

Submission
Committee Secretary
Education, Employment and Small Business Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Ms Manderson

Re: Inquiry into wage theft in Queensland

I wish to make a submission on the above inquiry.

If the Committee wishes further input or assistance, I am delighted to assist and am available by any of the means below.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'DM', with a wavy line extending to the right and a period at the end.

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INTRODUCTION

Wage theft is a multi-dimensional, interdisciplinary problem that has a wider manifestation than unpaid wages to employees. It is a complex problem and as such, is difficult to define; to place a boundary around; and, to solve.

In its simplest form, the term refers to the circumstances where an employee is underpaid wages; or, circumstances where an employee is unpaid wages due and owing. Further, is the consequential impact of an unpaid or underpaid employee being unpaid or underpaid, is usually a lack of contribution by the employer owed via the superannuation guarantee that flows to the employee's superannuation fund (based on the employee's gross wages).

The superannuation issue more widely includes employees who are paid correctly but their employer either under-contributes their superannuation entitlement or makes no contribution to their superannuation entitlement. This is also a form of wage theft, since a wage in Australia includes the compulsory contribution that employers are required to make on behalf of each individual employee.

Employers are required, when determining gross wage entitlements for employees, to withhold an estimate of the personal income tax owed by the taxpayer to the Australian Taxation Office (ATO). This withholding amount, or "Pay As You Go" (PAYG) contribution, is then required to be forwarded by the employer, on behalf of the employee, to the ATO. Where an employer fails to remit PAYG to the Commonwealth, then taxation revenue collection is lessened. Thankfully, employees are not responsible for shortfalls or failures to remit PAYG by employers, however it is the case that where an employer is failing to remit PAYG to the ATO that it is almost certainly not meeting its superannuation guarantee obligations to its individual employees. Furthermore, while the ATO has the right to seek recovery of the PAYG withheld by an employer but not passed on, it often does not recover those sums, leading to a shortfall in predicted revenue for the Commonwealth Government that in turn affects funding to state and territory governments.

There is an increasing and pervasive incidence of companies not meeting their various obligations and when eventually there is enough pressure on them to perform, they simply shut up shop and set up again (in almost identical circumstances) without making good their outstanding obligations to creditors including their employees. This phoenix company behaviour results in non-payment of wage and related entitlements to employees as well as contributions to governments, including state based taxation requirements.

We assume an employer-employee relationship between the parties when considering wage theft. However, wage theft also arises where a person entitled to be appointed as an employee is instead offered work on the basis of a contractor. While contracting is legitimate and appropriate in circumstances where a person offers their services to various unrelated enterprise, the substitution of a person's employment contract with contracting poses a risk to

the financial well-being of the worker. Contracting may involve an hourly rate or an agreed sum for a task performed. Where an hourly sum is agreed upon, it will often be higher than the wage rate and therefore often misconceived by the worker as “better”. The reality is often different because contractors are not automatically entitled to the minimum wage, nor to the superannuation guarantee, nor sick leave, nor holiday accrual or long service leave. These costs to an employer are significant and therefore contracting is a desirable way for an employer to avoid: (i) the full cost of wages and entitlements; (ii) the laws that apply to protect workers employed as employees; and, (iii) the higher cost of administering an employee as distinct from a contractor. Not all employers are unscrupulous though, and workers often enjoy the benefits from being a contractor, including a wider array of tax deductible items they may claim against their income as well as their ability to incorporate their business as a company. Less-scrupulous employers and contractors are able to avoid the application of employment laws as well as utilising the booming industry of avoiding paying creditors by various means but most popularly via the use of the phoenix company.

Anecdotal evidence suggests there are often trades working in contractor relationships where the arrangement is in fact one of employer-employee, but where it suits both parties to characterise the relationship as non-employment based, notwithstanding evidence to the contrary. This arises where both parties benefit from not meeting the various statutory requirements as to superannuation and remission of income tax and hold the view that when the burden becomes too great, they may simply fold their respective businesses and start over: a second form of phoenix company behaviour. This wide spread behaviour costs the Australian economy around \$5 billion per year.

One variation on the contracting relationship arises where a combination of employment entitlements is made available to workers involving the receipt of a wage together with treatment as a contractor for the purposes of otherwise avoiding employer obligations. One example is within the painting industry where the worker accepts the conditions for various reasons including paucity of work and the attractiveness of the paid hourly rate.

So called “work experience” appears to be an opportunity for free labour and arises where a person works in an organisation for the purposes of getting experience or being exposed to an industry where they might have aspirations to work. This unpaid work may lead to a paid position and in the worst instances, no guarantee is given allowing an unscrupulous employer to engage a series of workers over time without making wage payments.

Evidence also exists that in some instances workers are required to make “deposits” to employers for the opportunity to get work experience. These deposits may or may not be refundable. Some workers are also asked to pay for “training”, similar in nature to deposits, but with no prospect of a refund.

Case law reports show that there are often unfair dismissal actions accompanied by under-payment or non-payment of wages owing. In these circumstances, the employer fails to make final wage payments to the worker on the basis of the failure of the employment agreement,

however the worker is still entitled to be paid their final sum outstanding for hours worked; the paid entitlements that accrue with that final sum; and, any superannuation guarantee contribution to the worker's superannuation fund.

It is the case that the wage conditions and awards in many instances are unnecessarily complex. Contractual complexity is not only confounding to employees seeking to determine whether or not they are being paid in accordance with their employment award, they are also difficult for employers to navigate and for various reasons. So it is the case that in normal commercial circumstances where an employer is solvent and willing to do the right thing by its employees, (for example with Lush and Qld Hospitals), claims are made of underpayment of wages. This goes to regulatory complexity.

