# *EDUCATION, EMPLOYMENT AND SMALL BUSINESS COMMITTEE*

**Members present:**

Mrs LM Linard MP (Chair)
Mr N Dametto MP
Mr MP Healy MP
Mr BM Saunders MP
Mrs JA Stuckey MP
Mrs SM Wilson MP

**Staff present:**

Ms L Manderson (Acting Committee Secretary)
Ms E Jameson (Inquiry Secretary)

# PUBLIC HEARING—INQUIRY INTO WAGE THEFT IN QUEENSLAND

## TRANSCRIPT OF PROCEEDINGS

**MONDAY, 20 AUGUST 2018**

**Brisbane**

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**The committee met at 9.06 am.**

**CHAIR:** Good morning. I now declare open this public hearing for the Education, Employment and Small Business Committee's inquiry into wage theft in Queensland. I want to acknowledge the traditional owners of the land on which we are meeting this morning and pay my respects to elders past, present and emerging. My name is Leanne Linard. I am the chair of the committee. Other members present with me today are Mrs Jann Stuckey, member for Currumbin and deputy chair; Mr Bruce Saunders, member for Maryborough; Mrs Simone Wilson, member for Pumicestone; Mr Michael Healy, member for Cairns; and Mr Nick Dametto, member for Hinchinbrook.

Today's proceedings are similar to the proceedings of parliament and are subject to the standing rules and orders of the parliament. The proceedings are being recorded by Hansard and broadcast live on the parliament's website.

On 17 May this year the Legislative Assembly referred to the committee an inquiry into wage theft in Queensland. Copies of the inquiry terms of reference are available on the committee's web page or from committee staff. The terms of reference include that the committee examine the incidence of wage theft in Queensland; the impact of wage theft on workers, businesses, the economy and community; the reasons wage theft is occurring; the effectiveness of the regulatory framework; and options for ensuring wage theft is eradicated. The program for today's hearing has been published on the committee's web page and there are hard copies available from committee staff.

## COLLYER, Mr Nick, Systems Advocate, Queensland Advocacy Inc.

## PHILLIPS, Ms Emma, Senior Lawyer, Queensland Advocacy Inc.

**CHAIR:** I welcome representatives from Queensland Advocacy Inc.—Mr Nick Collyer, and we will welcome Ms Emma Phillips soon. Thank you very much for making yourselves available to the committee this morning and thank you also for making a written submission. I invite you to make an opening statement of no more than five minutes and then we will open for questions.

**Mr Collyer:** Thanks very much, Chair. Queensland Advocacy Inc. is a disability advocacy organisation based in South Brisbane but we are a statewide organisation. Our submission relates to Australian disability enterprises, more commonly known as sheltered workshops. I suppose you would have heard of sheltered workshops. There are about 20,000 people in sheltered workshops throughout Australia, so I would estimate about 5,000 Queenslanders are in sheltered workshops. These are people primarily with some kind of intellectual impairment or intellectual disability, people with Down syndrome and so on.

Apparently there are 186 Australian disability enterprises around the country. I did a quick Google search You might have heard of the Holy Cross Laundry, the Multicap laundry at Banyo and Mylestones Employment in Holland Park. Of course the Endeavour Foundation runs a lot of sheltered workshops, as do many of the other major disability support organisations. Primarily the people are doing fairly simple repetitive tasks like printing, packaging, gardening and hospitality. They operate under the Supported Employment Services Award 2010 and they are paid a pro-rata wage based on their productivity, so that means that they are commonly being paid between $1 and $3 an hour or something like that.

You might have heard a couple of years ago there was a case in the federal court about the BSWAT, the Business Services Wage Assessment Tool. There was a claim that it was a discriminatory instrument that worked out people's payments based on their cognitive capacity rather than on their productivity. The applicants in that particular case were successful. They were able to demonstrate it was a discriminatory instrument. The federal government applied for an exemption to the Human Rights Commission and they have received an exemption with the hope that they will eventually change that manner of assessment. However, it is our contention that the whole sheltered workshop arrangement is an anachronism. It is something that really belongs to the 20th century primarily because of the segregation. The issue is that people with disability are being forced to go to work in places with other people with disability rather than working in the open market. At this point I want to introduce my colleague Emma Phillips.

**CHAIR:** Welcome.

**Ms Phillips:** Good morning, and my sincere apologies. I got caught in terrible traffic caused by a collision on Coronation Drive.

**CHAIR:** Welcome, Emma. We are about halfway through some opening remarks by Nick.

**Mr Collyer:** It is our contention that people with disability, no matter what their level of capacity, should be able to work in the open workplace, of course with support, and that it is a much better arrangement for them to work in the open workplace rather than be segregated. We have seen in education, for example, people with disability increasingly going to mainstream schools quite successfully with the right support. It is about time that that happened in the workforce as well.

Other comments associated with sheltered workshops are that people have limited access to skills development. Essentially they are being warehoused in these workshops. Once people commence in these sheltered workshops, that is where they are likely to remain for the rest of their working career, so their skill set is generally limited to the very simple skills associated with that particular job. Imagine doing the same repetitive job day after day, year after year, decade after decade. There are very few opportunities for skills progression.

With regard to solutions, first of all, of course, there needs to be support to enter and remain in open employment. Maybe some kind of a marketing campaign could be used to promote the employment of people with disability in mainstream workplaces. It is good for corporate reputation, for example, in a competitive market. Government, particularly the state government, could introduce some kind of a procurement leverage and have preferred suppliers that are workforce diverse; develop and deliver sector-wide and agency-specific publicity or education campaigns; adopt sector-wide and agency-specific disability targets; and create flexibility in the workplace so that people can work just one or two days a week if that is what suits them rather than the 40 hours.

**CHAIR:** I might stop you there and open up for questions. I again thank you for making a submission to the inquiry. Obviously you represent a group that could be particularly vulnerable to issues of wage theft as per the terms of reference that we are looking at in regard to the incidence and prevalence of that in regard to which industries and people may be more vulnerable. I thank you for your opening statement. As it happens, about three out of four of those organisations you mentioned are in my electorate. I have quite a lot to do with them. I think they do an extraordinary job in what they do and it is quite a mixed workforce. I am always going to defend those organisations. I think they do a brilliant job. I appreciate your viewpoint that you bring to this committee.

The first question I had was in regard to your submission on page 7. You make a comment at the bottom of that page in regard to term (g) in our reference and that is that Australia remains an outlier amongst OECD countries in its low rate of employment of people with disability. I wonder if you could speak to what other countries are doing, given that part of our reference is to look at jurisdictions—federal, state and international—and what they are doing that you feel is better in this regard as it relates to paid employment.

**Ms Phillips:** Our submission in that regard is based on the quantitative evidence. It has been before the federal Human Rights Commission, at a gap of 10 years apart in two inquiries, that there has been unacceptably low rates of employment of people with disability in Australia. That did not change over the decade between an initial inquiry and then the Willing to Work inquiry in 2015. I cannot personally speak to what strategies other countries are doing. It is not an area that I have expertise in.

**Mr Collyer:** People with disability are about 18 per cent of the population here in Australia. Fifty per cent of working-age people with disability are not in the labour force. Workplace participation for people with disability is 53 per cent, versus 83 per cent for people who do not have disabilities. There was a recent study done by Deloitte that established that if the labour force participation rate increased by 10 per cent, including people with disability, then Australia's GDP would increase about $40 billion over a decade.

Sorry, Chair, you asked what strategies have been used in other countries. I was lucky to witness a talk a few years ago by a fellow called Christy Lynch from an organisation called KARE in Ireland. They have been established I think since the mid sixties. There are about 350 employees that support people with intellectual disabilities and they have decided that they will support people only into mainstream employment and they have been doing that successfully, I understand, since about 2010. It is really about finding the right supports and selling it to employers. It is not something that is just going to happen, because we all know, of course, the unemployment rate is four or five per cent. There are always going to be some people who are unemployed and people with disability are

going to be competing with people who do not have disabilities and employers naturally are going to want the best person for the job so people are going to need supports, but it is possible. That is what KARE has been able to demonstrate.

**CHAIR:** In respect to your opening comments, for those individuals who are employed in the open market, have you had any feedback about cases of where those individuals have been underpaid, wrongly paid or had entitlements withheld?

**Mr Collyer:** No, that is not what our issue is.

**Ms Phillips:** No. I know there has been a recent qualitative study that showed that there were significant difficulties by a number of employees with disability transitioning to open employment, but the author of that study and advocates working in the area and outside our organisation were of the view that that was due to a lack of supports and the fact that there were not appropriate buffers in place to help with that transition to open employment. The majority still recorded a positive experience in open employment and the significant majority still had aspirations of working in open employment. We are not in any way trying to submit that it is without its difficulties, but we see the difficulties are largely due to a lack of support and a recognition of what is appropriate support in that space.

**Mrs STUCKEY:** Thank you so much for coming along. I applaud the work that you do and acknowledge that there is a lot more that can be done. In your strategies for change, your first point is 'providing additional, appropriate support for people with disability to enter and remain in open employment'. Can you elaborate on that? Can you give examples of that? Like the chair, I also have quite a lot to do with people with disability working in sheltered and non-sheltered workshops and also at the special school, where we have a great relationship with local businesses for those students who do have some capacity to be in small business situations. That is the sort of support I am used to. Could you give any examples?

**Mr Collyer:** I know one organisation that employs a mix of people with disability and people who do not have disabilities. As long as there is a mix then it is possible. One of them is a gardening service and another is a commercial kitchen. It is simply a matter of—not 'simply', but it is very much a matter of attitude. Many people with disability are just as capable, if not more capable, than people who do not have disabilities to carry out relatively simple tasks if they are given the right encouragement and support. Christy from Ireland, for example, had lots of stories of people who are considered to be more reliable because they are so pleased to have a job. In some cases it is actually better for the workplace to employ people with disability.

**Ms Phillips:** I think there is a lot of enduring discrimination and a lot of stigma that are main barriers. I am not sure, because I missed the first part of my colleague's opening, but I think we see a significant problem being with the use of the Business Services Wage Assessment Tool. It was recognised back in 2012 that it is discriminatory. There have been a number of exemptions that have permitted it to still be used. The Supported Wage System that has replaced it is still, in our view, discriminatory because it permits someone to be still assessed on the basis of productivity and to have their wages reduced to below what is the legislated minimum award wage in circumstances where they are deemed not to be as productive as a person without disability performing that same role. There is a great degree of variation of productivity in employees without disability and there is no lawful basis to subject any person without disability to a similar garnishment of their wages. There is a lot of those sorts of attitudes and about what is possible and what would be an appropriate role for a person with disability that are limitations we do not impose on people without disability.

**Mrs STUCKEY:** There needs to be some sort of an assessment of any worker of their capacity to do certain tasks. A physical impairment is very easy to see and people often with a physical impairment do not necessarily have a mental impairment as well but a diminished mental capacity. Do you work with agencies that try to place people with disabilities?

**Mr Collyer:** As I say, there are only the two that I mentioned before that I know of. It is just not a very common thing.

**Ms Phillips:** We are not funded to work at that gateway.

**Mr Collyer:** There is no silver bullet. It is not like people with intellectual impairment are substantially different from us. Other than their intellectual impairment, they have the same aspirations and goals in life. It is simply a matter of encouraging them and supporting them, giving them the right support, having the right people to support them. It is not complicated.

**Mr HEALY:** Welcome. Emma, you would not have had these problems coming in if we were in Cairns. It is very accessible.

**Ms Phillips:** I might consider a move!

**Mr HEALY:** You are more than welcome. I can help with you that. It is a genuine welcome because obviously we need a lot of input. That is the goal of the committee. It is important that you are here and we do recognise that—I certainly do. This is our second day of public hearings. One of the things I am interested in is the process of engagement. In your submission you have noted, like a lot of vulnerable groups, a lack of awareness of workers' rights. This is also in the disability area. I am asking this question because I am hoping somebody might have a different view and we can put it all together, but how would you see that advocacy happening? Do you see a process of the dissemination of information about workers' entitlements? How do you see that happening that is not happening now?

