



A fair day's pay for a fair day's work?
**Exposing the true cost of
wage theft in Queensland**

Report No. 9, 56th Parliament
Education, Employment and Small Business
Committee
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Education, Employment and Small Business Committee

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Abbreviations

ABC	Australian Broadcasting Corporation
ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
Ai Group	Australian Industry Group
ALHR	Australian Lawyers for Human Rights
AMIEU	Australian Meat Industry Employees' Union
AMWU	Australian Manufacturing Workers Union
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BFVG	Bundaberg Fruit and Vegetable Growers
BOOT	Better Off Overall Test
CEO	Chief Executive Officer
CFMEU Queensland	Construction, Forestry, Mining and Energy Industrial Union of Queensland
Commissioner	Commissioner of Taxation
Committee	Education, Employment and Small Business Committee
Corporations Act	<i>Corporations Act 2001</i> (Cth)
Department	Department of Education (includes the Office of Industrial Relations)
EBA	Enterprise Bargaining Agreement
EERC	Education and Employment References Committee
ELICOS	English Language Intensive Courses for Overseas Students
ETU	Electrical Trades Union
FEG	Fair Entitlements Guarantee
FEG Act	<i>Fair Entitlements Guarantee Act 2012</i> (Cth)
FWA	<i>Fair Work Act 2009</i> (Cth)

FWC	Fair Work Commission
FWO	Fair Work Ombudsman
GST	Goods and services tax
HIA	Housing Industry Association
IEU	Independent Education Union
IGT	Inspector General of Taxation
Inquiry	Inquiry into wage theft in Queensland
IR Act	<i>Industrial Relations Act 2016 (Qld)</i>
IR Claims	Industrial Relations Claims
JobWatch	JobWatch Inc.
LHLCU	Labour Hire Licensing Compliance Unit
MEA	Master Electricians Australia
National Temporary Migrant Work Survey	Laurie Berg and Bassina Farbenblum, <i>Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey</i> , University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017.
NES	National Employment Standards under the <i>Fair Work Act 2009 (Cth)</i>
NRA	National Retail Association
NSW	New South Wales
NUW	National Union of Workers
OIR	Office of Industrial Relations
POQA	<i>Parliament of Queensland Act 2001 (Qld)</i>
QAI	Queensland Advocacy Incorporated
QCA	Queensland Community Alliance
QCAT	Queensland Civil and Administrative Tribunal
QCU	Queensland Council of Unions
QIRC	Queensland Industrial Relations Commission
QLS	Queensland Law Society

QNMU	Queensland Nurses and Midwives' Union
QTIC	Queensland Tourism Industry Council
ROC	Registered Organisations Commission Entity
R&CA	Restaurant & Catering Australia
Senate EERC	Senate Education and Employment References Committee (Parliament of Australia)
SG	Superannuation Guarantee
SGA Act	<i>Superannuation Guarantee (Administration) Act 1992 (Cth)</i>
SGC	Superannuation Guarantee Charge
Standing Orders	Standing Rules and Orders of the Legislative Assembly
TWU	Transport Workers Union
US	United States
VET	Vocational Education and Training
Work Choices	<i>Workplace Relations Amendment (Work Choices) Act 2005 (Cth)</i>
YWAS	Young Workers' Advisory Service
YWH	Young Workers Hub

Glossary

Better Off Overall Test (BOOT)	A test applied by the Fair Work Commission to determine whether to approve a proposed enterprise agreement or other registered agreement. For the agreement to be approved, the award-covered employee must be better off overall under the registered agreement than they would be under the relevant modern award. See page 15.
Enterprise agreements	<p>Enterprise agreements are agreements between employers, employees and employee representative organisations (such as unions) which set out mutually accepted terms and conditions of employment.</p> <p>Most enterprise agreements set out:</p> <ul style="list-style-type: none"> • wage rates • employment conditions (e.g. hours of work, meal breaks, overtime) • a consultation process • dispute resolution procedures • deductions from wages for any purpose authorised by an employee. <p>To be approved by the FWC, enterprise agreements must pass the 'better off overall' test (BOOT).</p>
Enterprise bargaining	Enterprise bargaining is the process of negotiation generally between the employer, employees and their bargaining representatives with the goal of making an enterprise agreement.
Fair Entitlements Guarantee (FEG)	A safety net scheme established under the <i>Fair Entitlements Guarantee Act 2012</i> (Cth) that provides financial assistance to eligible employees who lose their jobs due to, or within six months of, the liquidation or bankruptcy of their employer. See page 19.
Gig work and the gig economy	Where employers engage workers through a series of micro-contracts mediated through an online platform. Examples of gig work include making an earning from Airbnb, Whizz, Airtasker, Freelancer and care.com; ridesharing platforms such as Uber; food delivery services like Deliveroo. See page 188.
Illegal phoenix activity (phoenixing)	The practice of deliberately liquidating a company and creating a new company in its place, with the intention of avoiding paying debts including employee entitlements. See pages 12 and 191 for further details.
Minimum wage	An employee's base rate of pay for ordinary hours worked, generally dependent on the modern award or a registered agreement.
National minimum wage order	An outline of the minimum wage for employees not covered by an award or an enterprise agreement. See page 17.
Modern award	A document that establishes the minimum wages and working conditions for employees in a particular industry or occupation. See page 13.

National Employment Standards (NES)	A set of ten minimum terms and conditions of employment that must be provided to all employees, as set out in part 2-2 of the FWA. See page 14.
Registered agreement	An agreement between an employer and their employees regarding employment conditions, which must be approved by and registered with the Fair Work Commission.
Superannuation Guarantee	Compulsory superannuation contributions made by employers on behalf of eligible employees as set out under section 16 of the <i>Superannuation Guarantee (Administration) Act 1992</i> (Cth). See page 17.
Wage theft	The underpayment or non-payment of wages or entitlements to a worker by an employer, encapsulating any of a range of activities that deny workers their legal/entitlements. See page 21.

Chair's foreword

A fair day's pay for a fair day's work, is an ideal deeply rooted in Australia's labour history and egalitarian values. To most, it is an indisputable right that a worker is fairly and duly remunerated in accordance with their effort and the law. Yet recent public high-profile cases of significant worker exploitation, federal inquiries, and academic studies have found that wage theft is prevalent and going largely unanswered.

The task given to the committee was to inquire into the incidence, forms and impacts of wage theft in Queensland. To let Queenslanders tell their story. And, to report on the effectiveness of the current regulatory framework at state and federal level in dealing with wage theft, and recommend options for eradicating the practice into the future.

The committee travelled across Queensland, holding 24 hearings, receiving evidence from more than 100 witnesses, 360 survey respondents, and 49 written submitters.

Overwhelmingly, the committee heard that wage theft is imposing significant costs on Queensland workers, their families, businesses and the economy. Conservative estimates suggest that over 437,000 Queensland workers are not receiving their full wages, and that a resulting five percent loss in income for these individuals would amount to an aggregate \$1.22 billion loss annually. In terms of superannuation, the annual loss associated with the underpayment or non-payment of superannuation has been estimated at \$1.12 billion. Further, annual reductions in consumer spending in Queensland and in federal tax revenue have respectively been estimated at \$100 million and \$60 million. Taken together, these losses could amount to almost \$2.5 billion stripped from the Queensland economy every year.

The committee heard that affected workers feel powerless to reclaim their lost wages and entitlements, and have been largely left alone to do so by an under resourced federal regulatory system. We can and must do more.

It is my hope that this report will shine a light on the issue in a Queensland context and build on a growing body of work nationally that is making the case for real change on behalf of affected workers.

I would like to take this opportunity on behalf of the committee, to thank those individuals and organisations who made written submissions and participated in the committee's online survey and as witnesses in the committee's public and private hearings. For many, it took great courage to come forward and tell their stories. Some who did so acknowledged their fear of reprisals in the workplace.

I would like to also acknowledge the great contribution made by industrial organisations, both unions and employer registered bodies, to the inquiry. Both shared their insights and expertise, and facilitated others coming forward. Addressing wage theft will be a collective effort.

I also thank our Committee Secretary Lucy and Inquiry Secretary Erin, Parliamentary Service staff and the Queensland Office of Industrial Relations, the Fair Work Ombudsman, the Australian Taxation Office, and the Australian Securities and Investments Commission.

Finally, I thank my committee colleagues for their time and contributions to this inquiry.

I commend the report to the House.



Leanne Linard MP
Chair

Recommendations

Recommendation 1 **103**

The Committee recommends the Queensland Government conduct a public education campaign to assist in the fight against wage theft, including outlining information on the findings from this inquiry and the measures the Queensland Government is taking in response, and how and where affected workers can go for help to recover their lost wages.

Recommendation 2 **103**

The committee recommends the Queensland Government re-establish the tripartite Industrial Relations Education Committee under the auspices of the Office of the Industrial Relations to conduct visits to schools, TAFE and VET providers, and universities. The visits would be conducted on an opt-in basis and provide information focusing on the rights and responsibilities of both workers and employers.

Recommendation 3 **103**

The committee recommends the Queensland Government, through the Department of Education, work with the higher education sector in Queensland to ensure international students have access to relevant information and advice on their workplace rights in Australia, including the right to join a union and where to go for further information.

Recommendation 4 **108**

The committee recommends the Federal Government introduce a national labour hire licensing scheme so the benefits of the Queensland scheme can apply across the country.

Recommendation 5 **112**

The committee recommends the Queensland Government ensure its current procurement policies allow for appropriate and proportionate action to be taken against companies that have underpaid workers.

Recommendation 6 **119**

The committee recommends the Federal Government consider measures to improve worker access to representation in the workplace and ensure compliance with industrial instruments, using the model of the *Industrial Relations Act 2016* (Qld).

Recommendation 7 **135**

The committee recommends the Federal Government appoint additional Federal Circuit Court Judges in Queensland, and ensure Queensland retains its proportionate share of Federal Circuit Court judges.

Recommendation 8 **135**

The committee recommends the Queensland Government review and take actions available to it, to ensure that wage recovery processes for Queensland workers are simple, quick and low-cost. This should include further investigation of the following options:

- a) establishing a dedicated industrial division within the Queensland Magistrates Court, in line with the example in Victoria
- b) investigating the inclusion of the Queensland Industrial Relations Commission or Industrial Court as an eligible state court under the *Fair Work Act 2009* (Cth)
- c) reviewing relevant forms and processes to ensure the legal process is simple and user friendly for workers and their representatives
- d) waiving or reducing current court filing fees for wage theft matters.

Recommendation 9	143
The Committee recommends unpaid superannuation be included as a recoverable entitlement under the Fair Entitlements Guarantee scheme and the Fair Entitlements Guarantee scheme be extended to temporary overseas visa workers who are currently denied access.	
Recommendation 10	146
The committee recommends that the Federal Government fund a workplace rights information and support service based in Queensland, as is funded for other Australian jurisdictions and was formerly the case, up until the removal of funding in 2016 by the then Federal Government.	
Recommendation 11	157
The committee recommends the Federal Government take immediate steps to appoint additional Fair Work inspectors in Queensland under the <i>Fair Work Act 2009</i> (Cth).	
Recommendation 12	158
The committee recommends the Federal Government establish a full, independent review into the performance, resourcing and culture of the Fair Work Ombudsman to ensure that it can respond to wage theft and support affected workers in an effective and timely fashion.	
Among other things, the review should consider the findings and recommendations of the Best Practice Review into Workplace Health and Safety Queensland which have driven a cultural shift from education to compliance.	
Recommendation 13	161
The committee recommends superannuation be included as an industrial entitlement in the National Employment Standards.	
Recommendation 14	169
The committee recommends the Fair Work Commission be given the power to assess the status of an employment contract similar to that available to the Queensland Industrial Relations Commission under the <i>Industrial Relations Act 2016</i> (Qld), and, further consideration be given to removing the ‘reckless defence’ from the offence of sham contracting under section 357(2) of the <i>Fair Work Act 2009</i> (Cth) and introducing a new ‘reasonable person’ test for determining whether an employer has engaged in sham contracting.	
Recommendation 15	175
The committee recommends the Queensland Government legislate to make wage theft a criminal offence, where the conduct is proven to be deliberate or reckless.	
The Queensland Government should consider the variety of models and approaches for criminalising wage theft that were presented to the inquiry and consult further with stakeholders in regard to a preferred model.	
Recommendation 16	186
The committee recommends an automatic termination date be legislated for remaining <i>Work Choices</i> ‘zombie’ agreements, with consideration given to necessary transitional arrangements and protections to ensure no workers are disadvantaged as a result.	
Recommendation 17	191
The committee recommends reform of the <i>Fair Work Act 2009</i> (Cth) to more adequately accommodate emerging forms of non-traditional employment.	
This should include consideration of law reform to broaden the definition of worker and provide broader access to the benefits of collective bargaining, minimum standards for pay and conditions, and access to the Fair Work Commission.	

1 Introduction

1.1 Role of the committee

The Education, Employment and Small Business Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* (POQA) and the Standing Rules and Orders of the Legislative Assembly (Standing Orders).¹

The committee's primary areas of responsibility include:

- Education
- Industrial Relations
- Employment and Small Business, and
- Training and Skills Development.

Section 92 of the POQA provides that, in addition to performing a general legislative scrutiny and parliamentary oversight role in relation to its primary areas of responsibility, a portfolio committee is also responsible for dealing with any issue referred to it by the Legislative Assembly or under another Act.²

1.2 Inquiry referral and process

On 17 May 2018, the Queensland Legislative Assembly passed a motion that the committee conduct an inquiry into and report on the problem of wage theft in Queensland (inquiry).³

In undertaking the inquiry, the committee was required to consider:

- the incidence of wage theft in Queensland, with reference also to evidence of wage theft from other parts of Australia
- the impact of wage theft on workers, families, law-abiding businesses, the economy and community
- the various forms that wage theft can take, including through unpaid super, the misuse of Australian Business Numbers (ABNs) and sham contracting arrangements
- the reasons why wage theft is occurring, including whether it has become part of the business model for some organisations
- whether wage theft is more likely to occur in particular industries, occupations or parts of the state or among particular cohorts of workers
- the effectiveness of the current regulatory framework at state and federal level in dealing with wage theft and supporting affected workers, and
- options for ensuring wage theft is eradicated, including consideration of regulatory and other measures either implemented or proposed in other jurisdictions interstate, nationally or internationally and the role of industrial organisations, including unions and employer registered bodies in addressing and preventing wage theft.

The committee was required to report to the Legislative Assembly by 16 November 2018.

¹ *Parliament of Queensland Act 2001* (POQA), s 88; Standing Rules and Orders of the Legislative Assembly (Standing Orders), Order 194.

² POQA, s 92(2).

³ Hon Anastacia Palaszczuk MP, Premier and Minister for Trade, Queensland Parliament, *Record of Proceedings*, 17 May 2018, pp 1364-1370.

1.3 Submissions

On 11 June 2018, the committee invited stakeholders and subscribers to make written submissions addressing the inquiry terms of reference.

Public submissions could be made for a period of seven weeks, with submissions closing on 30 July 2018. The committee accepted 49 submissions. A list of submitters is provided at **Appendix A**.

1.4 Online survey

The committee conducted an online survey, using the platform *Survey Monkey*, over the period from 11 June to 30 September 2018, via link from the committee's website.

The survey consisted of 20 questions to capture:

- demographic information (to aid identification of vulnerable cohorts)
- information about the form of wage theft experienced and the industry, location and timeframe in which it occurred
- information about whether the respondent reported the wage theft, and interactions with regulatory agencies.

A free text field allowed respondents to provide additional information relevant to the inquiry terms of reference.

The survey was promoted on the committee website, via correspondence with stakeholders, and in subscriber updates and media releases about the inquiry. Stakeholders who received information about the survey included educational institutions, unions and employer and industry organisations, community groups (including, migrant and refugee organisations), community legal centres and legal practices.

The survey had several limitations:

- a self-selected sample is not able to provide definitive or statistically significant data. Rather, the survey results illustrate key issues and trends in workers' experiences of wage theft.
- an individual could attempt to complete the survey on multiple occasions. This risk was reduced by requiring an email address to be provided, however the risk of multiple completions was not removed.
- there was no mechanism by which to verify respondents' identity or the accuracy of the information they reported.

The committee received 360 survey responses. Further information about the survey is provided in chapter 5 of this report.

1.5 Briefings and hearings

The committee received a written briefing from the Office of Industrial Relations (OIR) on the current regulatory framework and other matters in the inquiry terms of reference, ahead of a public briefing on 11 June 2018. A list of officials who appeared at the briefing is provided at **Appendix B**.

The committee held a total of 24 hearings for the inquiry, comprised of:

- five public hearings in Brisbane, held on 16 and 20 August 2018, 3 and 17 September 2018 (two hearings)
- three private hearings in Brisbane

- ten regional public hearings, held in Cairns (27 August 2018), Townsville (28 August 2018), Mackay (29 August 2018), Rockhampton (30 August 2018), the Gold Coast (10 September 2018), Toowoomba (10 September 2018), Ipswich (11 September 2018), the Sunshine Coast (11 September 2018), Maryborough (12 September 2018) and Bundaberg (12 September 2018), and
- six private hearings in regional locations.

Over the course of these hearings, the committee received evidence from more than 100 witnesses. A list of the witnesses who provided public evidence is available at **Appendix C**.

1.6 Parliamentary privilege and the right of reply

Section 8 of the POQA establishes the important protection of ‘parliamentary privilege’, which ensures that the proceedings of the parliament—including information provided to committees in written or oral evidence⁴—cannot be subject to civil or criminal action or examination in legal proceedings. This legal immunity is recognised as essential for allowing free and open evidence and thorough inquiry into matters without fear of interference, but can lead to adverse comments, whether fairly or not, being made about persons or corporations.⁵

In such circumstances, in the interests of fairness, the Standing Orders seek to balance the application of parliamentary privilege by specifying that where evidence is given which reflects adversely on a party and that evidence is made public, a committee shall provide reasonable opportunity for the affected party to respond to the adverse evidence.⁶

The nature of this inquiry and its terms of reference, which called for submitters and witnesses to share their insights into and experiences of wage theft and its impacts, inevitably invited evidence that singled out certain businesses, employers and affiliated individuals for various untoward practices and conduct.

In keeping with the relevant provisions of the Standing Orders, the committee provided an opportunity for parties named in adverse evidence to provide a written response to that evidence. All such responses were taken into consideration by the committee in the preparation of this report.

1.7 Inquiry material

Copies of the material published in relation to the inquiry—including information from OIR and other regulatory agencies, transcripts of the public briefing and hearings, documents tabled at the hearings, responses to questions taken on notice, and public submissions—can be found on the inquiry webpage.⁷

⁴ Section 9 of the POQA defines the meaning of the ‘proceeding in the Assembly’ to which parliamentary privilege applies.

⁵ Parliament of Australia, *No. 13 – Rights and Responsibilities of Witnesses before Senate Committees*, Senate Brief No. 13, July 2017.

⁶ See Standing Orders, Schedule 3, (k)-(m).

⁷ See: Education, Employment and Small Business Committee, Queensland Parliament, <http://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/current-inquiries/Wagetheft>. All web references in this report were accessed on 12 November 2018.

1.8 Inquiry background

‘Wage theft’, or underpayment of workers, is not a new feature of the national employment landscape. Historical assessments of non-compliance with employment standards in Australia—some dating back to the 1970s—have revealed evidence of ‘significant and sustained’ underpayment of workers.⁸

However, wage theft appears to be growing both in prevalence and prominence.⁹

While once conceptualised as being confined largely to less visible small businesses and informal economy operators,¹⁰ in recent years there have been a series of public scandals and reports of non-compliance that have affected a number of large, high profile companies.

Media investigations have exposed instances of significant worker exploitation in the supply chains and franchises of nationally recognised brands of the likes of Myer, Woolworths, Coles, Aldi, 7-Eleven, Pizza Hut, Domino’s Pizza, Caltex, United Petroleum, and others.¹¹

With regard to 7-Eleven in particular, just over two years after the joint *Four Corners* and Fairfax Media investigation that uncovered the systematic underpayment of wages and doctoring of payroll records; the bill for the repayment of wages had climbed to more than \$150 million for over 3,600 workers— at an average of roughly \$41,000 per worker.¹²

According to Clibborn and Wright, media reports of instances of underpayment increased ten-fold from 2013 to 2017.¹³

⁸ Miles Goodwin and Glenda Maconachie, ‘Unpaid entitlement recovery in the federal industrial relations system: Strategy and outcomes 1952–95’, *Journal of Industrial Relations*, vol 49, no. 4, 2017, p 523; Glenda Maconachie and Miles Goodwin, ‘Employee Evasion of Workers’ Entitlement 1986-1995: Why, What and Whose?’, *Journal of Industrial Relations*, vol 52, no. 4, 2010, pp 419-437.

⁹ Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 3; Louise Thornthwaite, ‘The living wage crisis in Australian industrial relations’, *Labour & Industry: a journal of the social and economic relations of work*, vol 27, no. 4, 2017, p 261.

¹⁰ Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 22; Associate Professor John Howe, Tess Hardy and Professor Sean Cooney, ‘The transformation of enforcement of minimum employment standards in Australia: A review of the FWO’s activities from 2006-2012’, Centre for Employment and Labour Relations Law, University of Melbourne, July 2014, p 50.

¹¹ Sarah Kaine, Emmanuel Josserand and Martin Boersma, ‘How to stop businesses stealing from their employees’, *The Conversation*, 8 September 2017, <https://theconversation.com/how-to-stop-businesses-stealing-from-their-employees-83363>

¹² Queensland Government, Office of Industrial Relations (OIR), written briefing, 7 June 2018, p 20.

¹³ Stephen Clibborn and Chris F Wright, ‘Employer theft of temporary migrant workers’ wages in Australia: Why has the state failed to act?’, *The Economic and Labour Relations Relations Review*, vol. 29, no. 2, 2018, p 212.

This increased public attention has coincided with the publication of a number of scholarly studies¹⁴ and Fair Work Ombudsman (FWO) reports.¹⁵ Combined, they paint a picture of widespread non-compliance, prompting concerns about the normalisation of various forms of underpayment, including suggestions that it may have become ‘endemic’ and part of the business model in some sectors.¹⁶

The seriousness of the problem has also attracted the attention of legislators and policymakers, who have sought to better understand and address the various dimensions of wage theft in a series of federal reviews and inquiries, and their resulting reports. Most recently, this has included:

- the November 2015 Productivity Commission report on its inquiry into the workplace relations framework, which highlighted the higher risks of exploitation for permanent and temporary migrant workers due to factors including their ‘lower proficiency in English skills, lack of awareness of their rights in the workplace and a reluctance to reveal exploitation in circumstances where the migrant is working in breach of the *Migration Act 1958* (Cth), for example, by exceeding the prescribed limits on hours’¹⁷
- the March 2016 Senate Education and Employment References Committee (EERC) report on its inquiry into temporary work visa programs, tellingly titled *A National Disgrace: The Exploitation of Temporary Work Visa Holders*¹⁸

¹⁴ See, for example: Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017; Stephen Clibborn, ‘Multiple frames of reference: Why international student workers in Australia tolerate underpayment’, *Economic and Industrial Democracy*, 2018, pp 1-19; Unions NSW, *Lighting up the black market: enforcing minimum wages*, July 2017, <http://www.wagethieves.com.au/wp/wp-content/uploads/2017/07/UNSW-wage-thieves-report.pdf>

¹⁵ See, for example: Australian Government, Fair Work Ombudsman (FWO), *National Hospitality Industry Campaign (Wave 3) – Takeaway Foods*, March 2016; Australian Government, FWO, *National Hospitality Industry Campaign (Wave 2) – Restaurants, Cafes and Catering*, June 2015; Australian Government, FWO, *National Hospitality Campaign 2012-2015 Accommodation pubs, taverns and bars*, November 2013; Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, October 2016; Australian Government, FWO, *Fair Trades: Outcomes from the Fair Work Ombudsman’s National Apprenticeship Compliance Monitoring Campaign*, March 2017, p 3; Australian Government, FWO, ‘Fair Work Ombudsman Inquiry uncovers rampant exploitation of Woolworths cleaners’, media release, 14 February 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/february-2018/20180214-ww-cleaners>

¹⁶ In November 2017, in reporting the results of the landmark *National Temporary Migrant Work Survey*, Berg and Farbenblum advised that the study confirmed that ‘wage theft is endemic among international students, backpackers and other temporary migrants’ and that ‘for a substantial number of temporary migrants, it is also severe’. The Senate Education and Employment References Committee (Senate EERC) also reported in September 2017 that ‘corporate avoidance of obligations to workers has become a business model taking many forms’; and in March 2016 that unscrupulous operators have ‘...built the systematic exploitation of visa workers into their business models’. See: Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 48; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 3; Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, p 324. See also: Louise Thornthwaite, ‘The living wage crisis in Australian industrial relations’, *Labour & Industry: a journal of the social and economic relations of work*, 2017, pp 261-269.

¹⁷ Australian Government, Productivity Commission, *Workplace Relations Framework: Final Report*, no. 76, vol. 1, November 2015, p 48.

¹⁸ Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, pp 1-5.

- the May 2017 Senate Economics References Committee inquiry report *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, which highlighted the pervasive impacts of the ‘unacceptable’ non-payment of what is a ‘vital component of an employee’s remuneration’ and which ‘should be categorised as deferred wages that rightfully belong to an employee’¹⁹
- the September 2017 Senate EERC report on its inquiry into corporate avoidance of the *Fair Work Act 2009 (Cth) (FWA)*, which cited the ‘large volume of evidence describing ways in which some employers circumvent the letter and/or spirit of the FWA’, and concluded that the legislation has not kept pace with the increasingly sophisticated commercial arrangements in the labour market and ‘is no longer fit for purpose’,²⁰ and
- the Commonwealth Black Economy Taskforce, which handed down its final report in October 2017, noting that ‘underpayment has emerged as a key aspect of the black economy’ and also highlighting the ‘blatant exploitation’ associated with sham contracting arrangements.²¹

These inquiries have made a significant series of recommendations for reform, with further recommendations also expected to result from current joint parliamentary and senate inquiries into:

- the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies, due for report by 13 November 2018,²² and
- the operation and effectiveness of the Franchising Code of Conduct, due for report by 6 December 2018.²³

In response to these inquiries and recommendations, certain amendments to Commonwealth legislation have been implemented, including:

- the introduction of a higher scale of penalties for ‘serious contraventions of payment-related workplace laws’ and increased penalties for record-keeping and payslip contraventions
- holding franchisors and holding companies responsible for underpayments by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions, and failed to take reasonable steps to prevent them

¹⁹ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, p ix.

²⁰ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, pp 2-3.

²¹ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 2.

²² Parliament of Australia, Senate EERC, *The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners

²³ Parliament of Australia, Parliamentary Joint Committee on Corporations and Financial Services, *The operation and effectiveness of the Franchising Code of Conduct*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising

- expressly prohibiting employers from unreasonably requiring their employees to make payments in relation to the performance of their work (e.g. demanding a proportion of their wages be paid back in cash), and
- strengthening the evidence-gathering powers of the FWO and prohibiting the hindering or obstructing of the FWO or an inspector in the performance of their functions of powers, or the giving of false or misleading information or documents.²⁴

However, the issue of wage theft remains widespread and widely unaddressed.

Within state and territory jurisdictions, steps have been taken to address the underpayment of workers in the labour hire sector. Queensland, Victoria and South Australia have all established licensing schemes over the past year; though the recently-elected South Australian government has since announced its intention to repeal its scheme.²⁵

Citing the need for broader action to stem the proliferation of wage theft, and the ongoing shortcomings of federal efforts and resourcing to address the issue, in 2018 the Victorian Labor government and Labor oppositions in New South Wales, South Australia and the Australian Capital Territory all committed to criminalising wage theft by establishing a criminal offence and associated penalties, including jail terms.²⁶

In Queensland, at a Labour Day rally on 7 May 2018, Premier Anastacia Palaszczuk and Minister for Education and Minister for Industrial Relations the Hon Grace Grace MP, announced the government's intention to launch a parliamentary inquiry into allegations of wage theft, and 'take action' following the inquiry to address the problem.²⁷

It was within the context of these developments that this inquiry was established, providing the opportunity for a thorough examination of the nature and extent of wage theft in Queensland and system responses to it, to support an informed assessment of both the current state of affairs and possible options to better address this serious problem.

1.9 Report structure

This report first outlines the industrial relations frameworks in Australia and in Queensland that provide for workers' minimum wages and entitlements (Chapter 2).

Chapter 3 seeks to define wage theft, with Chapter 4 examining the incidence of wage theft in Queensland and Australia, drawing on available statistics and the results of the committee's own survey of Queenslanders. This includes considering whether the problem is more prevalent in certain industries and/or experienced differently amongst particular employee cohorts.

Chapter 5 presents information from the committee's survey.

²⁴ *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth). See also: Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Explanatory Memorandum, p i.

²⁵ 'Labour hire laws targeting workforce exploitation to be scrapped by SA Government', *ABC News* (online), 21 September 2018, <http://www.abc.net.au/news/2018-09-21/state-government-seek-to-repeal-labour-hire-licensing-laws/10287832>

²⁶ Noel Towell and Ben Schneiders, 'Labor promises to jail bosses over wage theft', *The Sydney Morning Herald*, 25 May 2018, <https://www.smh.com.au/business/workplace/labor-promises-to-jail-bosses-over-wage-theft-20180525-p4zhko.html>; NSW Labor, *A new law to criminalise wage theft*, 2017, https://www.nswlabor.org.au/a_new_law_to_criminalise_wage_theft; ACT Labor, *ACT Labor Platform 2017-18*, p 146 (General Resolution 6); AAP, 'SA Labor promises crackdown on wage theft', *SBS News*, 18 February 2018, <https://www.sbs.com.au/news/sa-labor-promises-crackdown-on-wage-theft>

²⁷ Felicity Caldwell, 'Wages inquiry will examine bosses who rip off their employees', *Brisbanetimes.com.au*, 7 May 2018, <https://www.brisbanetimes.com.au/politics/queensland/wages-inquiry-will-examine-bosses-who-rip-off-their-employees-20180507-p4zdto.html>

Chapter 6 explores the impact of wage theft for the individual experiencing it, for their families, and for businesses and the broader economy.

Drawing on stakeholder experience, chapter 7 explores the different forms wage theft can take.

Chapter 8 of the report seeks to identify the reasons why wage theft occurs.

Chapters 9, 10, 11 and 12 collectively evaluate the effectiveness of different aspects of current system responses to wage theft and its impacts, respectively considering:

- proactive measures to support compliance – including education and engagement activities, licensing and registration, and procurement and supply chain policies
- the role of industrial organisations in helping to address and prevent wage theft and support those affected
- systems for reporting wage theft and recovering amounts owed – including interactions with regulators, court processes and other access to remedies, and
- enforcement and deterrence mechanisms – including agency monitoring and compliance activities and penalties for non-compliance.

Chapter 13 considers regulatory and other measures either implemented or proposed elsewhere in Australia and internationally.

Chapter 14 considers exploitative practices occurring within the legal framework which merit further attention.

Lastly, chapter 15 provides a summary of issues raised by stakeholders that were beyond the scope of the committee's inquiry terms of reference, but of no less importance to those who raised them.

2 Current regulatory framework

In 2006, the commencement of the majority of provisions of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices) saw the Commonwealth use its constitutional ‘corporations’ powers to expand its industrial relations jurisdiction to cover all trading corporations in the private sector (excluding not-for-profits).²⁸ The jurisdictional takeover, which was resisted by the states and territories,²⁹ saw the majority of the employers and employees brought under the federal industrial relations system.³⁰

In 2009, following the repeal of the Work Choices legislation and enactment of the *Fair Work Act 2009* (Cth), all states and territories other than Western Australia subsequently referred their residual private sector powers to the Commonwealth to avoid ambiguity for workers, creating a national system.³¹

As a result, the Commonwealth is now responsible for the industrial relations framework for the private sector, an estimated 87 percent of the workforce.³²

Federally, the national framework of laws that sets out enforceable minimum terms and conditions of employment and associated enforcement agencies is referred to as the Fair Work System, the primary instrument of which is the FWA, which took effect on 1 July 2009.³³

Queensland retains regulatory responsibility in relation to the public service, local governments and other related bodies.³⁴

2.1 Queensland industrial relations system

Employees who remain in the state industrial system have their pay and conditions set under the *Industrial Relations Act 2016* (Qld) (IR Act).³⁵ The state retains responsibility for all sectors, including the private sector, in respect of long service leave entitlements and the employment of children (people under 18 years of age).³⁶

²⁸ Industrial Relations Bill 2016, explanatory notes, p 1.

²⁹ See: Submission on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory to the Parliament of Australia, Senate Employment, Workplace Relations and Education Committee inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005*, submission 160. See also *State of New South Wales & Ors v Commonwealth (Workplace Relations Challenge) [2006]*, High Court of Australia, transcripts 235, 11 May 2006.

³⁰ Australian Bureau of Statistics (ABS), ‘Workplace Relations’, 6102.0.55.001 – *Labour Statistics: Concepts, Sources and Methods, Feb 2018*, 12 February 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/6102.0.55.001~Feb%202018~Main%20Features~Workplace%20Relations~12>

³¹ Fair Work (Commonwealth Powers) and Other Provisions Bill 2009, explanatory notes, p 1; Fair Work Ombudsman, *Australia’s industrial relations timeline*, <https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system/australias-industrial-relations-timeline>

³² ABS, ‘Workplace Relations’, 6102.0.55.001 – *Labour Statistics: Concepts, Sources and Methods, Feb 2018*, 12 February 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/6102.0.55.001~Feb%202018~Main%20Features~Workplace%20Relations~12>

³³ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 5.

³⁴ Australian Government, FWO, ‘Australia’s industrial relations timeline’, <https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system/australias-industrial-relations-timeline>

³⁵ Queensland Government, OIR, written briefing, 7 June 2018, p 6.

³⁶ Queensland Government, Business Queensland, ‘Industrial relations’, 15 March 2017, <https://www.business.qld.gov.au/running-business/employing/employee-rights/ir>

During the public briefing on 11 June 2018, the OIR advised that approximately 250,000 workers are covered by the state industrial relations system.³⁷

The IR Act is the cornerstone of the state's system, and provides protections for wages and conditions which include:

- establishing a state 'safety net' for wages and entitlements by providing for the setting of a minimum wage, modern awards, and the Queensland Employment Standards; and requiring employers to provide at least these baseline employment conditions³⁸
- setting out bargaining process requirements for certified agreements and bargaining awards, including a requirement to negotiate in good faith,³⁹ and
- specifying that to grant an application for a certified agreement or bargaining award, the Queensland Industrial Relations Commission (QIRC), must be satisfied that the bargaining instrument passes the 'no-disadvantage test',⁴⁰ such that if there is an applicable modern award it must not result in a reduction in the employee's entitlements and protections under the award.⁴¹

The state regulator seeks to encourage early correction and/or resolution of an issue of non-payment or underpayment where possible by contacting the complainant 'to verify the substance of the claim and to clarify any details about the claim, before contacting the employer to advise them of the claim in an attempt to resolve the matter without formal investigation'.⁴² If the claim remains unresolved, inspectors will then make an appointment with the employer for a formal record of interview to gather evidence and make a formal claim on the employer for any assessed unpaid amounts.⁴³

Where the claim is refused by the employer, the process for the recovery of wages in the state system is through the courts (either via an employee claim or a claim made on their behalf).⁴⁴

³⁷ Dr Simon Blackwood, Deputy Director-General, OIR, public briefing transcript, Brisbane, 11 June 2018, p 3.

³⁸ *Industrial Relations Act 2016* (IR Act), Chapter 2, Part 3.

³⁹ IR Act, ss 169-174, 193, 195.

⁴⁰ IR Act, s 199.

⁴¹ IR Act, ss 210-213.

⁴² Queensland Government, OIR, written briefing, 7 June 2018, p 2.

⁴³ Queensland Government, OIR, written briefing, 7 June 2018, p 2.

⁴⁴ QIRC, 'Information Sheets: Recovery of unpaid wages and superannuation', 28 September 2018, http://www.qirc.qld.gov.au/prod_form_leg/factsheets/fs_recovery.htm

An application may be made for recovery of an identified underpayment within six years after the amount became payable, to:

- the QIRC, if the total amount of the claim does not exceed \$50,000⁴⁵ (including via a wage recovery process where appropriate⁴⁶), or
- an Industrial Magistrate.⁴⁷

The non-payment of wages is a civil offence under the IR Act, and attracts a maximum fine of up to 200 penalty units (\$25,230). Other civil offences and maximum penalties apply in relation to contraventions of industrial instruments and modern awards (27 penalty units or \$3,525), and with respect to sham contracting (90 penalty units or \$11,750).⁴⁸ These maximum penalties increase five-fold where the employer is a corporation.⁴⁹

The QIRC and Industrial Magistrate are authorised to order the repayment of any wages and to impose penalties, and may also award costs.⁵⁰

The two bodies responsible for the administration of the IR Act are the OIR and the QIRC. These agencies perform equivalent roles at the state level to the FWO and FWC respectively.

2.1.1 Office of Industrial Relations

In Queensland, the OIR is responsible for promoting and enforcing compliance with respect to the state's industrial relations jurisdiction. Its role includes providing:

- advocacy, advice, and support to government agencies, including government owned corporations, on public sector industrial relation matters and bargaining
- policy, legislation and research advice on state and national industrial relations matters

⁴⁵ QIRC, 'Information Sheets: Recovery of unpaid wages and superannuation', 28 September 2018, http://www.qirc.qld.gov.au/prod_form_leg/factsheets/fs_recovery.htm

⁴⁶ The QIRC advises that 'under certain circumstances it may not be practical to allocate a conference and in these circumstances, the applicant or the applicant's agent may request the conference be waived'. Such circumstances may include: (i) where an applicant (or the applicant's agent) has had discussions with the respondent prior to the application being filed and the applicant (or the applicant's agent) believes a conference before the Commission is unlikely to settle the matter; or (ii) where discovery is required in order to finalise the claim. See: QIRC, 'Information Sheets: Recovery of unpaid wages and superannuation', 28 September 2018, http://www.qirc.qld.gov.au/prod_form_leg/factsheets/fs_recovery.htm

⁴⁷ Applications to an Industrial Magistrate may be made for amounts up to \$150,000. For amounts in excess of this, and applicant must seek recovery of wages through the District or Supreme Court. See: Queensland Courts, *Money disputes under \$150,000*, 2 July 2018, <https://www.courts.qld.gov.au/going-to-court/money-disputes/money-disputes-up-to-150000>; Queensland Courts, *Money disputes \$150,000 to \$750,000*, 15 August 2018, <https://www.courts.qld.gov.au/going-to-court/money-disputes/money-disputes-150000-to-750000>; Queensland Courts, *Money disputes over \$750,000*, 15 August 2018, <https://www.courts.qld.gov.au/going-to-court/money-disputes/money-disputes-over-750000>

⁴⁸ IR Act, Schedule 3.

⁴⁹ IR Act, s 575.

⁵⁰ IR Act, ss 397(4), 479(1); Queensland Government, OIR, written briefing, 7 June 2018, p 7.

- compliance and information services on Queensland's industrial relations laws for state and local government, long service leave, child employment, trading hours and holidays (online information and resources, responses to telephone and written enquiries)
- licensing and compliance services to protect vulnerable labour hire workers and promote the integrity of the labour hire industry in Queensland.⁵¹

With respect to compliance activities, the chief inspector in the state's industrial relations system is appointed by the Governor in Council under section 899(1) of the IR Act, who in turn appoints other inspectors under section 899(2). The chief inspector and other inspectors form the core of the Regulation and Compliance Branch of the OIR (the inspectorate).⁵²

The inspectorate conducts investigations using a wide range of powers set out in the IR Act, and can initiate enforcement action through the Industrial Magistrates Court and QIRC.⁵³

2.1.2 Queensland Industrial Relations Commission

The functions of the QIRC, which are set out in section 447 of the IR Act, include:

- providing a general ruling about the Queensland minimum wage for all employees at least once each year⁵⁴
- establishing modern awards with 'fair and just' minimum wages and conditions (and reviewing these awards and other modern award conditions under section 156 of the IR Act)
- supervising the bargaining of agreements and certifying agreements and making bargaining awards (subject to their passing the no-disadvantage test)⁵⁵
- resolving industrial disputes by conciliation and where necessary by arbitration
- resolving disputes over union coverage
- determining claims for unpaid wages and superannuation contributions (where the total claims is \$50,000 or less; and dealing with reinstatement applications (unfair dismissal claims).⁵⁶

2.1.3 Labour hire licensing

Queensland has legislated to address wage theft and other unscrupulous practices in the labour hire industry by establishing a mandatory labour hire licensing scheme, under the *Labour Hire Licensing Act 2017*. During introduction of the legislation, the Minister stated that the scheme was intended to promote the integrity of the industry and better protect workers from exploitation, citing cases of wage theft including underpayment, unauthorised deductions, sham contracting, and avoiding worker entitlements through phoenixing⁵⁷—that is, the practice of deliberately liquidating a company and creating a new company in its place, to avoid paying debts including employee entitlements.⁵⁸

⁵¹ Queensland Government, OIR, 'Industrial Relations', 6 September 2018, <https://www.oir.qld.gov.au/industrial-relations>; Queensland Government, OIR, written briefing, 7 June 2018, p 2.

⁵² Queensland Government, OIR, written briefing, 7 June 2018, p 1.

⁵³ Queensland Government, OIR, written briefing, 7 June 2018, p 1.

⁵⁴ IR Act, s 458.

⁵⁵ IR Act, ss 142-143.

⁵⁶ IR Act, s 447.

⁵⁷ Hon Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, Queensland Parliament, *Record of Proceedings*, 25 May 2017, pp 1445-1446.

⁵⁸ Australian Government, Australian Taxation Office (ATO), 24 July 2018, 'Illegal phoenix activity', <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/>

Under the scheme, which took effect from 15 June 2018, all labour hire providers are required to be licensed and users of labour hire are also required to only engage licensed providers. In order to be licensed, labour hire providers must meet certain standards including:

- being a fit and proper person to supply labour
- being financially viable
- complying with relevant laws.⁵⁹

There are strong penalties for operating without a licence and for using an unlicensed provider – up to 1,034 penalty units (\$134,988) or three years’ imprisonment for individuals, and up to 3,000 penalty units (\$391,650) for a corporation.⁶⁰

Members of the OIR inspectorate are also appointed as inspectors under the *Labour Hire Licensing Act 2017* (Qld) and assist the OIR’s recently formed Labour Hire Licensing Compliance Unit (LHLCU) in enforcement and audit activities. The LHLCU also take complaints from labour hire workers which may involve complaints about the underpayment of wages; and can refer the matter to the relevant federal agency. If a labour hire provider is found not to be compliant with their time and wages record keeping or the payment of wages or other workplace legislation, the LHLCU may consider action to suspend or cancel the provider’s labour hire licence.⁶¹

2.2 The Fair Work System

Under the Commonwealth’s Fair Work System, minimum conditions at work are set out in registered agreements, awards, or legislation.

The promotion of collective bargaining between employers, employees and other representatives such as unions is one of the stated objectives of the FWA.⁶² Employees are most likely to be covered by an enterprise agreement or other agreement registered with the Fair Work Commission (FWC), negotiated specifically for a particular enterprise and stipulating certain minimum employment conditions.⁶³

Where there is no agreement in place, a modern award is likely to apply. The majority of awards pertain to specific industries or occupations, with 122 modern awards currently in place.⁶⁴

Where an employee is not covered by an award or agreement, they will have their minimum wage set by the national minimum wage orders.

⁵⁹ Queensland Government, Labour Hire Licensing Queensland, ‘About the licensing scheme’, 18 June 2018, <https://www.labourhire.qld.gov.au/about-the-licensing-scheme>

⁶⁰ Queensland Government, Labour Hire Licensing Queensland, ‘Penalties and offences’, 3 July 2018, <https://www.labourhire.qld.gov.au/i-provide-labour-hire/laws-and-compliance/penalties-and-offences>

⁶¹ Queensland Government, OIR, written briefing, 7 June 2018, p 3.

⁶² *Fair Work Act 2009* (Cth) (FWA), s 3(f).

⁶³ Fair Work Commission (FWC), ‘Minimum wages and conditions’, 5 April 2016, <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions#field-content-1-heading>

⁶⁴ For a list of modern awards, see: FWC, ‘Modern awards list’, 27 September 2018, www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list

The minimum wages and conditions in agreements and awards for all employees are underpinned by the National Employment Standards (NES) — a set of ten minimum terms and conditions of employment that must be provided to all employees, as set out in part 2-2 of the FWA, as follows:⁶⁵

1. *Maximum weekly hours of work – 38 hours per week, plus reasonable additional hours*
2. *Requests for flexible working arrangements – in certain circumstances employees can request a change in their working arrangements*
3. *Parental leave and related entitlements – up to 12 months unpaid leave for each employee, and a right to request an additional 12 months' unpaid leave, plus other forms of maternity, paternity and adoption-related leave*
4. *Annual leave – four weeks' paid leave per year, plus an additional week for certain shift workers.*
5. *Personal/carer's leave (includes sick leave) and compassionate leave – 10 days' paid personal/carer's leave (includes sick leave), 2 days' unpaid carer's leave as required, and 2 days' compassionate leave (unpaid for casuals) as required*
6. *Community service leave – unpaid leave for voluntary emergency activities and up to 10 days of paid leave for jury service (after 10 days is unpaid)*
7. *Long service leave – paid leave for employees who have been with the same employer for a long time*
8. *Public holidays – a paid day off on each public holiday, except where reasonably requested to work*
9. *Notice of termination and redundancy pay – up to 4 weeks' notice of termination (plus an extra week for employees over 45 years of age who have been in the job for at least 2 years), and up to 16 weeks' severance pay on redundancy, both based on length of service, and*
10. *The Fair Work Information Statement – a statement that must be provided by employers to all new employees, and which contains information about the NES, modern awards, agreement making, freedom of association and workplace rights, termination of employment, individual flexibility arrangements, right of entry, transfer of business, the role of compliance agency the FWO, and the role of national industrial tribunal the Fair Work Commission (FWC).⁶⁶*

2.2.1 The safety net and other protections

The combination of modern awards, the national minimum wage, and the NES are commonly referred to as the three instruments that establish the legislative 'safety net' that sets the price floors to workers' wages and conditions.⁶⁷

While registered agreements may vary the pay rates, penalty rates and other conditions in an underpinning award, section 206 of the FWA specifies that the base rate of an employee must be at least equal to the modern award.⁶⁸ Section 55 provides that an agreement can include additional terms to the NES, but cannot exclude any of those terms.⁶⁹

⁶⁵ FWC, 'National employment standards', 4 October 2017, <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/national-employment-standards>

⁶⁶ FWA, s 61(2); FWC, 'National employment standards', 4 October 2017, <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/national-employment-standards>

⁶⁷ Australian Government, Productivity Commission, *Workplace Relations Framework: Final Report*, no. 76, vol. 1, November 2015, p 14.

⁶⁸ FWA, s 172(1).

⁶⁹ FWA, s 55.

The FWA also prescribes a range of additional requirements for the process to finalise and approve an agreement. They include stipulating that employees have the right to representation during bargaining and must be given a copy of a proposed enterprise agreement,⁷⁰ and that bargaining must be conducted in good faith, with an explicit set of 'good faith bargaining requirements' specified in section 228.

Further, once negotiations have concluded and an agreement has been reached; it can be approved by the FWC, which is responsible for approving agreements, only if it passes the 'better off overall test' (BOOT).⁷¹ Section 193 of the FWA, stipulates that an agreement passes the BOOT, if the FWC is satisfied:

*... as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.*⁷²

*These safety net and associated provisions do not apply to independent contractors, who are separately regulated under the Independent Contractors Act 2006 (Cth), which sets out rights and entitlements for contractors, including defining what is an 'unfair contract' and providing for courts to order that the terms of an unfair contract be changed, or set aside all or parts of the contract.*⁷³

In relation to circumstances of sham contracting, in which an employee is mischaracterised as an independent contractor, the FWA seeks to protect those affected by prohibiting employers from:

- deliberately disguising an employment relationship as a contract for services
- making false statements to convince an employee to become an independent contractor, and
- dismissing an employee and then re-hiring them as an independent contractor to do the same work.⁷⁴

Regulators have a variety of compliance processes and mechanisms for early correction and/or resolution of an issue of non-payment or underpayment identified through an employee complaint or monitoring and investigation. This may include providing advice and information to assist the employee to resolve the issue directly with their employer; facilitating mediation or in-house facilitation; undertaking further investigation or auditing; and issuing a findings letter or ruling, or a formal caution to the employer.⁷⁵

⁷⁰ FWA, s 180.

⁷¹ FWA, s 186(2)(d). Note: Section 189 does allow for the FWC to approve an enterprise agreement that does not pass the BOOT if, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest. FWA, s 180.

⁷² FWA, s 192. See also: FWC, 'Agreements', 23 May 2016, <https://www.fwc.gov.au/awards-and-agreements/agreements>

⁷³ Queensland Government, Department of Industry, Innovation and Science, 'Unfair contracts and sham contracts', 5 April 2018, <https://www.business.gov.au/people/contractors/independent-contractors/unfair-contracts-and-sham-contracts>

⁷⁴ FWA, ss 357-359.

⁷⁵ Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, pp 11-12, 24-25; Australian Government, ATO, *Disputes Policy*, 20 December 2018, <https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/disputes-policy/#Taxandsuperannuationdisputes>; Australian Government, ATO, *Alternative Dispute Resolution*, 31 March 2017, [https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Options-for-resolving-disputes/Alternative-Dispute-Resolution-\(ADR\)/](https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Options-for-resolving-disputes/Alternative-Dispute-Resolution-(ADR)/)

Other available enforcement mechanisms include the issuing of an infringement notice or equivalent administrative penalties, the issuing of a compliance notice; or entering an enforceable undertaking or compliance partnership with the employer.⁷⁶

However, if an employer who has not met their legal obligations declines to address the issue or comply with the conditions of any notice or undertaking, to enforce payment a matter must be taken (within six years), to either:

- the small claims tribunal, if owed under \$20,000, or
- the Federal Circuit Court, if owed more than \$20,000.⁷⁷

The underpayment of wages is a civil offence under sections 45, 50 and 293 of the FWA, depending on whether the underpayment contravenes a modern award, an enterprise agreement or the national minimum wage order, respectively; and sham contracting behaviours constitute civil offences under sections 357(1), 358 and 359 of the FWA.⁷⁸ In relation to proceedings brought to a federal or state court with respect to such matters, under sections 545-546 of the FWA, a court may make any order it deems appropriate, including repayment of wages to the affected employee(s), and a penalty of up to 60 penalty units (\$12,600) for individuals, or 300 penalty units (\$63,000) for corporations.⁷⁹

In relation to offences for underpayment, the penalties increase tenfold in the case of deliberate and systematic underpayment.⁸⁰

There are two key bodies responsible for the administration of the Fair Work System with respect to wage theft – the FWO and the FWC.⁸¹

2.2.2 Fair Work Ombudsman

The FWO is the body responsible for promoting and monitoring compliance with the FWA and fair work instruments. Established in Part 5-2 of the Act and an independent statutory agency, the FWO objectives, as set out in section 682 of the FWA, include:

- promoting harmonious, productive and cooperative workplaces that are compliant with the FWA and fair work instruments, including by ‘providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices’
- monitoring compliance and inquiring into and investigating any act or practice that may be contrary to the FWA, a fair work instrument or a safety net contractual requirements
- commencing proceedings in a court, or making applications to the FWC, to enforce the FWA

⁷⁶ Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, pp 26, 28-31.

⁷⁷ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 71.

⁷⁸ FWA, Part 4-1.

⁷⁹ Queensland Government, OIR, written briefing, 7 June 2018, p 7; Australian Government, FWO, ‘Litigation’, <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation>

⁸⁰ Queensland Government, OIR, written briefing, 7 June 2018, p 7. See also FWA, s 539.

⁸¹ The Australian Building and Construction Commission performs a role equivalent to the FWO, as a dedicated regulator within the building and construction industry. See: Australian Government, Australian Building and Construction Commission, ‘Overview’, <https://www.abcc.gov.au/about/what-we-do/overview>

- referring matters to relevant authorities, and
- representing employees who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC 'if the FWC considers that representing the employees or outworkers will promote compliance' with the FWA or a fair work instrument.⁸²

2.2.3 Fair Work Commission

The FWC is the national workplace relations tribunal, established under the FWA.⁸³ Functions of the FWC include:

- setting the safety net of minimum wages and employment conditions, by setting national minimum wage orders (reviewed annually) and making modern awards (every four years)
- facilitating good faith bargaining and approving enterprise agreements (subject to their passing the BOOT)
- dealing with applications in relation to unfair dismissal
- administering the regulation of industrial action
- resolving a range of collective and individual workplace disputes through conciliation, mediation and in some cases public tribunal hearing, and
- other functions in connection with workplace determinations, equal remuneration, transfer of business, general protections (including ruling in relation to sham contracting), right of entry, and stand down.⁸⁴

2.3 Superannuation Guarantee

Superannuation is a supplemental component of employees' remuneration, payable under section 16 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (the SGA Act).