We face a long-run towards disruption of the workplace, where increasing numbers of workers are working part-time for wages or working for themselves, it is apparent that the scope of our understanding of 'minimum wages' ought to be reconsidered. This is based on the opinion that there are a lot of subcontractors and small business owners who work for many unpaid hours in order to establish or keep running their business, in less than ideal circumstances. That is to say that where a contractor agrees on a supply price, (particularly for services rendered), and then finds that the task requires more time, it is axiomatic that the hourly rate quoted for drops as an average of the hours in fact taken for the payment received. In these circumstances, that hourly rate may be dismal and if the contractor is a sole contractor effectively working for that hourly rate, then the contractor is earning less than the minimum wage.

"Casualisation" of the workforce occurs when employers reduce the number of full-time employee jobs on offer to those on a part-time basis. Part-time jobs, unless permanent appointments, also provide for a lessening of employment benefits. The extent that this is a problem related to wage theft is not known, although there are strong arguments made in favour of such employment being less stable, primarily by union interest groups.

It is suggested that self-employed workers as a proportion of the total workforce has not changed much for the past ten years. If the securing of contracting parties is lessening then that economic factor will want watching if it translates to work-loss, since such a decline will result in a wealth shift. This appears at least to be no more than a reflection of macro-economic effects, rather than poor practices in the workplace. If the proportion of the total workforce of those workers employed as wage earners decreases, the ranks of the contracting workforce will increase, and it is posited, that this will cause a second wave of a more difficult problem impacting on living standards world-wide. Note that recent evidence suggests a slowing of this change, however it is recommended that this issue remain on the longer-term horizon of stakeholders as an issue likely to cause ongoing difficulty.

This submission addresses the aspects of wage theft as set out by the Queensland Government's terms of reference.

DEFINITION

The US website [wagetheft.org](http://www.wagetheft.org) defines “wage theft” as: “a variety of infractions that occur when workers do not receive their legally or contractually promised wages”. Examples given include: “non-payment of overtime; not giving workers their last pay (cheque) after a worker leaves a job; not paying for all the hours worked; not paying minimum wage; not paying a worker at all”.¹ The Australian position is along the same lines, as is New Zealand.²

Other variations include the claim by Australian Unions state that wage theft is via “employers deliberately underpaying workers and refusing to pay mandatory superannuation”³ and in New Zealand the paying of premiums by the employee to the employer.⁴ The US state of San Francisco completed a wage theft inquiry in 2013 finding that it includes:⁵ where an “employer requires an employee to work “off the clock”; where an employer commits payroll fraud by misclassifying an employee as an “independent contractor” or as an employee “exempt from overtime and break requirements”; an employer steals an employee’s tips, or illegally deducts money from a worker’s paycheck; an employer pays an employee late, with a check that has insufficient funds, or fails to give an employee their last paycheck after they have quit or been fired”.⁶

It is apparent that the problem of wage theft is sufficiently understood to be adequately defined and that there is similar behaviour occurring across jurisdictions. It is important to note however, that while the idea of wage theft is readily understood; it is not the case that a single solution is evident and moreover, aspects of the problem do suffer from definitional problems, (such as “phoenixing”), discussed below in this report.

¹ <http://www.wagetheft.org/faq/> <accessed 2 July 2018>

² Catriona MacLennan “Wage theft in Aortearoa/New Zealand: How employers are stealing millions of dollars from workers and how to fix it” April 2017 paper, p3 published at: http://www.standagainstslavery.com/wp-content/uploads/2017/04/WageTheft_MacLennanApr2017.pdf <accessed 5 July 2018> states: “is where employers steal from workers by paying them less than the minimum wage, not paying them at all, failing to pay holiday pay, not paying for work on public holidays, or charging unlawful employment premiums”.

³ https://www.australianunions.org.au/wage_theft_factsheet <accessed 2 July 2018>

⁴ Catriona MacLennan “Wage theft in Aortearoa/New Zealand: How employers are stealing millions of dollars from workers and how to fix it” April 2017 paper, p8, published at: http://www.standagainstslavery.com/wp-content/uploads/2017/04/WageTheft_MacLennanApr2017.pdf <accessed 5 July 2018> pp7-8 states that employment premiums: “are unlawful payments, commonly taken by employers from migrant workers. In particular, migrant workers may be charged thousands of dollars in premiums by employers for the provision of jobs or for assistance with immigration applications”.

⁵ <https://sfgov.org/olse/ftp/meetingarchive/www.sfgsa.org/modules/Wage%20Theft%20Task%20Force%20Final%20Report-documentid=11224.pdf> <accessed 10 July 2018>

⁶ Further enunciations of “wage theft” include where accrued sick leave is not paid, including leave unpaid where legitimate time is taken to assist with sick family members: <https://sfgov.org/olse/ftp/meetingarchive/www.sfgsa.org/modules/Wage%20Theft%20Task%20Force%20Final%20Report-documentid=11224.pdf> <accessed 10 July 2018> p8.