**Ms Phillips:** We have previously advocated for information to be distributed to all employers at tax time on the benefits of employing workers with disability. We have also advocated strongly for quotas within government. I know it is something that certain government departments that do work with people with disability have recognised—that there is a need for them to model those practices in increasing their rates of employment. Certainly we think there is a need for some significant positive education about the benefits for people with disability and also for the economy because we are, as my colleague said, talking about 18 per cent of the Australian population. That is a significant portion of the population. It is a significant portion to have on welfare benefits if they are out of work.

I think another area in particular that needs some appropriate information provision is with respect to the interface between the disability support pension and wages. That is something that Nick and I have spoken about quite recently. There is a lot of concern about the amount that a person can work before they are penalised in terms of loss of their pension. There are a few areas where we really see the need for some education.

**Mr HEALY:** I recognise those areas too. There seems to be an excellent opportunity at a variety of levels for the dissemination of further information. What is happening at the moment in relation to that information being disseminated? I take those points as suggestions, but do you know what is happening at the moment?

**Mr Collyer:** No, I do not know of any concerted programs to disseminate that kind of information at all—not by the state government.

**Mr HEALY:** Any parties?

**Mr Collyer:** We have broad programs but not specific ones to people with disability.

**Ms Phillips:** I think the introduction of the National Disability Insurance Scheme has brought some opportunity because people have the opportunity—again, this is not unproblematic because a lot of people do not have the support to properly understand and articulate their goals—to articulate goals around employment and to seek support that is appropriate if it is reasonable and necessarily linked to that goal. I think that is one area where we are seeing some information come out, but it is very early days and, as you would be aware, the rollout of the NDIS has not been unproblematic.

**Mrs WILSON:** Thank you both for coming in. You have suggested possible actions such as a targeted education and awareness campaign. Are there any specific issues that you feel could be implemented to assist Queenslanders with disabilities in this regard?

**Mr Collyer:** That is not my area of expertise, I have to say. It is really about articulating the case for reform and raising awareness—raising people's consciousness. I think if you asked most people in the street, 'Are there sheltered workshops out there?' they would probably say, 'Well, not that I know of. That is something from days past.' A lot of us just are not aware because these places are segregated, because it is only people with intellectual impairments who work in these places. That would be the first step: raising awareness. I think it would need to be a targeted campaign. We are talking about 5,000 Queenslanders here. Maybe it is not about raising the awareness of the public in general but about raising the awareness of specific potential employers.

**Ms Phillips:** A concern we have is that there is a lot of focus and a lot of funding that is directed to assessing people. We see that students with disability are subjected to a lot more assessments and red tape when they are leaving school and seeking to enter the workforce. We know that those sorts of assessments are not being effective at getting people into employment that they stay in. We need to change the way we do that. Rather than making people undergo assessments a lot more and having a lot more hurdles to jump over before they can pursue what they want to do, we need to be taking a much more individualised approach to supporting people to find work and to find out what supports they need and whether that is something that will work.

**CHAIR:** The time allocated for this session has expired. Mr Collyer and Ms Phillips, I thank you very much for your time in coming in to speak to the committee today and for your submission.

## CARLISLE, Mr Jordon, Workplace Relations Adviser, Master Electricians

## O'DWYER, Mr Jason, Manager Advisory Services, Master Electricians

**CHAIR:** Welcome. Thank you for your submission to the terms of our inquiry. Thank you also for coming in this morning to talk to us about your industry specifically. I invite you to make an opening statement of up to five minutes and then we will ask questions.

**Mr O'Dwyer:** We would like to thank the committee for the opportunity. It is an important topic for both employers and employees. Master Electricians is basically saying that wage theft does happen and it is wrong. It affects employees and employers from a multitude of aspects. Obviously employees are hardest hit. However, we do have some concerns about what has been put out in the media and what is being discussed about what has been classified as wage theft. The vast majority of employers are trying to do the right thing. In our submission it is quite clearly shown from the Fair Work Ombudsman's point of view that 75 per cent to 80 per cent of those are being resolved within a week and those underpayments are being rectified. I think it is very important that we realise that the wage theft—what is wage theft—is intentional and has a number of other characteristics.

The complex modern award system that all employers work under—and whether you think it is complex or not, in reality is it is. In most cases what you have is a situation where it is probably not the employer who is actually making the mistake; it is whoever is doing the payroll. They are administrative, and it is probably not their preferred position. It is probably attached to an accounts area. When you are talking small business, which most organisations are, they do not have a payroll department and they do not have a HR person sitting there trying to work out what is going on with the award. It is an electrician and probably his wife or his partner in the kitchen or the office at home doing the wages on a Sunday night or a Thursday night—whatever it happens to be.

We do recognise that many industries do have problems. There are vulnerabilities. I think those vulnerable areas have been pretty much exposed in the last week or so. In terms of electrical, our biggest issue with our employers is trying to work through apprentices. That is where we probably tend to get the most questions and it tends to be where the most errors occur. There are four pay levels. It depends on what their progress is through the apprenticeship and things like that. Do the allowances apply? Do they not apply? Do they apply at the full rate or do they apply at the percentage rate in terms of their progress through the apprenticeship? Those sorts of things give you an indication of what mums and dads are trying to pay apprentices as well. I note that Alan Sparks from group training is up next, so he will probably have a similar sort of situation.

From our point of view and from our submission, we do not believe this is a Queensland-specific issue; it is a national one. Information from the department said that 90 per cent of employers are in the federal system. Our view is that the most efficient use of government funds to enforce this and to police it would be to re-enter into a memorandum of understanding with the Fair Work Ombudsman, like we had prior to 2012, and provide those resources to the Fair Work Ombudsman to look after Queensland, like we had previously. We think the legislation could be improved. Criminal charges certainly may be appropriate. Will they have an effect? If someone is going to act illegally, they will always act illegally. It probably does not really matter what the penalties are. Certainly if you want to criminalise it and put it in, I would say that working with the federal system to put criminal charges of wage theft into the federal system would be a much more efficient way of doing it. It then creates a less complicated situation for small businesses having Fair Work Ombudsman inspectors turn up and then maybe having a Queensland inspectorate turn up causing confusion.

Our position is that yes, it does happen, yes it needs to be stamped out if we can and that is done through criminal charges, prosecutions, education and enforcement. At the end of the day we think this is a federal issue and it should be dealt with through the federal system.

**CHAIR:** We will move to questions. For me, your submission went quite strongly towards the reasons it occurs, so my questions for you are quite practical in nature. Before I ask about payroll systems and things like that, I wish to understand the sector a little better. As a trade association, what role do you play or how active are you in trying to educate and assist all of these different contractors who are out there—electricians—in trying to understand the complexity you have spoken to?

**Mr O'Dwyer:** In Queensland alone we have 1,800 members. Our workplace relations team would probably take somewhere between 3,000 and 4,000 phone calls about workplace relations issues from them. The vast majority of those would be—

**CHAIR:** Is that a year?

**Mr O'Dwyer:** That is a year. The vast majority of those would be about payroll and about what to pay and in what circumstances. That will be all of the things about, 'When is overtime? Can I work a nine-hour shift, a 10-hour shift, 12-hour shifts?', 'When do I pay overtime?' and 'When do I pay shift allowance? When do I not pay shift allowance?' All of those situations, particularly given the breadth of our industry—we go from mining to domestic and everything in between. I think you will find that the majority of employers pay well above the base level of pay, but they bring into their employment contracts the terms and conditions of the award. Someone might be getting paid $30 an hour as an electrician and the base rate is $22, but they will pay them time and a half or double time out of the award. They will pay them the allowances et cetera because that is easy enough for them to understand. It is easy for the employees to understand as well. In our industry, electricians are remunerated much higher than the base award and that is mainly because of a lack of skill—a skill shortage basically.

**CHAIR:** They are indeed in demand. We all need their services. In your submission on page 5 you also talk about payroll software. You then move on to, on page 19, a reference to single-touch payroll systems. Can you talk practically about some of the complexities that may be experienced now? Do you feel that going to the new single-touch system will assist in this regard?

**Mr O'Dwyer:** I do not think it will assist. The reason I mentioned the single-touch payroll is that it is probably another form of data matching that the federal system could be able to do. It is probably a thought bubble from our association; we have not put any real rigour through to that process. The single-touch payroll, which occurs for all organisations in July next year, means that every employee will have their gross, their tax and their super advised through the one-touch payroll, so it is all there. I would have thought it would not be that hard to include another data column, that being hours. That gives at least the semblance of a situation where the Fair Work Ombudsman may be able to look at hours and the hourly rate or the hours and the annual remuneration and actually determine what are some of our high-risk areas and what does not make a lot of sense. The number of hours would also probably help with Centrelink.

We have all heard about the robocall debt collection stuff that happened over the last couple of years. Again, from my understanding a lot of the errors that occurred were employers saying, 'Jason, you might have worked for me from 1 September to November, but on the payroll system we have actually said you were employed for the whole of 2017-18.' Centrelink then sees that that money was earnt over the entire year and so, therefore, there has been an overpayment at certain points. Data accuracy for small businesses in terms of payroll may not be what it should be, but it is trying to make sure that those systems are in place and that we understand that. With one-touch payroll, if you recorded that sort of situation in terms of the number of hours, it would give the Fair Work Ombudsman or other bodies an opportunity to have a little bit of a look and do some rough checks—

**CHAIR:** The matching capacity.

**Mr O'Dwyer:**—yes, matching capacity—and see what is going on with the award.

**CHAIR:** In your submission it seems that you are certainly trying to make a point with respect to our terms of reference. One is the incidence of wage theft and that there is a continuum, if it is fair to say—that is my reflection of your submission. There is a continuum: there are obviously omissions which are unintentional and an employer would be willing to obviously fix those once it comes to their attention, but then there are those where there is clear intent. Is it fair to say that that is where the line is at when you are getting into this space of wage theft or being noncompliant?

**Mr O'Dwyer:** Yes, where there is actual intention. According to some of the reports and others who have raised the issue—and even the Fair Work Ombudsman's own situation; they have identified the characteristics—there is an intent to do it. Those sorts of things will actually—they are wage theft; there is an intention to do it. Given the complexity of the award system for most employers, it really is not intentional in that regard. Yes, it is unfortunate that it happens, but I think the vast majority of employers, once we explain to them what is going on and where they have made the error, want to address it.

**CHAIR:** In your industry?

**Mr O'Dwyer:** In our industry, yes.

**CHAIR:** It is a very different take on this.

**Mr O'Dwyer:** Absolutely. We understand that. Again, that is our members as well. Non-members do not tend to ring us about wage theft and things like that.

**CHAIR:** I gather the hospitality sector is not ringing you too often!

**Mr O'Dwyer:** No.

**CHAIR:** Your submission speaks quite strongly to the activity and compliance measures of the Fair Work Ombudsman, which is very, very different to some of the submissions we have received which show that their compliance activities, investigations and what they will pursue is a very small subset—less than one per cent.

**Mr O'Dwyer:** I probably agree with that. I think the department made the comment that they dropped from 495 inspectors down to whatever number it was. The department here in Queensland also pointed out that a number of their own inspectors were discontinued from the relationship that they had with the Fair Work Ombudsman. You have to realise that Queensland referred federal employers across to the feds. Up until 2012 we were paying our way as I sort of see it. After 2012 we stopped paying our way and expected the feds to pick up the tab. We have not made any change to that—

**CHAIR:** Jason, you are getting into a dangerous area that has caused debate in this place.

**Mr O'Dwyer:** Absolutely. I do not want to be partisan about this. From a non-political situation I think it is a bit of a no-brainer when you refer power and you are referring those employers across. You are pulling in the payroll tax from the employers, they are paying it and part of that process from a community expectation is that you enforce the rules. Enforcing rules means the Fair Work Ombudsman. Queensland, I think, should be contributing towards that.

**CHAIR:** More compliance and more enforcement?

**Mr O'Dwyer:** Absolutely.

**Mrs STUCKEY:** Welcome, gentlemen. We hear this complexity of the award system—and I thank you for your submission where you have given a bit of history about how thousands of awards have been reduced. That can create its own set of complexities, as will any system. Given that one of our earlier witnesses—Maurice Blackburn—which you refer in your submission was caught underpaying staff to the tune of $925,000 over six years, the talk of increasing criminal sanctions and new offences may affect people who quite inadvertently have not been paying for whatever reason. That is a fairly large firm. We have acknowledged that many businesses are small to medium size and do not have those levels of management. Do you have any concerns that, if it were going down the path of that criminalisation, some people would be caught up?