Generally, if an employee is over 18 years of age and earning over \$450 per month, their employer is required to make superannuation guarantee (SG) contributions on their behalf.⁸⁵ Since 1 July 2014, the amount payable under the SGA Act is equal to 9.5 percent of the total wages or salary paid to an employee each quarter.⁸⁶

If an employer does not pay the correct SG contribution to an employee's nominated fund by the quarterly payment due date, they may be liable for the SG charge (SGC), payable to the Australian Taxation Office (ATO).⁸⁷

⁸² FWA, s 682.

⁸³ FWA, s 575.

⁸⁴ FWA, s 576; FWC, 'About us', 24 April 2018, <https://www.fwc.gov.au/about-us>; Queensland Government, OIR, written briefing, 7 June 2018, p 6; FWC, *General Protections Benchbook: Misrepresenting employment*, 15 June 2018, <https://www.fwc.gov.au/general-protections-benchbook/sham-arrangements/misrepresenting-employment>

⁸⁵ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, p 5.

⁸⁶ Queensland Government, OIR, written briefing, 7 June 2018, p 6.

⁸⁷ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, p 6.

The SGC comprises:

- SG shortfall amounts
- interest on those amounts (currently 10 percent), and
- an administration fee of \$20 per employee, per quarter.⁸⁸

The ATO can impose a number of administrative penalties under Part 4-25 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).⁸⁹ Penalties include issuing director penalty notices (DPNs), which impose a penalty equal to the SGC on the director of the company. The intent of DPNs is to reinforce the SGC's deterrent against non-compliance, discourage phoenix practices (as a director of a phoenix company remains responsible), and enhance the ATO's ability to recover the SGC debt after a company has been wound up.⁹⁰

An individual can also seek recovery of their unpaid super through courts, under the Fair Work System or Queensland Industrial relation system (depending on the jurisdiction).⁹¹

2.3.1 Australian Taxation Office

The Commissioner of Taxation is responsible for the day-to-day administration of the SG Act, and the role of the ATO is to 'support employers to comply with their superannuation guarantee obligations and identify and deal with those who do not.'⁹²

Under the SGA Act, the ATO has a range of functions associated with its role of ensuring employees receive their minimum superannuation payment from employers. They include:

- educating employers and employees about their responsibilities for SG
- monitoring employer compliance with SG obligations
- receiving and redistributing the SGC, under Part 8 of the SGA Act, and
- investigating employers for possible breaches of the SG legislation (including imposing administrative penalties where appropriate).⁹³

The ATO carries out audits and reviews in response to both employee notifications of a contravention by their employers; and contraventions identified by the ATO, including through referrals from other agencies or super funds.⁹⁴

⁸⁸ Australian Government, ATO, 'The super guarantee charge', 11 October 2018, [https://www.ato.gov.au/business/super-for-employers/paying-super-contributions/missed-and-late-payments/the-super-guarantee-charge-\(sgc\)/](https://www.ato.gov.au/business/super-for-employers/paying-super-contributions/missed-and-late-payments/the-super-guarantee-charge-(sgc)/)

⁸⁹ See also: Australian Government, ATO, 'Penalties, amendments and objections', 8 October 2018, <https://www.ato.gov.au/Business/Super-for-employers/Paying-super-contributions/Penalties,-amendments-and-objections/>

⁹⁰ Parliament of Australia, Tax Laws Amendment (2012 Measures No. 2) Bill 2012, Revised Explanatory Memorandum, p 4.

⁹¹ Australian Government, ATO, 'Other ways to obtain your unpaid super', 30 January 2018, <https://www.ato.gov.au/Individuals/Super/In-detail/Growing/Unpaid-super/?page=2>

⁹² Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, p 7.

⁹³ Australian Government, ATO, correspondence, 19 July 2018, p 4.

⁹⁴ Queensland Government, OIR, written briefing, 7 June 2018, p 9.

2.4 Insolvency

Where an employee is not provided with their due wages and entitlements because their employer goes into liquidation or becomes bankrupt, separate protections and recovery options apply.

In recognition of the special vulnerability of employees of insolvent employers, provisions in the *Corporations Act 2001* (Cth) (Corporations Act) assign them priority ahead of other creditors in the company's liquidation, ranking behind the costs of the liquidator.⁹⁵

Financial assistance is also available to eligible employees under the Commonwealth Government's Fair Entitlements Guarantee (FEG), or the former General Employee Entitlements and Redundancy Scheme (GEERS), if the relevant events occurred before 5 December 2012.

Established under the *Fair Entitlements Guarantee Act 2012* (Cth) (FEG Act), the FEG scheme provides assistance to employees who have lost their job due to, or less than six months before, their employer's liquidation or bankruptcy. It covers:

- unpaid wages (up to 13 weeks)
- unpaid annual leave and long service leave
- payment in lieu of notice (up to 5 weeks), and
- redundancy payments (up to 4 weeks per full year of service).⁹⁶

The FEG scheme does not cover unpaid superannuation contributions, which must be pursued separately through the ATO.⁹⁷ Scheme payments are subject to a capped weekly amount.⁹⁸

Once entitlements are paid under FEG, the Commonwealth stands in the shoes of the employee as a subrogated creditor and is entitled to claim in the liquidation and is given priority over other unsecured creditors under the Corporations Act.⁹⁹

Where a director has abandoned a company without paying employee entitlements, but employees are unable to access an advance through the FEG scheme because the company has not been put into liquidation; an employee can lodge a request with the Australian Securities and Investments Commission (ASIC) to wind up the company. ASIC's power to wind up a company is provided for in section 489EA of the Corporations Act.¹⁰⁰

⁹⁵ See, for example: *Corporations Act 2001* (Cth), ss 556, 551.

⁹⁶ LawRight, submission 028, p 12.

⁹⁷ Australian Government, Department of Jobs and Small Business, 'Fair Entitlements Guarantee', 3 September 2018, <https://www.jobs.gov.au/fair-entitlements-guarantee-feg>

⁹⁸ The FEG maximum weekly wage is \$2,451.00 from 1 August 2013 to 30 June 2021. If an employee earned more than the FEG maximum weekly wage, the Department of Jobs and Small Business advises that it calculates employment entitlements as though the employee earned the FEG maximum weekly wage at the time their employment ended. See: Australian Government, Department of Jobs and Small Business, *FEG Information for Insolvency Practitioners*, updated 21 September 2018, <https://www.jobs.gov.au/fair-entitlements-guarantee-information-insolvency-practitioners-0>

⁹⁹ Australian Government, Department of Jobs and Small Business, *Fair Entitlements Guarantee Recovery Program*, fact sheet, February 2018, https://docs.jobs.gov.au/system/files/doc/other/feg_recovery_program_fact_sheet_v2_february_2018.pdf

¹⁰⁰ Australian Government, Australian Securities and Investments Commission (ASIC), *Regulatory Guide 42: ASIC's power to wind up abandoned companies*, January 2013, <https://download.asic.gov.au/media/1247117/rg242.pdf>

Section 596AB of the Corporations Act also imposes criminal liability on directors who enter into a relevant agreement or transaction with the intention of, or with intentions including the intention of:

- preventing the recovery of the entitlements of employees of a company, or
- significantly reducing the amount of the entitlements of employees of a company that can be recovered.

3 Defining wage theft

There is no universally accepted definition of ‘wage theft’. First coined in the United States, the term has recently gained wider currency in Australia, but remains subject to a degree of debate regarding both its scope and its use.¹⁰¹

‘In its simplest form’, the OIR advised the committee that wage theft ‘is when an employer fails to provide their employees with the full wage or salary to which they are entitled’.¹⁰² Broad definitions were also nominated by the Young Workers Hub (YWH) and the Queensland Council of Unions (QCU), who respectively said the term describes ‘the underpayment or non-payment of wages or entitlements to a worker by an employer’,¹⁰³ and encapsulates ‘a range of activities that deny workers their legal/entitlements’.¹⁰⁴

Some stakeholders opposed the general use of the term in this manner, arguing its broad application to describe all instances of wage non-compliance is ‘misleading’, ‘unfair’, and not conducive to ‘balanced community discussion’ on the issue.¹⁰⁵ Master Electricians Australia (MEA) highlighted the scope for the misinterpretation of awards and other unknowing non-compliance among members of industry, suggesting that application of the criminal term ‘theft’ implies an intent that may not be present in many instances of non-compliance.¹⁰⁶ The National Retail Association (NRA) offered the alternative expression ‘wage non-compliance’, noting that ‘wage theft’ is ‘primarily a rhetorical device’.¹⁰⁷

To a certain extent, these comments reflected a position among these stakeholders on the appropriate definitional thresholds for the application of criminal sanctions, should a criminal offence of wage theft be established. The committee wishes to emphasise that in this respect, the committee agreed with the view of a majority of stakeholders that any criminal sanctions should apply only in relation to the deliberate and/or reckless conduct of an employer; with further comment in this regard provided in chapter 12.5 of this report.

However, to conceptualise the problem and support exploration of the matters in the terms of reference, the committee did not wish to limit its investigation in this manner, noting:

- the difficulties in determining or ascribing intent and the inability of most datasets to make such a distinction (between circumstances of intent or accident), and
- that the impacts of non-compliance are the same irrespective of intent.

The committee noted Dr Tess Hardy’s comments about the implications of the definition employed for the way the problem is addressed:

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

¹⁰¹ Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 19; Housing Industry Association (HIA), submission 043, p 5.

¹⁰² Queensland Government, OIR, written briefing, 7 June 2018, p 17.

¹⁰³ Young Workers Hub (YWH), submission 019, p 2.

¹⁰⁴ Queensland Council of Unions (QCU), submission 034, p 4. See also Queensland Law Society (QLS), submission 040, p 1.

¹⁰⁵ Mr Shane Rodgers, Head – Queensland, Ai Group, public hearing transcript, Brisbane, 16 August 2018, p 49.

¹⁰⁶ Mr Jordon Carlisle, Workplace Relations Adviser and Mr Jason O’Dwyer, Manager Advisory Services, Master Electricians Australia (MEA), public hearing transcript, Brisbane, 20 August 2018, p 27.

¹⁰⁷ National Retail Association (NRA), submission 021, p 3.

*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.*¹⁰⁸

Recognising that a comprehensive consideration of ways to address this serious issue should examine the full spectrum of circumstances in which it may occur, the committee thus adopted a broad definition of wage theft as: the underpayment or non-payment of wages or entitlements to a worker by an employer, encapsulating a range of activities that deny workers their legal entitlements.

3.1 Forms of wage theft

While there was debate around the issue of intent when defining wage theft, there was generally consensus about what constitutes wage theft.

In keeping with research and data from regulators on workplace issues, witnesses and submitters generally pointed to one or more of the following broad means by which employers may fail to provide workers' minimum wages or entitlements:

- unpaid hours or underpayment of hours
- unpaid penalty rates
- unreasonable deductions
- unpaid superannuation
- withholding of other entitlements, and
- sham contracting and the misuse of Australian Business Numbers (ABNs).¹⁰⁹

Unpaid hours or underpayment of hours may involve being paid below the minimum wage or relevant award or not being paid for higher duties, for all hours worked, and for time spent training and in work meetings. This may include a person undertaking trials of unreasonable length.¹¹⁰

Most industry awards contain '**penalty rates**'—additional rates of wages for persons who work overtime, late or early morning shifts, weekends and public holidays. Workers may be denied their due compensation through non-payment or underpayment of applicable penalty rates.¹¹¹

Employees may be subject to **unreasonable deductions**. Unreasonable deductions involve withholding part of a person's pay, or unlawfully requiring an employee to pay back an amount. This could include for example, an employee being required to pay for breakages, returned meals, and order mistakes.

¹⁰⁸ Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 19.

¹⁰⁹ See for example: YWH, submission 019, p 2; Maurice Blackburn Lawyers and joint submitters, submission 033, pp 4-5; QCU, submission 034, p 31; Australian Lawyers for Human Rights (ALHR), submission 051, p 3; Queensland Government, OIR, written briefing, 7 June 2018, p 17; Australian Council of Trade Unions (ACTU), correspondence, 21 August 2018; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, chapter 6, pp 59-75; Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, p ix; Fiona Macdonald, Eleanor Bentham and Jenny Malone, 'Wage theft, underpayment and unpaid work in marketized social care', *The Economic and Labour Relations Review*, vol 29, no. 1, 2018, p 81.

¹¹⁰ See, for example: Independent Education Union of Australia – Queensland and Northern Territory Branch (IEU), submission 007, p 2; Queensland Tourism Industry Council (QTIC), submission 22, p 7; Maurice Blackburn and joint submitters, submission 033, pp 4-5; QCU, Submission 034, p 6.

¹¹¹ See for example: Sevegne Newton, submission 001, p 1; YWH, submission 019, pp 5-7; MEA, submission 030, p 6; The Services Union, submission 046, p 2; Franchise Redress, submission 049, pp 9-11.

Previous inquiries have also highlighted related exploitation through mandated use of employer-provided staff accommodation and transport with associated deductions from wages for residential rental and transport costs at inflated rates, to ‘claw back wages’.¹¹²

Unpaid superannuation is another commonly recognised form of wage theft. This includes complete non-payment of superannuation, or payment below the superannuation guarantee (SG).¹¹³

The **withholding of other entitlements** can include not being paid for breaks, leave, and other entitlements, and workers’ compensation to which the person is entitled.¹¹⁴

Sham contracting refers to the deliberate mischaracterisation of an employment relationship as an independent contracting arrangement. By engaging a person as an independent contractor rather than an employee, employers are able to avoid obligations under the FWA, such as the payment of minimum wage rates, various leave entitlements and penalty rates.¹¹⁵ The NRA submitted that ‘the misuse of ABNs goes hand-in-hand with sham contracting, as unscrupulous entrepreneurs seek to take advantage of the mere fact that an employee has an ABN—regardless of whether that employee is actually operating a bona fide business’.¹¹⁶

In addition to these various illegal activities, which are examined further in chapter 7, there is also a range of other concerning practices that have been acknowledged in the research literature and various inquiries, and which were also highlighted by stakeholders as serving to diminish the wages and entitlements a worker would ordinarily expect to receive.

3.2 Other concerning practices

The Senate Standing Committee on Education and Employment, in its 2017 inquiry report on *Corporate Avoidance of the Fair Work Act 2009*, reported that ‘it quickly became clear over the course of this inquiry that avoidance of the legal obligations set out in the FWA occurs in two distinct ways’:

- firstly, through the overt forms of avoidance by way of ‘breaches of the FWA, such as underpayment’; and
- secondly, through ‘exploitation of legislative loopholes and shortcomings which serve to inadvertently limit the protections offered by the FWA’.¹¹⁷

As was the case for the Senate EERC, during the course of this inquiry, the committee heard concerning evidence about the latter type of ‘exploitative’ practices with respect to wages and entitlements. This included commentary regarding the exploitation of the enterprise bargaining system, casualisation of the workforce, illegal phoenix activity, and other means of circumventing the legal framework.

Stakeholders also raised concerns about the continued operation and effects of ‘zombie agreements’ – expired employment agreements made prior to 2009 under Work Choices legislation, which remain in

¹¹² See for example: Maurice Blackburn and joint submitters, submission 033, p 4; QCU, submission 034, p 18.

¹¹³ See for example: IEU, submission 007, p 4; IR Claims, submission 013, p 47; QCU, submission 034, p 23.

¹¹⁴ See for example: IEU, submission 007, pp 3-4; IR Claims, submission 013, p 7; Maurice Blackburn and joint submitters, submission 033, pp 4-5; QCU, submission 034, p 31.

¹¹⁵ MEA, submission 030, p 6; IEU, submission 007, pp3-4; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 75.

¹¹⁶ NRA, submission 021, p 8.

¹¹⁷ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 2.

effect today. Such agreements are characterised by the ongoing use of pay rates and conditions that may be inferior to those in the relevant modern award.¹¹⁸

Additionally, some stakeholders discussed the related issue of the gig economy—that is, where employers engage workers through a series of micro-contracts (e.g. for food delivery or transport), mediated through an online platform.

Stakeholders considered that gig economy employment arrangements can sometimes be a form of sham contracting, and therefore, an avenue for wage theft.¹¹⁹ However, the committee notes that gig economy workers have taken legal action in several jurisdictions in an attempt to win recognition as employees of platforms, without success. The OIR advised in this regard:

Uber drivers have twice been found not to be employees by the Fair Work Commission (FWC) (in Mr Michail Kaseris v Raiser Pacific VOF [2017] FWC 6610 and Janaka Namal Pallage v Rasier Pacific Pty Ltd [2018] FWC 2579). In its decisions, the FWC noted that the current rules for determining the existence of an employment relationship developed prior to the emergence of the gig economy, and no longer reflect the current economic circumstances. It has taken the position, however, that developing the law in this area is a matter for the legislature.¹²⁰

While concerning, as the aforementioned range of ‘exploitative practices’ may not be considered strictly unlawful, they did not meet the committee’s definition of wage theft in a technical sense, and accordingly were not a primary focus of the committee’s inquiry.

However, the committee agrees with the comments of the Senate EERC, that to the extent that these practices are contrary to the spirit of the FWA, the question of their lawfulness is moot.¹²¹ Their impact is to allow some employers to ‘drive down wages and strip workers of the conditions to the greatest extent possible’, undermining the regulatory floor on minimum wages and entitlements, and disadvantaging businesses adhering to both the letter and spirit of the law.¹²²

These issues are further explored in chapter 14 of this report.

¹¹⁸ See for example: Executive Security Group, submission 029, p 6; Maurice Blackburn and joint submitters, submission 033, p 30; Ms Taylor Bun, Food Manufacturing Worker, public hearing transcript, Gold Coast, 10 September 2018, pp 4-5; Ms Mele-Otufale Tulimaiau, Food Manufacturing Worker, public hearing transcript, Gold Coast, 10 September 2018, pp 4-5; Mr Jeffrey Jones, public hearing transcript, Brisbane, 17 September 2018, pp 8-11; Mr Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018, pp 25-28; Private hearing transcript, regional hearing, 2018.

¹¹⁹ Maurice Blackburn and joint submitters, submission 033, pp 9-10, 16; Queensland Government, OIR, written briefing, 7 June 2018, p 19.

¹²⁰ Queensland Government, OIR, written briefing, 7 June 2018, p 19.

¹²¹ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, pp 5-6.

¹²² Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 109.

4 Incidence of wage theft

Despite a lack of conclusive data on the incidence of wage theft in Australia, there are a host of available statistics that reveal enough to cause serious alarm.

Key statistics

- FWO audits of Australian businesses have regularly found that up to a third or more are underpaying workers. Of the 4,752 audits completed in 2017-18, the FWO reported that contraventions of hourly payment rates were identified in 39 percent of businesses, with 11 percent of businesses contravening requirements relating to penalty rates for weekend work.¹²³ Within these results, significantly higher levels of non-compliance were identified in particular industries and among particular worker cohorts.
- With respect to superannuation contributions, levels of non-compliance have been estimated at between 11 and 21 percent (ATO), or up to 33.4 percent (Industry Super Australia) nationally.
- On 12 November 2018, just prior to the finalisation of this report, the McKell Institute published Queensland-specific FWO data demonstrating that of 6,371 Queensland businesses audited between 2009 and 2018, 28.2 percent of these businesses were found to be non-compliant overall.¹²⁴ For the workforce, the authors extrapolated the results of these audits to estimate that around 17.56 percent of workers in Queensland – some 437,323 workers – likely are not receiving their full wages; and over 580,000 workers, or 23.4 percent of the workforce are likely to be underpaid superannuation, or not paid at all.¹²⁵
- Wage theft appears to be widespread across many industries, and for a small and particularly vulnerable cohort of the workforce, the extent of the exploitation is so severe that it has been described as bordering on modern slavery.¹²⁶

In sum, the committee's findings were consistent with previous studies and inquiries – including, most recently, the Senate EERC inquiry into corporate avoidance of the FWA, which reported:

*On the basis of evidence presented, the committee concludes that underpayment of wages is a far bigger problem than isolated non-compliance or inadvertent oversight. In some sectors, such as the hospitality industry and jobs involving workers on temporary visas, wage theft is rampant.*¹²⁷

¹²³ Australian Government, FWO and Registered Organisations Commission Entity (ROC), *2017-18 Annual Report*, 2018, pp 12, 17.

¹²⁴ Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy*, The McKell Institute, November 2018, p 14.

¹²⁵ Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy*, The McKell Institute, November 2018, pp 8, 23, 41.

¹²⁶ Reporting the interim findings of the FWO's three-year Harvest Trail Campaign, Ms Jennifer Crook, the FWO's assistant director in compliance advised the FWO had 'encountered situations where a person is virtually bonded like a slave to a particular [labour hire] provider' and that backpackers have been lured to regional centres and ripped off 'to the tune of hundreds – and sometimes thousands – of dollars per person'. See: Marty McCarthy, 'Bonded like a slave': Workplace watchdog investigation into labour exploitation reveals poor conditions', *ABC News*, 27 June 2018, <https://www.abc.net.au/news/rural/2018-06-27/workplace-watchdog-investigation-into-labour-exploitation/9911710>. See also: Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 7.

¹²⁷ Parliament of Australia, Senate EERC, *Corporate avoidance of the Fair Work Act 2009*, September 2017, p 69.

Further work to address existing data gaps and better assess the prevalence of wage theft at an aggregate level, would serve to enhance our understanding of the true scale of this problem.

4.1 Available statistics

There is no concrete or comprehensive data available on the incidence of wage theft in Australia.¹²⁸ This is owing to a wide range of factors, including:

- the deliberate nature of wage theft on the part of some employers and their significant efforts to hide it
- challenges associated with identifying many of the different forms of wage theft, some of which can be subtle and difficult to detect, particularly where employees may lack awareness of their entitlements and receive false or inadequate documentation
- ‘chronic’ underreporting of the problem even where workers are aware of their entitlements and the shortfall in those provided, due to worker resignation to the practice for various reasons (including for fear of losing their job, and a lack of alternative employment options); reticence to interact with authorities; and other factors (see further discussion at chapter 8)
- the necessarily fragmented nature of much of the available information, due to the many and complex ways in which wage theft can manifest, and the interface with multiple agencies and actors at different points in time
- the use of confidentiality agreements in wage theft settlements, preventing disclosure of the issue, and
- the limitations of agency datasets with respect to the both the information collected and the transparency and availability of that information.

Generally speaking, available statistics have been drawn primarily from:

- administrative data from regulators, providing counts of received reports of non-compliance with employee entitlements and associated compliance actions; and the results of specific investigations or compliance audits (and associated enforcement actions), and
- interviews and surveys of employees or businesses, often conducted within specific workforce populations and/or geographical regions.

None of these sources of information are definitive, with Berg and Farbenblum noting that ‘service providers and policy makers have not had access to an evidence-based big picture of the context and extent of wage theft’ across the country.¹²⁹ However, collectively, this information can provide significant insights into the extent of the problem, both at an aggregate level and within particular industry sectors, regions and cohorts, as necessary to inform appropriately targeted regulatory and other policy interventions.

4.2 Reported wage theft

Regulator statistics on reports of non-compliance stand to offer the most systematic barometer of levels of wage theft, as they can capture identified incidents and associated agency actions that cut

¹²⁸ Queensland Government, OIR, written briefing, 7 June 2018, p 19; Ms Tricia Rooney, Director, Industrial Relations Strategic Policy, OIR, public briefing transcript, Brisbane, 11 June 2018, p 6; Maurice Blackburn Lawyers, response to a question taken on notice at the public hearing on 16 August 2018, pp 1-2.

¹²⁹ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 8.

across industries and geographical boundaries.¹³⁰ However, there are considerable limits to their utility as an indicator of incidence, due to both the lack of detail provided in published figures, and the significant rate of underestimation as a result of under-reporting.¹³¹ In the latter respect, Berg and Farbenblum, in their October 2018 report on the results of a survey of 2,250 underpaid migrant workers, noted that only 3 percent of these workers contacted the FWO for assistance.¹³²

4.2.1 Office of Industrial Relations

The OIR advised that in 2017, the inspectorate's Infoline service received approximately 11,324 enquiries related to the state jurisdictional matters of long service leave and arrears of wages from local government or parents' and citizens associations.¹³³ As a result of subsequent investigations and legal proceedings, the OIR reported adjustments to wages in the order of \$1.32 million and \$33,887 respectively.¹³⁴

4.2.2 Fair Work Ombudsman

At a national level, in 2017-18 the FWO reported receiving 15,138 anonymous reports and resolving 28,275 requests for assistance involving workplace relations matters¹³⁵ through education, dispute resolution and compliance actions.¹³⁶ As a result of these employee-driven interactions and other FWO-initiated audits and inquiries, the FWO advised that it recovered over \$29.6 million in unpaid wages nationally for 13,367 workers across the financial year.¹³⁷

In 2016-17, the FWO:

- received 10,535 anonymous reports
- resolved 26,917 requests for assistance involving workplace relations matters, and
- recovered \$30.6 million nationally for more than 17,000 employees.¹³⁸

The FWO advised the committee that of the 10,535 anonymous reports received in 2016-17, over 2,200 related to Queensland businesses.¹³⁹ Of the 26,917 resolved workplace relations matters, 5,427

¹³⁰ For example see: Maurice Blackburn Lawyers, response to a question taken on notice at the hearing on 16 August 2018, pp 1, 3; Queensland Government, OIR, written briefing paper, 7 June 2018, pp3-5; Restaurant and Catering Australia (R&CA), submission 017, p 3.

¹³¹ Job Watch Inc (JobWatch), submission 016, p 3; IR Claims, submission 013, p 28; Maurice Blackburn Lawyers, response to a question taken on notice at the hearing on 16 August 2018, p 1.

¹³² Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 6.

¹³³ The OIR advised that in 2017, '747 enquiries were received by the inspectorate in relation to wages, conditions and unfair dismissal matters under the FW Act'. See: Queensland Government, OIR, written briefing, 7 June 2018, p 3.

¹³⁴ Queensland Government, OIR, written briefing, 7 June 2018, p 1.

¹³⁵ The workplace relations matters the FWO can assist with are not limited to 'wage theft'. The FWO also deals with matters concerning discrimination and other protections; union membership and right of entry; and non-monetary matters relating to ending employment (e.g. notice, etc.). See: Australian Government, FWO, *Step 1: Find out what we can help with*, <https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/step-1-find-out-what-we-can-help-with>

¹³⁶ Australian Government, FWO and ROC, *2017-18 Annual Report*, 2018, p 11.

¹³⁷ Australian Government, FWO and ROC, *2017-18 Annual Report*, 2018, pp 11, 13.

¹³⁸ Australian Government, FWO and ROC, *2016-17 Annual Report*, 2017, p 13.

¹³⁹ Australian Government, FWO, submission 044, p 2.

related to employees working in Queensland.¹⁴⁰ Over one third of these Queensland matters related to underpayment or non-payment of wages, with 18 percent of employees alleging underpayment of their hourly rate and 17 percent alleging non-payment for time worked.¹⁴¹

The resolution of these matters contributed to the FWO's recovery of \$5.4 million in unpaid wages and entitlements for employees in Queensland in 2016-17.¹⁴²

While these figures provide some indication of the scale of employee interactions with the agency and of wage recoveries, the results of workplace audits carried out as part of FWO campaigns, inquiries and other compliance activities provide more specific information on rates of non-compliance, albeit in relation to particular industries, regions and cohorts targeted in these activities.

In 2017-18, the FWO completed 4,572 campaign audits across Australia. Contraventions relating to hourly rate underpayments were identified in 39 percent of businesses, with 11 percent contravening requirements relating to penalty rates for weekend work, and 25 percent failing to provide payslips in their prescribed forms.¹⁴³

Examples of results from campaigns and inquiries that included Queensland business and which have been published over the past two years also point to significant rates of non-compliance across multiple sectors and areas. These include:

- July 2018 – a campaign report on audits of food precincts in three locations, one of which was Fortitude Valley in Brisbane. Of 73 Fortitude Valley businesses audited over a three-day period, 60 percent were found to be non-compliant, with 76 breaches identified. The top three sources of the breaches were the underpayment of the hourly rate (33 percent), failure to provide payslips in the prescribed form (14 percent) and breaches of weekend penalty requirements (12 percent). A total of \$64,941 was recovered for 180 employees from 25 businesses.¹⁴⁴
- June 2018 – the FWO's report on an inquiry into the procurement of security services by 23 local governments, including three Queensland councils (Brisbane City Council, Logan City Council and the Gold Coast City Council), revealed 14 of the 23 councils (61 percent) had a non-compliant labour supply chain. The inquiry found 42 percent of principal contractors (16 of 38) and 63 percent of subcontractors (12 of 19) failed to comply with Commonwealth workplace laws. Total underpayments of \$72,250 to 54 employees (12 percent) were identified.¹⁴⁵ In Queensland, 70 percent (7 out of 10) of the businesses providing security employees to councils were non-compliant, and one business undertaking security work for the Gold Coast City Council was found to have underpaid three employees almost \$16,000 (from April 2015 to June 2016).¹⁴⁶

¹⁴⁰ Australian Government, FWO, submission 044, p 2.

¹⁴¹ Australian Government, FWO, submission 044, p 2.

¹⁴² Australian Government, FWO, submission 044, p 2.

¹⁴³ Australian Government, FWO and ROC, *2017-18 Annual Report*, 2018, pp 12, 17.

¹⁴⁴ Australian Government, FWO, *Food Precincts Activity Report*, July 2018, pp 6, 21.

¹⁴⁵ Australian Government, FWO, *Inquiry into the procurement of security services by local government*, June 2018, pp 11, 13.

¹⁴⁶ Australian Government, FWO, *Gold Coast security operator penalised \$115,668*, media release, 24 July 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/july-2018/20170724-vip-security-penalty>

- March 2018 – a campaign report on audits of 25 franchise operated Caltex businesses located in Brisbane, Sydney, Adelaide and Melbourne that were audited in October 2016. The FWO found 76 percent of businesses to be non-compliant due to issues including non-award rates, non-payment of penalties, and record keeping and pay slip deficiencies, with the FWO identifying underpayments of \$9,329 over a month for 26 employees. Of the Brisbane franchises, 60 percent (3 of 5) were non-compliant.¹⁴⁷
- November 2017 – a national campaign report on audits of 696 health care and social assistance employers, in which 15 percent were identified as having errors relating to pay rates or a combination of pay rates and records and pay slip errors. A total of \$142,953 was recovered for 136 employees from 38 businesses. Queensland had the equal lowest rate of non-compliance of the states (with South Australia) at 17 percent, of which only a third of contraventions related to underpayment. For Queensland, \$8,445 was recovered for 11 employees.¹⁴⁸
- July 2017 – the FWO reported on the results of audits of 266 Far North Queensland businesses. The audits found 21 percent of businesses were not paying their employees correctly. A total of \$109,295 was recovered for 136 employees from 38 businesses.¹⁴⁹
- March 2017 – in a national audit of 822 businesses employing apprentices,¹⁵⁰ with a total of 2,266 apprentices checked, the FWO found 32 percent of businesses were not paying their apprentices correctly and 22 percent were not compliant with pay slip and record keeping obligations.¹⁵¹ Queensland had the highest compliance rate (68 percent), with 49 percent of errors made in relation to the base rates provided to apprentices, and \$25,597 recovered for 29 apprentices.¹⁵²

In addition to these recent reports, in July 2016 the FWO published the results of a Central Queensland audit of 232 businesses in Rockhampton/Yeppoon, Gladstone/Biloela and Emerald and Blackwater, conducted ‘in response to an increase in requests for assistance from employees’ in these areas.¹⁵³ Of the 232 businesses audited, the FWO found that 31 percent of businesses were not paying their employees correctly. As a result of the audits, a total of \$110,087 was recovered from 51 businesses on behalf of 316 employees; and one formal caution was issued.¹⁵⁴

The Senate EERC, in reviewing audit results for its inquiry into corporate avoidance of the FWA, concluded that these campaign audits are also likely to be ‘a very conservative reflection of the bigger picture’, given employers are often ‘contacted well in advance of FWO audits’ and ‘have every

¹⁴⁷ Australian Government, FWO, *Caltex Compliance Activity*, March 2018, pp 6-8.

¹⁴⁸ Australian Government, FWO, *Health Check: Outcomes from the Fair Work Ombudsman’s National Health Care and Social Assistance Campaign*, November 2017, pp 4, 22.

¹⁴⁹ Australian Government, FWO, *Outcomes from the Fair Work Ombudsman’s Far North Queensland Regional Campaign 2015*, July 2017, p 4.

¹⁵⁰ The campaign focused on employers with apprentices undertaking the following apprenticeships: automotive; electrical services; manufacturing; hair and beauty; and retail service industry.

¹⁵¹ Australian Government FWO, *Fair Trades: Outcomes from the Fair Work Ombudsman’s National Apprenticeship Compliance Monitoring Campaign*, March 2017, p 3. The campaign focused on employers with apprentices undertaking the following apprenticeships: automotive; electrical services; manufacturing; hair and beauty; and retail service industry.

¹⁵² Australian Government, FWO, *Fair Trades: Outcomes from the Fair Work Ombudsman’s National Apprenticeship Compliance Monitoring Campaign*, March 2017, p 19.

¹⁵³ Australian Government, FWO, ‘Central Queensland regional campaign results’, media release, 22 August 2016, <https://www.fairwork.gov.au/about-us/news-media-releases/2016-media-releases/august-2016/20160822-central-qld-reg-campaign-mr>

¹⁵⁴ Australian Government, FWO, *Central Queensland Regional Campaign*, March 2017, p 4.

opportunity to examine their practices and make necessary changes before an audit takes place'.¹⁵⁵ Dr Laurie Berg also noted that 'audits are generally undertaken on the basis of employment records that are prepared by the employer', which as the 7-Eleven case has shown, may not have been kept or may include 'manufactured records which mask the true underpayments that have occurred'.¹⁵⁶

4.2.3 Australian Taxation Office

With respect to unpaid superannuation, the ATO advised the committee that in 2017-18, it actioned 31,954 cases across Australia relating to the non-payment of SG, of which 7,548 involved Queensland-based employers. Of these 7,548 Queensland cases, an SG shortfall was identified in 4,740 cases (62.79 percent).¹⁵⁷

In addition to these reported non-compliance statistics, the ATO produces an SG 'gap' estimate. The estimate is based on the difference between contributions paid and contributions expected, drawing on Australian Bureau of Statistics (ABS) compensation of employee data, with certain adjustments (including to take account of estimated unpaid superannuation within the cash economy).¹⁵⁸ For the year 2015-16, the SG payment gap was estimated at approximately \$3.26 billion or 5.7 percent of the estimated \$56.77 billion in SG payments that employers were required to pay for the financial year.¹⁵⁹ The ATO gap estimates include an adjustment (to the tune of \$799 million in 2015-16) to take account of unpaid superannuation within the cash economy. For the six years from 2010-11 to 2015-16, gap estimates suggest a cumulative \$19.55 billion of super contributions lost to employees (see table below).¹⁶⁰

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Gross gap (%)	6.8%	7.6%	6.4%	6.2%	5.9%	5.7%
Net gap (%)	5.6%	5.6%	5.6%	5.6%	5.6%	5.6%
Gross gap (dollar value - \$m)	2,971	3,596	3,150	3,294	3,283	3,262
Net gap (dollar value - \$m)	2,483	3,088	2,623	2,763	2,774	2,790

Source: ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

In its inquiry report on non-compliance with the SG, the Senate Economics References Committee noted advice that the ATO methodology for estimating the SG gap does not identify the level of non-

¹⁵⁵ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 69.

¹⁵⁶ Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 21.

¹⁵⁷ Australian Government, ATO, correspondence, 19 July 2018, p 1.

¹⁵⁸ Australian Government, ATO, 'Super guarantee system', 26 October 2018, <https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/tax-gap/superannuation-guarantee-gap/?anchor=Methodology#Methodology>

¹⁵⁹ Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

¹⁶⁰ Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

compliance among employers (e.g. the proportion of non-compliant employers), nor does it support analysis of characteristics of non-compliance.¹⁶¹ However, the Australian National Audit Office has noted that the ATO's internal risk assessment indicates that 'as many as 11 to 20 percent of employers could be non-compliant with their SG obligations, and that non-compliance is 'endemic',¹⁶² especially in small businesses and industries where a large number of cash transactions and contracting arrangements occur'.¹⁶³

Industry Super Australia, which conducts research on behalf of industry super funds, believes the size of the annual superannuation gap is significantly larger than the ATO estimates. In an October 2018 report, *Unpaid Super: Getting Worse While Nothing is Done*, Industry Super Australia reported that it estimates that 2.98 million Australians – approximately 33.4 percent of SG eligible employees – were 'short-changed \$5.9 billion in super entitlements in 2015-16'.¹⁶⁴ Industry Super Australia reported that the size of the average underpayment per year is \$1,994 – the equivalent of \$77 per fortnight.¹⁶⁵

For Queensland, the reported result was only marginally better. Industry Super Australia estimated that approximately 33.0 percent of SG eligible employees in Queensland – or 583,150 people – were underpaid superannuation (including non-payment) in 2015-16. The overall estimated gap in underpayments for the state was \$1.12 billion, with an average underpayment of \$1,915 per person (close to \$74 per fortnight).¹⁶⁶

4.2.4 Other reports and findings

In addition to regulator statistics (and associated estimates), stakeholders cited various reports and figures drawn primarily from workforce surveys and interviews, which present benefits in terms of:

- capturing practices in the informal sector that may escape the attention of authorities, and
- providing an opportunity for participants to report their experience with the security of anonymity and/or without the formality of interactions with regulators.

Perhaps the most comprehensive of the cited reports (and the most widely referenced by stakeholders)¹⁶⁷ is the first report of Berg and Farbenblum's National Temporary Migrant Work Survey, published in November 2017. While the study is confined to temporary visa holders, it 'draws on responses from 4,322 temporary migrants across 107 nationalities of every region of the world,

¹⁶¹ The Inspector-General of Taxation Mr Ali Noroozi noted that this would require the different approach of extrapolating the results of a sizeable and representative sample of random audits to calculate a population estimates. See: Parliament of Australia, Senate Economics References Committee, *Superbad: Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, p 20.

¹⁶² 'Endemic' is defined by the ATO as pervasive through time and/or populations.

¹⁶³ Parliament of Australia, Australian National Audit Office, *Report No. 39, 2014-15: Promoting Compliance with Superannuation Guarantee Obligations*, June 2015, pp 18-18.

¹⁶⁴ Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done*, October 2018, p 3.

¹⁶⁵ Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done*, October 2018, p 5.

¹⁶⁶ Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done*, October 2018, p 10.

¹⁶⁷ See: Dr Stephen Clibborn, submission 011; IR Claims, submission 013; Job Watch Inc (JobWatch), submission 016; QTIC, submission 022; MEA, submission 030; Dr David Morrison, submission 032; Dr Laurie Berg and Bassina Farbenblum, submission 042; Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050; ALHR, submission 051.

working in a range of jobs in all states and territories'.¹⁶⁸ Dr David Morrison noted that it 'is the most authoritative in terms of surveying and collecting information'.¹⁶⁹

Most of the survey respondents were international students (55 percent) or working holiday makers (backpackers – 33 percent), with the remaining participants holding temporary skilled (457 class) work visas (seven percent) and tourist visas without work rights or other temporary visas (five percent).¹⁷⁰ The survey found 30 percent of survey participants earned \$12 per hour or less – a figure approximately half the minimum wage for a casual employee in many of the jobs in which temporary migrants work.¹⁷¹ Almost half (46 percent) of respondents earned \$15 per hour or less (excluding 457 visa holders).¹⁷²

The authors reached the conclusion:

*... wage theft is endemic among international students, backpackers and other temporary migrants in Australia. For a substantial number of temporary migrants, it is also severe.*¹⁷³

Dr Laurie Berg advised the committee that twelve percent of survey respondents (almost 400) had worked in Queensland, and that the results for the state were 'about the same as the national average'.¹⁷⁴ The three jobs most frequently reported as the lowest paid jobs for the respondents who had worked in Queensland were fruit/vegetable picker or packer or farm worker (31 percent), shop assistant/retail job/sales (25 percent), and cleaner (9 percent).¹⁷⁵

In announcing the results of a follow up-study on non-reporting amongst this survey population, Ms Farbenblum said the scale of unclaimed wages for this 'silent underclass of underpaid migrant workers' is 'likely well over a billion dollars'.¹⁷⁶

¹⁶⁸ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 5.

¹⁶⁹ Dr David Morrison, Associate Professor, University of Queensland, public hearing transcript, Brisbane, 20 August 2018, p 20.

¹⁷⁰ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 12.

¹⁷¹ At the time of the survey, the statutory minimum wage for all workers was \$17.70 per hour. The legal minimum wage for a casual worker was \$22.13 per hour. Berg and Farbenblum noted that many temporary migrants would have been entitled to higher rates based on penalty rates and entitlements under relevant awards: 'For example, a 21 year old standard fast food employee should have earned at least \$24.30 per hour, and \$29.16 on a Saturday'. Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 5.

¹⁷² Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 6.

¹⁷³ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 7.

¹⁷⁴ Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 18.

¹⁷⁵ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 51.

¹⁷⁶ Anna Patty, 'Unclaimed wages likely to top one billion dollars', *Sydney Morning Herald*, 29 October 2018, https://www.smh.com.au/business/workplace/unclaimed-wages-likely-to-top-one-billion-dollars-20181025-p50c02.html?fbclid=IwAR1dztF52HX-VkJvAsTtJuz_LMMVYBu9MCcfa749soLsfwkuRAVpY

These results are consistent with a series of other surveys and studies of this employee cohort, which are examined further in the next section of this chapter.

In terms of other economy-wide or cross-industry findings, the QCU cited analysis of entries to an online 'Fair Pay Campaign Calculator',¹⁷⁷ over a three-week period from October to November 2016. The analysis revealed:

*Of the 20, 000 Australian workers who checked their pay through an online wage calculator in 2016, one in four of them found they were receiving less than minimum rates. Approximately 60% of submissions in the restaurant industry showed underpayments (Toscano 2016). Other industries affected by wage theft include agriculture, food processing, poultry processing and journalism.*¹⁷⁸

In relation to the practice of sham contracting, the Construction, Forestry, Mining and Energy Industrial Union of Queensland (CFMEU Queensland) submitted:

*On the basis of official figures, the CFMEU (2011) has estimated that the number of sham contracting arrangements in the building and construction industry as being between 92,000 and 168,000. This represents between 26-46% of all "independent contractors" in the industry. Accordingly, in 2011 the CFMEU estimated that \$2.5 billion of tax revenue is lost in the construction industry alone through the abuse of sham contracting arrangements.*¹⁷⁹

The CFMEU sham contracting figures are consistent with broader ABS figures providing details of the characteristics of employment for independent contractors across all industries, as at August 2016. That is, for the estimated 1 million independent contractors in Australia as at August 2016, a significant 36 percent indicated they did not have authority over their own work, and 42 percent indicated they were unable to subcontract their work.¹⁸⁰ These employment characteristics are possible indications that a contractor should be an employee and entitled to all the benefits and rights that accrue to other permanent employees.

4.3 Vulnerable cohorts

Evidence provided to the committee – both empirical and anecdotal – confirmed that the problem of wage theft is particularly pronounced in certain segments of the labour market. Peetz has reported:

*The businesses that want to steal pay from workers will focus on the most vulnerable, those who are most likely to be afraid, or tolerant or least likely to complain... where the employer has the upper hand in making it not worthwhile – very not worthwhile – to complain.*¹⁸¹

Stakeholders particularly highlighted the higher risks of exploitation amongst migrant workers and visa holders, and young people – two broad employee groupings or 'cohorts' which have been the focus of much academic study and regulator attention.

¹⁷⁷ The Fair Pay Campaign Calculator was an online tool launched by the National Union of Workers, Australian Meat Industry Employees Union and United Voice to compares pay rates to the federal minimum wage scale and awards in eight different industries. See: Nick Toscano, 'Thousands of workers find out they're being ripped off', *Sydney Morning Herald*, 25 November 2016, <https://www.smh.com.au/business/workplace/thousands-of-workers-find-out-theyre-being-ripped-off-20161125-gsxn7.html>

¹⁷⁸ QCU, submission 034, p 5.

¹⁷⁹ Construction, Forestry, Mining and Energy Industrial Union of Queensland (CFMEU), submission 039, p 7.

¹⁸⁰ ABS, *6333.0 - Characteristics of Employment, Australia, August 2016*, 2 May 2017, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6333.0Main%20Features4August%202016?opendocument&tabname=Summary&prodno=6333.0&issue=August%202016&num=&view=>

¹⁸¹ David Peetz, 'Debt in paradise: On the ground with wage theft', *Griffith Review*, no. 61, 2018, p 187

Within these vulnerable cohorts, the OIR noted that ‘there is an underpinning gender pay gap’, with women more likely to be affected by wage theft;¹⁸² and Queensland Advocacy Incorporated (QAI) highlighted the heightened vulnerability and insecurity for people with disabilities, ‘who are at the fringes of the labour market’ and are often subject to employment discrimination.¹⁸³

4.3.1 Migrant workers and visa holders

Migrant workers and visa holders have been increasingly the focus of attention for researchers, policymakers and regulators, as evidence of their significant overrepresentation among workers who experience wage theft has come to light. This employee cohort includes international students, backpackers, other temporary visa holders, new residents, and undocumented workers.¹⁸⁴

The FWO notes that migrant workers make up six percent of the Australian workforce but in 2017-18 featured in 20 percent of the workplace disputes FWO assists with; and 63 percent of the court cases commenced throughout the year.¹⁸⁵ The FWO has stated that their ongoing status as ‘one of the most vulnerable worker cohorts... potentially reflects their unique situation’:

*... being new to the Australian labour market, not having baseline knowledge about workplace rights and entitlements, and potentially experiencing language and cultural barriers. Some migrant workers may also be reluctant to speak with public officials and may be concerned about their visa status if they raise issues. These factors can make migrant workers particularly vulnerable to exploitative practices from unscrupulous employers.*¹⁸⁶

The following case study, provided by a member of the Queensland Community Alliance (QCA), highlights the ways in which such factors may play out.

Case study

*‘I met a lady—she is from Bolivia—through the church and she told she was working for just \$50 per week. I said, ‘You are a slave. Why are you doing that?’ I was trying to help her to get her out of the situation, but the people where she used to live brought her out and paid for her ticket and everything. They brought her out to Australia on a tourist visa and the agreement was that she had to work as a nanny with them for \$10 per day, so \$50 a week. She was scared to tell me her situation. Finally, when they knew I was following her, they told me to get out when I was trying to visit her. They knew she had to get in some support. They sent her back to her country, but that happened for a year here. She was living on \$50 a week’.*¹⁸⁷

As previously noted, the National Temporary Migrant Work Survey identified that ‘wage theft is endemic among international students, backpackers and other temporary migrants in Australia’, with approximately 30 percent of surveyed workers reporting the earned approximately half the minimum wage, and 46 percent indicating they earned \$15 per hour or less (excluding 457 visa holders).¹⁸⁸

¹⁸² Queensland Government, OIR, written briefing, 7 June 2018, p 21.

¹⁸³ QAI, submission 026, p 7.

¹⁸⁴ Queensland Government, OIR, written briefing, 7 June 2018, p

¹⁸⁵ Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, pp 17, 18.

¹⁸⁶ Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, p 17.

¹⁸⁷ Ms Luz Mosquera, Member, Queensland Community Alliance (QCA), public hearing transcript, Brisbane, 3 September 2018, p 2.

¹⁸⁸ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 7.

While the legal minimum wage at the time was \$17.70, and most award rates were over \$22 per hour (not including penalty rates), the survey found:

- 28 percent of workers in cafes, restaurants and takeaway food shops were paid \$12 an hour or less, and 49 percent were paid \$15 per hour or less
- 15 percent of workers in fruit and vegetable picking and farming were paid \$5 per hour or less and 31 percent were paid \$10 an hour or less
- 20 percent of workers in convenience stores and petrol stations earned \$10 an hour or less, and an overwhelming majority (82 percent) were paid \$17 per hour or less
- 56 percent of cleaners were paid \$15 an hour or less.¹⁸⁹

This research followed a similarly large-scale survey of 4,044 working holiday visas conducted by the FWO, as part of an inquiry into the working conditions of these visa holders. Reporting the results of the survey in October 2016, the FWO noted that 28 percent of working holiday visa holders indicated that they did not receive payment for some or all of the work they did, and further:

- 35 percent stated they were paid less than the minimum wage
- 14 percent revealed they had to pay in advance to get regional work, and
- 66 percent felt employers take advantage of people on working holiday visas by underpaying them.¹⁹⁰

In a previous, 2016 survey of 1,433 international students, Clibborn found that of those working at the time of the survey, 35 percent were paid \$12 or less (well under the minimum wage). All respondents working as waiters and shop assistants were paid under the prevailing minimum legal weekend wage rates.¹⁹¹ Clibborn and Wright have also cited:

*Underhill and Rimmer's (2016) survey of 278 horticulture workers, the majority of whom held working holidaymaker visas, found mean hourly wages well below applicable minima. In Howe et al.'s (2017: 35) survey of 332 employers of horticulture workers, the majority of whom were temporary migrants, 17% of employers admitted to paying under minimum weekday wage rates and 74% to paying under minimum weekend wage rates. Nyland et al. interviewed 200 international students, 62 of whom reported their hourly pay. About 58% earned AUD7–AUD15 per hour, which the authors assessed as below the applicable minimum wages (Nyland et al., 2009).*¹⁹²

Reporting in July 2017 on the results of two separate audits of 200 Australian job advertisements on Chinese, Korean and Spanish websites carried out in 2016 and 2017, Unions New South Wales revealed 78 percent of the 200 advertisements examined were offering pay rates below minimum award levels.

¹⁸⁹ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, pp 30-31.

¹⁹⁰ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act*, September 2017, p 65.

¹⁹¹ Stephen Clibborn, 'Multiple frames of reference: Why international student workers in Australia tolerate underpayment', *Economic and Industrial Democracy*, March 2018, pp 7, 9.

¹⁹² Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, p 213.

The lowest rates discovered included \$4.20 per hour for a nanny and \$9 per hour for an office clerk, both advertised in Chinese. The minimum legal rate for both jobs is more than \$18 per hour.¹⁹³

Further, in 2015, a joint investigation by Fairfax Media and Monash University surveyed more than 1,000 foreign-language job advertisements and found that 80 percent targeted overseas-born workers and advertised wages well below the legal minimum rates in Australia.¹⁹⁴

4.3.2 Young workers

The OIR advised that young people ‘are notably vulnerable for similar reasons to those of many migrant workers: a lack of understanding of workplace laws and culture, a lack of marketable skills, especially among students still completing tertiary study, and little or no bargaining power’.¹⁹⁵

While workers under the age of 25 account for 15 percent of the Australian working population, the FWO reported that in 2016-17, they were involved in 28 percent of the workplace disputes the FWO assisted with. Further, the FWO advised:

*... young workers were involved in 44% of the court cases commenced. We recovered over \$1.4 million in underpayments for 723 young workers.*¹⁹⁶

Research has highlighted that high rates of youth unemployment have increased competition for paid positions,¹⁹⁷ and young people have reported a willingness to tolerate wage theft and other unlawful treatment in order to remain in employment.¹⁹⁸ IR Claims submitted that young workers ‘are often keen to get their foot-in-the-door, whether it be their first casual job, an apprenticeship, or their first paid employment after graduating college or university’, and that this leaves them vulnerable to exploitation.¹⁹⁹

In relation to apprentices in particular, as previously noted, the March 2017 report on the FWO’s national apprenticeship campaign revealed that 32 percent of the 822 businesses audited nationally were not paying their employees correctly. Included in this number were 100 businesses in Queensland, 32 percent of which were identified as non-compliant, with 49 percent of identified errors involving the base rates provided to apprentices and \$25,597 recovered for 29 apprentices.²⁰⁰ East Coast Apprenticeships submitted that there is ‘a ‘hidden’ iceberg of theft’ where apprentices are concerned.²⁰¹

¹⁹³ Jackson Gothe-Snape, ‘Chinese, Korean and Spanish speakers subjected to ‘wage theft on massive scale’’, *SBS News*, 17 July 2017, <https://www.sbs.com.au/news/chinese-korean-and-spanish-speakers-subjected-to-wage-theft-on-massive-scale>

¹⁹⁴ Schneiders and Millar cited in Queensland Government, OIR, written briefing, 7 June 2018, p 18.

