

30 July 2018



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Committee Secretary

Education, Employment and Small Business Committee
Parliament House
George Street
Brisbane QLD 4000

By email to: eesbc@parliament.qld.gov.au

Dear Committee Secretary

Inquiry into wage theft in Queensland

LawRight welcomes the opportunity to contribute to the inquiry into wage theft in Queensland. We **enclose** our submission to Parliament on this important issue.

We have sought to add to the inquiry by providing data about workers seeking assistance from LawRight's Self Representation Service (**SRS**) to access the Queensland registry of the Federal Circuit Court in order to pursue unpaid entitlements in court proceedings. We have also undertaken a review of client files in the 2017-2018 FY so as to identify:

- the main industries across which SRS clients worked in that period, as defined in the Australia and New Zealand Industrial Classification 2006;
- the main type of unpaid employment entitlements pursued by SRS clients; and
- some of the significant hurdles that workers face to establish a legal entitlement to an unpaid wages claim against employers.

We have highlighted some of the initiatives that LawRight is pursuing to further assist workers, including through the development and evaluation of an online guided interview in partnership with The University of Queensland.

It is worth pointing out that the workers we assist are those who have identified they have been underpaid. As outlined in our submission, in many cases underpaid or unpaid workers, especially those experiencing a range of vulnerabilities, are unaware of their legal rights and unable to pursue them. We believe that the SRS provides invaluable assistance to workers and the courts. It is imperative that this service, and similar services, receive adequate funding from government to continue with this service.

Thank you for the opportunity to make this submission. LawRight would welcome the opportunity to participate in private or public consultations.

Yours faithfully

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A handwritten signature in black ink, appearing to read 'Linda Macpherson', with a wavy underline.

Linda Macpherson
Joint Director



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SUBMISSION
TO THE
PARLIAMENT INQUIRY INTO WAGE THEFT IN QUEENSLAND
EDUCATION, EMPLOYMENT AND SMALL BUSINESS COMMITTEE

Submission prepared by LawRight

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Lodged electronically at eesbc@parliament.qld.gov.au on 30 July 2018.

LAWRIGHT SUBMISSION**PARLIAMENT INQUIRY INTO WAGE THEFT IN QUEENSLAND****CONTENTS**

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1. Background

LawRight (formerly the Queensland Public Interest Law Clearing House) is an independent, not-for-profit, community-based legal organisation coordinating the provision of pro bono legal services for individuals and community groups in Queensland. We are a partnership of law firms, barristers, the Community Legal Centres Queensland, the Queensland Law Society, the Queensland Bar Association, Legal Aid Queensland, university law schools, accountancy firms and government and corporate legal units.

LawRight undertakes law reform, policy work and legal education, and operates civil law pro bono referral schemes and direct legal services for particular disadvantaged client groups through a number of programs. While other LawRight programs may assist parties with matters related to unpaid employment entitlements, this submission seeks to provide valuable information in respect of wages theft in Queensland from the perspective of its Self Representation Service (**SRS**) operating in the Brisbane Registry of the Federal Circuit Court and Federal Court of Australia (**Federal Courts**).

2. Self-Representation Service in Australia

In 2007, LawRight started the SRS in Australia in the Queensland Courts to provide pro bono legal assistance to self represented litigants who were not eligible for legal aid funding and could not afford private legal assistance, known as the ‘missing middle’ resulting in a significant access to justice gap. As the Productivity Commission has noted, this is an increasingly large group.¹

LawRight commenced the SRS in the Queensland Civil and Administrative Tribunal in 2010 and, following LawRight’s pilot of the SRS in the Brisbane Registry of the Federal Courts in 2011, the Commonwealth Attorney-General’s Department announced funding in 2013 for a national rollout of a SRS model in the Federal Courts. Since 2013, the SRS model has been successfully adopted by Justice Connect (NSW, VIC, TAS, ACT), JusticeNet South Australia (SA, NT) and Legal Aid Western Australia to operate similar services in those jurisdictions. The SRS model has been embraced by the pro bono sector nationally and receives the support of judicial and tribunal members and registry staff at its various locations.

In 2017, the Commonwealth Attorney-General’s Department conducted a national evaluation of the SRS in the Federal Courts, and reported to SRS service providers that, over the three year period evaluated (2013-14 to 2015-16 FY), nationally:

- service levels increased steadily and the SRS received 5214 applications for assistance, mostly concerning employment matters (33%), followed by bankruptcy (28%) and judicial reviews (11%);
- the SRS supported over 7000 individuals, and a typical client of the SRS in that period was a male applicant (or appellant) on a low income, with those aged between 31-45 (32%) and 46-65 (36%) making up the larger client base; and
- the SRS primarily assisted financially disadvantaged clients (65%) on an annual income lower than \$26000.

¹ Productivity Commission, *Inquiry Report, Access to Justice Arrangements*, No. 72, Vol 1, Chapter 14 (‘Self-Represented Litigants’) (Australian Government, 2014).