**Mr O'Dwyer:** Absolutely. The literature is telling us what the characteristics are of wage theft—about the intention and purposely going around and finding systems that will get away from having to pay proper wages and things like that. Our situation is that we do not want the 90 per cent caught up in the 10 per cent—the 90 per cent of employers who are trying to do the right thing, who inadvertently underpay. Maurice Blackburn would be a classic example. I do not know the details, but I am presuming from what I have read in the paper that the clause in—

**Mr Carlisle:** Part-time employment.

**Mr O'Dwyer:** The clause of concern was part-time employment. The employees have decided to work Monday, Tuesday, Wednesday. One of the supervisors in Maurice Blackburn has asked, 'Can you work an extra Thursday?' There is mutual agreement but, under the terms of the agreement, it is supposed to be overtime whereas the two parties have made an agreement to say, 'Yes, it is at ordinary time.' They have corrected it and away they have gone. It has not gone to the Fair Work Ombudsman. It has not gone any further. Hopefully, the parties have signed some sort of deed of release to say, 'Yes, it is all settled. It is all done. There will not be any more and we will address our processes in the future.' That is what happens.

In our industry, it certainly happens that we find it and we fix it as quickly as we can. There are circumstances where fixing things can take a long period of time. That is because, particularly when you work for organisations that charge for work, there is no ability to go back to the customer to say, 'I have charged you an underpayment for work that I have done in the last six years'—which is what we are talking about with Fair Work and—'I need to go back and charge you on your invoice an extra amount.' That is not going to happen. The employers have to find that money out of their own pockets at some stage.

We do these sorts of deeds of agreement with employees and the unions all the time in saying, 'There will be a payment plan over a period of time.' Everybody is happy. It is being addressed. The correct wages are going to be paid moving forward. The employee can then change their charge-out rates, or whatever it happens to be, to take account of what they were not taken account of before. Everybody is happy. It is not intentional. It is not theft.

**Mr Carlisle:** I think the Maurice Blackburn case also highlights, notwithstanding the comments around the rigidity of the part-time clauses in the modern awards, that a bit of record keeping probably would have staved off a lot of those claims: 'We want you to work the extra Thursday'; 'Yes, I'm happy to work the extra Thursday. No problems.' The award says that you have to agree to vary your ordinary hours. It is a very specific agreement that you should have made. With a lack of record keeping around 'Can you just work that Thursday?', 'No problems,' all of a sudden there is an interpretation issue. It is a question. Is it a dispute over, 'I've agreed to work this extra Thursday, but is that an extra Thursday as part of my ordinary hours, or is that an extra Thursday now as overtime?' If I want to create an issue, or whatever, later on down the track, I can turn that around through a lack of information in that request. It might be an email request to work that Thursday, but now I have an email request where I have an opportunity to turn that into overtime. That is a dispute. That is not great.

**Mrs STUCKEY:** We all say that small businesses make up the most of this and they will not have that facility. In the conclusion of your submission you talk about the state regulatory agency for dealing with wage theft issues being considered to be hamstrung by the state's referral powers. In this situation, would it be your suggestion that the Queensland government wait until the end of the federal modern award review, until they consider issues in this area?

**Mr Carlisle:** There is no end to that review. That is the great joke. It is a four-year review, which is meant to happen every four years. We should have already started at the beginning of this year—the next four-year review—

**Mr O'Dwyer:** And we have not finished the last one. There is legislation in the parliament at the moment to remove the four-year review, because it has become too complicated and is taking too long.

**Mrs STUCKEY:** End on end.

**Mr O'Dwyer:** It is, basically.

**Mr Carlisle:** That is right. If you wanted to do something, so to speak, I would not necessarily wait for an opportunity or a window to open.

**Mrs STUCKEY:** What would you like to see happen?

**Mr O'Dwyer:** From an association point of view, we think it should sit in the federal system. From our point of view, we think, certainly, advocating to the federal government to criminalise it—if that is what the Queensland government wants to do, I would be suggesting that they work very hard with the federal government to criminalise it in the federal system. I would then also suggest that any money that the Queensland government may consider putting into enforcement is then processed and done by an exchange of letters with the Fair Work Ombudsman to provide those funds as long as those funds are being spent in Queensland to enforce the law. That is from our point of view. That is where we would like to see it. Otherwise, if you start doing a state jurisdiction and a federal jurisdiction, it is going to get even more confusing for small employers and things like that. We certainly do not see that state legislation is a fix in any way, shape or form.

**Mr Carlisle:** I think that first step really needs to be the definition and that intent element in determining that. That is not the quantum. The Maurice Blackburn $920,000 is a lot. I help many employers and apprentices. I am the practical application of compliance in the electrical industry for our members. I help them a lot with that. A $20,000 underpayment of wages claim for an apprentice over a four-year period is not hard to do. That is travel time allowance that you did not understand, a start and finish on the job allowance that you did not understand. That is the most confusing element of the award. If you put a quantum on the amount, I think you have a problem. If you put an intent behind it—you determine it through an intent—that is where you start to have a better definition, but I do not think a definition based on the immediate identification of the underpayment of wages as wage theft is a good definition.

**Mrs STUCKEY:** Thank you.

**Mr SAUNDERS:** We have a different opinion on wage theft, but let us get over that. I do not agree with your definition of wage theft. I think if a meal is not paid for, it is theft. You are taking away from the worker. I have employed a lot of people. As an organisation, what do you do when you take money from small employers? What do you do across the state in training and educating your members about their rights and obligations to make them fully compliant, especially their obligations to an employee? Do you have courses throughout the state—from Coolangatta right through to the cape?

**Mr Carlisle:** Come along on Wednesday. On Wednesday I am doing a webinar on award interpretation. I am not picking apart the whole award; I am going to talk specifically about the areas that are commonly not applied very well. There is misinterpretation. You are always going to have the ombudsman giving an opinion that they might walk away from later, which they did famously for the Queensland employers. You think you can rely on the Fair Work Ombudsman's view, but do not count on that because, if you did, you have made wage theft. I am sorry, we have offended you again. I am going to be talking about common areas of the award that are not understood very well—travel, those sorts of things.

**Mr O'Dwyer:** From our point of view, not only do we do pre-emptive strikes with webinars but also, because we are a national organisation, we look after the whole country. We find webinars are the best way to get to the administration people. They can sit at their desk. They do not have to leave. They do not have to come to our stores or shopfronts or things like that. We make it for about 45 minutes. It works around the country at a set time. We aim it to make sure that it is between nine and three so part-time ladies and people like that can still do the kid drop-off and kid pick-up.

**Mr Carlisle:** It is recorded so that people can look back at it later. In addition, we do email alerts, newsletters and, obviously, a hotline taking 3,000 to 4,000 calls a year from Queensland alone about questions that people have.

In terms of the availability of information, we have our website. We have our own separate summary of the award that tries to explain it in better detail for employers about how to do it properly, with examples and things like that. We have quite an extensive list of wage sheets that we pump out and the mandated Fair Work requirements of notices about rights and things like that when employers take on employees. They have to be given out as well. From our point of view, we do an awful lot to try to make sure that we get as much information out as possible.

**Mr SAUNDERS:** Do not worry about offending me, because when people attack workers' rights you will not offend me. I will always stand up for workers in any shape or form. There is really no reason your members should not be across the conditions and the rights of workers, because what you have just explained to me is all there for them.

**Mr O'Dwyer:** But it is the same with the workers. Only 13 per cent of workers are members of the union. Only about 13 per cent to 14 per cent of employers are members of our union. We are an employer association. We are just as much an employer union as an employee union. From our perspective, yes, our members are well informed.

I must admit that we have had very limited effect with our members in regard to the Fair Work Ombudsman's one big order that happened over the last three or four years, because we were advising them to be cautious about it and trying to work with them about those things. We had a few that slipped through the cracks and they have some money to repay. They are working through that with the union and with the employees themselves. They are doing their best for it.

**Mr Carlisle:** You also do not know you have a problem until you have a problem. You might think you are complying. Most of our members say, 'I'm complying, I'm complying, I'm complying, I'm complying, I'm complying,' and I explain to them, 'No, you're not. You are applying this area. You need to have a look further down.' The first person who looks at an apprentice's all-purpose wage rate asks, 'Why is this apprentice getting an electrician's licence allowance? They do not hold an electrician's licence.' Common sense applies. Common sense says that they should not get that allowance. It is only when they wade through 16.4(b) (ii), (iii), or (iv)—whichever one that might apply—that they go, 'Okay, there's that proportional amount.' They thought they were complying, but they did not read it to the finest minutiae. I take your point, but if you do not know that you have a problem, you would not look.

**Mr O'Dwyer:** If you have a look at this Fair Work Commission's report that we referred to—the Sweeney research—it gives you a good indication of where the employers are coming from about what they see when they look at an award. It gives you a bit of an idea that they are time poor, there are a lot of words and it is hard to read. The same would be for employees as well. As a community, that is the issue that we have in this situation. It is not just employees and it is not just employers; it is everyone.

**Mr Carlisle:** Justice Ross said that these clauses came out of disputes written in legal jargon 40 or 50 years ago. For the average mum-and-dad organisation trying to read the implementation of a 38-hour-week clause, which does not say anywhere near what you would like it to say in practical terms, it gets tough. They walk away from that and say, 'I'll just keep doing this until someone kicks me,' which we do not want.

**CHAIR:** Jason, you mentioned a large number of different bulletins and information sources that you provide to your members. We asked the National Retail Association, as a similar employer organisation or union, to take it on notice and provide some of those just to inform the committee about how you try to inform your members. It would be great if you could provide some of those.

**Mr Carlisle:** Yes.

**Mr DAMETTO:** Jason and Jordan, thank you very much for coming along today. As a dual-trade mechanical fitter, I will not hold it against you that you are representing electricians right now, but I will confess that between 2006 and 2008 I did an adult apprenticeship as an electrical refrigeration mechanic. I only completed two years of that before the GFC hit. I was working for a company called Haden refrigeration and air conditioning. That is the work that we used to do.

Earlier you were talking about the complexities of the award. I had firsthand experience of that as an apprentice and in how the tradespeople were managed as well. One day you are working on a fridge truck; the next minute you are pulling a hard-drawn pipe through a commercial building; the next minute you are doing stuff with instrumentation. All of these things made the award and what these gentleman and ladies were paid quite complex. Is there a solution to simplifying the award so that it is easier for employers to not slip into what could potentially be an offence in the Criminal Code in the years to come?

**Mr Carlisle:** It would be lovely. We have just been having a laugh at the Fair Work Commission's attempt at a four-year review and the length of time that takes. For simple changes to the awards that you want to make for practical reasons you get what we would say is an unnecessary and disproportionate response as a fightback to say, 'Let's not change that. That clause has existed for 50 years. Let's leave it as it is.' People say, 'Let's open up the awards to change things.' It would be lovely. It would be an ideal world.

**Mr O'Dwyer:** Australia's industrial relations system is very adversarial. Both sides—employers and employees, and their representatives—will use the term 'unintended consequences' about trying to simplify awards. On the employees' side, does that mean that they get paid less? On the employers' side, does that mean the costs go up? It is very hard. There are so many associations on both sides. They all have differing views and processes. There is a long history as well. There are many representatives who have long held positions on certain topics who will not consider any change to that because it was hard fought and won.

**Mr DAMETTO:** Exactly. I can understand that.

**Mr O'Dwyer:** From that point of view, is there a simple solution? No, I do not think there is. The situation is that better education would assist. How does that get through to the 80 per cent of businesses or the 80 per cent of employees who are not members of associations? I do not know. In our submission, the Fair Work Ombudsman has had 16 million hits on its site in a 12-month period so it is not like people do not know about the Fair Work Commission's website and their tools and things like that. Can we do more? Possibly. The smarter brains and people who have done more research than I would probably have some further suggestions, but we are certainly doing the best we can.

**Mr Carlisle:** Employers do tend to take that sort of stuff on themselves. They go, 'Look, if we do a whole range of different work'—that is where they get into this—'we will pay you $31 an hour. We will try to load in these sorts of bits and pieces that happen here and there. We will just make it convenient for ourselves and pay you a higher rate of pay.' That falls down when someone does not express it well enough and you get into disputes around why you have chosen to do that. That is where you can get more disputes. Again, this is the Ecob principle.

