Inquiry into wage theft in Queensland

Queensland Council of Unions

Submission

Queensland
Council of Unions

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Executive Summary

The Queensland Council of Unions (QCU) provides this submission to the Education, Employment and Small Business Committee to bring wage theft further to the forefront of public attention. It has long been incongruous to workers and their representatives that a worker caught taking money from his or her employer is subject to criminal charges whereas wage theft is dealt with as an administrative error and often where it is resolved, it merely costs the employer what they were legally obliged to pay in the first place.

As is evidenced by this inquiry, wage theft has become topical due to its prevalence. There is some recent academic literature that addresses the topic of wage theft which is reviewed for this submission. In addition, there has been a range of parliamentary inquiries that have been tangential to this topic that also provide an understanding of the scope and extent of wage theft. Fair Work Ombudsman (FWO) activity also assists in highlight the various types of wage theft that have occurred in industries that have been the subject of FWO investigation. Media attention on cases of wage theft have brought this topic into the public domain. Some of the more high-profile cases of wage theft are also discussed in this submission.

To enable workers to tell their stories, the QCU set up a web site. At the time that this submission was drafted 169 valid responses had been received. The data from this web site is used to attempt to get some understanding of the types of wage theft and the industries in which wage theft is most prevalent. The results from the QCU web site appear consistent with the knowledge developed from the secondary sources mentioned above.

Wage theft, in our submission, can be traced to structural changes to industry that have enabled business practices that promote or attempt to hide wage theft. The prevalence of wage theft also coincides with decades of restrictions on the activities of unions, particularly concerning enforcement of industrial entitlements.

In response to Term of Reference (g)[1] the QCU has developed a number of suggestions that are contained in Table 4 of this submission. Those submissions cover those policies which the Queensland Government could introduce as well as suggestions that might be adopted for the Australian Government.

[1] 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

Those suggestions are as follows:

State Government	**Recommend for federal system**
Industrial Division of Magistrates Court	Waiting time provisions (unpaid shifts)
Criminalising wage theft	Easy, inexpensive and quick access to remedies
Procurement policy	Aggravated damages
Accredited standards	"Hot" goods
Funding of NFP organisations	Right of entry for non-union members
Mapping supply chains (Labour Hire licensing)	
Services for NESB	
Education of employers and potential employees	

Introduction

The Queensland Council of Unions (QCU) is the peak union council in Queensland. We are pleased to make this submission to the Inquiry into wage theft in Queensland and commend the Queensland Parliament for undertaking this Inquiry. As will be discussed throughout this submission, wage theft has become and remains a major problem for workers in Australia and has contributed to the current crisis in low wage growth and the growing inequality being experienced in Australia.

The QCU has been involved in a range of recent inquiries that have been tangential to the theme of wage theft. The Queensland Parliament has undertaken an inquiry into Labour Hire and the Queensland Government subsequently issued a discussion paper. Labour Hire has been associated with wage theft and a range of other practices detrimental to Queensland workers. A senate inquiry was undertaken into corporate avoidance of the Fair Work Act. The corporate avoidance inquiry focused on practices that avoided the intentions of that act and touched upon wage theft. Most recently the QCU made a submission to an inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies. This very focused inquiry considered some of the practices in this sector of the economy in which wage theft has been found to occur.

The QCU has also been involved in a number of submissions concerning workplace health and safety. Many of fundamental issues are the same. The inability of regulators to halt the flow of non-compliance has led to a series of reviews of legislation and inquiries. The QCU has contributed to the recent best practice review of Workplace Health and Safety Queensland; the review of model laws currently being undertaken by Safe Work Australia; and the recent senate inquiry into industrial deaths. Parallels can be drawn between lapses in workplace health and safety compliance and wage theft and this occurs at times in this submission.

The submission reviews contemporary literature on the topic of wage theft and includes a discussion of media reports into some high-profile cases of wage theft in recent years. That secondary research provides an explanation of what types of wage theft are understood within the literature, some of the recent cases to gain public notoriety, explanations as to why there has been a recent upsurge in wage theft and discusses enforcement. The submission also discusses responses received by members of the public on a web site set up for the purpose of

assisting this inquiry. The data collected from the web site is somewhat limited but, along with the literature, helps inform the QCU response to the Terms of Reference for this Inquiry, with which the submission concludes.

The next section of this submission deals with the types of wage theft discussed in contemporary literature. This literature review is to provide an understanding of the various types of wage theft that have been studied and helps inform some of the specific questions asked in the terms of reference.

Types of wage theft in Australia

Upon reviewing the literature with respect to wage theft, one quickly concludes that compliance with and enforcement of industrial obligations has been traditionally understudied in Australia (Goodwin and Maconachie 2007:524; Howe 2017:24; Quinlan and Sheldon 2011:5). Wage theft encapsulates a range of activities that deny workers their legal entitlements (Macdonald et al 2018:81). The term itself implies the gravity of this misconduct on the part of employers. Wage theft can include the most blatant form of paying a worker at less than the correct hourly rate of pay but also refers to failure to comply with a range of other obligations (Macdonald et al 2018:81).

Given the relatively broad array of minimum standards that apply in Australia because of the history of arbitrated awards, there are a range of obligations (Macdonald et al 2018:82). In addition to the hourly rate, other non-observed entitlements that constitute wage theft include failure to pay overtime, penalty rates and occupational superannuation, as well as failure to comply with working time arrangements such as minimum and maximum hours of work and minimum call back[2] also contribute to wage theft (Macdonald 2018:82).

The more deliberate means of wage theft is to treat an employee as an independent contractor, or sham contracting, thereby purportedly avoiding the employment relationship (Thornthwaite 2017:262; Underhill 2013:193; Weil 2018:439). Wage theft is often, but not always, associated with the practice of payment by cash in hand which clearly breaches a number of other laws,

[2] Minimum call back refers to a minimum payment made to workers under an industrial instrument for having to return to work outside normal hours for urgent work (Yerbury and Karlsson 1992:44)

including taxation law and denies the worker access to workers' compensation and superannuation contributions (Parliament of Australia 2016; Parliament of Australia 2017:69).

Unlawful deductions from wages also constitutes another form of wage theft in which unscrupulous employers will illegally take money from their workers' pay for spurious reasons such as breakages and theft beyond the control of the employee or exorbitant rent for substandard accommodation (Parliament of Australia 2017:62). Poor record keeping is usually associated with wage theft as non-existent records make proving wage theft more difficult and in extreme cases, employers will fraudulently create false records to avoid prosecution (Parliament of Australia 2017:62). Ultimately not to pay an employee at all is wage theft of the highest order and is manifested in the form of internships or trial shifts (Thornthwaite 2017:262/3).

Noncompliance with industrial obligation has always featured to some extent in Australia (Goodwin and Maconachie 2007). What has been witnessed in recent years however has been described as both a national disgrace in relation to guest workers (Parliament of Australia 2016) and a crisis in relation to the maintenance of a living wage (Thornthwaite 2017). It can be reasonably presumed that the growth in wage theft has been the cause of substantial interest from academics, journalists and parliaments over recent years (Howe 2017:216; Quinlan and Sheldon 2011:6). Retail, fast food, service stations hospitality and digital platforms have featured prominently as industries in which wage theft is common, if not a business model (Healy 2016:319; Thornthwaite 2017:262/3). Of the 20, 000 Australian workers who checked their pay through an online wage calculator in 2016, one in four of them found they were receiving less than minimum rates. Approximately 60% of submissions in the restaurant industry showed underpayments (Toscano 2016). Other industries affected by wage theft include agriculture, food processing, poultry processing and journalism.

The next section of this submission sets out some recent high-profile cases of wage theft in Australia. These examples provide real life illustration of wage theft and its prevalence.

Recent Cases in Australia

One of the more prominent cases in recent years is 7-Eleven. 7-Eleven brought large scale non-compliance to national attention with a Fair Work Ombudsman investigation that started in 2014. Not only was there evidence of underpayments but fraudulent records were kept by the franchisees. A franchise system meant that individual stores were the employers and liable for any sanctions for breaching workplace laws. The corporate brand as a franchisor was immune from prosecution as 7-Eleven was not the employer. The conciliatory approach that was adopted by the Fair Work Ombudsman in this case failed due to 7-Eleven failing to cooperate with any program intended to bring about a culture of compliance. A large number of employees on working visas also hampered the investigation as employees were too scared to speak for fear of deportation (FWO 2016; Healy 2016:319: Patty 2016).