(a) The incidence of wage theft in Queensland, with reference also to evidence of wage theft from other parts of Australia

EVIDENCE

No evidence, other than anecdotal, has been collected in Queensland regarding wage theft. The most recent report on wage theft in Australia is a comprehensive survey-based report of temporary migrants. It paints a grim picture.⁷ This Australia-wide survey, (“the Australian survey”), is drawn from 4,322 temporary migrants from 107 nationalities. The cohort of temporary migrants in Australia comprise up to 11% of the Australian labour market.⁸ While the Australian survey notes that it suffers from some methodological concerns, primarily stemming from the anonymity of those completing the survey, and ensuring wide coverage of the survey,⁹ it nonetheless is the best indicator of the nature and extent of wage theft in Australia today.

The Australian survey shows that “almost a third (30%) of survey participants earned \$12 per hour or less” (approximately half the minimum wage for casual employees, and further that nearly “half (46%) of participants earned \$15 per hour or less (excluding 457 visa-holders)”.¹⁰ The Australian survey further reports useful break-up of the data by visa category, nationality and, inter alia, industry/job classification. It is well-prepared and detailed.

Unions NSW produced a report¹¹ based on surveys of job advertisements that highlights the extent of wage theft via a systematic series of advertisements where the wage shown to be paid is below the minimum wage. This suggests that employers are either ill-informed as to wage rates or ill-advised as to their importance. Their website provides a register “Wage Thieves Register” of those who have advertised rates of pay below the minimum award rate.¹² The State of Victoria Premier’s Office issued a press release in May 2018 stating that if re-elected, then “employers who deliberately withhold wages, superannuation or other employee entitlements, falsify employment records, or fail to keep employment records will

⁷ L Berg, B Farbenblum, “Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey”, November 2017: <https://www.mwji.org/highlights/2017/11/14/report-released-wage-theft-in-australia-findings-of-the-national-temporary-migrant-work-survey> <accessed 12 July 2018> Note also L Berg, “Migrant Rights at Work: Law’s Precariousness at the Intersection of Immigration and Labour Law”, 2015, Taylor and Francis, London.

⁸ L Berg, B Farbenblum, “Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey”, November 2017, p5.

⁹ L Berg, B Farbenblum, “Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey”, November 2017, p11.

¹⁰ L Berg, B Farbenblum, “Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey”, November 2017, p25.

¹¹ 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> <accessed 20 July 2018>

¹² <http://www.wagethieves.com.au/wp/wage-thieves-register/> <accessed 20 July 2018>

face fines of up to \$190,284 for individuals, \$951,420 for companies and up to 10 years jail”.¹³ There is evidence in New Zealand of wage theft receiving wide attention.¹⁴

INQUIRIES

The Parliament of Australia’s Select Committee on the Future of Work and Workers, established by the Senate to inquire and report on the impact of technological and other change around work and workers has been granted an extension to report until 15 August, 2018.¹⁵ With around 10% of workers in Australia being within the retail sector, and with that sector having complex bargains and awards; shift work; and, odd hours, it is apparent that a form of involuntary wage theft also occurs. This is due, in part, to employers not keeping their payroll systems up to date and that challenge is “in need of serious transformation”.¹⁶ A related concern is around wage theft in the gig economy, where a person who is not technically a wage earner is deprived the minimum wage.¹⁷ This also arises in the Franchising arena, where investors buy into a franchise operation to provide themselves with employment, often with devastating consequences.¹⁸

It will be interesting to see the recommendations made as a result of this inquiry, because those recommendations will impact on the regulatory framework of work and workers throughout Australia.

¹³ Office of Premier “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/> <accessed 19 July 2018>

¹⁴ Note that in New Zealand, an official information request by the Council of Trade Unions revealed at least \$35 million has been paid by 25 employers in outstanding holiday leave. The NZ government estimates that wage theft in NZ may approximate \$2.3 billion. http://www.unite.org.nz/wage_theft_revealed <accessed 10 July 2018>

¹⁵ Parliament of Australia, Select Committee on the Future of Work and Workers, Australia:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers <accessed 25 July 2018>

¹⁶ PWC Australia, “Paid Right in Retail: Let Paid Right bring your confidence back”:

<https://www.pwc.com.au/people/payroll/paidright/payroll-compliance-in-retail.html> <accessed 25 July 2018>

¹⁷ R Johnstone, A Stewart, “Swimming Against the Tide? Australian Labour Regulation and the Fissured Workplace”, 37(1) Comparative Labour Policy Journal 55, 2015

¹⁸ Submission to Senate Select Committee on the Future of Work and Workers, Submission 57, J Stanford, The Australia Institute Centre for Future Work, “The Future of Work Is What We Make It”, January 2018, pp25-26 “Another factor facilitating the expansion of precarious work practices in general (and gig work in particular) has been the generally passive, inconsistent application of traditional labour regulations and standards. In some cases... existing regulations (like minimum wage laws, collective bargaining rights, and other minimum standards) explicitly exclude non-standard workers. Regulators have been slow to recognise the risks posed to the quality of work by the expansion of precarious work and the resulting avoidance of traditional labour regulations; they have failed to adapt regulatory models to encompass workers in these growing categories of nominally independent labour. In other cases, the applicability of existing regulations is uncertain; but regulators have still been slow to test the robustness or applicability of existing laws. In still other cases, it is clear that existing regulations should protect contingent or “gig” workers, yet the widespread non-enforcement of those rules undermines their real-world effect. The epidemic of wage theft documented in numerous Australian franchise-based businesses in recent years, which have avoided paying even minimum wages to thousands of employees, is a good example of this regulatory failure”:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/Future_ofWork/Submissions <accessed 21 July 2018>

(b) the impact of wage theft on workers, families, law-abiding businesses, the economy and community

