrete issues as, of the 3914 Queenslanders who called JobWatch, 7667 issues were reported. A statistical analysis of these calls reveals that approximately 10% of callers from Queensland in a variety of industries, the most common being hospitality and retail trade, had or were experiencing some form of underpayment of wages and/or other entitlements.

Types of underpayments in Queensland

Problem	Number of times mentioned	Percentage per issue
Overtime - unpaid (6 Years)	10	0.1304%
Super - non payment	39	0.5087%
Super - under payment	9	0.1174%
Underpayment certified agreement (6 Years)	141	1.8391%
Underpayment common law contract (6 Years)	105	1.3695%
Underpayment federal award (6 Years)	171	2.2303%
Underpayment of wages	404	5.2693%
Wages – non-payment (6 Years)	33	0.4304%
Total	912	11.8951%

Underpayments in Queensland by industry

Accommodations, cafes and restaurants	47
Agriculture, Forestry and Fishing	15
Communication Services	4
Construction	46
Cultural and recreation services	10
Education	10
Electricity, gas and water supply	10
Finance and insurance	8
Government Administration and Defence	2
Health and community services	35
Manufacturing	18
Mining	4
Other services	31
Personal and other services	37
Professional, Scientific and Technical Services	7

Property and business services	29
Retail trade	49
Transport and storage	28
Wholesale trade	9
Not applicable	2
Unknown	6

Despite wage theft being a common issue faced by employees when calling JobWatch’s TIS, it is likely these statistics actually under report the rate of non or under payment of wages and entitlements being experienced by vulnerable and disadvantaged employees. 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.

There are several factors indicating that wage theft is under reported. Firstly, under reporting may be linked to an expectation that underpayment is the reality of the modern market – given that it appears many individuals are aware they are being paid below minimum wage.⁶ This is exacerbated by poor employment prospects across Australia and the prevalence of underpayment in specific industries. For instance, within the hospitality sector, it is estimated that across Australia less than 79% of workers are paid correctly.⁷ In specific industries this rate is higher due to exploitative hiring practices that target individuals – often migrant workers⁸ – who are often perceived as unlikely to know about or be willing and able to recover their legal entitlements. In short, 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

⁶ Laurie Berg and Bassina Farbenblum *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, November 2017 34-37.

⁷ Education and Employment References Committee, the Senate, ‘Corporate avoidances of the Fair Work Act 2009’ September 2017, [6.52].

⁸ Education and Employment References Committee, the Senate, ‘Corporate avoidances of the Fair Work Act 2009’ September 2017, [6.27].

job with a compliant employer. Consequently, employees in these circumstances are less likely to report their underpayments.

This competing interest between accessing legal entitlements and continuing their employment or finding legally compliant employers is evident in Kaled's experience (see below). Secondly, for those who believe they can find a job with a compliant employer, a positive reference from the current employer is often necessary. This forces workers to choose between accessing their legal rights to recover their legal entitlements or maintaining a positive employee-employer relationship.

A third issue is that the process to recover non or underpaid wages is perceived to be difficult, leading to vulnerable and disadvantaged employees accepting their underpayment and not seeking legal advice.

C. *The Problem:*

1. Summary of Issues:

As noted in the previous section, under reporting is caused by several factors. These factors have been observed by JobWatch while providing tailored legal information via its TIS. To reiterate, these include:

- Acceptance of the current under payment paradigm caused by a belief that the situation is not better elsewhere.
- The misalignment between the value of a below-minimum wage job and no job at all.
- The misalignment between the sums of money owed and the value of a good reference or the expense and effort necessary to recover the money.
- Confusing and negative perceptions of the legal system.
- Difficulties in enforcing their legal rights. This manifests in several different ways including:
 - Employer's not engaging with FWO recovery processes e.g. mediation;
 - Employer insolvency; and
 - The complexity and cost of making an underpayments claim.

JobWatch also believes that some employers have essentially undertaken a cost/benefit analysis regarding wage theft and have considered it worthwhile making the practise part of

their business model. 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. 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.

