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30 July 2018

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

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

Dear sir/madam,

We welcome the opportunity to provide feedback in relation to the Education, Employment and Small Business Committee Inquiry into wage theft in Queensland.

This submission is made on behalf of Maurice Blackburn, the Australian Manufacturing Workers Union Queensland, the Australian Meat Industry Employees Union Queensland, the Together Union Queensland, the Transport Workers Union Queensland, United Voice Queensland and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia – Plumbing Division Queensland.

Please do not hesitate to contact me and my colleagues on [redacted] or at [redacted] if we can further assist with the Committee's important work.

Yours faithfully,

Giri Sivaraman
MAURICE BLACKBURN

SUBMISSION IN RESPONSE TO THE INQUIRY INTO WAGE THEFT IN QUEENSLAND

July 2018

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 31 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Queensland practice has 13 offices spread across both regional and metropolitan parts of the State, with these offices similarly offering legal services across the firm's primary practice areas of personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation, negligent financial and other advice, and consumer and commercial class actions. The Queensland arm of Maurice Blackburn has also contributed to recent parliamentary inquiries into labour hire, and has appeared at numerous parliamentary hearings to advocate for vulnerable workers on a range of issues including wage theft and conditions.

The Australian Manufacturing Workers Union Queensland, the Australian Meat Industry Employees Union Queensland, the Together Union Queensland, the Transport Workers Union Queensland, United Voice Queensland, and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia – Plumbing Division Queensland ("**the Unions**"), are all unions that cover workers in Queensland. Between them they cover workers in most areas in Queensland.

Our Submission

Maurice Blackburn and the Unions believe that wage theft should be criminalised.

We see this inquiry as an important part of a wider current focus on exploitative employer practices and misconduct, of the undermining of employment practices through labour hire arrangements and sham contracting, the loss of life in workplace accidents, the rampant exploitation of cohorts of vulnerable workers – such as cleaners – and the emergence of an almost dystopian sector of the economy.

Encouragingly however, the Queensland Government and other legislators have been providing policy leadership in recent times. We applaud their actions in moving to licence labour hire, legislate industrial manslaughter and to encourage a discussion on the future of work – as well as wholesale state-based reviews of workplace health and safety.

Maurice Blackburn believes that in exploring how best to criminalise wage theft, instead of adjusting the existing provisions of the criminal code, a separate legislative scheme should be implemented to criminalise wage theft, balancing the needs of business and the rights of workers – a Wage Theft Act.

The potential provisions of a Wage Theft Act include:

- Strict liability offences;
- Tiered levels of conducted amounting to wage theft; and
- Tiered levels of penalty.

Further, Maurice Blackburn believes that existing regulatory instruments can be adjusted to work toward the abolition of wage theft in particular industrial relationships, such as franchise, ride share and gig economy arrangements.

We also believe that the pursuit of wage recovery must also be made easier.

Maurice Blackburn congratulates the Queensland Government on its ongoing quest to ensure that workers are treated fairly, and that employers accept responsibility for ensuring their safety and wellbeing.

Responses to the Terms of Reference

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

Maurice Blackburn is confident that the inquiry will receive many well researched submissions which will contain specific statistics relating to the scale and extent of wage theft on Queensland.

In this submission, we will outline the types and extent of wage theft that we and our union colleagues come across on a daily basis.

Wage theft is broad in nature, crossing many industries and employment types. It is not restricted to those that we hear most about in the media. But there is significant similarity in the circumstances through which wage theft is able to occur. We mainly see wage theft in circumstances where:

- There is a pronounced power or status difference between the worker and the employer;
- The company operates within a highly competitive industry, where the employer feels that the only option to save costs is through cutting corners on staff wages and benefits;
- The workers feel powerless to do anything about it, through fear of losing their jobs or residential status; and
- There is competition for the jobs on offer.

As a national law firm, we are certainly aware that wage theft is not restricted to Queensland. We acknowledge that other jurisdictions are exploring ways through which the likelihood and incidence of wage theft can be reduced, or nullified.[1]

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

Our experience with clients tells us that the impacts of wage theft extend much deeper than merely loss of income – although that in itself is a major concern for families struggling with the day to day cost of living.

[1] http://www.abc.net.au/news/2018-05-26/victorian-government-vows-to-crack-down-on-wage-theft/9802072

Wage theft impacts on the very core of a worker's sense of self.

Many of our clients report the following feelings associated with, or generated through, their experience of wage theft:

i. Fear.
As we will demonstrate throughout this submission, many victims of wage theft are from the most vulnerable of Australian cohorts. They include immigrant communities and particularly those without residency or work rights, young people, students, women, those with disabilities, older workers, Indigenous Australians, early school leavers and those returning to the workforce. Inevitably, these people fear that speaking out against wage theft will hamper their capacity to retain work, or find anything better. Migrant workers are often told that they are not receiving their full wage because that would put their citizenship status in jeopardy. There is a feeling of being stuck – unable to see a way forward to a better future. The fear is a natural extension of the power imbalance that exists between unscrupulous employers and vulnerable employees.

ii. Shame or embarrassment.
Victims of wage theft often report feeling that they have done something wrong – that they have somehow put themselves and their families in this situation.

iii. Isolation.
Many victims of wage theft feel like they are alone. Many don't know of the supports that are available to them, through unions, consumer advocates or the various information and complaints authorities.

iv. Anger and frustration.
Negative feelings generated in the workplace are often ventilated in inappropriate ways, having dreadful consequences on families, peer groups and communities.

v. Desperation.
Feelings of inadequacy can sometimes lead to tragic consequences.

Maurice Blackburn is also concerned that businesses which engage workers but abrogate their legal responsibilities for proper pay and conditions are being given an unfair commercial advantage over businesses which play by the rules. We recommend that the Committee give consideration to how 'the level playing field' should be retained.

At the end of this document are a number of case studies compiled by Maurice Blackburn and our union colleagues. Each speaks to the impacts of wage theft, way beyond the stresses associated with being in a poorly paying occupation.

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

In this submission, Maurice Blackburn notes the following forms of wage theft:

- Paying under award wage rates;
- Failing to pay superannuation;
- Failing to pay for breaks;
- Failing to pay overtime;
- The compulsory use of employer-provided staff accommodation to claw back wages;
- Withholding of wages on the basis that it will put visa status at risk;
- Not paying for trial or training periods;

- Classifying workers as independent contractors;
- Deliberate employee misclassification;
- Sham contracting arrangements;
- Not paying personal, annual or paid leave;
- Not paying appropriately for higher duties;
- Failing to meet basic worker entitlements in family run businesses;
- Phoenixing-type activity, where a firm goes into administration to avoid having to pay employee entitlements, then re-emerges under a different legal structure but with the same individuals in control;
- Inappropriate deductions from workers' wages such as inflated rent and transport costs;
- Charging employees for PPE;
- Paying flat rates of pay, regardless of the shift type;
- Failing to deduct taxation amounts;
- Requiring the employee to pay an 'employment bond';
- Compulsory medicals and drug testing at nominated medical centres with inflated medical fees; and
- Failing to pay for 'on call' periods.

This list is not exhaustive, yet indicates the scale and extent of wage theft in Queensland.

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

As mentioned, we mainly see wage theft occurring in industries and entities where:

- There is a pronounced power or status difference between the worker and the employer;
- There is a general custom or industry practice to utilise insecure forms of work;
- The company operates within a highly competitive industry, where the employer feels that the only option to save costs is through cutting corners on staff wages and benefits;
- The workers feel powerless to do anything about it, through fear of losing their jobs or residential status; and
- There is competition for the jobs on offer.

Industries through which services are procured are, by nature, prone to exploiting workers.

Large retailers, producers, manufacturers and even ASX200 corporations are able to outsource their manual labour requirements through competitive tender processes. Through this, they are able to dictate pay rates – by selecting the successful tenderer on the basis of cost – without having the direct responsibility to the workers for their employment terms and conditions.