3. LawRight SRS assistance with Fair Work matters in the Federal Courts

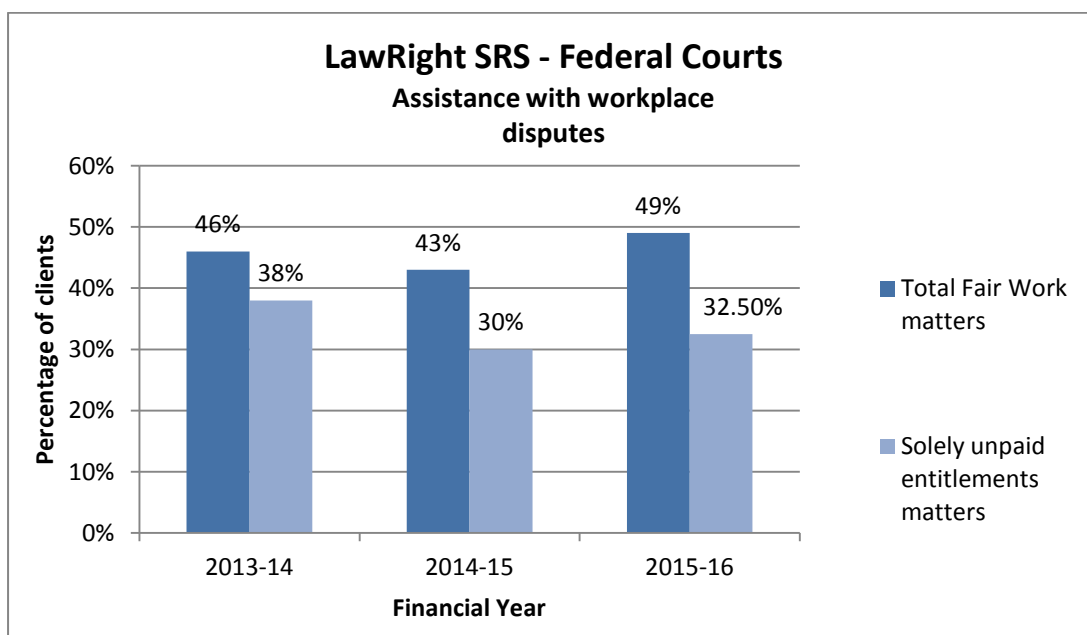
LawRight’s SRS assists eligible parties with Fair Work matters in the Federal Courts by:

- providing skilled pro bono legal advice and practical task assistance during appointments with volunteer lawyers from 12 participating law firms;
- when appropriate, encouraging early resolution and diversion from the courts, including by providing a pro bono mediator to facilitate settlement conferences for employees and employers involved in small claims proceedings in the Federal Circuit Court; and
- providing useful and accessible legal education materials to promote understanding of the legal system and relevant procedures.

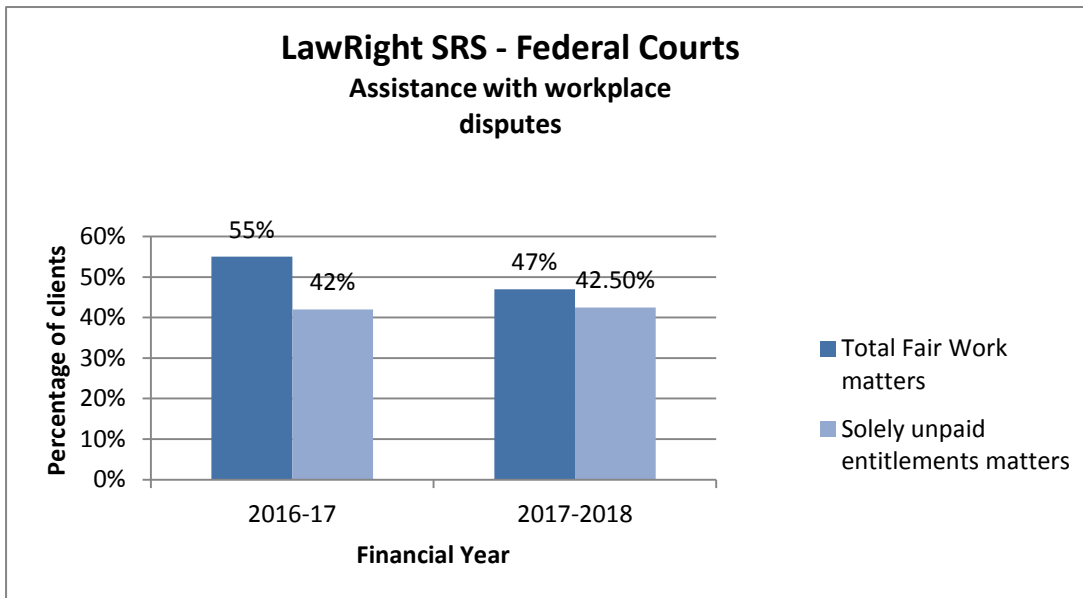
Since the LawRight SRS commenced in the Federal Courts in 2013-14 (excluding the trial period in 2011 and the 2018-19 FY), 1047 case files have been opened for parties seeking assistance with current or prospective proceedings in the Federal Courts, of which 509 files concerned workplace disputes (including 395 matters relating exclusively to allegations of unpaid wages in Queensland). In our experience, most workplace disputes with which the SRS assists generally include allegations of unpaid amounts payable to an employee in relation to the performance of work.

We have observed a steady increase in demand for pro bono assistance from employees trying to access the justice system to address the issue of wage theft in Queensland.

As noted above, in the three year period during which the LawRight SRS was evaluated by the Commonwealth Attorney-General’s Department (2013-14 to 2015-16 FY), the national average of applications for assistance received by SRS service providers concerning employment matters was 33%. However, in the same period, approximately 46% of applications for assistance received by LawRight’s SRS in Queensland concerned unpaid wages and other workplace disputes, such as allegations of unfair dismissal and adverse action in contravention of a general protection under the *Fair Work Act 2009* (Cth). Approximately 34% of the total number of applications for assistance LawRight’s SRS received in that period concerned disputes relating exclusively to allegations of unpaid wages.