¹⁹⁵ Queensland Government, OIR, written briefing, 7 June 2018, p 24.

¹⁹⁶ Australian Government, FWO and ROC, *Annual Report 2016-17*, p 20.

¹⁹⁷ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 7; Brotherhood of St Laurence, *Generation Stalled: Young, underemployed and living precariously in Australia*, March 2017.

¹⁹⁸ Queensland Government, OIR, written briefing, 7 June 2018, p 24; Stephen Clibborn, ‘Multiple frames of reference: Why international student workers in Australia tolerate underpayment’, *Economic and Industrial Democracy*, 2018, pp 13-14.

¹⁹⁹ IR Claims, submission 013, p 21.

²⁰⁰ Australian Government, FWO, *Fair Trades: Outcomes from the Fair Work Ombudsman’s National Apprenticeship Compliance Monitoring Campaign*, Australian Government, March 2017, p 19.

²⁰¹ East Coast Apprenticeships, submission004, p 2.

IR Claims provided the following example of wage theft experienced by a young apprentice plumber.

Case study

After completing six weeks of unpaid work experience with a Brisbane plumbing company, 21 year-old Aiden was offered a plumbing apprenticeship with the company.

Two weeks after commencing work, Aiden checked the Fair Work Ombudsman website and discovered he was being underpaid. He was receiving \$11.67 an hour when he should have been paid \$19.07 an hour.

'The fact that they were charging me out as a fully qualified tradesman, at \$90 an hour, and I was only seeing \$11 of that, and the fact that I was putting in the hard yards every day - it was pretty draining - it was hard to keep any form of positive relationship with those guys.'

Aiden decided not to approach his bosses about the underpayments until after he had completed his three month probation period.

'I walked into the shed and [his employer] was like, 'how long you been working for us now?', and I said, 'ah, just over three months,' and he said, 'ah, well you must be finished your probation'. I asked if there was any paperwork to fill out and he said there wasn't, and he said, 'you're one of the family now', those were his exact words - they've stayed in my mind ever since.'

About a week after being told his probation period was over, Aiden asked to have a meeting with his employer and raised his concern that he was not being paid according the award rate.

'[His employer] said, 'is this the avenue you want to go down?' and I said, 'yeah it is', I said, 'I'm 21, that's what I'm supposed to be on - that's what I'm going to get.'

'And he said, 'we'll have another meeting soon' - so I hassled them a few weeks after that, and they sat me down for another meeting, and that's when they sacked me'.²⁰²

The OIR stated that young workers often make up a significant portion of the workforce in industries that have higher levels of non-compliance. The OIR noted that the scheduling requirements of tertiary students can make some of these industries – and 'notably the hospitality industry', attractive for young job seekers.²⁰³

The FWO reported that in 2016-17, 44 percent of the hospitality workers assisted by the FWO to resolve workplace disputes were under the age of 26.²⁰⁴

The committee heard from the YWH that 'the enforcement of current laws does not deter wage theft and is more often than not complicated and inaccessible for young workers'.²⁰⁵

4.4 Vulnerable industries and sectors

Dr Laurie Berg advised the committee that risks of exploitation are higher in labour market segments 'where there is a concentration of low-skilled work, thin profit margins, limited union presence and fragmented employment arrangements', which may include franchise networks, labour hire arrangements, supply chains, and subcontracting.²⁰⁶ These are characteristics that are common to a number of industries that have been singled out as having 'systemic' problems with wage theft. It is no coincidence that the vulnerable cohorts discussed above feature prominently in the workforces of these industries.

²⁰² IR Claims, submission 013, pp 22-23.

²⁰³ Queensland Government, OIR, written briefing, 7 June 2018, p 24.

²⁰⁴ Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, p 20.

²⁰⁵ Ms Imogen Barker, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 22.

²⁰⁶ Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 20.

IR Claims submitted:

In Queensland, hospitality, food services, retail, farming and fruit & vegetable picking industries are rife with underpayments because they create “a perfect storm” for exploitation.

The “wage theft recipe” is simple:

- *The insecure nature of the work*
- *High numbers of migrant workers and young people*
- *Staff already being paid low wages*
- *People desperate for the work*
- *A lack of knowledge of workplace rights*
- *Absence of strong unionisation.*²⁰⁷

In 2017-18, the FWO reported that of all the anonymous reports of non-compliance received by the agency, the accommodation and food services industry (hospitality) ‘was by far the most reported industry, amounting to 37% of all anonymous reports. The next highest industries were retail (13%), and building and construction (5%)’.²⁰⁸ The FWO also received the most enquiries from the accommodation and food services industry (12 percent), followed by health care and social assistance (10 percent), professional, scientific and technical services (10 percent) and retail trade (9 percent).²⁰⁹

Further, the FWO highlighted its work to target ‘industries and geographic regions with high or emerging levels of non-compliance such as hospitality and cleaning’,²¹⁰ including reporting on ‘how key industry sub-sectors (security and cleaning services) rely on multi-level labour supply arrangements and the correlation with non-compliance’.²¹¹

In the committee’s own survey on experiences of wage theft, the largest number of responses received similarly related experiences of wage theft in the accommodation and food services industry (23.17 percent), followed by other services (14.94 percent), and retail trade and construction (both 8.23 percent).²¹²

The QCU reported that of 169 responses to a wage theft survey conducted on its website, the industries of incidence most commonly nominated were accommodation and food services (17.2 percent); agriculture, forestry and fishing (14.2 percent); other services (11.8 percent); manufacturing (9.5 percent); and retail trade (8.9 percent).²¹³ The QCU stated that the high proportion of responses from the accommodation and food services industry is ‘unsurprising’ and noted that responses for the other services industry grouping ‘includes responses for contract cleaning and security’.²¹⁴ The QCU stated in this regard:

It would be unsurprising that these industries would also be over represented compared to their proportion of the work force... whilst contract cleaning represents 1.2 percent of the total workforce (ABS 2016) it represents 4.7 percent of responses to the QCU web site. Likewise,

²⁰⁷ IR Claims, submission 013, p 18.

²⁰⁸ Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, p 16.

²⁰⁹ Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, p 14.

²¹⁰ Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, p 10.

²¹¹ Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, p 10.

²¹² See chapter 5.

²¹³ QCU, submission 034, p 14.

²¹⁴ QCU, submission 034, p 15.

*security represents 0.4 percent of the total workforce but 3.6 percent of responses to the QCU web site.*²¹⁵

Job Watch Inc. (JobWatch) and LawRight respectively submitted that the Queenslanders who contact JobWatch's information service and access LawRight's legal self-representation service to recover unpaid entitlements mostly worked in accommodation and food services, retail trade, construction, and other services.²¹⁶

The IEU and Transport Workers Union also highlighted issues in their sectors,²¹⁷ and IR Claims emphasised that while rates of non-compliance may vary, 'it is our experience that wage theft occurs in almost every industry, including medical, legal, transport, trades, construction and childcare.'²¹⁸

4.4.1 Accommodation and food services

According to 2016 Census data, 156,672 workers were employed in the accommodation and food services industry in Queensland. If one were to extrapolate the rate of wage non-compliance detected in the recent audit of Fortitude Valley bars and cafes, to the number of employees engaged in the accommodation and food services industry, the QCU stated that it would be 'in the order of 94,000 employees within that industry alone [who] would not be in receipt of their proper entitlements'.²¹⁹

The FWO has reported that its 'operational data has consistently indicated this industry is over-represented in non-compliance with workplace laws':²²⁰

Despite it only making up around 7% of Australia's workforce, the hospitality industry accounted for the highest number of disputes the FWO assisted with both in 2016-17 (17%) and 2017-18 (18%). We also made over \$4.8 million in recoveries from this sector - 19% of all our recoveries.

It is the industry in which a significant proportion of vulnerable workers (in particular young workers and migrant workers) seek our assistance, accounting for 33% of all formal disputes we assisted migrant workers with, and 29% of all formal disputes we assisted young workers with. Thirty-seven percent of all anonymous reports received were in relation to the hospitality industry.

*The industry is also over-represented in our compliance and enforcement outcomes. It makes up almost a third of all of our litigations in the last two years, and had the highest number of compliance notices (34%), infringement notices (36%) and letters of caution (30%) issued in 2017-18.*²²¹

Chef David Carter told the committee:

Every single person I know who has spent a reasonable amount of time working in hospitality has wage theft stories—from being worked well and truly over your salaried hours to penalty rates not being paid and superannuation not being paid. I do not know anyone who has spent more than a few years or has worked in a number of establishments who does not have wage theft stories...

²¹⁵ QCU, submission 034, p 15.

²¹⁶ JobWatch, submission 016, pp 6-7; LawRight, submission 028, p 9.

²¹⁷ See: IEU, submission 007; Mr Peter Biagini, Secretary, Transport Workers Union (TWU), public hearing transcript, Brisbane, 16 August 2018, pp 38-39.

²¹⁸ IR Claims, submission 013, p 7.

²¹⁹ QCU, submission 034, p 28.

²²⁰ Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, p 19.

²²¹ Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, p 19.

*It is ingrained. It is indoctrinated... If you try to make an issue of it, in the hospitality industry everyone knows everyone else within a few degrees of separation. The intimidation factor they use is that you will be badmouthed and you will never get another job in this industry again.*²²²

4.4.2 Horticulture

Issues with exploitation of horticultural workers have been highlighted in a number of previous inquiries, including the Senate EERC inquiry into the exploitation of working holiday visa holders and the Queensland parliamentary inquiry into the practices of the labour hire industry in Queensland in 2016. As noted by Berg and Farbenblum, in the National Temporary Migrant Work Survey, 'underpayment was widespread across numerous industries but... especially severe in fruit and vegetable picking'.²²³ The survey also found 53 percent of fruit and/or vegetable pickers or packers and farm workers, were paid \$15 or less.²²⁴

The FWO highlighted the incidence of wage theft in the horticulture industry, in its inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program. The inquiry was established after an escalation in the number of requests for assistance received by the FWO from temporary visa holders.²²⁵ In its report, the FWO noted 'locally sourced labour was often either reluctant or unwilling to undertake the labour-intensive and low skilled work involved in the horticulture and agriculture sectors'.²²⁶ It was reported that:

*... a 417 visa holder's desire for a second year extension and the requirements to undertake specified work can have the unintended consequence of driving vulnerable workers to agree to work for below minimum entitlements and in some circumstances enter in to potentially unsafe situations.*²²⁷

The inquiry identified instances of underpayment and/or non-payment of wages and an increased dependency on the employer by the visa holder seeking employment to fulfil the 88-day specified work requirement of the 417 visa program, in order to secure a second year visa and stay in Australia.²²⁸

Ms Rachel Mackenzie of Growcom spoke of the incidence of wage theft in the horticulture industry, but noted:

It is very difficult to track workers who are illegally working in the horticulture sector because they are not putting up their hands...a lot of money flows through horticulture, but the profit margins are not particularly high. When you have commodities where really growers are being

²²² Mr David Carter, Worker/chef, QCU, public hearing transcript, Brisbane, 16 August 2018, p 4.

²²³ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 5.

²²⁴ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 31.

²²⁵ Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, October 2016, p 3.

²²⁶ Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, October 2016, p 16

²²⁷ Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, October 2016, pp 49-50.

²²⁸ Australian Government, FWO, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, October 2016, p 3.

*paid less than the cost of production, it is very tempting to cut corners. Nobody for one minute is excusing that, but it does create an environment where that happens.*²²⁹

4.4.3 Food processing

The committee heard from the Australian Meat Industry Employees Union (AMIEU), representing workers in the meat processing industry. It was stated that the meat processing industry ‘contributes \$16 billion a year to our national economy and \$5 billion here in Queensland’.²³⁰ The AMIEU advised that it had been involved in ‘many blatant cases of wage theft’ and provided evidence to the committee, as a ‘snapshot of what has been happening within our industry’.²³¹ It stated that instances of wage theft in the meat processing industry commonly included labour hire arrangements, and involve overseas visa workers. The AMIEU told the committee that it had assisted members to reclaim hundreds of thousands of dollars over the last five years.²³²

4.4.4 Construction

As previously noted, the CFMEU estimated that sham contracting in the construction industry cost the public almost \$2.5 billion in 2011.²³³ In its report on its inquiry into the corporate avoidance of the FWA, the Senate EERC stated that ‘the construction industry has been plagued by sham contracting for many years’.²³⁴

At the public hearing on the Gold Coast, Mr Beau Malone of the ETU stated that ‘we are seeing an escalation, in our view, in this space of underpayments due to the insecure work that exists out in that industry at the moment’.²³⁵

At the hearing in Toowoomba, Mr Dan McGraw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of the ETU, stated:

*Locally as well, the ETU has dealt with companies that have gone into receivership where employees were not paid their entitlements. A company would set up a holding company, transfer all of their assets, transfer all of their finances, make all of their employees redundant and say, ‘We’ve got no money to pay your entitlements. See you later.’ We have to deal with that a lot as well.*²³⁶

Dr David Morrison stated that the practice of illegal phoenixing is recognised ‘to be rife in the construction industry for example, where various trades are able, by use of a company structure, to avoid payment to various creditors including subcontractor trades and the ATO’.²³⁷

²²⁹ Ms Rachel Mackenzie, Chief Advocate, Growcom, public transcript hearing, Brisbane, 17 September 2018 (morning), p 4.

²³⁰ Mr Ronald Weston, Queensland Branch, AMIEU, public hearing transcript, Ipswich, 11 September 2018, p 1.

²³¹ Mr Ronald Weston, Queensland Branch, AMIEU, public hearing transcript, Ipswich, 11 September 2018, p 1.

²³² Mr Ronald Weston, Queensland Branch, AMIEU, public hearing transcript, Ipswich, 11 September 2018, p 1.

²³³ Construction, Forestry, Mining and Energy Union, submission to the Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, Submission 200, p. 11.

²³⁴ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 75.

²³⁵ Mr Beau Malone, State Organiser, Electrical Trades Union, Queensland and Northern Territory Branch, public hearing transcript, Gold Coast, 10 September 2018, p 20.

²³⁶ Mr Dan McGraw Branch President, Queensland Council of Unions Toowoomba Branch; State Organiser (South West Queensland), Electrical Trades Union, public hearing transcript, Toowoomba, 10 September 2018, p 7.

²³⁷ Dr David Morrison, submission 032, p 14.

4.4.5 Cleaning and security

In 2014, the FWO commenced an inquiry into cleaning arrangements in Tasmanian supermarkets, and specifically targeted the labour procurement contracting arrangements adopted at Woolworths stores. The inquiry was established ‘in response to intelligence received by the Fair Work Ombudsman that supermarket cleaners in the state were being significantly underpaid’,²³⁸ and the FWO’s ‘experience of a correlation between multiple levels of subcontracting and non-compliance with the Fair Work Act 2009’.²³⁹ The FWO found ‘an alarming non-compliance rate of 90% by contractors and sub-contractors at these sites, and underpayments of over \$64,000.’ As a result of the findings, referrals were made to the ATO, two litigations were initiated by the FWO, and as of August 2018, Woolworths has publicly committed to monitoring its network of cleaning contractors through a new compliance partnership with the FWO.²⁴⁰

During its inquiry, the committee heard evidence of wage theft occurring in the cleaning and security industries. Mr Dermot Peverill of United Voice stated:

*I think what comes out in that is the two points ... vulnerable workers and transient workers. When you get those two together in a low-paid contracting industry like the members I represent—contract cleaning and contract security—as Giri says, it is inescapable.*²⁴¹

Mr Brian McCarrick, Director of Ardent Security, told the committee that ‘wage theft has been a constant problem’ in the security industry since he started work in the industry in 1985.²⁴²

As previously noted, in June 2018, the FWO conducted an inquiry into the procurement of security services by 23 local governments. The FWO found that 14 councils (61 percent) had a non-compliant labour supply chain, and that 42 percent of principal contractors and 63 percent of subcontractors failed to comply with Commonwealth workplace laws. The FWO identified total underpayments of \$72,250 to 54 employees.²⁴³ It was also noted that in Queensland, 70 percent of the businesses providing security employees to three councils were non-compliant, and one business undertaking security work for the Gold Coast City Council was found to have underpaid three employees almost \$16,000 (from April 2015 to June 2016).²⁴⁴

²³⁸ Australian Government, FWO, 14 February 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/february-2018/20180214-ww-cleaners>

²³⁹ Australian Government, FWO, *An inquiry into the procurement of cleaners in Tasmanian supermarkets*, February 2018, p 2.

²⁴⁰ Australian Government, FWO, 14 February 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/february-2018/20180214-ww-cleaners>

²⁴¹ Mr Dermot Peverill, Industrial Officer, United Voice, public hearing transcript, Brisbane, 16 August 2018, p 43.

²⁴² Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 7.

²⁴³ Australian Government, FWO, *Inquiry into the procurement of security services by local government*, June 2018, pp 11, 13.

²⁴⁴ Australian Government, FWO, *Gold Coast security operator penalised \$115,668*, media release, 24 July 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/july-2018/20170724-vip-security-penalty>

4.5 Regional variation

Key statistics

- Responses to the committee’s survey, while predominantly from Brisbane (66.16 percent), included responses from across the state, including the Gold Coast region (8.54 percent), Central Coast region (7.93 percent), Ipswich region (4.88 percent), and North Queensland (including Townsville and Cairns) (4.57 percent).
- LawRight submitted that of the clients seeking assistance for wage theft claims through its self-representation service, 43.98 percent were from Brisbane, 37.25 percent were from parts of South East Queensland outside Brisbane, and 15.13 percent were from remote or regional areas.²⁴⁵
- a Brisbane—specific campaign audit of Fortitude Valley bars and cafes found 60 percent of businesses were non-compliant, with 33 percent of breaches involving underpayment of the hourly rate and 12 percent of breaches relating to the payment of weekend penalty rates,²⁴⁶ and
- two multi-industry regional campaigns carried out by the FWO in Central Queensland and Far North Queensland, the results of which were reported in 2016, revealed wage non-compliance rates of 31 percent and 21 percent respectively.²⁴⁷

As previously noted, three regional campaigns carried out by the FWO in recent years, in Brisbane, Central Queensland and Far North Queensland, identified varying levels of non-compliance. Given the FWO’s campaigns are informed by an intelligence-led approach, which focuses on regions (and industries) from which there have been a concentration of reports, inquiries and identified incidents,²⁴⁸ it is fair to conclude that FWO data pointed to a higher risk of non-compliance in these regions. However, as the YWH noted, without specific audit data available for other parts of the state, it is difficult to determine incidence: ‘we would say that wage theft in the regions is not measured’.²⁴⁹

Despite a lack of regional audit data, evidence provided by stakeholders at regional hearings highlighted a range of regional wage theft issues, many of which tended to be characterised by the confluence of particular high risk industries and high risk workers within the local area. When questioned about regional issues in Toowoomba, Mr Dan McGraw, Branch President of the QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, stated:

*Straightaway I think of the Lockyer Valley and the fresh produce industry. There are a lot of foreign workers down there. I know that Immigration does raids down there regularly, but the problem is: how do we get access to these workers to talk about it? They do not know their rights. If a worker does not know their rights, they do not know they are getting ripped off, and it is hard for us to get on sites and talk to these workers. They are bundled up in houses and put all over the place so it is very hard. That is one industry that comes to mind.*²⁵⁰

²⁴⁵ LawRight, submission 028, p 5.

²⁴⁶ Australian Government, FWO, *Food Precincts Activity Report*, July 2018, pp 6, 21.

²⁴⁷ Australian Government, FWO, *Outcomes from the Fair Work Ombudsman’s Far North Queensland Regional Campaign 2015*, Australian Government, July 2017, p 4; Australian Government, FWO, *Central Queensland Regional Campaign*, March 2017, p 4.

²⁴⁸ Australian Government, FWO and ROC, *Annual report 2017-18*, 2018, p 16.

²⁴⁹ Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 24.

²⁵⁰ Mr Dan McGraw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 8.

In Bundaberg, one of the largest horticultural production regions in Australia, former Salvation Army worker and local businessman Mr Moe Turaga highlighted a history of systemic problems with the exploitation of backpackers and seasonal workers from the South Pacific by rogue labour hire operators, including acknowledging three deaths in the industry in Bundaberg.²⁵¹ While noting apparent improvements since the introduction of the state's labour hire licensing scheme, Mr Turaga advised:

Over the last couple of years we have been trying to provide pastoral care to seasonal workers who are coming here from the South Pacific... They are living on about \$50 a week and it is not the best thing for a big, round Tonga man to be living on noodles and rice.

.... If they speak up... their labour hire contractor, who is from their own nationality for most of those source countries, will punish them; they will not come back; they will not be able to go through the program again the year after or the following year... They should be making \$23 an hour. Half of them are making \$7 an hour in this modern day of 12 hours or 13 hours—it is not the farmer's fault. I will say that openly because most of the farmers I spoke to in Bundaberg are paying the right wages to the labour hire companies... It is the labour hire company that is the problem where the money is not flowing through to the workers or the seasonal workers.²⁵²

In Mackay, the committee heard from locals that they had often heard the term 'Whitsunday wages' used locally – a term which they understood to be synonymous with the imposition of a flat rate of pay, with no payment of penalty rates for weekends, overtime hours and public holidays.²⁵³

Some of the restaurants close of a public holiday, especially Easter Monday ... Some of them open. The ones that close say, 'We have to pay penalty rates, so we will not open.' The ones that are open have been there long term and they say, 'No, we don't pay penalty rates'.²⁵⁴

In Cairns, the committee heard of problems in the local tourism industry, which engages a significant backpacker workforce. It was suggested to the committee that some business owners may fail to account for seasonal fluctuations and seek to cut costs by reducing workers' wages:

We are really subject to tourism and people. We have a fluctuating industry. Just after Chinese New Year there are three or four months where hardly anyone visits the town and then in July all of a sudden people come again. There are people who live here who are business owners who have not necessarily worked in the tourism industry before. They do not expect there to be such a big gap of income. If they do not account for that, they see half a year where they make profits and they do not see that for the other half of the year they need the profits they made to save up ...for those bad months. They did not expect that and all of a sudden they cannot pay. What is the business cycle here for small businesses? It is as long as the lease is, which is usually three to five years, and then people give up...

I have seen businesses here shortcutting wherever they can—half an hour from everyone—but what do people say? People say, 'Oh well, it is only half an hour'.²⁵⁵

Finally, the largest turnout of stakeholders and members of the public at all regional hearings was at the hearing on the Gold Coast (also the region that was the second largest source of responses to the committee's survey). Noting that construction, retail trade and accommodation and food services

²⁵¹ Mr Moe Turaga, private capacity, public hearing transcript, Bundaberg, 12 September 2018, p 9.

²⁵² Mr Moe Turaga, private capacity, public hearing transcript, Bundaberg, 12 September 2018, p 9.

²⁵³ Private hearing transcript, regional hearing, 2018.

²⁵⁴ Private hearing transcript, regional hearing, 2018.

²⁵⁵ Private hearing transcript, regional hearing, 2018.

feature among the top few industries of employment in the Gold Coast region,²⁵⁶ the reports of problems with wage theft in the region were consistent with evidence regarding the high risk nature of these industries.

4.6 Further research

Stakeholders regularly commented on the need for more comprehensive data and improved transparency in regulator reporting, to support informed and appropriately targeted responses to wage theft.²⁵⁷ While acknowledging that wage theft ‘is very difficult to measure’, the YWH stated:

*The statistics that we have right now are shocking. The statistics that are unreported could be even more so... The statistics that we referred to in our submissions are what we have available to us, but there is a lack of organisations out there that are able to measure those statistics.*²⁵⁸

Dr David Morrison submitted:

*Australian regulatory agencies generally are opaque when it comes to sharing data about their operations. There is an urgent need for a more transparent landscape with respect to accessing the data held by various government agencies.*²⁵⁹

Senate committees have also commented on the limits of available data in recent reports.²⁶⁰ In particular, the Senate Economics References Committee, in its report on non-compliance with the SG, noted the ‘data gaps’ which make it difficult to accurately estimate the extent of non-payment of the SG,²⁶¹ and recommended ‘the ATO and ASIC work together to collect data on abandoned companies to produce a comprehensive picture on the levels of unpaid SG contributions left by such companies’.²⁶²

Committee comment

While there are limits to available statistics, those that are available consistently show that wage theft is endemic across Queensland and Australian workplaces. Further, it is ‘systemic’ in some industries and amongst the vulnerable cohorts who work in them.

The cumulative picture painted by available datasets, and responses to the survey of workers carried out by the committee as part of our inquiry, is sufficient to allow identification of the key ways in which wage theft is occurring, and to help pinpoint common conditions and variables that are allowing it to occur, with responses to be targeted accordingly. These forms of wage theft and underlying factors are explored further in chapters 7 and 8.

²⁵⁶ .id, *Gold Coast City, Industry sector of employment* (2016 Census data), <https://profile.id.com.au/gold-coast/industries>

²⁵⁷ See, for example: Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, pp 21-22; Dr David Morrison, Associate Professor, University of Queensland; public hearing transcript, Brisbane, 20 August 2018, p 21; Maurice Blackburn Lawyers, response to a question taken on notice at the public hearing on 16 August 2018, pp 1-3; Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 24.

²⁵⁸ Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 24.

²⁵⁹ Dr David Morrison, submission 032, p 17.

²⁶⁰ The Senate EERC acknowledged the likelihood that actual rates of non-compliance far exceed those suggested by regulator statistics. See: Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, submission 205, p 69.

²⁶¹ Parliament of Australia, Senate Economics References Committee, *Superbad – Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, p x.

²⁶² Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, p xiv.

5 Survey results – What Queenslanders said

The following outlines the results of the committee’s survey on experiences of wage theft in Queensland. Information about the survey methodology is provided at Chapter 1.

5.1 Survey sample

The committee received 360 survey responses. The committee excluded 32 responses from consideration as the respondent reported that the incident occurred in another jurisdiction (26 responses) or did not specify a postcode (6 responses).

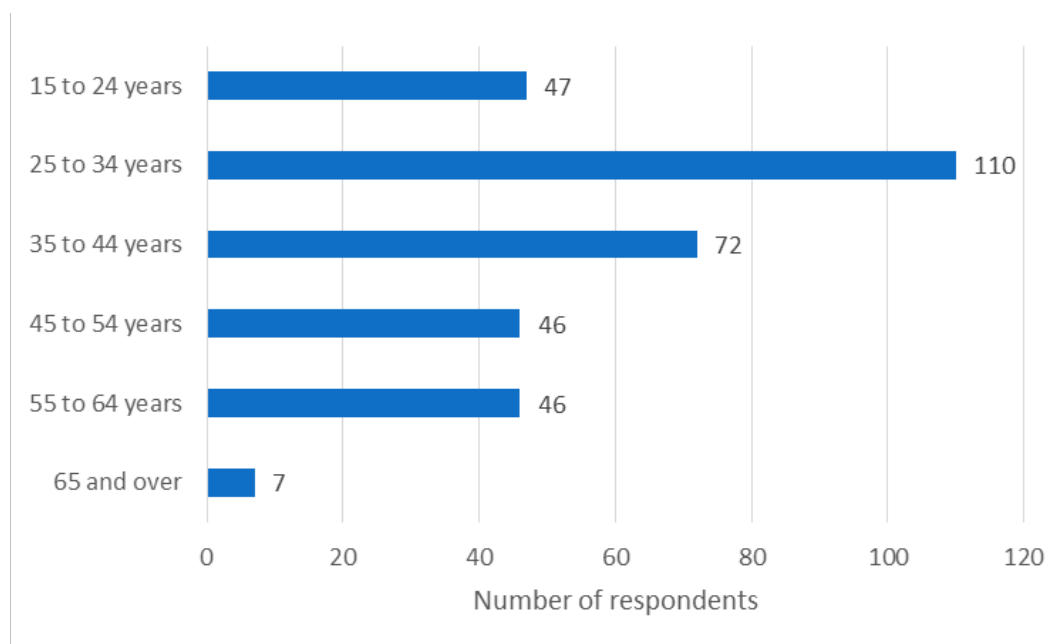
Data from the remaining 328 responses was analysed. Respondents worked in a range of industries, and had experienced varying levels of wage theft, in a range of locations.

Of the 328 respondents, 259 identified as Australian residents (79.0 percent) and 69 (21.0 percent) as visitors to Australia. Three respondents identified as Aboriginal (0.91 percent) and one respondent (0.30 percent) identified as a Torres Strait Islander.

Approximately half of the respondents identified as male (50.91 percent) or female (48.48 percent) and two respondents (0.61 percent) indicated their gender was other. Seventy-five of the 328 respondents (22.87 percent) stated they were a member of an industrial organisation such as a union or employer registered body at the time of the wage theft issue.

The age group most highly represented was that of people aged 25 to 34 years (33.54 percent) followed by those aged 35 to 44 (21.95 percent), as shown in Figure 1 below.

Figure 1: Number of respondents experiencing wage theft by age group



Source: Inquiry into wage theft in Queensland, survey data.

Ninety-five respondents (28.96 percent) spoke a language other than English at home. Of the 60 respondents who specified the language spoken at home, 43 respondents (71.67 percent) identified that they spoke Spanish.

Of the 328 respondents, 26 (7.93 percent) reported an ongoing disability.

5.2 Experiences of wage theft

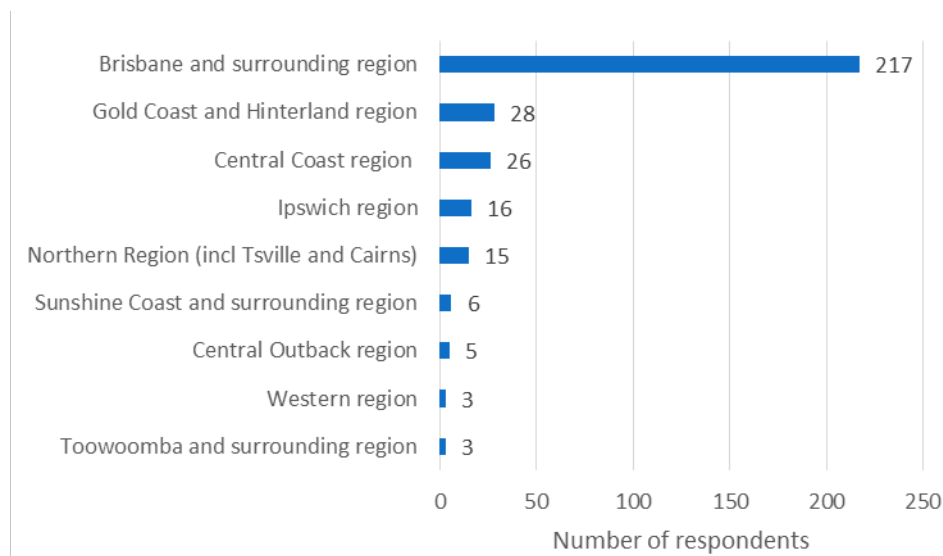
5.2.1 Time of experience

Most respondents reported they had experienced wage theft within the last year (178 responses), with 136 responses indicating the wage theft occurred more than a year ago but within the last six years. The least number of participants responded that the issue had occurred more than six years ago (43 responses). Participants could choose multiple responses (noting that the person may have experienced multiple instances of wage theft).

5.2.2 Location of wage theft

Of the 319 respondents that identified a region in which their wage theft issue took place, 217 (68.03 percent) selected areas within the Brisbane region. This was followed by the Gold Coast and Hinterland Region with 28 respondents (8.78 percent) and the Central Coast Region (including Bundaberg and Wide Bay, Mackay and the Whitsundays, and Rockhampton) with 26 respondents (8.15 percent).

Figure 2: Regional locations of wage theft



Source: Inquiry into wage theft in Queensland, survey data.

5.2.3 Employment status

Most respondents recorded their employment status at the time of the issue as being casual employment (126 respondents or 38.41 percent), followed by permanent full-time (101 or 30.79 percent).

The majority of respondents reported they were employed directly by the employer (252 respondents or 76.83 percent), with 40 respondents recording their employment was undertaken as an independent contractor (12.20 percent). Nineteen respondents were employed through an agency/labour hire arrangement, and 17 were not sure of their employment status at the time of their wage theft issues.

One respondent who reported that their issues occurred during employment through an agency/labour hire arrangement, commented:

I was a casual worker employed through labour hire [employer name] as a packer. All packers could not earn a reasonable salary. We were paid on piece rates per punnet of berries. The faster packers could earn \$12-14 au per hour before tax. The slower earn \$5-6 au per hour before tax (even when working in the peak season)... I only could earn \$5-10 au per hour from second trays.

We spent a lot of time to sorting fruits, but were not paid for this, only the amount of punnets. With the low wages, most of us could only afford food and accommodation. Some of packers wanted to take a day off, but the response is 'if you have a day off and you would lose this job'.

5.2.4 Types of wage theft

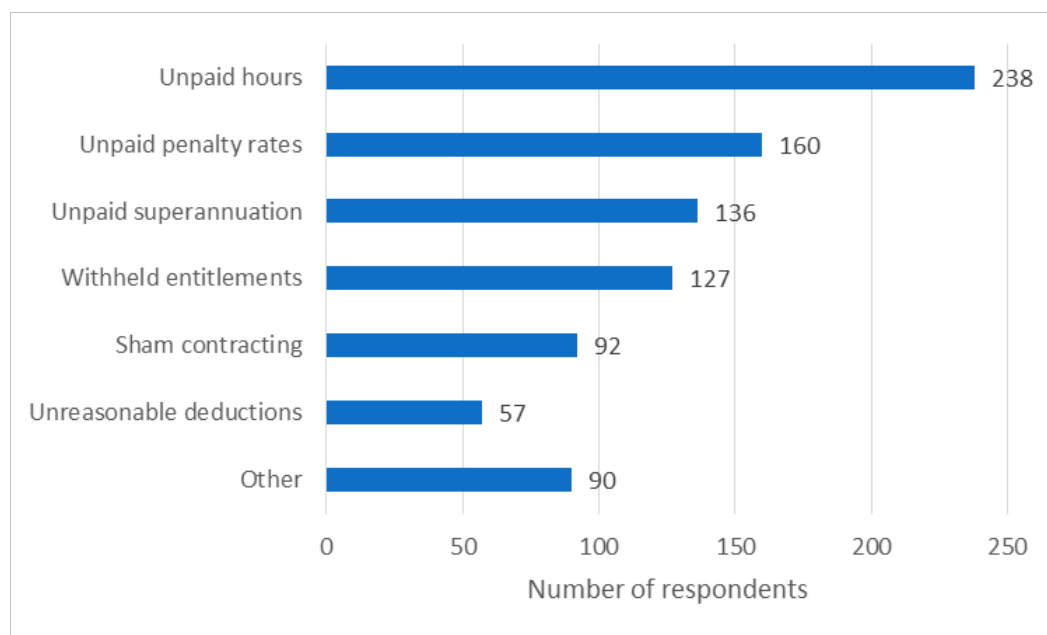
The survey asked respondents to choose one or more of the types of wage theft they had experienced:

- unpaid hours (including not being paid for all hours worked, for time spent training and in work meetings, and unreasonable length trials; or being paid less than the agreed wage)
- unpaid penalty rates
- unpaid superannuation
- unreasonable deductions
- withholding other entitlements (including not being allowed to take breaks, or not being paid leave to which you are entitled)
- sham contracting (where employees have been made to use an ABN and act as a contractor, when they should have been considered as an employee), and
- other (respondents were asked to specify other types of wage theft in 'further information').

Unpaid hours were reported by 238 respondents (72.56 percent); 160 respondents (48.78 percent) reported unpaid penalty rates; 136 respondents (41.46 percent) reported unpaid superannuation; and 127 respondents (38.72 percent) reported other entitlements had been withheld. (Figure 3).

Sham contracting was reported by 92 respondents (28.05 percent), and unreasonable deductions were reported by 57 (17.38 percent). 'Other' was selected by 90 respondents (27.44 percent) and included unpaid redundancy payments, unpaid unused annual leave, unpaid termination, and payments on a lower payscale than required of the duties they performed.

Figure 3: Types and reported incidence of wage theft



Source: Inquiry into wage theft in Queensland, survey data.

5.2.4.1 Unpaid hours and unpaid penalty rates

Respondent comments about their experience of unpaid hours and unpaid penalty rates included:

- *I was with them from 4.30 am until 3.30 pm. They paid for hours worked doing cleaning, discounted transportation minutes. However, they paid between 4 to 6 hours per day, which was not consistent with the hours actually worked. At the time when I asked them in detail for the hours worked, they fired me...*
- *I was employed from the age of 18 to 19 at a local cafe in New Farm, Brisbane. I was paid \$14.50/hour, a rate that did not change after I turned 19. I was not paid weekend penalty rates or any superannuation. My employer made no efforts to inform me of my rights in this area. I accepted my pay rate without question and did not realise that it was lower than the legal minimum.*
- *I was told I would be fired for asking for breaks. I worked every public holiday and most weekends and never once received penalty rates. How was your Xmas, I worked 15 hours straight and got nothing for it.*

5.2.4.2 Unpaid superannuation

Comments from respondents about their experiences of unpaid superannuation included:

- *I work at a water bottling plant in [employer name]. Since the new owners took over in 2015, myself and other workers have not had our superannuation paid properly. Despite working full time hours over the last two years, I've received hardly any contributions. When confronted about this management have said they 'have a deal with the ATO'.*
- *While working for two separate IT companies in Rockhampton, myself and work colleagues were not paid our superannuation. Despite the figures being displayed on our fortnightly pay slips, both employers failed to make these contributions. This happened to multiple members of staff and not just myself. Failure to pay these contributions occurred at two separate family owned IT businesses that I was employed by.*
- *During that time [employer name] owed me over \$30,000 in unpaid superannuation and when I reported it to the ATO she sacked me...I am not the only one she owes Superannuation to as I know at the time she shut down there was at least 4 of us she hasn't paid... She walked away from it all by shutting the business down. It worked then so she kept doing it with every business and she's doing it again. How is this fair? I am now 52 years old and have \$25,000 superannuation to retire on. I honestly don't know how I'll survive.*

5.2.4.3 Withheld entitlements and unreasonable deductions

Respondents' comments included:

- *I work a 12 hour day, yet my employer will only pay me 10hrs per day during sick days and annual leave. There is also no portable long service. So when the anniversary date for long service comes close the employer terminates our contracts and a new employer takes over the contract.*
- *The wage theft included no pay for some employee meetings, no breaks (paid or unpaid) during long shifts, and tip theft (which is not illegal in Australia apparently, but should be). I and my co-workers didn't complain to our employers or the Fair Work Ombudsman because we were scared to lose our jobs - it is exceedingly difficult to find work while on a Working Holiday visa due to the 6-month rule, even if you intend to stay put and live in one city, and I couldn't afford to spend another month looking for a job without income. The amount of time, struggle with the employer, and bureaucracy involved in going to the Fair Work Ombudsman would not be worth it.*

- *In a job as a barista, working 9 hour days we were prevented from taking our breaks as the owner would not hire enough staff to cover time spent on breaks. He thought he could pay for lunch every day to make up for it.*

5.2.4.4 Sham contracting

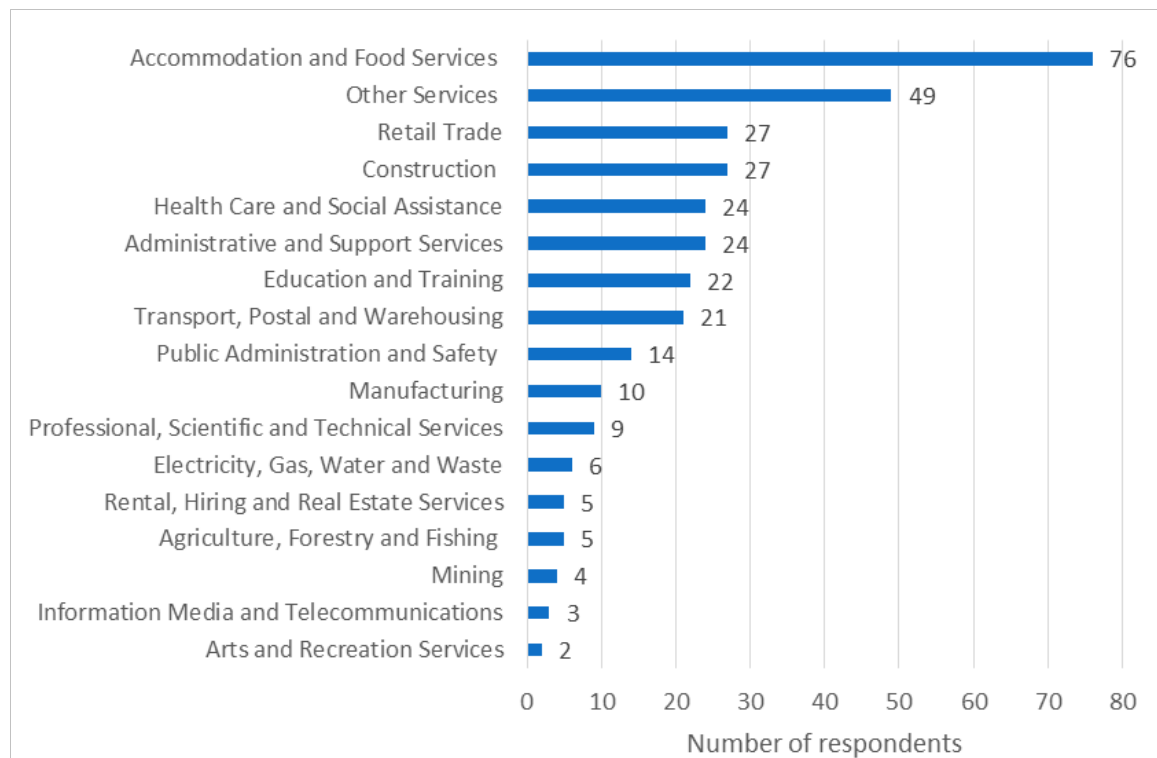
Comments from respondents about their experience of sham contracting included:

- *The company hired me more than a year ago as a subcontractor (ABN) to clean four sites which are at the same places, times and days every week in Brisbane... My supervisor gave me a T-Shirt with the company logo I must use at all times [sic]. The company did not provide me any equipment as vacuum, dust mop, mops, cleaning products, clothes, buckets, etc. (I understood that I was a subcontractor so I must have bought them) and to have a car. Even though after six months working for this company, my supervisors asked me to buy an extra equipment (flat mop), because some people had had some problems using a normal mop so they suggested one which costs more than hundreds of dollar and also suggested to buy it as soon as possible since they could finish my agreement. After, the trainers explained to us (all the subcontractors) with an email the importance of having this "new mop" they remembered to us that whole responsibility if something happens (accident or incident) it will be our responsibility. Furthermore, the company stated to control the work time two months ago with an app which we must to register the entrance and exit of each site. To be honest, I do not have clear the conditions of a casual job. However, I feel that the company has us as subcontractors for paying less money (around \$20 - \$22 p/h, but most of times, the time is not enough and we do not get the Payment for that) and skipping taxes and superannuation.*
- *For many years I have been driving tourists in Cairns and for the last few the employment basis offered is as a subcontractor at below award wages. It is as if many companies in the same sector collude to all offer similar below award employment conditions. They do not pay penalty rates for odd hours, public holidays or weekends. They do no pay superannuation. They do not provide WorkCover. They do not recognise minimum callout hours. If you complain you get your hours cut. The company is the worst I have ever worked for. There is no focus on human resources.*

5.2.5 Industries affected by wage theft

The largest number of reported wage theft experiences were in the accommodation and food services industry (76 respondents or 23.17 percent). No other industry accounted for more than ten percent of responses except for other Services, which was reported by 49 respondents (14.94 percent). Other Services includes a broad range of personal services including; religious, civic, professional and other interest group services; selected repair and maintenance activities; and private households employing staff (Figure 4).

Figure 4: Industries and incidence of wage theft



Source: Inquiry into wage theft in Queensland, survey data.

2.5.1 Incidence within industries

In the top five industries of incidence, the four most commonly reported types of wage theft were unpaid hours, unpaid penalty rates, unpaid superannuation and withholding of entitlements.²⁶³

Accommodation and food services

Seventy-six respondents reported issues in the accommodation and food services industry (including hospitality and hotel workers). 76.31 percent (58 respondents) reported unpaid hours, 60.53 percent (46 respondents) reported unpaid penalty rates, 39.47 percent (30 respondents) reported withholding of entitlements, and 36.84 percent (28 respondents) reported unpaid superannuation.

Comments from respondents about experiences of wage theft in the accommodation and food services industry included:

- *I was doing 50+ hours week and getting paid for 38h. Every week. In the end I was making less than the minimum wage. I called the Ombudsman and was told to talk with my employer. As I was afraid of losing my job I didn't talk with them. It's a standard practice in hospitality industry. We have no support from the agencies that supposed to support the people.*
- *I was employed from the age of 18 to 19 at a local cafe in [suburb], Brisbane. I was paid \$14.50/hour, a rate that did not change after I turned 19. I was not paid weekend penalty rates or any superannuation. My employer made no efforts to inform me of my rights in this area. I accepted my pay rate without question and did not realise that it was lower than the legal minimum.*

²⁶³ Note that respondents were able to select multiple types of wage theft. 'Other Services' were excluded from the top five industries in this summary.

- *Over many years in the hospitality industry I have experienced just about every possible kinds of wage theft. In my current position as a full time chef working for a catering company in the Coal Seam Gas industry I am currently in dispute with my employer who has on many occasions left me sitting at home without notice due to "not having any work available", we are treated like casuals even though we are permanent full time employees. They are also paying below award wages, not paying for travel time from Point of Hire, usually Toowoomba or Brisbane, to the remote camps in which we work. Sometimes these travel days are in excess of 12 hours and we get paid nothing. They are also not paying overtime at overtime rates....*

Retail trade

Of the 27 respondents who reported issues in the retail trade industry, 96.30 percent (26 respondents) reported unpaid hours, 59.30 percent (16 respondents) reported unpaid penalty rates, 48.15 percent (13 respondents) reported unpaid superannuation, and 44.44 percent (12 respondents) reported entitlements were withheld.

Respondents' comments about experiences of wage theft in the retail trade industry included:

- *My employer often made mistakes with the payment of wages, so I decided to use Excel spreadsheet to work out my annual leave balance, as I did not trust my pay slip. During this process, I decided to work out if my pay was in line with the applicable award, and this led to the discovery that my employer had significantly underpaid me by about \$10,000 over the 3 years since I started working for them... Knowing that I am at least \$10,000 short of pay for the 3 years I have worked for this employer, made me feel physically sick.*
- *As it was part of the culture at that workplace to work additional hours I felt as if I couldn't report it and if I did I would be seen as a trouble maker and let go.*

Construction

Of the 27 respondents who reported issues occurring in the construction industry, 51.85 percent (14 respondents) reported an experience of unpaid hours, 44.44 percent (12 respondents) reported withholding of entitlements, 40.74 percent (11 respondents) reported unpaid penalty rates and unpaid superannuation.

Comments from respondents about experiences of wage theft in the construction industry included:

- *Working in excess of 100 hours some weeks. Never less than 60 hours. Only paid 40 hours and they make me put 40 hours on timesheet. Competition has up to four guys doing my job. My company just has me. Culture is suck it up and do it. Other staff have complained and either been fired shortly after or verbally harassed as having no commitment to the company.*
- *For 12 months I was not paid my travel allowance (\$9 a day which is a lot of money as a third year apprentice) I was employed by a group training organisation. After contacting fair work I was told they couldn't do anything. The employer would not answer my calls or return emails. It wasn't until the electrical trades union had to get involved on my behalf was this issue resolved. I know I wasn't the only one but I was the only one to pursue the issue and receive a back pay.*

Health care and social assistance

Of the 24 respondents who reported issues occurring within the health care and social assistance industry, 75 percent (18 respondents) reported an experience of unpaid hours, 45.83 percent (11 respondents) reported withholding of entitlements, and 20.83 percent (5 respondents) reported unpaid superannuation.

Respondents' comments about experiences of wage theft in the health care and social assistance industry included:

- *[employer name] underpaid my holiday pay for years. I brought it to their attention and they ignored me. I brought it to the attention of my union and [employer name] would repeatedly assure them the back pay was "in the next pay cycle". This went on for 9 months. I had to tell [employer name] was taking it to Fair Work Australia for them to finally pay me what was owing. I was also warned verbally to "keep quiet about it" as there was countless others who were unaware of the EA terms.*
- *I was a full time Physiotherapy employee paid on a commission basis. I noticed certain patients and other billable items were being back dated into past pay periods which meant I didn't receive my portion of the payment. When comparing my pay to the corresponding weekly billing reports it seemed accurate. Upon auditing previous pay periods, the loss totalled > \$8000 over the 4 years. I brought this to my employers attention. It was agreed that my calculations were correct however they were angry with me, told me I didn't understand the billing process and that it was my fault for not noticing this earlier. For 2 months I worked with them to try to resolve the issue with no success. Eventually I resigned. Upon resigning I was sent home immediately. Instead of paying me my base wage during my 4 weeks' notice period, they just paid me a portion of what I was owed. By my calculations I am still owed >\$5000. This does not include the hours of unpaid work I was required to do to audit my pay nor does it include a review of the first 4 years of my employment with them.*

Administrative and support services

Of the 24 respondents who reported issues occurring in the administrative and support services industry, 87.50 percent (21 respondents) reported an experience of unpaid hours, 45.80 percent (11 respondents) reported unpaid superannuation, 37.50 percent (9 respondents) reported unpaid penalty rates, and 25 percent (6 respondents) reported withholding of entitlements.

Comments from respondents about experiences of wage theft in the administrative and support services industry included:

- *Being employed at a flat hourly rate. With no penalties on weekends and public holidays etc. Where the employers contract was not a registered agreement with Fair Work Australia.*

5.3 Reporting of wage theft

Of the 328 respondents who experienced wage theft, 36.28 percent (119 respondents) reported it to their employer, 25 percent (82 respondents) reported wage theft to the Fair Work Ombudsman (FWO) and 10.06 percent (33 respondents) reported wage theft to the Australian Taxation Office (ATO). Some respondents reported the issue to more than one body, and 143 respondents did not report the issue.

Thirty respondents reported their wage theft issue had been resolved, however, most respondents who said their issue was resolved were not satisfied with the outcome. Five out of the six respondents who reported their case to the ATO were not satisfied; nine out of thirteen respondents were not satisfied with the outcome from the FWO; and three out of eight respondents were not satisfied with the resolution offered by their employer.

A small number of respondents commented on their experience of reporting their wage theft matter, which included:

- *Yes I persisted to argue the case for severance pay and eventually won. I was awarded some severance pay.*

- *His response was to shrug his shoulders and say "sometimes you have a win, sometime we have a win."*
- *They simply stated that is how it is! Your hands are tied when you need an income and this is how they operate! Bullying you into submission!*

On reporting to the FWO:

- *I called the Ombudsman to report excess of reasonable hours, nothing was done. I was told to talk with my employer. Zero support from the government.*
- *Was not paid holiday pay or superannuation. Also was never given the opportunity to take lunch breaks. Reported to my employer and Fair Work. Fair Work advised I could take the employer to court. I did not want to go through the stress so just left.*
- *...The most disappointing thing was the attitude of officials to this exploitation. We went to Fair Work to for ask some information two times. The first time, we went to the office with our landlord who is local. The staff said this problem happened everywhere and didn't want to talk to us. He just wanted to pass the buck. The attitude was awful. After few days, we sent our complaints to Fair Work. A month later we got a call from an inspector, although not everyone who made a complaint was called. The Inspector said the farm could not provide the information such as: our working hours, pay slips etc to him. Most of us offered our own records and pay slips to him but we felt he just wanted to finish this case but never tried to help us. He did not ever contact other complainants. This made us very angry and disappointed. We wanted to leave, but we need the 2nd visa and most of the workers did not have a car. Most of farms in this area do not even pay the tax to government!*
- *I am 16 years old and started full time employment with a small business, I was very committed and loyal to my employer. I had been working for one year and trusted my employer had been paying me correctly. It has taken both myself and parents a lot of work and stress to try and receive the entitlements I am owed. We are now having to prepare for court so I can try and get my unpaid wages and because when I asked my employer to pay me correctly I was fired. We have supplied information to both the ATO and QLD Treasury as the employer had provided conflicting information in relation to my unpaid superannuation and grants the employer received throughout my employment. We have worked with The Fair Work Ombudsman and The Fair Work Commission and have found the process to be stressful and strenuous.*
- *When I contacted the fair work ombudsmen they were excellent. They provided me with the correct hourly rates and I contacted my employer who paid what I was due. However the employer received no fine or punishment.*

On reporting to the ATO:

- *They told me that they didn't have the resources to investigate my situation.*
- *I followed through with the ATO from 2008 till now and they tell me that the "debt has been established" however I have seen no sign of any money paid towards it. I believe it is now in the hands of the receivers which means lawyers will eat up any money left and of course I will get nothing. Furthermore this woman has gone on to buy one agency after another in this area using different ABN and TFN to do so. She racks up the debts, owing people thousands of dollars and then shuts them down with no way for these people to get their money owed to them. The ATO tell me they are aware this happens and they call it "phoenixing" however they can't seem to deliver justice or punishment for her doing it time and again.*

5.4 Summary

The survey data illustrated that people are experiencing many different types of wage theft in Queensland. These experiences cut across a variety of industries, locations, and age groups.