The emergence of this middle party – the employer of the workers – has led to a disconnect between the development of purchasing policies by retailers/corporations and the impacts those policies have on those actually providing services.

These middle parties – the business operators who win the tender to provide services - must figure out how to provide the services and derive their own profit in a highly competitive marketplace where the success of the tender is determined primarily by the lowest bid. One obvious way we have seen is to cut costs in employees' pay rates.

For example, a 2016 audit by the Fair Work Ombudsman (FWO) found that 33% of cleaning businesses were paying their staff incorrectly.[2] United Voice has found that the likelihood of breaches of the Award increases exponentially once a second tier or more of sub-contracting is introduced.

From the employees' perspective, it's a race to the bottom.

Over the past two decades, many business operators have found legal ways to avoid their responsibilities under Fair Work legislation and other legal and regulatory structures.

One approach is that people who work for them become self-employed or independent contractors, and as such avoid having to take responsibility for the provision of safety nets that Australians have come to expect: awards-based wages, superannuation and workers' compensation.

These business operators have managed to move the public discourse away from their responsibility for providing adequate employee entitlements to a focus on 'who employs whom'.

Many business operators adopt 'sham contracting' arrangements between themselves and their contracted staff. This is especially prevalent in low-paid sectors where those doing the work have little market power such as cleaners, construction workers, beauticians, call centre workers, disability workers and drivers. We are seeing increasing cases of businesses replacing their permanent workforce with contractors or labour hire processes.

In its report on its inquiry into Corporate Avoidance of the Fair Work Act, the Senate Education and Employment References Committee noted that for many workers engaged in such arrangements: "*There is also no security of income, no insurance for the worker in case of accident, no superannuation, no personal, annual or paid leave of any description.*"[3]

These new work arrangements are sometimes positioned in the context of entrepreneurship, self-determination and workplace flexibility, but Maurice Blackburn believes that they are merely another way in which employers are abrogating their responsibilities to their workers.

Many labour hire operators operate outside employment frameworks and routinely exploit workers. They are effectively invisible to legal and regulatory regimes. While a number of states are now implementing labour hire licensing schemes[4], there is still the outstanding issue of how federal laws intersect with these schemes, while other states continue to be without a framework at all.

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[2] https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160513-cleaning-compliance-campaign-presser

[3] www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report/c08, section 8.2.

[4] See, for example, https://www.worksafe.qld.gov.au/news/2018/regulation-of-the-labour-hire-industry-in-queensland; https://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry; https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire/labour-hire-licence

Precarious work and particularly the prevalence of sham contracting, the abuse of labour hire arrangements, freelance/contingency work and gig economy work outside of regulatory frameworks are increasing year by year.

It is important that industry regulators are appropriately resourced to proactively and reactively respond to issues arising from these multi-level employment arrangements. This involves ensuring that a regime of regular audits of employers sits alongside a capacity to investigate complaints efficiently and in a timely manner.

Maurice Blackburn and the Unions believe that any whole of government procurement policies should be required to ensure that companies with any history of wage theft are not awarded contracts.

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

As mentioned, those who fall victim to wage theft most often work for businesses which attract and employ the most vulnerable workers. These may include workers from culturally and linguistically diverse backgrounds, those returning to the workforce following family responsibilities, early school leavers and students.

This vulnerability often places them at a distinct status disadvantage in negotiating appropriate employment conditions. This is typified by:

- Employee non-engagement with unions or forms of workforce organisation;
- Employees not questioning inappropriate behaviours of employers through fear of retribution, or not being able to find alternative work; and
- Employees not seeking external information on entitlements.

In our experience, migrant populations are often the victims of sham contracting arrangements. There are approximately 650,000 temporary migrants in Australia, a large majority of whom are working.

Business operators claim that contracted employment arrangements offer young migrants an opportunity to join the workforce in a flexible and entrepreneurial way.

In our experience, the conditions of their visas are often used against them to claw back salaries or underpay them. They are led to believe that if they complain about working arrangements, or if they are paid too much, they will be deported.

In its well-researched submission to a recent Senate inquiry into the future of work,[5] the Centre for Multicultural Youth says, in relation to young immigrants:

> '*In the future, young people are likely to be navigating a much more flexible and variable workplace, with less support and where there may be increased risks of exploitation. As such, young people will also need to be equipped with knowledge*

[5] https://www.aph.gov.au/DocumentStore.ashx?id=3cd33a44-816c-46dc-87ae-5d4709cb98bb&subId=563289.

> *about their rights and responsibilities in the workplace, as well as with supports to exercise those rights.*'

In short, the most marginalised workers are over-represented in poor working arrangements that leave them vulnerable to wage theft.

Worker exploitation and wage theft is always lowest in workplaces with the highest union membership. The reasons for this are self-evident:

- The union is a source of information for workers on their rights, conditions and entitlements;
- The union will involve workers in bargaining processes with the employer; and
- The union will take action if it finds that workers are being exploited and hold the employer accountable.

There are, however, several issues associated with industries prone to wage theft which make connections with unions difficult. These include:

- A high turnover or availability of staff;
- A highly casualised workforce;
- Antipathy or aggression from some employers about the role of unions; and
- Fear amongst some cultural and minority groups of potential negative consequences of joining a union in the eyes of the employer.

Research has indicated that nearly 60% of international students in Australia are paid less than the minimum award rate and some are paid below the minimum wage[6].

Maurice Blackburn and the Unions encourage the Committee to recommend that the Queensland Government work with and through unions as a primary means of information distribution to the workforce, for information pertaining to minimum employee entitlements and recourse available in the event of employer misconduct.

Throughout this submission, we will focus on four cohorts of workers that are vulnerable to wage theft. They are:

i. The gig economy;
ii. Transport;
iii. Franchising arrangements; and
iv. The public service.

i. The gig economy

The advent of the 'gig-economy' and resulting irregular and insecure employment has drastically changed Queensland and Australia's industrial relations landscape. Gig-economy entities have leveraged new technology and exploited out-of-date legislative frameworks to

[6] https://www.theguardian.com/money/2016/feb/17/more-than-60-of-international-students-in-sydney-underpaid-survey?CMP=soc_568

circumvent industrial laws and have sought to engage workers as independent contractors in the delivery of services previously performed by employees.

The most prominent and obvious example of gig-economy work that has sought to evade conventional employment arrangements and which has thereby derived an unfair advantage are the food delivery services such as UberEats, Foodora and Deliveroo.

Maurice Blackburn submits that workers performing work for gig-economy food delivery services should properly be considered employees.

This position is supported by the Fair Work Ombudsman's recent decision to commence proceedings in the Federal Court of Australia alleging contraventions of sham contracting and minimum payment provisions by Foodora, in an important test case.[7]

ii. Transport:

Despite the fact that Uber has complete control over the rates of pay drivers receive for their services and jobs they perform, Uber denies its drivers are employees, instead referring to them as "driver partners".

Uber also denies playing a significant role in the service it provides, describing its role as merely providing a digital platform through which drivers and customers can enter into contractual arrangements.[8]

Uber's "arm's length" position is hard to reconcile with the fact that it allocates jobs to drivers, sets the rates charged, dictates and imposes terms of service on both drivers and passengers and has the power to unilaterally terminate drivers' services.

Uber drivers are responsible for all petrol, insurance, operating and capital costs, as well as net GST payments. They are responsible for their own income tax, and for their own superannuation contributions. They are not paid for the time and expense of driving to their fare, or for time spent waiting between fares.

A recent study[9] found that, after taking into account all costs, but before paying income tax and superannuation contributions, the average Australian Uber driver is paid $14.62 an hour, with many drivers receiving less.

This is over $4 an hour below Australia's statutory minimum wage of $18.93 per hour. That's a loss of $163.78 a week for a driver working 38 hours a week (it is clear that many Uber drivers work well in excess of that figure to make ends meet).

It is also $6 an hour below the base rate payable to drivers under the *Passenger Vehicle Transportation Award 2010*, and potentially equates to less than half the payments due to drivers under that Award once casual loading and penalty rates are taken into account.