The demand for pro bono legal assistance with employment matters in the Federal Courts increased further in 2016-17 to 55% of SRS clients, with 42% of clients seeking assistance with disputes relating exclusively to unpaid wages. In 2017-18, the percentage of SRS clients seeking assistance to recover unpaid wages increased to 42.5%.² In our view, this level of demand for pro bono legal services with unpaid employment entitlements indicates that wage theft is a systemic issue in Queensland.



4. LawRight SRS client demographics data

The aggregate demographics data below concerns parties who sought pro bono assistance from LawRight’s SRS in the Federal Courts with matters that related exclusively to unpaid employment entitlements in Queensland. A typical client of the LawRight SRS seeking assistance to recover unpaid wages is an English-speaking male employee living on a low income in Brisbane.

Location of employees	Brisbane City	South East Queensland (outside Brisbane)	Rural Regional or Remote	Other State or Territory
2014-15 to 2017-18	43.98%	37.25%	15.13%	3.64%

Gender of employees	Female	Male	Other	Not stated
2014-15 to 2017-18	40.06%	52.38%	7.28%	0.28%

² In 2017-18 the overall percentage of SRS clients seeking assistance with workplace disputes in the Federal Courts decreased slightly to 47%, when compared to 55% in 2016-17, due to a significant increase in pro bono assistance provided to asylum seekers involved in judicial review proceedings in the Federal Courts.

Employee annual household income³	\$0-\$26,000	\$26,000-\$52,000	\$52,000 - \$80,000	\$80,000 - \$150,000	Not stated
2014-15 to 2017-18	34.45%	25.77%	17.65%	10.36%	11.76%

Non-English speaking background	Yes	No	Not stated
2014-15 to 2016-17	20.95%	49.16%	29.89%

Employees from non-English speaking backgrounds seeking LawRight SRS assistance to recover unpaid wages in Queensland make up a significant proportion of service-users, who often need assistance from an interpreter to communicate effectively with LawRight staff and volunteer lawyers. Anecdotally, LawRight has noted that these SRS clients face additional hurdles in accessing their legal rights, including difficulties in gathering evidence, understanding legal frameworks and court procedures, and effectively advocating for themselves as self-represented litigants.

Case study 1

“Alex”⁴ is a non-English speaking migrant employed on a full-time basis at a restaurant, who performed duties as a sou-chef. Alex and his employer entered into a basic sponsorship agreement that only recorded Alex’s annual salary and duration of employment, but allowed Alex to live in Australia with his family on a Temporary Work (Skilled) visa (subclass 457).

Alex was paid below the relevant hourly rate under the Restaurant Industry Award 2010, was not paid overtime or penalty rates, and was not provided payslips. After working at the restaurant for over a year, Alex raised the issue of underpayment with the employer and was told the Award did not apply because both parties signed an employment contract. As Alex had no records of the duties he performed or hours he worked, he would face evidentiary hurdles to prove his claim in the Federal Circuit Court. Alex and his wife were expecting a child and feared the sponsorship agreement would be terminated if Alex pursued his rights. Alex decided to continue the employment relationship and never returned to LawRight’s SRS for further legal assistance.

5. The small claims jurisdiction of the Federal Circuit Court

As demonstrated above, LawRight’s interactions with people who might have experienced wage theft in their working lives occur in the context of that person’s legal action. The majority of its clients are making an unpaid wages claim in the Federal Circuit Court small claims division. The Federal Courts and specialist industrial relations bodies deal with a range of other employment matters where wage theft may also occur. However, this submission only

³ Reference to annual household income relates to a person’s household income at the time of applying to LawRight for pro bono assistance, it is not necessarily an indication of employees’ household income at the time the dispute arose.

⁴ All case studies included in this submission are published with clients’ consent, using fictitious names, and omitting or changing other details so that the parties involved cannot be identified.

relates to the Federal Circuit Court small claims division jurisdiction.⁵ This section briefly sets out the law and process for these claims.

A claim for unpaid wages and other legal entitlements are potentially governed by a number of legal instruments. These include the National Employment Standards, the *Fair Work Act 2009* (Cth) (the **Act**), the applicant employee's contract of employment (which may include an 'Individual Flexibility Agreement' under s 61.1 of the Act), and a modern award or an enterprise agreement that applies to that employee's work.

While the small claims jurisdiction of the Federal Circuit Court relates to claims in respect of a small amount of money (less than \$20,000), the complexity of the legal regime remains. For instance, where the relevant employment relationship is governed by an individual agreement, there are minimum safety net standards set by industry awards. Alternatively, a National Minimum Wage Order made by the Fair Work Commission each year provides for a national minimum wage for those not covered by an award or enterprise agreement. The National Employment Standards also provide minimum terms and conditions applying to all employees covered by the national system (under the Act), which applies to Queensland private sector workers (Part 2-2 of the Act). The minimum terms and conditions cannot be replaced with lesser entitlements by any legal instrument such as an award, enterprise agreement or individual agreement. These include provisions for such things as maximum weekly hours, leave entitlements and notification procedures for termination of employment and redundancy.