**Mr O'Dwyer:** You can annualise salaries, but you have to be very careful how you do those on both sides. It has to meet the 'better off overall' test. This happens in the mining industry all the time. The formulas to work those out are very detailed in terms of the number of public holidays, the hours, the shifts, how much sick leave and so on. All those sorts of things actually go into creating the annualised salary that appears in some of those agreements—not the awards, but they are very complex and there is a long history to them so when you get a dispute about those it is hard to unpick it. It makes change harder as well through enterprise bargaining agreements, because no-one really understands what has to happen into the future about a new roster and how that will affect the annualised salary. It is not simple in any way, shape or form. I think the vast majority of people are doing their absolute best. Yes, we can improve and, yes, there are industries that are more susceptible to it and, yes, we need to enforce those and we need to do better in those areas for those employees. From an employer's perspective, I want to get those people out of the industry because they will be undercutting my members in terms of the services they are providing.

**Mr HEALY:** Jason and Jordon, thank you very much for your time. It is appreciated. I was impressed by your opening statement. We have had some people come in and say that wage theft happens—intentional, not intentional. I agree. I have worked for small family businesses where it has been an absolute struggle in relation to the dissemination of information and procuring the appropriate information. I get that. That is important. Obviously it happens that there is intent out there and part of what we have to do is to ensure we exhaust all the appropriate avenues.

In doing so I think it is great to have a number of suggestions from a variety of areas. I notice in your submission you mention certification programs. You say there are commercial reasons for companies to do the right thing—assuming that the right thing is to pay what the agreement is. I am interested in what your view is of a certification program in your area. What does that look like?

**Mr O'Dwyer:** What we tend to find in tendering is that whoever is putting out the tender will have benchmarks about what they want to do. Part of that will be looking at their industrial relations situation and making sure they are paying appropriately.

**Mr HEALY:** Include that in your tender?

**Mr O'Dwyer:** Absolutely. From that point of view, that then demonstrates for those who are paying appropriately that they have a leg up in terms of the tender process. Those who are not will know that they are not going to be able to get that sort of work.

**Mr HEALY:** You do not think I would get a lot of phone calls from small operators saying, 'This is going to increase our red tape'? I am just playing devil's advocate.

**Mr O'Dwyer:** In terms of the small guys, you tend to find a lot of them will not go through tender processes, particularly for domestic and small, light commercial areas and things like that. They do not go through massive tenders. In relation to the recent smoke detector contract that was put out by Housing and Public Works, we did a couple of webinars with our members across the state to say, 'Look. here is the tender. Here is the situation. Here are the things they are going to be looking for.' Safety was a big one but the next one was making sure people are being paid appropriately and making sure that people and apprentices are being trained appropriately and supervised appropriately—those sorts of things, those sorts of examples. That is a big step up for some of our smaller guys. Some of the people on those webinars made the decision that it was all too hard because they had to do their costings and processes and it is probably a little bit more advanced than what they were used to.

**Mr Carlisle:** If you are already tendering it would not be that big a step. People are already supplying things like employment contracts if they have to show compliance with the Building Code 2016 as it stands. They are already supplying a lot of that. If they work for a primary contractor in different areas they often need to supply evidence that they are contributing to super and those sorts of things. I would not say that it is a big extra piece of red tape. It might be a little bit longer.

**Mr HEALY:** Fundamentally when you look at that, that is going to be probably applicable to a segment within your membership—not the lower end?

**Mr O'Dwyer:** Yes, not the smaller end.

**Mr HEALY:** The more competitive end, I should say. We will put it that way.

**CHAIR:** Thank you for coming in today. You did kindly agree to take it on notice to send us some of those materials—and if you can also leave that report which you have on your table. I was looking through your submission trying to find a reference to it, so it would be easier if we could just keep it.

**Mr O'Dwyer:** I also have copies of the Fair Work Ombudsman's enforcement policy and compliance policies that we have referred to.

**CHAIR:** If you would like to table those the committee will be happy to take those as additional material. Thank you both very much.

## SPARKS, Mr Alan, Chief Executive Officer, East Coast Apprenticeships

**CHAIR:** Welcome, Alan. Thank you for your submission on behalf of East Coast Apprenticeships. Would you like to make an opening statement of no more than five minutes and we will then open for questions.

**Mr Sparks:** First I thank the committee for the opportunity to be here today. I have been engaged in group training for 20 years, and over that time have dealt with many instances where our most vulnerable young Queenslanders—apprentices—have been abused in the workplace and have often been victims of wage theft. Over this period I have also witnessed and contributed to the commitment of quality group training to ensure apprentices and trainees are paid their correct entitlements.

The provision of correct wages and entitlements to apprentices, as we have already heard, is a complex matter and requires broad-based knowledge of industrial awards and the circumstances upon which wages and entitlements are prescribed. Who would guess, for instance, that an apprentice may have an entitlement to a height allowance working several levels down in an underground car park because there were further levels below that work station? Apprentice entitlements are very complex and include percentages for each stage, generally starting at 55, 65, 75 and 90 per cent. However, in some awards they are 55, 65, 70 and 82 per cent. Further features of that complexity can be demonstrated with inclement weather entitlements—wet days. An apprentice under some awards is entitled to be paid four days every 28 days, calculated from 5 February 2005. For instance, in this month the 28-day cycle began on 30 July and finishes on 26 August.

Apprentice entitlement calculations must be inclusive and include elements such as wages, general superannuation, superannuation on travel, all leave entitlements, travel leave and other costs, paid college days, wet days et cetera. Unintended errors in calculations can easily occur. We have heard again that for the sole trader who is on the tools by day and his partner works the books at night it is a huge ask that that sole trader keep up with these complex and changing industrial relations features. More serious, however, is the blatant wage theft, where the employer is more than aware of their responsibilities but deliberately chooses to short-change apprentices. In my original submission I provided examples where the incidence of wage theft was most obvious.

I am grateful for the opportunity to bring to the committee the view that there is room to improve the protection of apprentices' wages and entitlements and thereby the welfare and wellbeing of our apprentices. I offer the following for your consideration: there were 56,410 apprentices in training in Queensland as at 31 December 2017; Queensland's annual revenue generated by apprentices is estimated at $2.7 billion; there are approximately 40,000 employers of apprentices in Queensland. The challenge we face in an industry generating $2.7 billion each year is safeguarding the wages and allowances of apprentices.

To secure an apprenticeship is an achievement, but many young apprentices fear the loss of that apprenticeship and can be reluctant to rock the boat. Who is looking after their interests? It should be their employer, but this committee would already recognise that this is not always the case. The extent of that neglect has never been defined. I would like to highlight the important role that quality group training organisations provide in relation to their apprentices. They carry a genuine commitment for the welfare and wellbeing of their apprentices. They generally have the level of staffing and experience to understand and maintain compliance with the complexities of today's industrial relations laws and they operate in a strictly regulated environment under broad scrutiny of their actions. Is this duty of care duplicated in other non-group-training apprentice arrangements for sole traders and small and medium enterprises?

There was a time when Queensland's vocational education and training act incorporated safeguards for apprentices. It provided processes that strengthened the contractual arrangements of the apprenticeship whereby an employer could not sack an apprentice, and nor could an apprentice simply walk away from their apprenticeship. It is my view that these legislative processes helped reduce misconduct and abuse. This legislated mantle offered greater security to the vulnerable young apprentice. With the transfer of much of this responsibility to the federal arena, this security mantle has been diminished.

I would respectfully invite the committee to consider how to identify the true extent of theft from apprentices in a $2.7 billion sector; what legislative arrangements can be considered to improve the industrial relations security for apprentices; how government might expand the efforts of quality group training as reliable custodians and advocates with a genuine commitment to the welfare and wellbeing of apprentices; and what benefit would be achieved by reinstating a Queensland wage line.

I would like to add a supplementary remark, if I may, because it has come out already in discussion. In those remarks I have just made I identified unintended wage and entitlement calculations where an employer makes a mistake but in doing so believes they are acting in good faith. A decision of the Fair Work Commission in August 2016 determined that preserved awards in Queensland terminated on 1 January 2014. Many employers across Queensland relied on previous advice, and in our case it was in writing from the Fair Work Ombudsman's office, that preserved awards applied beyond that date. This determination by the commission in 2016 held the ombudsman's office advice to be incorrect. The implications for thousands of Queensland apprentices engaged from 1 January 2014 and paid in accordance with the preserved awards is that they may have a legitimate entitlement to back-pay adjustments. It has been estimated that that entitlement across Queensland may fall somewhere between $114 million and $360 million. There have been ongoing discussions between the federal government and the state government investigating a possible support package to help address the financial implications. I am advised that the matter is currently being further considered at the federal government level and that a decision may be made soon.

I advise the committee that in our own case, East Coast Apprenticeships, we acknowledge our legal obligation to address those apprentices who have a legitimate claim. In our case, we have an implementing plan that has been shared with the federal and state governments, the union movement and the Fair Work Ombudsman's office. In good faith, we have commenced settling those claims with our apprentices. To date, we have paid out almost $1 million. This is drawn down on critical financial reserves that are essential for the financial viability of our organisation. It places at risk our organisation, the employment of 420 apprentices, trainees and a further 48 staff. I have informed both the federal and state governments that a support package is critical to filling our full legal obligation without compromising hundreds of jobs. Again I highlight the commitment of quality group training organisations to act in good faith and with proper purpose. The question remains: who is looking after the claims of 50,000 non-group-training apprentices?

**CHAIR:** Thank you, Alan. You have put a number of questions to the committee, which I am sure that committee members and the secretariat will look at and discuss further. We thank you very much for your opening statement. Can you give us a sense in regard to the incidence of whether it is miscalculation versus wage theft in the industry that you serve? Do you have a sense of how prevalent is from what you have seen or from stories you have heard?

**Mr Sparks:** I think it is quite prevalent, but I think it is also split between the unintended efforts, as I have outlined in that statement, of the sole trader with mum doing the books and trying to keep up with the complexity of it. I think a fair amount of that goes on. We see on a fairly regular basis somebody coming to us wanting to do an apprenticeship where they have had some very bad experiences previously and exploring those with them. In my mind, it is purely straight out an intent to not pay them what their wages and entitlements are. My personal view is that it is an iceberg and what we are seeing is the tip of that iceberg. How we go about identifying the full extent of that is a very good challenge for this committee, I think.

**CHAIR:** To clarify, you would assert that both forms are prevalent—that is, honest miscalculations and also genuine intent to rob someone of their entitlements?

**Mr Sparks:** Yes.

**CHAIR:** Could you tell the committee whether you have seen, in those who come to you seeking assistance because they may have experienced situations of intent, any trends in regard to that specifically occurring, or is it varied?

**Mr Sparks:** I think a fair amount of the anecdotes that come across my desk have been around the non-payment of entitlements, overtime, penalty rates and those sorts of features. I use one example in my submission where an individual was told to only put 25 hours on his time sheet, which we have an obligation to fulfil and pay, and they would be paid cash for the other times that they have worked. It is open to abuse in a whole range of areas, particularly with the younger people coming into apprenticeships. They are so pleased that they have an apprenticeship, the last thing they want to do is rock the boat. Again in an example I gave, the individual thought he was in an apprenticeship, but when he started saying, 'When am I going to go to college?' the employer turned around and said, 'We've run out of work and you have to go.' Only then did we recognise that he was never in a formal registered training contract.

Again, the difference between a group training apprentice and a non-group training apprentice is that it would be commercial suicide for us to put a young person out with a host employer unless we had all of the regulatory requirements stitched up. We would be exposed to WorkCover, we would

be exposed to insurance and we would be exposed to all sorts of things. I am not saying that there are not times when we might make a mistake ourselves, but certainly, in our own case, we have field officers who are working closely with the host employer and the apprentice. We brief those host employers on what the wage entitlements and features are that we will fulfil as an obligation. We have a compliance officer. We have an industrial relations manager. The sole trader with a wife does not have that immediate access to keep across some of those changes. They do literally change, depending on the circumstances. I think Jason covered that. One moment they can be on a commercial site, the next day they might be on a residential site and the next day they might be travelling outside their 50-kilometre radius and are entitled to a further travelling allowance. It is an on-occurrence change, on top of what is a base wage and entitlement generally.