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[7] https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180612-foodora-litigation
[8] See for example https://www.nytimes.com/2016/11/27/technology/uber-europe-court-ecj.html
[9] https://www.futurework.org.au/innovation_or_exploitation_simulating_net_hourly_incomes_of_uberx_drivers

Uber points to their "surge pricing" as a way that their "driver partners" can make a living wage.

General Manager for Uber in Australia and New Zealand, David Rohrsheim, was recently quoted as saying, in response to the above featured income findings, that:

> "*When surge pricing automatically kicks in … the fare might be one-and-a-half, two times the normal rates. Drivers know this and the smart ones log on at the right times and the right areas and earn the big bucks*."[10]

However, as Economist and Director of the Centre for Future Work Dr Jim Stanford points out:

> "*This 'surge' income cannot be relied on, since drivers have no control or knowledge when (or even if) this system will be activated. Moreover, as Uber drivers increasingly organise their work schedules around peak periods, and as the general population of drivers increases, then the likelihood that demand for drivers will exceed supply (hence triggering surge pricing) is further reduced… supplemental income from surge pricing is shrinking as a result of the growing supply of Uber drivers – many of whom concentrate their working hours in peak periods in often-unfulfilled hope of attracting surge price revenue."* [11]

Uber has also indicated that its goal is to limit instances of surge pricing - "*For us, it's better not to surge. If we don't surge, we can produce more rides*."[12]

If Uber were required to pay their "partner" drivers, it would actually encourage healthy competition in the market, in which traditional providers such as taxis will not be disadvantaged by paying its drivers living wages.

Imposing minimum pay requirements on ride share companies is also likely to improve safety of drivers, as it will reduce the need for drivers to work extended hours in order to make a living wage.

iii. Franchising

One of the most common industries in which wage theft occurs in Australia is the franchising industry. Confidence in franchises is at an all-time low, following repeated scandals of wage theft and unsound business practices and relationships. Ongoing, public cases such as 7-Eleven, Caltex, Domino's and Retail Food Group show the need for reform in the sector, to ensure that workers aren't exploited and compliant franchises can operate with integrity.

The franchise industry employs over 775,000 people.[13] The $180 billion sector is currently the subject of a federal senate inquiry and the focus of the Australian Competition and

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[10] http://www.abc.net.au/news/2018-03-06/uber-x-drivers-working-for-half-the-minimum-wage/9513250
[11] *Subsidising Billionaires: Simulating the Net Incomes of UberX Drivers in Australia* by Jim Stanford, Ph.D. Centre for Future Work at the Australia Institute. March 2018
[12] https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html?_r=0
[13] Jenny Buchan, *Franchising: A Honey Pot In A Bear Trap*, Adelaide Law Review (2014) 34.

Consumer Commission ("ACCC"), following 600 franchising related complaints made last year.

The franchising model has been described as a 'honey trap', luring inexperienced franchisees with prospects of business success.[14] When franchisees suffer as a result of these relationships, so do workers engaged by the franchisees. It is not uncommon for a franchise relationship to be so restricted that the only way a franchisee can make a profit is through the undercutting of their wages bill.

Professor Allan Fels, past chairman of the Australian Competition and Consumer Commission is on record as saying: "*My impression – my strong impression – is that the only way a franchisee can make a go of it in most cases is by underpaying workers, by illegal behaviour*"[15]

This goes some way to explaining why the scandals are so wide spread, as it stems from the deliberate business model of franchisors, which hang franchisees and workers out to dry.

iv. The Public Service:

In 2009, the Industrial Court of Queensland held that the then *Public Service Act* 1996 (Qld) and the *Industrial Relations Act* 1999 (Qld) did not provide a means for public servants to seek back-pay resulting from their position being under classified, or developing to incorporate higher duties which attracted a higher classification, and therefore a higher rate of pay.

The Industrial Court held that the QIRC did not have the power to order back-pay for any period where a public servant was performing duties sufficient to attract a higher classification level, until this was formally recognised as such by the Chief Executive reclassifying their position:

> *"It is not the scheme of the Award to attach a salary to a particular set of duties, nor to attach a salary to a public service employees' principal function. It is not a grant of authority to the Commission to retrospectively arbitrate a "fair" or "reasonable" wage for a particular public service employee in an action to recover outstanding wages."*[16]

While the decision was specific to the wording contained in the relevant award, where the Award changed the wording used from "office" to "role", it is unclear whether the precedent of the Langley matter would apply today. A legislative amendment to ensure there is no ambiguity is required, a possible solution is to examine the provisions of the Western Australia public sector legislation which make appointment decisions in respect of classification levels for the employee subject to industrial awards.

The result is that Queensland public servants may still be barred from making underpayment claims, even where it has been recognised by their department's Chief Executive that they

[14] Jenny Buchan, *Franchising: A Honey Pot In A Bear Trap*, Adelaide Law Review (2014) 34.
[15] https://www.smh.com.au/interactive/2015/7-eleven-revealed/
[16] *Minister for Industrial Relations AND Perry Keith Langley* (C/2009/46)

were performing duties attracting a higher rate of pay. This leaves public servants in a demonstrably worse position that employees in the private sector, and needs to change.

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

Refer to our response to ToR (g)

ToR (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.

Maurice Blackburn is of the opinion that wage theft should be criminalised.

Theft by an employee is a separate offence in the *Criminal Code Act 1899* (Qld) ("Criminal Code") and garners a more serious penalty than stealing generally. However there is no equivalent for theft by an employer. Theft by an employer, as described earlier, takes advantage of the trust or vulnerability of an employee.

To this end, Maurice Blackburn submits that:

a) This inquiry should recommend that a comprehensive legislative scheme is introduced to criminalise wage theft;
b) The legislative scheme should create strict liability offences, with various penalties dependent on the nature of the wage theft; and
c) That industrial organisations be given standing to prosecute wage theft.

The Criminal Code

Maurice Blackburn submits that current provisions of the criminal code are not the most appropriate vehicle to criminalise wage theft. Below we provide our view on why neither the 'stealing' nor 'fraud' provisions of the Queensland Criminal Code would be an appropriate mechanism for criminalising wage theft.

i. Stealing

The Criminal Code criminalises theft. Section 391 of the Criminal Code defines stealing.

Section 398 of the Criminal Code sets out the punishment for stealing, and, "special circumstances" that are aggravated types of stealing. Section 398 subsection 6 sets out the particular offence of stealing by clerks and servants:

> *If the offender is a clerk or servant, and the thing stolen is the property of the offender's employer, or came into the possession of the offender on account of the offender's employer, the offender is liable to imprisonment for 10 years.*[17]

[17] *Criminal Code Act 1899* (Qld) s 6.

The Criminal Code defines a servant as follows:

> *"…any person employed for any purpose as or in the capacity of a clerk or servant…"*[18]

As stated earlier, the stealing provisions of the Criminal Code anticipates and criminalises theft by an employee, however, does not apply to an employer.

One reason why wage theft by an employer is not anticipated in the stealing provisions of the Criminal Code is as to steal one must 'take' or 'convert' anything capable of being stolen.[19]

Stealing is not the appropriate provision to criminalise wage theft, as the stealing provision in the Criminal Code is designed to criminalise the taking of a thing, not the withholding of a thing, such as a failure to pay wages.

ii. Fraud

Within the Criminal Code, fraud may be a more appropriate mechanism to criminalise wage theft. Section 408C of the Criminal Code sets out the following[20]:

A person who dishonestly:

- Gains a benefit, pecuniary or otherwise, to any person;[21] or
- Causes a detriment, pecuniary or otherwise, to any person.[22]

While the fraud provisions of the Criminal Code could be amended to criminalise wage theft, two issues exist:

- Proving intent to engage in wage theft, which would mean that employers who are ignorant of their obligations and fail to pay could not be prosecuted successfully;
- The burden of proof, beyond reasonable doubt, coupled with intent makes the bar too high.