In its widest sense, wage theft is one element of an estimated \$5 billion per year direct cost to the Australian community that phoenix company operators are estimated to cost the economy.¹⁹ The apparently widespread occurrence of wage theft, together with the associated activities, and particularly phoenixing by some small businesses, is firmly entrenched as part of “usual” business practice within Australia. The difficulty is that the particular aspects of the problem are very difficult to identify until after the damage has been done.²⁰ It is important to note that there are two schemes that currently allow for employees to recover entitlements; and, the use of these schemes is not limited to instances of wage theft.²¹

With respect to wage theft particularly, one of the real difficulties experienced by business, is understanding and complying with the particular award/s that apply to employees. The idea of a minimum wage is simple, as ought to be ensuring that wages meet that standard. While there is a minimum wage in place, many of the various award conditions make it difficult for employers and employees to understand the calculation of the correct amount of wages that are to be paid in some circumstances. In 2016 the Queensland Newman government failed to recover costs against IBM regarding an attempt by the government to recoup losses from the health payroll scandal.²² More recently, cosmetics giant Lush admitted to payroll errors of around \$2million.²³

Even if payroll systems are adequate, it is still difficult to ensure that while technically efficient, they in fact pay the correct amount due to employees for wages earned. If complex computer systems can get it wrong, there is little wonder that it’s all too hard for employee wage earners.

¹⁹ Price Waterhouse Coopers, “The Economic Impacts of Potential Illegal Phoenix Activity”, A report prepared at the request of the Australian Taxation Office, Fair Work Ombudsman and the Australian Securities and Investments Commission, June 2018, piii. It asserts that the direct cost of illegal phoenix activity for the period of 2015-16 constituted unpaid trade creditors to business \$1.162-\$3.171 billion; unpaid entitlements to employees \$0.031-\$0.298 billion; and, unpaid taxes to government and associated compliance costs \$1.660 billion giving a total direct cost of somewhere between \$2.850-5.130 billion. These estimates are based on data provided to PWC by the ATO.

²⁰ For example, where a company that is an employer goes into liquidation, it is unlikely that there will anything more than a few cents in the dollar returned to its various creditors. Those creditors include workers who are often owed wages and other entitlements. They may recover some money from the Fair Entitlements R Johnstone, A Stewart, “Swimming Against the Tide? Australian Labour Regulation and the Fissured Workplace”, 37(1) Comparative Labour Policy Journal 55, 2015.

²¹ The two schemes are the Fair Entitlement Guarantee (FEG); and, the General Employee Entitlements and Redundancy Scheme (GEERS). Note too, that employee claims are not necessary paid in full.

²² AAP, “Queensland Health payroll fail: Government ordered to pay IBM costs”, The Sydney Morning Herald, 4 April 2016.

²³ B Wylie, “Lush Australia admits it underpaid staff by \$2m, payroll errors could affect 5,000 employees”, ABC News, 17 July 2018.

It seems that there is good cause to reconsider where the responsibility for correct payment of wages arises, and especially in circumstances where a variety of stakeholders (including union bodies) are part of a negotiation that leads to complex industrial award conditions.²⁴

There is no doubt that all members of the community are stakeholders in the problem of wage theft and that ultimately many people are affected, even though the precise determination of the social and economic costs cannot be precisely quantified. The non-direct costs of wage theft include: employee stress; a discouragement effect on labour supply; increased social welfare burden as a result of increased government transfers to counter the impact upon workers; and, adverse impact on competition within the marketplace by discouraging businesses to employ because the barriers to entry for complying businesses are too high or “phoenix activity becomes the accepted business model and previously law businesses begin to avoid payment of liabilities”.²⁵

One of the very real concerns addressed sparsely within the Australian literature relating to community impact is the cultural cost of illegal behaviour.²⁶ If we accept that there are direct and indirect costs of wage theft to the community, and we understand that the activity is unevenly spread throughout the economy), for example where we see more allegations in retail, construction and where migrant workers are used), then it is axiomatic that “acceptance” of illegal practices will become wider spread. “Acceptance” here includes both the willing adoption of the illegal practice because of various factors, including widespread use making it seem ok as well as the reluctant adoption of an illegal practice where the perpetrator feels forced to adopt the behaviour because they have no other palatable options. The latter is referred to in the PWC report in referring to the inevitable distortion in competition where illegal operators can cut their costs by noncompliance creating a ‘race to the bottom’ with a concomitant response by lawful competitors.²⁷

²⁴ Submission to Senate Select Committee on the Future of Work and Workers, Submission 112, Australian Council of Trade Unions, “The Future of Work: Great Inequality and Insecurity Unless We Act”, 26 February 2018, p 25 contains a recommendation taken from International Labour Organisation policy that where an employment agency is utilised to hire labour, to consider that that the end user employer be jointly responsible for ensuring employees are paid, p25. One related concern is that sometimes workers do not know the identity of their ultimate employer: if this is so, then it seems likely that the details of their employment agreement are also obscured.

²⁵ Price Waterhouse Coopers, “The Economic Impacts of Potential Illegal Phoenix Activity”, A report prepared at the request of the Australian Taxation Office, Fair Work Ombudsman and the Australian Securities and Investments Commission, June 2018, p18 “Both responses have the overall effect of particular industries being dominated by potential illegal phoenix operators and will have exponential effects. This disincentive to operate lawfully in certain industries could increase the overall size of the problem or distort the most productive mix of industries in the economy in to these industries with a prevalence of potential illegal phoenix operators and an artificial competitive advantage. Similarly, if potential illegal phoenix operators become prevalent in particular industries, lawful business may find it more difficult to access credit, due to the perceived risk of the industry and credit providers’ difficulty in differentiating potential illegal phoenix companies from legally operating businesses”.