2. What Can Queensland Do?

As noted, there are many issues facing an individual who seeks to recover their unpaid legal entitlements. Given the current referral of powers,⁹ the Queensland government (without withdrawing its referral to the Commonwealth), is limited in its ability to address these issues. The limitation is two-fold. Firstly, Queensland does not have jurisdiction over national system employers, i.e. non state government or local council employers, where wage theft is most common. Secondly, as wage theft is uncommon in the state public/local council sector, any internal work-place reforms will be of minimal effect.

One avenue for Queensland is the implementation of criminal sanctions. This option will be discussed below, alongside an overview of the legal processes to recovery non or under payment of wages and the possibility of reforming the Magistrates Court of Queensland's rules and procedures to allow better access to justice for vulnerable and disadvantaged employees. Additionally, Queensland could consider funding a community legal centre similar to JobWatch to advise and represent vulnerable and disadvantaged workers experiencing wage theft and other exploitative employment practises. Otherwise, Queensland's capacity to effect change to Australia's workplace laws appears limited to discussions with the Commonwealth Government.

⁹ *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* s 6(d).

II. Issues facing workers:

There are several issues JobWatch has observed. The first is how common wage theft is and how it interrelates with other issues. Wage theft should not be limited to underpayment of ordinary time wages, but also to underpayment of other legal entitlements such as superannuation, annual leave, long service leave and penalty rates.

A. *Commonality*

Case study: Sham contracting

Rick worked for a transportation company as an independent contractor. 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.

Case study: Unwilling to enforce entitlements

Kaled has been underpaid \$5,000 in salary, \$13,000 in superannuation and \$2,500 in other payments. Kaled was told that the company was becoming insolvent and that his employer could not pay his own mortgage and could not afford to pay him. Kaled has made claims to the Australian Taxation Office but has decided it is better to change employers rather than to risk accruing more debt.

The pervasiveness of wage theft is one of its most problematic aspects. As mentioned before, quantitative studies have showed that, in some industries, wage theft is not an aberration but the norm. JobWatch sees another side of wage theft – the human impact. 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.

The above two callers indicate these contradictions. Rick had to weigh up whether he should accept his – probably – incorrect description as an independent contractor and whether to accept a deduction from his pay contrary to the unlawful deductions provisions in the *Fair Work Act 2009* (Cth) (Fair Work Act). Kaled decided to take proactive steps to find a new employer rather than challenge his current employer's inability to pay.

B. *Lack of Enforcement*

The ability for Queensland to bring about reforms to the Fair Work Act's enforcement measures is limited. However, awareness campaigns for employees regarding their employment rights may help to empower vulnerable and disadvantaged employees to enforce their minimum entitlements and to report non-complying employers. Such awareness campaigns could be undertaken by a community legal centre providing community legal education to appropriate audiences such as student visa workers and other temporary migrant workers.

Case study: Incorrect classification/Labour hire arrangements/Constructive dismissal

Kat is a security guard. She was being paid as a Level 1 employee rather than level 3 per her duties. She was also told she is working for a 3rd company but, in reality, is working is doing work for the company that hired her.

She sent a letter of demand regarding her payment and her boss is now refusing to communicate with her.

One of the responses that Queensland¹⁰ (and Victoria and South Australia also)¹¹ has taken to reduce wage theft is to institute a licensing regime for labour hire companies. This

¹⁰ *Labour Hire Licensing Act 2017 (Qld)*.

¹¹ Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the State failed to Act?' (2018) 29(2) *The Economic and Labour Relations Review* 207, 218.

addresses a common issue causing wage theft: the abuse of a company's separate legal identity to push down wages and working conditions while limiting directorial liability. Licensing reform to this area, while beneficial in providing some oversight, is responding to a limited sphere of wage theft and is dependent upon accurate reporting from the licensee¹² and effective oversight.

Case study: Non-payment of superannuation/Insolvency

Gin is on a 457 VISA. Gin has worked for the same employer for 4 years, having a permanent position for the last 2 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 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.