In light of the above, Maurice Blackburn and the Unions believe that the current Criminal Code is not the appropriate vehicle to criminalise wage theft.

Instead, Maurice Blackburn and the Unions submit that a separate legislative scheme is required to criminalise wage theft, balancing the needs of business and the rights of workers.

To this end, Maurice Blackburn and the Unions recommend that the inquiry consider the development of a Wage Theft Act. Our summary of its potential provisions appears below:

A Wage Theft Act would set out the following:

- Strict liability offences;

[18] Ibid, Part 1 Definitions.
[19] Ibid s 391(1).
[20] Similar to the Stealing provisions, fraud contemplates if the offender is an employee of another person. If the victim is the employer, then the employee will be liable to 12 years imprisonment at 408C (1) (e)
[21] *Criminal Code Act 1899* (Qld) s 408C(1)(d).
[22] Ibid s 408C(1)(e).

- Tiered levels of conducted amounting to wage theft;
- Tiered levels of penalty.

A Wage Theft Act would have parallels with the *Workplace Health and Safety Act* (Qld) 2011 ("WHS Act") in terms of offences and penalties. For example, categories could take a form as follows:

Category 1 – reckless or intentional conduct in relation to wages (highest category)

The category one offence would criminalise reckless conduct by an employer or engager, where either intentionally or recklessly, the employer or engager engages or engaged in conduct that results in an individual or group of workers being underpaid.

A pecuniary penalty of up to $1,000,000 and/or 10 years imprisonment would be appropriate for this conduct contrary to this offence.

Category 2 – multiple failures to comply and make payment of wages (medium category)

The category two offence would criminalise a failure by an employer or engager to comply with relevant industrial instruments, superannuation laws in a systemic failure to pay wages.

An appropriate pecuniary penalty for this offence would be $300,000.

Category 3 – individual failure to comply and pay wages (lowest category)

The category three offence criminalises an employer or engager's failure to pay wages without a reasonable excuse. This simple offence is applicable to employers and engagers who are unsure of their obligations and fail to pay wages as a result of their ignorance.

An appropriate pecuniary penalty for this offence would be $100,000.

A reasonable excuse for an employer or engager could be the lack of a dedicated Human Resources team.

In the drafting of any legislative scheme, it is important that its application be broad so as to encapsulate new and emerging methods of engagement, such as the gig economy.

In terms of prosecution of offences, the defence would bear the burden of proof to prove the conduct was engaged in with a reasonable excuse.

Industrial organisations already provide assistance to their members when it comes to recovering wages. Industrial organisations should be given standing to prosecute wage theft, and to be able to seek costs from an employer on a successful prosecution.

Prosecution via the creation of new provisions within the criminal code is only one potential method for prosecuting wage theft. Enhancing existing regulatory regimes may also be more appropriate in some situations. Some examples are included below.

Other Regulatory Regimes

In our response to ToR (e), we noted the prevalence of wage theft within different employment relationships. Again, we here discuss prosecution in terms of:

i. Transport and the gig economy;
ii. Franchise Arrangements; and
iii. Wage recovery.

i. Transport and the gig economy

The Fair Work Commission, in two decisions, has previously considered whether Uber drivers who transport passengers are employees for the purposes of determining their capacity to bring unfair dismissal applications pursuant to section 394 of the Fair Work Act 2009 (Cth) (FW Act)[23].

On these occasions, the Commission has concluded that the workers were not employees, within the meaning of section 386(1)(a) of the FW Act. This conclusion has not been upheld by any court and does not have the force of precedent. Maurice Blackburn and the Unions believe that the conclusion of the Commission in respect of Uber drivers in these discreet circumstances will not be determinative in respect of all workers performing work for 'gig-economy' food delivery services.

There is the possibility that even if the Fair Work Ombudsman or any subsequent applicant seeking to test the employment status of these workers in a court or an industrial tribunal is successful that 'gig-economy' entities will continue to seek to structure their operations, and the basis on which they engage workers, to avoid attempts to characterise these workers as employees.

The Federal Government has provided no indication that it intends to legislate minimum conditions for 'gig-economy' workers.

Due to the referral of the State's powers to make law in respect of industrial relations for the private sector to the Commonwealth, the State Government cannot itself legislate the employment status of these workers.

Accordingly, to address the circumstances where 'gig-economy' food delivery services structure the arrangements by which they engage workers to circumvent an employment relationship, Maurice Blackburn and the Unions submit that the Queensland Government should seek to grant the Queensland Industrial Relations Commission (QIRC) powers to

[23] https://www.afr.com/news/policy/industrial-relations/uber-wins-fair-work-commission-case-over-drivers-employment-rights-20180105-h0duqq

make determinations with respect to certain 'contracts for carriage' which apply to these entities, akin to powers currently held by the New South Wales Industrial Relations Commission (NSWIRC).

Maurice Blackburn and the Unions would be pleased to provide additional information about the powers of the NSWIRC upon request.

Currently, to the extent that 'gig-economy' workers may formally be deemed independent contractors, they are regulated by the *Independent Contractors Act* 2006 (Cth) (the ICA).

As noted above, the Federal Government has demonstrated no intent to regulate or to address the systemic worker exploitation and market distortion caused by the advent of 'gig-economy' entities.

Nevertheless, state governments have expressly sought to regulate these industries and legislation to this effect is expressly exempted from the operation of the ICA. Specifically section 7(2) of the ICA expressly excludes Chapter 6 of the *Industrial Relations Act* 1996 (NSW) and the *Owner Drivers and Forestry Contractors Act* 2005 (Vic) which has introduced somewhat similar reforms to those in New South Wales.

Accordingly, to effect the desired changes, it is anticipated that it will be necessary to seek that the Federal Parliament amend section 7(2) of the ICA to expressly exempt any anticipated new section of the *Industrial Relations Act* 2016 (QLD).

In relation to Uber and other ride-sharing organisations, there are a number of legislative options available:

- Insert a new section 91W(2) into *The Transport Operations (Passenger Transport) Act* (1994) (the Act) which requires that all applications for the grant or renewal of a booking entity authorisation be submitted with calculations demonstrating that, on its lowest rate of pay (ie, excluding surge pricing from calculations), after all petrol, insurance, operating and capital costs, net GST payments, income tax obligations and superannuation contributions are taken into account, drivers will receive at least the minimum they would be entitled to under the Passenger Vehicle Transportation Award 2010 (including casual loading and penalty rates), or in the alternative, the minimum they would be entitled to under the minimum wage, including casual loading and all other entitlements;

- Insert new section 91W(3) into the Act which requires that the Chief Executive reject any applications for the grant or renewal of a booking entity authorisation when not satisfied that the applicant's driver pay rates are sufficient to meet the minimum they would be entitled to under the Passenger Vehicle Transportation Award 2010 (including casual loading and penalty rates), or in the alternative, the minimum they would be entitled to under the minimum wage, including casual loading and all other entitlements;

- Insert new 91Y(2) into the Act mandating that all booking entity authorisations are subject to the condition that the holder provide records on a yearly basis confirming that drivers are paid at least the minimum they would be entitled to under the Passenger Vehicle Transportation Award 2010 (including casual loading and penalty

rates), or in the alternative, the minimum they would be entitled to under the minimum wage, including casual loading and all other entitlements;

- Insert new 91Y(3) allowing the chief executive to impose more regular driver payment reporting as a condition of the entity's booking entity authorisation, where the entity has a history of underpaying its drivers within the last five years;

- Insert new 91ZA(2)(iv) into the Act providing that a regulation may authorise the chief executive to suspend or cancel a booking entity authorisation if the chief executive is satisfied that the person or entity holding that authorisation has paid a driver or drivers below the minimum they would be entitled to under the Passenger Vehicle Transportation Award 2010 (including casual loading and penalty rates) after taking into account all petrol, insurance, operating and capital costs, net GST payments, income tax obligations and superannuation contributions, or alternatively, the minimum they would be entitled to under the minimum wage, including casual loading and entitlements;

- Insert new 91ZC into the Act allowing the chief executive to refuse the issuing of a booking entity authorisation for up to three years in circumstances where the entity has a repeat history of underpaying drivers; and

- Insert new 91ZD into the Act mandating the imposition of significant fines for every day that an entity operates as a booking entity without the necessary booking entity authorisation. This provision is suggested in light of Uber's past history in Queensland of operating unlawfully. Fines would need to be significant to provide Uber and other organisations the necessary motivation to obtain the booking entity authorisation.

ii. Franchise arrangements.