In order for an employee to make a claim for unpaid wages or entitlements, he or she must establish that there is a legal entitlement to the claim. There are also other requirements that must be satisfied in this jurisdiction. For instance, the claim for unpaid wages or entitlements must be commenced within 6 years of the claimed entitlement accruing and the court cannot make an order for more than \$20,000. While most employment relationships (including former employees) are covered by this jurisdiction, those engaged as true independent contractors cannot access this court. Finally, the jurisdiction is limited to statutory, industrial award or enterprise agreement based entitlements such as unpaid wages, unpaid penalty rates or allowances or unpaid leave entitlements and safety net contractual entitlements. Purely contractual entitlements (which do not fall under the meaning of a "safety net contractual entitlement") cannot be claimed in isolation (eg. bonuses).

Where a claim has been commenced in the Federal Circuit Court under s 548 of the Act, there may be a hearing before a presiding judicial officer with the power to make a range of orders to dispose of the case (Chapter 4 part 1 of the Act). These powers include ordering the parties to attend a mediation conference to attempt to settle the claim. As mentioned above, LawRight's SRS facilitates settlement conferences for employees and employers involved in small claims proceedings by providing a pro bono mediator for matters referred to LawRight by the Federal Circuit Court.

After a hearing in which both parties will have the right to present their case, the Court may make an order for the respondent employer to pay any unpaid wages found to be owed in part or full, or find that there are no legal entitlements owed by the respondent employer. Orders for an employer to pay outstanding pay or other entitlements can be enforced through the Court if they remain unpaid by the set date.

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

⁵ In Queensland, this division is in the Federal Circuit Court but may be exercised under the *Fair Work Act 2009* by the Magistrates Court.

later in this submission, pose added barriers to many people enjoying their legal entitlements. The effort to access legal entitlements through the justice system may seem disproportional compared to the amount of their claim, especially when there is no guarantee that the money found to be legally owed will be recovered at the end of legal proceedings.

The process of initiating a small claim

For many people, accessing the court system is a difficult and overwhelming prospect. As described above, LawRight's SRS provides assistance to people initiating an unpaid wages claim, including to draft a letter of demand, to understand the process of initiating a claim and appearing in court, completing the necessary prescribed court forms and to select and present relevant evidence for their claim in affidavit material. In an unpaid wages small claims case, an application form must be completed and filed with the court and served (within 5 days) on the respondent employer. The court also needs to be informed (through an affidavit of service) that the respondent employer has been properly served. These processes are generally unknown to most people, and claimants might require an explanation of each step of their case.

In Federal Circuit Court unpaid wages small claims cases, parties are unrepresented except by leave of the court. It is intended to be an accessible jurisdiction. However, LawRight has observed that it is not uncommon for the court to grant leave for employers to be legally represented in this jurisdiction. In any jurisdiction, self-representing litigants are a significant impost on the court and themselves face particular challenges in obtaining access to justice.⁶ Therefore, LawRight's SRS provides invaluable assistance in preparing the claimant and their documentation to assist the court and to seek to address what may be a significant imbalance of power between parties.

Before appearing before the court, claimants must establish in their documentation that they were employed by the respondent employer concerned and that there are legal grounds for the entitlements that they believe they are owed. Claimants need to gather information about what payments and/or benefits they are entitled to in their job, in order to determine whether they have been underpaid or have not received an entitlement and the quantum of their claim. 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. LawRight's SRS will ordinarily refer that person to the Fair Work Ombudsman's online resources for assistance to such as the Pay and Conditions Tool available at www.fairwork.gov.au/pay.

In all cases, before the claim can proceed there will need to be calculation of the quantum of the claim, which might be unpaid wages and also the amount owing for other entitlements. Again, the Fair Work Ombudsman has developed an online tool to assist self-represented claimants in this process available at www.fairwork.gov.au/smallclaims. However, LawRight's experience is that the Fair Work Ombudsman's assistance to claimants in preparing calculations is limited, and when a claim is complex (such as when it is made under different instruments for different periods of time), it can be difficult for claimants to present clear and accurate calculations for the court. LawRight is considering a multidisciplinary approach to pro bono assistance in these circumstances, where a pro bono

⁶ John Dewar, Barry W Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia- A Report to the Family Court of Australia', *Research Report No. 20* (Family Court of Australia, 2000), 8; Australian Institute of Judicial Administration and Federal Court of Australia, 'Forum on Self-Represented Litigants: Report, The Australian Institute of Judicial Administration', *Litigants in Person Management Plans: Issues for Courts and Tribunals* (Australian Institute of Judicial Administration Incorporated, 2001); Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants: The Dark Side' (2014) 24 *Journal of Judicial Administration* 61.

accountant can also be provided through the SRS to assist claimant employees in preparing calculations of unpaid entitlements, when that assistance is not provided by the Fair Work Ombudsman. LawRight would welcome additional funding to operate a pilot project for that purpose.

Thus, many claimants may struggle to assemble all the information they need, which might include small things like identifying the name of the employer and whether, if it is a company, it is still registered. LawRight will assist clients to find the information required where possible, including searching for the full name of the employer (which might require searching that a company is still registered <https://connectonline.asic.gov.au>). As described below, unfortunately many clients face the situation where they appear to have been underpaid or unpaid but experience a significant hurdle where the employer is insolvent or entering bankruptcy.

Where a claimant establishes that an employment relationship exists, and that some form of underpayment (or no-payment) of wages has occurred, reversing the onus of proof to the employer to establish that all entitlements have been adequately paid would greatly assist many employees to receive what they are entitled for their performance of work. After all, the obligation to make and keep accurate and complete records about the employment relationship (including time worked and wages paid) rest with employers, not employees.