The issue of wage theft is greater than unwitting underpayment – as an employer who acts without awareness can rectify the situation easily by repaying the employee. The major issue that faces workers are disreputable employers who seek to profit from the low risk of prosecution. Gin's experience is indicative of this: his employer traded into insolvency, placing its own interests first and, knowing the company's precarious economic position, failed to pay the correct legal entitlements for 16 months preceding the company's winding-up. The intentionality of this breach is clear – the employer knew of the obligation to pay superannuation, but realised money could be 'saved' by illegally withholding it. As Francesca's story (below) portrays, disreputable employers may also take advantage of unintended underpayments; becoming un-cooperative when back pay is requested indicating the opportunistic attitude of disreputable employers being to take advantage of vulnerable and disadvantaged employees whenever the possibility arises.

The focus, therefore, should rest upon the ability to recover unpaid minimum entitlements. The general increase in non-compliant payments may be attributable to lower rates of

¹² *Labour Hire Licensing Act 2017 (Qld) s 31.*

unionisation,¹³ which would accord with greater rates of non-compliance occurring in non-unionised sectors.¹⁴ The result being that the burden of enforcement has fallen to the inadequately funded FWO;¹⁵ an organisation whose effective budget was less in 2016-17 than the previous year.¹⁶

One possible solution here for Queensland is to simplify the recovery of wages and other entitlements process in the Magistrates Court of Queensland, which is an eligible court under the Fair Work Act, so that underpaid employees can commence their own legal action to recover unpaid wages and other employment entitlements.

1. Recovery of underpayments process:

Case study: Unilateral change to pay rate by employer

Sam was being paid at grade 6 of his EA since 2010. During the period of July 2015 to June/July 2017, his employer began to change his wage rate without consultation. After making a complaint, his grade 6 wage was reinstated, but Human Resources told him that back pay was not possible.

Sam requested information from JobWatch about how to make an underpayments claim.

JobWatch informed Sam that back pay was possible and the process through which he could make an underpayment claim. The process of making an underpayments claim, generally, works in three steps. The first is to determine the correct wage – by looking at the Enterprise Agreement (EA) or, if none, the relevant modern award. The second step is to contact the employer via a letter of demand; setting out the hours worked, the rate paid, and the rate that the individual should have received and give a time limit by which the back pay should be received.

¹³ Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the State failed to Act?' (2018) 29(2) *The Economic and Labour Relations Review* 207, 214.

¹⁴ Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the State failed to Act?' (2018) 29(2) *The Economic and Labour Relations Review* 207, 214.

¹⁵ Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the State failed to Act?' (2018) 29(2) *The Economic and Labour Relations Review* 207, 214.

¹⁶ Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the State failed to Act?' (2018) 29(2) *The Economic and Labour Relations Review* 207, 217.

Thirdly, should the previous stage be unsuccessful, a request for assistance to the FWO may be made. For a Queensland employee who is a national system employee, the FWO may investigate the matter. Where a negative finding to the employee is found, the matter is deemed resolved. Where a positive finding for the employee is found, the next step may be to schedule a voluntary mediation, issue a compliance notice or to file a claim in court. The FWO may prosecute the case (depending on policy reasons) or the individual may lodge a court application. An application lodged by the individual will be made to a court depending upon the amount claimed (with the small claims division being available for claims of less than \$20,000).

While the steps are relatively clear, 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)¹⁷ are responsible for 11.6 million workers who work in over 2.1 million workplaces.¹⁸ This amount of funding may be appropriate if there were alternative 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.

Therefore, JobWatch submits that the Queensland Government should investigate ways to reform the Queensland Magistrates Court's rules and procedures to increase access to justice for vulnerable and disadvantaged employees attempting to recover unpaid wages and other entitlements. Such reforms might include: waiver of filing fees, dispensing with the strict requirements of service such that, for example, a complaint may be served by post to the last known business address of the employer, allowing the award of costs to the employee in certain circumstances and other similar reforms. Such reforms would go some

¹⁷ Stephen Clibborn, 'Why Undocumented Immigrant Workers Should have Workplace Rights' 26(3) (2015) *The Economic and Labour Relations Review* 465, 469.

¹⁸ Stephen Clibborn, 'Why Undocumented Immigrant Workers Should have Workplace Rights' 26(3) (2015) *The Economic and Labour Relations Review* 465, 470.

way to alleviating the unnecessary cost and complexity of the wage recovery process so that individual employees are better able to prosecute their own wage recovery claims.