Currently there are two instruments aimed at regulating the franchising industry, namely Australian Consumer Law ("ACL") and the Franchising Code of Conduct ("the Code") under the *Competition and Consumer Act 2010* (Cth). The ACL has jurisdiction to deal with unfair terms in franchise agreements and any misleading, deceptive or unconscionable conduct against franchisees. However, as with other types of litigation, it is often not entered into because of the costly and lengthy nature.

The Code regulates the conduct of franchising participants towards each other, usually through franchise agreements. The ACCC regulates the Code and investigates alleged breaches.

Maurice Blackburn has previously argued:[24]

- That a positive obligation should be placed on the franchisor to ensure its franchisees are upholding the legislative requirements of workplace law. This positive obligation should be articulated in the Code of Conduct; and

[24] https://www.aph.gov.au/DocumentStore.ashx?id=26876526-f184-47fb-a2be-b767b5cfbf55&subId=566187

- That a Funder of Last Resort process should be embedded and mandated in the Code of Conduct.

It is clear that any solution should be based on catching the conduct of franchisors, not franchisees or workers who are left largely powerless under the status quo.

An industry that was recently reformed to include licenses for very similar cases of misconduct and unsound business practices was the labour hire industry in both Queensland and Victoria. These reforms were based on a 'fit and proper person' test in the granting of a license to operate in a jurisdiction.[25]

Both the labour hire and franchising industries contemplate similar industrial issues and arrangements. Therefore, Maurice Blackburn and the Unions submit that a licensing scheme for franchises could be a reasonable policy consideration.

Similar to Queensland's *Labour Hire Licensing Act* (Qld) 2017, a franchising licensing scheme could have the following features:

- Require a franchisor to hold a license to operate in Queensland, issued by a licensing body;
- Require a franchisor to pay for that license by way of annual fee, in line with the size of the business;
- Be based on a 'fit and proper person' test to ensure operators have a history of compliance; and
- A contravention of the scheme incurs civil penalties.

The proposed licensing body would be funded via the licensing fees from franchisors and be responsible for license registration, including termination, prosecuting contraventions and enforcing license conditions. The unit would also:

- Establish a register of franchisors in Queensland in the interests of transparency;
- Manage an online resource for franchisees and workers to visit, which lists franchisors and their businesses;
- Conduct investigations, including entry powers, into allegations of noncompliance with license requirements and share information with relevant bodies such as the Fair Work Ombudsman or Fair Work Commission;
- Make determinations on contraventions, and
- Report annually on compliance, including data on the number of investigations conducted and the number of fines and penalties issued.

The requirements of a license to be considered by the unit could include:

- A 'minimum capital' requirement of assets, revenue and cash flow;
- The identity of persons who, or ought to be, granted the license under the scheme;
- The business record of the franchisor;

[25] *Labour Hire Licensing Bill 2017* (Qld).

- Whether any individuals have been in breach under the scheme or any other industrial law;
- Whether the license applicant is of good character and judgement; and
- Any other relevant matters.

Franchisors should be required to report on the following:

- Compliance with industrial laws, including work, health and safety laws;
- The number of franchisees engaged by them;
- The number of employees engaged by their franchisees;
- Information of payment to superannuation funds and Workcover premiums;
- Relevant franchise agreements which govern franchisees;
- Relevant industrial agreements which govern employees of franchisees; and
- Compliance with ATO requirements.

It is important to ensure that in the design of a Franchising Regulation Scheme that the onus is on the franchisor to ensure compliance, due to the high degree of control franchisors have in the franchise relationship.

iii. Wage Recovery

Maurice Blackburn and the Unions remind the Committee of the importance of ensuring that appropriate processes for wage recovery must be considered as part of any review of wage theft.

We submit that wage recovery rules under Queensland *Industrial Relations Act* 2016 need to be streamlined and simplified.

One means for achieving that would be through the development of a dedicated, low-cost user friendly underpayment and wage recovery jurisdiction. This could be created in the Industrial Division of the Magistrates Court (Qld) with sitting judicial members who are experienced in such matters.

We further submit that the powers of the Regulation and Compliance Branch of the Office of Industrial Relations be resourced to recover all entitlements and deal with unpermitted deductions.

In doing so, and the Inspectorate should work collaboratively with the Fair Work Ombudsman.

CASE STUDIES

Over the following pages, we submit a number of case studies drawn from the experience of Maurice Blackburn and the Unions. They cover the range of employment types that we have been describing in this submission.

We trust that these help to put a human face to the evidence provided in the submission.

1. In relation to Labour Hire arrangements

Labour Hire Company Night Star Cleaning provided workers through a labour hire company to perform work at the Hans Primo Wacol plant, cleaning the facility after each day of production. These workers mostly worked through the night.

An investigation by the relevant union, the AMIEU, found that workers:

- Were paid a flat rate of $18 per hour;
- Worked predominately employed at night between the hours of 10pm to 6am;
- Were paid approximately $9 per hour under award rates;
- Were not paid any superannuation;
- Were not provided pay slips;
- Were told they were working as a contractor but did not even have to provide an ABN number;
- Payment was made into their accounts with no reference to who deposited the funds;
- No documentation exists at all between the employee and the employer, only phone numbers;
- Were required to provide finger scanning at the site which provided the AMIEU with proof/evidence of the employee start and finish times.

After exposing the exploitation, the AMIEU had extensive discussions, including with Night Star representatives and meetings with senior members of Hans Primo. The labour hire company disappeared from the site and the employees were employed by a cleaning company which paid proper award rates of pay. The union understands that the director of Night Star left the country.

Approximately 23 Indian workers joined the AMIEU, mostly holding partner visas. There were/are approximately 80 Indian visa workers employed at the site. The workers are now being paid award rates.

2. Hans Primo Wacol

At the same site, underpayments were also occurring under a different arrangement. The union found:

- Widespread under award payments to Korean 417 visa workers. Between $1 and $3:50 per hour under award rates;
- No overtime rates and no shift allowances;
- Payslips that clearly showed under award rates;

- Best link and Bayer were the labour hire providers but sub-contractors to BE poultry - employees moved between Bayer and Best Link after six months but stayed at the same worksite (avoiding the six month rule);
- Threats were made to Korean workers. A labour hire supervisor parked outside of the AMIEU office to watch who was attending meetings;
- The Branch Secretary wrote to Hans Primo's National HR manager;
- The Branch Secretary and Industrial Officer flew to Sydney to meet with the company; and
- Following negotiations a six figure back pay was reached.

3. Employment arrangements for short-stay temporary visa workers

Short stay visa workers, especially those on 'backpacker visas' are employed in large numbers in the meat processing industry.

In almost all cases, the direct employer is an on-hire labour company which supplies labour to a meat processing establishment. Such arrangements allow 'backpacker visa' workers to be employed at award rates, rather than the higher enterprise agreement rates which apply to direct employees of the establishment. Despite the advantage which accrues to employers in engaging visa workers on inferior award rates, non-compliance with even minimum safety net entitlements is rampant.