The fast food industry has also demonstrated a capacity for national brands to be embroiled in wage theft scandals. Recently the Fair Work Ombudsman activity in relation to Pizza Hut has been made public. Widespread non-compliance, including sham contracting, was attributed to the franchisees of this national brand. The Fair Work Ombudsman has issued compliance notices to recover wages for underpayments, infringement notices and formal letters of caution to Pizza Hut franchisees, ninety-two percent of whom were said to be non-compliant (Workplace Express 2016a). Dominos is another recent example of a franchise operation in which underpayment is rife. Continued costs of introducing new technology is blamed for franchisees being required to seek to reduce costs elsewhere, namely labour costs (Workplace Express 2017a). Another national brand operating under a franchise system is Red Rooster. Migrant workers in Brisbane are being paid as little as $8 per hour. Channel 7 reporters have been following this case which demonstrates how franchisees are quite often willing to exploit workers in order to increase their profit margin while the owner of the brand they are selling turns a blind eye (Love 2017).

Exploitation of guest workers is not restricted to fast food. Guara Nitai Pty Ltd operated a Coffee Club café in Brisbane and used the workers' fear of deportation to undertake what was described as "gross exploitation" by Judge Jarrett of the Federal Circuit Court. The guest worker, a cook, was paid an amount owing for underpayment of wages and then required to withdraw the same amount and pay it back to the company director. Highlighting the

desperation of workers who depend upon their visa being sponsored by their employer, Judge Jarrett imposed $180,000 in fines against Guara Nitai Pty Ltd and its director (Workplace Express 2017b).

Caltex have reportedly taken the decision to bring all of its service stations under direct control rather than use a franchise system. Franchising appears to be synonymous with wage theft for major brands in Australia. By using a franchise system, it appears that major brands have distanced themselves from actual payment of workers and therefore any level of compliance. In 2018, an audit of Caltex outlets found that 76 per cent of them were not compliant with providing employees' proper entitlements. The audit found evidence of underpayment, failure to pay overtime and penalty rates and poor record keeping, with even some examples of falsification of records. Typically, it was young workers and workers from non-English speaking backgrounds who were most likely to be underpaid by the Caltex franchisees (FWO 2018a; Workplace Express 2018a).

The name Baiada Poultry was probably not well known before FWO investigations brought national notoriety to this family-owned company. Baiada owns the Steggles brand and had previously publicised supplying its product to KFC, Red Rooster, Woolworths and Coles. Baiada, therefore has certainly been associated with some high-profile national brands. Baiada had a practice of engaging labour hire companies that were far from reputable. FWO reports state that Baiada and its suppliers of labour were uncooperative with investigations. Exploitation was rife amongst a workforce that included overseas workers on working holiday visas. Record keeping was described by FWO as "inadequate, inaccurate and fabricated". Baiada's use of sham contractors was prolific amongst a production workforce where an objective assessment of the work performed would make the suggestion of such workers being independent contractors laughable (Workplace Express 2015).

Underpayment is not only restricted to labour intensive industries such as fast food and retail. Touchpoint Media Pty Ltd is the subject of legal action by the Fair Work Ombudsman. It is claimed that Touchpoint Media Pty Ltd and its company director, Laurence Bernard Ward, are responsible for underpaying 23 young journalists by more than $300,000. The highest amount owed to one journalist was almost $50,000 (Mitchell-Whittington 2017).

A reluctance on the part of workers to complain is due to a fear of reprisal is substantial cause of wage theft (Goodwin and Maconachie 2011:61; Parliament of Australia 2017:62; Weil 2018:439). As is evidenced by the recent Australian examples, it is often the most vulnerable

workers who have been the victims of wage theft. Young workers and guest workers are commonly unaware of their rights or not in a position to enforce them. When considering guest workers, it is important to understand the layers of vulnerability that are in play. Language barriers are an obvious reason for workers whose first language is not English to not be completely aware of their entitlements. Added to this is the capacity for not only their employment to be threatened but the threat to their migration status means that guest workers are even less likely to stand up for their legal entitlements even if they are aware of them. When one considers student visa holders, many of whom appear to have been exploited, the restrictions on the number of hours they are permitted to work under their visa is held against them by the unscrupulous employer who entraps them into working in excess of their permitted hours only to use this fact as threat to have the student deported for breaching their visa conditions. The overseas student faces not only unemployment and deportation but potentially complaining might also impact upon their education (Parliament of Australia 2016:211; Parliament of Australia 2017:67).

The obvious question (and one contemplated by the Terms of Reference) is what has been the cause of wage theft if it is said to be becoming more prevalent. The following section reviews the recent literature concerning the apparent upsurge in wage theft.

Why the upsurge of Wage Theft?

There are several reasons for the upsurge in wage theft in more recent times. As previously stated, wage theft (or the more benign nomenclature of underpayments) has always been part of the Australian industrial relations system (Goodwin and Maconachie 2017). However, wage theft was usually not associated with nationally recognisable brands, the proprietors of which would be concerned with reputational damage. Wage theft was traditionally more likely to be found in small business with less recognisable public identities (Goodwin and Maconachie 2007:525; Maconachie and Goodwin 2010:422; Weil 2011:41). As can be deduced from the discussion of recent examples above, wage theft has now been associated with a range of high profile brands.

Fundamental to the recent upsurge are changes to the structure of industry that has been described as “fissuring” (Macdonald et al 2018:81; Weil 2011; Weil 2018:440). These

structural changes have manifested in complex structures and intricate supply chains that are now associated with a range of industries (Parliament of Australia 2017:69; Quinlan and Sheldon 2011:5; Thornthwaite 2017:264; Weil 2011:36). The use (or misuse) of labour hire has been the subject of steady and alarming growth (Belchamber 2012:313; Naughton 2014:133; Thai 2012:150; Underhill 2013:193). Labour hire, particularly the bottom end of that industry, has been a means by which the principal (who would otherwise be the employer) can shift responsibility and, more significantly legal responsibility, to a third party to take over employment of the workforce (Macdonald et al 2018:82; Thornthwaite 2017:263; Weil 2011:37).

Several parliamentary inquiries have taken place in Australia in response to the growing problems being faced by workers because of labour hire (Industrial Relations Victoria 2016; Parliament of Australia 2016; Queensland Parliament 2016; South Australian Parliament 2016). Evidence to these inquires illustrated the low threshold for entry into the provision of labour hire often from unscrupulous operators without the financial security to meet their legal obligations. Wafer-thin profit margins in extremely competitive markets inevitably led to workers' entitlements becoming a casualty. Moreover, layers of subcontracting created greater complexity and less accountability (Weil 2018:440). Seemingly legitimate contractors further subcontracted to less reputable contractors that neither had the financial viability or inclination to meet their legal obligations (Gough 2013:38). Workers are left with no recourse when the employer at law is discovered to have no assets (Macdonald et al 2018:82; Thornthwaite 2017:263).

Also evidenced by the recent scenarios discussed above is the association of wage theft with the use of franchises. A franchise arrangement has similarities to subcontracting in that the risk is transferred from the principal to the franchisee. A national brand might be identified to the consumer but the employer of the workers, at law, is a very small business on very tight margins (Thornthwaite 2017:264). In fact, as we saw above, the financial pressure being placed on franchisees is a common cause of wage theft. As the margins become increasingly impractical for the franchisee the exploitation of vulnerable workers is the obvious way in which a profit margin can be restored. This is the model that operated in the case of 7-Eleven convenience stores in which guest workers who fearful of losing their rights to employment in Australia were willing to undercut the award rates of pay.

Change to the industrial relations system in Australia have also contributed to the growth in wage theft. Changes to law in relation to unions will be discussed later, however the shift from centralised wage fixation to enterprise bargaining has also contributed to the propensity for wage theft. The award system had the effect of taking wages out of competition and therefore not providing an incentive for employers to undercut award minima (Thornthwaite 2017:263). The more decentralised system of enterprise bargaining includes a non-union stream that has proven to be problematic for the maintenance of reasonable standards. Evidence was produced for the Corporate Avoidance of the Fair Work Act Inquiry by Education and Employment References Committee (Parliament of Australia 2017) of the existence of agreements from the WorkChoices era that had the effect of institutionalising wage theft (QCU 2017; United Voice 2017).