²⁶ This is similar in nature to a social norm in the sense that social norms pick up on values, assumptions and behaviour of both groups and individuals enabling justification of undesirable behaviour.

²⁷ Price Waterhouse Coopers, “The Economic Impacts of Potential Illegal Phoenix Activity”, A report prepared at the request of the Australian Taxation Office, Fair Work Ombudsman and the Australian Securities and Investments Commission, June 2018, pp16-18. Chapter 11 of the Black Economy Taskforce seeks to address

(c) the various forms that wage theft can take, including through unpaid super, the misuse of ABNs and sham contracting arrangements

FORMS OF WAGE THEFT

These are generally apparent throughout this report, note that the introduction makes clear that unpaid and underpaid wages are the most prevalent form of wage theft. Further, that there are often flow-on effects as a result such as employers failing to make superannuation contributions on behalf of employees.²⁸

With respect to Australian Business Numbers (ABNs), the Commonwealth Black Economy Taskforce reported multiple registrations by directors under slightly different names or different dates of birth; 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).²⁹

Misuse of the ABN is related to sham contracting, since the ‘set and forget’ application and granting of an ABN allows for workers to obtain an ABN. Further, the lack of tax reporting required around contractors, as distinct from the tax reporting required for employees, facilitates sham arrangements. Where an employee is wrongly classified as a contractor, they:³⁰

“... lose access to basic workplace relations protections (including minimum or award wages). This is used to avoid paying PAYG and payroll tax, workers’ compensation premiums and superannuation contributions.”

Australian Government Treasury has called for submissions, due 17 August 2018, to the consultation process on “Modernising Business Registers Program”. The purpose of the call is, in part, to improve confidence in the business registers maintained by the Commonwealth; to mitigate economic loss by minimising fraud and business misconduct; and to provide a more flexible means of dealing with phoenix activity and misuse of ABNs. Given that there

cultural norms via a sustained high-profile public campaign: Commonwealth Treasury, “Black Economy Taskforce: Final Report”, Commonwealth of Australia, October 2017, pp270-283: https://static.treasury.gov.au/uploads/sites/1/2018/05/Black-Economy-Taskforce_Final-Report.pdf <accessed 10 July 2018>

²⁸ Australian Senate, Economic References Committee, “Superbad – Wage theft and non-compliance of the Superannuation Guarantee”, Commonwealth of Australia, May 2017.

²⁹ Commonwealth Treasury, “Black Economy Taskforce: Final Report”, Commonwealth of Australia, October 2017: https://static.treasury.gov.au/uploads/sites/1/2018/05/Black-Economy-Taskforce_Final-Report.pdf <accessed 10 July 2018>

³⁰ Commonwealth Treasury, “Black Economy Taskforce: Final Report”, Commonwealth of Australia, October 2017, p221: https://static.treasury.gov.au/uploads/sites/1/2018/05/Black-Economy-Taskforce_Final-Report.pdf <accessed 10 July 2018>

are some 250 different registers in Australia relating to business and approximately 3.5 million mismatched director records (when comparing the ASIC registry with the ABN registry), it seems that there is room for improvement from the regulatory side.³¹ 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.

EXPLOITATIVE EMPLOYMENT PRACTICES

The Australian survey sought related details from respondents in an attempt to “round out” the data being collected. The information collected reflects similarly outlawed offshore behaviour and confirms the anecdotal evidence collected previously. Particularly, the Australian survey illuminates four practices that amount to exploitation as follows:³²

1. The confiscation of passports, either by employers (3% of all participants) or accommodation providers (2% of all participants) and of all affected participants: 28% were in the food services industry, and 18% from the horticulture industry;
2. Threats made to 4% of all participants from within their workplace that they would be reported to the Immigration Department, either by their employer/manager (3%) or by a workmate (1%);
3. Seeking payments from workers in order to secure employment, sometimes called “deposits” (sometimes refundable) with 5% of participants stating they had paid ‘deposits’ and a further 6% paying money at the outset of employment that was described as ‘training’ or ‘fees’; and
4. Payments made by workers, called ‘cash back payments’, to employers of part of the wage paid to them. The practice extends beyond 7-Eleven employers and amounted to 4% of those surveyed.

The Commonwealth Fair Work Ombudsman made an inquiry into 7-Eleven in 2016,³³ into allegations of underpayment of wages and falsification of employment records within the franchise network. While there are some incentives associated with the use of the franchise model of the business, employers within the network nonetheless engaged in wage theft, including the cash back arrangement. This arrangement, described by one worker, as staff being paid “for all hours at the award rate” on the basis that “they must repay in cash everything exceeding their usual \$12 per hour”.³⁴ This mechanism was apparently used so that the store could report the correct hours and pay within the franchise reporting arrangements but recoup the “extra” so as to retain the theft of underpayment at the local

³¹ Commonwealth Treasury, “Black Economy Taskforce: Final Report”, Commonwealth of Australia, October 2017, pp102-103: <https://static.treasury.gov.au/uploads/sites/1/2018/05/Black-Economy-Taskforce-Final-Report.pdf> <accessed 10 July 2018>

³² L Berg, B Farbenblum, “Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey”, November 2017, pp41-45.

³³ Fair Work Ombudsman, “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”, Commonwealth of Australia, April 2016.