The AMIEU's practical experience is that it is commonplace for these arrangements to involve:

- Underpayment of basic award conditions, often due to blatant disregard of award entitlements;
- Attempts by the union to ensure award compliance are hindered by inadequate record keeping by the employers and intimidation of visa workers;
- Many of the labour hire companies operating in this sector are "$2 companies" with no significant assets or capital, allowing them to go into liquidation if attempts to enforce entitlements are successful;
- Inappropriate deductions from workers' wages;
- Disregard of workplace health and safety obligations, including at least some instances of failing to ensure workers are vaccinated against Q Fever (which, if contracted can become a chronic, debilitating condition);
- When exploitative practices by labour suppliers are brought to the attention of meat industry employers, the invariable reaction has been a refusal to investigate or take remedial action. Employers invariably (and often, implausibly) purport to have no knowledge of unlawful activity on the part of the labour hire company, and wilfully ignore any indication to the contrary; and
- Legal processes for the recovery of wages are often unrealistic when short-stay visa workers have to return to their home country long before these processes are completed.

4. Green Mountain Abattoir Coominya

The AMIEU estimates approximately 80 Taiwanese workers on 417 visa are employed at this site. We estimate there are approximately 200 production workers (plus admin, maintenance, management etc.). There were three Taiwanese workers who have made a formal complaint with the FWO. The AMIEU have assisted them in making that application.

The evidence gathered from meeting and speaking with the workers showed:

- Use of an ABN in a situation where workers are employees and not genuine contractors;
- Underpayment of minimum award wages;
- Unpaid overtime;
- Flat rates of pay;
- No taxation amounts deducted by the employer;
- The first two days worked for no pay as to “assess ability” to perform job;
- Employees are not provided with pay slips;
- No superannuation paid;
- Obligated to provide a $600 bond for a job. The $600 would be refunded only if the employee stayed in employment for 6 months. Each employee would have $100 a week deducted from their wage until the bond was reached;
- Forced into renting from certain housing. Up to 15 people can live in one home. $90/pw to share a room. $70/pw to share a lounge room. Some were forced to sleep on the floor (property searches show that the Plant Manager had an interest in five of the seven properties used to house Taiwanese workers); and
- Cost of PPE (Q fever) charged to employees, in contravention of the Queensland Work Health and Safety Act.

5. TASK Labour Hire

The AMIEU has uncovered another labour hire company (TASK) who predominantly employ Taiwanese workers. This company is becoming a major player in supplying labour to the meat industry. They are registered as required under the new licencing laws. What the union has uncovered about them so far is:

- Have an office in Taipei Taiwan where each week dozens of Taiwanese workers are interviewed for work in Australia;
- Paying award rates but freezing at entry level rates. This is a training wage and little training is needed to perform meat packing duties;
- Incorrect classification rates;
- Requiring workers to pay for Q fever vaccinations before commencement of employment;
- Compulsory medicals and drug testing at nominated medical centres with inflated medical fees;
- Non-compliant Individual Flexibility Agreement;
- Text message exchanges between company and workers (in Mandarin) with threats for asking about wage rates;

- On call workers – they are told they have to wait for work each day to get the call. If they do this for a period of time they then will be provided a more secure structure of casual work;
- Advertising for boys only;
- Asking height and weight when applying for a job;
- One of the directors was involved with underpayments of other employees with another company; and
- Threats of legal action to one former employee for informing workers of their rights on a social media website.

6. Uber

With Uber a system of ratings is used for customer feedback. When our client's ratings fell below a certain standard due to inexplicable reasons, his account with Uber was deactivated.

There being no place or tribunal to agitate the driver's grievances, an unfair dismissal was lodged. Soon, the driver found himself opposed by high priced lawyers acting for Uber. To be successful, the driver was going to have to prove that he was an employee, not an independent contractor.

In the end, some unfavourable decisions on the point from other jurisdictions and the huge obstacles facing this driver led to him discontinuing the proceedings.

7. Within the taxi industry

A Bailee taxi driver was aggrieved that a substantial fare allocated to him had been taken by another driver.

The driver lodged a small claim with QCAT, attempting to rely upon the sub-rules of the company that purported to regulate driver behaviour.

Ultimately, the claim failed as the sub-rules were said not to create a contract between the Driver and the company.

8. Within the courier industry

An independent contract courier had his contract terminated abruptly. The TWU assisted him in seeking a small debt/minor civil dispute by way of payment of reasonable notice. Judgement was ultimately entered by default in the contractors' favour.

However, the respondent was permitted to use lawyers to have the default judgement set aside. QCAT then subsequently dismissed the claim as not being "liquidated".

The contractor, sceptical of QCAT after this experience, engaged his own lawyers to pursue the matter in the Magistrates' Court.

The TWU has assisted many owner/drivers and other independent contractors with recovering debts owing to them. This assistance generally consists of drawing small claims/minor civil disputes for filing with QCAT. QCAT however has a culture regarding legal representation that in the union's experience rarely sees a party refused legal representation.

This places owner/drivers and independent contractors at a distinct disadvantage in representing themselves.

A purported independent contractor working for Boske was paid the same hourly rate no matter how many hours he worked in a week. He may have worked 60 to 70 hours but received no penalties, overtime of other allowances. He was significantly underpaid by comparison had he been an employee working the same hours and entitled to the benefit of an Award.

8. Within the public service

Together experienced significantly different responses from Queensland Health than it did from the Department of Transport and Main Roads in relation to similar instances of underpayments.

In both instances the employees were meant to be paid for a meal break, so an eight hour shift for continuous shift workers at the Gold Coast Hospital and Health Service ('the GCHHS') should include a paid half hour meal break, and a 9.5hr shift worked by a Department of Transport & Main Roads ('DTMR') shift worker should include a half hour meal break.

Neither entity was paying the half hour shift breaks, so GCHHS workers were working 8.5 hours, including an unpaid half hour break, and DTMR were working 10 hours, including an unpaid half hour break.

In both cases the industrial instruments meant that the meal break took the workers into overtime, and so not only were they not being paid at all for that half hour, they should have been paid that half hour at overtime rates.

Employees at GCHHS raised this issue with management in 2012 and requested a review by HR, but the rosters continued in operation and the employees continued to be paid in breach of their industrial instrument.

The employees raised the issue with Together in 2015 at which time they formally corresponded with the employer. The union received correspondence in late 2015 admitting the conduct was not compliant with the industrial instrument and proposing an arrangement to pay the affected employees a settlement based on them receiving a payment of 30 mins of ordinary time for each shift. We responded that the settlement should be based on payment at the overtime rates, per the industrial agreement.

Together had to notify of a dispute under the *Industrial Relations Act 1999*, at which point Queensland Health, representing the GCHHS, denied liability.

Contrast the behaviour of TMR, where they identified the error as part of some internal review and arranged a meeting with the union to inform them of the issue. They then entered into discussions of how to manage the issue, such as making arrangements to calculate back pay to be paid and informing staff on the issues and actions to be taken. This involved making an immediate change to the work pattern so the issue would not continue into the future and senior management sent out communications to all affected staff identifying the error, apologising to staff and indicating how payments to rectify the error were going to be processed.

At no time did TMR try and deny the error or argue there was no liability, they acted as a model litigant and showed genuine leadership on a sensitive issue.

It was only that the same type of situation arose in DTMR and the union were able to advise the QIRC of the actions taken by DTMR that GCHHS and Queensland Health entered into a settlement where the 30 mins on each shift was paid at double time. The settlement figure was in the order of $4.5M for affected staff. So despite employees raising the issue in 2012 the employer continued to underpay the employees in breach of the industrial instrument. Payment was not effected until 2016.

By not trying to deny the issue like GCHHS did in 2012 and Queensland Health did in 2016, TMR acted to prevent a practice generating future costs to the state.

More generally in the public service, procurement should be monitored to ensure that companies with any history of wage theft are not awarded contracts.

10. Regional shopping centre

In February 2016, United Voice Queensland (UVQ) were contacted by members employed as cleaners at a large regional shopping centre. The cleaners had performed cleaning duties at the centre for various employers over a few years. A cleaning contractor "SSS" held the contract but had regularly sub contracted other companies to engage the labour under a dubious pyramid sub-contracting scheme.

The various companies were irregular in their compliance with the award, keeping records and providing taxation information.