As a result of the current onus of proof on the claimant and all of the difficulties this entails for many workers, the Federal Circuit Court in Queensland heavily relies on LawRight's SRS to assist self-represented claimants in presenting their claim and being prepared for a hearing. In 2017-18, 49% of LawRight SRS clients pursuing claims dealing exclusively with unpaid wages matters were referred by the court registry. The data presented earlier in this submission indicates that there has been a steady need for assistance by self-represented claimants over several years and that this is likely to continue.

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. We therefore encourage governments to recognise the importance of adequate funding to support the production of community education and user-friendly resources to navigate this complex regulatory regime. In addition, as recognised by the Federal Courts, the Federal Government and several reviews of LawRight's SRS, there is a continued need for personalised assistance for claimants. It is crucial that adequate funding be provided for this SRS, and like services, to continue their work.

6. Stories of wage theft and its context - findings from LawRight SRS casework files related to unpaid wages in 2017-18

In undertaking a review of 2017-18 LawRight SRS casework files relating exclusively to allegations of unpaid employment entitlements in Queensland, we have identified that:

- of the nineteen broad industries in which the Australian workforce is employed, as defined in the Australia and New Zealand Industrial Classification 2006,⁷ SRS clients seeking pro bono legal services to access unpaid entitlements mostly worked in Accommodation and Food Services and Retail Trade. The main other industries were Other Services, Construction, Transport, Postal and Warehousing, Education and Training, and Rental, Hiring and Real Estate Services;

⁷ Industry information maintained by the Australian Government, Department of Jobs and Small Business, can be found on: <http://lmip.gov.au/default.aspx?LMIP/GainInsights/IndustryInformation>

- employees faced significant evidentiary hurdles to establish that they had a legal entitlement to an unpaid wages claim against employers and, in many cases, these obstacles led a claimant employee to desist from a legal claim:
 - 52% of clients told us they had an oral employment agreement with the employer; and
 - 43% of clients told us they had incomplete, inaccurate or no employment records at all, such as:
 - payslips or other records with the rate of pay, gross and net amounts paid, deductions, details of incentive-based payments, bonus, loading, penalty rate or other separately identifiable entitlements, leave records, superannuation contributions etc;
 - records of hours of work for casual or irregular part-time employees;
 - records of hours of overtime when penalty rates or loading applied; and
 - termination records setting out the date and reason for termination, and if notice was provided, and
- the main type of unpaid employment entitlements that SRS clients sought assistance to pursue related to:
 - main salary components (66%);
 - superannuation contributions (48%);
 - underpayments under modern awards (43%);
 - leave entitlements (42%);
 - overtime or penalty rates (25%);
 - termination entitlements, such as notice and redundancy payments (20%);
 - monetary allowances (13%); and
 - bonuses and incentive-based payments (10%).

The case studies below contain examples of the various forms of wage theft LawRight clients experience across the main industries in which they work, and of some of the hurdles employees face to access unpaid entitlements. All case studies included in this submission are published with clients' consent, using fictitious names, and omitting or changing some details so that the parties involved cannot be identified.

7. Systemic exploitation of workers in the Accommodation and Food Services Industry

Case study 2

“Ben” is an English-speaking migrant worker who commenced casual employment at a restaurant pursuant to an oral employment agreement. Ben was paid \$18 per hour and was not paid overtime or penalty rates. After a few months, Ben asked the employer if he was entitled to a higher hourly rate under the Restaurant Industry Award 2010, including 25% loading as a casual employee and penalty rates. Ben’s pay was raised to \$21 per hour (still below the Award rate), and one month later Ben’s employment was terminated. The employer failed to make adequate superannuation contributions and to respond to Ben’s requests for back payment of wages, loading and penalty rates. The employer also refused to participate in conciliation facilitated by the Fair Work Ombudsman.

LawRight advised Ben about the process involved in commencing proceedings in the Federal Circuit Court against the employer, including the need for enforcement proceedings if Ben obtained a judgement debt and the employer did not pay it by the set date. Ben felt overwhelmed and desisted from pursuing his rights.

Case study 3

“Emily” is employed by the same employer company mentioned in Case Study 1 above, which operated another restaurant at the same business precinct. 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.

LawRight assisted Emily to write a letter of demand and prepare court documents to commence proceedings in the Federal Circuit Court. However, Emily desisted from representing herself in court and never filed the court documents LawRight prepared for her.

Case study 4

“Jun” is a Chinese national employed on a casual basis at a restaurant as a food and beverage attendant. 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.

Jun’s English language skills were poor and he needed an interpreter to communicate effectively with LawRight staff and volunteer lawyers. We offered to help Jun commence proceedings against the employer in the Federal Circuit Court, but Jun told us that he could not wait for months for court proceedings because he was going back to China. Jun left Australia without ever being paid for his work.

8. Underpayment of workers in the Retail Trade industry**Case study 5**

“Grace” was employed on a permanent part-time basis as a shop assistant for a store in a shopping centre for 5 years. Grace checked her payslips against the terms of the General Retail Industry Award and realised that she was not paid the correct annual leave entitlement and leave loading. When Grace found new employment, she asked her former employer to be paid out for that leave on the correct basis, but the employer refused.

LawRight helped Grace negotiate a settlement with her former employer.

Case study 6

“Mitch” is a young person who was employed as a salesperson in Brisbane and was paid \$8 an hour. Mitch was fired for not making enough sales and was told that his final pay would be withheld for 100 days pursuant to a clawback clause on the employment agreement. Mitch had been significantly underpaid as he was entitled to receive \$18 an hour under the relevant modern award. When Mitch approached his former employer to ask for the amount he was owed, he was told he was an independent contractor, not an employee, so the modern award did not apply. LawRight did not assist Mitch further because the Fair Work Ombudsman agreed to investigate his case.