Employee reluctance to complain is a common thread throughout literature concerning wage theft. The more vulnerable the employee the less likely they are to complain. This is an obvious problem for identifying wage theft in the first place but it makes enforcement extremely difficult. The expansion of precarious employment in Australia has contributed to the environment in which workers are less likely to make complaint (Maconachie and Goodwin 2010:423; Underhill 2013:193). There is also a definite correlation between the decline in union membership and the rise of wage theft (Cockfield et al 2011:133;). That is union members are less likely to be underpaid and more likely to be willing and able to enforce their legal entitlements (Maconachie and Goodwin 2010:434).

Union membership has suffered a steady decline over recent years. Changes to the structure of industry and consequently employment has made the recruitment of workers as union members increasing difficult. This is a common phenomenon in most advanced economies (Boyer 1995:547), however in Australia decades of anti-union legislation and hostility from employers has placed further downward pressure on union membership (Bodman 1998:30; Peetz 1998:175; Sappey et al 2006:299; Watson et al 2003:194). It is hardly surprising that an upsurge in wage theft would result from union resources being stretched and severe legal restrictions being placed on unions operations (Hardy and Howe 2009:310).

It is obvious that a problem exists with respect to wage theft. This section has explained why there has been an upsurge in wage theft and the following will look at issues concerned with enforcement.

Enforcement

Most relevant to the topic of wage theft, has been the restrictions placed on unions in relation to enforcement of industrial instruments. Restrictions on union right of entry and the capacity to seek recovery of underpaid wages were restricted by the Workplace Relations Act 1996 (WRA 1996) and have never been returned (Cockfield et al 2011:134; Hardy and Howe 2009:307). Given that the entire non-government and private sector is now covered by the federal industrial relations system, unions in Queensland operate under this restrictive system where wage theft is most likely to occur (Cockfield et al 2011:146). The restrictions on unions' capacity to police industrial instruments was matched with the development of a federal bureaucracy ostensibly to take up the business of enforcement (Cockfield et al 2011:135; Hardy and Howe 2009:307). Whilst industrial inspectorates, state or federal, are nothing new, the intention of policy following the introduction of the WRA 1996 was to shift from a complementary role between inspectorates and the union movement towards unions' functions being replaced in relation to enforcement (Hardy and Howe 2009:308).

Resources committed towards enforcement was always going to be an issue of contention (Hardy and Howe 2009:315; Weil 2011:34). Unions are motivated to maintain minimum standards in an industry so that their members' (and potential members") wages and conditions are not being undercut by competitors not complying with the award (Hardy and Howe 2009:308). Inspectorates are not going to have the same motivation as unions and will have their resources devoted to the preference of the government of the day (Goodwin and Maconachie 2007:527; Hardy and Howe 2009:315; Maconachie and Goodwin 2010:423). This factor is well described in relation to the post WRA 1996 era by Goodwin and Maconachie (2011:73):

> With de-unionisation and individualisation high on the political agenda in the 1990s the enforcement agency's activities were diverted to promote new individualised AWAs and the development of cooperative and harmonious industrial relations under the Workplace Relations Act 1996. Official prosecution and inspection strategies stagnated, while unions fought to survive in the hostile environment. These pressures intensified in 2005 with the Howard government's Work Choices reforms.

The current federal enforcement agency is the Fair Work Ombudsman (FWO), that like previous incarnations has done more than merely prosecute employers for underpayment of

wages. In addition to the pursuit of wage matters, the FWO is currently seeking damages against unions, including one case in which the dispute between the employer and the union has been settled (Workplace Express 2018b). With such limited resources it difficult to believe that suing a union, where the supposedly injured party is not interested in such an action, is more important than pursuing wage theft. The FWO operates on a complaint based model of enforcement which relies upon workers who are often unaware of their rights or afraid to enforce them making the complaints in the first place (Cockfield et al 2011:147; Goodwin and Maconachie 2007:542; Hardy and Howe 2009:310; Maconachie and Goodwin 2010:423).

The complaints based approach can be contrasted from a more strategic approach. Strategic enforcement is a mechanism to use extremely limited resources in relation to an enormous workload (Goodwin and Maconachie 2007:525). This approach requires attention to the outcomes rather than inputs (Weil 2017:448). A strategic approach is said to have four major aspects to it: prioritisation, deterrence, sustainability and systemic effect (Hardy and Howe 2017:567). Obviously with the very limited resources at the disposal of the FWO compared to the extent of wage theft in Australia, not all cases brought to the attention of the FWO will be addressed. Long delays are associated with the processing of claims if they are to be addressed at all.

Deterrence is an obvious method by which a regulatory agency seeks to change behaviour (Hardy and Howe 2009:311). One criticism of the FWO is its assumption that underpayments are as a result of an error on the employer's part rather than a deliberate avoidance of obligations (Hardy and Howe 2015:565; Parliament of Australia 2017:63). Sustained compliance pertains to strategies that ensure that errant employers continue to comply even after the regulator has ceased to observe that particular employer. The final strategy of systemic effect obliges the regulator to use both prioritisation and deterrence in order to attack the root cause of wage theft. As we have seen, the root cause is often the competitive market at the bottom end of the supply chain.

Recently the QCU was involved in the Best Practice Review of Workplace Health and Safety Queensland (WHSQ). One of the findings of the report that arose out of that review was that there had been an over reliance on the part of WHSQ on softer compliance strategies, such as education and partnerships with employers, at the expense of deterrence measures, that is prosecution and the routine imposition of fines for breach of obligations under the Work Health and Safety Act 2011. A criticism of a partnership approach is that it lacks any form of

accountability (Hardy and Howe 2015:578). Previous research concerning enforcement of industrial entitlements has likewise found that prosecution as a last resort does result in a reduced probability of detection, provides little deterrence to underpayment and allowed employers to avoid their obligations (Hardy and Howe 2009:329).

Enforcement is but one of the issues of concern to this inquiry. Its apparent failure appears to be widespread but some specific examples were thought to be of assistance to this inquiry. The following section of this submission is devoted to a web site that was created by the QCU in order to obtain firsthand accounts of wage theft from the public.

QCU Website

In response to this inquiry, the QCU launched a web site http://stopwagetheft.org.au/ that encouraged members of the public to tell their stories concerning wage theft. This site went live on 12 July 2018 and the following discussion pertains to the preliminary data that is available from that site. It is intended to keep the site running past the time of the submission so that further information can be provided to the committee or any other person or organisation interested in wage theft. A total of 68 responses had been received by 20 July 2018.

The following table uses ABS industry classifications to compare the response received with the percentage of workers employed in an industry. Whilst the number of responses to the web site to date are not sufficient to be statistically significant, it might be instructive to consider those industries that are over-represented. As the note to this table identifies there is an inordinately high number of responses to the QCU web site that do not provide an industry. This overrepresentation of "not stated" in the responses to the QCU would tend to understate that which is attributed to other industries, thereby making any generalisation from our limited data quite reasonable.

Table 1 Reponses to QCU Web site by Industry

Industry	% total employment	% wage theft responses
Agriculture, Forestry and Fishing	2.6	14.2
Mining	1.7	1.8
Manufacturing	6.6	9.5
Electricity, Gas, Water and Waste Services	1.1	-
Construction	8.8	7.7
Wholesale Trade	3.0	0.9
Retail Trade	10.2	8.9
Accommodation and Food Services	7.1	17.2
Transport, Postal and Warehousing	4.8	5.9
Information Media and Telecommunications	1.7	1.2
Financial and Insurance Services	3.7	-
Rental, Hiring and Real Estate Services	1.8	-
Professional, Scientific and Technical Services	7.5	-
Administrative and Support Services	3.5	4.1
Public Administration and Safety	6.9	1.2
Education and Training	9.0	2.4
Health Care and Social Assistance	13.0	7.7
Arts and Recreation Services	1.7	0.6
Other Services	3.8	11.8
Not stated	1.3	5.9

Source 2016 Census (ABS 2016) and QCU web site

Note as at 12.00 pm 30 July 2018 n = 169

It is of interest that the responses from workers associated with the following industries are well in excess of those industries' proportion of the total workforce:

- Agriculture, Forestry and Fishing
- Manufacturing
- Accommodation and Food Services
- Other Services

There is the potential for some bias as towards responses from workers in the industries in which the QCU would have contact. Nonetheless, some of those industries are consistent with the anecdotal experience of affiliated unions, the literature and FWO activity. In particular "Accommodation and Food Services" is unsurprisingly well represented on the web site. The small number of responses for "Other Services" includes responses for contract cleaning and security. It would be unsurprising that these industries would also be over represented compared to their proportion of the work force. Number of employees is accessible by way of occupation at the four-digit level in the census data and whilst contract cleaning represents 1.2 per cent of the total workforce (ABS 2016) it represents 4.7 per cent of responses to the QCU web site. Likewise, security represents 0.4 per cent of the total workforce but 3.6 per cent of responses to the QCU web site.