**CHAIR:** You have spoken about the complexity of awards being a significant contributor to why these sorts of errors may occur. If we deal with those matters that you have raised in regard to intent, there have been some assertions in a number of industries that it is becoming a business model in particular industries for employers to seek to reduce costs and undercut. What would you say is driving those intentional underpayments? Is it just greed or is it something more?

**Mr Sparks:** I would agree. There are a couple of comments that I would make. The first would be that the stagnation of wages has been an issue in that marketplace. I did a check this morning. I went to Seek and I could identify advertising for qualified carpenters for between $25 and $30 an hour. The charge-out rate or the actual cost rate for an apprentice sits somewhere at the moment, under the modern award, between $25 an hour and $38 an hour. If you have somebody who needs an apprentice, the cost of the apprentice is an issue for them. There are such small margins in some of the sectors at the moment that they need to try to do what they can to reduce cost. Sadly, it is quite often those who are ill informed about what their rights and entitlements are.

I listened to some of the earlier evidence provided to the committee. The unions play a very strong role in making sure that there is that education, knowledge, monitoring and compliance. Group training as a network and a capacity is doing the same thing. My question keeps coming back to: what about the 50,000 apprentices out there who do not have that level of advocacy and support? That is the unknown.

**Mrs STUCKEY:** Alan, do you have any statistics on the percentage of group training organisations compared to non-group training organisations that employ apprentices in Queensland?

**Mr Sparks:** You might regret asking me about statistics. Let me put a couple to you. Small and medium enterprises represent 83 per cent of businesses in Queensland. They employ 43 per cent of all people employed in Queensland. At the moment, there are 28 group training associations across Queensland. They represent around nine per cent of the apprentices. If you go back to that original statistic that I got from the National Centre for Vocational Education Research of 54,000 in December last year, nine per cent of those are apprentices held by group training.

In answer to how we might address some of these issues around apprentices, I am biased, obviously, but I would say increasing the take-up of apprentices through the group training model. It was originally established in Australia in the early 1970s by the ACTU and the Lendlease Foundation, specifically to create the opportunity for a small and medium enterprise that might not be able to commit to a four-year apprenticeship to commit some contribution of time. The group training organisation as the common law employer, under a legal framework, can rotate an apprentice between employers.

The answer is sitting there and it has been there for quite some time to offer greater opportunities for people to take an apprentice and for apprentices to get jobs. However, it is pitched pretty much in the area where most of the unintended errors are occurring in those small, medium and sole-trading pathways.

**Mrs STUCKEY:** You are a very strong advocate for the benefits of group training, particularly as opposed to other forms of registered training. How can the state respond to recommendations that you have put forward, given that the training sector is largely regulated at the Commonwealth level? Do you have any specifics there?

**Mr Sparks:** I think there is an opportunity to close the gap a bit between the practical distance between people who are working in Queensland and the responsibility going to the Fair Work Ombudsman's office at the federal level. I have been an advocate for quite some time that, particularly in that apprentice world, you cannot separate the industrial relations features of the apprenticeship. It was very well recognised in the old Vocational Education, Training and Employment Act 2000. For instance, it covered off things such as cancellation of an apprenticeship. At the moment, an apprentice can simply say, 'I've had enough,' and walk away. Back in those days there was greater control,

whereby you could not just do that and nor could an employer turn around and say, 'Look, I've found a better kid than you, so I am going to sack you and put the new kid on.' In effect, that is what we can do right now, because some of those safeguards in industrial relations have been withdrawn from legislation.

Wageline was another one. If I go back to my early start with the company I am with, Queensland was well and truly recognised as being the leading state in the balance between the training and the educational responsibilities in an apprenticeship and the industrial relations monitoring and compliance features. I think there is an opportunity to have further discussions with all of the stakeholders, to see how we could bring back some of that feature of monitoring. It really comes down to that. At the moment, a lot of things are going on and there is no teeth out there to do anything about it.

**Mr HEALY:** Alan, it is good to see you again. Thanks for your advocacy for a vitally important industry, particularly for apprenticeships and where we are going. In your line of work, how many people would come to you with questions about the complexities of paying people? We hear about it from a variety of areas. In your role, how many people would talk to you about this? What percentage of your day would be occupied with that?

**Mr Sparks:** On a very regular basis, with perhaps one exclusion, and that would be the host employers we work with. Part of the offering that we bring to those host employers is that we will take on the administrative, the legal and the compliance and a large portion of the risk, which allows them, as I have been arguing for 20-odd years, to get into their business and focus on profitability and productivity within their business. In our own organisation's case, we have been getting a lot of inquiries from other group training companies in more recent times. In the past, they would have gone to the department to get some response or they would have gone to Wageline to get those responses. I think we are probably all pretty gun-shy about getting advice from some other statutory bodies around the place when that advice has perhaps not been as accurate, given the circumstances of situations here.

**Mr HEALY:** That highlights the complexities of it, doesn't it?

**Mr Sparks:** It does. A previous witness answered a question about how we might simplify it. My personal view is that most of the wages and the entitlements that are a feature of an apprenticeship's life have been hard fought for and they are a legitimate right and feature of a worker, and an apprentice is a worker. To attempt to simplify those, I think, you risk not recognising the significant on-occurrence differences between this person doing something and that person doing something. I would be quite cautious about feeling there is a golden bullet out there that could simplify it down to 'let's just give them $40 an hour extra' or something and that will make the whole issue go away. I do not think it is like that. I think we need to be very careful about recognising that the apprentice's rights, wages and entitlements are a consequence of the hard work that has gone on to create that for any worker.

**Mr HEALY:** I agree. Thanks, Alan.

**Mrs WILSON:** Enforcement of workplace laws has been a common theme during the inquiry, but you specifically do not mention this in your submission. Do East Coast Apprenticeships have any views on the existing penalties or potential criminal penalties for employers who undertake deliberate and systemic wage theft?

**Mr Sparks:** Where it is a deliberate breach, I would agree that there needs to be some form of penalty or some form of disincentive for that. I have great faith in whatever legislation or system of law would come in place to do that, where there would be a presumption that you would have to prove that there was a deliberate intent. I am not a lawyer so I cannot define that, but I do think—and I have heard the argument—that if somebody steals from me as an employer then there are consequences currently that are not matched by consequences if I deliberately steal. I think there is a case there to get that balance. I have the greatest faith that legislators and the legal system would get that balance right.

**Mr DAMETTO:** It does not look like the complexity around trying to figure out exactly how or what we pay an apprentice in different situations is going to go away. If we were to bring this piece of legislation to counter wage theft into the Criminal Code, how do you think it will affect the mum-and-dad businesses when it comes to deciding whether they take on an apprentice on their own books or through group training organisations?

**Mr Sparks:** In the first instance, there may well be a greater incentive to look at the group training model so that the responsibility rests with the common law employer, which would be the group training organisation. There will always be—and it has been a feature of 20 years of my life—

a matter of choice between employers of whether they go down a group training pathway or whether they do it themselves. Some of the complications around that, at the moment, are related to the costs and some of these very features where individuals are not being paid correctly by some employers. When they come up against a group training company, they are saying, 'Your charge-out rates are too high.' My argument has always been that our charge-out rates are a regulated statutory requirement to pay. The more astute employers I have come across over the years, when they have recognised that that is the way that the group training charge-out rates are created, will then turn around and say, 'You know, I'm using your charge-out rates now when I tender for the job, because I know that is the actual cost.'

**Mr DAMETTO:** Would bringing this into the code actually benefit organisations such as your own?

**Mr Sparks:** That is a long point to draw a conclusion on. It would have to be seen in the end. I think the issue would be establishing an appropriate response where legally it was determined that somebody was doing the wrong thing. It is a problem. I heard earlier evidence that we are not playing on a level playing field. I refer to the point that I made about the Seek newspaper this morning. If I am charging out, say, $33 for a third-year carpenter apprentice but somebody can get a qualified carpenter for $25 an hour, how can that encourage young people to come into the trade? Not so long ago in the *Courier-Mail* there was a statement that identified that a carpenter's average wage in Queensland should be $55.71. If it was $55.71, the charge-out rates for apprentices would fall neatly into where they do sit in the regulation, and that is in that 55, 65, 75 and 90 per cent of a tradesman's rate of pay. At the moment, that is the challenge out there. To clean up the industry, if criminalisation is deemed ultimately to be a process then I think it may have an impact. It would take time to determine whether that impact was correct.

**CHAIR:** Alan, our time has expired. I am sure I can speak confidently on behalf of the committee when I thank you for your strong advocacy for apprentices in Queensland. Thank you for your time today.

**Proceedings suspended from 10.34 am to 10.47 am.**

**BERG, Dr Laurie, Senior Lecturer, University of Technology Sydney (via teleconference)**

**HARDY, Dr Tess, Senior Lecturer, University of Melbourne (via teleconference)**

**MORRISON, Dr David, Associate Professor, University of Queensland**

**CHAIR:** Thank you for making yourselves available for the inquiry today and thank you also for the written submissions that each of you have presented. We are conducting this session as an academic panel and we very much appreciate the contributions that you will make. I will give each of you an opportunity to make a brief opening statement if you wish to add any additional comments to your written submission. We will then ask committee members to ask questions. I will state the names of committee members for those who are appearing via teleconference, but can members be clear in who they are directing their question to or if they are seeking comment from each of the academics that we have available today. Shall we start with you, David?

**Dr Morrison:** Good morning. I am an interdisciplinary researcher at the University of Queensland. I am also a barrister-at-law and I hold a practising certificate for Queensland and the High Court. My specialities are, broadly speaking, commercial law, so I am a tax specialist and I have a very keen interest in corporate matters, particularly financial matters around corporate behaviour. One of the areas of my research is solving complex problems, and those complex problems often cross more than one discipline. That is very much the case with the subject matter of this inquiry. Complex problems are difficult to understand and, because they are difficult to understand, they are difficult to solve.

The first point that I would make, in addition to the submission that I have made, is that I would be exercising a great amount of caution for any stakeholder or commentator in this process that is proposing either a quick fix or a simple solution.

The second point I would like to broadly note is that there are two competing background issues that are driving this problem. The first is an incentive based one, and that is that the various stakeholders have strong incentives to present their material in a particular way and to behave in a particular way. The very title of this inquiry, being wage theft, is, as the *Courier-Mail* suggested this morning—and I am inclined to agree—somewhat provocative because it imports a very wide and generous view of the word 'theft'. I think there are stakeholders in this process who are well meaning and who have well-meaning incentives but that does not necessarily translate, I suppose, into a recommended course of action.

The second broad thing that drives this is the impact that previous behaviour, laws, rules and regulations play in driving the situation that we have now. That is to say that when we face this problem or any other complex problem we are not necessarily able to produce a solution that gives us the best possible result, and that is because we are somewhat bound by other things that are in place that are difficult to shift, too expensive to shift or impossible to shift. For example, if you think about the funding that the state of Queensland has in the way that it runs, it is in part dependent upon revenues collected by the Commonwealth. You have a constitutional issue that drives some of the regulation that is affected by the submissions made here today. That is the second broad theme that is there.

The other thing I have highlighted in the report that I will quickly comment on is that when we talk about wage theft in its broadest or most generous context there are a lot of other factors that are causing people not to be paid properly, one of which is a failure by employers and employees to understand the awards that they are paid under. There are many of them and they are complex. The failure to remit PAYG tax that is supposedly withheld by an employer on behalf of an employee is a very simple problem—it is simple to understand—but it is not necessarily one that is directed towards taking money from an employee. It is certainly not taking money from the government, which of course is the funding process for the rest of us. The failure to pay superannuation is definitely a failure to pay an employee their entitlement and, as such, they end up with less of a superannuation balance. That is a problem for a whole range of reasons including how it gets funded later on because they have not got sufficient savings.

The fourth thing that I would like to do is give you a quick example of how the complexity of this rolls out. I will not talk about the trades because I suspect that you are going to hear enough about trades elsewhere. I thought I would pick a cab driver or someone who puts an Uber sticker on their car. In the simplest category of case, someone who drives a car to transport other people may be self-funded. If that is the case, they set the business up, they bear all of the costs and they reap

the rewards that follow from that. That is a purely commercial arrangement that they make. There is an upside for them because there is blue sky: if they do it well they get paid well. The downside of course is that if they do not calculate it properly then they do not get properly paid.