Case study 7

“Carla” was hired on a part-time basis as a technician for a store. Carla was paid the correct base remuneration under the Business Equipment Award, but was not paid penalty rates or provided with payslips during her employment. After months of employment, Carla spoke to her manager about non-payment of penalty rates and was told she was not entitled to them. Carla sent the employer a formal letter of demand but never received a response.

LawRight assisted Carla to prepare court documents to make a small claim in the Federal Circuit Court. The outcome of this case is unknown.

9. Insolvent trading in the Accommodation and Food Services Industry

Many LawRight clients seek legal advice about their options when employers tell them that their wages cannot be paid because the employer’s company is in financial difficulty. In our experience, when an employer company is nearing insolvency or going into liquidation, employees rarely recover their employment entitlements, despite having preferential rights against unsecured creditors under s 556 of the *Corporations Act 2001* (Cth).

When employees lose their job because of the liquidation or bankruptcy of their employer, the Fair Entitlements Guarantee (**FEG**) scheme provides some financial assistance to eligible employees to cover:

- 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).

Employees are eligible for financial assistance through the FEG scheme if the Australian Government, Department of Jobs and Small Business, assesses their claim as meeting all eligibility criteria set out in the *Fair Entitlement Guarantee Act 2012* (Cth).

Case study 8

“Angelo” is a migrant worker who was employed on a casual basis at a restaurant as a food and beverage attendant. Neither Angelo nor the business owners were Australian citizens or permanent residents. Angelo signed an employment contract but never received a copy of it. Angelo’s boss told him that his salary would not be paid because his company had to pay its taxes, but Angelo agreed to continue to work hoping that the company would pay him when its financial position improved. After a couple of months, Angelo arrived at work and found a notice on the front door saying the restaurant had closed down and the company went into liquidation. Angelo lodged a formal Proof of Debt Claim with the insolvency agency. A few weeks later the liquidator called Angelo and told him that he had no entitlements because he was not an Australia citizen, and that the employer company had not made superannuation contributions for years.

LawRight assisted Angelo to write to the liquidator requesting a formal Notice of Rejection under the Corporations Regulation 2001 (Cth). Two days later Angelo’s Proof of Debt Claim was accepted and Angelo received a formal report to creditors. The report indicated that the company owed wages to several staff, had an extensive tax liability with the Australian Taxation Office, and had a number of secured creditors. It became apparent then that Angelo would not recover any money from the company for unpaid wages or superannuation

contributions. Angelo was not entitled to make a claim under the *Fair Entitlements Guarantee Act 2012* (Cth) because when his employment was terminated he was not an Australian citizen, permanent resident or the holder of a special category visa that allowed him to live in Australia for as long as he remained a New Zealand citizen.

Case study 9

“Felipe” worked as a head chef at a restaurant on a full-time basis. Felipe did not receive a copy of his employment contract or any payslips. Felipe resigned because he was not paid for almost 20 weeks. Felipe made a complaint to the Fair Work Ombudsman but the employer did not respond to the Fair Work Ombudsman’s invitation to participate in conciliation. The employer company subsequently went into liquidation and Felipe found out that the employer had not made any superannuation contributions on his behalf.

LawRight advised Felipe to make a claim via the FEG scheme. However, Felipe could only recover up to 13 weeks of unpaid wages under the scheme. Felipe was also advised to lodge a complaint with the Australian Taxation Office to try to recover his superannuation contributions, but it is unknown if Felipe recovered these.

Case study 10

“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.

Case study 11

“Mario” entered into an oral employment agreement with a cafe owner and started to work at the cafe on a permanent part-time basis a few weeks before Christmas. Mario’s wages were not paid and the cafe closed for the Christmas break. During the Christmas holiday, Mario received an email stating that his employment was terminated effective immediately, that the employer company was going into liquidation, and that the company did not have funds to cover Mario’s unpaid wages and annual leave.

LawRight advised Mario to make a claim via the FEG Scheme, however he would have to wait several weeks for the company to go into liquidation and the Department of Jobs and Small Business to assess his claim before he could receive financial assistance. It is unknown whether Mario has lodged a claim under the FEG Scheme and he has not returned to LawRight for assistance.

10. Employers' misconduct in the Transport, Postal and Warehousing industry

Case study 12

"Mario" is a migrant worker who was employed by a company as a courier and subcontracted to a third party company. After 3 weeks at work, Mario checked the registration of the truck he was required to drive and found out that the registration had expired before his employment commenced. Mario raised the issue at work and was directed to ignore the registration and continue to work. Mario contacted the Queensland Department of Transport and Main Roads and his local police station for advice. Mario was told to stop driving the unregistered truck. When Mario raised the matter at work again, he was told that if he did not want to drive the unregistered vehicle, his employment would be terminated. Mario's wages were not paid and he was not reimbursed for fuel expenses that he paid as stipulated on the employment contract he was provided.

Mario asked LawRight for help after he was dismissed and diagnosed with depression. Mario believed his mental health deteriorated as a result of threats made by the employer and his difficult financial position. Mario has not returned to LawRight for assistance.

Case study 13

"Ron" was employed as a courier under an oral employment contract and agreed to be paid a set amount each week covering both base hours and overtime hours. Ron told us that he worked for a courier company for 2 days and was then subcontracted to another courier company. Ron drove the company truck for 3 weeks and was let go when he asked to be paid. Ron never received payment or a termination letter. When Ron contacted the companies to discuss the situation, each company claimed that the other company was the employer.