A recent Fair Work Ombudsman report illustrates the level of noncompliance in the hospitality industry (FWO 2018). This FWO report combined with the responses to the QCU web site means that it can safely be assumed that wage theft is prevalent within the hospitality industry. The following response was received from one member of the public that is quite comprehensive and sets out some of the types of wage theft witnessed by an experienced hospitality worker over the years:

> I've been working in the hospitality industry for 22 years. Those stories you hear on the news about Domino's or George Calombaris is a snowflake sitting atop the tip of the iceberg.
>
> Chefs tend to move around from job to job a lot more than people in other trades/professions. And over my time, I've had a lot of jobs. I can honestly say, I can count the number of restaurants I've worked at, where I've been paid correctly for the hours I've worked, on one hand.

On top of that, I was recently meeting with a financial advisor. We were going over my current position. To my shock I discovered I only had $33K in superannuation. As we went over who has paid my super, I realized only 50% of the establishments I've slaved away at, had paid my super. Now, these other restaurants have since closed down, and my chances of getting the money owed is slim to none.

Below are some of the usual tactics employers have used against me in the past to steal from me:

A) The Primary Weapon: Salary

As a full-time employee in hospitality, chances are you're immediately put on an individual EBA. Where, without working one day at the establishment, you are required to negotiate your pay, based on the word of the interviewer as to how many hours you will roughly work each week.

For example, the interviewer may tell you, you'll work 45-50 hours p/w. But as always in hospitality, your constantly understaffed, and the true hours p/w you work are closer 60. And the unpaid over-time is expected of you.

If you dare to question how you can be worked so many hours, while being paid for so few, you'll be rebuffed with something along the lines of, "with an attitude like that, you clearly don't have enough passion to make it in the industry". Followed by a scoff, and a questioning of your self-worth.

B) Disappearing penalty rates

Much like point A. When negotiating your individual EBA, weekend, and public holiday penalty rates are rarely factored in.

C) Fined for breakages, or tills that are out of balance

Pretty much as the title says. Some employers believe they can make a staff member pay for a broken plate. Or replace the money a till may be out by, by raiding tips. The second point, regarding tips is very common place.

D) Hours worked go missing

At least 90% of the full-time staff in hospitality will never take breaks. We simply don't have time for one. However, 5 hours p/w will go missing from your time sheet to allow

for a break. Not only do you lose money 5 hours pay each week, your also not paid penalty rates which would otherwise have to be paid.

E) (my personal favourite) Negotiating with inexperienced staff

This is a rare one. It usually only happens at very large establishments, or where the employer owns multiple businesses.

The employer will negotiate a group EBA, but, will only invite 17 & 18 year old teenagers to the negotiations (even after pointing out I was a union member, and happy to be the union rep, I still wasn't invited. In hindsight, that was probably a massive black mark on my name).

Now, not to say these kids aren't intelligent, but they lack the experience to know their rights, and what they're truly entitled to. Let alone negotiate for people who work under a different award on top of it as well.

F) Straight out theft

What is on your pay slip doesn't match what is deposited in your bank account

I have encountered other methods of wage theft. But, those above are the most common I've encountered.

More to the problem, when I talk to other people in the hospitality industry (even experienced staff). The theft is so ingrained, they don't even realize they're being ripped off, they believe it's normal and legal. And common place in other industries too.

Several responses to the QCU web site were from the fresh food supply chain and food manufacturing industries. The problem of wage theft in the horticulture sector has been well documented and likened to forms of modern slavery (Meldrum-Hanna and Russell 2015). The industry is particularly vulnerable to exploitative wage theft because of the over-representation of temporary and permanent migrant workers.

Predominantly employed by labour hire contractors, these workers are either unaware of their workplace rights, or afraid to raise concerns about their wages and conditions. This is because of their dependent relationship with their contractor, and the lack of legal rights in their form of employment.

In the horticultural sector, workers are routinely paid less than the minimum wage, are denied superannuation, penalty rates and other minimum entitlements. Wage theft in the horticulture industry also takes the form of: unlawful or unreasonable deductions from wages for Visas, transport, accommodation, food and flights and exploitative 'piece rate' agreements.

> "I was a casual worker employed through labour hire at [withheld], in Caboolture, Brisbane as a packer.
>
> All of packers could not earn a reasonable salary. We were paid on piece rates per punnet of berries. The faster packers could earn $12-14 au per hour before tax. The slower earn $5-6 au per hour before tax (even when working in the peak season). The packing standard changed every day. Made us confused all the time. And they seldom declared the packing standard in front of everyone
>
> There were different grades of berries. We needed to recognize fruits, determining which one is 'good', 'second' and 'rubbish'. We were required to sort and pack fruit into different punnets from 'second' trays. It was hard to make money packing 'second' trays. For example, I only could earn $5-10 au per hour from second trays. We spent a lot of time to sorting fruits, but were not paid for this, only the amount of punnets.
>
> With the low wages, most of us could only afford food and accommodation.
>
> Some of packers wanted to take a day off, but the response is 'if you have a day off and you would lose this job'.
>
> The most disappointing thing was the attitude of officials to this exploitation. We went to Fair Work to for ask some information two times. The first time, we went to the office with our landlord who is local. The staff said this problem happened everywhere and didn't want to talk to us. He just wanted to pass the buck. The attitude was awful.
>
> After few days, we sent our complaints to Fair Work. A month later we got a call from an inspector, although not everyone who made a complaint was called. The Inspector said the farm could not provide the information such as: our working hours, pay slips etc to him. Most of us offered our own records and pay slips to him but we felt he just wanted to finish this case but never tried to help us. He did not ever contact other complainants.

> This made us very angry and disappointed. We wanted to leave, but we need the 2nd visa and most of the workers did not have car. Most of farms in this area do not even pay the tax to government!"

Submissions from the food manufacturing workers also indicate the prevalence of wage theft in that industry. Common forms of wage theft described by the submitters include: failure to pay shift loadings, penalty rates and over time; failure to pay the correct classification for work performed and non-payment of superannuation.

> "I was a labour hire worker at [withheld] food processing facility in Yatala. I was meant to be paid under the *Food, Beverages and Tobacco Manufacturing Award 2010.*
>
> During 2015, I queried whether I was receiving the correct rate of pay and shift loadings. I consistently worked 12 hour shifts overnight but was getting the flat level 2 Award rate. When I queried it with the labour hire company, they said they didn't have to pay it There was around 20 workers who hadn't been paid the night shift loading since we started."

> "I work at a water bottling plant in Staplyton that manufactures water for [withheld]. Since the new owners took over in 2015, myself and other workers have not had our superannuation paid properly. Despite working full time hours over the last two years, I've received hardly any contributions. When confronted about this management have said they 'have a deal with the ATO'".

> "I was a full-time employee at [withheld] between January 2014 to the end of 2017. I was paid around 90 cents less than the Award rate for the entire time that I worked there.
>
> I did not receive any entitlements including penalty rates, overtime rates, or shift loading, even though I would work night shift each week and work on weekends. I would work 12 hours on a Sunday but only get paid the same amount as I would on a weekday. I used to work 60 hours a week but would only receive the same rate of pay,

and was never paid overtime. I worked night shift which commenced after 5pm but would not receive a shift loading.”.

I was 17 I got a second job working at a discount store, they paid me via check book that I would have to cash at the bank. I never got payslips and I never paid tax and never accumulated super.