³⁴ Fair Work Ombudsman, “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”, Commonwealth of Australia, April 2016, p59.

store level. As at March 2018, there were eleven matters taken to court in relation to 7-Eleven with penalties exceeding \$1 million. Wage theft nonetheless continues to occur.

Incidences such as 7-Eleven and the apparent increasing use of wage theft as a mechanism to increase profitability by some businesses may have provided the impetus for the Victorian government's recent announcement to introduce a maximum jail term of 10 years for employers, (and a fine for businesses of up to \$950,000), engaging in the conduct.³⁵ The ACTU has referred to wage-theft in these circumstances as "a business model" that is effective in part because the only means of redress being our "slow and expensive court system" that proves inefficient and resolving the issue "and ineffective at deterring the perpetrators of wage theft".³⁶

PHOENIX COMPANIES

Phoenicing ... Illegal phoenix activity is described by the Australian Securities and Investments Commission (ASIC).³⁷

"... involves creating a new company to continue the business of an existing company that is deliberately liquidated to avoid paying taxes, creditors and employee entitlements. Directors involved in this activity transfer the assets of the existing company to the new company without paying fair or market value, leaving any debt with the existing company. After transferring the assets, the director usually places the existing company in liquidation, leaving no assets to pay creditors. The new company continues the business. It is often managed by the same directors and operates in the same industry. By engaging in this illegal practice, directors intentionally avoid paying debts owed to creditors, employees and statutory bodies (e.g. the Australian Taxation Office)."

There is little doubt that phoenix company and associated activity is occurring throughout Australia at great cost to all, including wage earners.

³⁵ B Smee, AAP, "Victorian government pledges to introduce jail terms for wage theft", The Guardian, 26 May 2018.

³⁶ Submission to Senate Select Committee on the Future of Work and Workers, Submission 112, Australian Council of Trade Unions, "The Future of Work: Great Inequality and Insecurity Unless We Act", 26 February 2018, p 2 refers to 7-Eleven, Caltex, Bakers Delight and "celebrity chef restaurants" as high profile examples of wage theft that remain unresolved. The submission also contains a recommendation, where an employment agency is utilised to hire labour, to consider that that the end user employer be jointly responsible for ensuring employees are paid, p25.

³⁷ ASIC, "Illegal phoenix activity", Compliance for small business, ASIC: <https://asic.gov.au/for-business/your-business/small-business/compliance-for-small-business/illegal-phoenix-activity/> <accessed 20 July 2018>

(d) The reasons why wage theft is occurring, including whether it has become part of the business model for some organisations

It is only possible to understand why wage theft occurs by examining the forms that it occurs in. Those forms are discussed throughout this submission and will not be elaborated upon here. An example of blatant wage theft is that contained in the case of the business Trek North. There are various Fair Work Ombudsman cases concerning the director of this business and allegations relating to the workplace.³⁸ The operator in question was found to under-pay employees. He was sentenced to jail for contempt of court in May this year. The matter is currently on appeal. It is the first instance where a court has tried such a matter on the grounds of contempt. The operator was apparently sorry and was ordered to spend only ten days out of the 365 days ordered because of mitigating factors.

The contempt allegations arise because of the complicated means that the operator utilised: including multiple bank accounts; the use of a family trust; two companies; different business names; and, associated with the last two items, phoenix company behaviour. Court orders were breached and penalties arising from same were not paid, the first company was left to 'whither on the vine' and logically the operator was unable to meet employee obligations. Some of the alleged behaviour by the operator/business includes unpaid trial periods of work and passing an exam in order to be paid. On 9 July the Australian Financial Review reported that workers within the business were alleging fresh complaints around the operator underpaying them.³⁹ It will be interesting to see how this matter pans out and whether it has any impact on others engaging in wage theft.

There is evidence of advisors operating in the company sphere to assist with the creation and use of phoenix companies. These advisors are referred to generically as pre-insolvency advisors and they are very much part of the problem.⁴⁰

³⁸ *Fair Work Ombudsman v Jorgensen* [2018] FCCA 1201 (30 April 2018); *Fair Work Ombudsman v Jorgensen (No 2)* [2018] FCCA 1202 (3 May 2018); and, *Fair Work Ombudsman v Jorgensen* [2018] FCCA 1235 (10 May 2018). Furthermore, the operator appeared in the Cairns Magistrates Court (13 February 2018) and found guilty of contravening s 1308(2) of the Corporations Act, fined \$2,000 and disqualified from managing a corporation for a period of five years. The appeal against that conviction and sentence will be heard in the Cairns District Court 17 August, 2018. ASIC reference 18-044MR: <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-044mr-former-director-of-cairns-tour-company-convicted-for-making-a-false-or-misleading-statement-to-asic/> <downloaded 29 July 2018>

³⁹ D Marin-Guzman, "Convicted tour operator again accused of 'underpaying' visa workers", Australian Financial Review, 9 July 2018: https://www.afr.com/news/policy/industrial-relations/convicted-tour-operator-again-accused-of-underpaying-visa-workers-20180709-h12g2s?eid=Email:nnn-16OMN00049-ret_news-membereng:nnn-06%2F09%2F2016-BeforeTheBell-dom-business-nnn-afr-u&et_cid=29135169&et_rid=1925796749&Channel=Email&EmailTypeCode=&LinkName=https%3a%2f%2fwfw.afr.com%2fnews%2fpolicy%2findustrial-relations%2fconvicted-tour-operator-again-accused-of-underpaying-visa-workers-20180709-h12g2s%3feid%3dEmail%3annn-16OMN00049-ret_news-membereng%3annn-06%252F09%252F2016-BeforeTheBell-dom-business-nnn-afr-u&Email_name=BTB-07-10&Day_Sent=10072018 <accessed 11 July 2018>