Respondents most commonly experienced unpaid hours. The accommodation and food services industry was the industry in which wage theft was reported by the largest number of respondents.

Respondents who reported wage theft to the FWO and ATO did not always have their issues resolved, or not resolved to their satisfaction.

6 Impacts of wage theft

As noted in chapter 4, the direct economic impacts of wage theft in Queensland and nationally, likely figure in the billions of dollars every year.

Key figures

- On 12 November 2018, just prior to the finalisation of this report, the McKell Institute published projections estimating that conservatively, total lost wages in Queensland are at least \$156.5 million annually. Assuming these workers lost just one percent of their wages, this cost grows to \$244 million; and the loss of five percent of their income would see the cost rise markedly to \$1.22 billion in lost earnings.²⁶⁴
- Nationally, the shortfall in superannuation payments in 2015-16 alone has been estimated at between \$3.26 billion and \$5.9 billion by the ATO and Industry Super Australia respectively, with the ATO pointing to a cumulative \$19.55 billion deficit for the period from 2010-11 to 2015-16.²⁶⁵
- In Queensland, for 2015-16, estimates from Industry Super Australia put the annual loss in unpaid superannuation for the state at up to \$1.12 billion annually, and approximately \$1,915 for an individual.²⁶⁶
- In addition, the McKell Institute report stated that conservative wage theft estimates would see consumer spending reduced in Queensland by more than \$100 million per year, with at least \$60 million in federally levied taxes being forgone in the state as a result of unpaid wages.²⁶⁷

These staggering amounts do not include all of the micro and macro multiplier effects of this serious problem on individuals and their livelihoods; on their families' ability to access services; on business competition and wage growth; and on tax income, superannuation balances and the cost of social security and pensions – all of which go to the productivity, wealth and wellbeing of the community and economy generally. Further, these are effects that may compound and intensify over time.

The McKell Institute report concluded that 'wage theft is a serious problem, a major economic liability for individual workers, federal and state governments, and a manifestly unfair scourge that is widespread through Queensland and Australia, demanding serious policy intervention at both state and federal levels'.²⁶⁸

²⁶⁴ Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy*, The McKell Institute, November 2018, p 7.

²⁶⁵ Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings; Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done*, October 2018, p 3.

²⁶⁶ Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

²⁶⁷ Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy*, The McKell Institute, November 2018, p 7.

²⁶⁸ Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy*, The McKell Institute, November 2018, p 7.

6.1 Impacts on individuals and families

6.1.1 Financial impacts

The committee heard incidents of underpayments and direct financial losses experienced by individuals ranging from thousands and tens of thousands of dollars, up to \$261,715 in one instance.²⁶⁹

For example, some of the direct losses cited included:

- \$18,000 (for a hospitality worker)²⁷⁰
- \$25,000 (for a real estate sales employee)²⁷¹
- \$34,000 including superannuation (for a tourism industry employee)²⁷²
- \$40,000 (for a service station attendant)²⁷³
- \$60,000 (for an IT and communications professional),²⁷⁴ and
- \$261,715 for a motorcycle service manager.²⁷⁵

The Services Union submitted that it is currently pursuing ‘an underpayment of \$150,000 for three workers who were employed by a medium sized community sector organisation from 2012 to 2017’.²⁷⁶ IR Claims stated that in the past two years, ‘our small team has helped recover \$1.8 million in stolen wages for our clients, ranging in individual amounts of \$6,000 up to \$80,000’.²⁷⁷

The OIR noted that as wage theft may be episodic or systematic and prolonged, the effects will vary depending on the circumstances.²⁷⁸ However, regardless of the size of the reported underpayments, the committee heard that the immediate impact of the financial loss associated with wage theft cannot be underestimated, noting the overrepresentation of low-income, vulnerable workers among those affected; and the scope for resulting pressures on ‘basic things like rent, bills and groceries’.²⁷⁹

Experiences of wage theft conveyed to the committee put a very human face on this insidious issue. For example, hospitality worker Ms Kate Hamburg estimated she had been underpaid at least \$100, and noted that although this amount may seem insignificant to some, it meant ‘a lot of money’ to her as a student: ‘That is the difference in being able to afford to travel to uni on public transport—the basics and the necessities of life. It was a substantial amount of money to me at the time’.²⁸⁰

²⁶⁹ IR Claims, submission 013, p 12.

²⁷⁰ Ms Sivaiala Lemisagele, Food manufacturing worker, public hearing transcript, Brisbane, 16 August 2018, p 23.

²⁷¹ Dr Jennifer Fraser, private capacity, public hearing transcript, Sunshine Coast, 11 September 2018, p 17.

²⁷² Private hearing transcript, regional hearing, 2018.

²⁷³ IR Claims, submission 013, pp 7, 12.

²⁷⁴ Mr Jason Spectre, private capacity, public hearing, Gold Coast, 10 September 2018, p 33.

²⁷⁵ IR Claims, submission 013, p 12.

²⁷⁶ The Services Union, submission 046, pp 1-2.

²⁷⁷ IR Claims, submission 013, p 4.

²⁷⁸ Queensland Government, OIR, written briefing, 7 June 2018, p 20.

²⁷⁹ IR Claims, submission 013, p 10.

²⁸⁰ Ms Katherine Hamburg, Hospitality worker, public hearing transcript, Brisbane, 16 August 2018, p 29.

Describing the impact of \$3,600 in amounts owed for completed work, Tim Dunne, a gyrocker, stated:

*My son's education rides on this money. I've got a special needs son, he's got autism, and he goes to a very expensive school – it's \$300 bucks a week - and because I didn't get paid for those weeks - those payments didn't go through.*²⁸¹

Some workers indicated that they had been forced to take out high interest cash loans²⁸² or borrow money from family members just to get by.²⁸³

At the Gold Coast hearing, the committee was moved by Mr Ben Hargreaves' testimony of his own experience in this regard:

Mr Hargreaves: *Just with this situation in general where I have not been paid my redundancy, as a result of that, the way it has been done, I had to go and get a cash loan to pay my bills and now if I do not keep the payments up on that cash loan it is slowly drawing my credit back so my credit is now screwed for any future loans that I might get as a result of this. ...Everything just mounts up. I have had to sell personal possessions. I have had to sell things I have had for 20 years just to get by because these people refuse to do the right thing and they just keep doing it, mate.*

Mr BROWN: *How many more things can you sell?*

Mr Hargreaves: *I have got nothing left, mate. This is my last avenue. If something does not happen soon I am done.*²⁸⁴

IR Claims also highlighted a recent case before the Federal Circuit Court involving a delivery driver who worked at a 'Pizza Hut' outlet, and was paid a flat rate of \$16 an hour under a sham contract. Judge Michael Jarrett said the underpayments were 'significant' to the worker, an Indian man in his 20s:

According to the evidence, he was the sole breadwinner for he and his wife and was responsible for their daily living expenses, rent, groceries and his wife's tuition fees.

*Partly as a result of being underpaid, he needed to borrow about \$1,500 from his cousin in Melbourne and about \$20,000 from his father in India, which he says was culturally shameful and embarrassing. (The driver's) evidence was that he was constantly anxious and stressed about their low bank balance and at time felt pressured and humiliated.*²⁸⁵

For some stakeholders, the theft of their wages meant significant delays in paying off a mortgage,²⁸⁶ with one survey respondent noting that 'we also had to pay more interest over 6 years than we needed to'.²⁸⁷ For others, the security of their housing was more directly under threat as a result of their experience:

I had to give up the unit that I was renting and I ended up with my 80-year-old father supporting me because we were not paid out.

²⁸¹ IR Claims, submission 013, p 72.

²⁸² IR Claims, submission 013, p 84.

²⁸³ IR Claims, submission 013, p 71.

²⁸⁴ Mr Ben Hargreaves, Food processing worker, public hearing transcript, Gold Coast, 10 September 2018, pp 17-18.

²⁸⁵ Judge Michael Jarrett, cited in FWO, '\$216,700 penalties after Pizza Hut franchisee engages in sham contracting', media release, 15 June 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180615-skyter-penalty>

²⁸⁶ Name suppressed, submission 014, p 1.

²⁸⁷ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, survey respondent.

*Between my assistant manager and I, there was about \$70,000-odd worth of long service leave and annual leave accrued. He did eventually pay the redundancy under much protest. Had it not been for my dear old dad, I would have probably been living on the streets or in my car. It was just so traumatic.*²⁸⁸

The impact of wage theft on financial independence and living standards can also increase the strain on formal systems of support (e.g. Centrelink and other forms of social welfare), and on broader social networks.²⁸⁹ At the public hearing in Brisbane on 3 September 2018, Reverend Pauline Harley of the QCA shared a story from her community.

Case study

*'All I can do is give you an example of a lady who came to me just last week. She is in the cleaning industry. She has an ABN but that ABN has been submitted twice to the authorities. She has been socially cut off—she is not from an ethnic group; she is an everyday Australian. She had her Centrelink payments cut off as well. She is now facing homelessness because she cannot pay her rent. She came to me wanting me to pay her rent, but as a church we cannot pay thousands of dollars in rent because of her situation. She has discovered that her tax is now thousands of thousands of dollars, not by her own doing but by her employer or the person she was contracted with has done the wrong thing. For her and her family, she is going to lose her home. She has no way of providing food, so she comes to the church looking for food and looking for a way for us to help her keep her home. There are a number of people who come like that. We give out so much. It will affect her children in school. She is a single mum. That is just one example of an experience I had from last week. There are impacts that go on beyond the individual; it affects families.'*²⁹⁰

Where unpaid superannuation is concerned, IR Claims submitted that the effects of wage theft can be particularly 'insidious', with far-reaching effects on a person's financial wellbeing:

Not only does the worker miss out on regular contributions, but they also lose the investment returns on those contributions, and the compounding interest that results...

*Make no mistake, employers who don't pay super are stealing from their worker's retirement.*²⁹¹

Mr David Carter, a chef, who appeared before the committee with the support of the QCU, stated that as a result of the non-payment of his superannuation in close to half of his workplaces in the last 20 years, 'I am now in a position where I am seriously concerned about what I am going to do come retirement'.²⁹²

As noted in chapter 4.2.3, Industry Super Australia has estimated that for 2015-16, the size of the average superannuation underpayment for SG eligible employees in Queensland was \$1,915 per person.²⁹³

Industry Super Australia has also reported that a one-off, \$2,000 underpayment of this nature can grow to a \$24,000 shortfall in investment returns by retirement.²⁹⁴

²⁸⁸ Ms Kay Clifton, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 9.

²⁸⁹ Queensland Government, OIR, written briefing, 7 June 2018, p 20.

²⁹⁰ Reverend Pauline Harley, Anglican Priest, QCA, public hearing transcript, Brisbane, 3 September 2018, p 5.

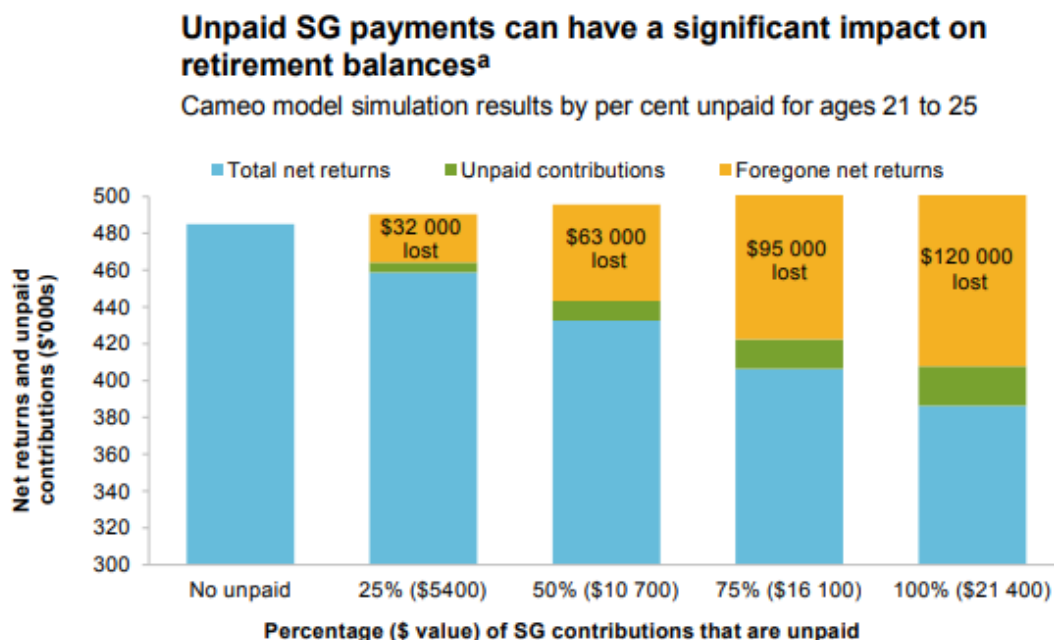
²⁹¹ IR Claims, submission 013, p 11.

²⁹² Mr David Carter, Worker/chef, public hearing transcript, Brisbane, 16 August 2018, p 8.

²⁹³ Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done*, October 2018, p 10.

²⁹⁴ Industry Super Australia, cited in IR Claims, submission 013, p 11.

Productivity Commission modelling, based on more modest underpayment estimates applied over a longer period of time, similarly confirms the significant impact of unpaid contributions and associated foregone compound returns. For example, the Commission’s modelling estimates indicate that a person on a \$50,000 full time starting salary, whose employer does not pay 50 percent of due contributions during the early years of the person’s career (while they are aged 21 to 25) would have a retirement balance 7.6 percent (\$63,000) lower than a peer who received all their contributions (see figure below).²⁹⁵



Source: Australian Government, Productivity Commission, Superannuation: Assessing Efficiency and Competitiveness, Productivity Commission Draft Report, April 2018, p 264.

Once identified, the cost of recovering entitlements duly owed can have a further significant financial impact on individuals. Recovery through a court process can include application fees, filing fees, costs of legal advice and representation (see Chapter 11.2.2 for more information on the court process).

6.1.2 Emotional and health impacts

Workers who appeared before the committee, advised that their experience of wage theft invariably also took a significant toll on their emotional and physical wellbeing.²⁹⁶

The OIR noted that accounts from victims of wage theft ‘frequently mention their feeling powerless, exploited and undervalued’, and that ‘a positive link has been demonstrated between low-paid work and insecure work (of which wage theft is an exacerbating factor) and poorer health outcomes, particularly in relation to mental health’.²⁹⁷

Mr Chris McCoomb stated that the process also ‘requires vast amounts of time and effort and can result in anger, frustration and a sense of being worthless and insignificant’,²⁹⁸ together with the

²⁹⁵ Australian Government, Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness*, Productivity Commission Draft Report, April 2018, p 264.

²⁹⁶ See, for example: Justin Cobbett, submission 003; Julie Riding-Hill, submission 006; IR Claims, submission 013, pp 5, 11-13, 18; Mr Michael Rickards, Member, TWU, public hearing transcript, Brisbane, 16 August 2018, p 37-38; Mr Lucas Halkeas, Hospitality worker, public hearing transcript, Gold Coast, 10 September 2018, pp 9-10.

²⁹⁷ Queensland Government, OIR, written briefing, 7 June 2018, p 21.

²⁹⁸ Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 14.

danger of ‘being sacked for raising the issue or people refusing to employ you because you have previously taken action against them’.²⁹⁹

IR Claims submitted that the clients they represent who have experienced wage theft ‘often report feeling extreme stress, frustration, anxiety and even depression’:

*They first have to deal with the reality that they have been cheated or robbed by their boss, often after having put their heart and soul into a business, and then they are left to manage the financial pressure that results’.*³⁰⁰

The ‘daunting prospect of commencing legal action’ can then intensify the pressure workers can feel.³⁰¹

Ms Kay Clifton stated of her own experience that ‘the stress and the mental anguish you are going through at that time is just deplorable’;³⁰² and for a survey respondent similarly, ‘the stress has been immeasurable’.³⁰³ In one case, a submitter advised that the stress resulting from bullying by their employer following the lodgement of their complaint for incorrect wages, led to a substantiated WorkCover claim for compensation.³⁰⁴

The YWH submitted that for young people, who are often in one of their first jobs, the experience can damage their confidence levels, and impact on their independence and self-worth.³⁰⁵ Apprentice plumber Aiden Martin submitted in this regard:

*With all the effort that I had to go to to retrieve my money and all the hard work I put into the apprenticeship, for it to be taken off me because they didn’t want to pay me an extra \$8 an hour ... it was appalling. How I felt for those few months - I wouldn’t wish it upon anyone.*³⁰⁶

Maurice Blackburn also listed a range of feelings often reported by clients arising from their experience of wage theft:

- fear – including, for vulnerable workers with limited alternative employment options, a feeling of being stuck and unable to see a way toward a better future
- shame or embarrassment – ‘victims of wage theft often report feeling that they have done something wrong – that they have somehow put themselves and their families in this situation’
- isolation – many victims of wage theft feel like they are alone, and may not know the supports available to them through various avenues
- anger and frustration – ‘negative feelings generated in the workplace are often ventilated in inappropriate ways, having dreadful consequences on families, peer groups and communities’, and
- Desperation – ‘feelings of inadequacy can sometimes lead to tragic consequences’.³⁰⁷

²⁹⁹ Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 14.

³⁰⁰ IR Claims, submission 013, p 11.

³⁰¹ IR Claims, submission 013, p 5.

³⁰² Ms Kay Clifton, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 8.

³⁰³ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, survey respondent.

³⁰⁴ Name suppressed, submission 036, pp 10-22.

³⁰⁵ YWH, submission 019, p 9.

³⁰⁶ IR Claims, submission 013, p 13.

³⁰⁷ Maurice Blackburn and joint submitters, submission 032, p 7.

In addition to these significant emotional impacts, the OIR advised that workload intensification, whether directed by employers or performed ‘voluntarily’ by employees to compensate for reduced hourly incomes, has been associated with poorer workplace health and safety, particularly when coupled with bullying by employers and threats to job security. The OIR stated that insecure workers have been ‘noted as being more willing to accept dangerous tasks in the workplace, and to avoid reporting injuries or illness (both physical and mental) in order to retain their income’. Further, an increase in the number of hours of jobs worked to compensate for wage theft:

*... may, in turn, decrease time available to spend with family or in leisure. The same phenomenon has been noted in the context of insecure work, where it has been shown to inhibit the capacity for workers to build and contribute to family and community relationships, leading to stressed and dysfunctional families.*³⁰⁸

6.2 Impacts on businesses and the economy

Beyond the serious and harmful impacts on the workers and families affected by wage theft, evidence provided to the committee highlighted that the problem can be equally ‘devastating’ for compliant businesses and for the communities in which it is occurring.³⁰⁹

Businesses that engage in wage theft can generate significant cost savings, allowing them to undercut compliant businesses on price and generate an illegitimate competitive advantage.³¹⁰ In imposing penalties on a Gold Coast restaurant owner who underpaid overseas workers \$60,000 in just four months, Judge Vasta highlighted the extent of the competitive advantage gleaned by the business in that circumstance:

If one extrapolated that to the course of a year, it would mean that a business such as the ones being run by the First Respondent and the Second Respondent, would have a saving to them of about \$180,000.

*When one is looking at a small business, the temptation is great that such a saving to them would give them a competitive edge of all the other businesses in their area.*³¹¹

The impact is often magnified, IR Claims noted, in sectors where competition is fierce and margins are small:

*Businesses engaged in wage theft have greater scope to offer cheaper prices than their competitors, they can afford to open on public holidays, and they have a better chance of pocketing a bigger profit.*³¹²

Mr Paul Wessel of Wessel Petroleum stated in relation to his industry:

*For a competitor to get an advantage over us is pretty easy. The award wage is \$27.55 and \$35 weekends, and I have heard of plenty in the industry that are paying \$15 to \$20 an hour. If you do your sums on that over \$7 million a year, it does not take long to put us way out of the game as far as being competitive.*³¹³

³⁰⁸ Queensland Government, OIR, written briefing, 7 June 2018, p 21.

³⁰⁹ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 7.

³¹⁰ NRA, submission 021, p 6.

³¹¹ IR Claims, submission 013, pp 13-14.

³¹² IR Claims, submission 013, p 13.

³¹³ Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 13.

Within the security industry, Mr Andrew Bourke, managing director of Executive Security Group, advised the committee:

The impact of wage theft on my business and my personal health has had a devastating impact on me, my company and the employees through unfair tendering.

ESG has tendered for many contracts to only be rejected by clients... who want the cheapest rate and are not worried what the Security Companies pay their employees or the quality of the security officers provided.

For example I lost a major contract solely on my tender price, whereas a major multinational Security Company won the contract only to have them outsource to a company that employ individual sub-contract staff required to hold their own Australian Business Number (ABN).³¹⁴

A survey respondent similarly stated that ‘it is demoralising and heart breaking to constantly lose work and tenders to companies who underpay their workers for commercial gain’.³¹⁵

Within regional communities, stakeholders highlighted that reduced local wages can have flow-on effects on spending in the community. At the public hearing in Toowoomba, Mr Lloyd Abbott of Together Union noted that ‘when people have got the money they spend it’, and ‘if they have not got the money circulating in the community, if those funds are being held from it, that could impact on the local shop or the local service station’.³¹⁶

In Bundaberg, Mr Allan Mahoney, Chairman of Bundaberg Fruit and Vegetable Growers (BFVG), stated of the local economic impact:

If you look at the numbers, it is very easy to see. At any given time I think there are 375,000 backpackers here over a 12-month period. If you start adding up the dollars, what is it doing to the economy? ... We have proven that 75 percent of a worker's wage is put back into the region where they are working.³¹⁷

Stakeholders also pointed to specific sectoral damage, with the Queensland Tourism Industry Council (QTIC), for example, submitting that the record of poor pay and conditions in the tourism and hospitality industry, ‘damages the industry’s reputation and Australia’s global competitiveness as a place to live and work’³¹⁸ and negatively influences ‘the perception of career opportunities in the industry and the potential to engage in the hospitality industry as a long-term career opportunity.’³¹⁹ The connection between wage theft and international students has also been identified as a significant reputational risk for the international education sector³²⁰ – cause for concern given international education is Australia’s third biggest export earner after sales of iron ore and coal, and worth over \$30

³¹⁴ Executive Security Group, submission 029, p 2.

³¹⁵ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, survey respondent.

³¹⁶ Mr Lloyd Abbott, South West Organiser, Together Union, public hearing transcript, Toowoomba, 10 September 2018, p 15.

³¹⁷ Mr Allan Mahoney, Chairman, Bundaberg Fruit and Vegetable Growers (BFVG), public hearing transcript, Bundaberg, 12 September 2018, p 5.

³¹⁸ QTIC, submission 022, p 6.

³¹⁹ QTIC, submission 022, pp 6-7.

³²⁰ Study Queensland, correspondence, 10 September 2018.

billion annually.³²¹ In Queensland, international education is the state's second largest service export, and was worth \$4.13 billion in 2016-17.³²²

Within the construction industry, as previously noted, the CFMEU estimated in 2011 that \$2.5 billion of tax revenue is lost annually through the abuse of sham contracting arrangements.³²³

More broadly, submitters considered that wage theft also serves to 'drive down overall actual wages in an industry' as part of a race to the bottom,³²⁴ and to thereby contribute to low wage growth and wage stagnation.³²⁵ The OIR advised:

*Pressure to under-pay wages to remain competitive has been observed in the cleaning, horticulture, hospitality and retail industries in Australia (Laurie and Farbenblum, 2017) and the hospitality, children's services, agriculture, construction, cleaning, and clothing and footwear industries internationally (Howe and Owens, 2016). As the industries identified in Australia account for over 20% of all employees (Australian Bureau of Statistics, 2018), it is not unreasonable to conclude that wage theft may have contributed to the historically low rates of overall wage growth in recent years (see, e.g. Australian Nursing and Midwifery Federation, 2015).*³²⁶

The OIR noted that policymakers, including the Reserve Bank, have expressed considerable concern about the persistence of low rates of wage growth in Australia, and the negative social and economic consequences³²⁷ associated with the low wage 'crisis'.³²⁸

The Senate EERC, in its report on the corporate avoidance of the FWA, acknowledged stakeholder testimony in this regard, which highlighted that:

*... reducing wages reduces consumer spending, thereby reducing public financing through taxation—from the goods and services tax, income tax and tax on profits. This equates to decreasing public spending and investment, further reductions in consumer spending, slowing employment and falling productivity in the longer term. This is the view of the Organisation for Economic Co-operation and Development (OECD), which reports that rising wage differentials and inequality will only serve to inhibit economic growth.*³²⁹

Ardent Security director Mr Brian McCarrick also sought to highlight other 'knock-on effects', including:

... less revenue to both state and federal governments through PAYG taxes and payroll taxes and less GST revenue to the state as the employee has less to spend. It also affects business costs to other businesses through less workers compensation payments making the workers compensation pot smaller so attracts higher premiums for businesses. Greater pension payments

³²¹ Australian Government, Department of Foreign Affairs and Trade, *Australia's Top 10 Goods & Services Exports, 2017 (a), (\$A million)*, <https://dfat.gov.au/trade/resources/trade-at-a-glance/Pages/top-goods-services.aspx>

³²² Hon Kate Jones MP, Minister for Innovation and Tourism and Industry Development and Minister for the Commonwealth Games, 'International students continue to embrace Queensland', media release, 23 April 2018, <http://statements.qld.gov.au/Statement/2018/4/23/international-students-continue-to-embrace-queensland>

³²³ CFMEU, submission 039, p 7.

³²⁴ Queensland Government, OIR, written briefing, 7 June 2018, p 20; QCU, submission 035, pp 29-30; Mr Alan Sparks, CEO, East Coast Apprenticeships, public hearing transcript, Brisbane, 20 August 2018, p 14.

³²⁵ QCU, submission 034, pp 3, 29, 30; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 109-112.

³²⁶ Queensland Government, OIR, written briefing, 7 June 2018, pp 20-21.

³²⁷ Queensland Government, OIR, written briefing, 7 June 2018, p 21.

³²⁸ QCU, submission 034, p 2. See also: Louise Thornthwaite, 'The living wage crisis in Australian industrial relations', *Labour & Industry: a journal of the social and economic relations of work*, vol 27, no. 4, 2017, p 261.

³²⁹ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 111.

*because of the loss of superannuation. In the mid-1990s the director or owner of a local security firm, after being chased by employees for their superannuation, left the country with the superannuation not paid. Those affected persons were all around my age and are now entering retirement so the loss of many tens of thousands of dollars will now have to be paid by the federal government in pensions.*³³⁰

Further, impacts of wage theft are magnified for particular cohorts such as migrant workers.

As previously noted, some limited estimates of aggregate impacts have been provided by Farbenblum in relation to the unpaid wages of temporary migrant workers – that is, ‘likely well over a billion dollars’;³³¹ and by the ATO and Industry Super Australia in relation to unpaid superannuation. The ATO estimates the super ‘gap’ at \$3.26 billion for 2015-16, and a total of \$19.55 billion for the six years from 2010-11 to 2015-16.³³² Industry Super Australia has estimated the super gap at \$5.9 billion for 2015-16.³³³

Industry Super Australia previously produced forward estimates from 2013-14 (for which it estimated an underpayment of underpayment of \$5.6 billion) through to 2023-2024, suggesting that if the rate of underpayment of superannuation estimated for 2013-14 were to continue to occur in the workforce for each year of the forward estimates, the cumulative impact on retirement savings growth would be \$102 billion.³³⁴ The projection, included in the Senate Economics References Committee’s *Superbad* report and also illustrated in the table below, assumed consistent wage growth and accounted for a scheduled rise in the SG rate and 5 percent returns.

Growth in the impact on retirement savings over a decade

Year ending June	Cumulative gap
2014	5.59 billion
2015	\$11.84 billion
2016	\$18.62 billion
2017	\$25.98 billion
2018	\$33.98 billion
2019	\$42.68 billion
2020	\$52.16 billion
2021	\$62.45 billion
2022	\$74.09 billion
2023	\$87.21 billion
2024	\$101.95 billion

Source: Industry Super Australia projections based on wage growth consistent with the forward estimates, ABS projected population growth, the scheduled rise in the SG rate and 5 percent returns. Cited in Parliament of Australia, Senate Economics References Committee, Superbad – Wage theft and non-compliance of the Superannuation Guarantee, May 2017, pp 14-15.

³³⁰ Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 7.

³³¹ Anna Patty, ‘Unclaimed wages likely to top one billion dollars’, *Sydney Morning Herald*, 29 October 2018, https://www.smh.com.au/business/workplace/unclaimed-wages-likely-to-top-one-billion-dollars-20181025-p50c02.html?fbclid=IwAR1dztFtEtQKTF52HX-VkJvAsTtJuz_LMMVYBu9MCCfa749soLsfwkuRAVpY;

³³² Australian Government, ATO, ‘Trends and latest findings’, Superannuation guarantee gap, 26 October 2018, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

³³³ Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done*, October 2018, p 3.

³³⁴ Industry Super Australia, supplementary submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, supplementary submission 7.1, p 7.

Beyond this savings effect, Industry Super Australia also submitted to the Senate Economics References Committee that the \$5.6 billion underpayment it estimated for 2013-14:

*...implies a contributions tax loss of \$838 million in a single year (and a cumulative contributions tax loss over the Forward Estimates of approximately \$4 billion). By 2023-24 ISA [Industry Super Australia] projects that the annual contributions tax lost on unpaid contributions will reach \$1.5 billion.*³³⁵

Additionally:

*We know from [the 2013-14 estimates] that a single year's underpayment is associated with a lower balance of \$23,860 for 60-64 year olds, but we do not have direct information on historical underpayment. In the absence of longitudinal data, it might be useful to note that a balance difference of \$23,860 would imply \$1,200 less per year in an allocated pension payment and \$388 per year more in age pension (if assessed at the higher income test deeming rate of 3.25 percent). If there are 250,000 current retirees affected (about double a single year impact for 60-64 year olds), this would imply a \$300 million loss in private retirement drawdown and \$97 million more in age pension payments. As the underpayments accumulate, these impacts will become larger.*³³⁶

Committee comment

The committee received a large amount of verbal and written testimony and evidence throughout the inquiry of the significant, direct and indirect costs of wage theft on Queensland workers, their families, businesses and the economy. While the lost earnings and adverse impacts on economic activity estimated to be in the billions of dollars each year are sufficient cause for concern, it is the emotional and health impacts on workers and their families that may impose the greatest cost.

Workers deserve to be paid what they are legally entitled to, and businesses equally so to operate on a level playing field. Given the evident prevalent nature of incidences of wage theft in Queensland, and across Australia, it is hard to imagine that most have not had some experience with this issue.

The committee concurs with the findings of the McKell Institute report, that 'wage theft is a serious problem, a major economic liability for individual workers, federal and state governments, and a manifestly unfair scourge that is widespread through Queensland and Australia, demanding serious policy intervention at both state and federal levels'.³³⁷

³³⁵ Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, pp 14-15.

³³⁶ Industry Super Australia, Supplementary submission to the Senate Economics Committee, 'Inquiry into Superannuation Guarantee non-payment', March 2017, p 7.

³³⁷ Edward Cavanough and Esther Rajadurai, *The Impact of Wage Theft on Queensland's Workers & Economy*, The McKell Institute, November 2018, p 7.

7 Forms of wage theft experienced

Over the course of the inquiry, individuals, businesses, industrial and employer organisations, and community stakeholders generously shared their personal experiences with circumstances of wage theft, in each case providing the committee with a distinct perspective on the problem and the forms it can take. Member organisations and community stakeholders often played an important facilitative role in this regard, collecting and presenting the accounts of their members or clients, and supporting member witnesses through the sometimes emotional and difficult process of recounting the circumstances of their exploitation. The committee was very grateful for the facilitative role played by these organisations.

This wide-ranging evidence provided the committee with many and varied insights into the different ways in which wage theft can manifest, helping to develop a deeper insight into this complex problem.

7.1 Underpayment of wages

The form of wage theft most commonly identified in evidence to the committee was the underpayment of wages. This was reported by 72.56 percent of respondents to the committee's survey, and was also the primary form of wage theft identified in survey and other data submitted by stakeholders.³³⁸ This included reports of being paid below the minimum wage, relevant award or agreement, or not being paid for all hours worked.

Mr Jamie Gardiner-Hudson shared his story with the committee:

Case study

Mr Gardiner-Hudson was employed as a service station attendant for approximately seven years. When the business was sold to new owners, they did not pay Mr Gardiner-Hudson his correct wages.

'If they had to give me a pay rise, they would simply say that they could not afford to do that and that they would fire me instead. They finally gave me a pay rise from \$14.50 an hour to \$16 an hour, and I stayed on that rate up until 2014 until after they sold it to someone who I believe was a distant cousin of theirs. He told me one day that he was interested in keeping me to help him run the company, and then I got a phone call on my way home from work and I was told that I was being fired—not because of anything I had done wrong, but simply because he could not afford to keep me on.'

*'I contacted the Fair Work Ombudsman and I gave them a complete detailed listing of everything. They asked me if I had pay slips or any other evidence to back it up, and I said that I was not given pay slips, that they did not believe in giving any. I went through the list of how much my wages should be increased every year and I did my own calculations. It was approximately \$40,000 that I was owed in back wages.'*³³⁹

³³⁸ Legal services provider LawRight reported that for its self-representation service, 'unpaid salary components' was type of unpaid employment entitlements most frequently cited by clients seeking assistance (66 percent). The QCU also noted that respondents to a survey conducted on its website most commonly reported their experience of wage theft having involved being underpaid the hourly rate (34.9 percent). LawRight, submission 028, p 10; QCU, submission 034, p 22. See also JobWatch, submission 016, p 6.

³³⁹ Mr Jamie Gardiner-Hudson, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 9.

Stakeholders highlighted the experiences of workers who are consistently paid below the minimum wage,³⁴⁰ highlighting the experiences of workers in the retail,³⁴¹ horticulture³⁴² and tourism industry³⁴³ in particular.

Case study

An employee working in a business at North Lakes shopping centre was told she would be paid \$300 per week in wages.

After calculating her own wage rate, the employee discovered she was getting paid less than \$10 an hour.

'I worked there for a while and every week I had to ask for my weekly pay which he would give to me out of the till. If I didn't ask for it or the till didn't have the money, I didn't get it, or I would get a response implying that next week I would get paid. The week would end and I would feel bad about asking for the current week of pay let alone the previous week's pay. By the end, he owes me over \$1500'.³⁴⁴

In some instances, the denial of entitlements extended to total non-payment for work performed.³⁴⁵ LawRight detailed the experience of 'Jun', a Chinese national employed as a food and beverage attendant on a casual basis:

Jun had entered into an oral employment agreement with the restaurant owner and agreed to be paid \$15 per hour, with no casual loading, overtime or penalty rates. Jun worked for 3 months at the restaurant and never received any payment for the performance of his work. Jun told us the employer gave him different excuses every fortnight, when he was supposed to be paid.³⁴⁶

The committee also heard numerous accounts of underpayment of wages occurring due to the misapplication of modern awards.³⁴⁷ Within the retail sector, the NRA submitted that the underpayment of employees subject to the awards system is most commonly associated with employers applying the wrong modern award, classifying the employee at too low a level under a

³⁴⁰ See for example, Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 18; Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017; QCU, submission 034, p 18.

³⁴¹ QCU, submission 034, p 20.

³⁴² QCU, submission 034, p 18.

³⁴³ Private hearing transcript, regional hearing, 2018.

³⁴⁴ QCU, submission 034, p 20.

³⁴⁵ JobWatch noted that of 912 calls to its legal information service received from Queensland since 1 January 2017, 33 of those calls involved complete non-payment of wages during the last six years. The OIR advised that such non-payment of wages is 'more properly considered modern slavery if it occurs over an extended period,' noting: 'For example, a foreign national employee of a restaurant in northern Adelaide reported working without pay for two and a half years under threat of deportation (Ferguson, 2017). Cases have also been reported where employees never received their final pay or severance entitlements'. See: JobWatch, submission 016, p 6; Queensland Government, OIR, written briefing, 7 June 2018, p 18.

³⁴⁶ LawRight, submission 028, p 11.

³⁴⁷ See, for example: IR Claims, submission 013, pp 14, 22, 24, ; NRA, submission 021, pp 8-9; Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 2; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 7; Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, p 13.

modern award, or instances of ‘classification creep’.³⁴⁸ A worker in the hospitality industry told the committee he had been underpaid approximately \$9,000, as a result of being misclassified under the relevant award as a junior staff member, rather than an adult.³⁴⁹

The QTIC reported underpayments due to ‘All inclusive wages’, where other ‘benefits’ were provided rather than correct wages, for example ‘including high cost rent or the opportunity to work with high profile chefs,’ as part of the remuneration package.³⁵⁰

Other stakeholders highlighted practices such as paying workers at apprentice rates despite not having registered their apprenticeships,³⁵¹ and various other more direct forms of wage theft involving non-payment for services rendered.

For example, the committee heard reports of half-pay scams, where a worker is only paid for half the time worked, and the employer only records half the hours actually worked.³⁵² A half-pay scam occurred during systemic underpayments of employees by 7-Eleven, with workers reporting they worked 40 hours a week but were only paid for 20 hours.³⁵³

Mr Giri Sivaraman of Maurice Blackburn Lawyers noted this practice and stated:

... what I saw through the 7-Eleven case was that the absolute worst case was that someone was getting paid 47 cents an hour. That is when you actually added up how much they got paid for the number of hours they worked...³⁵⁴

7.1.1 Unpaid trials

Unpaid trials can be unlawful where the period of the trial extends unreasonably past what is required to demonstrate the skill necessary for the job.³⁵⁵ In this regard, Franchise Redress submitted that workers they had spoken to reported that their employer required them to work for free during a trial period, however the ‘training’ period would ‘seemingly never end and sometimes go on for a month or more, until the franchisee would tell them that they weren’t successful’. It was submitted that this was a systematic process and that ‘the franchisee would then put another worker on this free trial and the cycle would continue’.³⁵⁶

An individual submitted to the committee regarding the experience of his daughter, who had undertaken an unpaid trial in which she was required to perform tasks she was not aware would form the regular duties of the position. It was submitted that ‘trial runs’ were ‘a common practice for many other students at [employer name], each giving many hours for no payment’.³⁵⁷

³⁴⁸ NRA, submission 021, p 8.

³⁴⁹ Private hearing transcript, regional hearing, 2018.

³⁵⁰ QTIC, submission 022, p 7.

³⁵¹ East Coast Apprenticeships, submission 004, p 2.

³⁵² Australian Government, FWO, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, Australian Government, April 2016, p 7; Franchise Redress, submission 049, p 6.

³⁵³ Australian Government, FWO, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, Australian Government, April 2016, p 7; Alison Bradley, ‘7-Eleven staff work twice as long at half pay rate, investigation reveals’, *ABC News*, 29 August 2015, <https://www.abc.net.au/news/2015-08-29/7-eleven-half-pay-scam-exposed/6734174>

³⁵⁴ Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 43.

³⁵⁵ Australian Government, FWO, *Unpaid Trials*, <https://www.fairwork.gov.au/pay/unpaid-work/unpaid-trials>

³⁵⁶ Franchise Redress, submission 049, p 6.

³⁵⁷ Name suppressed, submission 002 supplementary, p 1.

The MEA submitted that not being paid for work completed, including time spent training and in work meetings and unreasonable length trials, 'can be the hallmark of exploitative practices'.³⁵⁸

Maurice Blackburn and joint submitters cited research into unpaid internships, which has raised concerns that some employers may be seeking to cut costs by replacing paid, entry-level positions with a revolving roster of unpaid interns.³⁵⁹ IR Claims submitted the below experience of a young lawyer.

Case study

Tomy was a graduate lawyer, and was offered unpaid work experience with a legal practice in July 2017. The initial arrangement was for Tomy to undergo a one-month probationary period, with the possibility of a paid position after that.

'When I had the interview with [the employer], he said, 'let's have a look at you for one month, and after one month, if you perform well, we'll likely hire you'. But then he sent me an email, and it said three months probation.'

At the end of the three months, Tomy inquired about his future, and the possibility of a paid position with the firm.

'They said, 'oh yes, we've got a contract waiting for you, it's just getting prepared', but they just kept extending it basically - three months became four months, and then five months. They said, 'yep, we're going to hire you at the start of January', and I was like, okay, I've waited five months, one additional month should be okay, but suddenly I got cut off. They just said, 'oh no, we don't know, you're not doing well, you haven't done the right thing', and then they dumped me.'

After six months working at the firm without pay - one of the directors - gave Tomy a cheque for \$500, and told him it was a 'Christmas gift'.

'I was just passionate about becoming a lawyer, but when they got rid of me, I was feeling disgusted, betrayed, depressed, you know, just sad that this kind of thing happened. I felt used, and I felt like this isn't fair and it shouldn't happen to other people - so I thought I would take action.'

At conciliation, the employer agreed to pay Tomy \$18,000 in general damages.

7.2 Unpaid superannuation

As cited earlier in this report, unpaid superannuation is a widespread form of wage theft, with estimates of between \$3.26 billion³⁶⁰ and \$5.9 billion³⁶¹ nationally per year in unpaid superannuation entitlements. A worker can have their superannuation underpaid or not paid, as its own form of wage theft, or may suffer from an underpayment of superannuation as a result of an underpayment of wages. Unpaid superannuation can also result from sham contracting, where a worker does not realise their employer is responsible for paying their superannuation.

³⁵⁸ MEA, submission 030, p 5.

³⁵⁹ Maurice Blackburn and joint submitters, response to a question taken on notice at the hearing on 16 August 2018, pp 11-12.

³⁶⁰ Australian Government, ATO, 'Trends and latest findings', Superannuation guarantee gap, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings#Trends_and_latest_findings

³⁶¹ Industry Super Australia, *Unpaid Super: Getting Worse While Nothing is Done*, October 2018, p 3.

Unpaid superannuation was reported by 41.46 percent of respondents to the committee’s survey, and was one of the four most commonly reported types of wage theft within the top five industries of incidence.³⁶²

The committee heard numerous reports of underpayment of superannuation in the accommodation and food services industry in particular.³⁶³

Case study

An employee working as a cook/manager, received notification from his superannuation company after working for his employer for 12 months, that no contributions had been made during that year.

After contacting the ATO it began an investigation. The cook resigned and told the employer the reason was unpaid superannuation.

After initially denying the allegation, the employer later wrote to the cook to advise that superannuation had not been paid as a ‘happy work environment’ was a better idea.³⁶⁴

Hospitality worker and chef Mr David Carter told the committee that non-payment of superannuation contributions is ‘common’ in the hospitality industry.³⁶⁵

Case study

Like most chefs, David has moved from job to job in different restaurants over more than 20 years.

A financial adviser went through David’s superannuation and found that only about half of the restaurants David has worked in have paid the required superannuation contributions. Many of those restaurants have since closed, so it is unlikely the missed superannuation contributions could ever be covered.

After decades of work, David found he had only \$33,000 in superannuation.

The Independent Education Union – Queensland and Northern Territory Branch (IEU) highlighted instances of unpaid superannuation in the education and training industry, reporting in a case study that an ATO audit had identified over \$2 million in non-payment and underpayment of superannuation in a school south of Brisbane.³⁶⁶

Stakeholders also cited instances of underpayment of superannuation for apprentices,³⁶⁷ and migrant workers, including workers engaged in the horticulture industry.³⁶⁸

³⁶² Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018.

³⁶³ See, for example: Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 5; Mr David Carter, Worker/chef, public hearing transcript, Brisbane, 16 August 2018, p 8; QCU, submission 034, p 25; LawRight, submission 028, pp 10, 12, 15.

³⁶⁴ QCU, submission 034, p 25.

³⁶⁵ Mr David Carter, Worker/chef, public hearing transcript, Brisbane, 16 August 2018, p 8.

³⁶⁶ IEU, submission 007, p 4.

³⁶⁷ Julie Riding-Hill, submission 006, pp 1, 3, 4.

³⁶⁸ Mr Joe Moro, President, Mareeba District Fruit and Vegetable Growers Association, public hearing transcript, Townsville, 28 August 2018, p 2.

The OIR advised that an employer ‘may pay the required amount to an entity controlled by the employer, which then fails to meet the relevant regulatory requirements’.³⁶⁹

A former worker in the tourism industry told the committee his employer did not pay the superannuation of an employee for the entire 18 months the worker was employed. When questioned about the underpayments the employer’s response was ‘He won’t live long enough to make retirement.’³⁷⁰

Dr David Morrison noted that the flow-on effects of the underpayment of wages include the underpayment of superannuation, given the SG is calculated as a percentage of ordinary time earnings.³⁷¹ More directly, Dr Morrison noted that it typically involves ‘employees who are paid correctly but their employer either under-contributes their superannuation entitlement or makes no contribution to their superannuation entitlement’.³⁷²

The Australian Council of Trade Unions (ACTU) has highlighted that unpaid superannuation is often associated with cash in hand payment arrangements (which may also avoid be used to avoid taxation and other employer responsibilities), and ‘independent’ contracting arrangements in which there may be uncertainty about whether genuine liability exists, and if so, who should pay it.³⁷³

7.3 Unpaid penalty rates

Non-payment of applicable penalty rates was another form of widespread wage theft reported by stakeholders, with employees from the accommodation and food services industry figuring prominently amongst those affected.³⁷⁴ It was the second most common form of wage theft reported by 48.78 percent of respondents to the committee’s survey.³⁷⁵

The YWH stated that a ‘number of studies have found this form of underpayment to be the most common’;³⁷⁶ and noted the case of a 21-year-old hospitality worker, who was ‘paid a flat rate of \$11.81 an hour’, ‘... irrespective of weekends or late hours of work between 7pm and 9pm’.³⁷⁷ The YWH further clarified:

That is, a flat rate which disregards entitlements such as penalties, overtimes and loadings, which ought to be paid under the relevant industrial instrument.

*When [employee] raised her situation with the Ombudsman, she was advised: As a class 2 under the award the minimum wage for a casual at 18 was \$15.76 an hour. On Saturdays with penalty rates this becomes \$18.92 an hour and on Sunday \$22.07.*³⁷⁸

³⁶⁹ Queensland Government, OIR, written briefing, 7 June 2018, p 17.

³⁷⁰ Private hearing transcript, regional hearing, 2018.

³⁷¹ Dr David Morrison, submission 032, p 10.

³⁷² Dr David Morrison, submission 032, p 2.

³⁷³ Australian Council of Trade Unions (ACTU), cited in Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, p 29.

³⁷⁴ See, for example: Sevegne Newton, submission 001, p 2; Julie Riding-Hill, submission 006, p 1; IR Claims, submission 013, pp 14-16, 36, 40; Name suppressed, submission 014, p 1; Mr Lucas Halkeas, Hospitality worker, public hearing transcript, Gold Coast, 10 September 2018, p 3; LawRight, submission 028, p 11.

³⁷⁵ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018.

³⁷⁶ YWH, submission 019, p 6. See also: Australian Government, FWO, *National Hospitality Industry Campaign: Restaurants, Cafés and Catering (Wave 2) Report*, June 2015, p 7.

³⁷⁷ YWH, submission 019, pp 5-6.

³⁷⁸ YWH, submission 019, p 6.

LawRight submitted the case study of 'Emily':

Case study

Emily was an English-speaking migrant worker employed on a casual basis pursuant to an oral employment contract, who was paid \$18 per hour and received no overtime or penalty rates. Emily asked the employer about her entitlements under the Restaurant Industry Award 2010 and was told that she was correctly paid the minimum wage. The employer ignored Emily's requests for adequate payment and Emily's employment was terminated after the employer was invited to participate in conciliation proposed by the Fair Work Ombudsman.³⁷⁹

According to Mr Alan Sparks, Chief Executive Officer (CEO) of East Coast Apprenticeships, unpaid entitlements, overtime, and penalty rates are also forms of wage theft most likely to affect apprentices.³⁸⁰

IR Claims submitted the experiences of their client Thomas, a service manager at a motorcycle dealership; and Mr Kym Rake, a former waste truck driver:

Over the course of his entire employment, Thomas was paid for a standard 38 hour week, but worked much longer hours. He was not paid the correct hourly award rate, and he was not paid overtime – except for a short period when he was given \$100 cash-in-hand when he worked late on Thursday nights. "They just claimed that because I was on salary, they didn't have to pay it – no overtime at all. We were getting paid for 38 hours, but we were working 47/48 hours a week." Thomas was also not allowed to take meal or crib breaks, as outlined under the award.³⁸¹

Further:

Instead of being paid overtime, Kym was told to "bank" the extra hours that he worked each week, and take that time off on another day. This had the effect of cheating him out of higher overtime rates of between \$37 and \$50 an hour that he should have been paid for the work.³⁸²

Ms Isabella Morosan of Working Women Queensland told the committee that from the stories relayed by her, she found that not being paid for overtime is common across all industries, including 'health, hospitality, accommodation, financial, insurance and clerical and administration'.³⁸³

7.4 Unreasonable deductions and withholding of other entitlements

Evidence from inquiry stakeholders highlighted that there is a range of different ways in which employees can be subjected to unreasonable deductions and have other entitlements withheld. This included reports of cash back schemes, workers not being allowed to take meal breaks, and misuse of staff tips. Withholding of other entitlements was reported by 38.72 percent of respondents who completed the committee's survey, with unreasonable deductions reported by 17.38 percent.

The committee heard reports of cash back schemes 'where employers make the appropriate payments, but then require the worker to pay a proportion of that back to the employer in cash', which were recently associated with practices of 7-Eleven.³⁸⁴

³⁷⁹ Lawright, submission 028, p 11.

³⁸⁰ Mr Alan Sparks, CEO, East Coast Apprenticeships, public hearing transcript, Brisbane, 20 August 2018, p 13.

³⁸¹ IR Claims, submission 013, p 35.

³⁸² IR Claims, submission 013, p 29.

³⁸³ Ms Isabella Morosan, Industrial Officer, Working Women Queensland, public hearing transcript, Brisbane, 17 September 2018, p 22.

³⁸⁴ ALHR, submission 051, p 3. See also: IR Claims, submission 013, pp 15, 20; private hearing transcript, regional hearing, 2018.

IR Claims noted the results of the National Temporary Migrant Work Survey revealed '112 respondents to the survey said they had been asked to pay money back to their employer in cash after receiving their wages'.³⁸⁵

Within the food and accommodation services industry, the QCU submitted:

*Some employers believe they can make a staff member pay for a broken plate. Or replace the money a till may be out by, by raiding tips. The second point, regarding tips is very common place.*³⁸⁶

An inquiry survey respondent reported that their employer had taken staff tips, claiming it was payment for breakages from staff.³⁸⁷

The committee heard from Mr Glenn Bergin, an employee in the real estate industry, who reported his entitlements were withheld as his employer had unlawfully withheld his sales commission.³⁸⁸

The committee also heard of an employer using an employees' personal leave without consent, when the business was relocating.³⁸⁹ This suggests the employer unreasonably deducted from the employees' accrued leave entitlements.

A client represented in IR Claims' submission described her experience as an apprentice hairdresser, stating that she was not paid superannuation, was being underpaid for her hours, and was not provided meal breaks.³⁹⁰ Another client described her story to the committee as follows:

Case study

Ms Clifton was employed as a practice manager in a medical practice. When the practice was sold and bought by a new owner, the responsibility of her leave entitlements were transferred to the new owner.

Ms Clifton and an assistant practice manager were made redundant, however her leave entitlements were not paid by the owner....

'Between my assistant manager and I, there was about \$70,000-odd worth of long service leave and annual leave accrued. He did eventually pay the redundancy under much protest. ...

You cannot imagine that is suddenly going to happen 16 years on, after you think you are going to retire from a job like that'.³⁹¹

³⁸⁵ IR Claims, submission 013, p 20.

³⁸⁶ QCU, submission 034, p 16.

³⁸⁷ Education, Employment and Small Business Committee, Survey for the inquiry into wage theft in Queensland, 2018, survey respondent.

³⁸⁸ Mr Glenn Bergin, public hearing transcript, Sunshine Coast, 11 September 2018, pp 1-9; Clare and Glenn Bergin, submission 009, pp 1-2.