If you are a driver, you can choose to drive someone else's car. If you choose to drive someone else's car, you can do that either purely commercially and offer them a proportion of the take and keep the rest for yourself or you can be an employee or on a base wage and take an incentive. Those arrangements that I have just outlined very quickly all have different implications. It may well be that if you funded a business yourself the hours that you work do not equate to a minimum wage. There is no way you would get close to a minimum wage. The question there is: how do you resolve that?

Part of this is around what we call a contractor, and there are issues there as well which I am happy to speak to today, but I thought that simple example might set the scene. While minimum wages are a simple concept, I do not think they translate into the workplace simply and neither do awards. They suffer from complexity. They suffer from the various incentives of the parties that are playing, and they suffer from a great historical development that makes them very difficult to fix.

The final thing that I would like to say by way of introduction—and thank you for listening to all of this so carefully—is that I believe there is a great need for a form of collaboration of the stakeholders in order to resolve this. I do not believe this is going to be resolved quickly. It is difficult to fix. I think one of the key processes that will help fix this is to allow researchers and other interested parties access to data that allows them to properly validate claims and solutions for the benefit of all.

**CHAIR:** Thank you very much. For the purposes of those who may be watching online, David, I indicated that you were from the University of Queensland but I note from my notes that you are an interdisciplinary research program leader from the Australian Institute for Business and Economics at the University of Queensland. I invite Dr Laurie Berg, senior lecturer at the University of Technology Sydney, to make a brief opening statement.

**Dr Berg:** I would like to thank the committee for inviting me and my colleague Bassina Farbenblum from UNSW to speak this morning about our research into wage theft affecting temporary visa holders in Australia and Queensland. I will confine my remarks to that group of workers.

In our report on wage theft in Australia we report on the results of our online survey of almost 4½ thousand people who had worked in Australia on a temporary visa. Twelve per cent of those, almost 400, had worked in Queensland. In our submission we outline that in relation to wage theft we found that a third of participants in Queensland earned $12 an hour or less in their lowest paid job, which is, as you know, about half the minimum wage for casual workers in the main jobs in which temporary migrants work, and that was about the same as the national average.

Nationally, we found that wage theft was particularly severe in horticulture and that was also the case for Queensland, and low-paid jobs were particularly prevalent in food services—restaurants, cafes and takeaway shops. About 86 per cent—an overwhelming majority of underpaid participants—believe that some, most or all other people on their visa were also being underpaid.

In this and other empirical work that we have done we have investigated two problems which we consider to be exacerbating the incidence of underpayment of minimum wages in Australia. First, there is a limited capacity of the FWO to investigate individual businesses where wage theft is occurring. Certainly the FWO has stepped up its compliance activity especially in relation to temporary migrant workers, but in certain industries like food services and horticulture, which are dominated by small businesses and which also have very low rates of unionisation, compliance activities including by the FWO are very resource intensive.

Secondly, there are barriers to individual workers coming forward. We consider for both of those reasons that there is an important role for states to play in reducing the expectation of impunity among noncompliant employers. That is particularly the case when it comes to supporting individuals to report wage theft. Ensuring the ability of low-paid workers to make complaints and to seek to recover their wages, including temporary visa holders, is important not just to ensure that workers are ultimately paid what they were owed for the work that they performed but it also increases detection of patterns of wage theft and ensures accountability on the part of employers.

I want to briefly address further research that we expect to publish in October that reveals that, across Australia, around nine per cent of temporary migrant participants in our survey who were underpaid came forward to attempt to recover their wages. We asked the remainder why they had not attempted to do so. There has been an assumption that the reason especially international students and backpackers do not come forward is that they do not know their basic entitlements. Our research has shown that that is not the case. When it comes to the basic minimum wage—the

minimum national statutory wage in Australia—three-quarters of our survey participants who were underpaid knew that the statutory minimum wage was higher. Instead, the more significant reason they declined to make complaints about underpayment was that they do not know what to do or that it seems too hard or too much work. Of this vast majority—almost 90 per cent—who had not attempted to report their underpayment, around half of those said that they would be open to doing so.

Consequently, we recommend the provision of resources for support services to assist individuals in Queensland to report labour violations, including wage theft, whether those claims are ultimately reported to the FWO or to Queensland authorities or both. We also recommend that the Queensland government assist the higher education sector to provide dedicated legal advice and representation services to international students in Queensland. We also support the criminalisation of wage theft at the state level, which we believe has the benefit of increasing the penalty for employers and also bringing their state resources in investigations.

Since I know that others are addressing the regulatory dimensions of systemic underpayment, I will focus briefly on our recommendations to support services for workers. Currently in Queensland there are no dedicated statewide services for low-wage workers to make complaints or seek to recover wages. We suggest the establishment of a dedicated legal advice and support service for migrant workers at the very least. Not only would that assist workers to recover underpayments; the information that would come through that service through individual claims would also feed into broader enforcement and policy goals.

The other way in which the Queensland government can support international students in particular to report wage theft is by supporting and enabling a role for the international education sector. In New South Wales, key stakeholders have come together to seek funding from the state government for a sector-wide response to the exploitation of international students. The Queensland government could proactively assist international education providers in Queensland across higher education but also the VET ELICOS sectors to do the same. I would be very happy to take questions on what that might involve.

**CHAIR:** Thank you very much, Dr Berg. I now invite Dr Tess Hardy, who is a senior lecturer at the University of Melbourne, to make an opening statement.

**Dr Hardy:** Thank you very much. I would also like to start by thanking the committee for providing me with an opportunity to be heard today and allowing me to elaborate on the written submission prepared by me, Melissa Kennedy and Professor John Howe. As you mentioned, I am a senior lecturer at Melbourne Law School. I am also the co-director of the Centre for Employment and Labour Relations Law and an Australian Research Council Discovery Early Career fellow. I am currently working on a major research project into the regulation of work in franchise systems which encompasses noncompliance with basic employment standards. This builds on my earlier research that has been broadly concerned with the enforcement of employment standards regulation in Australia. I have been conducting research in this area for about a decade.

Given that this inquiry is focused primarily on the issue of wage theft, as a preliminary step I believe it is necessary to address what is potentially encompassed by this concept. I build on some of the comments of David Morrison. 'Wage theft' is a term that was first coined in the United States, but it is one that has recently gained wider currency in Australia. There is no consensus about what is precisely meant by this term. It has been used in a broad sense to refer to any circumstance where an employer has failed to provide their employees with their legal entitlements, including benefits such as wages as well as the superannuation guarantee. However, others believe that the term 'wage theft' should be confined to cases involving deliberate or reckless breaches of the law as opposed to noncompliance that has arisen as a result of ignorance, inadvertence or incompetence on the part of the employer.

The definition of 'wage theft' is important, as it has implications for analysis of the extent and breadth of the problem as well as the subsequent assessment of which regulatory responses are most appropriate and effective. For example, enhanced information and educational initiatives directed towards employers are likely to be futile in relation to firms that are systematically seeking to avoid their legal obligations and evade enforcement efforts. These initiatives are also problematic when it may be the case that lead firms—franchisors, for example, in franchise systems—may be driving or influencing the compliance behaviour of the direct employer. For the purposes of our submission and to allow for the broadest possible discussion, we adopted the wide definition of 'wage theft' that was put forward by the Queensland Office of Industrial Relations in its briefing report to the inquiry.

As we set out in our submission, we believe that there is now incontrovertible evidence that non-payment or underpayment of employment related entitlements is serious, widespread and persistent in Australia, including in Queensland. There is mounting research showing that this problem is particularly pronounced in certain segments of the labour market—namely, where there is a concentration of low-skilled work, thin profit margins, limited union presence and fragmented employment arrangements, such as franchise networks, which I have just mentioned, labour hire arrangements, which many of you would be familiar with given the recent inquiry into that particular organisational form, as well as supply chains, subcontracting et cetera.

What is less clear is what can be done to stem this wave of wage theft, particularly at the state level. Our submission, along with many others, has acknowledged that state intervention in an area that is largely regulated by federal laws is not necessarily straightforward. That said, we also appreciate that the task of combating wage theft is enormous and the resources of the Fair Work Ombudsman and trade unions are limited. In that regard, we believe that positive regulatory contributions made by state governments is, therefore, a welcome development.

In our submission we identified four initiatives that could be adopted by the Queensland government. Firstly, we agree with Laurie Berg's and Bassina Farbenblum's submission that more resources could be directed towards the state based inspectorate. Although the inspectorate may not be able to institute enforcement proceedings under the Fair Work Act, in our view there are limited constitutional barriers for such an inspectorate engaging in educational activities that may be directed towards vulnerable workers. That includes not only migrant workers but also young workers. It does not prevent the inspectorate engaging in proactive initiatives, such as targeted audits, which may encompass entitlements that fall squarely within the state jurisdiction as well as a check on federal related entitlements. This funding for inspectors is critical in detecting employer noncompliance among these vulnerable groups who are less likely to complain on a formal or individual basis.

Second, we also support additional funding for specialist community legal centres at the state level. Given that underpaid workers have little access to legal aid and the cost of bringing enforcement proceedings is often prohibitive, assistance from community legal centres is critical in allowing underpaid workers to seek redress. This supplements the processes that are available at the federal level via the Fair Work Ombudsman.

Third, our submission highlights some of the ways in which the Queensland Procurement Policy may be further strengthened to better ensure best practice industrial relations. In particular, we recommend that the policy be amended to make clear that any contractor or supplier who has deliberately failed to comply with employment laws will not be eligible to apply for government contracts.

Fourth, we surveyed some of the main arguments for and against the criminalisation of wage theft. This issue is one of the most contentious areas of debate at the state level. Although introducing criminal sanctions for wage theft carries great normative weight and may be perceived as delivering greater deterrence than civil penalties, in our view holding firms and offices criminally liable raises some thorny regulatory issues and may have some counterproductive consequences. These issues are especially complex in an environment where criminal sanctions are being introduced at the state level in relation to conduct that largely constitutes contraventions of federal laws. Thank you for the time in allowing me to make an opening statement. I look forward to your questions.

**CHAIR:** Thank you, Dr Hardy. I thank each of you for your opening statements. I will ask a general question first and then have a few specific questions. I will not be able to get through all of my questions for each of you. I found all of your submissions and supporting papers very interesting. The general question that I wanted to put to each of you is that one of the key elements of the terms of reference that the House has requested the committee look at is the incidence of wage theft. David, you spoke directly to this. It seems very difficult to quantify that for a number of very complex reasons. What do you consider the most authoritative sources from which this committee can best estimate a Queensland figure? In this regard, Dr Berg, I know that you will have particular views for the cohort that you have looked at, but I am interested to know which ones come to mind for each of you. You can take it on notice, too, if you wish to come back.

**Dr Morrison:** I think that Dr Berg's report, as far as I can see, is the most authoritative in terms of surveying and collecting information. It is that objective data that we look to when seeking to understand the problem. I think that both Dr Hardy and Dr Berg are correct to suggest—they do not say it outright—that it is the case that if you have the kind of sentiment that is arising for those who are surveyed by this report then it is not a longbow to suggest that others are experiencing similar issues.

For example, in my own world of students who graduate and get jobs, I have dealt with people who have had these kinds of issues and who feel guilty about, for example, suggesting to an employer that they ought to be paid, and who are not paid and who do not want to cause a fuss. They are educated people. They understand that there is an ombudsman. They understand that there is a process. At the same time, they are reluctant. Again, this is anecdotal. We would like more information and more data, but it is difficult because it comes from a range of sources and not all of those sources are equally accessible.

For example, I can look up the Fair Work cases. I am midway through looking at those and trying to understand the behaviour by categorisation. That is easy for me to do. The one thing that I cannot do is get the same access to the various court registries in each state and across the Commonwealth for matters relating to prosecution for the collection of tax debt. That is not available to me.

There are very good reasons the Australian Taxation Office does not allow full access to its information, notwithstanding the warranties that we can make around privacy. It beggars belief that ASIC is not more cooperative with its data and that it wants to charge for all its data. This is a long problem. I talked about this 10 years ago at a Senate inquiry of the Commonwealth parliament.