⁴⁰ ASIC, "2016-17 ASIC business plan summary by sector: Insolvency practitioners": <https://download.asic.gov.au/media/4060345/asics-2016-17-insolvency-practitioners-summary-business-plan.pdf> <accessed 19 July 2018>

(e) whether wage theft is more likely to occur in particular industries, occupations or parts of the state or among particular cohorts of workers

The difficulty in determining this with any degree of specificity is that the drivers of wage theft differ depending upon the factual circumstances and context that it arises within. In the 7-Eleven scandal, the agreement between the franchisor and franchisees was a significant driver. In the case of trades generally, it appears to be the case that sham contracting arrangements are rife as are the issuance of invoices with false ABNs.⁴¹ It will also be the case that wage theft may well thrive in industries that differ as between Australian states and territories.

It is the case that the Australian survey⁴² identified that 38% of the lowest paid jobs were in the food services industry.⁴³ This is easily the largest percentage and was followed by professional services at 11%; those working on farms, picking vegetables or fruit and packing or other farm work at 9%; cleaning 9%, and retail at 8%.⁴⁴ It is difficult to assert with any accuracy that these percentages apply to the broad population of Australian workers, although it is not difficult to imagine that this might be so.

On the other hand, phoenixing is generally attributed 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.

It is possible that some businesses are simply not viable and that the proprietors of those businesses have little to no understanding about how to determine whether or not they ought to stay in business. The desire to survive in business, hardly adds to the risk taken by a business owner by being in business and leads to a range of actions that include cost cutting, by for example paying low wages; being slow in paying creditors, notably the Australian Taxation Office that is often used by business as a source of operational funding; and, phoenixing, where once the business can no longer survive, it is simply abandoned with creditors including employees left stranded and the business then recommences in much the same form and often using an almost identical business name.

⁴¹ N Tabakoff, A Aikman, "Tax leak as tradies borrow Bunnings ABN", The Australian, 2 August 2017: <https://www.theaustralian.com.au/national-affairs/treasury/tax-leak-as-tradies-borrow-bunnings-abn/news-story/aec7f98c8e9e78b6f2736bac8ac4de34> <downloaded 29 July 2018>

⁴² L Berg, B Farbenblum, "Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey", November 2017.

⁴³ Being a waiter, a kitchen hand, or a food server; L Berg, B Farbenblum, "Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey", November 2017, pp20-21.

⁴⁴ L Berg, B Farbenblum, "Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey", November 2017, p20. See Figure 9 at page 21.

The Australian survey makes clear the dilemma that arises by showing that migrant workers in fact know they are not being paid the correct amount of money but persevere nonetheless.⁴⁵

“Though they may not have known their precise entitlements, the overwhelming majority who earned \$15 or less knew that the legal minimum wage was higher (73% of international students and 78% of Working Holiday Makers). However, they perceived that few people on their visa can expect to receive minimum wages under Australian labour law, with at least 86% of them believing that many, most or all other people on their visa are paid less than the basic minimum legal wage.”

There is no reason to suspect that Australian resident workers are not also subject to wage theft.

Because the problem arises on an individual basis, there is an incentive for government and policy makers to look for individual solutions. It is suggested instead that the problem of wage theft be viewed as an aggregate problem and dealt with on that basis. When done so, it will more ably allow for individual action.

It is therefore posited that the solution to the problem of wage theft does not arise by targeting particular industries. Dealing with particular and individual instances by regulating for them or by providing further specific action for particular circumstances will only weaken the existing regulatory structure that attempts to enable the conduct of business and the proper treatment of employees and related transactions overall.

Moreover, if the individual approach, currently applied on an ad hoc basis, was making ground in terms of solving the problems relating to wage theft, then it follows that the reported incidence of wage theft ought to be decreasing. This is currently not the case. Because businesses cross state and territory borders, and because of the complex nature of the problem, state-federal cooperation is required. The difficulties will not be fixed with a ‘one agency’ approach.

Further, because this is a nationwide problem, it involves a series of regulators and court system enforcement much of it being federal in nature for example: the ATO; ASIC; and, APRA in addition to state government stakeholders.

Therefore, 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.

⁴⁵ L Berg, B Farberblum, “Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey”, November 2017, p48.

(f) the effectiveness of the current regulatory framework at state and federal level in dealing with wage theft and supporting affected workers

Because wage theft is part of a more complex problem that crosses the boundaries of various regulators and the state/federal legislative divide, it is very difficult to set parameters for the assessment of regulatory effectiveness and accordingly similarly difficult to make an assessment of regulatory effectiveness.

An example of the difficulties in this area is ably given by the phoenixing activity that is flourishing in Australia at present. Part of the problem is the difficulty in understanding the difference between the differing motivations for setting up and shutting down companies. ASIC sought to address this by using the terms “legal” and “illegal” phoenixing in an attempt to put a fence around the behaviour that was causing the most difficulty. Others have sought to further subdivide the issue. Despite the efforts of these well-meaning stakeholders, phoenixing is a burgeoning Australian industry. That is because the problem is complex and the solutions are not evident; nor are the prospects for dealing with phoenixing resolved by targeting particular industries or activities.