³⁸⁹ Mr Ben Hargreaves, Food processing worker, public hearing transcript, Gold Coast, 10 September 2018, p 13.

³⁹⁰ IR Claims, submission 013, p 70.

³⁹¹ Ms Kay Clifton, public hearing transcript, Brisbane, 3 September 2018, pp 8-9.

7.5 Sham contracting

The committee heard reports of sham contracting across multiple industries, including in the accommodation and food services industry,³⁹² transport industry,³⁹³ security industry,³⁹⁴ and among cleaners.³⁹⁵ Sham contracting was reported by 28.05 percent of respondents who completed the committee's survey, and was one of the four most commonly reported types of wage theft within the top five industries of incidence.³⁹⁶

Ms Saskia Lawrence detailed her experience in seeking employment, in which employers insisted she would require an ABN, although the position was advertised as a casual vacancy. Ms Lawrence submitted:

Despite my indicating to them that to apply for an ABN in order to obtain employment is not legal, the general attitude was one of indifference and needless to say I was unable to secure a job with them. Most recently, the prospective employer was in fact willing to offer employment on the basis of an employee but upon realising the rates of remuneration as set out under the Hospitality Award, the offer was withdrawn before even starting for reasons of not being able to afford the rate commensurate with the employment classifications of the Award.³⁹⁷

Other employment arrangements appeared to include a more deliberate misclassification of employees as independent contractors. JobWatch outlined the case of 'Rick':

Case Study

Rick was hired as an independent contractor; though the characteristics of his employment suggested he was actually an employee.

Rick was driving his employer's truck, wore his employer's uniform and transported goods depending on his employer's needs. Rick was being paid around \$19 per hour and also had to pay his own tax, superannuation and \$50 a week to insure his employer's truck. Once Rick resigned, his employer withheld his pay. Rick was probably at law an employee and so was entitled to the relevant minimum award rate and other employment entitlements.³⁹⁸

Mr Brian McCarrick of Ardent Security told the committee the security industry 'is turning to sham contracting now to employ security providers on ABNs to circumvent the payment of award wages, superannuation contributions and appropriate public liability insurances'.³⁹⁹

³⁹² Saskia Lawrence, submission 010, p 1.

³⁹³ JobWatch, submission 016, p 10; Mr Michael Rickards, Transport Workers Union, public hearing transcript, Brisbane, 16 August 2018, pp 37-38.

³⁹⁴ Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Brisbane, 28 August 2018, p 7.

³⁹⁵ Private hearing transcript, regional hearing, 2018.

³⁹⁶ Education, Employment and Small Business Committee, Survey for the inquiry into wage theft in Queensland, 2018.

³⁹⁷ Saskia Lawrence, submission 010, p 1.

³⁹⁸ JobWatch, submission 016, p 10.

³⁹⁹ Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Brisbane, 28 August 2018, p 7.

In another instance, an employer 'fraudulently' registered a young man for an ABN:

Case Study

A 15 year old commenced work as a local pool builder and was asked to obtain an ABN. His mother however, worked for the ATO and did not believe him to be employed as an independent contractor. She provided this advice to his employer.

The employer fraudulently registered the young man for an ABN and demanded a tax invoice for the work performed over the previous month at a rate of approximately \$10 per hour.

It is believed the employer did the same thing to other employees.⁴⁰⁰

7.6 Insolvency

The committee heard evidence of unpaid entitlements due to a company becoming insolvent. This included reports of employees who arrived at their workplace, only to find the business has closed.⁴⁰¹ For example, LawRight cited the case of 'Angelo', a food and beverage attendant, who arrived at his employer's restaurant and 'found a notice on the front door saying the restaurant had closed down and the company went into liquidation'.⁴⁰² Angelo had not been paid his recent wages, and later discovered his employer had not paid superannuation contributions for years.⁴⁰³

In another case, 'Bianca', a bartender, approached her employer when she realised she was being paid under the relevant award rate. Her employer responded that the business was in the process of going into liquidation and so did not pay her the entitlements owing.⁴⁰⁴

⁴⁰⁰ QCU, submission 034, p 24.

⁴⁰¹ JobWatch, submission 016, p 17; LawRight, submission 028, pp 12-13.

⁴⁰² LawRight, submission 028, pp 12-13.

⁴⁰³ LawRight, submission 028, pp 12-13.

⁴⁰⁴ LawRight, submission 028, p 13.

8 Reasons why wage theft occurs

Research and evidence gathered during the inquiry suggests there is a range of factors that can contribute to an employer engaging in, and an employee experiencing, wage theft. From an employee's perspective such conduct may go undetected, or may be recognised but not raised or reported for a variety of reasons. Understanding the factors that contribute to wage theft and responses to it is critical to addressing the problem and its impacts.

8.1 An honest mistake

It was widely acknowledged by stakeholders, including employers and industry associations that wage theft can and is occurring in a purposeful and calculated fashion.⁴⁰⁵

However, over the course of the inquiry, some stakeholders also emphasised that not all instances of wage theft are deliberate. Ms Jo Sheppard, CEO of the Toowoomba Chamber of Commerce said that over 25 years in the South East Queensland business community, she had found 'the vast majority of businesses that I work with want to do the right thing'. Citing the example of a member who recently discovered they had paid employees incorrectly, Ms Sheppard said underpayments can result from 'a genuine mistake', and can be confronting and stressful for all involved.⁴⁰⁶ Ai Group considered that 'many instances of incorrect payment are a result of misunderstanding or error'.⁴⁰⁷ The HIA argued there were in fact no instances of deliberate wage theft in their industry, and underpayment of wages and entitlements arose only from mistake or error.⁴⁰⁸

Ms Lindsay Carroll, NRA Legal Practitioner and Director, submitted that 'the types of non-deliberate errors that we see on a reasonably regular basis' are:

*... the application of the wrong modern award, misclassification of employees under a modern award and employers not understanding the circumstances when allowances, loadings and penalties are to apply and be paid.*⁴⁰⁹

A number of stakeholders noted that underpayments which result from genuine mistakes and oversights are often immediately corrected upon their discovery,⁴¹⁰ contrary to the experience of many workers' from whom the committee received evidence.

Recent media coverage highlighted the actions of cosmetics company Lush Australia, which proactively identified, then apologised for and undertook to rectify the underpayment of staff wages. It was reported that Lush had underpaid over 5,000 of its staff over eight years by approximately \$2 million, as it had 'not correctly calculated staff payments accurately according to Modern Awards'.⁴¹¹ The company self-reported to the FWO, engaged the NRA to review its payroll system, and developed its own repayment scheme to assist current and former staff to recover their unpaid wages. Lush referred to an error in its payroll infrastructure and internal systems, and stated that its conduct was

⁴⁰⁵ See for example, NRA, submission 021, p 54; MEA, submission 030, pp 5-8, Executive Security Group, submission 029.

⁴⁰⁶ Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 2.

⁴⁰⁷ Ai Group, submission 038, p 3.

⁴⁰⁸ HIA, submission 043, pp 4-6.

⁴⁰⁹ Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 54.

⁴¹⁰ See, for example: R&CA, submission 017, p 4; NRA, submission 021, p 7; QTIC, submission 022, p 9; MEA, submission 030, p 4.

⁴¹¹ Lush Cosmetics Australia, 'A letter to our staff', <https://lushbackpay.com.au/customer-contact/>

not deliberate.⁴¹² The committee considered this to be a clear example of when a genuine error had occurred and been rectified in good faith.

Ms Sheppard (Toowoomba Chamber of Commerce) commented on the effect of complex regulation for small businesses in particular.⁴¹³ Compliance by small businesses was noted in the FWO *Annual Report 2017-18*, which stated:

*Our intelligence indicates that, due to their comparable lack of resources, small businesses have more difficulty understanding and complying with workplace laws. In 2017-18, 46% of small businesses we audited as part of our campaigns were non-compliant, compared to 36% of larger businesses. Of all formal disputes we finalised, 63% involve small business.*⁴¹⁴

The complexity of the awards system and enterprise bargaining was raised as an exacerbating factor of accidental underpayments. For example, East Coast Apprenticeships noted: 'While not an excuse but perhaps an explanation in some of these cases, is the complexity of industrial relations and, the complicated features for wages and allowances'.⁴¹⁵ Simplification of the awards system was suggested by a number of stakeholders.⁴¹⁶

However, other stakeholders considered the argument that awards are complex, to be an insufficient excuse.⁴¹⁷ For example, IR Claims stated:

When they talk to you about this being a complicated area, I would ask you to take a fairly cynical view because of the resources that the ombudsman dedicates to that process. It is very easy for them to understand compliance. You have heard from restaurateurs and child-care centres. These people have to understand child safety and the complications of food hygiene and cross-contamination, yet they cannot understand the basic financial components of how to employ their staff. It is nonsense; it is not that complicated.

*There is a modern award. Twenty years ago, there were 16 awards for an industry in Queensland. We have one award nationally now. That argument 20 years ago had some legs, but today as a result of the nationalisation of the laws we say that it really is an inexcusable area. The Fair Work Act came in in 2009, and award transitional provisions existed over five years from 2010. Perhaps up until 2015, there may have been an argument that awards converting from a state environment to a federal might have been tricky, but it is 2018.*⁴¹⁸

⁴¹² See, for example: Nick Toscano and Maddison Leach, "Deeply sorry': Cosmetics chain Lush admits to underpaying thousands of staff", *Sydney Morning Herald*, 17 July 2018, <https://www.smh.com.au/business/workplace/deeply-sorry-cosmetics-chain-lush-admits-to-underpaying-thousands-of-staff-20180717-p4zrwf.html>; Michael McGowan, 'Lush cosmetics payroll error underpaid staff by \$2m', *The Guardian*, 17 July 2018, <https://www.theguardian.com/australia-news/2018/jul/17/lush-cosmetics-payroll-error-underpaid-staff-by-2m>.

⁴¹³ Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 2.

⁴¹⁴ Australian Government, FWO, *Annual Report 2017-18*, p 17.

⁴¹⁵ East Coast Apprenticeships, submission 004, p 3.

⁴¹⁶ See for example: R&CA, submission 017, p 4; MEA, submission 030, p 1; Mr Noel Ambler, private capacity, public hearing, Townsville, 28 August 2018, p 24; Mr Brian Carrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 10.

⁴¹⁷ See for example: Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 9; private hearing transcript, regional hearing, 2018.

⁴¹⁸ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

The view that the awards system is not overly complicated was also expressed by a private witness in Townsville, who told the committee:

When you go through the modern award... that is written quite well. It clarifies the job, the duties, and what they should be paid—penalty rates and all of that sort of thing. That is pretty simple. I am finding that lawyers, on behalf of the employer, are trying to hide behind this complexity and it is not. It is really annoying me. Fair Work has said, 'Yes, it's very complex.' No, it is not. I think the big problem is that they are allowing the legal system to make it complex.⁴¹⁹

The Senate EERC, in its inquiry into corporate avoidance of the FWA, was not persuaded by evidence suggesting underpayments are 'usually a result of oversight, or that the law is too complex for employers to understand'.⁴²⁰ It concluded:

Although there may well be employers who do not take the time to acquaint themselves with the relevant awards, ignorance of the law should not be an acceptable defence. Put simply, if you want people to work for you, you have a legal and ethical responsibility to work out what they should be paid, and then pay them correctly.⁴²¹

Similarly, the OIR cautioned the committee about the extent of underpayments being reported as employer mistakes, stating:

It has been noted, however, that the mistakes identified by the FWO have consistently favoured employers, and that genuinely innocent errors could be expected to include some proportion of overpaid employees. The absence of any evidence of widespread overpayments casts a certain amount of doubt over claims of inadvertent underpayments.⁴²²

8.2 Commercial gain – a business model?

Evidence suggests that deliberate wage theft occurs in a wide range of industries and employment arrangements, including large organisations and company franchises. The committee heard numerous reports of employers engaging in deliberate forms of wage theft to increase profits and gain advantage over competitors.⁴²³ In some cases the conduct was of such a systemic nature it was included in the employers' business model. Some employers were reported as appearing to treat wage theft as a usual business practice, and having little fear of being caught.⁴²⁴

A recent Senate committee inquiry stated: 'Underpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm'.⁴²⁵

⁴¹⁹ Private hearing transcript, regional hearing, 2018.

⁴²⁰ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 72.

⁴²¹ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 72.

⁴²² Queensland Government, OIR, written briefing, 7 June 2018, p 25.

⁴²³ See, for example: JobWatch, submission 016; QCU, submission 034; Mr Michael Fraser, Investigator and Researcher, Franchise Redress, public hearing transcript, Gold Coast, 10 September 2018.

⁴²⁴ See, for example: JobWatch, submission 016; YWH, submission 019; QCU, submission 034; Mr David Carter, Worker/chef, public hearing transcript, Brisbane, 16 August 2018, p 4; Ms Taylor Bun, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018; Ms Mele-Otufale Tulimaiau, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018.

⁴²⁵ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 59.

An indicator that wage theft is part of a business model was said to be repeated and deliberate conduct. One of the main reasons for businesses to engage in deliberate wage theft is to lower the costs of running a business. NRA noted this motivation in the retail industry, submitting:

*In NRA's view, deliberate non-compliance occurs out of a desire to increase profitability. Since labour costs are the most significant cost of doing business for a retail operator, it naturally makes sense to try and decrease this cost.*⁴²⁶

Recent case law involving a Brisbane 7-Eleven operator, similarly made this point, with Federal Circuit Court Judge Salvatore Vasta stating: 'Not only is it blight upon the system for workers to be exploited this way, it also enables a business such as that of the Respondents to unfairly profit.'⁴²⁷

In another case, a Gold Coast restaurant owner who had allegedly underpaid workers \$60,000 over four months highlighted 'the true extent of the competitive advantage wage theft'.⁴²⁸ It was reported that the employer 'did say to the Fair Work Ombudsman that he felt that he had to underpay so as to stay competitive'.⁴²⁹ Judge Vasta stated: 'Whilst one applauds persons trying to stay competitive, this cannot be done at the expense of the employees and in breach of the FW Act'.⁴³⁰

The National Union of Workers (NUW) told the committee that within the food manufacturing industry, the NUW has assisted workers to recover \$2 million in unpaid wages, which were 'taken from workers due to systemic miscalculation of shift penalties and hourly rates for workers as well as through either non-payment or underpayment of superannuation'.⁴³¹

In its recent report on compliance activities in food precincts such as Fortitude Valley, the FWO stated that 'businesses operating in high-density hospitality precincts may be adopting non-compliant practices to remain competitive'.⁴³²

A respondent to the committee's survey commented:

*Any periods of trading that do bring sufficient revenue are so fleeting and at odd times that it is clear that the business model has been deliberately designed to evade the costs of appropriately remunerating labour.*⁴³³

Mr Brian McCarrick, Director of Ardent Security, stated:

*The ever-increasing pressure of competition is driving down prices and business owners desperate to stay in business have to cut expenses to match revenue. The easiest target is to cut wages through underpaying the employees or non-payment of superannuation. Wage theft in the security industry is so far embedded that unfortunately it is becoming a business model.*⁴³⁴

⁴²⁶ NRA, submission 021, p 9.

⁴²⁷ *Fair Work Ombudsman v S & A Enterprises Pty Ltd (QLD) & Anor* [2017] FCCA 3332 (11 December 2017), [17]; IR Claims, submission 013, p 13.

⁴²⁸ IR Claims, submission 013, p 13.

⁴²⁹ *Fair Work Ombudsman v Samurais Paradise Pty Ltd & Anor* [2017] FCCA 2013 (9 August 2017), [17].

⁴³⁰ *Fair Work Ombudsman v Samurais Paradise Pty Ltd & Anor* [2017] FCCA 2013 (9 August 2017), [17].

⁴³¹ Ms Karthika Raghwan, Organiser, National Union of Workers, public hearing transcript, Gold Coast, 10 September 2018, p 12.

⁴³² Australian Government, FWO, *Food Precincts Activities – a report on compliance activities undertaken by the Fair Work Ombudsman*, July 2018, p 6.

⁴³³ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018, survey respondent.

⁴³⁴ Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8.

The YWH submitted:

Perhaps the key indicator of wage theft as a business model is when it affects several workers and is not an isolated incident. This submission's worst case of underpayment relates to this at Appendix E. Siva was underpaid at a famous food manufacturing company between July 2016 and May 2018, along with nearly 400 of her co-workers.

Again, Siva experienced the most common form of underpayment – a flat rate of \$22 per hour, ignoring overtime rates, shift loadings and other legal obligations:

Some of us had worked 22 hour long shifts with no breaks. We all just thought this was normal...

Following an audit of the site by the National Union of Workers, it was found Siva was underpaid \$17,616.82. The company did not provide Siva's pay slips in the legal timeframe and cases of underpayment are still ongoing at the site.⁴³⁵

The YWH submitted that 'the severity of wage theft at this famous manufacturer is wage theft as a business model'.⁴³⁶

The committee received evidence from a technical support officer in the healthcare sector, who stated that his employer 'has been using the lack of employment opportunities against the staff in the form of offering low wages & minimum wage increases over the years as they tell us that 'we are free to find employment elsewhere'. The committee was provided with a copy of a spreadsheet from the employer's payroll area, in which the employer (or designated officer) had calculated the difference in the wages being paid to staff compared to the award rate. This suggested the employer was aware of the exact entitlements owed to staff. The spreadsheet was saved in a common folder on the company server, where it was accessed by the employee in question.⁴³⁷

An intention to deprive workers of entitlements becomes clear when businesses make active attempts to cover up forms of wage theft, such as by deliberately misreporting wages and superannuation to both employees and the ATO, and ignoring advice provided by regulatory agencies.

An individual submitted to the committee that his daughter's employer did not pay her superannuation entitlements, however had falsely indicated on her pay slips that the contributions were being paid.⁴³⁸

Another individual provided evidence in a private hearing, that his employer had an employee 'employed on the books who does not work for the company' who was paid via the employers' bank account but then returned the money in cash. It was stated that the employer 'submits fraudulent documents to her immigration agent when requested'.⁴³⁹

The committee heard of an employer who had ignored a FWO request to back-pay an employee who had been found by the FWO to have entitlements owing,⁴⁴⁰ and an employer who had received advice from the ATO that they were misclassifying employees as independent contractors, however ignored the advice and continued to provide employee entitlements on the basis staff were independent contractors.⁴⁴¹

⁴³⁵ YWH, submission 019, p 7.

⁴³⁶ YWH, submission 019, p 7.

⁴³⁷ Mr Brad Davidson, correspondence, 18 October 2018, p 1.

⁴³⁸ Name suppressed, submission 002, p 1.

⁴³⁹ Private hearing transcript, regional hearing, 2018.

⁴⁴⁰ Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 13.

⁴⁴¹ Private hearing transcript, Brisbane, 2018.

The visibility of regulators and levels of enforcement may impact on an employers' decision to engage in wage theft, or an employee's decision not to report it. Enforcement activities reach a small proportion of businesses. One example is the FWO's National Hospitality Campaign in the restaurants, cafes and catering sector, the last phase of which audited 565 businesses across NSW, the ACT and Victoria.⁴⁴² When compared to the estimated number of businesses operating in the cafe and restaurant sector in NSW, ACT and Victoria at the time (just under 24,000 businesses), there was less than a two percent chance of being audited by the FWO, as part of this campaign.⁴⁴³

IR Claims commented on the lack of risk of being caught by the FWO, stating:

*There is no risk. Even if you interact with the Ombudsman, the Ombudsman's own annual report says that they recovered money for 17,000 people, yet their own document says only 1,500 of those were subject to enforcements. Even when they catch you with your hand in the cookie jar, you have less than a 10 percent chance of even getting a breach notice. Of that 17,000, which we say is grossly underestimated, only 33 were prosecutions involving only underpayments and of those, 75 percent involved a migrant worker. When you look at those numbers, that means that you are 25 percent of 33—so in other words a handful—six are likely to go to prosecution or civil remedy claims if you employ a wholly Australian workforce. They run the gauntlet and then you have all the pressures of the applicant bearing all the costs and all of the risk, and the employer can sit back and know that this is a significant hurdle for an employee to chase. There is no risk.*⁴⁴⁴

The committee was told some employers appeared to have decided to engage in wage theft, based on a cost/benefit analysis, believing it to be worth the risk and impacts on the workers.⁴⁴⁵ JobWatch stated:

*That is, the financial benefit of illegally reducing wage costs which in turn provides the employer with a competitive advantage over other like businesses far outweighs the risk of being reported to the FWO. This is particularly the case given the current recovery process usually allows the chance for voluntary compliance and/or private mediated settlements rather than judicial adjudications, which allows employers to negotiate a private settlement with no prospects of additional penalties being attached.*⁴⁴⁶

Clibborn and Wright reported that the lack of an effective enforcement regime 'allows employers to calculate the minimal chance of being caught breaching employment laws against the considerable savings available through underpayment'.⁴⁴⁷

⁴⁴² Australian Government, FWO, *National Hospitality Industry Campaign 2012-15: Takeaway Foods (Wave 3)*, March 2016, pp 4-5.

⁴⁴³ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 60; Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman', *Sydney Law Review*, 2017, 39(4), p 483.

⁴⁴⁴ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 11.

⁴⁴⁵ JobWatch, submission 016, pp 8-9; ACTU, correspondence, 21 August 2018.

⁴⁴⁶ JobWatch, submission 016, p 9.

⁴⁴⁷ Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, p 216.

JobWatch stated that when calculating risk, some employers factor in the low rate of prosecution and enforcement by regulators, including the FWO and ATO.⁴⁴⁸ A similar conclusion was reached by the Senate EERC in its inquiry into corporate avoidance of the FWA, which suggested:

*Because unions have reduced power to inspect wages records, the union and the FWO is unlikely to deploy its limited resources to undertake a prosecution where penalties might be imposed and the ATO is unlikely to discover underpaid superannuation contributions then the most likely consequence for being found out is that they have to repay the wages—it follows that the potential rewards are significant and the risk is low.*⁴⁴⁹

Business structures can also impact on the degree to which wage theft is enabled. Research suggests worker exploitation may be perpetuated by ‘fissured’ businesses which have complex and fractured structures (as may be found in some labour hire and franchise networks),⁴⁵⁰ and may provide further barriers to effective enforcement.⁴⁵¹ While these structures may assist in productivity and efficiency of the running of a business, they may also assist employers to avoid obligations and shift liability to smaller business entities or third-party intermediaries.⁴⁵²

FWO campaigns and investigations have reported on franchises’ wage theft activities, which appeared to be facilitated by business models and spread through the franchise networks.⁴⁵³ A well-known example is the FWO’s inquiry into 7-Eleven, which investigated allegations of significant underpayment of wages and falsification of employment records across the franchisee network.⁴⁵⁴ The investigation found that the 7-Eleven business model meant the cost of wages and risk of underpayment, settled on the franchisee rather than the franchisor,⁴⁵⁵ and that ‘controlling labour costs was possibly the only lever available to franchisees to significantly reduce their costs and increase net profit’.⁴⁵⁶ It also reported that the franchisees showed a tendency to adopt practices from other stores, even though they were aware the wages were below the legal minimum wage.⁴⁵⁷

⁴⁴⁸ JobWatch, submission 016, p 12.

⁴⁴⁹ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 85.

⁴⁵⁰ David Weil, ‘The Fissured Workplace Why Work Became So Bad for So Many and What Can Be Done to Improve It’, *The Economic and Labour Relations Review*, vol. 22, no. 2, 2011, p 36.

⁴⁵¹ See, for example: Stephen Clibborn and Chris F Wright, ‘Employer theft of temporary migrant workers’ wages in Australia: Why has the state failed to act?’, *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, p 214; Tess Hardy, ‘Who Should Be Held Liable for Workplace Contraventions and on What Basis?’, *Australian Journal of Labour Law*, vol 29, no. 2, 2016, pp 82-83.

⁴⁵² David Weil, ‘The Fissured Workplace Why Work Became So Bad for So Many and What Can Be Done to Improve It’, *The Economic and Labour Relations Review*, vol. 22, no. 2, 2011, 2011, p 37.

⁴⁵³ See, for example: Australian Government, FWO, *Domino’s Compliance Activity Report*, September 2018, pp 12, 16: The FWO noted ‘ongoing systemic issues within the Domino’s network’; Australian Government, FWO, *Caltex Compliance Activity*, March 2018, p 9: The FWO noted that the auditing conducted ‘suggests broader, more systemic issues, within the Caltex franchise network that could be contributing to promoting or enabling noncompliance throughout the network’. See also: Australian Government, FWO, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, April 2016.

⁴⁵⁴ Australian Government, FWO, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, April 2016, p 4.

⁴⁵⁵ Australian Government, FWO, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, Australian Government, April 2016, p 39.

⁴⁵⁶ Australian Government, FWO, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, Australian Government, April 2016, p 41.

⁴⁵⁷ Australian Government, FWO, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, Australian Government, April 2016, p 45.

The NRA stated:

It has been mooted in various forums that the franchising sector is particularly rife with wage non-compliance, thanks in large part to the case of 7-Eleven, due to the segregation between franchisor and franchisee^[89] This is not however the case; the Fair Work Ombudsman, in its report into the 7-Eleven case, noted that the 7-Eleven franchise model was unique in the franchise sector for the extremely limited areas in which the franchisee had any direct control over their business, with wages being one of these few areas.⁴⁵⁸

Franchise Redress told the committee that wage theft by employers can be ‘learned’, and reported that in one case franchise owners were ‘taught to keep workers back one to two hours each shift to clean after clocking them off’.⁴⁵⁹

8.3 Lack of worker awareness

Lack of workers’ awareness of their correct wage and entitlements is a factor which assists to perpetuate wage theft. If a worker is unaware of their entitlements, they are unable to enforce their rights and hold their employer accountable, should the need arise.

Several organisations reported that a significant number of employees were not aware they were being underpaid, or lacking entitlements.⁴⁶⁰

JobWatch submitted:

In JobWatch’s experience, wage theft is often a secondary or unknown issue for many who call the JobWatch TIS – and is often only identified by the TIS worker rather than the actual caller. For example, a caller will often call the JobWatch TIS after being dismissed in order to obtain information about challenging their dismissal and it is in the course of that conversation that it becomes apparent that recovery of underpayments is also an option for the caller.⁴⁶¹

The significance of worker awareness in the hospitality industry was noted by the NRA in their submission:

The Fair Work Ombudsman noted, during the National Hospitality Industry Campaign, that although people aged between 15-25 in the café and restaurants sector were the largest single group of employees, they were the least likely to make a complaint or inquiry about their rights at work.^[50] In NRA’s view, this is due to a lack of awareness of this group of workers about their rights and entitlements in the workplace.

Further, the Fair Work Act 2009 (Cth) and the processes under it are designed to allow workers to more readily take matters into their own hands. Workers cannot do this if they are not aware that those systems exist, or indeed that there is any reason to activate them.⁴⁶²

Some stakeholders made connections between worker awareness and membership rates of unions or registered employer organisations.⁴⁶³ One stakeholder group stated that ‘worker exploitation and wage theft is always lowest in workplaces with the highest union membership’, referring to a union’s role as a source of information, involving workers in employment bargaining processes, and its ability

⁴⁵⁸ NRA, submission 021, p 10.

⁴⁵⁹ Mr Michael Fraser, Investigator and Researcher, Franchise Redress, public hearing transcript, Gold Coast, 10 September 2018, p 25.

⁴⁶⁰ See also: ALHR, submission 051, p 4; IR Claims, submission 013, pp 18, 19, 21.

⁴⁶¹ JobWatch, submission 016, p 7.

⁴⁶² NRA, submission 021, p 13.

⁴⁶³ These are registered organisations under the FWA or the IR Act.

to take action.⁴⁶⁴ The QCU supported this view, suggesting ‘union members are less likely to be underpaid and more likely to be willing and able to enforce their legal entitlements’.⁴⁶⁵

There is some evidence that suggests particular employee groups are generally aware they are being underpaid or not treated fairly, however are either unaware of the existence of the FWO and its aims,⁴⁶⁶ or do not wish to report their concerns. For example, the findings of the *National Temporary Migrant Work Survey* reported that the majority of temporary migrants, being 78 percent of working holiday makers and 73 percent of student visa holders, who earned \$15 or less in their lowest paid job, knew that they were being paid under the minimum wage,⁴⁶⁷ but showed a level of acceptance, for want of a better word, and perceived ‘that few people on their visa can expect to receive minimum wages under Australian labour law, with at least 86% believing that many, most or all other people on their visa are paid less than the basic legal minimum wage’.⁴⁶⁸

In response to a question of the committee regarding ability of workers to recover lost wages, Mr Dan McGaw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, told the committee:

I guarantee you could walk out into the street right now and people would not know what the Fair Work Commission is or the Fair Work Ombudsman is. If a person or employee does not know where to go for help, they are probably limited and they will probably bite their tongue and think, ‘This is the norm. This is what I have to do.’⁴⁶⁹

8.4 Power imbalance

The power imbalance in the relationship between employers and employees can facilitate wage theft, as employees may be less likely to advocate for their entitlements if they feel they are in a position of weakness.⁴⁷⁰ This is particularly likely in vulnerable populations such as young workers, and those whose first language is not English, and where workers are unaware or unable to obtain assistance in understanding and enforcing workplace rights.

The ACTU stated it believed that ‘many workers are in a weak position to ask for decent wages (i.e. they are casual or temporary visa workers, labour hire or sham contracts) and therefore will “accept” a wage that is under the legal minimums for their industry’.⁴⁷¹

⁴⁶⁴ Maurice Blackburn and joint submitters, submission 033, p 8.

⁴⁶⁵ QCU, submission 034, p 10.

⁴⁶⁶ Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, p 6.

⁴⁶⁷ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 6,

⁴⁶⁸ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017, p 48.

⁴⁶⁹ Mr Dan McGaw, Branch President, QCU Toowoomba Branch; State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 13.

⁴⁷⁰ Maurice Blackburn and joint submitters, submission 033, p 5; YWH, submission 019, p 8; ACTU, correspondence, 21 August 2018.

⁴⁷¹ ACTU, correspondence, 21 August 2018, p 7.

The YWH suggested young people are particularly vulnerable:

*Young people who experience wage theft are often in one of their first jobs and can find it hard to speak up or raise issues related to wages with their boss. This can have a number of effects on young people, ranging from their confidence levels to their economic position.*⁴⁷²

A power imbalance is apparent where employers have extensive resources at their disposal, compared to those of employees. In response to a committee question regarding workers' ability to recover lost wages, Mr Dan McGaw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, responded:

*Very little hope, particularly if they are dealing with a big company that has not unlimited resources but access to hordes of lawyers and solicitors. There are industrial relations experts on one side and the HR manager on another side and then you have a barrister and a solicitor, compared to poor old Joe Blow with his solicitor from down the road. There is not much hope for those workers.*⁴⁷³

Another individual stated:

*Companies have the ability to scare individuals or provide them information such as by saying, 'This is the agreement you are under.' Employees have no ability to go and check it because the organisations they go to just do not know or just do not care or they are too incompetent to do some investigation.*⁴⁷⁴

The committee heard from an individual in a private hearing in Brisbane, who had experienced wage theft in the cleaning industry, and told the committee: 'the company has many people and they have money to pay good lawyers, and I do not have any kind of support'.⁴⁷⁵

Case study

Alannah was employed as an apprentice hairdresser. She was underpaid \$22,415 by her employer, including underpayments in wages and overtime. When Ms West approached her employer about the underpayments, her employer 'verbally abused her, and offered her an ultimatum – either resign or be sacked'.

'They made me feel like I was the smallest person in the world and they were the biggest people.

They made me feel tiny - and that I was useless - and that I didn't have any say in what was going on'.⁴⁷⁶

8.5 Lack of documentation

Employers' avoidance of legal requirements to provide payslips⁴⁷⁷ and other documentation, was consistently raised during the inquiry. This not only hinders detection of wage theft by regulatory agencies and the worker, but may also factor into a person's decision to report their underpayments.

⁴⁷² YWH, submission 019, p 8.

⁴⁷³ Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 7.

⁴⁷⁴ Private hearing transcript, regional hearing, 2018.

⁴⁷⁵ Private hearing transcript, Brisbane, 2018.

⁴⁷⁶ IR Claims, submission 013, pp 21, 24.

⁴⁷⁷ Under section 536 of the FWA, an employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

If a worker is not receiving any, or correct, payslips, it becomes extremely difficult for the worker to realise and accurately calculate the extent to which they are being underpaid.⁴⁷⁸

The YWH submitted:

*Without detailed, regular pay slips young workers aren't given the opportunity to understand their entitlements. This leaves young workers powerless when it comes to ensuring they are being paid correctly.*⁴⁷⁹

The YWH told the committee about the impact of lack of documentation on a worker when their wages were reduced:

Case Study

Kate worked in the hospitality industry and did not receive payslips. Prior to broader reductions in penalty rates, Kate's weekend rate was reduced from \$23 per hour to \$16.62 per hour, with no information or discussion from her employer.

Without payslips Kate worked out her pay rate from discussion with colleagues and calculation of her pay and hours worked. She was nervous about questioning the pay reduction in case her employer said her previous pay was an accidental overpayment and attempted to recover money from her.

*When Kate raised her concern about reduced wage rates, her employer said he would get back to her. He failed to do so, despite Kate following up. Kate said without proof of her original and reduced wage rate, she wasn't empowered to question the changed rate.*⁴⁸⁰

The committee also heard from Mr Sergio Duran, a cleaner, who stated:

*I was working part time and they never gave me a pay slip so I did not know how much they used to pay me, I did not know about our taxes and I did not know about my superannuation. They just said, 'We are upgrading our system,' and that was it.*⁴⁸¹

In a recent case before the Federal Circuit Court, a 7-Eleven operator was found to have breached record keeping practices. Judge Vasta noted the effect this had on the relevant FWO investigation, and stated:

*The record keeping was an appalling breach of the standards that are needed for businesses to operate fairly in this country. But not only did that mean that there were false records that were kept, it meant that when the Fair Work Ombudsman wanted those records, they were given false records, which, as I have already pointed out, has meant that the investigation was a lot more arduous and tedious than it should have been.*⁴⁸²

8.6 Worker non-reporting

As cited above, there are many reasons why a worker who is aware that they have been, or are being, subjected to wage theft may choose not to report the activity. The committee heard multiple reasons why employees did not report their concerns, ranging from the cost and time to recover wages, to fear

⁴⁷⁸ See, for example: Mr Moe Turaga, private capacity, public hearing transcript, Bundaberg, 12 September 2018, p 11; Ms Katherine Hamburg, Hospitality worker, public hearing transcript, Brisbane, 16 August 2018, p 22; YWH, submission 019, p 6; QCA, submission 035, p 2.

⁴⁷⁹ YWH, submission 019, p 6.

⁴⁸⁰ YWH, submission 019, p 15.

⁴⁸¹ Mr Sergio Duran, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 2.

⁴⁸² *Fair Work Ombudsman v S & A Enterprises Pty Ltd (QLD) & Anor* [2017] FCCA 3332, 11 December 2017, [23].

of damage to reputation and employment prospects. Other workers simply felt unable to do anything about it.

Of the 328 respondents who completed the committee's online survey, 36 percent (119 respondents) reported wage theft to their employer, 25 percent (82 respondents) reported wage theft to the FWO and 10 percent (33 respondents) reported wage theft to the ATO. Some respondents reported the issue to more than one authority.⁴⁸³

East Coast Apprenticeships submitted this reluctance can extend even beyond the employment period, with young people 'often reluctant to report such matters even when they have left that employment'.⁴⁸⁴

JobWatch suggested tight market conditions and 'poor employment prospects across Australia' were factors in under reporting wage theft, and:

*...vulnerable and disadvantaged employees often feel they have little option but to accept their below minimum wage rates as there are few legally compliant employers in their industry or, if they complain and are dismissed, will be unable to find another job let alone find another job with a compliant employer.*⁴⁸⁵

In a case example of an employee who was underpaid \$5,000 in salary, \$13,000 in superannuation and \$2,500 in other payments, JobWatch stated:

*The failure to pay the correct legal entitlement forces workers to resolve difficult questions whether having any job or having a good reference is worth being paid less than their legal entitlements... Kaled decided to take proactive steps to find a new employer rather than challenge his current employer's inability to pay.*⁴⁸⁶

Some stakeholders did not report due to their belief that the situation was not better elsewhere,⁴⁸⁷ or that their situation would not be improved by reporting.⁴⁸⁸

Franchise Redress outlined reasons workers do not report wage theft, and in addition to fear of consequences, stated: 'Workers also often don't believe that they have enough evidence to show that they were underpaid and feel that reporting wage theft would be a waste of their time'.⁴⁸⁹

The FWO's investigations into 7-Eleven stores in 2016, reported employees feeling resigned to a lower rate of pay and unlawful conditions, including unpaid training and excessive hours.⁴⁹⁰ Workers told the

⁴⁸³ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018.

⁴⁸⁴ East Coast Apprenticeships, submission 004, p 2.

⁴⁸⁵ JobWatch, submission 016, p 7.

⁴⁸⁶ JobWatch, submission 016, p 11.

⁴⁸⁷ See for example: JobWatch, submission 016, p 8; Dr Stephen Clibborn, submission 011; Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017; Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018 (see chapter 5.3)

⁴⁸⁸ See, for example: JobWatch, submission 016; Franchise Redress, submission 049, p 12; Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, pp 6, 59.

⁴⁸⁹ Franchise Redress, submission 049, p 12.

⁴⁹⁰ Australian Government, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, Australian Government, April 2016, p 49.

FWO they did not report the wage and conditions due to inability to find other employment, and pressures such as student loans and visa working conditions.⁴⁹¹

The National Temporary Migrant Work Survey found, ‘international students and backpackers were aware of the Australian minimum wage and knew they were being underpaid, but believed that few people on their visa can expect to receive that wage’.⁴⁹² Dr Laurie Berg stated:

*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 percent—who had not attempted to report their underpayment, around half of those said that they would be open to doing so.*⁴⁹³

The length of time required to recover wages, compared to the time a person intends to stay in Queensland also affects reporting. For example, the QCA explained:

*... a lot of the different migrant communities and international students are not here for a really long period of time as well. Sometimes we have people coming forward saying, ‘I’m owed this amount of money,’ but by the time they are able to go through the right process it will be months in order to get that back and they might be moving on or going somewhere else. It is quite a transient community as well.*⁴⁹⁴

Some international workers feel it necessary to work more than the stipulated hours, in breach of their visa conditions, resulting in fear of visa cancellation and deportation.⁴⁹⁵ The FWA also does not apply once a visa condition has been breached.⁴⁹⁶

As highlighted by Mr Palani Thevar, an employee’s cultural background may influence reporting:

*Often if people come from some part of the world they are very scared of authority, so anyone who is an authority figure they do not really feel comfortable telling. They do not understand that people can maintain confidentiality when they share. It is often themselves they are worried about but also friends and other people as well.*⁴⁹⁷

The results of the National Temporary Migrant Work Survey, outlined in the report *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, revealed that of 2,250 survey participants who had acknowledged they had been underpaid, 91 percent ‘suffered wage theft in silence’.⁴⁹⁸ The majority (97 percent), did not contact the FWO for assistance. Of the 194 participants who pursued recovery of unpaid wages, 67 percent did not receiving anything, and only 16 percent

⁴⁹¹ Australian Government, FWO, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, April 2016, pp 50-51.

⁴⁹² Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, November 2017.

⁴⁹³ Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 19.

⁴⁹⁴ Ms Elise Ganley, Community Organiser, QCA, public hearing transcript, Brisbane, 3 September 2018, p 4.

⁴⁹⁵ Private hearing transcript, Brisbane, 2018; Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 8.

⁴⁹⁶ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 8.

⁴⁹⁷ Mr Palani Thevar, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 4.

⁴⁹⁸ Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 5.

received the full amount owed.⁴⁹⁹ Of those employees who pursued recovery with the FWO's assistance, 58 percent did not receive any amount, and 21 percent recovered the full amount owed. Ten participants pursued recovery with the assistance of a union; 30 percent recovered all entitlements owed, and 40 percent recovered some of their unpaid amount.⁵⁰⁰

A report commissioned by the FWO about international students' interactions with the FWO also highlighted a reluctance to approach the FWO among the 766 international students who participated in the survey.⁵⁰¹ Reasons for not reporting to the FWO included that 'respondents doubted that approaching FWO would improve their situation',⁵⁰² and indicated they would be more inclined to report if they knew the FWO 'had successfully helped other students'.⁵⁰³

This view, that the FWO could or would not help employees recover stolen wages if they formally reported the incidence, was consistently expressed by stakeholders during committee hearings. The reasons cited for this view were that employees were advised when calling the FWO for assistance that they would have to do their own investigations, calculations of estimated lost entitlements, approach the employer for mediation, and take the matter to court should mediation be unsuccessful. Most witnesses and submitters advised that following this advice, or lack of response from the FWO, they felt that reporting was futile, or that should they wish to pursue any reimbursement of lost entitlements, they were on their own. This issue is addressed in more detail in chapter 11.

8.6.1 Intimidation and reprisals

The committee heard numerous reports of workers who feared loss of employment or being allocated reduced hours within casual rosters, or who had experienced intimidation or reprisals after raising their wage theft issues. Concerns about employment security were raised in a range of industry sectors including in relation to the food-processing industry, group-training organisations representing apprentices, and workers in the tourism industry.⁵⁰⁴

One survey respondent stated:

*I worked as an ESL teacher for twenty-four years in Brisbane and if you want to keep your job, you do not try to enforce your rights as an individual or as a union member.*⁵⁰⁵

⁴⁹⁹ Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 6.

⁵⁰⁰ Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 6.

⁵⁰¹ Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, p 56.

⁵⁰² Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, pp 6, 59.

⁵⁰³ Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and Dr George Tan, *International Students and the Fair Work Ombudsman*, University of Adelaide, 2017, p 6.

⁵⁰⁴ See, for example: YWH, public hearing transcript, Gold Coast, 10 September 2018, p 4; Mr Alan Sparks, CEO, East Coast Apprenticeships, public hearing transcript, Brisbane, 20 August 2018, p 12; private hearing transcript, regional hearing, 2018; private hearing transcript, Brisbane, 2018.

⁵⁰⁵ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018, survey respondent.

Such concerns were also reflected in the comments of another survey respondent, identified as a worker in the security industry. The respondent said they and dozens of other guards:

*... feel as though we are being taken for a ride but none of us can speak up for fear of our jobs and our reputation within the industry nobody will hire somebody that took on their own company.*⁵⁰⁶

JobWatch detailed a case study of a couple who spoke to their employer when they realised they were earning under the minimum wage, and requested copies of their timesheets. The employer agreed and at first appeared conciliatory; however late cancelled their shifts and did not engage any further. It was then unclear whether they had been dismissed, or whether they would receive their legal entitlements.⁵⁰⁷

Casual employees were particularly concerned about loss of employment. A survey respondent, employed in a medical practice stated: ‘many staff are casual and fear being left off the roster if they complain to employer so just put up with it.’⁵⁰⁸

Mr Beau Malone, state organiser for the Queensland and Northern Territory Branch of the Electrical Trades Union, told the committee:

*...at the moment, labour hire and insecure employment are the main issues that we are seeing around wage theft, because people are not prepared to raise the issue for fear of losing their job. There are no alternative permanent employment opportunities out there that give them the ability to pay down loans and put food on the table for their families. They are going out there knowing that they are getting their wages stolen off them.*⁵⁰⁹

In a private hearing, a migrant worker spoke of the general fear of making a claim with FWO, and that workers in the cleaning industry feel scared to talk or provide information.⁵¹⁰

A member of the QCA told the committee of people’s fear in coming forward to share their story, and stated:

*There is a bit of fear—fear of losing some kind of income and fear of identification about themselves, so someone will be finding them.*⁵¹¹

Bullying and intimidation was reported by clients of IR Claims,⁵¹² and by Maurice Blackburn and joint submitters.⁵¹³

⁵⁰⁶ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland, 2018*, survey respondent.

⁵⁰⁷ JobWatch, submission 016, p 15.

⁵⁰⁸ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland, 2018*, survey respondent.

⁵⁰⁹ Mr Beau Malone, State Organiser, ETU Queensland and Northern Territory Branch, public hearing transcript, Gold Coast, 10 September 2018, p 21.

⁵¹⁰ Private hearing transcript, Brisbane, 2018.

⁵¹¹ Mr Palani Thevar, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 4.

⁵¹² IR Claims, submission 013, pp 5, 37, 89.

⁵¹³ Maurice Blackburn and joint submitters, submission 035, p 21.

Case Study

A service station attendant was underpaid \$261,715 by his employer.

After approaching his employer, and initiating dispute resolution, he was subjected to intimidation and bullying by his employer. He was threatened, harassed, and intimidated by his bosses, and according to his wife, his reputation in the industry was also damaged.

'They even tried with me when I told them I was taking it through to court, and they kept threatening me and saying I would lose everything - just to try and get me to drop it'.⁵¹⁴

A survey respondent also reported bullying by their employer, and stated: 'I was also warned verbally to "keep quiet about it" as there was countless others who were unaware of the EA terms'.⁵¹⁵

The National Temporary Migrant Work Survey reported a case study about an employee who reported intimidation from his employer through direct messages and legal correspondence seeking cost orders in the case of any action taken by him against his employer. The YWH noted that this correspondence would have been difficult to understand and affected the employee's confidence to pursue his rights. The YWH considered this to be 'deliberate intimidation by employers to discourage actions being brought in relation to wage theft'.⁵¹⁶

8.7 Cash economy

Wage theft may be facilitated by employers who pay cash-in-hand and avoid complying with relevant reporting, documentation and legal entitlements.

Cash-in-hand payments were explored by the Black Economy Taskforce, which identified the practice was used to systematically 'avoid paying minimum wages, avoid paying taxes, reduce compliance costs and allow under-reporting of income by the recipient of the payment'.⁵¹⁷ In its report, the Black Economy Taskforce noted broader drivers of the black economy, including high tax and regulatory burdens, and low profit margins. It reported that the black economy 'is fuelled by a combination of commercial opportunity and poor transparency'.⁵¹⁸

The Black Economy Taskforce Report recommended mandating the payment of salaries and wages into bank accounts to improve transparency and provide further protections for workers.⁵¹⁹ The Federal Government agreed in principle that 'the payment of salary and wages into bank accounts is preferable to the payment of cash' and advised that 'consultation will be held with industry on options to encourage the electronic payment of salary and wages, noting the particular impact on small business'.⁵²⁰ The Black Economy Taskforce also noted that cash-in-hand payments for wages is sometimes instigated by employees.⁵²¹

⁵¹⁴ IR Claims, submission 013, p 73.

⁵¹⁵ Education, Employment and Small Business Committee, *Survey for the inquiry into wage theft in Queensland*, 2018, survey respondent.

⁵¹⁶ YWH, submission 019, pp 8-9.

⁵¹⁷ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 12.

⁵¹⁸ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 15.

⁵¹⁹ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 58.

⁵²⁰ Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report*, May 2018, p 13.

⁵²¹ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 59.

The Restaurant and Catering Australia (R&CA) submission stated that employees in the hospitality sector sometimes requested cash payments:

The main manifestation of the black economy as it relates to the hospitality sector is the payment of workers' wages in cash. R&CA notes that this practice is, in many cases, driven by employees asking their employers to be paid in cash. In a survey of R&CA members, roughly one-quarter (26.9 percent) of hospitality sector businesses indicated that their staff members had requested cash-in-hand payments at some point in time. When asked to provide the reasons why staff requested cash-in-hand payments, the most commonly reported answers were to avoid tax or losing Centrelink payments and other Government benefits. Businesses also reported that some staff made requests to receive cash-in hand payments due to specific restrictions on their visas.⁵²²

⁵²² R&CA, submission 017, p 3.

9 Promoting compliance

Any system response to a regulatory issue inevitably draws on a mix of proactive and reactive strategies, in order to both:

- deliver appropriate regulatory interventions and support after an issue has been reported or detected by authorities, and
- seek to address the enabling factors that allow the issue to arise in the first place and encourage early identification and reporting, to minimise its effects.⁵²³

This chapter considers the effectiveness of current proactive approaches to addressing wage theft, focussing on:

- education and awareness programs, and
- other proactive compliance mechanisms in the form of licensing regimes, business registration and procurement policies, all of which serve to increase oversight and establish additional obligations and incentives for parties to operate within the legislative framework.

9.1 Education and awareness

As highlighted in Chapter 8, a lack of awareness or understanding of workplace rights and responsibilities can leave employers at higher risk of non-compliance; and employees, ill-placed to question their wages and entitlements or recognise whether they meet minimum legislative standards.

Educational and awareness initiatives are critical for addressing these shortfalls in knowledge and understanding, thereby reducing scope for employer errors and ensuring workers are equipped to identify circumstances in which they may not be receiving their minimum entitlements.

However, the committee wishes to acknowledge at the outset that these initiatives are likely to have limited impact on those employers who deliberately seek to evade their employment obligations. Equally, they do not address the disincentives for reporting wage theft arising from the cost and inaccessibility of recovery processes and from broader shortcomings in enforcement. Accordingly, the measures outlined here will address only a subset of the issues that are contributing to the prevalence of wage theft in Queensland.

9.1.1 Current education and awareness services

The FWO and ATO both provide detailed information and resources about workplace rights and obligations, chiefly as online content on their respective websites. This includes information on workplace laws in an array of different formats and targeted to different industries and audiences, as well as a number of self-service tools.

The FWO's online and mobile content includes:

- factsheets and guides, including information tailored to specific industries or audiences
- an online learning centre, including a recently launched 'small business showcase'

⁵²³ New South Wales Government, Department of Finance, Services and Innovation, *Guidance for regulators to implement outcomes and risk-based regulation*, October 2016, p 44; Meredith Minkler et al., 'Wage Theft as a Neglected Public Health Problem: An Overview and Case Study from San Francisco's Chinatown District', *American Journal of Public Health*, vol. 104, no. 6, 2014, pp 1010-1020; Associate Professor John Howe, Dr Tess Hardy and Professor Sean Cooney, 'The transformation of enforcement of minimum employment standards in Australia: A review of the FWO's Activities from 2006 to 2012', Centre for Employment & Labour Relations Law, Melbourne Law School, University of Melbourne, July 2014, p 56.

- a Pay and Conditions tool, including a ‘Find my Award’ search facility
- the smartphone app ‘Record My Hours’, to assist workers to keep their own log of hours worked, and
- the ‘My account’ online portal for online enquiries or to save tailored information based on user preferences.⁵²⁴

The ATO provides online information and resources including:

- online fact sheets, brochures, videos and guidance
- an ‘Estimate my super’ tool for employees
- a ‘Super guarantee private health check’ resource for employers
- various small business webinars and a free Small Business Superannuation Clearing House which allows small businesses to make a single electronic payment and distributes the payments to each employees’ super fund
- the SuperStream system - the ‘standardised electronic payment and information sharing system for employers and super funds’,⁵²⁵ and
- online enquiry and live chat facilities.⁵²⁶

The OIR provides a full information service on its website, though its approach is primarily ‘to be a conduit’ with federal regulators.⁵²⁷ All three regulators also operate telephone information services.⁵²⁸

Usage statistics from the FWO and OIR indicate that their informational resources and services are well utilised. The FWO has reported that in 2017-18, over 9.5 million users viewed its website, with staff answering over 376,200 calls and 64,533 online enquiries.⁵²⁹ The OIR advised it receives approximately 11,000 enquiries each year about state and federal wage matters.⁵³⁰

The FWO and ATO also seek to promote their online resources and provide associated updates in newsletters and alerts issued through email subscription services and social media platforms (including, for the ATO, issuing SG payment reminders).⁵³¹ The FWO advised that it has recently

⁵²⁴ Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, pp 1-2, 13-14.

⁵²⁵ Australian Government, ATO, ‘*Commissioner of Taxation Annual Report 2016-17*, 2017, p iii.

⁵²⁶ See: Australian Government, ATO, ‘Small Business Superannuation Clearing House’, 24 September 2018, <https://www.ato.gov.au/business/super-for-employers/paying-super-contributions/small-business-superannuation-clearing-house/>; Australian Government, ATO, ‘Key webinar topics for small business’, 24 October 2018, <https://www.ato.gov.au/general/webinars/small-business-webinars/?sbnquicklink>; Australian Government, ATO, ‘Estimate by super’, 21 December 2016, <https://www.ato.gov.au/calculators-and-tools/estimate-my-super/>; Australian Government, ATO, correspondence, 19 July 2018, pp 7-8.

⁵²⁷ Ms Natalie Wakefield, Director, Labour Hire Licensing Unit, OIR, public briefing transcript, Brisbane, 11 June 2018, pp 4-5.