There was no regular pay cycle and my rate of pay changed depending on the owners mood towards me, I was the only white female employee and everyone was from india or Fiji which isolated me further in the workplace.

When I asked the employer why I wasn’t paying tax or why I didn’t receive super contributions I was told not to return to work.

I wasn’t until a month ago I actually realised what I had experienced was wage theft and that it was highly illegal practice that the employer was performing will the staff who worked there.

I used to work at [withheld] at the North Lakes shopping centre. I was told by my boss (Hussein) that I would be getting $300 per week (It wasn't fantastic but I was hoping it would get my foot in the door). It worked out that I was getting paid a little less than $10 per hour but I was keen. I worked there for a while and every week I had to ask for my weekly pay which he would give to me out of the till. If I didn't ask for it or the till didn't have the money, I didn't get it, or I would get a response implying that next week I would get paid. The week would end and I would feel bad about asking for the current week of pay let alone the previous weeks pay. By the end, He owes me over $1500 (I can't remember the the amount, this was over 5 years ago). Thinking about it now, I should have just quit but, $300 per week was more than $0 if I hadn't had "the privilege" of working there.

An interesting perspective is for workers in regional communities. In addition to often precarious employment, repercussions beyond their current employment are also possible. The following example demonstrates this aspect of the problems facing workers in regional areas:

this refers to my grandaughter's partner living in Gunnedah NSW.

He has worked for 2 panelbeaters as a senior apprentice and at both places he has and is being short paid, and not paid for overtime, nor for being on call at all hours of the week and weekends. His super account is being underfunded by his employer, and his previous employer failed to give him any pay slips either in paper or electronically.

In a regional town he is unable to get any other work in his given trade, and is therefore reluctant to speak up for himself.

Wage theft, is just that...THEFT!

What is needed is for unions to once again be given the right to enter premises, inspect books, and speak to employees about their wages.

A few years ago I was working at a local Thai restaurant, I was 18 years old then. I did a few nights of a work as a "trial" at a rate of $50 in cash for four hours work, i.e. 12.50 an hour. When I secured the job properly, I was given a raise to around 14.4 an hour, I checked online an I should've been receiving 16.6 an hour minimum for hospitality work as a casual. When I contacted my boss about this and asked for the minimum rate, I was sacked. I contacted fair work and they did nothing.

The following table also sets out the type of wage theft described by the responses to the QCU web site.

Table 2 Type of Wage Theft Reported on QCU website

Response/ reason for underpayment	**% of all responses**
Underpaid the hourly rate	34.9
No superannuation	16.0
Independent contractor	16.0
No overtime	9.1
Wrong classification	4.6
Work in own time	4.0
Wrong or no penalty	2.9
Leave not provided	2.9
No or wrong allowance payment	2.3
Illegal deduction from wages	2.3
No pay at all	1.7
No breaks	1.1
No pay rise	1.1
Overtaxed	0.6
No notice provided	0.6

Source QCU web site

Note some responses were for more than cause meaning that there were 175 responses counted here as opposed to the 169 counted in the previous table. as at 12.00 pm 30 July 2018 n = 154

This list does purport to be exclusive but it does provide some examples of wage theft. The incidence of "independent contractor" being listed as such a frequent response would tend to indicate its prevalence, at least in the industries in which responses were received. Consistent with conventional understanding the construction and transport industries featured highly in responses where "independent contractor" was the reason for wage theft.

The high prevalence of "independent contractor" as a reason for wage theft would tend to indicate that the worker in question does not consider themselves to be genuinely classified as

such. In all of these cases the rate paid to purported contractor would be less than that which they would be entitled under various laws[3].

The following comments made through submissions to the QCU web site:

> My husband was working for a security firm who insisted he be a contractor with an ABN. The company he worked for supplied his uniforms and also had a patrol car for him to use. He was paid $25 per hour. Out of that he had to pay his tax, super and save some for sick or holiday leave. Needless to say there was never enough to cover all that. The director of the company sent out a roster of shifts each fortnight and heaven forbid he call in sick! If anyone ever questioned the director of the company he would become aggressive, with his way of speaking and generally just a bully. My husband had a major breakdown and ended up in hospital for a month. Needless to say the company never contacted us to see how he was doing and thankfully my husband never got any shifts ever again!

> After two years of driving ride-share full time, mostly 12 hours a day, every day and keeping me poor, I jumped at the chance to drive for a limosine company, diving their vehicles and not having to pay for maintenance, repairs and fuel. For about seven months, I was up early and drove an airline crew to and from their hotel. But work for the day was patchy from then, with another job maybe five hours later. This made it also not a good living. But I wanted to show that I was ready for work when it came, so I was in my white shirt and company tie all day. An opportunity came, with this company, to drive a shuttle bus in a circuit every day for 6.6 hours, which I did for another six or seven months until that suddenly stopped. On inquiry, I found that they had decided that any regular work made me look like an employee rather than a contractor. So my work became patchy again, never enough to give me a proper full day's earnings. After about 15 months with them I am now no longer working with this company. There was no paid sick leave, recreation leave nor superannuation.

[3] The payment of an hourly rate to the purported contractor will make no allowance for penalties, overtime, superannuation or workers compensation premiums.

> My eldest son left school and 15 and obtained work with a local pool builder. The builder wanted my son to obtain an ABN but as I work for the ATO was fully aware that he was not a contractor and could not be considered a contractor. I explained the situation to my son and showed him the information on contractors/employees on the ATO website. My son completed an employment declaration and handed it in to his employer. The employer immediately used those details to fraudulently register my son for an ABN through the website, demanded that he supply a tax invoice for the work performed over the previous 4 weeks at a rate of approx. $10 per hour. This employer did the same thing to my son's friend who was employed at the same time. My son contacted me to let me know what had happened and he did not return to work for that employer. This was reported to ATO through the complaints line but we did not think to report it to Fair Work at the time. While this happened over 10 years ago now, in addition to the underpayment, my son was not paid super, was not covered by additional entitlements such as workcover in the event of an accident and potentially could have been held liable for any defects in the pools built - even though he had no prior experience and was not a qualified contractor. I have no information to confirm whether the employer is still trading.

> Required to get and ABN as an independent contractor for [withheld], was expected to wear company uniform and pay rent for company apartment, have invoices and contracts as proof. Job was caretaking of apartments including all cleans, maintenance, transfers and callouts, Was not paid an hourly rate instead was forced to invoice for cleaning only and all other work was done for free.

Failure to pay superannuation is also prevalent and of considerable concern. Non-payment of superannuation contribution has an ongoing detrimental effect to the worker. The following excerpts are from submissions to the QCU web site:

> I wasn't paid any superannuation. I was a restaurant supervisor with a franchised chain restaurant. When I asked the owner about it he said he would look into it. When nothing was done and as I had quit by then I reported it to the Tax department, as I had had to do after a previous job had also not paid super. After 5 years of letters from the ATO saying that they are working on it. I got a final letter saying that nothing more could

happen with my case and it was shut down. So I not only lost the super I was entitled to but the interest it would have been earning me.

It's not just wages its super as well was working for a seafood shop and was never paid super in 7 years.

I recently received a letter from my superannuation company saying that my account had been closed. Upon further investigation I discovered that no super had been paid for 2 years, and for the 3 years I have worked for the company prior to that, I didn't have a super account at all! I have been given a range of excuses but nothing has been done to remedy the problem. I'm completely stuck because I make a good wage for the job I do and can't afford to start from the bottom with a new company as I have 2 little mouths to feed.

I worked for a local cafe for 13 months as a cook/ manager. Our pay slips consisted of an envelope with our names on them and inside was the cash and a piece of paper that told us how much was in the envelope and how much she had deducted for consumable items like coffee and lunch.

After I had been there for 12 months I received a letter from my super company saying that no contributions had been made in the last 12 months. I was scared to call my super company to find out the truth. Was probably more denial than anything else. Then a few incidents happened at work where staff injuries were covered up, people were fired for things they did not do. So I called my super company and found out that no super had been paid. I asked them what it was I needed to do and they told me to contact the ATO. Which I did. The ATO then activated an investigation into my unpaid super. I then rang my boss and quit. I told her why and she denied it was true. I told her no it was true I had already contacted my super company. The next day I received a letter from her telling me that they didn't pay my super because they felt that giving me a happy work environment was a better idea. I still have this letter just in case she decides to do something stupid. The ATO also received a copy of this letter and my super is being paid in instalments.