In terms of understanding this problem, it goes to Dr Hardy's proposition—and I think I start with a US definition of wage theft. How wide do you want to make this? Every single aspect of it is important. Data is one of the critically lacking things. We just do not have it. That is why the point was made about being cautious to distinguish between normative incentive based contributions—that was my use of the term—and evidence, which is positive methodology. If you want to ask further questions of me, I am happy to try to outline that on notice for you.

**CHAIR:** Dr Berg, do you have any comment? I think your comments will be fairly short. I know we have read a lot of commentary similar to what David said. Your authoritative source has been very helpful, but it obviously focuses on a particular cohort. It would be wonderful if you are able to include everyone.

**Dr Berg:** I will certainly take that under advisement. We hope that our research has made an important contribution. Yes, we confined our study to temporary visa holders only. We did so because we believe that wage theft overall, especially among temporary visa holders—I am sure this also applies to other vulnerable workers like young workers—is extremely difficult to quantify. Naturally, the best sources might be among the FWO's own audit reports—there are other studies that have been undertaken—looking at court cases and media reports.

Unions New South Wales did a study on advertisements that advertise wages which would amount to wage theft. There have been smaller empirical qualitative studies that have focused on particular industries, particular locations and certain visa holder groups in the temporary migrant worker world that I would be happy to direct the committee to as well. None of these studies capture definitively the incidence of wage theft, even among the groups of workers they focus on.

To give an example that is addressed in research in an article that we referenced in our submission that we did on the 7-Eleven wage repayment program to indicate the difference between the rates that are reported, the claims that are made, the amounts that are recovered and what we believe to be more in the ballpark of the actual incidence of wage theft, the 7-Eleven wage repayment program awarded well over $150 million to workers in 7-Eleven franchises across the country, many of whom were international students. That was far and away more than the recovery rates that FWO was able to achieve in audits they had conducted in the lead-up to the establishment of that program. This is a hidden issue that is very difficult to come to grips with.

**Dr Hardy:** Yes, I would agree with much of what has already been said. I would just add to some of the comments Dr Berg made in relation to audits that are undertaken by the Fair Work Ombudsman. In other jurisdictions, audits which are conducted by the inspectorate are generally seen as data that is as good as you can get on quantifying the extent of the problem. There is no concrete or comprehensive data in Australia and it is certainly elusive in other jurisdictions, but audits by the inspectorate are seen as good as or as accurate as one can strive towards.

The issue that we have encountered in Australia—it is certainly not confined to this country—is that audits are generally undertaken on the basis of employment records that are prepared by the employer. It involves an inspector going into the worksite or requesting that records be provided and then reviewing them and checking whether or not they show that the worker has been paid in accordance with their legal entitlements. The 7-Eleven cases are the most well known example, but it is certainly not an isolated case, of where employers either have not kept employment records or have manufactured records which mask the true underpayments that have occurred. The reliance on

employment records and the fact that records are often inaccurate or absent makes it even more difficult to ascertain the true extent of the problem. In that regard, surveys such as Dr Berg's, which rely on workers' reports, are sometimes a better indication of the likely magnitude of the issue.

**CHAIR:** Dr Hardy, in your 2017 paper with John Howe titled 'Creating Ripples, Making Waves?'—which I really enjoyed, thank you very much—you make mention of a business survey that is seeking to examine the regulatory effect of business size, firm history, market position and publicity on compliance. When will the findings of that be available?

**Dr Hardy:** Hopefully in the next 12 months. I have been somewhat diverted by the current franchising project, but it is something that we are hoping to publish shortly.

**CHAIR:** I think that will be instructive. If you look at the nature of employment relationships, large companies have been seen to be more concerned about reputational damage. I think the argument has been made that the employment relationship has changed with regard to contracting and sham contracting and it is further than it has ever been between the ultimate employer-employee relationship in some cases, so it would be interesting to see what you find.

**Dr Hardy:** Indeed, it has. In terms of reputational sanctions, there are some excellent case studies now which show that that only gets you so far in changing both the compliance behaviour of that large firm—whether it is the company at the top of the supply chain or the franchiser in the case of franchise systems—and what they are willing to do with respect to that business network. Domino's is a really good example. It seems they have entered into proactive compliance deeds with the Fair Work Ombudsman which have been somewhat cosmetic. They do not address some of the fundamental issues which have since been identified within that network.

**CHAIR:** You also reference your further work with regard to franchise operations. When will that be available, Dr Hardy?

**Dr Hardy:** I have various papers coming out. I have published some of those findings by way of conference proceedings which I could provide to the committee on a confidential basis. I am more than happy to address any specific questions that you have in relation to franchising.

**CHAIR:** If you would be willing provide that to the committee on the proviso that it is confidential, I think we would still be very interested to read the outcomes of that. Would you take that on notice?

**Dr Hardy:** Yes, of course.

**Mrs STUCKEY:** I have a question with regard to penalties and the introduction of criminalisation. Some people say that higher penalties are not necessarily linked to an increase in deterrence and that the introduction of criminal penalties is another avenue. I notice that Associate Professor Morrison has put naming and shaming as one of the suggestions that has been brought forward. I certainly do not want to underestimate the importance of this, but my concern is that so many small businesses have the potential to make genuine mistakes as opposed to engage in deliberate wage theft. What are your thoughts about penalties and how we define or separate those who are not deliberate offenders but who are simply caught up in the legislation?

**Dr Morrison:** Both Dr Berg and Dr Hardy are able to give you a better answer, in my view, when it comes to the particularity of the industrial relations aspect. My view is somewhat more strategic in the sense that I would not take a view immediately on changing anything until we properly put a fence around the problem and understand it objectively. That is my position. Furthermore, I believe that it is very much the case that, because of the complexities around particular workplace laws and regulations and the extraordinary differences between awards, it is almost impossible for people to properly understand their obligations or for those who are protected by them to understand their awards. I would be surprised, no matter the scale of an organisation, if you approached an employee and asked them the particular particularities of their award, if they understood it. They rely on the human resources department primarily.

The point made by the chair, that larger corporates are more inclined to take compliance seriously, is evident across a raft of law because there is so much more involved if they do not and they have the money to afford all of the advice to comply with complex laws. It is almost impossible for small business operators to understand all of those laws. We know this because when we ask them really basic questions around the operation of their businesses—some of them have difficulty understanding the notion of incorporation. They do not seem to properly understand whether they are running a partnership, a small business or a company.

From my point of view, the bottom line is that it would be much better if we could move towards a cooperative model, where we work to make sure that awards are made less complex without forgoing people's arrangements in a fair way so that everybody understands what they are entitled

to. Because we live in a complex world, it does not mean that we have to have all of these complex rules. It is some sort of hubris that we all suffer from: because we think we are sophisticated, we have to have all of these laws. We have far too many laws and far too little enforcement and effective compliance with the laws. I am the last person to suggest another law at this stage. I would like to see a little bit more data. I would like to think about collaborative ways and openness, naming and shaming. I like the inspectorate idea of Dr Hardy. I think they are really good ways to spend public money.

**Dr Hardy:** I think there are a range of issues raised by the criminalisation question. The one that has been introduced is a really legitimate concern. There are various ways that you could frame any kind of amendment to the Criminal Code in a way that addresses those concerns. For example, you could make it clear that a provision is only triggered where an employer has deliberately underpaid their workers or done so on a reckless basis, so you would have to show either a level of intent or a level of recklessness that is worthy of a criminal sanction. The structure of criminal proceedings or offences under the National Minimum Wage Act in the UK is such that you make the liability provision fairly broad but then introduce a statutory defence. If an employer has underpaid their workers inadvertently or accidentally then they could have a safe harbour. Effectively, they could raise that defence.

I think the concerns are largely misplaced, because one of the perennial issues that is raised by criminologists as well as social legal theorists around criminalisation is that, even when criminal sanctions are introduced in relation to white-collar crime, it is often the case that prosecutors and courts are reluctant to invoke those criminal sanctions, so it is really generally only reserved for the most serious cases. Public interest is often a touchstone of prosecutorial decision-making processes, so it would be highly unlikely that there would be criminal proceedings in relation to an employer who has not paid their workers correctly. It would be very unusual for that to meet the threshold for civil litigation, let alone criminal proceedings.

**Mrs STUCKEY:** It sounds like it is coming down to the definition, which is a concern.

**Dr Berg:** I agree with much of what has been said. It seems clear, and I think there probably is a broad consensus, that if criminal sanctions were to be introduced they really should be reserved for deliberate or reckless underpayment. We would not want to criminalise inadvertent underpayments or mistakes which are made. There is also ample evidence that the introduction of criminal sanctions does not necessarily lead to greater enforcement and is not a silver bullet in terms of deterrence either. For instance, in a vaguely related field of criminalising employers of unauthorised migrants—employers who are employing workers contrary to their visa conditions or who have overstayed a visa—the introduction of criminal sanctions in 2007 was not broadly enforced at all and is unlikely to have changed behaviour in that sphere.

At the same time there is also evidence, at least among those who are deliberately underpaying workers—and this is coming from focus groups that we have conducted with international students and backpackers—that those employers see interacting with the FWO and the potential penalties under the Fair Work Act as just the cost of doing business in a way that does not appear to be the case when it comes to the ATO, for instance. Those employers have much more concern about non-payment of tax being detected than underpayment. I think there is a role for heftier penalties and state resources being dedicated to detection of underpayment.

**Mr HEALY:** Welcome and thank you all for your submissions. I have read them, they are many and varied and it is appreciated. Laurie, did you make the comment that we have no place for migrant workers to report wage theft?

**Dr Berg:** No, I certainly did not mean to be making that point. There are no dedicated state based, statewide services for low-wage migrant workers in Queensland—unlike, for instance, in Victoria, where there is a community legal centre known as JobWatch, which provides advice to workers there. JobWatch is resourced by the Fair Work Ombudsman to provide telephone advice to workers in Queensland, but my point was simply about further resources for workers to be able to come forward and receive a fair amount of assistance—to receive advice, to ventilate their claim and to understand what the extent of the underpayment might be. As both David and Tess have outlined, it is a very difficult process to understand what the correct wage is and then to calculate what the extent of the underpayment might have been, based on when the work was undertaken. For workers to understand their claim and then be able to pursue it is something that I think there is a need for in Queensland and other states.

**Mr HEALY:** When I heard that I thought you were right. We have had that group appear before us, but you are right. One thing that is obvious to me is that we need to see an expansion in the opportunities for people to put these issues forward. Thank you very much for that; I appreciate it.

**Mrs WILSON:** Welcome to all of you today and thank you so much for your contributions. Dr Hardy, if criminal offences were introduced in Queensland, what types of penalties do you think would be appropriate in terms of maximum jail terms? What thresholds would an employer have to meet to fall within an offence?

**Dr Hardy:** It is a really good question, and I do not have any firm views on what might be appropriate. I can certainly say that in other jurisdictions where there are quite large jail terms—10 years imprisonment, for example—if a court orders incarceration, which is rare, they are often very limited jail terms. They are nowhere near the maximum. I think that is also true to some extent of civil penalty regimes. Much of this is within the court's discretion in determining what is an appropriate penalty in the circumstances or an appropriate jail term in the circumstances. I do not have any firm views about whether it should be five years or 10 years.

One thing I would say is that there is a lot of discussion around the nature of the sanction, whether or not it should be civil or criminal. One thing that has not been well canvassed in the debate so far is: who is the target of that sanction? This is an issue which is increasingly arising in the federal sphere around whether or not we should be bringing proceedings against the direct employer or entities beyond the direct employer that might be influencing the compliance behaviour.

I know that there has been some discussion in Victoria, which is also contemplating the introduction of criminal sanctions for deliberate underpayment, that there might be an ability to pursue lead firms under the existing accessorial liability provisions which are generally embedded within the various criminal codes. There are a number of problems, in my view, in relation to that. For a start, even the justification for attaching criminal sanctions starts to weaken in respect of supply chains or labour hire, where the distance between the firm and what has occurred starts to widen because these justifications generally turn on a level of moral wrongdoing, culpability et cetera. More practically, and from an instrumental point of view, because we are in the criminal jurisdiction, evidentiary rules and burdens of proof are much higher than within a civil penalty regime.