⁵²⁸ Ms Natalie Wakefield, Director, Labour Hire Licensing Unit, and Mr Tony Schostakowski, Chief Inspector, Industrial Relations Regulation and Compliance, OIR, public briefing transcript, Brisbane, 11 June 2018, p 4.

⁵²⁹ Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, pp 13-15.

⁵³⁰ Queensland Government, OIR, written briefing, 7 June 2018, pp 1, 3.

⁵³¹ Australian Government, FWO, correspondence, 5 October 2018, p 3; Australian Government, ATO, correspondence, 19 July 2018, p 8.

released social media campaigns and content to reach vulnerable employee groups and their employers, including:

- general campaigns about tools and resources available to assist employees and employers to understand their rights and obligations under Australian workplace law
- a targeted campaign for international students, and
- a targeted campaign promoting the FWO's apprenticeship guides.⁵³²

All three agencies also undertake targeted engagement initiatives with key industry stakeholders through various events and campaigns, to collaborate on efforts to promote compliance in their industries.

For the OIR, these campaign activities have been focussed on the labour hire industry.⁵³³ For the ATO, outreach and engagement activities include:

- discussing SG obligations at tax agent forums and presentations to ensure advisors are aware of recent developments and changes in approach
- holding regular small business seminars to assist new businesses to understand their obligations and requirements, and
- conducting school visits to engage students in discussions about tax and super to assist them to prepare for employment and further education (In its 2016-17 annual report, the ATO advised that it had conducted 'almost 270 school visits, delivering face-to-face talks and webinars' which 'engaged over 19,500 students in discussion', and noted that 600 schools had registered for its *Tax, Super and You* online teaching resource, which had been updated during that financial year to map it to the national school curriculum for Years 7 to 10).⁵³⁴

The ATO also reported that it is expanding its network of community partners so it can assist them in helping new people to Australia, recognising that 'engaging through trusted community leaders is one of the most effective means of communicating with this audience'.⁵³⁵

The FWO advised the committee that in Queensland, it 'has funded Growcom, an employer organisation in the horticulture industry, through the Community Engagement Grants program to educate Queensland growers about issues such as labour procurement and employment law'.⁵³⁶

As part of its International Student Engagement Strategy, the FWO provides information for distribution through more than 20 international student community stakeholders in, or responsible for Queensland. It also 'partners with the Department of Education and Training to distribute information nationally to 8,000 registered providers of education to overseas students. Those providers include tertiary institutions, vocational education providers and English language educators'.⁵³⁷

The FWO reports it has also formed relationships with community organisations, such as community legal centres and universities, 'to more effectively reach at risk workers' through these intermediaries'. This includes engaging with these community partners to highlight a visa assurance protocol with the

⁵³² Australian Government, FWO, correspondence, 5 October 2018, p 3.

⁵³³ Ms Natalie Wakefield, Director of the Labour Hire Licensing Unit, OIR, public briefing transcript, Brisbane, 11 June 2018, p 4.

⁵³⁴ Australian Government, ATO, correspondence, 19 July 2018, p 8; Commissioner of Taxation, *Annual Report 2016-17*, p 17, updated 30 October 2017, <https://www.ato.gov.au/misc/downloads/pdf/qc53532.pdf>

⁵³⁵ Australian Government, ATO, Commissioner of Taxation, *Annual Report 2016-17*, 2017, p 17.

⁵³⁶ Australian Government, FWO, submission 044, pp 3-4.

⁵³⁷ Australian Government, FWO, correspondence, 5 October 2018, p 3.

Department of Home Affairs that allows migrant workers ‘to seek our assistance without the fear of having their visa cancelled’.⁵³⁸

In 2017-18, the FWO launched a tool that automatically translates its website content into 40 different languages, consolidating existing foreign language resources (translated material on key topics in 30 different languages).⁵³⁹

9.1.2 Stakeholder proposals

Stakeholder feedback on existing regulator education and engagement activities was generally positive. IR Claims director Mr Miles Heffernan stated of the FWO in particular:

*‘For your \$110 million, the ombudsman does an exceptional job of education. They have a great website; they have great information which employers can find on what they need to do to comply with the laws.’*⁵⁴⁰

Ms Lindsay Carroll, NRA Legal Practitioner and Director, stated:

*‘... the Fair Work Ombudsman has a number of fantastic resources that are available online—pay calculators, resources that assist with identifying which award applies. The Fair Work Ombudsman operates a great hotline where people can go for general advice.’*⁵⁴¹

However, many stakeholders saw room for improvement in the general approach to education and awareness activities, citing the persistence of low levels of awareness of employee rights and the options for employees to access information and pursue remedies, particularly amongst vulnerable cohorts (see chapter 8.6).

There was support for a broad public education campaign to support the cultural change necessary to empower workers and highlight the seriousness of wage theft.⁵⁴² The QNMU considered that such a campaign should be funded to:

- increase workers’ awareness of workplace rights and entitlements and the action they can take to remedy wage theft, and
- increase employers’ awareness of their workplace obligations to comply with industrial laws and keep accurate time and wages records.⁵⁴³

IR Claims submitted that the campaign should also highlight the impact of wage theft on its victims.⁵⁴⁴

Other suggested improvements from stakeholders’ focussed on enhancing approaches to education for three vulnerable cohorts – international students, migrant workers and young people.⁵⁴⁵

Of these groups, the largest amount of education-related commentary was directed towards the education of young people on their employment rights and responsibilities.

⁵³⁸ Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, p 2.

⁵³⁹ Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, p 1.

⁵⁴⁰ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

⁵⁴¹ Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 59.

⁵⁴² IR Claims, submission 013, p 57; JobWatch, submission 016, pp 3, 11; YWH, submission 019, p 11; QNMU, submission 023, pp 4, 8, 10.

⁵⁴³ QNMU, submission 023, pp 4, 8, 10.

⁵⁴⁴ IR Claims, submission 013, p 57.

⁵⁴⁵ JobWatch, submission 016, p 1; QTIC, submission 022, p 11; Dr Laurie Berg and Bassina Farbenblum, submission 042, p 5; Ms Debra McPherson, private capacity, public hearing transcript, Cairns, 27 August 2018, p 11.

Stakeholders generally acknowledged that the current approach to engaging with this cohort does not appear to extend much beyond making information available, notwithstanding the efforts of some institutions. Notably, the 600 schools signed up to the ATO's online program and 270 schools visited by the ATO throughout 2017, represent only a very small fraction of the 9,444 schools nationally, as reported by the ABS in 2017.⁵⁴⁶ Further, while the Queensland Government previously provided joint funding for a Young Workers' Advisory Service (YWAS) for young people under 25 years of age, and an associated education and outreach program; this funding, and accordingly, the provision of the service, ceased in 2012.⁵⁴⁷ YWAS activities had included visits to schools and sessions at Brisbane Youth Service and Get Set for Work agencies, as well as a telephone helpline and casework services.⁵⁴⁸

The NRA submitted:

*We are aware that many schools provide a basic education with respect to the necessity of having a tax file number, and some schools go so far as provide some education in workplace skills. However, we know of no formalised attempt to educate young people about their rights under the Fair Work system, even in formal traineeships and apprenticeships...*⁵⁴⁹

Mr Martin de Rooy, YWH stated:

*In our experience, schools focus a lot on careers, university and degrees, which is great, but they do not focus on jobs. A lot of senior secondary school students and TAFE students already have jobs. They are not being prepared for the jobs they currently have and they are not being prepared for the jobs they may have in the future... We think young workers definitely need to be taught their rights at work in TAFEs and schools. Similarly, if those young people would like to run businesses, this will be helpful for them as well.*⁵⁵⁰

Gold Coast-based teacher Ms Jessica Prouten stated:

*.... I teach business and legal studies and in those subjects we have an opportunity to discuss workplace law and what happens in the workplace broadly under the HR banner, but not every student does those and there needs to be some space provided for a group that actually have training in what happens in workplaces to come in and talk to the students. Whilst I have the training to teach business and legal studies, I am not an expert in industrial relations law and some of the questions that students raise at times are questions that I have to go away and look up answers to because I am not an expert. So it would be really great to have experts come in—in the same way that we would get in experts to talk to them about how to set up a business—to talk to them about what they can do when they find themselves in difficult situations...*⁵⁵¹

Ms Helen Wood, Executive Manager, Client Relationships, Hostplus stated with regard to superannuation in particular:

There is a need for financial education as part of either the national curriculum but certainly education for adults... I do think it is important, particularly in superannuation. People start their

⁵⁴⁶ Australian Government, ABS, '4221.0 – Schools, Australia, 2017', <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4221.0>

⁵⁴⁷ Working Women Queensland, correspondence, 26 October 2018.

⁵⁴⁸ Queensland Working Women's Service Inc, 'Annual report 2011/2012, 1 July 2012', pp 17-19, <http://wwq.org.au/wp-content/uploads/2015/01/QWWS-2011-2012-Annual-Report.pdf>

⁵⁴⁹ NRA, submission 021, p 12.

⁵⁵⁰ Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, pp 24-26.

⁵⁵¹ Ms Jessica Prouten, private capacity, public hearing transcript, 17 September 2018 (evening), p 4.

*first jobs at times when they are 14 or 15. They walk into a café and do some waitressing on a Saturday, and they literally have no idea whether they are eligible for super.*⁵⁵²

Ms Prouten further stated:

*.... even if we just bring in a guest speaker on a day to allow students to raise some of these issues. You can find time to do that for an hour, as long as it is allowable, and I think that is the question. When I have spoken to co-workers in other schools, they are not sure that they are allowed to do that because of the political climate.*⁵⁵³

Calls for investment in formalised, structured education for secondary school students had strong support across all stakeholder groups.⁵⁵⁴ IEU industrial officer Ms Vaishi Rajanayagam considered such education could be easily incorporated into existing workplace education in VET courses;⁵⁵⁵ and IR Claims submitted that such education programs should be comprehensive and compulsory, and accompanied by the introduction of similar programs for TAFE, university and college students.⁵⁵⁶ With regard to TAFE institutions, IR Claims director Mr Miles Heffernan, noted that ‘we do a lot with apprentices who are faced with exploitation’ and as ‘obviously Queensland helps write the curriculum’, ‘during TAFE courses there is a role to play’.⁵⁵⁷ The YWH recommended that:

*...the Queensland government allow senior secondary schools and TAFEs to opt in to programs that educate years 11 and 12 students on their rights at work, noting that non-government schools and RTOs can also opt in.*⁵⁵⁸

Beyond addressing shortfalls in awareness, the YWH submitted that ‘issues of ignorance and intimidation young workers face can be dealt with in these sessions’, including discussions of how to go about raising a matter.⁵⁵⁹ Ms Prouten also noted that young people tend not to question their circumstances and assume a manager and employer will know and do the right thing, and may need the reassurance of discussing matters openly in this way, to be empowered to speak up.⁵⁶⁰ The QTIC emphasised the importance of communication including ‘not only what legal entitlements are but also the grievance process if individuals have been subject to wage theft’.⁵⁶¹ The QCA submitted that as ‘trusted institutions’, schools and universities are well placed to educate students directly so they are better able to navigate such issues.⁵⁶² In this respect, the NRA also emphasised that the FWA ‘and the processes under it are designed to allow workers to more readily take matters into their own hands’.⁵⁶³

⁵⁵² Ms Helen Wood, Executive Manager, Client Relationships, Hostplus, public hearing transcript, Brisbane, 17 September 2018 (morning), p 11.

⁵⁵³ Ms Jessica Prouten, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 6.

⁵⁵⁴ See for example: Ms Debra McPherson, private capacity, public hearing transcript, Cairns, 27 August 2018, p 11; Mr Lloyd Abbott, South West Organiser, Together Union, public hearing transcript, Toowoomba, 10 September 2018, p 15; Ms Jessica Prouten, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening); Ms Vaishi Rajanayagam, Industrial Officer, IEU, public hearing transcript, Brisbane, 17 September 2018 (morning), p 35; IR Claims, submission 013, p 57; YWH, submission, p 10; NRA, submission 021, p 12.

⁵⁵⁵ Ms Vaishi Rajanayagam, Industrial Officer, IEU, public hearing transcript, Brisbane, 17 September 2018 (morning), p 35.

⁵⁵⁶ IR Claims, submission 013, p 57.

⁵⁵⁷ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 14.

⁵⁵⁸ Mr Martin de Rooy, Founder, Young Workers Hub public hearing transcript, Brisbane, 16 August 2018, p 22.

⁵⁵⁹ YWH, submission 019, p 10.

⁵⁶⁰ Ms Jessica Prouten, private capacity, public hearing transcript, 17 September 2018 (evening), pp 1-3.

⁵⁶¹ QTIC, submission 022, p 11.

⁵⁶² QCA, submission 035, p 3.

⁵⁶³ NRA, submission 021, p 13.

The YWH advised that it has been developing a draft program to help inform students about their rights at work, in line with the Australian Curriculum of Work Studies and Civics and Citizenship, and with funding from the QCU.⁵⁶⁴ Ms Jessica Prouten also highlighted a workplace readiness curriculum developed by the Australian Curriculum, Assessment and Reporting Authority, which can be implemented from year 10.⁵⁶⁵

Regardless of the program employed, the consensus amongst submitters and witnesses was that government, unions and business should all have input to, and play a role in this education process.⁵⁶⁶

Previously, Queensland had a formal mechanism for the collaboration and cooperation of industry stakeholders in this respect, in the form of a tripartite Industrial Relations Education Committee.⁵⁶⁷ While this tripartite committee is no longer in operation, the committee considers that the Queensland Government could serve to facilitate such collaboration in the future.

With respect to the other two key cohorts of concern, in international student and migrant workers, stakeholders acknowledged the broad availability of information and stated regulator efforts to disseminate information to this audience through various channels and outreach activities. However, the committee heard consistent calls for more direct and frequent engagement with those affected, to support their uptake of the information.

Ms Lindsay Carroll of the NRA noted that while a wide range of helpful resources exist, you 'have to know where to look', in what can seem like a sea of information.⁵⁶⁸ Reverend Pauline Harley from the QCA also highlighted informational challenges for her community:

My community, in particular, is quite multicultural. It is about education in languages that people can understand. It is about resources. At times even I do not know where to go to help these people. I find myself chasing all sorts of channels to figure out where I am going to be able to help these people. It is about having a simpler process to know where you can send people to get help when help is needed.⁵⁶⁹

The QTIC emphasised 'the value of strategic communication' and need for 'highly developed methods of outreach'.⁵⁷⁰ Clibborn, in previous research on the international student sector, reached the conclusion that 'providing information through traditional passive means will have limited impact on workplace outcomes'.⁵⁷¹ Noting that international students take their cues from peers rather than host country laws, he suggested that regulators 'need to reassess their provision of information regarding minimum employment standards and avenues available to pursue recovery of unpaid wages':

... regulators might benefit from examining interventions aimed at disrupting current information flows in peer networks. At the least, employment and immigration authorities could consider providing information to all temporary migrants with work rights on arrival – that is, before they are exposed to advice from peers. Education institutions are also well placed to

⁵⁶⁴ Mr Martin de Rooy, Founder, Young Workers Hub, public hearing transcript, Brisbane, 16 August 2018, p 25.

⁵⁶⁵ Ms Jessica Prouten, private capacity, public hearing transcript, Brisbane, 17 September 2018, p 3.

⁵⁶⁶ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 4; NRA, submission 021, p 13; QCA, submission 035, p 3.

⁵⁶⁷ Hon Grace Grace MP, Minister for Education and Minister for Industrial Relations, public hearing transcript (Estimates Hearing), Brisbane, 2 August 2018, p 6.

⁵⁶⁸ Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 59.

⁵⁶⁹ Public hearing transcript, Brisbane, 3 September 2018, p 6.

⁵⁷⁰ QTIC, submission 022, p 11.

⁵⁷¹ Stephen Clibborn, 'Multiple frames of reference: Why international student workers in Australia tolerate underpayment', *Economic and Industrial Democracy*, 2018, p 15.

*provide information to international students on workplace rights and to influence opportunities for widening their peer interactions.*⁵⁷²

A QCA member Ms Lus Mosquera called for the provision of education for international students on arrival in the country as part of their student orientation, including suggesting they be provided with referrals to compliant job service providers.⁵⁷³ Dr Laurie Berg and Bassina Farbenblum recommended supporting a 'sector-wide response among universities, ELICOS and VET providers to deliver appropriate information and support services to assist international students to avoid and address wage theft, including legal assistance'.⁵⁷⁴

In this respect, the second report of Berg and Farbenblum's National Temporary Migrant Work Survey, highlighted that of those international students who tried to recover their unpaid wages, only one percent approached the FWO, while 34 percent contacted someone at their university of college: 'This included 38 percent of university students and 27 percent of vocational and English language students'.⁵⁷⁵

Similar recommendations were made in relation to migrant workers, with Mr Giri Sivaraman from Maurice Blackburn Lawyers highlighting that:

*... when you come into Australia you are told to not bring any plant food and other products or drugs, but you are not told what your rate of pay should be or anything like that. There is no education in terms of your employment rights.*⁵⁷⁶

Mr Sergio Duran, himself a migrant worker and also a member of the QCA, gave evidence in this respect:

*It is about training people. Let us know what we have to do. For example, when many people come to Australia they do not have any idea what is a phone number and what is an ABN. It is as simple as that. You see people working with an ABN and they receive a payment of \$15 per hour. Who is paying their insurance? Who is paying their superannuation? Who is paying their tax?*⁵⁷⁷

Mr Duran stated that migrants would benefit from receiving information before they arrive in Australia:

*I think it is much better to get it before you come to Australia and even when you are in Australia. Sometimes the agency sells you the package, inviting you to come to Australia. They tell you how Australia is really rich and how when you arrive in Australia you are going to get a job instantly. You say, 'Okay, I am going to go there.' When you arrive here you see another situation. Of course we came with money but that money is not going to support us for a year. It will support you for a maximum of six months or three months and you hope to find a job to support yourself after that.*⁵⁷⁸

⁵⁷² Stephen Clibborn, 'Multiple frames of reference: Why international student workers in Australia tolerate underpayment', *Economic and Industrial Democracy*, 2018, p 15.

⁵⁷³ Ms Lus Mosquera, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 3.

⁵⁷⁴ Dr Laurie Berg and Bassina Farbenblum, submission 042, p 5.

⁵⁷⁵ Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 5.

⁵⁷⁶ Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 43.

⁵⁷⁷ Mr Sergio Duran, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 4.

⁵⁷⁸ Mr Sergio Duran, Member, QCA, public hearing transcript, Brisbane, 3 September 2018, p 5.

His suggestion was welcomed by IR Claims director Mr Miles Heffernan:

*I was really impressed by the last submitter referring to migration and getting them before they come over here. I thought that was a really impressive way to go as part of your welcome to Australia pack... give them that Fair Work information statement in their language explaining what a modern award is and these are your starting points.*⁵⁷⁹

The NRA also agreed that formalising education for new arrivals to Australia – ‘through co-operation between the Fair Work Ombudsman, industrial organisations and the Department of Immigration; will have a significant effect in improving the effectiveness of the current legislative provisions’.⁵⁸⁰

The Senate EERC, in its 2016 report *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, also made general recommendations in this regard. The Senate committee recommended:

Recommendation 27

The committee recommends that universities consider how best they might develop proactive information campaigns for temporary visa workers around workplace rights.

Recommendation 28

*The committee recommends that the Department of Immigration and Border Protection provide funding on a submission basis for non-governmental organisations, registered employer organisations, trade unions, and advocates to provide information and education aimed specifically at improving the protection of the workplace rights of temporary migrant workers.*⁵⁸¹

Further to these suggested improvements, the QCA called for more in-depth engagement with community groups, noting that vulnerable workers often turn to familiar organisations when they need support, positioning civil society organisations to play a role in educating workers about their rights:⁵⁸²

*... the people we have with us today are part of existing communities. We are advocating that if we were able to better equip these communities and community leaders—people like Palani, who has been here for 20 years, and Father Ignacio, who is the Catholic priest in Sergio’s community—if we were able to better educate the leaders and give them the tools to teach their communities—because people will go to their existing community leaders, whether it be Columbian community or the Nepalese or Indian community—about their rights, that will go a really long way.*⁵⁸³

Committee comment

Given the seemingly endemic nature of wage theft in many parts of the workforce, it was clear to the committee that there is a need to raise public consciousness of this insidious problem, to enhance social pressures on employers to comply and help empower workers to identify and report their issues.

For the most vulnerable cohorts, it is apparent that broad public education must necessarily be accompanied by more targeted and systematic approaches to communicating information about their employment rights and where to go to seek assistance.

⁵⁷⁹ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 14.

⁵⁸⁰ NRA, submission 021, p 13.

⁵⁸¹ Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, p 318.

⁵⁸² QCA, submission 035, p 3.

⁵⁸³ Ms Elise Ganley, Community Organiser, QCA, public hearing transcript, Brisbane, 3 September 2018, p 5.

Although our schools and training providers do a great job of preparing students for the world of work, any steps taken to educate students on workplace rights and obligations are discretionary, and appear to be far from widespread.

These educational ‘gaps’ may be leaving young workers vulnerable to exploitation, and as the YWH noted, to expect them to learn their rights at work ‘by osmosis’⁵⁸⁴ is impractical and unrealistic.

Accordingly, the committee considers that there is a compelling argument for the Queensland Government to engage closely with the higher education sector on these issues, and to establish a workplace rights education program for implementation in Queensland schools, TAFE and VET facilities.

Noting stakeholder agreement that government, businesses, and unions all have a role to play in this educative process, the committee considers that the re-establishment of the former Industrial Relations Education Committee would provide an appropriately structured and robust mechanism for collaborative engagement on this important issue.

Further, the committee considers that there is a role for the higher education sector in making information and support available to international students in a more structured way, perhaps as part of their student orientation. Noting students are more likely to approach their university or college with concerns about their employment conditions than they are to approach a regulatory agency, these relationships and avenues of advice need to be supported.

Recommendation 1

The Committee recommends the Queensland Government conduct a public education campaign to assist in the fight against wage theft, including outlining information on the findings from this inquiry and the measures the Queensland Government is taking in response, and how and where affected workers can go for help to recover their lost wages.

Recommendation 2

The committee recommends the Queensland Government re-establish the tripartite Industrial Relations Education Committee under the auspices of the Office of the Industrial Relations to conduct visits to schools, TAFE and VET providers, and universities. The visits would be conducted on an opt-in basis and provide information focusing on the rights and responsibilities of both workers and employers.

Recommendation 3

The committee recommends the Queensland Government, through the Department of Education, work with the higher education sector in Queensland to ensure international students have access to relevant information and advice on their workplace rights in Australia, including the right to join a union and where to go for further information.

⁵⁸⁴ Mr Martin de Rooy, Founder, YWH, public hearing transcript, Brisbane, 16 August 2018, p 26.

9.2 Proactive compliance measures

9.2.1 Licensing and registration

Licensing and registration schemes can serve to level the playing field for competition and enable growth for legitimate businesses. These schemes help to remove non-compliant competitors through pre-screening and auditing requirements (including renewal processes), which create barriers to entry for rogue operators and encourage ongoing compliance.⁵⁸⁵ They also serve as important signposts for purchasing entities and for suppliers (including workers) as to the legitimacy of operators in the supply chain.⁵⁸⁶

This form of labour market regulation has often been used to address issues of exploitation and poor conduct in industry sectors characterised by a significant degree of ‘fissuring’ – that is, the shifting of responsibility for workers’ employment standards and other workplace requirements to smaller business units or labour intermediaries operating in highly competitive markets.⁵⁸⁷

9.2.1.1 Labour hire licensing scheme

In Queensland, the introduction of a labour hire licensing scheme to address extensive exploitation in that sector has added to a suite of existing industry licensing regimes,⁵⁸⁸ and was widely commended by witnesses and submitters to the inquiry.⁵⁸⁹

As outlined at chapter 2.1.3, in order to be eligible for a licence, an applicant must meet a fit and proper person test and provide proof of financial viability. A licence can be cancelled at any time if a licensee does not comply with workplace laws – including by engaging in wage theft of any kind. Given the scheme makes it an offence to engage an unlicensed provider, with significant penalties attached, there is a strong incentive for all players to conduct their business within the legal framework.

While Ai Group expressed concern that the scheme may impose an excessive regulatory burden on employers and that the concept of ‘labour hire’ in the *Labour Hire Licensing Act 2017* is too broad and not sufficiently defined,⁵⁹⁰ most stakeholders considered the scheme to be ‘definitely a good thing and a positive move’.⁵⁹¹ Whilst acknowledging that the licensing reform is ‘responding to a limited sphere of wage theft’⁵⁹² and is not a complete solution to sectoral problems, Maurice Blackburn and its joint

⁵⁸⁵ Gangmasters Licensing Authority, *The Preventative Impact of Licensing on Labour Exploitation*, United Kingdom, June 2015, p 1.

⁵⁸⁶ Mick Wilkinson, Gary Craig and Aline Gaus, *Forced Labour in the UK and the Gangmasters Licensing Authority*, Wilberforce Institute for the Study of Slavery and Emancipation, University of Hull, 2010.

⁵⁸⁷ Tess Hardy, ‘Reconsidering the Notion of ‘Employer’ in the Era of the Fissured Workplace: Traversing the Legislative Landscape in Australia’, in Hiroya Nakakubo and Takashi Araki, eds., *The Notion of Employer in the Era of the Fissured Workplace: Should Labour Law Responsibilities Exceed the Boundary of the Legal Entity?*, Kluwer Law International, 2017; David Weil, ‘Enforcing Labour Standards in Fissured WorkPlaces: The US Experience’, *The Economic and Labour Relations Review*, vol 22, no. 2, 2011, pp 33-54.

⁵⁸⁸ Queensland Government, Fair Trading, ‘Licensing and registration’, 1 September 2016, <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/fair-trading-services-programs-and-resources/fair-trading-services-and-contact-information/contact-us/licensing-and-registration#industry-licences>

⁵⁸⁹ See, for example: Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 42; Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, pp 1-2; Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

⁵⁹⁰ Ai Group, response to a question taken on notice at the hearing on 16 August 2018, pp1-2.

⁵⁹¹ Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 42.

⁵⁹² JobWatch, submission 016, pp 11-12.

submitters considered that the scheme will likely help ‘at least... in terms of stamping out the really dodgy labour hire operators, the fly-by-night operations and so on’.⁵⁹³ Growcom’s Rachel Mackenzie also considered that the scheme will address some of the industry’s issues:

*... When I met with the department recently I was pleased to hear that they are actually undertaking audits... We had a few issues with some of the earlier iterations of that legislation, but I think as it has come out in the end it seems to be doing the right thing.*⁵⁹⁴

Ms Cherry Emerick of Bowen Gumlu Growers Association stated that ‘the fact there is an onus on the growers to ensure the contractors they engage with are registered and doing the correct processes, which they are audited for’ was a significant factor in observed improvements in her growing region.⁵⁹⁵ Ms Emerick stated: ‘I would not say that it has eradicated the problem, but the standard has definitely lifted’.⁵⁹⁶

The HIA also considered that ‘the [Labour Hire Licensing Act] will provide the OIR with extensive scope to investigate labour hire companies, impact their ability to operate and refer any behaviours they believe, or suspect to be in breach of any relevant laws’. HIA stated that the current framework for responding is appropriate, and need not be accompanied by further legislative reform.⁵⁹⁷

Stakeholders did, however, call for harmonisation of labour hire licensing laws nationally, noting slight differences in schemes in other jurisdictions:

*Contractors travel interstate seasonally, so they do not just reside in Queensland. You will find that they go to Victoria or New South Wales. In order to have that level of consistency, it would be really good. That way, growers would know that when they employ contractors they are doing the right thing by all their workers and everything is adhered to.*⁵⁹⁸

Mr Allan Mahoney, Chair of BFGV, stated:

*It is great to see that Queensland, South Australia and now Victoria have come on board with labour hire contractor registration, but this was always a federal matter. To deal with this in the most efficient way is to have a federal panel up here.*⁵⁹⁹

The Queensland Government has been consistent in emphasising its preference for a national licensing scheme, with the Minister for Education and Industrial Relations, Hon Grace Grace MP having acknowledged as much on introduction of the Labour Hire Licensing Bill 2017,⁶⁰⁰ and in subsequent commitments to progressing the matter through Council of Australian Governments meetings.⁶⁰¹

⁵⁹³ Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 42.

⁵⁹⁴ Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

⁵⁹⁵ Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, p 2.

⁵⁹⁶ Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, p 1.

⁵⁹⁷ HIA, submission 043, pp 11-12.

⁵⁹⁸ Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, p 2.

⁵⁹⁹ Mr Allan Mahoney, Chairman, BFGV, public hearing transcript, Bundaberg, 12 September 2018, p 4.

⁶⁰⁰ Hon Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, ‘Introduction: Labour Hire Licensing Bill’, Queensland Parliament, *Record of Proceedings*, 25 May 2017, p 1445.

⁶⁰¹ Queensland Government, Response to Queensland Parliament, Finance and Administration Committee, *Report No. 25 on the Inquiry into the Practices of the Labour Hire Industry in Queensland*, 2016.

More recently, in a submission to the Senate Select Committee on the Future of Work and Workers in February 2018, the Queensland Government once more called for ‘a national labour hire licensing scheme, modelled on Queensland’s *Labour Licensing Act 2017*’.⁶⁰²

Further, since March 2016, the establishment of a national scheme has also been recommended by no less than five federal parliamentary committee inquiry reports (see below).

Year	Committee	Inquiry	Recommendation
2018	Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade	Inquiry into establishing a Modern Slavery Act	No. 48: The Federal Government establish a uniform national labour hire scheme, consistent with recommendations of previous committees; and incorporating random audits and unannounced inspections to ensure compliance
2017	Parliamentary Joint Committee on Law Enforcement	Inquiry into human trafficking, slavery and slavery-like practices	No. 12: The Federal Government establish a labour hire licensing regime.
2017	Senate Education and Employment References Committee	Corporate Avoidance of the Fair Work Act	No. 2: Federal and state governments work together to establish labour hire licensing authorities in each state.
2016	Joint Standing Committee on Migration	Seasonal change: Inquiry into the Seasonal Worker Program	No. 9: Implement recommendation 32 of the EERC report (see below).
2016	Senate Education and Employment References Committee	A National Disgrace: The Exploitation of Temporary Work Visa Holders	No. 32: Establish a national licensing regime for labour hire contractors.

Looking beyond the labour hire industry, some stakeholders saw scope for similar regulatory interventions in other industry sectors.

9.2.1.2 Franchise industry regulation

In relation to the franchise industry in particular, Maurice Blackburn and joint submitters proposed that a licensing scheme ‘similar to the Queensland labour hire licensing scheme’ be established, with the following proposed features:⁶⁰³

- *Require a franchisor to hold a license to operate in Queensland, issued by a licensing body;*
- *Require a franchisor to pay for that license by way of annual fee, in line with the size of the business;*
- *Be based on a ‘fit and proper person’ test to ensure operators have a history of compliance; and*
- *A contravention of the scheme incurs civil penalties.*⁶⁰⁴

⁶⁰² Queensland Government, submission to the Parliament of Australia, Senate Select Committee on the Future of Work and Workers, inquiry into the impact of technological and other change on the future of work and workers in Australia, 2018, submission 132, pp 5, 10.

⁶⁰³ Maurice Blackburn and joint submitters, submission 033, pp 18, 32.

⁶⁰⁴ Maurice Blackburn and joint submitters, submission 033, p 18.

It was suggested the proposed licensing body could 'be funded via the licensing fees from franchisors and be responsible for license registration, including termination, prosecuting contraventions and enforcing license conditions'.⁶⁰⁵

In addition, Maurice Blackburn and joint submitters called for a change to the Franchising Code of Conduct, which is established under the *Competition and Consumer Act 2010* (Cth), and regulates the conduct of franchising participants towards each other, usually through franchise agreements.⁶⁰⁶ It was noted that:

Maurice Blackburn has previously argued:

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

*It is clear that any solution should be based on catching the conduct of franchisors, not franchisees or workers who are left largely powerless under the status quo.*⁶⁰⁷

Following the September 2017 commencement of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), which means that franchisors can now be held responsible for contraventions by a franchisee; options for franchise industry reform are now being considered by the federal Parliamentary Joint Committee on Corporations and Financial Services, as part of its inquiry into the operation and effectiveness of the Franchising Code of Conduct. The joint committee is due to report by 6 December 2018.

9.2.1.3 Other industry regulation

Other licensing proposals made during the inquiry included:

- regulation of the massage/sports massage industry with a licensing scheme similar to the labour hire licensing scheme, to address problems of exploitation in the industry⁶⁰⁸
- strengthening Queensland's existing security licensing scheme, including enhancing the education provided to licence applicants and licensees by the Office of Fair Trading on the obligations of licence holders, and improving monitoring of licensee compliance,⁶⁰⁹ and
- introducing a licensing or registration system for cleaning companies.⁶¹⁰

⁶⁰⁵ Maurice Blackburn and joint submitters, submission 033, p 18.

⁶⁰⁶ Maurice Blackburn and joint submitters, submission 033, p 17.

⁶⁰⁷ Maurice Blackburn and joint submitters, submission 033, pp 17-18.

⁶⁰⁸ Confidential submission 005.

⁶⁰⁹ Executive Security Group, submission 029, p 8. See also: Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville 28 August 2018, p 8. Mr Brian McCarrick stated: 'I believe that the state government has the capacity under the security contractor's act and labour hire act already to prevent wage theft by policing the fit and proper person clause'.

⁶¹⁰ Ms Elise Ganley, Community Organiser, QCA, public hearing transcript, Brisbane, 3 September 2018, p 6.

Committee comment

Noting the evidence from the inquiry of the positive impact of the Queensland labour hire licensing laws since their commencement, the committee calls on the Federal Government to introduce nationally consistent labour hire licensing, to ensure the benefits of the Queensland scheme apply equally to workers, employers and labour hire providers across the country.

Recommendation 4

The committee recommends the Federal Government introduce a national labour hire licensing scheme so the benefits of the Queensland scheme can apply across the country.

9.2.2 Business registration – the Australian Business Register

Obtaining an ABN is a relatively quick and easy process. A quick internet search reveals countless third-party service providers promising to ‘get you an ABN’ within five to 15 minutes.

While the system was intended to be accessible and straightforward, to support simple dealings with government and the administration of the Goods and Services Tax (GST),⁶¹¹ a shift in the function of ABNs and the rise of sham contracting and other related fraudulent and dishonest practices has raised serious questions about its integrity. Although ‘an ABN has become a de facto ‘licence to do business’,⁶¹² the system has significantly fewer checks and balances than most licensing schemes – a factor described in the Black Economy Taskforce report, in October 2017 report, as an ‘important enabler’:

*In the absence of proper identity checks, there are many fraudulent and inappropriate ABN holders, including those on tourist visas and apprentices, who may not be entitled to use them. There are significant numbers of ABN holders who have never lodged a tax return. The perception among some in the community is that holders view the ABN as something they own rather than something as carrying both rights and responsibilities.*⁶¹³

To address some of these issues, the Black Economy Taskforce recommended:

*The Government should adopt a number of measures to strengthen the ABN system, including: banning people on certain visas and apprentices from getting ABNs; requiring periodic renewal of ABNs (which would be conditional on meeting tax obligations); and providing for real-time verification of ABNs.*⁶¹⁴

The shortcomings of the ABN system and accompanying need for system improvements were also raised by stakeholders.

Reverend Pauline Harley from the QCA highlighted the lack of appropriate system checks:

*So many of the people who do the cleaning work are not well educated. They are told to get an ABN or they are told to do it this way and they simply do it without understanding the implications of that.*⁶¹⁵

⁶¹¹ Australian Government, *Tackling the Black Economy - Designing a modern Australian Business Number system: Consultation paper*, 20 July 2018, p 2; Australian Government, *Black Economy Taskforce, Final Report*, October 2017, p 85.

⁶¹² Australian Government, *Tackling the Black Economy - Designing a modern Australian Business Number system: Consultation paper*, 20 July 2018, p 3.

⁶¹³ Australian Government, *Black Economy Taskforce, Final Report*, October 2017, p 85.

⁶¹⁴ Australian Government, *Black Economy Taskforce, Final Report*, October 2017, p 5.

⁶¹⁵ Reverend Pauline Harley, Anglican Priest, QCA, public hearing transcript, Brisbane, 3 September 2018, p 6.

Describing the application process as a ‘set and forget’ application and granting of an ABN, Dr David Morrison submitted that sham arrangements are also facilitated by ‘the lack of tax reporting required around contractors, as distinct from the tax reporting required for employees’.⁶¹⁶

Dr Morrison and Executive Security Director Mr Andrew Bourke acknowledged the efforts of the ATO in seeking to crack down on the misuse of ABNs.⁶¹⁷ Dr Morrison noted that the Black Economy Taskforce reported on:

*... the cancellation by the Australian Taxation Office of over 2 million ABNs for not lodging tax returns associated with those numbers; and, the improper arrangement of ABNs to a variety of people including: employees (usually trades apprentices); unemployed people, elderly people; and, other professionals willing to be ‘straw’ directors of companies (often multiple companies).*⁶¹⁸

However, Dr Morrison also noted that there is ‘room for improvement from the regulatory side’, submitting:

*Such improvement ought to increase transparency of data for all users, but in the very least, a reduction of duplication will reduce the opportunity for wage theft.*⁶¹⁹

IR Claims Director Mr Miles Heffernan stated more specifically:

Mr Heffernan: *... It is almost that as a threshold of getting that ABN a step needs to be put in place. You file it, what is the purpose of it? Is it cleaning services or contracting or security?*

Mr DAMETTO: *Alarms should go off, yes.*

Mr Heffernan: *And what steps can then alert whatever is the correct body and it could be a combination of ASIC and the Fair Work Ombudsman.*⁶²⁰

The committee notes these matters are currently the subject of a federal ‘Monitoring Business Registers Program’ review. As part of this review, the Commonwealth Treasury issued a discussion paper and invited public submissions up to 17 August 2018 on possible reforms to the ABN system. The consultation paper noted that the proposals on which views were sought included ‘adjusting ABN entitlement rules, imposing conditions on ABN holders, and introducing a renewal process including a renewal fee’. Stakeholders have also been encouraged to ‘make comments or provide insights on any other aspects of the ABN system’.⁶²¹ The consultation paper further advised:

*Following this consultation period, the Government will consider stakeholder views and develop a coordinated package of ABN reforms. Further consultation is planned to occur on the details of these reforms and how they should be implemented. Consideration of reforms to the ABN system is not occurring in isolation. There are currently a number of related reforms occurring across Government. Reforms to modernise business registers, implement a digital identity framework, introduce director identification numbers, and reduce phoenixing activity will all contribute to improving business identity and verification.*⁶²²

⁶¹⁶ Dr David Morrison, submission 032, pp 10-11.

⁶¹⁷ Mr Andrew Bourke, Managing Director, Executive Security, public hearing transcript, Brisbane, 17 September 2018 (morning), p 29.

⁶¹⁸ Dr David Morrison, submission 032, pp 10-11.

⁶¹⁹ Dr David Morrison, submission 032, pp 10-11.

⁶²⁰ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 20 August 2018, p 15.

⁶²¹ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 2.

⁶²² Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 2.

The committee looks forward to seeing the proposals for reform and subsequent system improvements that result from the reform process. Responses to illegal phoenixing activity are considered in more detail at chapter 14.3.

9.2.3 Procurement and supply chain policies

In addition to strict regulatory schemes; institutions and businesses engaged in procurement and purchasing through supply chains are increasingly using their market power to influence the terms and conditions under which workers are employed.⁶²³

For government procurement, expectations are well established. In their submission, Dr Tess Hardy, Ms Melissa Kennedy and Professor John Howe stated:

Indeed, there is an ILO convention and recommendation on the subject of labour-specific criteria in procurement contracts dating from the post-Second World War era: Labour Clauses (Public Contracts) Convention 1949 (No, 94) and Recommendation (No. 84). The Convention and Recommendation provides that public authorities entering into contracts which require the employment of workers must include clauses requiring that minimum employment standards are observed, thus preventing competition among bidders for government contracts on the basis of labour costs. In addition, the convention requires that public contracts provide for employment at prevailing wages and conditions, that is, 'hours of work and other conditions that are not less favourable than those established for work of the same character ... in the district where the work is carried on' whether by collective agreement, award or legislation.

*... The growth in public procurement has only increased the pressure on government to ensure that government contractors are subject to social performance criteria such as the observance of minimum labour standards and progressive employment practices. Where governments purchase goods and services from the private sector using taxpayer funds, it is argued that government should use its purchasing power to ensure that its suppliers follow decent employment practices.*⁶²⁴

In Queensland, the government has recently introduced a new procurement policy. The policy requires that 'the government take into account a range of economic, environmental and social matters when considering whether the relevant purchase of goods and services represents 'value for money''. Dr Hardy, Ms Kennedy and Professor Howe submitted:

While the current policy is an important step forward, and does broadly take into account whether a firm adheres to 'best practice industrial relations', it could be further enhanced. In particular, the policy could 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. It could also set out the specific consequences that may flow if an existing contractor is found to have engaged in wage theft (i.e. termination of the relevant contract)...

*... The Queensland Government would need to determine whether these requirements apply to all contractors, or only to larger contracts, and/or contracts in particular industries or types of procurement. There would need to be thought given to implementation of the program, to ensure there is a structure and process for effective assessment of contractor eligibility for the program, and for ongoing monitoring of compliance with the program requirements.*⁶²⁵

⁶²³ Dr Tess Hardy, Melissa Kennedy, Professor John Howe, submission 050, p 10; Mark Anner, 'Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains,' *Politics and Society*, vol 40, no. 4, 2012, p 609.

⁶²⁴ Dr Tess Hardy, Melissa Kennedy, Professor John Howe, submission 050, pp 10-11.

⁶²⁵ Dr Tess Hardy, Melissa Kennedy, Professor John Howe, submission 050, p 11.

Queensland's procurement policy requires the application of 'best practice principles for all major projects valued at \$100 million and above and declared projects.'⁶²⁶ These principles include best practice industrial relations, and history of compliance with procurement, tendering and other government policy.⁶²⁷ Best practice industrial relations involves a demonstrated history of and commitment to positive industrial relations, including requiring declarations in relation to the FWA, such as any convictions of an offence, enforceable undertakings, or infringement notices issues (in the last five years).⁶²⁸

Mr Andrew Bourke of Executive Security also considered that any contractor found to be underpaying their employees should have their contract terminated, and highlighted scope for the Queensland Government to impose minimum standards with respect to qualifications and eligibility requirements for tenders.⁶²⁹ Mr Jason O'Dwyer from MEA stated that the inclusion of benchmarks in tenders, including 'looking at their industrial relations situation'.⁶³⁰

*... 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.*⁶³¹

In response to a question about the administrative burden associated with including such explicit terms, MEA Workplace Relations Adviser Mr Jordon Carlisle stated:

*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.*⁶³²

Dr Hardy, Ms Kennedy and Professor Howe noted that such factors can also be taken into account at different stages of the tender process – including during assessment and with respect to the contractual requirements imposed on the successful tenderer.⁶³³

Outside procurement processes, the QCU and IEU submitted that the government's provision of funding to service providers should be contingent on the organisation demonstrating that they operate in compliance with industrial laws. The IEU submitted that service providers should 'lose this funding in the event of non-compliance'.⁶³⁴

⁶²⁶ Queensland Government, Office of the Chief Advisor – Procurement, *Queensland Procurement Policy bridging guide – 2018 updates*, 2018, p 2, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/QPPBridgingGuide.PDF>

⁶²⁷ See: Queensland Government, Office of Industrial Relations and Office of the Chief Advisor – Procurement, *Best Practice principles: Quality, safe workplaces*, 2018, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/QualitySafeWorkplaces.pdf>

⁶²⁸ Queensland Government, Office of Industrial Relations and Office of the Chief Advisor – Procurement, *Best Practice principles: Quality, safe workplaces*, 2018, p 13.

⁶²⁹ Executive Security Group, submission 029, p 7; Mr Andrew Bourke, Managing Director, Executive Security, public hearing transcript, Brisbane, 17 September 2018 (morning), p 28.

⁶³⁰ MEA, submission 030, p 19.

⁶³¹ Mr Jason O'Dwyer, Manager Advisory Services, MEA, public hearing transcript, Brisbane, 20 August 2018, p 11.

⁶³² MEA, public hearing transcript, Brisbane, 20 August 2018, p 11.

⁶³³ Dr Tess Hardy, Melissa Kennedy, Professor John Howe, submission 050, p 11.

⁶³⁴ QCU, submission 034, p 37; IEU, submission 007, p 6.

Noting that the state government is only responsible for a limited sphere of procurement, some stakeholders also referred to the importance of large companies with complex supply chains having ethical sourcing policies in place, as part of their corporate social responsibility program.⁶³⁵

Industry bodies highlighted the important work they are doing to lead the market in this regard, developing certification schemes which offer practical market recognition that the employment practices of the certified business comply with Australian laws and industry standards. Such schemes are discussed further in chapter 10.2.

Recommendation 5

The committee recommends the Queensland Government ensure its current procurement policies allow for appropriate and proportionate action to be taken against companies that have underpaid workers.

⁶³⁵ See, for example: ALHR, submission 051, p 2; Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

10 Role of industrial organisations

While primary responsibility for monitoring and enforcing minimum employment standards rests with government, both employer organisations and trade unions play an important role in supplementing regulator enforcement activity.⁶³⁶ These organisations provide support and advice to employers and employees to help them to better understand their rights and obligations, and can act as ‘gatekeepers’ or ‘connectors’ to regulatory agencies.⁶³⁷ Dr Tess Hardy suggested that they can also ‘address calculated and social motivations by imposing sanctions different from those employed by the state, including shame, moral persuasion, protest, and withdrawal of friendly cooperative relations’, which can be mutually reinforcing and in some cases ‘far more exacting than direct government intervention’.⁶³⁸

This chapter considers the ways in which these key system actors can help to address and prevent wage theft.

10.1 Unions

As noted at chapter 8.6, workplaces with the highest degree of union membership tend to have the lowest level of worker exploitation and wage theft.

Maurice Blackburn Lawyers and joint submitters considered that the reasons for this ‘are self-evident’:

- the union is a source of information for workers on their rights, conditions and entitlements
- the union will involve workers in bargaining processes with the employer, and
- the union will take action if it finds that workers are being exploited and hold the employer accountable.⁶³⁹

A number of workers gave evidence that it was only through union involvement that they came to discover they were being underpaid,⁶⁴⁰ and that were it not for their union’s intervention, they would not have raised the matter with their employer, let alone pursued it further.

The story of Ms Siva Lemisagele was illustrative in this regard:

***Ms Lemisagele:** Because I came from another country, this was my first job in Brisbane. I would not have a clue what goes on. I started on \$16 where I came from but in coming here it was \$22 an hour, which was big to me. I thought it was normal because it is big money for me. I thought everything was normal. I am working hard—at least 60 hours a week just to have my target that I need. Then the union came in. That is when I learned that I was paid differently. It was a massive gap from what I am meant to be owed hourly. I learned that I am entitled to something else instead of just \$22 an hour.*

⁶³⁶ Dr Tess Hardy, ‘Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards’, *The Economic and Labour Relations Review*, vol. 22, no. 3, 2011, p 118.

⁶³⁷ Stephen Clibborn, ‘It takes a village: civil society regulation of employment standards for temporary migrant workers in Australian horticulture’, (accepted for publication in) *University of New South Wales Law Journal*, vol. 41, no. 1, 2019.

⁶³⁸ Dr Tess Hardy, ‘Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards’, *The Economic and Labour Relations Review*, vol. 22, no. 3, 2011, p 123.

⁶³⁹ Maurice Blackburn and joint submitters, submission 033, p 8.

⁶⁴⁰ Ms Taylor Bun also gave evidence to the committee that: ‘It was not until the union came onsite and they educated us on our rights that we realised just how poorly we were being treated and the basic penalty rates and things we were missing out on’. Ms Taylor Bun, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018, p 2.

When I used to leave home the sun had not come out, and then I would come back home and the sun was down. I would work really long hours. I never had a 10-hour turnover. Sometimes when I finished work I would come back home and have a shower and then have an hour sleep and then go back to work, because I was rostered on.

CHAIR: *Just to clarify... if the union had not been involved in your case in helping you to advocate to your employer, would you have approached your employer? Do you feel that you would have been able to recoup that money?*

Ms Lemisagele: *No, I would not, because I would not have had the guts. It is my job. It is my only income that I am getting. I know that if I would have spoken to the boss about it I would have lost my job already.*⁶⁴¹

Ms Lemisagele also submitted:

*Just to discover how much I had been underpaid was a fight that I could not have won on my own. I did not have the time to go through all my payslips and timesheets from the past year to calculate how much my employer owed me. And I wasn't in the financial position to hire an accountant or lawyer to do it for me. Neither were my colleagues. But as a union member I had the support and expertise to get this done! The only problem was trying to get my records from my employer to the union without upsetting my boss and getting my shifts cut or losing my job. So, what we did was, a large group of us, with the assistance of the NUW, all handed in pay audit forms that authorised the union to review all of our timesheets and payslips. My employer failed to provide our payslips to the union in the legal timeframe. The NUW had to take them to the Fair Work Commission. Once the union was finally able to access our payslips they calculate how much I have been underpaid during my time working for my company. I had been underpaid almost \$18,000 and I lived pay cheque to pay cheque... Prior to the NUW coming out to my workplace I knew very little about my entitlements at work and never thought something like this would happen to me.*⁶⁴²

Ms Lemisagele's experience illustrates the important role unions play in addressing power imbalances and advocating for workers' legal minimum rights. An employee might be resigned to unfolding circumstances of wage theft due to a fear of being labelled a difficult worker or of losing their job should they protest.⁶⁴³ A union taking up a matter and advocating on the employee's behalf can take the pressure off that individual and shift the employer's attention onto the union.⁶⁴⁴

If an employer fails to rectify underpayments, the committee heard that union intervention can be key to achieving a result for affected workers. At the public hearing on the Gold Coast, ETU representative Mr Beau Malone spoke of his own union's experience:

The ETU became aware that an employer of a business in the construction industry had not being paying superannuation contributions for many months. After almost a year of assurances from

⁶⁴¹ Ms Sivaiala Lemisagele, Food manufacturing worker, public hearing transcript, Brisbane, 16 August 2018, p 25.

⁶⁴² YWH, submission 019, p 15.

⁶⁴³ Hospitality worker Ms Katherine Hamburg said of the employee-employer dynamic: 'That is the person who determines when I get my next shift, if I get my income. If I am labelled a difficult worker, I lose my income. There is a lack of support in going up against your employer to demand what you know your rights are'. See: Ms Katherine Hamburg, Hospitality worker, public hearing transcript, Brisbane, 16 August 2018, p 26.

⁶⁴⁴ IR Claims submitted in this regard: 'Union members tend to be better educated about their entitlements. They will likely have a delegate onsite who will know what their entitlements are and the delegates will be able to go and talk to the employer to make sure that the right thing is being done if they hear that the right thing is not being done. Generally, workers feel more empowered to take up those issues. Where you do not have union membership then people do not feel empowered and ... feel intimidated about raising issues...' See: IR Claims, submission 013, p 6.

*owners about paying the required superannuation contributions at the correct time, the union decided to formalise the process. The union encouraged all of its members to contact the ATO and raise the underpayment of superannuation, which was outside of ATO requirements. The ETU does not, by law, have the ability to do this on behalf of members. It must be carried out on an individual basis. The union then gathered information from members and sent a detailed letter of demand to the employer. In the absence of any reply, the union filed a dispute with the Fair Work Commission. Before the listing was heard, the ETU was contacted by Fair Work, which outlined that the employer had entered into a payment plan with the ATO. We believe that, without the union's persistence, the employer would not have entered into discussions with the ATO at all.*⁶⁴⁵

A number of stakeholders emphasised, that union membership is now at an 'all-time low',⁶⁴⁶ suggesting liberalisation and 'casualisation' of the labour market contributed to the decline.⁶⁴⁷ In its written briefing to the committee, the OIR stated:

*... many workers in casual work or temporary visa workers, labour hire or operating under sham contracts are neither members of unions nor in a position to request award rates of pay (Clibborn and Wright, 2018).*⁶⁴⁸

Similarly, Mr Dan McGaw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, explained:

*Workers are not joining unions because they are made casual. They do not have full-time hours. They do not know if they are going to have a job next week. It is difficult to organise workers when they are casuals...*⁶⁴⁹

The extent of the effect, Clibborn and Wright have noted, is that 'union density has dropped from its height of 65% in 1948 to 16% of full-time workers overall and only 9% in the private sector in 2016'.⁶⁵⁰

Clibborn and Wright also pointed to the 'marginalisation of unions in recent decades', as having further weakened trade unions' traditional status as a co-regulator, alongside the state.⁶⁵¹ According to Hardy and Howe, most commentators argue that unions conducted much of the enforcement of award standards up until the 1990s, the monitoring and enforcement of compliance with awards was been a key aspect of their regulatory function.⁶⁵² With the introduction of the *Workplace Relations Act 1996* (Cth), union rights of entry and the capacity to seek recovery of wages were restricted. A federal

⁶⁴⁵ Mr Beau Malone, State Organiser, ETU, Queensland and Northern Territory Branch, public hearing transcript, Gold Coast, 10 September 2018, p 20.