Ron approached LawRight for advice about who his employer was, and about his options to recover unpaid entitlements. This case is ongoing.

11. Misuse of Australian Business Number and sham contracting

LawRight receives applications for pro bono assistance from many overseas nationals who have entered into oral agreements with businesses as independent contractors. They are asked to issue invoices for work performed but are then not paid for the work performed. As independent contractors, these workers cannot make a claim in the Federal Circuit Court small claims jurisdiction to recover money owed to them.

When those overseas nationals apply to LawRight for assistance, we refer them to other community legal centres that may be able to assist them to make a claim in a Magistrates Court or in the Queensland Civil and Administrative Tribunal if a claim falls within the minor civil dispute jurisdiction of the Tribunal. Despite the limited scope of the LawRight SRS to assist with these matters, we have observed from enquires received that there are some businesses that appear to have adopted a business model of engaging overseas nationals as contractors and not paying for their work performed.

LawRight also receives enquiries and requests for pro bono assistance from parties seeking to pursue unpaid entitlements when they are told by their employers that they are independent contractors, but their working relationship appears to be more like an employee. Whether a

person is an employee or an independent contractor is often a grey legal area. Clients are discouraged from applying to the court for a determination on that issue due to the costs risk involved in litigation, in particular in circumstances where clients often need to represent themselves in proceedings when employers are legally represented.

Case study 14

“Paulo”, “Gustavo” and “Miguel” are Brazilian nationals who were studying English in Australia. They responded to an online advertisement from a cleaning and painting business operated by an Australian citizen and sole trader, who promised over the phone to pay them \$25 per hour for cleaning and painting services. Paulo, Gustavo and Miguel attended work sites, performed the work required and issued invoices under their ABN. However, the invoices were not paid and the Australian sole trader never answered their calls again.

Paulo, Gustavo and Miguel were only studying in Australia for a few months and returned to Brazil without ever being paid for the work their performed.

Case study 15

“Maria” is a Colombian national who worked as a cleaner for a cleaning company and was asked to issue invoices using her ABN. Maria was told she would be paid on a fortnightly basis after she issued invoices. After a few months of working and issuing invoices, Maria had not received any payment. At that time, Maria was owed over \$3000. The company never answered Maria’s telephone calls or responded to her requests for payment.

LawRight referred Maria to another community legal centre for pro bono assistance.

Case study 16

“Paula” is an elderly woman with an acquired brain injury who worked as a caretaker and grounds person for 6 years. Paula was given a copy of a convoluted contract that required her to complete a list of duties over an estimated period of 4 days a week, and in return Paula was paid \$150 a week and supplied accommodation with electricity, internet and telephone connection. When Paula’s contract was terminated and she was evicted, she paid a lawyer to advise her about her rights and the lawyer wrote a letter of demand on Paula’s behalf. Paula’s former employer claimed that Paula was an independent contractor, and Paula did not pursue the matter further because she could not afford ongoing legal fees.

A few years later, Paula asked LawRight for assistance and we obtained a barrister’s opinion about Paula’s legal position, which was complex. LawRight could not secure pro bono representation for Paula, but we advised her that to be successful in a claim against her former employer, Paula would need to satisfy the court that she was an employee with unpaid entitlements under the Amusement, Events and Recreation Award 2010, the *Fair Work Act 2009* (Cth) and the corresponding Payscale from the relevant Notional Agreement Preserving a State Award for a period of her employment. Paula’s classification level under the Award was also unclear. With Paula’s consent, we discussed her case with the Fair Work Ombudsman. However, the Ombudsman could not assist because Paula faced significant evidentiary hurdles to establish her claim and the time limitation to commence proceedings against the employer was about to expire.

Due to Paula's vulnerability and the complexity of the legal issues she would need to present to the court, Paula would be unable to pursue her legal rights as a self-represented litigant. Unfortunately, Paula had to give up her claim.

12. Assistance with enforcement proceedings

When clients are successful in their unpaid wages claim, they might need further pro bono legal assistance to commence enforcement proceedings in the Federal Circuit Court if employers do not pay a judgment debt. Employees trying to access unpaid wages through the judicial system as self-represented litigants need stamina to be prepared to go to court twice if necessary and outcomes are never guaranteed.

Case study 16

"David" was a 17 year old apprentice chef who needed help to enforce an order of the Federal Circuit Court requiring his former employer to pay David's unpaid wages. David's mother acted as his litigation guardian and encouraged David to seek LawRight's assistance to enforce the judgment debt.

LawRight advised David about the enforcement process and prepared a letter of demand to his former employer. After this was sent, David informed us that the employer had paid the debt in response to his letter. He told us that he was happy that he did not need to return to the court to receive his legal entitlement.

13. Evidence of successful assistance from LawRight's SRS in unpaid wages claims

Clients of LawRight's SRS in the Federal Courts often tell us that without pro bono legal assistance they would not be prepared to self-represent in court proceedings in order to try to access their rights. Below are samples of the feedback received by LawRight's SRS from clients they have assisted:

"Perfect! Thank you very much for help me, all this assistance was amazing and I could never have done it by myself so I really appreciate that and I am very grateful."

"Extremely happy with all the valuable help I received. Fantastic service. Without [LawRight] I could never have represented myself."