The various companies engaging the labour had come and gone, and the employees had periodically been placed back on the "SSS" payroll. None of the transferring of employees from one employer's payroll to another seems to have been effected in accordance with regular industrial processes.

Employees contacted United Voice when they were told that "SSS" was, once again, not going to be their employer, but there was a new contractor "JS".

The employees were told that the new pay rate was "$20" per hour with wages paid directly into their bank accounts by cash deposit.

Employees were asked to complete new "PAYE" forms, which did not include details of the new employer. Employees were not provided with any details of the new employer other than a mobile phone contact number and a contact's first name.

Employees were threatened that if they contacted the union they would be sacked. It transpired that employees remained working at the shopping centre, performing identical duties.

Employees were not provided with payslips and received reduced remuneration for the same hours of work, deposited into their bank accounts. No detail of the payer was made available to employees.

One of the employees called "JS's" contact number and enquired about her payslip. "JS's" contact stated that none of the employees were employed by "JS" yet, because they hadn't provided "JS" with an ABN.

Another employee was absent through illness, provided a medical certificate as per usual practice to "SSS' and did not receive any sick pay.

It became clear, that "SSS" had intended to pyramid sub contract out the employees to "JS" who would employ all the cleaners under sham independent contracts under "ABNs" at reduced pay, performing exactly the same duties.

The union wrote to the shopping centre management and "SSS" setting out, inter alia, our concerns about potential breaches of the federal employment laws.

The union received a response from "SSS" advising that it no longer intended to engage "JS" to employ the cleaners, and that "SSS" intended to engage them all under the award.

Our members subsequently began receiving payslips from "SSS", but discovered that they were engaged as 'casuals', despite working the same regular rosters. After further intervention from the union, employees were re-classified as permanent part time.

11. Case Study: Cleaners compensated for improper underpayments by sub-contractors

UVQ secured financial compensation for union members who were paid a flat hourly rate for weekends and nights for cleaning two major shopping centres in Queensland.

United Voice organisers conducting shopping centre visits uncovered improper practices where a major cleaning contractor, Quad Services, had sub contracted out some of the work to smaller subcontracting companies.

The sub-contractors were underpaying cleaners, breaching the cleaning award, and paying a flat hourly pay rate for all hours worked, including weekends and nights.

The union initiated proceedings in the Fair Work Commission.

As a result of the union's actions, Quad subsequently terminated the services of both sub-contracting companies, employed the cleaners directly and financially compensated them.

One of the cleaners affected, United Voice member Hiren Patel stated:

"United Voice worked very hard to ensure that our underpayments were rectified.

A union organiser visited our site several times throughout the process and showed us how to understand our Award so we can recognise any underpayments if it ever happens again. I recommend to all cleaners that they contact United Voice if they have any concerns about their pay rate... Thanks to United Voice I am much more confident in speaking up and questioning work practices if I think something isn't right."

In a joint public statement Quad and United Voice stated:

"Quad and United Voice have been in dispute about employees who had claims of underpayment. The union had been contacted by its members but had been unable to resolve the matter with Quad. United Voice took the dispute to the Fair Work Commission.

Quad agreed to investigate the claims of United Voice and found that improper practices had occurred involving two sub-contractors who supplied labour to the two contracts in question.

The sub-contractors had engaged in various practices including underpayments and award breaches none of which were consistent with the commitments Quad has given to United Voice and the overall culture of the Quad business.

Quad did not condone the actions of the sub-contractors and committed to resolving the dispute on terms agreeable to United Voice and its members and ensuring that the improper practices did not occur again.

Quad subsequently terminated the services of the sub-contractors, and compensated the employees accordingly.

Quad agrees that the industry benefits from having United Voice represent the interests of the thousands of cleaners who work in the industry.

United Voice accepts that Quad is genuine in seeking to change and improve its relationship with the union in Queensland.

Quad and United Voice agree that both parties will commit to a professional working relationship that among other things will enable the union to visit work sites and talk to employees in a climate that emphasises the positive aspect of union membership.

12. Case Study: Jupiters Casino outsourcing to Challenger Cleaning

In December 2012, United Voice was notified by Jupiters Hotel & Casino (Jupiters) of its decision to outsource housekeeping, facility cleaning and stewarding functions to Challenger Cleaning (Challenger). These workers were at the time directly employed, and covered by an enterprise agreement (EA). Challenger did not have an enterprise agreement (EA) and its workforce was covered by the Modern Award (the Award).

Upon the outsourcing arrangement being completed in early 2013, United Voice members immediately began to raise concerns around their conditions of employment. The most common complaint from members was from part time workers (who made up the vast majority of transferring workers) having their regular hours reduced. Challenger relied upon the workers' contracts with Jupiters, which provided a broad spread of hours. Effectively, part time contracts of employment allowed the employer to roster workers anywhere between 10 and 37.5 hours per week. Workers who would regularly expect to be rostered, for example, 30 hours per week with Jupiters saw their hours reduced sharply to the minimum required in the employment contract. This understandably had a severely detrimental impact on these workers.

The rationale of Challenger was clear. Their plan was to starve out transferring workers, who retained the higher benefits contained in the EA in favour of new, cheaper workers, who could be covered by the Award.

Notwithstanding Challenger's dubious motives, this activity was a foreseeable consequence of the outsourcing arrangement.

However, as Challenger's operations ramped up, United Voice began hearing reports of more dubious employment arrangements. Particularly, United Voice members began reporting the use of foreign labour, usually international students, who responded to job offers posted on "Gumtree" and other like services. These workers were ordinarily paid flat rates of pay and on a cash-in-hand basis.

Following lengthy and extensive investigations, United Voice commenced Federal Court proceedings against Challenger. However, upon these proceedings reaching court, United Voice was made aware that Challenger (who by this time had established several different corporate entities) had gone into liquidation.

At a similar time, following adverse publicity and campaigning by United Voice, Jupiters made the decision to bring housekeeping, facility cleaning and stewarding services back 'in house'.

13. Case Study: Inspection of wages record

A United Voice official visiting a Club and talking with employees began to form suspicions about the payment practices of the catering sub-contractor operating within the club.

The union had quite a few members employed by the club, but only a handful of members who were employed by the sub-contractor.

Most employees of the sub-contractor had been discouraged from talking with union officials and were reluctant to do so.

Throughout visits between March and July 2017, an organiser was informed by various employees that the caterer was underpaying its staff, paying cash in hand and kept two sets of books. The organiser was unable to verify this information because of the reluctance of the affected staff to talk with her and because of the restrictions on her right to inspect records.

The organiser conducted 'suspected contraventions' visits on 24 and 25 July 2017, and gathered further information, but no evidence. As a result, the organiser applied to inspect non-member records.

The application to inspect non-member records was filed with FWC on 4 August 2017. The matter was not listed until 1 September. The matter was heard ex parte, so was uncontested, however, the organiser submitted a detailed affidavit setting out the basis of the suspected contraventions, and the reasons why it was necessary to inspect non-member records.

A decision and Order to inspect non-member records did not issue until 5 October.

On 27 October, the catering contractor applied to re-open the matter due to having not been heard before the order was issued. On 6 November, the union provided the caterer's representative with a copy of the official's affidavit provided in support of granting the orders.

After receipt of the affidavit setting out the grounds for suspecting contraventions, the catering company's representative provided employment records.

The union's inspection of the records revealed no contraventions.

Six months later, an employee of the catering company informed the union that the catering company kept two sets of books, one of which recorded 'cash in hand' payments. The union tried to get the evidence from this particular worker, but he travelled overseas. To date, despite holding suspicions based upon information received, the union is unable to substantiate that underpayments and breaches have occurred.

This example illustrates the difficulties faced by unions in investigating such issues and the timelines experienced.

14. Case Study: Fiona and Brian – Peninsula Fair Shopping Centre cleaners

Two cleaners, Fiona Quemuel and her partner, Brian Toleman, both work side by side performing identical work, however, Brian was paid the award rate and Fiona was paid below the award due to the continuing operation of an expired 'Workchoices' agreement.