I may have been hired as a casual but I worked 45 hours a week for a set wage of $600 a week. Yes I agreed to this, which is why when the other employees took her to fair work I did not put in a claim. I agreed to the wage because I really needed a job. Like so many others out there, you take what you can get. Horrible to be exploited.

Using the wrong classification for workers is also way in which some employers reduce their wage costs. The following examples illustrate how under-classifying workers occurs:

Worked for a local leagues club, as a "cook" was paid for 2 years $23.01 which was "level 1" cook while doing a literal head chefs role, in 2.5 years there never received a pay slip..

They did pay taxes but i never saw a pay slip.

They pay 15/hr to bartenders cash in hand as well as to cooks who would come and go.

I was working 4 days a week for 2.5 years as a "casual"…

When they "realized" I'd been underpaid by nearly $2.50 per hour 20 hours a week for 2 years they just laughed and then complained i was costing them too much.

I left 4-6 months later.

I once asked about perm part time got told "we cant afford leave etc"

I worked 15hours over 2 days in a bar/restaurant and didn't get paid. I made a complaint to the fair work ombudsman but by the time they got to it the business had been shut down as they couldn't pay their rent.

I currently work at a restaurant who are paying me entry level when they should be paying me as a level 3 f and b attendant.

As a casual Labour hire worker in civil construction I a was employed on the lowest labourers hourly rate but expected to operate high risk machinery without being paid higher rate for operating high risk machinery which I Am qualified and hold the

> appropriate tickets for. If you ask to be paid the extra they just say they will get somebody else. Also working from 9am till 9pm and not paying any night shift penalties.

Failure to pay overtime and penalty rates is another prominent form of Wage theft. “Work in own time” is somewhat similar to overtime but includes, for example, the requirement for the worker to undertake induction in their own time rather than being paid for the time it takes. These are some of the examples found on the QCU web site:

> Everyday we would do anywhere up to 2hrs overtime and not be paid anything for it. Two of us were expected to complete the job yet they never paid a cent above 38 hrs.

> Paid a 38 hour week, however average 50 plus per week, my time clock will automatically sign me off so there is no proof of correct hours, only rosted hours. I expect to do the extra hours, but what about work cover if I have an accident. My roster will say I'm not at work??

> It has happened many times in different jobs. Unpaid overtime. Or as employers put it "reasonable overtime". You are paid for a 38 hour week standard inclusive of a reasonable expectation of overtime. And your boss determines what is reasonable, obviously. And what a surprise, it's ALL reasonable. Currently, I am paid 38. Working 45-50+, every week. But it's all reasonable, of course.
>
> If challenged, the employer will say lies like "well if you want to get ahead in the business, this is what you need to do" or "if you want an office job and advancement then these are the costs". When asked when these promotions will be happening, they have no answer. There is no time in lieu, no annual leave accrual. Nothing. Work 50. Paid 38.

> I worked at [withheld]. During the 2 and a half years of my employment they docked my pay and cut my penalty rates example if i worked 8 hours straight without a break they would take anywhere from 30 minutes to an hour off that shift most penalty rates weren't paid and I've never been back paid even after bringing it up several times ... if and when I mentioned it they would drop my hours severely for a couple of weeks I ended my employment early this.

The previous discussion in the various preceding sections of this submission have been included to inform the specific responses to the terms of reference for this Inquiry.

Terms of reference

a) *the incidence of wage theft in Queensland, with reference also to evidence of wage theft from other parts of Australia.*

It is apparent that there has been an increase in the incidence of wage theft in Australia and it is our view that Queensland is in no different situation. The Report into Corporate Avoidance of the Fair Work Act (Parliament of Australia 2017:59/60) made the following observations:

> Underpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm. Figures cited below are alarming. In Victoria alone, it is estimated that 79 per cent of hospitality employers did not comply with the national award wage system from 2013 to 2016.3 The national average for noncompliance is brought lower by findings from other states, but is still hardly a figure engendering pride. Nationwide, it is estimated that one in two hospitality workers are being illegally paid, with similar figures available for the retail, beauty and fast food sectors.

According to the 2016 Census (ABS 2016) 156,672 workers were employed in the Accommodation and Food Services industry. A FWO audit that was undertaken in 2017 (FWO 2017) restaurants, bars and cafes in Fortitude Valley found non-compliance at 60 per cent. If

one was to extrapolate[4] the 60 per cent non-compliance rate that was found in one audit in 2017 to the number of employees employed in the Accommodation and Food Services industry, in the order of 94,000 employees within that industry alone would not be in receipt of their proper entitlements.

As discussed earlier on of the primary concerns is that nationally recognised brands are now associated with wage theft which would demonstrate that reputation harm is no longer a sufficient deterrent.

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

The impact on workers is obvious and the very name wage theft encapsulates the loss workers suffer when paid incorrectly

One of the economic impacts of wage theft is that it is contributing to low wage growth phenomena in Australia (Healy 2016:320) that has been widely described as being a crisis (Lowe 2018; McManus 2017; Stanford 2018). The following table sets out the measures of wage growth and how they have declined in recent years.

[4] It is accepted that caution would need to be used for a sample of this size and that it was at one geographic location being extrapolated to the entire state.

Table 3 Measures if Wage Stagnation

Measure of Wage Stagnation			
	Average Annual Growth		
	2000 - 13	**2013 - 17**	**Change**
Wage Outcome Measure			
Wage Price Index	3.7%	2.2%	- 1.5%
Average Weekly Earnings	4.3%	1.6%	-2.7%
New Enterprise Agreements	3.9%	3.0%	-0.9%
Average Hourly Compensation (National Accounts)	4.8%	1.5%	-3.3%
Unit Labour Cost	2.9%	0.2%	-2.6%
Other Relevant Variables			
CPI	2.8%	1.8%	-1.0%
Real Labour Productivity	1.3%	1.1%	-0.2%
Source Stanford (2018) calculations from ABS and RBA data			

To summarise the reasons Jim Stanford attributes to this stagnation, it is worth quoting the following:

- A steady erosion in the real "bite" of minimum wages, which have fallen from 60 percent of median wages in 1990 to around 45 percent today.
- The collapse of trade union membership in the face of legal restrictions, harassment, and full-protection for "free riders." Today just 9 percent of private sector workers, and less than 5 percent of young workers, are union members.
- A corresponding collapse in collective industrial action. Adjusted for the size of the workforce, the frequency of strikes and other industrial disputes has declined by 97 percent from the 1970s to the present decade.
- The relegation of industry awards to a baseline "safety net," instead of a system for supporting ongoing progress in wages and working conditions.
- The generally pro-business shifts in economic policy, including tax cuts, deregulation, privatisation, and globalisation, which have also shifted economic power in favour of employers and hence indirectly suppressed wage growth (Stanford 2018).

It is noteworthy that a number of the reasons for low wage growth overlap with the reasons for the emergence of wage theft. In particular the restrictions placed on the activities of unions and their members has a common explanation for both wage theft and declining wage growth.

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

Table 2, earlier in this submission sets out the types of wage theft that were provided to the QCU through its web site that established for this inquiry.

In conjunction with those responses and the literature that has been reviewed for this submission, we would suggest the following typology of forms of wage theft:

- Minimum rates of Pay (including less than minimum wage)
- Overtime and penalty rates (incorrect or non-existent additional payment)
- Unpaid overtime
- Allowances
- Misclassification:
    - Award rate (e.g. remain on introductory level)
    - Sham contracting
    - Treating permanent employees as casual employees
- Illegal deductions/truck
- Workers compensation (no payment of premiums)
- Superannuation (non-payment of contributions; payment into a non-compliant fund)
- Various forms of leave (see treating as casuals in misclassification)

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

The reasons for wage theft is considered at length in this submission under the heading "Why the upsurge of Wage Theft?" Authors have described the "fissuring" of industries which involves complex structural changes to supply chains (Macdonald et al 2018:81; Weil 2011;

Weil 2018:440). Included in the fissuring is the use of labour hire, contracting and subcontracting, competitive tendering, franchising and various forms of intermediaries (Weil 2011:41). This fissuring is combined with an increasing use of vulnerable employees most notably guest workers. It would appear that the use of a range of methods to avoid industrial obligations have become a business model. In some industries, such as the hospitality industry, it would appear that wage theft is the rule rather than the exception.