What the Fair Work Ombudsman has found is that trying to prove that a franchisor, for example, in the 7-Eleven case, was knowingly concerned in the contraventions, even though they were wide spread, systematic and serious, was not possible. That is under a lower burden of proof. Moving into a criminal jurisdiction would make that type of proceeding far more difficult. Then you would be focusing only on the direct employer, which might be a franchisee, for example, who has signed up to a business model that is somewhat flawed. Again, I think there are questions as to what extent that franchisee employer is culpable in a way that would justify a criminal sanction in those circumstances.

**Dr Morrison:** I agree with that entirely, especially the last part. The only thing that introducing a criminal sanction might do is give a few people a fright up-front. It is not going to result in any successful prosecution. There are two reasons for that. One is the amount of funding that you put behind the law, and there are too many laws to administer at the moment so there is insufficient funding for the people who are responsible to ensure that they are complied with. ASIC is a classic example Australia-wide.

The second one is that the point made about franchising is interesting in the sense that they sign up for a business model and they do what they are told, but even employers who are on their own do not necessarily take those sorts of things seriously so they are not necessarily going to comply. If you are trying to show that someone had the intention of committing a crime, you are up against it from the word go from an evidence point of view.

**Mrs WILSON:** Dr Berg, do you have any comments?

**Dr Berg:** I agree with much of what has been said. Having said that, criminal laws are playing a role in industrial relations contexts across the country, whether in occupational health and safety or indeed when an employee takes money from the till. Those matters are frequently investigated and I think the possibility of criminal sanctions is playing a deterrent role there, but I absolutely agree that criminal sanctions would need to be limited to deliberate, possibly also reckless conduct, potentially with a warning or a notice scheme so that it is really the most serious cases that are being caught. I definitely take Dr Hardy's point that it is often vulnerable employers who can be caught up in that as well, where there is a lead firm at the top of the supply chain or franchise that is the ultimate beneficiary of those underpayments.

**Mr SAUNDERS:** I was a humble small business man in a previous career, and I am having great difficulty understanding this from the brains that are before the committee at the moment. What you are saying to me is that if an employee knocks $20 out of the till they will get charged because that can be proved, yet under the law an employer can knock off money from the wages and conditions of workers and we cannot prosecute them. I cannot get my head around this. We can

knock off a worker, fine them and ruin their career if they have knocked $20 or $15 off or even taken a sandwich out of the display case, yet you are telling me that we cannot prosecute an employer for knocking off wages from a worker. It has to change. The law is absolutely crazy.

**Dr Morrison:** We can prosecute them, but the fact of the matter is that it does not appear that they are being pursued relentlessly enough within the existing legal framework.

**Mr SAUNDERS:** Is that because of the ideology? We have the ideology of the federal government at the moment where it has cut ASIC. You mentioned that before, David. With my private companies I know I do a lot with ASIC. We have Fair Work Ombudsman staff who have been cut to the bone. Is this the ideology that is driving workers' wages and conditions down to the lowest common denominator?

**Dr Morrison:** I do not think it is my place to comment on political ideology, other than to say that each side has its own ideology, but the very unfortunate fact is that when they behave they behave quite remarkably in the same way. My references to ASIC are long-running concerns that I have had and therefore, unfortunately, they cover both sides of parliament's administration of that organisation. How can it be that a publicly funded organisation continues to charge for the work that it does? How can it be that that institution returns a dividend to the Commonwealth government and that its fees are increasing? How can it be that when we look at the behaviour of corporates, 90-plus per cent of which are private small business companies—private operators, Pty Ltd companies—we know that the transgressions of law that are occurring there are not being enforced or followed up?

ASIC cannot stand up and say, 'We are not getting enough money or funding,' otherwise it is a new ASIC head. It does not matter if it is Bill Shorten or Malcolm Turnbull, to be quite frank with you. It really doesn't matter. This is a long-run problem. Phoenixing—what I am referring to particularly—is something that has occurred over a period of time, not with anyone's blessing but certainly by parliaments of any colour not taking enough notice and not taking it seriously enough. The estimates of the loss are something between $5 billion to $50 billion, so it is certainly something to be concerned about.

When it comes to the enforcement of law, you must have an understanding of the legal process in place for everybody. I do not believe it ought to be that burdensome and I think it is for small business. You also must have a regulator or regulators who understand what is required and who are vigilant in ensuring that it is complied with. I have no trouble with civil penalty orders and the sorts of matters that were addressed by my colleagues a moment ago by way of an alternative so that you do not necessarily have to get to prosecution. In fact, regulatory models suggest that it is better if you can deter or encourage rather than necessarily prosecute, but there is no question that we have plenty of law, in my view. It is a question of whether or not we are being effective in our administration of it.

**CHAIR:** Did you want to invite Dr Hardy or others on the line to comment?

**Mr SAUNDERS:** It was open to all of them, but I have a second question I would like to ask. You were talking before about business owners. I have been in business a long time. Franchisees sign up to a franchise. You buy it from, say, XYZ and you pay your percentage every month. You are supposed to get training and people who come through to help with your business. Surely the head of that franchise is liable if they are not advising their franchisees about wage updates, working conditions for their staff, safety conditions et cetera. Someone has to be made responsible. If that is the head of that franchise, they should be made responsible. Is it covered in law currently that they are?

**CHAIR:** Member for Maryborough, are you directing that generally?

**Mr SAUNDERS:** Sorry, to David.

**Dr Morrison:** If I may suggest, you should direct it to Dr Hardy. Dr Hardy, I might be mistaken, but you are the author of the 7-Eleven report?

**Dr Hardy:** I am not, but I have done a lot of research on liability of franchises. In response to that question that was raised by the member for Maryborough I would point out that there have been amendments to the Fair Work Act since the 7-Eleven case, and largely on the back of the 7-Eelven case, whereby under the Fair Work Act a responsible franchise or entity as defined can be held liable for prescribed contraventions committed by their franchisees unless it can be shown that they have taken reasonable steps to prevent those contraventions. Those provisions were passed late last year and are now in effect, but we are yet to see any test cases because they are so new.

It is the case that, under the Fair Work Act, liability provisions have certainly been strengthened in relation to franchises and in relation to corporate groups, so holding companies can similarly be held liable for contraventions committed by their subsidiaries. Of course, that leaves out a range of other organisational forms such as labour hire, supply chains and others. There have been some critiques about those provisions. There have been some questions raised about whether or not they will be sufficient ultimately. Time will tell.

**Dr Morrison:** Sorry, I have one more thing, if I may. My footnote No. 34 outlines the Fair Work Ombudsman report on 7-Eelven.

**Mr DAMETTO:** Welcome, Dr Morrison, Dr Berg and Dr Hardy. Thank you very much for your time this morning. My question is going to be a little bit left of field and branch out a little bit because we have not had this opportunity to have such a brilliant cohort of university employees to question about this. It has not been brought up yet in any of the submissions I have looked at. My question surrounds unpaid work that is performed through university degrees in terms of university students doing work experience in engineering, law and allied health services. How would you view this falling into the realm of wage theft? It just seems to be part of the rite of passage for a lot of these students, as highlighted in our last submission, which was about apprentices being underpaid. Coming from an apprentice background, a lot of the unpaid work I did felt to be a rite of passage at the time and I did not realise it was wage theft. How does this relate to university students?

**Dr Morrison:** It is okay; I was an articled clerk once, so there you go—same thing.

**Mr HEALY:** David, you are a brave man.

**Dr Morrison:** We were terribly paid.

**Mr SAUNDERS:** You have made up for it now.

**Dr Morrison:** I do not know about that. Again, it is complex. That is why I am having trouble; I cannot give Mr Saunders the answer he wants and I cannot give it to him in two or three sentences because it is such a difficult problem. With respect to university students, I am not an expert on what our university does with respect to students and where they send them, but I do know that part of the offerings that universities make around the country, including our university, is the opportunity for students to do a degree that leads them to a profession. For example, medicine, law and dentistry are all professions where people end up. It is certainly the case that if you want to be a dentist they are going to make you look at people's teeth before they let you loose. They do that at the dental school as far as I know and that is supervised. Whether you would call that work or study to me is a very interesting question, because there is no doubt that you need to be exposed to that environment. On the other hand, there is a tour operator that I have been reading about in my case work who is from your neck of the woods, Mr Healy.

**Mr HEALY:** Yes, I know him.

**Dr Morrison:** This is quite different from what a university is seeking to do. Basically, our job is to try to make sure that the people we present to the community with the qualification that their degree allows them and the opportunity to join a professional body if they meet that body's requirements—all of the things we are doing are to make sure, to put it in blunt terms, that what is written on the tin is what is inside the tin, whereas some of the cases I am reviewing now make it very clear that the word 'opportunity' is being used for the purposes of getting people to work and to take on significant responsibility in the conduct of an enterprise. At no point do we put a law student, a medical student, a dentistry student or any other student in charge or unsupervised. It is always about getting—

**Mr DAMETTO:** In saying that, would you say that someone who is working for an engineering firm who may be going through and categorising or filing CAD drawings, for example, could be looked at as doing administration work while they are there supposedly gaining work experience?

**Dr Morrison:** At the end of the day, I think it is a function of your attitude. For example, having done work for no pay or the wrong classification of pay earlier in my life, I simply saw that as an opportunity. It might not have been entirely fair to me, but the way I see that is I say, 'Well, I've got two choices here. I can stand on my digs and miss out, or I can give it a go, acquire the skills that I need and make the progress from that.' I do not say whether that is right or wrong, but I certainly do not think that any university would be at all pleased to hear of anyone in a program that involves the university effectively taking responsibility for something and not being properly rewarded. In fact, my suggestion would be that if, in fact, you are on work experience you are getting the work experience that has been set out by the course in that context. If someone is not, there is a responsibility on them to tell someone about it. It is a two-way street.

**Mr DAMETTO:** I understand that. I suppose someone at the grassroots or apprenticeship or traineeship level is in that same frame of mind, thinking to themselves, 'Perhaps my training is coming to an end. I'm going to put in this extra work,' which actually is work and unpaid work, 'with the pie in the sky that this will lead to future employment with that company.' I think it gets into a bit of a grey area.

**Dr Morrison:** It does. I see my students at the end of their law degree, so they are thoroughly jaded and disappointed and ready to go to work. They do not think that we can help them very much at that point. It is later on that they understand the great value that they have received. What I say to them is that they have to remember that when they go to work and they secure a job for at least the first six to 12 months the employer is expending extraordinary resources—

**Mr DAMETTO:** I agree.

**Dr Morrison:**—so it is paying them a wage and a salary but they are not returning anything to that employer. Most people are fairly good at working out what they need and making decisions for themselves. I would not want to present a view one way or the other. I think there is a responsibility. It is somewhat troubling that there are people who feel that the environment is such that they cannot really complain or say something when they do not feel they have been treated fairly. I think that goes beyond wages; I think that is another issue altogether.

**CHAIR:** Member for Hinchinbrook, we are out of time, but did you wish to seek comment from Dr Berg or Dr Hardy?

**Mr DAMETTO:** No, it is fine, thank you very much. I understand that we have run out of time.

**CHAIR:** You did not wish to seek feedback from the two?

**Mr DAMETTO:** Would you like to add some feedback to that?

**Dr Hardy:** Just briefly, this is an issue that has been the subject of extensive research by Andrew Stewart, Rosemary Owens and others. Whether or not a person is a volunteer or an intern engaging in unpaid work experience is a really difficult one and will depend on whether or not there is an intention to create an employment relationship and whether or not the work is being done as part of the ordinary course of business. There is quite a bit of information available on the Fair Work Ombudsman website about this particular issue and the factors that they consider relevant. They have also brought a number of cases against firms that have exploited interns who have been undertaking menial or administrative tasks rather than gaining any substantial work experience. It is something that is very much on the radar of the regulator.

**CHAIR:** Our time for this session has expired. I thank you very much Associate Professor Morrison, Dr Laurie Berg and Dr Tess Hardy for making yourselves available to the committee. We very much appreciate your expertise. Dr Hardy, you indicated that you would provide some additional information to the committee. However, should any of you wish to provide additional reading for the information of the committee, I am very happy for you to provide that. I now declare this hearing closed.

**The committee adjourned at 11.55 am.**