At both state and national level, there are a raft of laws and regulations. This means that government agencies are operating at peak capacity. It necessarily follows that there is no slack for the various agencies to engage in strategic initiatives, either among themselves or with their state counterparts, that will allow a closer collaboration in joint enforcement activities, such as dealing with wage theft.

Funding for government department enforcement activities is stretched and the various agencies themselves are not always aligned with each other as to their operation or the organisation of their information. This adds a further layer of difficulty in getting strategic cooperative enforcement efforts up and running.

It is entirely possible to improve in this area and one suggestion, (arising from the apparent difficulties associated with the long history of phoenixing by companies), is to allocate more funding to agencies such as ASIC to enable an increase in compliance and enforcement activity. Part of the problem relating to the ways that wage theft has manifested in Australia is the seeming ad hoc enforcement action around perfectly sound laws that are often not effectively or consistently enforced.

It is therefore dangerous to suggest that regulatory regimes are “not working” until they have been given the resources necessary to perform their function as well as the strategic direction required to address wage theft. Only then, can their ability to contain the problem and their performance therein be assessed. This is a key issue at federal level and it is one that the states can reasonably require be addressed as a matter of urgency.

(g) 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

REGULATORY OPTIONS

Increased regulation is a very poor idea for rectification of social issues on a wide scale in Australia. The reason is because regulation cannot, of itself, ensure compliance by stakeholders. Only sufficiently funded monitoring ability coupled with enforcement action ensures a measure of compliance. In the case of wage theft, it is doubtful that this alone will suffice.

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. This is no small task since some agencies still hold valuable data in paper or microfiche form, making a digital platform impossible until the information for all agencies is in the same form for collation.

In the immediate term, it might be useful for the states to cooperate as to how they deal with work rights as between themselves. This may then enable the states to interact as stakeholders with the federal government agencies involved with wage theft (ATO, ASIC, FWO). Any joint governmental cooperation will provide useful economies of scale and focus to the problem of wage theft.

Pay and work rights (Acas) in England at: <https://www.gov.uk/pay-and-work-rights> allows both workers and employers help and advice on their rights and obligations in relation to work. It proves a help-line open from 8am-6pm weekdays and assists with free translation in any language. It provides assistance with respect to:⁴⁶

- workplace employment rights and responsibilities
- pay and the National Minimum Wage
- discipline and grievance
- contracts and terms and conditions
- working time, rest breaks and holiday entitlement
- equality in the workplace
- working for an employment agency or gangmaster
- agricultural workers' rights

⁴⁶ <https://www.gov.uk/pay-and-work-rights> <accessed 20 July 2018> Note that the UK also has a Modern Slavery Act (2016) that Australia looks set to replicate in due course. Provisions of the UK legislation deal with, inter alia, wage exploitation.

NAME AND SHAME

Further, in England, there is a process of name and shame, where employer's details are published in the press, where they are identified by the business name and the amount; notably the company Argus (that took over Sainsbury's) in the amount of English Pounds 1,461,881.78 to 12,176 workers. Some 360 firms were named and shamed in the press⁴⁷ and HM Revenue and Customs levied fines with a further English Pounds 800,000.⁴⁸

There is a register in the state of NSW, organised by Unions NSW and called the "Wage Thieves Register".⁴⁹ It currently reports only in NSW and has 20 listings. While this is a start, it is confined in its jurisdictional reach and in its scope since not all employers who pay less than the minimum advertise publicly for worker positions.

Further, 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. This is supported to some extent by the Australian survey that found that underpaid temporary migrants overwhelming knew they were being underpaid and that they should expect to be paid less, because that is how immigrants are paid in this country.⁵⁰

The Black Force Economy Taskforce suggests a register be established containing the details of deliberate tax evaders.⁵¹ Such a register might well contain a cross reference to those engaging in wage theft thus adding weight not just to the usefulness of the ledger but public awareness of the importance of the issue and the interrelated effects of wage-theft with taxation avoidance abuses. This submission refers to the aggregate option outlined, ((e) above) for the most efficient approach, while acknowledging that a register may prove to be an effective interim measure.

Name and shame ought to be one register that is cross referenced for various kinds of behaviour. This is because the existence of one national portal that deals with all name and shame cases has a far greater chance of being accessed by various members of the public. It is not a difficult task to have a searchable mechanism that allows for various lists, including wage theft, or even more complicated searches, say for that topic by state or territory. All state governments can have a link to the portal and contribute to its contents. This will

⁴⁷ <https://www.mirror.co.uk/news/politics/full-list-233-firms-named-10999800> <accessed 20 July 2018>

⁴⁸ <https://www.mirror.co.uk/news/politics/debenhams-118-peacocks-among-firms-9823141> <accessed 20 July 2018>

⁴⁹ <http://www.wagethieves.com.au/wp/wage-thieves-register/> <accessed 17 July 2018>

⁵⁰ L Berg, B Farbenblum, "Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey", November 2017, p48.

⁵¹ Commonwealth Treasury, "Black Economy Taskforce: Final Report", Commonwealth of Australia, October 2017, p185: https://static.treasury.gov.au/uploads/sites/1/2018/05/Black-Economy-Taskforce_Final-Report.pdf <accessed 10 July 2018>

simplify the information access point and in time reduce the activity that is listed there as more users become aware of the portal and contribute towards it.

CONCLUDE

Wage theft is a complex problem that requires a collaborative effort to solve. Because it is complex, it is necessary for all stakeholders: governments (and their agencies); employers, workers; and unions to share resources and work together to ensure a better outcome for all.