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 Report into Corporate Avoidance of the Fair Work Act (Parliament of Australia 2017:59/60) made mention of the hospitality retail, beauty and fast food industries. This list of industries also features in the "Recent Cases in Australia" reference earlier in this submission, however service stations, poultry processing and agriculture have also gained significant media attention. It also appears that franchising and the use of labour hire lend themselves to wage theft as the responsibility for employment matters is outsourced and legal definitions of the employer and/or principle become complex.

The literature referenced earlier in this submission identified that vulnerable workers were most likely to be the subject of wage theft. It is self-evident that non-union members are infinitely more likely to be the subject of wage theft than union members. Young workers and workers from non-English speaking backgrounds are obviously going to be less aware of their rights and due to their vulnerability, less likely to pursue them even if they are aware. The threat of deportation and loss of visa status tend to silence dissent amongst guest workers. This additional vulnerability associated with guest workers has been described as the layers of vulnerability (Bissett and Landau 2008; Boese et al 2013; Campbell 2010; Commonwealth of Australia 2016)

In addition, anecdotally we have been advised that wage theft is emerging amongst workers towards the end of their career are also vulnerable (interview Caxton Legal 2018). Whilst being more likely to be aware of their rights, more mature workers might find themselves disadvantaged within the labour market. Workers who have been made redundant or whose career occupation no longer exists (or is in considerable less demand) may be forced to take

whatever work they can find to make ends meet. This is another form of vulnerability that has not been the subject of as much academic research as young workers and workers from non-English speaking backgrounds.

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

The Fair Work Ombudsmen does not have the resources to properly address the level of wage theft that exists in Australia. There is considerable discussion previously in this submission under the heading "enforcement".

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.

There are constitutional limitations on what actions the Queensland Government might be able to undertake. For this reason, it is necessary to consider what the Queensland Government might be able to and that which it would be appropriate to recommend to the Australian Government, given its universal coverage of private sector industrial relations.

The following table sets out a range of possible solutions to wage theft. Following that table is a brief discussion of matters that might immediately be considered by the Queensland Government and those that might recommended to the Australian Government.

Table 4 Possible Solutions to Wage Theft

State Government	Recommend for federal system
Industrial Division of Magistrates Court	Waiting time provisions (unpaid shifts)
Criminalising wage theft	Easy, inexpensive and quick access to remedies
Procurement policy	Aggravated damages
Accredited standards	"Hot" goods
Funding of NFP organisations	Right of entry for non-union members
Mapping supply chains (Labour Hire licensing)	
Services for NESB	
Education of employers and potential employees.	

State Government Responsibilities

One of the problems associated with enforcement in the federal system is cost. Applicants are required to use the Federal Court of Australia which is expensive and associated with considerable delays. Two federal circuit court judges operate in Queensland. Another option is the use of the Magistrates Courts in Queensland. The experiences of affiliates is that there are also significant delays associated with the Magistrates Court because of the workload in that jurisdiction. Moreover, most Magistrates will not be well versed in industrial law and this adds time and expense to what should be a fairly routine prosecution. An option that has been suggested by affiliated unions is the creation of an industrial division of Magistrates Court in Queensland. Victoria is a jurisdiction in which an industrial division has been established in the Magistrates' Court. Section 4 of the Victorian Magistrates' Court Act 1989 reads as follows:

4 Establishment of the Magistrates' Court

(1) There shall be a court to be known as the Magistrates' Court of Victoria.

(2) The Court shall consist of the magistrates, the judicial registrars of the court and the registrars of the Court.

(2A) The Court has an Industrial Division.

(2B) The Industrial Division has such of the powers of the Court as are necessary to enable it to exercise its jurisdiction.

(3) The Court shall be constituted by a magistrate except in the case of any proceeding for which provision is made by any Act or the Rules for the Court to be constituted by a registrar.

(3AA) Without limiting subsection (3), the Court may be constituted by a judicial registrar in the case of any proceeding for which provision is made by rules of court for—

(a) the Court to be so constituted; and

(b) the delegation to judicial registrars of powers of the Court to hear and determine the proceeding.

(3A) Despite subsection (3), the Industrial Division shall only be constituted by a magistrate who has been assigned to that Division by an Order made by the Governor in Council.

(3AB) Nothing in subsection (3A) prevents the Industrial Division being constituted by a judicial registrar in accordance with subsection (3AA).

(3B) Despite anything to the contrary in this Act, a party to a proceeding in the Industrial Division may appear by a person who is not a legal practitioner if that is authorised in writing by the party to appear for the party.

(3C) The Industrial Division must exercise its jurisdiction with the minimum of legal form and technicality. (emphasis added)

The amendments that refer to the industrial division of the Victorian Magistrates' Court Act are in bold in the insertion above. They were introduced by the *Employment Relations Act 1992* (83/1992). The wording contained in the section 4 above that constitutes the Industrial Division of the Victorian Magistrates' Court is quite clearly worded in such a way as to encourage inexpensive recovery of wages. This wording "minimum of legal form and technicality" is in fact similar to that which is used to guide the operation of various industrial tribunals.

Another option that we recommend to the committee is to criminalise wage theft. That is to make wage theft an offence within the criminal code. Criminalising wage theft is being contemplated in Victoria (Workplace Express 2018c).

Hall Payne Lawyers (2018) have also made a submission to this inquiry, more specifically on the topic of criminalising wage theft. The inequity between the way in which "stealing as a servant or a clerk" and wage theft are currently treated is well argued in that submission. The fact that theft as an employee is treated as an aggravated offence makes the absence of any similar offence on the part of employers antiquated and out of step with public opinion. That submission proffers the opinion that:

> In our view, there may be benefits in legislating symmetry between the punishment for stealing as a servant and wage theft. It would be difficult to argue that employers should be treated less severely than employees for the same conduct.

Clearly current deterrents are insufficient. The need for criminalisation of wage theft was succinctly expressed by Rick Stokes, a contributor to the QCU web site:

> The only way to stop wage theft is to start charging /prosecuting those guilty including company Co's. Restitution, jail time, criminal record, the works!

In our submission it would not be intended to criminalise simple mistakes but rather the more egregious and deliberate actions on the part of an employer who is fully aware of the breach and continues regardless. Repeated behaviour might also give rise to the necessity to impose more significant sanctions against a recalcitrant employer.

The Hall Payne submission recommends the criminalisation of the more egregious, deliberate and or reckless examples of wage theft. Intentional conduct needs to bring with it a more serious charge. Specifically, the Hall Payne Lawyers submission states:

> To combat the spread of wage theft in Queensland, which is undermining our system of industrial relations, proper deterrents need to be introduced. We are of the view that:
>
> (a) the intentional, or reckless, failure of an employer to pay the entitlements of an employee; and
>
> (b) the intentional concealing or falsification of employee records, should be the subject of criminal sanction under Schedule 1 of the *Criminal Code Act 1899* (Qld) ('**Criminal Code**').

The Hall Payne Lawyers submission also includes reference to the general defence of a mistake at fact contained in Section 24 of the Criminal Code. This defence would obviously be available to honest mistakes pertaining to underpayment, as opposed to deliberate wage theft.

The Hall Payne Lawyers submission also suggests that the recent introduction of the offence of industrial manslaughter into the Work Health and Safety Act 2011 provides some guidance as to how the offence of wage theft might apply to complex corporate structures. Moreover, the deliberate concealing, falsification, fabrication or destruction of records needs to be viewed as a crime, similar to the various sections of the criminal code cited in that submission.

Queensland Government procurement policy already provides for a range of economic, environmental and social matters to be considered when applying the principle of value for money (Queensland Government 2018:3). "Best practice industrial relations" does form part of that consideration. As with any policy, its utility will be measured, particularly by the union movement, in how stringently it is enforced. Procurement policy could go further with respect to wage theft making specific reference to penalties to imposed upon contractors and suppliers found to be guilty of wage theft.

Where the Queensland Government issues accredited standards, or provides funding to organisations, similar to the procurement policy it would be reasonable that the granting of any such accreditation or funding is contingent with compliance with industrial laws.