III. Misaligned benefits:

1. Reasons not to claim minimum entitlements:

Case study: Dismissal for inquiring about underpayments

Francesca and her partner had been working on a casual contract in a hotel for 3 months while backpacking around Australia. They were receiving \$15 per hour. When they realised that this was below minimum wage, they spoke to their employer and requested their timesheets. While the employer stated he would send them their timesheets and appeared conciliatory, he cancelled Francesca and her partner's shifts and ceased contact.

Francesca and her partner were left in limbo; unclear whether they had been dismissed and/or whether they would receive their legal entitlements.

Employment insecurity is an issue particularly faced by workers employed on a casual basis. In Francesca's case, she could make a general protections claim under section 340 of the Fair Work Act on the basis that she was dismissed *because* she had exercised or proposed to exercise a workplace right by inquiring about her wages and timesheets. Nevertheless, proving that she was dismissed *because* of her inquiry may be difficult because it is a subjective test meaning that the employer could always argue that the reason for her dismissal was any number of non-unlawful reasons including lack of work. Further, taking a litigious route is often seen as cumbersome and expensive when considered against the necessity of finding a new job.

If Francesca focused upon the underpayment issue, she would be advised per the above section (to write a letter of demand, contact FWO, file in court). For an itinerant worker, the

expense of applying to court is likely to be prohibitively high; with time and effort spent finding another job economically more rewarding. Also, she may no longer be in Australia or may be in another state by the time her matter comes on for hearing making it impossible to prosecute her case.

2. Non-compliance incentives:

One alternative to changing how the Fair Work Act operates (and an option available to State Governments) has been an attempt to reduce the incentives to employers to commit wage theft. An alternative mooted in Victoria aims to dis-incentivise wage theft from the employer's perspective by attaching criminal sanctions to 'deliberate' underpayments.¹⁹ Presumptively, 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.

There are operational concerns within this proposal. For the law to be effective and not merely window dressing, it will require 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. In short, Queensland may wish to consider ways to further fund other agencies, such as an employment rights community legal centre, that could take private legal action on behalf of underpaid vulnerable and disadvantaged employees thereby supporting and supplementing the work of the FWO.

2. Other, common issues:

Case study: Employer ceasing to trade

¹⁹ Daniel Andrews, *Dodgy Employers To Face Jail for Wage Theft* 26 May 2018 <<https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>>.

Chad was working as an apprentice for around 2 years. He turned up on Monday, like usual, only to discover that this employer had disappeared and was uncontactable.

Chad filed an unfair dismissal claim. He is currently owed \$14,000 in underpayments, and loss of annual leave and superannuation due to his employer disappearing. Further, he cannot make a claim under the *Fair Entitlements Guarantee Act 2012* (Cth) (FEG) as the company that employed him is not in liquidation. Unable to find his employer, and while the company remains without a liquidator appointed, Chad will receive no compensation for his loss from FEG and is unlikely to be able to enforce any order against the employer in unfair dismissal or underpayments.

The FEG provides a semblance of protection for Australian workers. However, a constant critique of the FEG from JobWatch's perspective is that it does not extend to foreign workers,²⁰ does not include owed superannuation,²¹ and generally only provides protection where the company has a liquidator appointed.²² This leaves many employees with no protection, such as Chad who, through no fault of his own, will likely not be able to recover his unpaid wages and other entitlements including superannuation.

This, again, appears to be outside of Queensland's jurisdiction, but is an important consideration in the schema of Australia's industrial relations law.

²⁰ *Fair Entitlements Guarantee 2012* (Cth) s 10.

²¹ *Ibid* ss 20-4.

²² *Ibid* s 10.

JobWatch thanks the Committee for considering its submission.

Please contact [REDACTED] or [REDACTED] on [REDACTED] if you have any queries.

Yours sincerely,

A handwritten signature in black ink that reads "Job Watch". The letters are cursive and slightly slanted to the right.

Job Watch Inc

Per: Ian Scott

Principal Lawyer