Both work at Peninsula Fair Shopping centre at Kippa-Ring on the north side of Brisbane.

Both wear the same uniform that of the principal contractor, have the same supervisor, have the same tasks to perform but both did not have the same employer.

Brian is directly employed by Trident Cleaning who has the contract to clean and provide security services for Peninsula Fair shopping centre, but Fiona was indirectly employed by Trident through a labour hire arrangement with a labour hire company trading as Workplace Central.

Fiona was on a flat rate of pay and paid the same flat hourly rate regardless of the day of the week, or the time of the day or night which she works. Fiona's hourly rate was simply the award minimum base rate.

Brian is paid under the terms and conditions of the Cleaning Services Award 2010 so he receives penalty rates at night, on the weekend and on Public Holidays.

Fiona was not paid any penalties or allowances.

Fiona stated to UVQ:

"I expressed an interest in cleaning work at the Peninsula Fair Shopping Centre, as my partner Brian already worked there for Trident. I gave my CV to the shopping centre management and to Trident.

Trident management called me to a meeting at their offices and offered me a casual position. I filled out paperwork and provided my bank and superannuation details.

About two weeks after my meeting with Trident, I received an email welcoming me to 'Workplace Central' and stating that I would be paid $23.08 per hour and that Trident Cleaning was my host employer.

I rang Trident as no one had mentioned anything to me about working for a different company and I hadn't heard of 'Workplace Central'.

The Trident supervisor told me that all new starters are engaged through Workplace Central as casuals on a flat pay rate regardless of the day or time you work.

I worked out over a four week period, working just 33 hours that I was paid $100.00 less than the award.

I spoke with a United Voice organiser who visited the site. The organiser explained to me that I was actually employed by another company related to Workplace Central, which had an expired 'Workchoices' era certified agreement still operating. The agreement did not provide for any penalty rates or allowances.

Workplace Central had a labour hire arrangement with Trident that allowed them to provide cleaners at below award conditions.

I think it is unfair that some of us at the shopping centre who wear Trident uniforms and work alongside cleaners directly employed by Trident are not paid penalty rates or allowances, when we perform the exact same tasks every day."

United Voice Queensland officials, have negotiated for Fiona to be directly employed by Trident, and she will now be paid under the award, and receive penalties and allowances, like her husband Brian.

UVQ subsequently negotiated directly with Workplace Central who agreed to terminate their "Workchoices" agreement from 1 January 2018.

15. Case Study: Wynnum Plaza shopping security guards

Guards worked for Trident under an indirect labour hire arrangement through Workplace Central as security guards at Wynnum Plaza shopping centre.

One was surprised after commencing work at the shopping centre to discover he did not receive any higher pay rates for working overtime, late shifts or weekends.

A wage comparison over just one fortnight in October 2016, showed that he had earned $180 less than the minimum award rates for the same period.

Two other security guards at Wynnum Plaza work identical fortnightly shift rosters, on the first week of the roster, they are paid $325 a week below the award, on the second week the hit is only $20 a week below the award!

Over their roster cycle they are about $180 per week below the award.

United Voice negotiated for the staff to be directly employed by Trident, so that they be paid penalty rates, instead of under the labour hire zombie agreement.

The sting in the tail however is that Trident Security had their own Zombie Agreement!

Although their agreement expired in 2011, it provided pay rates above the Workplace Central CA but below the award.

Trident security agreed with United Voice to terminate their own zombie agreement and pay its security guards under the award.

16. Case Study: Stamford Plaza

In 2016, United Voice Organiser, Mr David Malley exercised his right to enter the Stamford Plaza Hotel in Brisbane to hold discussions with employees working on the premises pursuant to section 484 of the *Fair Work Act 2009* (Cth).

Arising from those discussions, Mr Malley discovered employees working in the housekeeping department had been outsourced to a labour hire company trading as Style Hospitality.

The outsourced workers were represented as independent contractors and paid under an ABN; however, the indicia of their work arrangements suggested that they were more likely to be employees and not independent contractors.

Some employees of Style Hospitality were engaged as employees and others were represented as being independent contractors. Both groups of workers performed the same duties.

United Voice discovered the outsourced employees were paid on a ‘per room basis’ and those deductions were made for uniforms, cleaning chemicals and equipment supplied by Style Hospitality. Cleaning chemicals and equipment were charged at rate of 5.2% of their pay per fortnight.

United Voice also discovered that deductions were made for Public Liability and Accident insurance cover at a rate of $49.55 per fortnight.

These deductions seemed excessive relative to the outsourced employees’ modest earnings, and the value received by employees for their outlay.

United Voice considered that it was unlikely the ‘per room rate’ would provide sufficient compensation relative to the minimum wage rates and other entitlements payable under the Award.

United Voice also considered that it was unlikely the deductions made by Style Hospitality would be permitted under the Act.

United Voice met with Stamford Hotel management and advised them of the union’s concerns. Stamford Hotel representatives cooperated with the union and requested that we deal with Style Hospitality directly and advise Stamford Hotel of our findings.

Style Hospitality provided information and documents to the union including a copy of the schedule of payment per room cleaned and copies of invoices/pay slips.

United Voice formed a view that the housekeepers were likely to be incorrectly classified as independent contractors and underpaid relative to the award.

Style Hospitality then converted staff to employees and ceased the ‘independent contracting’ arrangements.

The union provided a brief report to the Commonwealth Employment Ombudsman, the Australian Tax Office and the Stamford Hotel.

This situation was unusual in that the Hotel and the Contractor co-operated with the union and provided information to us.

Summary of Recommendations

1. That wage theft be criminalised.

2. That rather than adjusting the existing provisions of the criminal code, a separate legislative scheme should be implemented to criminalise wage theft, balancing the needs of business and the rights of workers.

3. That to this end the inquiry consider the development of a Wage Theft Act.

4. That the potential provisions of a Wage Theft Act include:
    - Strict liability offences;
    - Tiered levels of conducted amounting to wage theft; and
    - Tiered levels of penalty.

5. That the prosecution should bear the burden of proof to prove that any misconduct was engaged in without a reasonable excuse.

6. That industrial organisations should be given standing to prosecute wage theft, with accompanying powers to access time and wage records, and to be able to seek costs from an employer on a successful prosecution.

7. That the Queensland Government grant the Queensland Industrial Relations Commission (QIRC) powers to make determinations as to the status of workers in ride sharing arrangements, with respect to certain 'contracts for carriage', akin to powers currently held by the New South Wales Industrial Relations Commission (NSWIRC).

8. That the *Transport Operations (Passenger Transport) Act* (1994) be amended to better regulate Uber and other ride sharing providers, to ensure these services do not allow for wage theft.

9. That the inquiry investigate state and federal options for ensuring that workers performing work for 'gig-economy' food delivery services such as UberEats, Foodora and Deliveroo are properly be considered employees.

10. That a licensing scheme for franchisors be considered, based on the licensing system for labour hire operators

11. That the Queensland Government work with and through unions as a primary means of information distribution to the workforce, for information pertaining to minimum employee entitlements and recourse available in the event of employer misconduct.

12. That wage recovery rules under Queensland *Industrial Relations Act* 2016 be streamlined and simplified and a dedicated, low-cost user friendly underpayment and wage recovery jurisdiction be created in the Industrial Division of the Magistrates Court (Qld) with sitting judicial members who are experienced in such matters.

13. That any whole of government procurement policy be amended to ensure that companies with any history of wage theft are not awarded contracts.

14. That the powers of the Regulation and Compliance Branch of the Office of Industrial Relations be expanded to recover all entitlements and deal with unpermitted

deductions, and the Inspectorate work collaboratively in enforcement action with the Fair Work Ombudsman.

15. That the inquiry consider ways to ‘level the playing field’ such that employers who are doing the right thing by their workers are not put at a commercial disadvantage to those who are not.