Recently the Queensland Government introduced the *Labour Hire Licensing Act 2017* (Queensland Parliament 2017). Labour hire companies operating in Queensland will need to

be licensed and operators will need to pass a 'fit and proper person test' to establish that they comply with all relevant laws and that their business is financially viable.

Parts of the labour hire industry has a poor reputation for complying with laws that protect workers. Queensland workers were able to report wage theft including payments below the legal minimum, no shift or weekend loadings, no superannuation or workers' compensation insurance to the inquiry that led to the creation of this legislation. It was apparent that a business model has emerged where labour hire providers use unscrupulous methods to drive down wages and conditions.

Every Labour hire firm operating in Queensland will need a licence and any labour hire arrangement can only use a licensed labour hire operator. Licences must be renewed every twelve months.

To get a licence, operators must pass a fit and proper person test which will consider:

- the person's character (such as their honesty, integrity and professionalism); and
- the person's history of compliance with workplace, health and safety, superannuation and other relevant laws; and
- whether they can demonstrate an ability to comply with relevant laws, including whether they have the financial ability to pay legal wages.

If a labour hire operator breaks a relevant law, as well as facing significant fines, they may have their licence suspended or revoked. If they operate without a licence, an individual will face fines up to $365,700 or three years' imprisonment, while a corporation will face fines up to $126,044.60. The same applies to any host employer who uses an unlicensed labour hire provider.

The fit and proper person test will help ensure that labour hire providers have the ability to pay workers their lawful entitlements and will also make them demonstrate a history of complying with the law. That gives workers more assurance that their employer will do the right thing. Host employers face serious penalties if they enter into an arrangement with an unlicensed labour hire firm or if they enter into an arrangement where they know, or should reasonable know, that workplace or other relevant laws are being broken.

Labour Hire Licensing Queensland (LHLQ) was introduced to administer this legislation. It is apparent that this office will be able to trap valuable information in relation to supply chains.

The literature in relation to wage theft identifies complex supply chains as one of the ways in which wage theft goes unpunished. LHLQ would undoubtedly have a significant role to play in providing information about corporate structures and supply chains where wage theft is discovered.

As we have seen the most vulnerable workers are most likely to suffer from wage theft are the most vulnerable. It follows that culturally and linguistically diverse workers are likely to fall into this category. It is difficult to enforce your rights if you are not in a position to understand them. One possible contribution that the Queensland Government could make is to provide services in various languages to workers who first language is not English.

It is obvious from submissions made to the QCU web site that many workers are unfamiliar with the legal entitlements. Obviously, education has a role to play to ensure that employers are aware of their responsibilities; and that workers and future workers are aware of their rights. This process should be considered through our educations system including schools, TAFE and Universities as well through job service providers.

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A range of award provisions have been removed over the years in the various forms of restructuring and modernisation. Whilst the stated objective of the award strip back has been efficiency and productivity, some of those now deleted clauses would have provided a disincentive for wage theft. One of the practices that has been said to feature in industries such as hospitality has been the "trial shift" in which a worker is given a shift to see if they are suitable and only paid if the employer deems them acceptable. In other words, free labour which is described in some circumstances as slavery. The federal hotels award, amongst other awards, used to contain a provision that if a casual employee is not paid at the end of their shift then they will be entitled to waiting time until such time as they are paid. Payment at the end of the shift is no longer practical since the universal use of payment by electronic funds transfer, however a provision that would require payment by the next scheduled pay period would be appropriate to contemporary business practices. Either modern awards could contain provisions of this nature or it could be a universal provision of the *Fair Work Act 2009*. Waiting time provisions would be a very powerful to stamp out the practice of "trial shifts".

As stated above, enforcement within the federal jurisdiction is expensive and time consuming. The necessity to take all matters to a court of record is the reason for the time and expense. Legislative change for more than 20 years now has removed the capacity of the Fair Work Commission and its predecessor the Australian Industrial Relations Commission to intervene in disputes by way of arbitration. One way in which the capacity of workers to seek less expensive redress for wage theft is to enable the Commission to arbitrate on disputes about entitlements. It is also noted that the *Industrial Relations Act 1999 (Qld)* introduced a provision that enabled the Queensland Industrial Relations Commission to hear and determine matters relating to underpayment of wages[5].

Weil[6] (2018:442) makes the point that the mere requirement to pay to workers that which is owed does not really provide a disincentive for wage theft. A perfectly logical, if unethical, business plan would be put aside the money that should have been paid to the employees in question and only pay it if required to by a court or some other process. No real detriment is suffered other paying that which should have always been paid. The capacity for a court to order aggravated damages to the worker would provide greater incentive for compliance.

Another suggestion from Weil (2018:442) is the concept of "hot goods". As the name implies hot goods would be those that were made by workers who not paid their proper entitlements. By declaring products as "hot" a regulator would then be able to ensure that they are not sold or be further supplied. This solution would clearly provide effective and immediate solutions to supply chain problems associated with wage theft.

It is also apparent that the various legislative changes that have been directed towards restricting the capacity of unions to operate in the sphere of enforcement have contributed to the spread of wage theft. As previously discussed in this submission, non-union members are far more likely to be the victims of wage theft than are union members. Restrictions on union right of entry and the capacity to undertake inspections of non-member records have had an obvious impact to detriment of compliance with industrial laws. Investigating breaches of industrial legislation or industrial instruments is difficult under current federal Right of Entry laws as they initially restrict an investigation to the records of union members (section 481(1) and section 482(1)(c) of the *Fair Work Act 2009*). As mentioned above, migrant workers often

[5] Section 278 of the Industrial Relations Act 1999
[6] David Weil is Dean and Professor of the Heller School for Social Policy and Management at Brandeis University he was also head of the Department of Labor's Wage and Hour Division during the Obama administration.

have little awareness of workplace rights and are dissuaded from joining unions. One of the characteristics of workplaces in which systemic non-compliance occurs is that they have no, or low levels of union membership. Even where there are a handful of union members, they are unlikely to want to expose themselves by having their records singled out as part of an inspection.

An application may be made by a union to the Fair Work Commission to gain access to the records of non-members (section 483AA(1)(a) and (b) of the *Fair Work Act 2009*), however this can be a costly and time-consuming process. It is noted that Right of Entry to investigate a suspected breach impacting on a textile, clothing and footwear award worker does not limit union officials to investigation of union members records and does not require an application to the Fair Work Commission to gain access to non-member records (section 483A and 483B of the *Fair Work Act 2009*).

Even when unions are able to exercise a Right of Entry to investigate a suspected breach, demonstrating the breach on the basis of records alone can be difficult as unscrupulous employers may hold two sets of records – an official set for any employees who are employed legitimately, and another set, including rosters, for those who are employed cash in hand. In these instances, the success of an investigation relies heavily on interviews with employees. However, current laws only allow a union official to interview an employee about a suspected breach if the employee agrees to participate in such an interview (section 482(1)(b) of the *Fair Work Act 2009*) and interviews must be held in a place agreed between the union official and the employer. Where such a place can't be agreed, the interview will be held in a place where employees will ordinarily take meal or other breaks (section 492 of the *Fair Work Act 2009*). In any event, the location will be reasonably public in that an employee will be seen voluntarily going to and from the interview. Being seen to volunteer to be interviewed by a union official about a suspected breach of an Act or an industrial instrument is viewed by many employees as a death sentence for their employment and they will simply not participate.

Since 1996, there have been increasing restrictions at a federal level on union Right of Entry to hold discussions with employees to ensure employees understand their rights, including their right to join a union and to organise, along with increasing restrictions on union Right of Entry to investigate suspected breaches of relevant legislation and industrial instruments. These restrictions have coincided with increasing instances of large scale non-compliance by employers. Unions have traditionally had an important role to play in protecting the rights of

working people, including ensuring compliance with basic standards. Unions provide a cost-effective way of ensuring workers have their rights and entitlements honoured. In doing so, it is more likely that appropriate tax and superannuation will be paid, lessening pressure on the public purse.

The QCU would advocate the removal of these restrictions under the *Fair Work Act 2009 (Cth)* as has been done in the *Industrial Relations Act 2016 (Qld)*. It is also noted that in the case of latter, we are unaware of any concerns from employers within the Queensland jurisdiction following the removal of restrictions on union activities such a right of entry.

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