⁶⁴⁶ Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 8.

⁶⁴⁷ QCU, submission 034, p 10; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 8; Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, pp 213-214.

⁶⁴⁸ Queensland Government, OIR, written briefing, 7 June 2018, p 10.

⁶⁴⁹ Mr Dan McGaw, Branch President of QCU Toowoomba Branch, and State Organiser (South West Queensland) of ETU, public hearing transcript, Toowoomba, 10 September 2018, p 11.

⁶⁵⁰ Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, pp 213-214.

⁶⁵¹ Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, pp 208-209.

⁶⁵² Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia', *Australian Journal of Labour Law*, vol 22, 2015, p 2.

enforcement agency – currently the FWO – was entrusted with the business of enforcement.⁶⁵³ The QCU noted that those union powers have not been returned, and submitted that inadequate resourcing of the FWO raises questions about the effect of their removal over the longer term:⁶⁵⁴

*We do not think it is a coincidence that we have seen an increase in the incidence of wage theft that has coincided with a reduction in union rights to enforce people's entitlements.*⁶⁵⁵

Many unions and other stakeholders called for the pre-1996 powers to be reinstated,⁶⁵⁶ citing several ways in which the restrictions have limited unions' capacity 'to operate in the sphere of enforcement' and may 'have contributed to the spread of wage theft'.⁶⁵⁷

Currently, under federal right of entry laws, unions are limited to investigating the records of their members.⁶⁵⁸ QCU Assistant Secretary Mr Michael Clifford noted with respect to this restriction:

*Where you have 100 percent union membership you will not find instances of wage theft. You will not find deliberate attempts by the employer to rip their workers off. The workers in those places are well educated and well supported, and they simply would not let it happen. We find it most often happens where you have no union members or where you might have one or two union members. Where you have one or two union members, those people would be very reluctant to stick up their hand and say, 'I'm the person that's going to report this,' because they know they will not have a job tomorrow if they do. When you say that a union can only investigate the records of union members, it really exposes people who are union members. You can go through a legal process to try and inspect the records of non-union members in the federal jurisdiction, but, again, it is a legal hurdle which is not simple to overcome. It puts another barrier in the way of us being able to properly address wage theft.*⁶⁵⁹

Also cited as an obstacle, was the requirement for unions to have a reasonable suspicion that a contravention has occurred, or is occurring in order to exercise their rights of entry.⁶⁶⁰ Mr Clifford stated that this causes 'the first legal hurdle, because often employers can use legal resources to prevent unions from even investigating records with arguments about whether it is a reasonably suspected breach or not'.⁶⁶¹ The OIR noted that the ACTU has also identified that this means unions are largely reliant on complaints from employed members to trigger enforcement action, and therefore that this process can be of limited effectiveness in resolving issues.⁶⁶² In addition:

... the advance notice required before physically entering premises must be granted before union officials can legally require the records to be provided. Records are frequently held off site. The ACTU has also found that in practice, a worker who is the subject of a prima facie case can be

⁶⁵³ QCU, submission 034, p 11.

⁶⁵⁴ QCU, submission 034, p 11. See also: JobWatch, submission 016, pp 12-13.

⁶⁵⁵ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

⁶⁵⁶ QNMU, submission 023, p 4; Maurice Blackburn and joint submitters, submission 033, p 12; QCU, submission 034, p 2; CFMEU, submission 039, pp 12-13; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, pp 7- 8.

⁶⁵⁷ QCU, submission 034, p 40.

⁶⁵⁸ FWA, ss 481(1) and 482(1)(c).

⁶⁵⁹ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 3.

⁶⁶⁰ QCU, submission 034, p 41; Mr Michael Clifford, Assistant Secretary, QCU public hearing transcript, Brisbane, 16 August 2018, p 3.

⁶⁶¹ Mr Michael Clifford, Assistant Secretary, QCU public hearing transcript, Brisbane, 16 August 2018, p 3.

⁶⁶² ACTU, cited in Queensland Government, OIR, written briefing, 7 June 2018, pp 10-11.

*dismissed in order to defeat the Union's right to investigate a complaint and attain the appropriate document.*⁶⁶³

The QCU also submitted that 'we think that unions need the capacity, as we used to pre-1996, to go around and talk to workers individually to get their stories'.⁶⁶⁴ The QCU explained that as the legislation currently stands:

*The employer can put out an email and say, 'Anybody who wants to complain about the fact that you have not been paid properly or paid overtime, let us know and you can talk to the union official.' Of course, most workers will not do that. You would be put in a lunch room or a place that is fairly visible. Again, you are being seen to do in the boss. It makes it very difficult for workers to tell their story truthfully in those circumstances.*⁶⁶⁵

Mr Clifford considered the implications of this restriction to be significant given the identified importance of workers' interviews in many circumstances, and particularly where the employer has generated false documents:

*The Fair Work Ombudsman ... particularly when they were investigating the 7-Eleven wage theft ... said that the interviews were the most valuable tool they had and it was important that they be able to get truthful submissions from workers when they spoke to them. We agree with that and we think it is vitally important that that change.*⁶⁶⁶

In response to these suggestions, the HIA submitted that it considered that current 'expansive' right of entry provisions are more than adequate, and that any move to extend them would be misconceived.⁶⁶⁷ The HIA argued that the presence of a union on a construction site can be 'incredibly disruptive' and impose significant burdens and costs on employers when exercised frequently. The HIA submitted that statutory authorities 'such as the FWO, an independent non-partisan body, are the appropriate entities to take action regarding underpayments'.⁶⁶⁸

The HIA further stated that it did not expect that greater union involvement would lead to substantial improvements in addressing and preventing wage theft.⁶⁶⁹

In contrast, unions contended:

If employers know they could be caught as unions are empowered to inspect records and recover stolen wages, this becomes a deterrent itself. At the moment employers know the chances of being caught are low so it is worth the risk...

*There are 12 million workers across Australia. Australian unions have thousands of trained officers and staff, yet the Fair Work Act now restricts unions from conducting workplace checks on businesses suspected of underpaying and exploiting workers.*⁶⁷⁰

⁶⁶³ Queensland Government, OIR, written briefing, 7 June 2018, p 11.

⁶⁶⁴ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 3.

⁶⁶⁵ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 3.

⁶⁶⁶ Mr Michael Clifford, Assistant Secretary, QCU public hearing transcript, Brisbane, 16 August 2018, p 3.

⁶⁶⁷ HIA, submission 043, p 14.

⁶⁶⁸ HIA, submission 043, p 14.

⁶⁶⁹ HIA, submission 043, p 14.

⁶⁷⁰ ACTU correspondence, 21 August 2018.

Another union said:

*In our view, improving workers' rights through greater union access is a better alternative to reliance on the powers and resources of the FWO to monitor and enforce regulation.*⁶⁷¹

Further:

*Unions provide a cost effective way of ensuring workers have their rights and entitlements honoured. In doing so, it is more likely that appropriate tax and superannuation will be paid, lessening pressure on the public purse.*⁶⁷²

The QCU noted that the stated restrictions on right of entry have already been removed from Queensland's IR Act, and advised: 'we are unaware of any concerns from employers within the Queensland jurisdiction following the removal of restrictions on union activities such as right of entry'.⁶⁷³

In its report on *Corporate avoidance of the FWA*, the Senate EERC also recommended that the FWA 'be amended to allow unions greater access to workplaces and workers in order to address the need for increased monitoring and random checks to ensure compliance'.⁶⁷⁴

Beyond these right of entry provisions, Maurice Blackburn and joint submitters and IR Claims called for industrial organisations (and legal firms, for IR Claims) to be 'given standing to prosecute wage theft', and to be able to seek costs from an employer on a successful prosecution.⁶⁷⁵

IR Claims also recommended that non-registered industrial organisations be accredited to bring wage theft claims as the claimant on behalf of multiple victims of wage theft, so that non-trade union members can 'enjoy the cost saving and efficiency of claims brought on their behalf by non-registered industrial organisations'.⁶⁷⁶

Further, a number of submitters sought to highlight the educative work of unions, and the importance of their contribution towards the education of young people and vulnerable workers.⁶⁷⁷ The OIR advised that responding to wage theft has spurred innovation among trade unions:

*United Voice, for example, has recently launched an online-only service branded as 'Hospo Voice' for Victorian hospitality workers. Hospo Voice members receive access to online tools to check pay rates, record hours worked or incidents of harassment and rate employers (Hospo Voice, 2018).*⁶⁷⁸

IR Claims submitted that in just its first few weeks of operation, Hospo Voice managed to

- *Recruit more than 300 members*
- *Expose a number of businesses engaged in systematic wage theft*
- *Organise snap public naming and shaming protests*

⁶⁷¹ QNMU, submission 023, pp 9-10.

⁶⁷² QCU, submission 034, p 42.

⁶⁷³ QCU, submission 034, p 42.

⁶⁷⁴ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 72.

⁶⁷⁵ Maurice Blackburn and joint submitters, submission 033, p 12.

⁶⁷⁶ IR Claims, submission 013, p 58.

⁶⁷⁷ See, for example; Maurice Blackburn and joint submitters, submission 033, p 8; QCA, submission 035, p 3; Ms Sivaiala Lemisagele, Food manufacturing worker, public hearing transcript, Brisbane, 16 August 2018, p 25; Ms Taylor Bun, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018, p 2. Ms Sivaiala Lemisagele, Food manufacturing worker, public hearing transcript, Brisbane, 16 August 2018, p 25.

⁶⁷⁸ Queensland Government, OIR, written briefing, 7 June 2018, p x.

- *Run guerilla-style social media campaigns targeting dodgy businesses*
- *Attract widespread mainstream media coverage about wage theft cases*
- *Shame the Fair Work Ombudsman into launching investigations.*⁶⁷⁹

Committee comment

The committee recognises the critical role unions play in educating, advising and advocating for their members with respect to their workplace rights; and the role they have and continue to play in maintaining industry standards. The benefits of these activities extend beyond just their members to also deliver beneficial outcomes for workers more broadly engaged in those workplaces and industries.

Evidence provided by workers highlighted the importance of union support to enable them to successfully recover wages and entitlements. They were able to engage directly with their employer, and where relevant, be represented in negotiations and obtain entitlements without fear of reprisal.

The committee acknowledges the concerns raised by unions in regard to worker access to representation in the workplace.

Recommendation 6

The committee recommends the Federal Government consider measures to improve worker access to representation in the workplace and ensure compliance with industrial instruments, using the model of the *Industrial Relations Act 2016* (Qld).

10.2 Employer and industry associations

Employer and industry associations perform a similar role for their members as unions in education on the legal framework under which they operate.⁶⁸⁰ Hardy has noted that the FWO recognises their importance in this respect, because the expertise and advisory services they can offer to members are ‘greater and more personalised than government agencies can ever offer’.⁶⁸¹

Associations can also serve as important regulatory intermediaries, helping members to identify and address issues early.⁶⁸² In addition, evidence provided to the committee indicated that these organisations are taking a more active role in self-regulation, through industry certification and quality assurance frameworks.⁶⁸³

⁶⁷⁹ IR Claims, submission 013, p 58.

⁶⁸⁰ Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 57.

⁶⁸¹ Wilson, cited in Tess Hardy, ‘Enrolling non-state actors to improve compliance with minimum employment standards’, *The Economic and Labour Relations Review*, vol. 22, no. 3, 2011, p 131.

⁶⁸² Neilsen and Parker have argued that in respect of largely ‘reactive regulators’ their role grows in importance ‘since they are able to act as a kind of fire alarm’. Neilsen and Parker, cited in Tess Hardy, ‘Enrolling non-state actors to improve compliance with minimum employment standards’, *The Economic and Labour Relations Review*, vol. 22, no. 3, 2011, p 131.

⁶⁸³ MEA, submission 030, pp 19-20; Mr Allan Mahoney, Chair, BFGV, public hearing transcript, Bundaberg, 12 September 2018, p 1; Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 14. Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

FWO audit data shows that employers who are a member of an industry association are far less likely to face wage compliance issues.⁶⁸⁴

Evidence from several business owners and employer and industry bodies illustrated the ways in which these various activities helped to support compliance among members. For example, with respect to education and training, Toowoomba Chamber of Commerce CEO Ms Jo Sheppard stated that this is a 'big role for us', 'particularly for the smaller businesses that potentially do not have the in-house capability to educate or upskill on certain matters that are affecting their business'.⁶⁸⁵

*Often the business owner wears about 15 different hats. Because of their margins and whatever, they cannot get consultants in. That is why the Queensland chamber service is very valuable to a lot of businesses, because they are at least able to access that baseline help at a reasonable price. I think they are time poor. If you talk to the businesses down the main street, most of them are working six days a week minimum.*⁶⁸⁶

Mr Shane Rodgers from Ai Group stated:

*At the moment there is so much happening in the industrial relations space. It is continuous. Every month there are lots and lots of things we need to update employers on... and we are constantly trying to keep people informed about what is going on... if you are in an individual business, trying to keep up with all of that is very difficult.*⁶⁸⁷

By ensuring that businesses are provided with the correct industrial relations information in this way, it was considered the scope for errors in the provision of employee wages and entitlements can be dramatically reduced.⁶⁸⁸

A number of industry bodies provided examples of the way they communicate and engage with their members. For example, BFGV Chairman Mr Allan Mahoney said that to keep his organisation's 4,000 members updated on their legal requirements and unfolding developments in the industrial relations space:

*... There are several electronic newsletters that go out. That is the main form now... We have very few members now who do not have an iPhone, but we cater for those who do not. We still send faxes. Some of our growers still want their fax every Friday, so that is what they get. All the industry groups send those out. All that information is sent out as it comes in.*⁶⁸⁹

The R&CA also outlined its 'proactive approach towards informing and educating individual businesses as to their various workplace obligations and responsibilities towards their staff':

The Association maintains a workplace relations advisory service staffed by industrial relations specialists which assists members in interpreting and applying the Fair Work Act as well as correcting any errors which may have occurred. The enquiries fielded by R&CA's workplace relations advisory service cover a wide range of workplace relations issues relating to correct pay

⁶⁸⁴ Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 54.

⁶⁸⁵ Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 41

⁶⁸⁶ Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 4.

⁶⁸⁷ Mr Shane Rodgers, Head- Queensland, Ai Group, public hearing transcript, Brisbane, 16 August 2018, p 50.

⁶⁸⁸ Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 55-56; Mr Jason O'Dwyer, Manager Advisory Services, MEA, public hearing transcript, Brisbane, 20 August 2018, pp 8-9; Mr Noel Ambler, private capacity, public hearing transcript, Townsville, 28 August 2018, p 22.

⁶⁸⁹ Mr Allan Mahoney, Chair, BFGV, public hearing transcript, Bundaberg, 12 September 2018, p 4.

*rates under the Awards, entitlements such as annual leave, personal leave and superannuation and penalty rates on Sundays and Public Holidays. R&CA estimates that its workplace relations advisory service fields over 1,200 calls from hospitality operators with enquiries in any given year. In addition to this, R&CA constantly stresses the vital importance of businesses complying with their relevant legal and regulatory obligations, including workplace relations legislation, through its various communication channels with members and the industry more broadly. R&CA's communication channels include direct members emails distributed on a weekly basis, bespoke newsletters and EDMs [electronic direct mail], company website updates and the publication of a monthly industry trade magazine.*⁶⁹⁰

Ms Jo Sheppard said the Toowoomba Chamber of Commerce:

*... run a range of workshops and educational opportunities to keep businesses up to speed on a range of matters. IR legislation is always very topical, because often businesses find it very complex, particularly, as I said, for SMEs [small and medium-sized enterprises]. That is something that we do. We also run an annual business excellence program, which is very well engaged in by the local business community. Again, it is really about striving for excellence. We award businesses that do really well and use them as a showcase piece for the rest of the business community.*⁶⁹¹

With respect to the regulatory 'intermediary' function industry bodies can serve, Ms Sheppard submitted that they can 'play a really proactive role in educating businesses and helping them to come forward if they do feel worried that they have made an error'. Citing 'an element of fear', and noting that 'it can send a business broke if they have been paying under the wrong award for two or three years...'; Ms Sheppard submitted that 'the chamber is a trusted partner for business' and that through providing a supportive environment in which to address issues 'we can then move forward in a positive way together'.⁶⁹²

Townsville business owner Mr Noel Ambler stated:

*I also think it is very important that each of those people should be a member of the industry body. That should be almost compulsory—the fact that they should be a member of the industry body—and then they have someone to go to and they know there will be no repercussions if they tell them exactly what they have done.*⁶⁹³

Commenting on industry self-regulation or self-auditing, Mr Paul Wessel of Wessel Petroleum advised that the Australasian Convenience and Petroleum Marketers Association was conducting compliance audits for industry members, submitting 'we think compliance audits through your industry bodies is one way to eradicate it [wage theft]'.⁶⁹⁴

The committee heard that in some instances, auditing processes can be part of a formal certification process, with industry associations seeking to establish processes for members to demonstrate their compliance credentials and provide market differentiation for consumers.

In the cleaning industry for example, MEA submitted that stakeholders have responded to industry issues by creating a 'Cleaning Accountability Framework':

⁶⁹⁰ R&CA, submission 017, p 2.

⁶⁹¹ Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, Public hearing transcript, Toowoomba, 10 September 2018, p 1.

⁶⁹² Ms Jo Sheppard, CEO, Toowoomba Chamber of Commerce, public hearing transcript, Toowoomba, 10 September 2018, p 4.

⁶⁹³ Mr Noel Ambler, private capacity, public hearing transcript, Townsville, 28 August 2018, p 22.

⁶⁹⁴ Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 14.

In the cleaning industry 21.5% of businesses were engaging in sham contracting by misclassifying employees as contractors. The industry is also characterised by high-rates of underpayment and denial of entitlements.

The new program has building owners, key tenants, facility managers and cleaning contractors verify standards concerning wages and entitlements, workplace health and safety, and working conditions are being met. This process actively involves the onsite cleaning workforce, and is ensured by an independent auditor. After the required standard is verified, certification is awarded for that particular building.

Over time, as this certification becomes established, being socially responsible will become a competitive feature in the cleaning industry. Not complying with the standards will result in potential reputational risk for building owners and investors. Cleaning companies that don't comply won't be competitive when bidding for contracts.⁶⁹⁵

Horticulture industry stakeholders also highlighted the development of the Fair Farms Initiative as one way of trying to 'stamp out exploitation within the industry'.⁶⁹⁶ Delivered by Growcom, the scheme comprises information and training for farmers, a risk assessment process in relation to employment practices, and a resulting certification that 'will bring into effect that the supply chain will not be able to use substandard paid workers'.⁶⁹⁷

Growcom Chief Advocate Ms Rachel Mackenzie explained:

The problem at the moment is that because Woolworths and Aldi et cetera cannot tell who is a 'goody' and who is a 'baddy', we are saying, 'Here is a mechanism to enable that differentiation.' I am pleased to say that we have really strong buy-in from the retailers... This is recognising that the issue is real but also saying that this is something that we are doing as a sector.⁶⁹⁸

The QTIC submitted that there are opportunities for the state government to work in partnership with industry groups to showcase such initiatives as positive outcomes of operating within legislative requirements, and to promote case-studies of best practice.⁶⁹⁹

Committee comment

Evidence provided to the committee affirmed the important role employer organisations play in supporting and educating their members about responsibilities, obligations, and navigating the industrial relations system. Small employers in particular benefit from a trusted source of advice about the most straightforward ways to implement their obligations.

The committee commends those employer organisations that are proactive in supporting their members to meet regulatory requirements through auditing and quality assurance processes. Employer associations create an important nexus with regulators and support early identification and rectification of inadvertent non-compliance.

Interactions with regulators across the reporting and recovery process, together with regulators' accompanying compliance actions and approach, are addressed in the next two chapters of this report.

⁶⁹⁵ MEA, submission 030, pp 19-20.

⁶⁹⁶ Mr Allan Mahoney, Chair, BFGV, public hearing transcript, Bundaberg, 12 September 2018, p 1.

⁶⁹⁷ Mr Allan Mahoney, Chair, BFGV, public hearing transcript, Bundaberg, 12 September 2018, p 1.

⁶⁹⁸ Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 2.

⁶⁹⁹ QTIC, submission 022, p 2.

11 Reporting and recovery

Options for recovering unpaid entitlements can range from informal interactions with the employer, to dispute resolution and/or litigation. A person may require legal assistance in understanding the options available, and to pursue their claim.

The committee heard that the recovery process for wage theft matters is inaccessible, complex, costly, and sometimes results in unenforceable outcomes.

Consistent criticism of the recovery process was raised, with claims that ‘the system is broken’.⁷⁰⁰ The limited chance of successfully recovering entitlements combined with difficult processes and lack of support, means in a lot of cases, it does not seem worth the worker’s time and money to pursue the matter.

Concerns raised about claims to recover unpaid entitlements included a lack of communication or response from the FWO; difficulties in obtaining documents to confirm unpaid entitlements when employers do not provide payslips as required; and private mediated settlements in which employees felt little choice but to accept only part of their unpaid entitlements. As mediation is voluntary, employers may choose not to participate. If both parties participate and agreement is reached, it is not enforceable.

Actions to recover employee entitlements through the Federal Circuit Court and its small claims process were also described by stakeholders as arduous and inaccessible. While the FWO may assist with small claims, its activity in this regard is limited.

The recovery of unpaid wages and superannuation when a business becomes insolvent was similarly of significant concern.

In addition to stakeholders’ experience of these recovery processes, this chapter outlines proposals to make procedures to recover unpaid entitlements more accessible, and proposes that additional non-government support services be funded by the Commonwealth Government.

11.1 Claims process

The committee heard significant evidence about claims processes for recovery of unpaid entitlements, particularly in relation to the FWO.

If a person believes they are subject to underpayment of wages or entitlements, the person could be expected to take the following steps:

1. Engage with the employer – speak to the employer to determine whether an error has been made, and / or if the dispute can be resolved
2. Contact the Fair Work Ombudsman – seek advice including about the correct EBA or award, and the wage rates and entitlements that apply
3. Calculate the estimated underpayment – noting there may be challenges, such as a lack of pay slips or record keeping

⁷⁰⁰ Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, University of NSW Law, ‘New report claims ‘broken system’ fails migrant workers suffering wage theft’, 29 October 2018, <http://www.law.unsw.edu.au/news/2018/10/new-report-claims-broken-system-fails-migrant-workers-suffering-wage-theft>

4. Contact the FWO – request assistance in resolving the dispute. The matter may then proceed to mediation or be addressed with FWO enforcement/compliance activities
5. If the dispute has not been resolved, the person may make an application to the court.⁷⁰¹

Workers are usually expected to calculate their estimated underpayment and contact their employer about the dispute, before seeking the FWO's assistance in resolving the matter and recovering amounts outstanding.⁷⁰²

The FWO can assist workers to recover unpaid entitlements through dispute resolution (which may include correspondence with the employer, providing advice, and facilitating mediation), compliance activities (such as targeted inquiries and campaign audits) and enforcement action (including compliance notices, infringement notices and litigation).

If a person seeks to recover unpaid superannuation, a claim may be directed to the ATO. In 2015, the ATO reported it recovered \$8 million in superannuation entitlements from South Australia and Victoria labour-hire companies who had engaged in phoenix behaviour and not paid staff entitlements.⁷⁰³ In its submission to the Australian Parliamentary inquiry into wage theft and non-compliance with the superannuation guarantee, the ATO stated that it had transferred almost \$2 billion in SG entitlements to superannuation funds, on behalf of 1.4 million employees, in 2015-16.⁷⁰⁴

JobWatch commented on the recovery process, stating:

*... the current recovery process usually allows the chance for voluntary compliance and/or private mediated settlements rather than judicial adjudications, which allows employers to negotiate a private settlement with no prospects of additional penalties being attached. Unfortunately, this process often also results in the employee settling their claim for less than their actual minimum entitlements because proceeding to court is too complex, costly, risky, stressful, time consuming and protracted.*⁷⁰⁵

The committee heard from an individual whose attempts to recover unpaid entitlements resulted in them accepting \$3,000 from the owing employer, after paying approximately \$9,000 in legal fees.⁷⁰⁶

Stakeholders consistently expressed frustration at the processes of recovering their entitlements.

The Services Union submitted:

*The options to pursue an underpayment in Queensland are difficult to navigate, onerous, time consuming and costly for individuals. Quite often this is a deterrent for individuals to pursue underpayments.*⁷⁰⁷

Clare and Glenn Bergin submitted:

Again the issue we have is the only way for us to have this enforced is to sue the employer in a civil matter. Why does the Government not charge and sue these employers. We understand that these are individual employers but we believe that once a few of them are sued and fined then it

⁷⁰¹ JobWatch, submission 016, p 14.

⁷⁰² JobWatch, submission 016, pp 13-14.

⁷⁰³ Australian Government, ATO, 'ATO uses new powers to recover superannuation entitlements from phoenix operators', 9 January 2015, <https://www.ato.gov.au/Media-centre/Media-releases/ATO-uses-new-powers-to-recover-superannuation-entitlements-from-phoenix-operators/>

⁷⁰⁴ ATO, submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 006, p 23.

⁷⁰⁵ JobWatch, submission 016, pp 8-9.

⁷⁰⁶ Private hearing transcript, Brisbane, 2018.

⁷⁰⁷ The Services Union, submission 046, p 2.

*would perhaps make others stop and think twice about ripping off their staff. Something should be done to stop these failings.*⁷⁰⁸

The Senate EERC, in its inquiry into corporate avoidance of the FWA, held the view that:

*... it would be more efficient and effective if the recovery processes for underpaid wages and underpaid superannuation were simplified and combined and made directly available to workers and their unions rather than separated between workers/unions/FWO and the ATO.*⁷⁰⁹

Allegations of unpaid entitlements under the Queensland industrial relations framework (such as long service leave), can be reported to the OIR. The OIR can refer the matter to the relevant human resource area for appropriate action, or can undertake its own compliance and enforcement including the conduct of investigations and enforcement action through the Industrial Magistrates Court and Queensland Industrial Relations Commission.⁷¹⁰

11.2 Reporting and interactions with agencies

Numerous stakeholders advised the committee that they reported their workplace concerns to various regulatory bodies including the FWO and ATO, however, satisfaction levels with these agencies were generally low.

Common complaints about the reporting process were about lack of communication by the agencies, and the level of assistance provided.⁷¹¹

An individual told the committee of his frustration when his numerous requests to the FWO for an update on his claim prompted no response from FWO officers.⁷¹²

*The Fair Work Ombudsman is slowly going through it, but there are simple things again that demonstrate a level of incompetence and a systemic problem with the Fair Work Ombudsman: they do not provide you with any feedback.*⁷¹³

The committee further heard from stakeholders who were not satisfied with the level of assistance provided by the FWO. Further, the OIR advised that it received correspondence from people who had made a complaint to the FWO but were dissatisfied with the outcome.⁷¹⁴

The YWH submission contained an example of an individual who contacted the FWO for assistance with his claim for underpayment, and 'Fair work advised to take my ex employer to the small claims court or federal circuit court and didn't provide any further assistance'.⁷¹⁵

The QLS described FWO's assistance as limited, telling the committee:

These days, practically, certainly my experience is that the Fair Work Ombudsman's assistance is limited to giving some assistance in working out what a claim may be—that can become problematic sometimes—and offering to mediate with employers. That mediation, as I understand it, is a voluntary process—employers do not have to participate—but good results

⁷⁰⁸ Clare and Glenn Bergin, submission 009, p 3.

⁷⁰⁹ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 71.

⁷¹⁰ Queensland Government, OIR, written briefing, 7 June 2018, p 1.

⁷¹¹ See, for example: Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 11; Queensland Government, OIR, written briefing, 7 June 2018, p 9; YWH, submission 019, p 7; private hearing transcript, regional hearing, 2018.

⁷¹² Private hearing transcript, regional hearing, 2018.

⁷¹³ Private hearing transcript, regional hearing, 2018.

⁷¹⁴ Queensland Government, OIR, written briefing, 7 June 2018, p 9.

⁷¹⁵ YWH, submission 019, p 7.

*can occur. However, generally speaking the Fair Work Ombudsman will not themselves then take up the fight and seek civil penalties or payment orders against employers. They give the employees, I understand, a kit and refer them back to the civil process to help themselves.*⁷¹⁶

Another individual, appearing at a private hearing on the Gold Coast, expressed similar frustration, telling the committee:

The lawyer advised that taking legal action would probably succeed but would be expensive and not financially viable. There was no guarantee of success. She suggested I approach both the Fair Work Ombudsman and the ATO and seek assistance with underpayment of wages and super.

*Since 2015 I have been in contact with both. They both seem to agree that I was an employee entitled to employee benefits but neither is prepared to pursue the matter on my behalf. I perceive the problem to be one of lack of resources, but they appear to be reluctant to admit this. They have each suggested I seek legal advice to pursue the matter myself.*⁷¹⁷

One private witness, who wished to retain his anonymity, informed the committee that the FWO:

*...very much dissuaded me from speaking to other employees at my workplace about what they had found ... they chose not to act any further apart from requesting that my employer make up my underpayments, which I felt was very disappointing.*⁷¹⁸

With respect to the ATO, IR Claims submitted that 'it is our experience that workers who request assistance from the ATO often encounter a difficult, time-consuming and frustrating process'.⁷¹⁹

11.2.1 Mediation processes

Mediation is one of the mechanisms used by the FWO for wage theft disputes. The FWO facilitates mediation, using accredited mediators to provide a free and confidential service.⁷²⁰ The FWO advised that in 2017-18, \$6.5 million was returned to workers via FWO-facilitated mediations, with an average settlement of \$5,000;⁷²¹ and in 2016-17 it resolved 3,716 disputes through its mediation service, recovering approximately \$5.51 million in back-payments.⁷²²

The FWO mediation was criticised by submitters who noted that the voluntary nature of mediation, means some employers simply choose not to participate.⁷²³ A QLS representative stated in their experience they believed that only approximately 50 percent of employers are willing to participate constructively in a mediation process.⁷²⁴

Mr Jamie Gardiner-Hudson told the committee the FWO had contacted his employer about \$40,000 of unpaid wages, but 'Fair Work contacted them and asked for mediation, and they said that they believed they did not owe me any money and that was it'.⁷²⁵

⁷¹⁶ Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, pp 9-10.

⁷¹⁷ Private hearing transcript, regional hearing, 2018.

⁷¹⁸ Name suppressed, private hearing transcript (published), Ipswich, 11 September 2018, p 5.

⁷¹⁹ IR Claims, submission 13, p 47.

⁷²⁰ Australian Government, FWO, *Mediation Checklist*.

⁷²¹ Australian Government, FWO, correspondence, 5 October 2018, p 6.

⁷²² Australian Government, FWO and ROC, *Annual Report 2016-17*, 2017, p 16.

⁷²³ Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, pp 9-10; JobWatch, submission 016, p 8.

⁷²⁴ Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, p 11.

⁷²⁵ Mr Jamie Gardiner-Hudson, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 9.

The committee heard of the frustrations when an employer does not agree to participate in mediation. Dr Jennifer Fraser, whose employer refused to proceed to mediation, said her matter ‘could not be taken any further because Fair Work says they have 30,000 cases of a similar nature to deal with’.⁷²⁶

Other evidence to the committee suggested a significant power imbalance, appeared visible when employers engaged senior legal representation at a mediation, intimidating the worker and using skills and experienced negotiation tactics that the worker did not possess. This was captured by a worker who explained:

*... one thing that I found very unfair was that I had to represent myself before the commissioner in that mediation process and my employer was able to get a very experienced advocate to represent them... It is very clear asymmetry where there is a huge balance in favour of the employer and you as the employee do not have access to that kind of experience to back you up.*⁷²⁷

IR Claims held a strong view on the mediation process, believing it is not appropriate:

*In terms of their mediation department, it actively encourages workers to bargain against their own. The employer comes there voluntarily and then they say that, if they do not settle, they will have to go to either small claims division or line up in the federal circuit court behind, interestingly, the refugee matters and the family law issues. Then you are in a highly stressed and highly over worked federal court system for them to recover the money.*⁷²⁸

IR Claims also said:

*The FWO employs “accredited mediators” - whose very role is to seek compromise. A worker should never be asked to bargain and compromise on their wages that have been stolen - and the FWO should not have a unit dedicated to facilitating this.*⁷²⁹

Such compromise during mediation, was outlined by a witness who provided evidence in a private hearing, who calculated his underpayments owed by his employer to be about \$30,000. He accepted a settlement of \$3,000 from his employer, and had to pay \$8,000 for his legal representation during the dispute resolution and mediation process.⁷³⁰ He was therefore not only unsuccessful in recovering his unpaid entitlements but was left out-of-pocket due to legal fees.

Concerns about the FWC mediation process were raised by JobWatch, which stated:

*One of the problems with the process is that, at the mediation stage with the Fair Work Ombudsman, employers will sometimes say things like, ‘I don’t care if it was \$26 an hour. You weren’t worth it. I’ll offer you half of what you are owed.’ The employee has the option then. They can have the money in their hand within seven days or they could have a four-month court case, so, yes, they do often settle for less than they are entitled to.*⁷³¹

Even if a settlement is agreed at mediation, there is no legal avenue for a person to enforce the settlement. The FWO website confirms ‘We can’t force employers and employees to take any specific action, including pay money’.⁷³²

⁷²⁶ Dr Jennifer Fraser, public hearing transcript, Sunshine Coast, 11 September 2018, p 16.

⁷²⁷ Name suppressed, private hearing transcript (published), Ipswich, 11 September 2018, pp 5, 8.

⁷²⁸ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 8.

⁷²⁹ IR Claims, submission 013, p 38.

⁷³⁰ Private hearing transcript, Brisbane, 2018.

⁷³¹ Mr Ian Scott, Principal Lawyer, JobWatch, public, hearing transcript, Brisbane, 16 August 2018, p 20.

⁷³² Australian Government, FWO, ‘Step 4: Ask for our help’, <https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/step-4-ask-for-our-help>

Some stakeholders suggested FWO mediation should not continue.⁷³³ IR Claims suggested the resources would be better spent on enforcement. It also argued that ‘you should not have to mediate your own money. You should not be the subject of mediation’.⁷³⁴

The ATO dispute resolution activities also includes mediation, which it refers to as ‘in-house facilitation’. Similar to FWO mediation, the process is voluntary, and can result in a ‘statement of expectations’ between the parties. Likewise, this is not legally enforceable.⁷³⁵

In contrast, the QLS noted that under the Queensland industrial relations framework, where a conference is held as a dispute resolution mechanism, the conciliator may require the parties to participate in the process. If the parties do not comply with the conciliator’s request, sanctions may be imposed on them by a Magistrates Court.⁷³⁶

Committee comment

The committee noted with concern, the issues raised by stakeholders and witnesses in regard to mediation processes used by the FWO, including non-participation of employers, and the inability of the FWO to enforce outcomes.

In particular, the committee is concerned that employees are required to negotiate the amount of their unpaid entitlements, particularly when an employer has admitted to underpayments. This does not reflect a fair or just system for workers who are only trying to recover what they are legally and duly owed, and can even leave workers worse off if they have sought legal representation or advice during the process.

The committee notes that the mediation processes of the QIRC, in contrast, can require employers to participate, and can result in enforceable and binding outcomes.

11.2.2 Court processes

If dispute resolution fails and assistance is not provided by regulators, legal action may be a person’s last avenue to pursue their unpaid entitlements.

The committee heard from a number of stakeholders who discussed the court process, and raised issues regarding its inaccessibility, particularly due to the cost and complexity of the system.⁷³⁷

The OIR advised:

Figures from the FWO show that matters involving its compliance and enforcement powers took an average of 136 days to resolve (FWO and Registered Organisations Commission Entity, 2017). By the FWO’s own admission, resolution through the courts can ultimately take years.⁷³⁸

The committee heard, for individuals in particular, that ‘accessing the court system is a difficult and overwhelming prospect’.⁷³⁹

⁷³³ IR Claims, submission 013, p 57.

⁷³⁴ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, 3 September 2018, p 15.

⁷³⁵ Australian Government, ATO, ‘In-house facilitation’, 29 September 2017, https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Options-for-resolving-disputes/In-House-Facilitation/?anchor=Resolve_tax_disputes_more_quickly_using_in_house_facilitation#Resolve_tax_disputes_more_quickly_using_in_house_facilitation – better reference?

⁷³⁶ QLS, response to questions taken on notice at the hearing on 16 August 2018, p 2.

⁷³⁷ See, for example: LawRight, submission 028, p 8; Ms Michelle Lovett, private capacity, private hearing transcript (published), Maryborough, 12 September 2018, p 11; IEU, submission 007, p 4.

⁷³⁸ Queensland Government, OIR, written briefing, 7 June 2018, p 26.

⁷³⁹ LawRight, submission 028, p 8.

Ms Michelle Lovett, who is not legally trained and is representing her son in an ongoing court case against her son's employer for underpayment of wages and entitlements, told the committee:

Even though I have an interest, it is still very difficult. Obviously, without formal training, I am still climbing walls, but I am trying to get through.

... we have found it very difficult. We have applied for Legal Aid. We keep getting a yes and a no, because they do not have a lot of employment funding. They have given us some advice, but very little. I have not managed to find any pro bono or anything to get any form of assistance to even help write an opening statement, and all of that sort of stuff.⁷⁴⁰

11.2.2.1 Federal Circuit Court of Australia

A person may apply to have their matter heard by the Federal Circuit Court of Australia, which has jurisdiction to hear matters relating to enforcement of workplace entitlements.

Costs of dealing with a matter in the Federal Circuit Court can include filing an application (\$665), mediation by a court officer attendance (\$535 for each attendance), and daily hearing fees (\$795 per day of a trial).⁷⁴¹

A person may represent themselves during a Federal Circuit Court matter, however this may be difficult, particularly in complex cases involving sham contracting.

The difficulty in accessing and progressing a claim, was outlined by the Independent Education Union, which submitted:

Another failing of the current regularly framework derives from the inaccessibility of the claims process. Wage theft cases involving under-payment of wages and sham contracting, are firstly brought before the Federal Circuit Court, which is intended to allow for self-representation. However, conceptualising and proving a case of sham contracting is often a very complex matter, making it difficult and unlikely for workers to bring cases without legal representation.⁷⁴²

The time taken for a matter to progress through the court system was also raised as a concern.⁷⁴³

As the primary courts with jurisdiction for hearing matters relating to enforcement of workplace entitlements, the QLS expressed concern that 'Queensland has historically had fewer Federal Circuit Court judges with employment and industrial relations experience as compared with other States and Territories',⁷⁴⁴ and calculated that in Queensland the ratio of Federal Circuit Court judges who predominately deal with employment matters, per one million residents, was 0.403, compared with 4.819 in the ACT and 2.315 in South Australia.⁷⁴⁵

Jurisdiction to hear matters relating to breaches of the NES and modern awards, is also provided to the Queensland Magistrates Court,⁷⁴⁶ which is an 'eligible State or Territory court' under the FWA. As an eligible court, the Queensland Magistrates Court can hear a relevant FWA matter as an 'Employment Claim'. The QLS noted, however, that this process is not often utilised as an avenue to

⁷⁴⁰ Ms Michelle Lovett, private capacity, private hearing transcript (published), Maryborough, 12 September 2018, p 11.

⁷⁴¹ Federal Circuit Court of Australia, *General Federal Law Fees*, 29 June 2019, <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl/fees-gfl>

⁷⁴² IEU, submission 007, p 4.

⁷⁴³ IR Claims, submission 013, p 12; QCU, submission 034, pp 34, 40; QCA, submission 035, p 4; QLS, submission 040, p 3; private hearing transcript, regional hearing, 2018.

⁷⁴⁴ QLS, submission 040, p 2.

⁷⁴⁵ QLS, submission 040, p 2.

⁷⁴⁶ QLS, submission 040, p 3; FWA, ss 12, 539, 545(3), 546.

progress claims relating to wage theft;⁷⁴⁷ and IR Claims submitted that its attempts at having matters heard through this process had not succeeded.⁷⁴⁸

Although the QIRC can hear matters regarding breaches of Queensland industrial laws, it is not considered an 'eligible State or Territory court' under the FWA so cannot hear matters relating to breaches of the FWA.

11.2.2.2 Small Claims

A person may choose to apply to have a matter heard through the Federal Circuit Court small claims process, if their claim is to recover entitlements of less than \$20,000. During a small claims proceeding, the court is not bound by the usual rules of evidence and procedure and may conduct proceedings in an informal manner.⁷⁴⁹

The cost of having a matter heard through the small claims process are less than Federal Circuit Court general matters, such as the costs of filing an application which reduce from \$665 to \$235 for claims less than \$10,000; and \$385 for claims between \$10,000 and \$20,000.⁷⁵⁰ However, these costs can still be significant for some people. The YWH noted: 'It is reasonable to assume most young workers who are being underpaid are not in a position, financial or otherwise, to pursue a claim according to the Ombudsman's advice'.⁷⁵¹

The FWO states it can provide assistance to people pursuing their entitlements through the small claims process, by 'directing them to tools and resources that explain the small claims process and help them to calculate minimum employment entitlements'.⁷⁵²

The FWO has an Assisted Small Claims team which may also provide assistance during the application process. The level of assistance is determined on a case-by-case basis.⁷⁵³ The FWO assisted over 800 people to pursue their small claims in 2017-18, which resulted in the recovery of \$1,224,145 in unpaid entitlements.⁷⁵⁴

The committee however, heard of the difficulties in navigating the court processes.

LawRight submitted:

*While the small claims specialist jurisdiction is designed to be user-friendly, lawyer-less and inexpensive, with procedures that are simplified and relatively informal, the complex legal regime governing employment in Australia presents an ever-present challenge.*⁷⁵⁵

*... This raises difficult evidentiary issues for claimants in circumstances where there is only an oral employment contract or where the claimant has no access to employment records, payslips or other forms of documentary proof that will be required by the court to establish their claim.*⁷⁵⁶

⁷⁴⁷ QLS, submission 040, p 3.

⁷⁴⁸ IR Claims, submission 013, p 50.

⁷⁴⁹ FWA, s 548(3).

⁷⁵⁰ Federal Circuit Court of Australia, *General Federal Law Fees*, 29 June 2019, <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl/fees-gfl>

⁷⁵¹ YWH, submission 019, p 8.

⁷⁵² Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 18.

⁷⁵³ Australian Government, FWO, correspondence, 5 October 2018, p 6.

⁷⁵⁴ Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, p 16.

⁷⁵⁵ LawRight, submission 028, p 9.

⁷⁵⁶ LawRight, submission 028, p 8.

The report of the National Temporary Migrant Work Survey also suggested the small claims process remains inaccessible to the majority of migrant workers, revealing:

... the very small number of migrant workers who use the courts are almost always assisted by trade unions or legal service providers because the complexity of applications still renders litigation inaccessible to this group. For example, even in the small claims division a self represented litigant must correctly identify the legal entity of their employer as well as the legal instrument the employer has breached. They must also prepare necessary affidavits and execute formal legal service of relevant documents on the employer. Among participants in the NTMW Survey, 1 in 12 (8%) did not even know who paid their wages, let alone the correct name of the employer's formal legal entity. In the context of an acute power imbalance in court between most migrant workers and their employers, even those few migrant workers who are able to file a claim have an understandably bleak view of the risks and likelihood of success.⁷⁵⁷

IR claims noted that there is no avenue for pecuniary penalties through the mediation or small claims process, and suggested 'there is no meaningful deterrence for employers who don't want to comply with workplace laws - even when they interact with the FWO after it receives an underpayment complaint.'⁷⁵⁸

11.2.2.3 Queensland Industrial Relations Commission

For matters which fall within the Queensland industrial relations framework, claims to recover unpaid entitlements may be made through the QIRC. This may be used for example, to recover unpaid long service leave entitlements, and arrears of wages from local governments and parents and citizens' associations.⁷⁵⁹

A person may apply to the QIRC if their claim of unpaid wages or superannuation amounts to less than \$50,000, within six years of the amount becoming payable.⁷⁶⁰ After lodging an application, the person may be required to attend a conciliation conference held by a QIRC member. The purpose of the conference is for the parties to agree to a settlement of the matter.⁷⁶¹ It was suggested by the ALHR that the QIRC conciliation processes could be an example of how to deal more broadly with wage theft matters in Queensland.⁷⁶² The QCU also noted the arbitration powers of the QIRC.⁷⁶³ For some matters where conciliation is unsuccessful, a matter may be referred to arbitration process under the IR Act, for determination by the QIRC.⁷⁶⁴ The decision is binding on all parties.

The Queensland Magistrates Court may refer matters to the QIRC for mediation. If mediation is unsuccessful, the matter is referred back to the Magistrates Court for determination.

⁷⁵⁷ Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 15.

⁷⁵⁸ IR Claims, submission 013, p 38.

⁷⁵⁹ Queensland Government, OIR, written briefing, 7 June 2018, p 1.

⁷⁶⁰ IR Act, ss 475-476; QIRC, Information Sheets: Recovery of unpaid wages and superannuation, 28 September 2018, http://www.qirc.qld.gov.au/qirc/prod_form_leg/factsheets/fs_recovery.htm

⁷⁶¹ QIRC, Information Sheets: Recovery of unpaid wages and superannuation, 28 September 2018, http://www.qirc.qld.gov.au/qirc/prod_form_leg/factsheets/fs_recovery.htm

⁷⁶² AHLR, submission 051, p 12.

⁷⁶³ QCU, submission 34, p 40.

⁷⁶⁴ IR Act, s177, 179.

The QIRC can also be used to assist in dispute resolution of matters under the *Work Health and Safety Act 2011* (Qld).⁷⁶⁵

11.2.2.4 Enforcement of court orders

If a person is successful in a court matter, they may still encounter issues having a court order enforced, and their entitlements repaid.

Such reservations were outlined by an individual about seeking recovery of her entitlements through the court:

*I thought what is the point? I am owed about \$3½ thousand gross in leave entitlements on my final pay, but I would have to spend more money to get that money and I know jolly well he will spend a fortune on lawyers to argue not to pay it. Also even if I get a court settlement I have friends who do bookkeeping, payroll and stuff who have worked for people who say that they will not pay the court settlement. Where does that leave me? I have not got the money to keep going to court. Basically this money is sitting there owed to me and I am in no man's land.*⁷⁶⁶

JobWatch outlined issues with enforcement of court orders, stating:

*There is a whole other area of law which no-one really likes talking about which comes after the case is finished. With underpayments, usually the employer does not have a defence... There is a high level of success in going to the hearing and getting an order in the employee's favour for the amount of the claim. In those cases, probably the employer has not showed up and then you are into the next stage which is called enforcement. That is what we were talking about briefly before, where insolvency issues arise. Sending the sheriff around to seize property when it is a business that has one computer or something is fruitless. Those employees are not in a position to commence insolvency proceedings. It costs thousands of dollars to get the ball rolling and there may not be anything in the end.*⁷⁶⁷

LawRight similarly submitted:

*Unfortunately, sometimes an employer does not participate in proceedings or comply with court orders. The employee claimant must then commence separate enforcement proceedings which requires the claimant to self-represent twice – once to obtain an order in their favour and another to enforce these orders. This, and other factors discussed further later in this submission, pose added barriers to many people enjoying their legal entitlements.*⁷⁶⁸

Fair Work Employment Lawyers raised the issue of Management Liability Insurance, whereby a company's insurance policy extends to legal costs associated with conduct, such as underpayment of wages, however the insurance does not extend to the underpayment that is owed.⁷⁶⁹ This means the employer may be able to fund litigation through their insurance policy but may not be in a financial position to pay any back-pay found owing.⁷⁷⁰

11.2.2.5 Stakeholder Proposals

A number of suggestions were made by stakeholders, as to how to improve aspects of the court process for people seeking to recover their entitlements.

⁷⁶⁵ Queensland Government, 'Dispute resolution', 2 July 2018, <https://www.worksafe.qld.gov.au/laws-and-compliance/dispute-resolution>; *Work Health and Safety Act 2011* (Qld), Part 5, Division 7A of the

⁷⁶⁶ Ms Sara Bartrum, private capacity, public hearing transcript, Maryborough, 12 September 2018, p 2.

⁷⁶⁷ Mr Ian Scott, Principal Lawyer, JobWatch, public hearing transcript, Brisbane, 16 August 2018, p 20.

⁷⁶⁸ LawRight, submission 028, pp 7-8.

⁷⁶⁹ Fair Work Employment Lawyers, submission 020, p 1.

⁷⁷⁰ Fair Work Employment Lawyers, submission 020, p 1.

Submitters generally supported simplified processes and procedures.⁷⁷¹ This included the Queensland Law Society, which proposed changes to the filing processes and forms, such as the establishment of a pro forma employment claim forms, lower filing fees and a presumption in favour of employees.⁷⁷² The QLS compared the forms and process of having a matter heard under the state industrial framework, to the forms and processes of the Commonwealth courts. It submitted that the application form used by the Federal Circuit Court is a pro forma application and prompts applicants to provide relevant details, whereas the application form of the Magistrates Court require the applicant to identify and articulate the basis for their claim.⁷⁷³ The QLS also noted the limited number of guides and resources available to assist applicants pursue their claim through the Magistrates Courts, compared to the resources available for the Federal Circuit Court.⁷⁷⁴

Further, the QLS noted recent changes to the Commonwealth jurisdiction by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) which ‘reversed the onus of proof in proceedings involving allegations of unpaid entitlements if the employer failed to maintain proper employment records’.⁷⁷⁵ It was suggested this reversal of the onus of proof should similarly apply to Employment Claims in the Magistrates Court.⁷⁷⁶

IR Claims noted that under the Queensland industrial relations framework, the process is more timely and does not require filing fees.⁷⁷⁷ It recommended filing fees for all wage theft claims to be waived, and facilitation of a pro-bono legal service to assist workers in recovery of their unpaid entitlements.⁷⁷⁸

Similarly, JobWatch submitted that the Queensland Government should consider amendment of the Magistrates Court’s rules and procedures to improve access to justice, including a potential to waive filing fees and make changes to service requirements.⁷⁷⁹

Reforms to the Magistrates Courts’ were proposed, including proposals to further utilise the ability of the Magistrates Court to hear wage theft matters which currently fall within the Commonwealth jurisdiction.⁷⁸⁰ For example, proposals included a designated Queensland Industrial Magistrate or industrial division of the Magistrates Court and magistrates specifically trained in industrial relations laws.⁷⁸¹ This could allow for a more accessible and timely process in comparison to the federal court system.⁷⁸²

The QCU suggested Queensland develop a legal framework similar to Victoria, which establishes an industrial division of the Magistrates Court under the *Magistrates Court Act 1989* (Vic).⁷⁸³ The Industrial Division of the Victorian Magistrates Court ‘has such of the powers of the Court as are necessary to enable it to exercise its jurisdiction.’⁷⁸⁴ This division operates in a less formal manner than

⁷⁷¹ See for example: IEU, submission 007, p 6; JobWatch, submission 016; QLS submission 040, pp 3-8.

⁷⁷² QLS, submission 040, pp 3-8.

⁷⁷³ QLS, submission 040, p 4.

⁷⁷⁴ QLS, submission 040, p 4.

⁷⁷⁵ QLS, submission 040, p 5.

⁷⁷⁶ QLS, submission 040, p 5.

⁷⁷⁷ IR Claims, submission 013, p 51.

⁷⁷⁸ IR Claims, submission 013, p 55.

⁷⁷⁹ JobWatch, submission 016, p 14.

⁷⁸⁰ IR Claims, submission 013, pp 56; JobWatch submission 016, p 13; YWH, submission 019, p 10.

⁷⁸¹ IR Claims, submission 013, pp 50, 56; QCU, submission 034, pp 2, 34; Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

⁷⁸² IR Claims, submission 13, p 50.

⁷⁸³ QCU, submission 034, p 34.