"The support I received from [LawRight] and the lawyers that assisted me on a pro bono basis made a huge difference in getting a result I was satisfied with at mediation. It was such a relief to have the matter resolved and I'm happy with the outcome we achieved and I know I couldn't have done it without the assistance I received."

"I am extremely grateful that this service exists. I don't believe I have any suggestions for the improvement from my perspective."

"[LawRight] is a wonderful community service and the staff I dealt with were so friendly and professional. The pro bono lawyers were wonderful people to work with and I am so thankful that firms and people donate their time and expertise to this community service."

“The appointments provided relief and instilled confidence, the information given by the lawyer was clear and comprehensive, the last letter provided helped bring the case to a close.”

“I am sincerely appreciative of the assistance that has been given to me by the staff members of [LawRight]. They have all been unfailingly courteous and professional in their dealings with me. They have acted promptly in responding to my requests and queries. They have provided relevant and timely advice. [LawRight’s] assistance has also helped me better understand how to consider and approach the matter I requested their assistance with. It would be hard to improve upon the high level of service that [LawRight] already provides with the current level of resourcing.”

14. Improving access to justice through technology

LawRight will continue to provide personalised support to self-representing claimants through the SRS as an essential aspect of assisting people to pursue their legal rights. However, with downward pressure on funding for all community legal centres, new ways to effectively and efficiently assist clients are required.⁸

LawRight’s SRS and other interstate pro bono assistance services provide easy to read guides for accessing the court to make an unpaid wages claim.⁹ As described above, the Fair Work Ombudsman also provides a range of online community information and assistance in the form of wage calculation on their website, including a number of short videos to explain the process of making an unpaid wages small claim.

Ten years ago, in establishing the SRS, LawRight took an innovative approach to service delivery. More recently, in recognising that a significant number of clients have claims for unpaid wages, LawRight has again sought to innovate to assist this group of people who consistently seek assistance to receive their legal wage entitlements. LawRight has created a user friendly, client-centric online tool to assist these claims. The tool has two parts:

- an online guided interview that asks clients questions about their claim in a logical order and plain English with a visually accessible format; and
- based on clients’ answers to the online questionnaire, the court form required to commence an action for unpaid wages is generated.

It is expected that this tool will result in fewer errors in claimants’ materials, less court registry time in assisting claimants, and assistance to the court in any hearing where the claimant’s issues are properly articulated on the documentary materials. This resource is also expected to assist the SRS in managing scarce pro bono resources by reducing the number of appointments provided to claimant employees in order to assist them in commencing court proceedings.

LawRight is collaborating with The University of Queensland on the development, testing and evaluation of this tool. The technological approach was selected on the basis of proven long-

⁸ It is noted that this sector is already a very efficient

⁹ See JobWatch’s Small Claims Kit available at <http://jobwatch.org.au/small-claims-kit/> and Justice Connect’s resource available at https://www.justiceconnect.org.au/sites/default/files/Claiming%20for%20Unpaid%20Entitlements%20in%20the%20Federal%20Circuit%20Court_1.pdf

term use in the United States (using A2J Author cloud based software tool).¹⁰ This evidence-based research will produce important information about the viability of using such tools for this and other types of claims. With more funding, this type of online tool could be improved upon or applied to other areas.

15. Limits of what we know about wage theft in Queensland

This submission only provides information about unpaid wages claims where an employee recognises that there has been an underpayment and resolves to do something about it. This requires some prior knowledge about their legal rights and some ability and courage to act upon this. It therefore seems very likely that there are many underpaid or unpaid workers who, due to a range of vulnerabilities and barriers, might not even make an inquiry about making a legal claim, let alone commence a legal action. In many cases, workers might be unaware of their legal entitlements, their rights to pursue these in the courts or they are unable to act upon these rights.

Scholarship in Australia and across the world has identified that there is a large amount of unmet legal need. This is often caused by a failure of many in the community to identify when they have a legal claim or to know how to go about vindicating their rights. The Law and Justice Foundation of NSW has conducted several large-scale projects which show that many people take no action to resolve legal problems, and that this is exacerbated by factors such as poor English language skills and a lack of education.¹¹ This submission has pointed to examples of where these factors might pose particular barriers to making unpaid wages claims.

Thus, we make the point that there are likely to be many employees in Queensland who have been unpaid or underpaid in wages or entitlements, and who do not seek assistance from LawRight's SRS or access the justice system to vindicate their legal rights.

16. Conclusion

We congratulate the Queensland Parliament in its efforts to collect evidence about this significant issue. We hope to have added to its evidence gathering by providing data about those workers who have sought to pursue their legal entitlements through the Queensland registry of the Federal Circuit Court and sought assistance from LawRight's SRS for that purpose. We believe that the LawRight SRS provides invaluable assistance to workers and the courts. It is imperative that this service, and similar services, receive adequate funding from government to continue with this service.

LawRight's submission has also sought to identify a range of difficulties claimants face when they pursue an unpaid wages claim in the Federal Circuit Court small claims jurisdiction. While it is designed to be a user-friendly jurisdiction where an ordinary member of the public can access the court without a lawyer, the law surrounding such claims is complex and the burden on claimants to establish their claims is heavy and often difficult. Despite the development of a range of excellent educational resources described in this submission, and assistance from LawRight's SRS, many employees still choose not to make a claim (or to give up on a claim) because the system or process is too daunting.

¹⁰ See evidence use at <https://www.a2jauthor.org>

¹¹ See Law and Justice Foundation reports including at [http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_3_Taking_no_action_Aus_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_3_Taking_no_action_Aus_FINAL.pdf)