⁷⁸⁴ *Magistrates Court Act 1989* (Vic), s 4(2B).

the general Magistrates Court, with ‘minimum of legal form and technicality.’⁷⁸⁵ This is designed to ‘encourage inexpensive recovery of wages’.⁷⁸⁶

Maurice Blackburn and joint submitters recommended the relevant rules under the IR Act be streamlined and simplified, and suggested ‘the development of a dedicated, low-cost user friendly underpayment and wage recovery jurisdiction’⁷⁸⁷ within the Industrial Division of the Magistrates Court, to consider matters within the IR Act.⁷⁸⁸

The CFMEU Queensland recommended legislation be introduced to refer the jurisdiction of the Queensland courts to the Queensland Industrial Relations Commission, suggesting it would ‘enable workers to more readily recover their wages and seek penalties that deter employers from engaging in wage theft’.⁷⁸⁹ This could be achieved by making the QIRC an ‘eligible State or Territory court’ under the FWA. This could utilise the expertise of the QIRC in hearing industrial relations matters and using dispute resolution processes including conciliation, mediation and arbitration of matters. The Committee understands however, that there may be some constitutional limitations on the ability of the QIRC to perform this role, which would require further investigation.

The committee notes that the QIRC already has the ability to mediate matters which are initiated in the Queensland Magistrates Court.

The QLS also recommended the appointment of more Federal Circuit Court judges in Queensland,⁷⁹⁰ suggesting this would assist workers’ ‘to access the court system and pursue wage and other entitlement matters in a timely manner’.⁷⁹¹ QLS stated that by continuing to have matters heard by Federal Circuit Court judges (opposed to other approaches such as increasing the role of magistrates), this approach would ‘promote consistency of approaches and limit complexity for litigants and practitioners’.⁷⁹²

Committee comment

Accessibility to, and delays in, the court process are clearly a significant barrier to workers’ recovery of unpaid entitlements resulting from wage theft. The committee noted that an increase in Federal Circuit Court judges in Queensland, to hear wage theft matters which fall within the Commonwealth jurisdiction (including the FWA) with expertise in industrial relations laws, could improve accessibility and decrease delays for persons’ seeking recovery of unpaid entitlements.

Further, the committee noted the difficulties in navigating the court process, particularly in regard to the structure of court forms and the cost of filing fees.

While the committee noted that filing fees under the small claims process were significantly less than filing fees for other matters heard by the Federal Circuit Court, the cost can still be unaffordable to workers who are already financially impacted by unpaid entitlements. It was further noted that there are no filing fees for wage theft matters under the Queensland industrial relations jurisdiction.⁷⁹³

An alternative avenue for increasing accessibility and reducing delays was also sought, in the form of establishing a dedicated industrial division within the Queensland Magistrates Court to hear wage theft

⁷⁸⁵ *Magistrates Court Act 1989* (Vic), s 4(3C).

⁷⁸⁶ QCU, submission 034, p 36.

⁷⁸⁷ Maurice Blackburn and joint submitters, submission 033, p 19.

⁷⁸⁸ Maurice Blackburn and joint submitters, submission 033, p 19.

⁷⁸⁹ CFMEU, submission 039, p 15.

⁷⁹⁰ QLS, submission 040, p 3.

⁷⁹¹ QLS, submission 040, p 2.

⁷⁹² QLS, submission 040, p 3.

⁷⁹³ IR Claims, submission 013, p 51.

matters, or to utilise the QIRC or Industrial Court, by increasing its jurisdiction. An industrial division of the Queensland Magistrates Court could operate in a less formal manner than the Federal Circuit Court, and provide a cheaper and faster process for hearing matters. This could also utilise existing resources of the Magistrates Courts throughout Queensland, including the ability of the Queensland Magistrates Court to refer matters to the QIRC for mediation.

Recommendation 7

The committee recommends the Federal Government appoint additional Federal Circuit Court Judges in Queensland, and ensure Queensland retains its proportionate share of Federal Circuit Court judges.

Recommendation 8

The committee recommends the Queensland Government review and take actions available to it, to ensure that wage recovery processes for Queensland workers are simple, quick and low-cost. This should include further investigation of the following options:

- a) establishing a dedicated industrial division within the Queensland Magistrates Court, in line with the example in Victoria
- b) investigating the inclusion of the Queensland Industrial Relations Commission or Industrial Court as an eligible state court under the *Fair Work Act 2009* (Cth)
- c) reviewing relevant forms and processes to ensure the legal process is simple and user friendly for workers and their representatives
- d) waiving or reducing current court filing fees for wage theft matters.

11.3 Insolvency

Where an employee is denied their due wages and entitlements as a result of their employer ceasing trade, the path to recovering their wages is slightly different.

After an employer goes bankrupt or into liquidation, employees and other ‘unsecured creditors’ cannot commence or continue legal action against the company, unless the court permits.⁷⁹⁴

Dr Hardy, Melissa Kennedy and Professor John Howe lamented that an insolvency event can often occur prior to the final determination of court proceedings, such that ‘the effectiveness of civil remedy litigation is severely compromised’.⁷⁹⁵

While enforcement litigation, and the imposition of pecuniary penalties, is ostensibly designed to provide redress and deliver deterrence, these objectives are foiled by the fact that the direct employer can easily arrange their affairs so as to render themselves ‘judgment-proof’.⁷⁹⁶

In other circumstances, employers may seek to exploit insolvency processes post-judgement, to avoid complying with a court direction (i.e. a repayment order). The FWO has intervened on some occasions by applying to the court to request the issuing of a freezing order on the assets of the company, to prevent an employer redirecting funds to trigger insolvency, as a means of avoiding paying penalties

⁷⁹⁴ Australian Government, ASIC, ‘Liquidation: A guide for creditors’, 1 September 2017, <https://www.asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/liquidation-a-guide-for-creditors/#purpose>

⁷⁹⁵ Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 5.

⁷⁹⁶ Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 5.

or amounts owed to employees.⁷⁹⁷ A recent example was the freezing order imposed in the case of Cairns-based tourism operator Leigh Alan Jorgensen, who had failed to pay a \$12,000 penalty and to arrange for his company to pay a \$55,000 penalty and back pay to five backpackers by a specified date, and suggested to FWO officers that he was prepared to 'bankrupt'⁷⁹⁸ his company to avoid paying the penalties and back-pay.⁷⁹⁹ Mr Jorgensen subsequently contravened the freezing order against his company by transferring a total of \$41,035 from two frozen accounts into his family trust account and was found in contempt of court for the contravention, receiving an \$84,956 fine and a 10 days imprisonment (and a further suspended jail term).⁸⁰⁰

As noted at chapter 2.4, where a company has been declared insolvent and liquidators appointed, employees have preferential rights against other unsecured creditors (under section 556 of the Corporations Act). This means employees have the right, if there are funds left over after the payment of the fees and expenses of the liquidator, to be paid their outstanding entitlements in priority to other unsecured creditors.⁸⁰¹

In recognition that prospects of recovery through the liquidators' distribution of funds can be limited,⁸⁰² some affected employees are able to access the legislative safety net of last resort provided by the FEG scheme, which is administered by the federal Department of Jobs and Small Business. The scheme provides eligible employees with financial assistance in the form of monetary advances in respect of their owed wages and entitlements.⁸⁰³

⁷⁹⁷ Australian Government, FWO, 'Jail term imposed in Fair Work Ombudsman's first contempt of court case', media release, 14 May 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180513-jorgensen-contempt-penalty-media-release>

⁷⁹⁸ Bankruptcy only applies to individuals, and is a legal declaration that a person is unable to pay their debts. Liquidation only applies to companies. When a company can't pay its debts and goes into liquidation, it stops operating, with company assets sold in an attempt to pay off the debts. See: Australian Government, Department of Industry, Innovation and Science, *Bankruptcy*, updated 21 August 2018, <https://www.business.gov.au/closing/bankruptcy>

⁷⁹⁹ Australian Government, FWO, 'Jail term imposed in Fair Work Ombudsman's first contempt of court case', media release, 14 May 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180513-jorgensen-contempt-penalty-media-release>

⁸⁰⁰ Australian Government, FWO, 'Jail term imposed in Fair Work Ombudsman's first contempt of court case', media release, 14 May 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180513-jorgensen-contempt-penalty-media-release>

⁸⁰¹ Australian Government, ASIC, *Liquidation: a guide for creditors*, information sheet 45, 30 January 2012, p 1. https://download.asic.gov.au/media/1340240/Liquidation_guide_for_creditors.pdf. For superannuation, the employee's priority status as an unsecured creditor applies only to amounts up to a limit of \$2,000 prescribed in section 556 (1A) of the Corporations Act, with any amounts exceeding \$2,000 ranking alongside those of unsecured creditors. See: Australian Government, ATO, Superannuation and insolvency, 11 May 2018, <https://www.ato.gov.au/tax-professionals/your-practice/insolvency-practitioners/superannuation-and-insolvency/>

⁸⁰² Al Bhadily and Hosie have stated that 'priority in the event of insolvency has not effectively protected employee entitlements because there are invariably insufficient assets available for distribution after secured creditors have recovered their entitlements'. See: Mohammad Al Bhadily and Peter Hosie, 'Australian employee entitlements in the event of insolvency: is an insurance scheme an effective protective measure?,' *Adelaide Law Review*, vol 26, 2016, pp 247-248.

⁸⁰³ Australian Government, Department of Jobs and Small Business, 'Fair Entitlements Guarantee', 3 September 2018, <https://www.jobs.gov.au/fair-entitlements-guarantee-feg>

To qualify for an advance under the FEG scheme, the end of the person's employment must have been due to the insolvency event, or occurred within six months of the event (six month threshold). The scheme places the following limits on employee claims:

- unpaid wages—up to 13 weeks
- unpaid annual leave and long service leave
- payment in lieu of notice—up to five weeks
- redundancy pay—up to four weeks per full year of service.⁸⁰⁴

Submitting to the Senate Economics References Committee inquiry into non-compliance with the SG, the former Commonwealth Department of Employment (now Department of Jobs and Small Business) advised that 'over the total life of FEG and its forerunner schemes from 2000 to 30 June 2016, \$2.1 billion has been paid to 180,148 people'.⁸⁰⁵ In 2016-17, a total of \$186.02 million was paid to 12,354 claimants under the FEG scheme, with the department's FEG hotline handling 24,940 telephone calls and responding to 12,179 emails about the scheme.⁸⁰⁶

Whilst acknowledging this important assistance, submitters considered that the FEG provides only 'a semblance of protection for Australian workers',⁸⁰⁷ because the scheme's limits render many workers ineligible, leaving them without any 'safety net' to depend on.⁸⁰⁸

11.3.1 Access to the Fair Entitlements Guarantee

11.3.1.1 Abandoned companies and the six-month threshold

In a recent journal article, Anderson emphasised that both 'the statutory priority and FEG are only available to employees of companies in liquidation, and do not cover companies in voluntary administration or for which no external administrator has been appointed'.⁸⁰⁹ Directors of such corporate employers may frequently have very little incentive to voluntarily wind up their company's operations.⁸¹⁰

An employee can engage in 'cumbersome and costly court processes seeking the winding up or bankruptcy of their employer'; though the QLS noted:

*Even putting aside the complexity that self-represented employees, who may frequently come from lower economic backgrounds, must overcome in this regard, the expense and time that a Court-ordered wind-up required risks the employee potentially falling short of meeting the six month threshold.*⁸¹¹

Part 5.4C of the Corporations Act gives ASIC the power to order the winding up of a company subject to notice requirements. This mechanism was introduced 'as a means by which employees of

⁸⁰⁴ Australian Government, Department of Jobs and Small Business, 'Fair Entitlements Guarantee', 3 September 2018, <https://www.jobs.gov.au/fair-entitlements-guarantee-feg>

⁸⁰⁵ Australian Government, Department of Employment, submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 024, pp 5-6

⁸⁰⁶ Australian Government, Department of Employment, *Annual Report 2016-17*, 2017, p 54.

⁸⁰⁷ JobWatch, submission 016, p 17.

⁸⁰⁸ IEU, submission 07, pp 4-6; JobWatch, submission 016, p 17; LawRight, submission 028, pp 13-14; QLS, submission 04, pp 6-9.

⁸⁰⁹ Helen Anderson, 'Understanding the phoenix landscape for employees', *Australian Journal of Labour Law*, vol. 29, no. 3, 2016, p 259.

⁸¹⁰ QLS, submission 040, p 6.

⁸¹¹ QLS, submission 040, pp 6-7.

abandoned corporate employers could access the predecessor to the FEG scheme without themselves having to apply for the winding up of their employer'.⁸¹² In correspondence to the committee, ASIC advised that 'since the [FEG] program's inception in 2012, ASIC has funded the winding up of 110 abandoned companies to help approximately 266 employees recover entitlements exceeding \$5.5 million'.⁸¹³ This includes:

- in 2014–15, exercising powers to appoint liquidators to 31 abandoned companies that owed 98 employees more than \$995,000 in entitlements⁸¹⁴
- in 2016-17, using wind up powers in relation to six abandoned companies owing four employees more than \$242,000 in entitlements,⁸¹⁵ and
- in 2017-18, winding up 17 abandoned companies owing at least 32 employees more than \$570,000.⁸¹⁶

Critics have highlighted that this represents only a small proportion of the total number of abandoned companies. For example, Anderson noted:

*In 2014-15, 7,044 companies entered liquidation; 6.2% of the 112,714 companies that were deregistered in that year. In that same period, about 37,600 companies were deregistered by ASIC for failure to return documents and pay fees. The latter are known as dormant or abandoned companies and there are potentially thousands of employees of such companies who are not paid their entitlements and who have no access to FEG... but between July 2014 and June 2015, ASIC only applied for the winding up of 31 abandoned companies.*⁸¹⁷

Anderson states that this limited use of the wind up power raises questions about whether it 'is exercised sufficiently to achieve its objective' of affording employees access to the FEG.⁸¹⁸ Highlighting the impact on those individuals who lose entitlements at the hands of such abandoned companies, JobWatch told the committee about a worker who lost entitlements at the hands of an abandoned company.

Case study

Chad worked as an apprentice for approximately two years. One Monday he arrived at work to find his employer had disappeared, and was not contactable. Chad is owed \$14,000 in underpayments, and has lost his annual leave and superannuation entitlements.

His former employer did not go into liquidation; they simply disappeared. Consequently Chad cannot make a claim under the Fair Entitlements Guarantee Act 2012 (Cth).

*Chad filed an unfair dismissal claim, but is unlikely to be able enforce any order against the uncontactable employer for unfair dismissal or underpayment.*⁸¹⁹

⁸¹² QLS, submission 040, p 6.

⁸¹³ Australian Government, ASIC, correspondence, 17 October 2018, p 3.

⁸¹⁴ Australian Government, ASIC, *Annual Report 2014-15*, 2015, p 56.

⁸¹⁵ ASIC, *Annual Report 2016-17*, 2017, p 66.

⁸¹⁶ Australian Government, ASIC, '18-312MR ASIC winds up 17 abandoned companies owing more than \$570,000 in employee entitlements', media release, 18 October 2018, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-312mr-asic-winds-up-17-abandoned-companies-owing-more-than-570-000-in-employee-entitlements/>

⁸¹⁷ Helen Anderson, 'Understanding the phoenix landscape for employees', *Australian Journal of Labour Law*, vol. 29, no. 3, 2016, p 259.

⁸¹⁸ Helen Anderson, 'It's all about the money', *Federal Law Review*, vol 46, no. 2, 2018, p 293.

⁸¹⁹ JobWatch, submission 016, p 17.

LawRight further shared the experience of one of their clients:

“Bianca” was employed as a bartender and paid below the relevant rate under the Hospitality Industry (General) Award 2010 during the entire term of her employment. Bianca became aware of the underpayment and raised the issue with the employer, at which point the employer company informed Bianca that it was in the process of going into liquidation. Bianca contacted the Fair Work Ombudsman and was advised to make a claim via the FEG scheme. However, Bianca’s claim was rejected because the employer company had not yet gone into liquidation. LawRight offered to help Bianca commence proceedings in the Federal Circuit Court to try to recover her unpaid entitlements before the employer company went into liquidation. However, Bianca desisted from pursuing her rights.⁸²⁰

The committee also heard from a number of individuals who had found themselves just outside of the six-month threshold, and were therefore unable to access the FEG scheme. This included one private witness who missed accessing the scheme by one month, after only having discovered the underpayment at the six-month mark.⁸²¹

The QLS recommended that consideration be given to giving ASIC broader powers to order the winding up of a company. The QLS submitted:

To achieve the policy aims referred to above, such a power could be limited to where an employee has served a valid statutory demand seeking the repayment of qualifying entitlements (i.e. wages, annual leave, termination and redundancy payments), with which the employer has failed to comply or which they have not applied to be set aside. Similarly, the Society recommends that consideration be given to the Secretary of the Department or their delegate being conferred standing under the Bankruptcy Act 1966 (Qld) to seek a sequestration order where an individual employer has failed to comply with a bankruptcy notice given by an employee or has not applied to set it aside. Under the proposal, the trigger for a person to qualify for an advance under the FEG Scheme would not change, and the Secretary would have the same subrogation rights as they do at present.⁸²²

The QLS also proposed that the six month threshold be extended:

... to allow employees additional time to directly pursue remedies themselves either through negotiating a payment plan with their employer, and any other persons involved in the employer’s contraventions of workplace laws (most commonly this will be the company’s directors).⁸²³

11.3.1.2 Exclusion of temporary visa holders

Some submitters highlighted the lack of access to the FEG scheme for foreign nationals,⁸²⁴ who tend to be more highly represented among those who experience wage theft (see chapter 4.4). JobWatch cited the example of a 457 class (temporary skilled work) visa holder who worked for the same employer for four years, and in a permanent position for two of those years:

For the past 16 months, Gin was not paid his superannuation entitlements. Gin requested payment but was told the company was being liquidated. Gin received advice from a lawyer that

⁸²⁰ LawRight, submission 028, p 13.

⁸²¹ Private hearing transcript, regional hearing, 2018.

⁸²² QLS, submission 040, p 7.

⁸²³ QLS, submission 040, p 7.

⁸²⁴ Section 10(g) of the FEG Act specifies that a person is eligible for the FEG only if, ‘when the employment ended, the person was an Australian citizen or, under the *Migration Act 1958*, the holder of a permanent visa or a special category visa’ (class 444 temporary visa for a New Zealand citizen).

*his prospects are poor: the Fair Entitlements Guarantee Act 2012 (Cth) does not extend to foreign nationals and an action against the directors of company is prohibitively expensive.*⁸²⁵

The ability of temporary visa workers to access the FEG was considered by the Senate Legal and Constitutional References Committee in its inquiry into the framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements. That committee's 2013 report found the omission of 457 visa workers from the FEG to be 'on its face, discriminatory, given that there is no coherent policy basis justifying the distinction between the entitlements of local and 457 visa workers in such circumstances'.⁸²⁶ Accordingly, the report recommended the FEG Act be amended to make temporary visa holders eligible for entitlements under the FEG.

While the recommendation was not supported by the Government,⁸²⁷ it was subsequently reaffirmed by the Senate EERC in its March 2016 inquiry report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*. Citing evidence that many working holiday makers and international student visas effectively work full-time and have on occasions lost thousands of dollars when an employer has gone broke, the 2016 report stated:

*The committee concurs with the position of the Senate Legal and Constitutional References Committee report on this matter and, accordingly, is of the view that under principles of fairness and equal treatment, this situation should be rectified so that temporary visa workers are afforded the same protection as Australian workers.*⁸²⁸

More recently, in the second report of the National Temporary Migrant Work Survey, Berg and Farbenblum also argued:

*The Fair Entitlements Guarantee Act 2012 (Cth) should be amended to provide for the non-discriminatory application of the Fair Entitlements Guarantee to all workers in Australia, including temporary migrant workers. This would ensure that, like Australian workers, migrant workers would be entitled to recover unpaid wages if their employer goes into liquidation.*⁸²⁹

The authors noted that this is particularly important 'in the absence of effective systematic enforcement' and given only a single participant (of 4,253 migrant workers in the National Temporary Migrant Work Survey) reported they had gone to court to recover amounts owed.⁸³⁰

⁸²⁵ JobWatch, submission 016, p 12.

⁸²⁶ Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, June 2017, p 57.

⁸²⁷ In its response to the recommendation, the government noted the possible cost implications of such an amendment and highlighted that the restrictions on residence requirements were tested when the FEG legislation passed the parliament in 2012 and are consistent with broader social security legislation. See: Australian Government, *Australian Government response to the Senate inquiry report: The Framework and operation of subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements*, July 2014, pp 6-7.

⁸²⁸ Senate EERC, *A National Disgrace: The exploitation of temporary visa holders*, March 2016, pp 159-160

⁸²⁹ Laurie Berg and Bassina Farbenblum, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, October 2018, p 44.

⁸³⁰ Laurie Berg and Bassina Farbenblum, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, October 2018, p 44.

11.3.1.3 Exclusion of superannuation

ASIC external administrator reports reveal that over the three years from 2014-15 to 2016-17, unpaid superannuation featured in about 41 percent of insolvencies.⁸³¹

The QLS noted that because employees are not eligible to recover unpaid superannuation contributions through the FEG scheme, claims must be pursued through the ATO or by the employee in Court proceedings. In its submission to the Senate Economics Reference Committee, the ATO reported that debt collection is unlikely for cases where the employer is displaying an insolvency indicator, such that the ATO is generally unable to collect any SG payment for these employees. For 2015-16, the ATO reported that as a result of insolvency, \$113.2 million in SGC debt was irrecoverable at law.⁸³²

Further, JobWatch principal lawyer Mr Ian Scott advised that generally, ‘employees are not in a position to commence insolvency proceedings. It costs thousands of dollars to get the ball rolling and there may not be anything in the end’.⁸³³

In sum, without the inclusion of superannuation in the FEG safety net, in cases of insolvency, the chances of recovery of unpaid superannuation may be slim.

The IEU submitted that the failure of the FEG to protect employees’ superannuation entitlements and the regularity of employers in the VET and ELICOS sectors becoming insolvent, means that employees are particularly vulnerable to losing their superannuation. Citing the example of ten of its members, the IEU noted:

*Ten IEUA-QNT members were employed by an RTO on the Sunshine Coast, when it went into liquidation. These members lost over \$38,000 in employer guaranteed superannuation between them. The members had little recourse as the FEG does not protect superannuation entitlements.*⁸³⁴

LawRight submitted a number of cases involving hospitality workers, which highlighted the impacts of excluding the SG from the FEG scheme.⁸³⁵

The QLS submitted that the separation of the recovery process for general entitlements and for superannuation entitlements respectively between the Department of Jobs and Small Business and the ATO is not practical and that it ‘may be extremely difficult for action to be taken by the ATO’.⁸³⁶ The QLS further stated:

*There is no good policy reason for the continued strict division of responsibility between the Department and ATO. The Society recommends that superannuation be added to the group of entitlements that are recoverable through the FEG Scheme, and that the Department be given subrogation rights in respect of those entitlements.*⁸³⁷

⁸³¹ Australian Government, ASIC, *Australian insolvency statistics, Series 3: External administrators’ reports (3.3 – External administrators’ reports time series for 1 July 2004 – 30 June 2017)*, December 2017, table 3.3.10.6 – initial external administrators’ reports by unpaid employee entitlements (superannuation), *Annual*.

⁸³² Australian Government, ATO, cited in Parliament of Australia, Senate Economics References Committee, *Superbad – Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, p 71.

⁸³³ Mr Ian Scott, Principal Lawyer, JobWatch, public hearing transcript, Brisbane, 16 August 2018, p 20.

⁸³⁴ IEU, submission 007, p 5.

⁸³⁵ LawRight, submission 028, pp 12-13; JobWatch, submission 016, p 12.

⁸³⁶ QLS, submission 040, p

⁸³⁷ QLS, submission 040, p

The IEU and QCU also called for the inclusion of superannuation in the FEG⁸³⁸ – a proposal that attracted support from numerous submitters to the Senate Economics References Committee.⁸³⁹

The former Commonwealth Department of Employment advised that senate committee that the exclusion of the SG from the scheme reflected its policy genesis as a scheme of protection aligned to those entitlements an employer is obligated to provide under the NES.⁸⁴⁰ However, Industry Super Australia has noted that GEERS, the predecessor to FEG, whilst not covering unpaid SG, did fund three months of superannuation contributions.⁸⁴¹

The QLS submitted that whilst acknowledging that the loss of superannuation benefits is different to the more immediate effect of the loss of wages of other entitlements, QLS's view is that there is an entitlement and there ought to be an available remedy where they are not paid'.⁸⁴²

This was echoed by Mr Michael Clifford of the QCU, who called for the recognition of superannuation as a form of deferred wages and therefore as an industrial entitlement that 'should be treated as such' (see further discussion regarding the treatment of the SG in this regard at chapter 12.1.2).⁸⁴³

Anderson has suggested that denying employees access to the immediate safety net of FEG with respect to their unpaid superannuation increases reliance on the later safety net of the aged pension.⁸⁴⁴ Given the compounding effect of unremitted superannuation, the impact on this secondary safety net may be significant – Stanford estimated 'that a present loss of \$10,000 will result in \$57,000 less superannuation in 30 years' time'.⁸⁴⁵

The committee notes that the Senate Economics Reference Committee, in its *Superbad* report, recommended 'that the relevant government agencies undertake further research into the fiscal and legislative impacts of an expansion of the current scheme'.⁸⁴⁶ The Inspector General of Taxation (IGT), in his 2010 review into the ATO's administration of the SGC, also supported the expansion of the then GEERS scheme, to cover unpaid SG liabilities.⁸⁴⁷ The IGT reported:

The review findings confirm that the employees missing out when employers become bankrupt or insolvent are those that are the most reliant on compulsory superannuation for retirement support.

⁸³⁸ IEU, submission 007, p 5; Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

⁸³⁹ Parliament of Australia, Senate Economics References Committee, *Superbad: Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, pp 71-72.

⁸⁴⁰ Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, p 78.

⁸⁴¹ Industry Super Australia, *Unpaid super: Getting worse while nothing is done*, October 2018, p 11.

⁸⁴² QLS, response to questions taken on notice at the hearing on 16 August 2018, pp 2-3.

⁸⁴³ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

⁸⁴⁴ Helen Anderson, 'Insolvency – It's all about the money', *Federal Law Review*, vol. 46, no. 2, 2018, p 292.

⁸⁴⁵ Stanford, cited in Helen Anderson, 'Insolvency – It's all about the money', *Federal Law Review*, vol. 46, no. 2, 2018, p 292.

⁸⁴⁶ Parliament of Australia, Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, May 2017, p xiii.

⁸⁴⁷ Australian Government, IGT, *Review into the ATO's administration of the Superannuation Guarantee Charge: A report to the Assistant Treasurer*, March 2010, pp 15, 92-93 (recommendation 11).

... An expansion of GEERS to cover unpaid SGC will also allow government to quantify higher future age pension outlays and act as a driver for improvements in the SG system to minimise employers defaulting on their SG obligations.⁸⁴⁸

The Association of Superannuation Funds of Australia has estimated it will cost up to \$150 million per year to include unpaid SG payments in the FEG scheme, with up to 55,000 affected individuals likely to benefit from the initiative annually.⁸⁴⁹ The Department of Employment has also conducted its own modelling, projecting an estimated 70 percent increase in scheme payments, together with an additional \$45 million in administration expenses (equivalent to a \$175 million increase on 2016-17 scheme payments of \$186.02 million).⁸⁵⁰ On the back of the department's estimates, the Cross Agency Superannuation Guarantee Taskforce recommended that the scheme not be extended to include the SG at this time. Neither estimates included any estimation of pension pay off.⁸⁵¹

Committee comment

For workers affected by the insolvency of their employer, prospects of recovering unpaid amounts are often poor. The FEG scheme may be the only avenue for workers to recoup their duly owed entitlements, but the current limits of the scheme mean that it is inaccessible to many workers, at a significant cost to these individuals and their families, and with longer-term implications for reliance on social services and the age pension.

Superannuation is a compulsory and vital part of an employee's remuneration and should not be treated any differently from the other entitlements appropriately covered by the scheme. Further, the exclusion of temporary migrant workers from the scheme heightens the effects of the exploitation of these workers, noting they are unable to access social security or other assistance in many instances. These are workers who pay tax, are entitled to superannuation contributions and have access to unfair dismissal and all other protections of the FWA, and who make important contributions to our businesses and economy.

Recommendation 9

The Committee recommends unpaid superannuation be included as a recoverable entitlement under the Fair Entitlements Guarantee scheme and the Fair Entitlements Guarantee scheme be extended to temporary overseas visa workers who are currently denied access.

11.4 Community service providers and other organisations

The committee received evidence that affected workers are seeking help from private organisations and community legal centres (including consultants, law firms and NGOs), to assist in the recovery of unpaid wages and entitlements, and are sometimes being referred to such organisations by the FWO itself.⁸⁵²

⁸⁴⁸ Australian Government, IGT, *Review into the ATO's administration of the Superannuation Guarantee Charge: A report to the Assistant Treasurer*, March 2010, p 92.

⁸⁴⁹ Association of Super Funds of Australian, 'Unpaid super – workers deserve better', media release, 22 March 2017, <https://www.superannuation.asn.au/media/media-releases/2017/media-release-22-march-2017>

⁸⁵⁰ Superannuation Guarantee Cross Agency Working Group, *Interim Report*, Australian Government, January 2017, p 34; Department of Employment, submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 24.

⁸⁵¹ Superannuation Guarantee Cross Agency Working Group, *Superannuation Guarantee Non-compliance: A report to the Minister for Revenue and Financial Services*, Australian Government, 31 March 2017, p 39.

⁸⁵² Ms Kay Clifton and Ms Catherine Black, private capacity, public hearing transcript, Brisbane, 3 September 2018, pp 11-12.

The Committee received detailed information and individual accounts from consultancy firm IR Claims representatives and clients. IR Claims had, over the last two years, assisted in the recovery of ‘1.8 million in stolen wages for our clients, ranging in individual amounts of \$6,000 up to \$80,000.’⁸⁵³ While it worked on a ‘low-cost model’ to be accessible to clients, it acknowledged that it is unable assist all affected people who seek assistance, pursuing approximately eight cases out of 80 calls it receives each week.⁸⁵⁴ IR Claims told the committee that to run a commercially viable case, it would need to pursue claims of at least \$20,000.⁸⁵⁵

Stakeholders proposed that funding be directed to community legal services to provide assistance and representation on behalf of workers,⁸⁵⁶ with Dr Tess Hardy noting:

*... 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.*⁸⁵⁷

Dr Berg noted the need for designated support services in Queensland for migrant workers, stating:

*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.*⁸⁵⁸

This was further outlined in the results of the second report of the National Temporary Migrant Work Survey, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, which concluded that:

Among underpaid participants who had not tried to recover their unpaid wages, 42% reported that they did not know what to do. This indicates both the importance of accessible information

⁸⁵³ IR Claims, submission 013, p 4.

⁸⁵⁴ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 10.

⁸⁵⁵ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 10.

⁸⁵⁶ See, for example: IR Claims, submission 013, p 55; JobWatch, submission 016, pp 4, 9; Dr Laurie Berg and Bassina Farbenblum, submission 042, pp 4, 12; Mr Ken Taylor, President, QLS, public hearing transcript, Brisbane, 16 August 2018, p 9; Dr Tess Hardy, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 20.

⁸⁵⁷ Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 20.

⁸⁵⁸ Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 23.

*on wage recovery processes and where and how migrant workers can seek help, and the depth of the need for legal advice and representation...*⁸⁵⁹

The report recommended resources be directed to ‘establishing adequate services to advise and represent migrant workers in relation to employment claims’ and that such services ‘must also involve ensuring that trade unions, community organisations and legal service providers have substantially expanded capacity to provide targeted advice and representation to assist migrant workers to recover unpaid wages’.⁸⁶⁰

JobWatch provides information and referrals to Victorian, Tasmanian and Queensland workers, through its free and confidential telephone information service.⁸⁶¹ It had provided ‘tailored legal information to 3,914 Queenslanders as at 3 July 2018’.⁸⁶² JobWatch advocated for funding to ‘an employment rights community legal centre to engage in community legal education and to advise and represent vulnerable and disadvantaged employees in prosecuting their own wage recovery claims,’ noting ‘we have three lawyers and 11,000 calls a year. It is not possible to help everyone, unfortunately’.⁸⁶³

The committee also heard from Working Women Queensland (WWQ), a not-for-profit organisation which provides services to vulnerable workers in Queensland, including advice regarding industrial relations matters. WWQ assisted workers to receive over \$840,000 in payments in 2017, which included wages, superannuation and compensation for discrimination.⁸⁶⁴ WWQ received funding from both the Queensland and Federal Governments up until 31 December 2016, at which time the Federal Government ceased all funding.⁸⁶⁵ The Palaszczuk Government then stepped in to fill the funding gap, providing necessary funding to WWQ.⁸⁶⁶ WWQ called for more funding, stating ‘we are the only organisation it funds to assist workers and \$230,000 will not do it for the state of Queensland’.⁸⁶⁷

The FWO advised that it provides funding through its Community Engagement Grants Program to organisations based in Victoria (JobWatch), New South Wales (Redfern Legal Centre Limited), South

⁸⁵⁹ Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 45.

⁸⁶⁰ Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 43.

⁸⁶¹ JobWatch, submission 016, p 3.

⁸⁶² JobWatch, submission 016, p 5.

⁸⁶³ Mr Ian Scott, Principal Lawyer, JobWatch, public hearing transcript, Brisbane, 16 August 2018, p 19.

⁸⁶⁴ Ms Lee Matahaere, Senior Industrial Officer, Working Women Queensland, public hearing transcript, 17 September 2018, p 18.

⁸⁶⁵ Emilia Terzon, ‘NT and SA women’s centres saved by federal grant funding as Qld sister service faces closure’, *ABC News*, 16 December 2016, <https://www.abc.net.au/news/2016-12-16/nt-sa-women-legal-centres-saved-queensland-facing-closure/8126862>; Felicity Caldwell, Queensland Working Women’s Service faces closure with funding cut’, *Brisbanetimes.com.au*, 22 December 2016, <https://www.brisbanetimes.com.au/national/queensland/queensland-working-womens-service-faces-closure-with-funding-cut-20161222-gtq5c.html>

⁸⁶⁶ Hon Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, 8 March 2017, <http://statements.qld.gov.au/Statement/2017/3/8/funding-boost-for-queensland-working-womens-service-after-1np-cuts>; Queensland Government, *Budget Statements: Delivering for Women*, Queensland Budget 2018-19, June 2018, p 3, https://budget.qld.gov.au/files/Budget2018-19_BudgetStatements_Women.pdf

⁸⁶⁷ Ms Lee Matahaere, Senior Industrial Officer, Working Women Queensland, public hearing transcript, 17 September 2018, p 19.

Australia (Working Women's Centre SA Incorporated), the Northern Territory (NT Working Women's Centre Incorporated) and Western Australia (Employment Law Centre of WA).⁸⁶⁸ The FWO provides funding to Growcom in Queensland, through the Community Engagement Grants Program. However, Growcom is the peak body representing the horticultural industry, as opposed to a general legal advisory body and specialist support service.

Queensland, the ACT and Tasmania are the only Australian jurisdictions that do not receive funding from the Federal Government to provide state-based advice and assistance in respect of employment matters under the FWA.

Committee comment

It is clear that private organisations and community legal centres provide an invaluable role in assisting and sometimes representing, workers who are seeking to pursue the recovery of unpaid entitlements.

It is unclear why the federal government does not fund a general advisory body based in Queensland, to assist the state's workers; instead, Queenslanders must rely on services provided in other states and territories of Australia, which though delivering an important service, are under-resourced to meet the demand in regard to worker complaints of wage theft.

The federal government should be providing the information and assistance necessary for individuals to understand and pursue their legal entitlements under its jurisdiction, including the FWA.

Recommendation 10

The committee recommends that the Federal Government fund a workplace rights information and support service based in Queensland, as is funded for other Australian jurisdictions and was formerly the case, up until the removal of funding in 2016 by the then Federal Government.

⁸⁶⁸ FWO, correspondence, 5 October 2018, p 8.

12 Enforcement and deterrence

This chapter outlines the approaches to enforcement by relevant regulatory agencies. It also discusses civil penalties in the Commonwealth and Queensland statutory frameworks, and stakeholders' views about criminalisation of wage theft in response to their view that the current system does not deter deliberate or reckless wage theft.

Active enforcement by the FWO was reported to be limited, particularly in the context of the frequency of unpaid wages or withholding of entitlements

Lack of resourcing of the FWO was of substantial concern, with stakeholders believing it contributed significantly to the ineffectiveness of the FWO's enforcement.

The FWO compliance and enforcement policy emphasises its role in providing advice, support and information, resolution at the workplace level or in mediation, and specific enforcement campaigns.⁸⁶⁹ In contrast, workers and their representatives emphasised their fear of loss of employment if they raised underpayment with their employer. They also raised difficulties in negotiating repayment of wages and entitlements if they had already left employment.

12.1 Enforcement actions

12.1.1 Fair Work Ombudsman

The FWO has a variety of activities in which it engages to enforce compliance with workplace laws. These activities range from providing information and advice and conducting audits and investigations, through to implementing a continuum of enforcement mechanisms that end in litigation.⁸⁷⁰ However, the FWO has increasingly been the subject of criticism regarding the extent of its activities and the frequency with which enforcement mechanisms are used. Stakeholders generally considered the enforcement actions of the FWO to be insufficient to deter employers from engaging in wage theft. Some suggested the risk of detection combined with low levels of enforcement can provide limited incentive for compliance.⁸⁷¹

The FWO conducts regular audits and investigations as part of its compliance activities. The focus of these activities are informed by intelligence, anonymous tip offs, research and requests for assistance.⁸⁷² The FWO conducted 4,572 audits of workplaces in 2017-18, including targeted campaigns in the hospitality industry and audits of supply chain networks.⁸⁷³

Audits usually target a particular geographic location or industry and can extend over multiple states and territories. For example, in July this year the FWO released its 'Food precinct activities report', which contained the results of a campaign focusing on food precincts in Victoria, New South Wales and Queensland (in Fortitude Valley in Brisbane).

As a result of these activities the FWO recovered \$471, 904 for 616 workers, over the three locations.⁸⁷⁴

⁸⁶⁹ Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018.

⁸⁷⁰ Australian Government, FWO, submission 044, p 1.

⁸⁷¹ See, for example: Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 11; JobWatch, submission 016, pp 8-9; Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, p 216.

⁸⁷² Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 8.

⁸⁷³ Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, pp 17, 19.

⁸⁷⁴ Australian Government, FWO, *Food Precincts Activities – a report on compliance activities undertaken by the Fair Work Ombudsman*, July 2018, p 6.

In Fortitude Valley, 73 audits were completed, with 60 percent of businesses found to be non-compliant with workplace laws. A total of \$64,941 was recovered for 180 employees, and the FWO issued one compliance notice, seven formal cautions and 21 infringement notices.⁸⁷⁵

The FWO reports on its activities in relation to allegations of serious non-compliance, asserting that the public nature of these reports may act as a form of education and deterrence.⁸⁷⁶ While the results of such audits and investigations, published on the FWO's website, are highly valuable, the relatively small number of such audits and enforcement action taken when viewed in context of the number of complaints made and businesses operating are very small.

FWO policies advise that monitoring and compliance activities by the FWO may be initiated as a result of reports by employees and employers, as well as self-initiated and proactive measures such as investigations and strategic audits.⁸⁷⁷ In response to detected instances of wage theft, the FWO may engage a range of mechanisms to enforce compliance. These include compliance notices, infringement notices, enforceable undertakings and litigation.

Compliance notices can be issued by the FWO, requiring a person to take specific action to fix an alleged breach of the FWA.⁸⁷⁸

Infringement notices can be issued by FWO Inspectors for breaches of the FWA including obligations in relation to pay slips.⁸⁷⁹

Enforceable undertakings are agreements between the FWO and a person (usually an employer), where the person agrees to fix a breach of the FWA, and can commit to future compliance measures.⁸⁸⁰ These agreements are enforceable by a court.⁸⁸¹

In 2017-18 the FWO issued 615 infringement notices, 220 compliance notices, seven enforceable undertakings, and commenced 35 court cases.⁸⁸² Court-issued penalties of \$7.2 million were issued, with another 85 matters before the courts yet to be decided.⁸⁸³

Fifty court matters were decided in 2016-17, which resulted in \$4,864,925 in court-ordered penalties, and \$3,942,314 worth of underpayments recovered.⁸⁸⁴ The FWO states it is committed to commencing court proceedings in 'the most serious cases of non-compliance' and working with industries to improve compliance.⁸⁸⁵

⁸⁷⁵ Australian Government, FWO, *Food Precincts Activities – a report on compliance activities undertaken by the Fair Work Ombudsman*, July 2018, p 6.

⁸⁷⁶ Australian Government, FWO, 'Activity reports', www.fairwork.gov.au/about-us/access-accountability-and-reporting/activity-reports.

⁸⁷⁷ Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 8.

⁸⁷⁸ FWA, s 716.

⁸⁷⁹ FWA, s 536; Fair Work Regulations 2009 (Cth), s 4.04.

⁸⁸⁰ FWA, s 715.

⁸⁸¹ FWA, s 715(6).

⁸⁸² Australian Government, FWO and ROC, *Annual Report 2017-18*, p 21.

⁸⁸³ Australian Government, FWO and ROC, *Annual Report 2017-18*, p 21.

⁸⁸⁴ Australian Government, FWO and ROC, *Annual Report 2016-17*, p 23.

⁸⁸⁵ Australian Government, FWO, *Food Precincts Activities – a report on compliance activities undertaken by the Fair Work Ombudsman*, July 2018, p 6.

IR Claims commented on what it viewed to be low numbers of ‘breach notices’ (compliance notices), stating:

*In dedicating 75 percent of enforcement resources to the migrant space, that means if you only employ Australians who are born here, as an employer you have got literally a two percent chance of interacting with the ombudsman if you are dodgy. On 17,000 times, the ombudsman knew that the employer underpaid because in their own annual report they recovered 17,000 times. Not one of those got a breach notice.*⁸⁸⁶

The FWO advised the committee:

*The FWO enforces compliance through more serious and costly avenues such as litigation only when it is in the public interest to do so. Serious incidences of exploitation are addressed through litigation, where court action will send a strong message of deterrence about the need for businesses to comply with the law.*⁸⁸⁷

Dr Laurie Berg noted the resource intensiveness of the FWO’s compliance activities:

*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 immunisation, compliance activities including by the FWO are very resource intensive.*⁸⁸⁸

12.1.1.1 Compliance and enforcement policy

The FWO’s *Compliance and Enforcement Policy* outlines its principles and processes to seek to ensure compliance with the FWA. It explains the FWO’s role ‘to promote harmonious, productive and cooperative workplace relations, and to monitor, inquire into, investigate, and enforce compliance with relevant Commonwealth workplace laws.’⁸⁸⁹ The policy details compliance and enforcement activities, including investigations, campaigns, and enforcement actions ranging from dispute resolution to providing infringement notices and engaging in litigation.

The FWO provided further information regarding its compliance and enforcement activities, explaining:

*In fulfilling our role under the Fair Work Act 2009, the FWO adopts a compliance model built on a mix of risk-based regulation and strategic enforcement, which is set out in our Compliance and Enforcement Policy and Litigation Policy. Key to this approach is that we remain proportionate in our response to non-compliance and direct our resources to where they will have the greatest impact.*⁸⁹⁰

On its website, the FWO states it is ‘unlikely to get involved in workplace issues which happened more than 2 years ago’,⁸⁹¹ even though the legal timeframe for initiating a claim is six years.

The committee consistently heard dissatisfaction about the rates of enforcement, and the FWO’s tendency to focus on larger organisations.

⁸⁸⁶ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 8.

⁸⁸⁷ Australian Government, FWO, correspondence, 5 October 2018, p 2.

⁸⁸⁸ Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 3 September 2018, p18.

⁸⁸⁹ Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 4.

⁸⁹⁰ Australian Government, FWO, correspondence, 5 October 2018, p 1.

⁸⁹¹ Australian Government, FWO, ‘Step 1: Find out what we can help with’, <https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/step-1-find-out-what-we-can-help-with>

In a private hearing on the Gold Coast, an individual expressed disappointment with the FWO: ‘In the beginning I thought Fair Work was a government body that could intervene and force employers to pay the award, but since speaking to them they have told me that that is not the case’.⁸⁹²

Mr Dan McGaw, suggested the FWO ‘is more like a call centre or a hotline. They cannot make a binding decision. It is more general, broad advice. It is tough for an individual worker’.⁸⁹³

In some cases workers who had not received significant multiple entitlements were unable to obtain assistance from the FWO.⁸⁹⁴

Mr Joe Moro, President of the Mareeba District Fruit and Vegetable Growers Association outlined his concerns with the FWO’s enforcement to the committee, stating:

*Enforcement seems to be the area where there seems to be a problem. I know that some of the employees seem to get a quicker response when they put in a complaint, but it is generally in regard to noncompliance with the award. We are talking about the more complicated situations where there are systemic processes in place where the employees are not coming forward with the evidence and the allegation is coming from a third party—normally someone who is witnessing it and seeing that this business is doing the wrong thing and it is causing unfair advantage. You have to understand that usually this occurs when farmers are seeing their prices very low and the margins are very tight, and they see certain businesses doing certain things that are giving them an unfair advantage so they generally put a complaint in but nothing seems to occur.*⁸⁹⁵

Mr Kym Rake, told the committee his story.

Case study

Mr Kym Rake was a waste truck driver who discovered he was being underpaid. After failed attempts at resolving the issue directly with his employer, he contacted the FWO’ for assistance.

*‘I rang the ombudsman, and they gave me the pay rate for three years previous to 2016 and said, “Work it out and then come back to us if you think you’re underpaid.” I said to the bloke at the time, “I know I’m underpaid but we’ve got to get something sorted.” They gave me the pay rate for three years previous and I worked all of that out myself and I rang them back. They said, “For the previous three or four years to that, we have to look it up in the archive and we’ll get back to you.” I waited and waited and waited, so I rang them again and I got some lady who said, “If you’ve made a complaint, you’re in the queue. Just wait.” That was it. I have not heard another word. That was three years ago’.*⁸⁹⁶

⁸⁹² Private hearing transcript, regional hearing, 2018.

⁸⁹³ Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 13.

⁸⁹⁴ IR Claims, submission 013, p 16.

⁸⁹⁵ Mr Joe Moro, President, Mareeba District Fruit and Vegetable Growers Association, public hearing transcript, Townsville, 28 August 2018, p 5.

⁸⁹⁶ Mr Kym Rake, private capacity, public hearing transcript, Brisbane, 3 September 2018, p 9.

It was noted in the findings of the National Temporary Migrant Work Survey:

*... the FWO's core functions are not directed to the large-scale provision of individual remedies. Rather, they are oriented to strategic enforcement, systemic deterrence of noncompliance, and the promotion of harmonious workplaces.*⁸⁹⁷

The FWO's performance target for 2017-18 was that no more than 10 percent of complaints be dealt with through compliance and enforcement tools.⁸⁹⁸ IR Claims commented on this target, arguing 'the employer is always going to win when the Fair Work Ombudsman sets its own goal of enforcement at "no more than 10%"',⁸⁹⁹ and stated:

*If you were to go to the telecommunications ombudsman or the financial ombudsman, they are the big stick department; they are not the education department. You have gone to your provider first, and you have sought their help. If they do not help you, you then go to the ombudsman who brings a regulatory and enforcement process. The Fair Work Ombudsman brags about having under 10 percent enforcement. In fact, in their annual report, as though it was a badge of honour, they say there were only six percent prosecutions or enforcements. We say that that is at the heart of the problem.*⁹⁰⁰

IR claims stated it 'should not have a business model', noting that its clients were 'pushed' into using its services, due to their disappointing interactions with the FWO.⁹⁰¹ IR claims further stated:

*There should be no place for the private sector to be enforcing someone's minimum wage and their award minimum conditions. Out of desperation, these people have all had to pay for a service that should have been out of the \$110 million that went to the ombudsman. Instead, the ombudsman prioritise them being an education department rather than an enforcement department. We say that they have got the balance wrong.*⁹⁰²

Conversely, the NRA's view of the FWO's approach to prosecution and regulation was that 'the generally high level of compliance is a testament to that office's effectiveness'.⁹⁰³

The Melbourne University Law School and FWO investigated the knowledge and perceptions of enforcement risks of the FWO, through a survey of 643 businesses across ACT, NSW and Victoria in the cafe and restaurant industry and the hair and beauty services industry.⁹⁰⁴ It was reported that half of the respondents thought it would be highly likely (24 percent) or likely (20 percent) that the FWO would discover a breach of the FWA, with a third of businesses (31 percent) believing it would have a 50/50 chance of being caught.⁹⁰⁵ Businesses were overrating the effectiveness of the FWO's proactive detection measures 'given that the number of audits undertaken by the FWO represents a very small

⁸⁹⁷ Laurie Berg and Bassina Farbenblum, *Wage Theft In Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia*, University of Technology Sydney, University of NSW Law, and the Migrant Worker Justice Initiative, October 2018, p 15.

⁸⁹⁸ Australian Government, FWO and ROC, *Annual Report 2017-18*, 2018, p 9.

⁸⁹⁹ IR Claims, submission 013, p 5.

⁹⁰⁰ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

⁹⁰¹ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

⁹⁰² Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 7.

⁹⁰³ NRA, submission 021, p 11.

⁹⁰⁴ Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman', *Sydney Law Review*, vol. 39, no. 4, 2017.

⁹⁰⁵ Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman', *Sydney Law Review*, vol. 39, no. 4, 2017, p 491.

slice of all businesses in operation at any given time'.⁹⁰⁶ As of 2016-17, the ABS estimated that there were 2,238,299 actively trading businesses.⁹⁰⁷ In the same year, the FWO reported that it conducted 5,645 campaign audits and inquiry activities.⁹⁰⁸ This constituted approximately 0.25 percent of all businesses.

The NRA commented on the Melbourne University Law School and FWO report, stating: '... although somewhat limited in its scope, this study demonstrates the 'ripple' effect of the actions of the Fair Work Ombudsman and its ability to utilise its limited resources to be an effective regulator'.⁹⁰⁹ However, that over half of the businesses did not think discovery of their conduct by the FWO would be likely, suggesting the FWO's enforcement activities are not always contributing to deterrence.

The YWH noted the complexity of the process for recovery of unpaid entitlements, particularly for young workers and suggested 'the current lack of enforcement has contributed to the prevalence of wage theft, particularly among young workers who cannot easily access remedies in the courts'.⁹¹⁰

The QCU drew parallels between workplace health and safety compliance and wage theft, by referring to the best practice review of Workplace Health and Safety Queensland (Best Practice Review).⁹¹¹ The Best Practice Review reported a need of WHSQ to re-balance priorities 'in favour of "hard" compliance work..., with a view to increasing on the ground visibility and activity of the inspectorate'.⁹¹² The review found insufficient emphasis had been placed on 'hard' compliance and enforcement, and that there was an 'ongoing need to ensure that the balance between "directing compliance" and "encouraging and assisting compliance" is appropriate'.⁹¹³

Hall Payne Lawyers used examples from the *Work Health and Safety Act 2011* (Qld), in its exploration of potential offence provisions for wage theft in Queensland.⁹¹⁴

Mr John Payne, of Hall Payne Lawyers, referred to the Robens Inquiry in England,⁹¹⁵ which inquired into 'the provisions made for the safety and health of person in the course of their employment'⁹¹⁶ and supported a more self-regulating system as well as cautioning against the practical limits of

⁹⁰⁶ Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman', *Sydney Law Review*, vol. 39, no. 4, 2017, p 491.

⁹⁰⁷ Australian Government, ABS, *8165.0 – Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017*, 20 February 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8165.0>

⁹⁰⁸ Australian Government, FWO and ROC, *Annual Report 2016-17*, 2017, p 14.

⁹⁰⁹ NRA, submission 021, p 11.

⁹¹⁰ YWH, submission 019, p 8.

⁹¹¹ QCU, submission 034, p 3.

⁹¹² Queensland Government, WorkCover Queensland, *Best practice review of Workplace Health and Safety Queensland*, 2017, p 8.

⁹¹³ Queensland Government, WorkCover Queensland, *Best practice review of Workplace Health and Safety Queensland*, 2017, p 7.

⁹¹⁴ Mr John Payne, Principal Lawyer, Hall Payne Lawyers, submission 027, pp 11, 12, 15, 16.

⁹¹⁵ Parliament of the United Kingdom, Secretary of State for Employment, Chairman Lord Robens, *Safety and Health at Work – Report of the Committee 1970-72*, 1972.

⁹¹⁶ Parliament of the United Kingdom, Secretary of State for Employment, Chairman Lord Robens, *Safety and Health at Work – Report of the Committee 1970-72*, 1972, p 469.

negative regulation by external agencies.⁹¹⁷ With a view that it was analogous to the problem of wage theft, Hall Payne Lawyers stated:

*What came out of that inquiry is that you cannot fix the problem by inspection and you cannot deal with the problem by monitoring; workplace health and safety is far too big a regime covering too many workplaces to conduct an enhanced workplace health and safety system. It went more to a proposition of self-auditing. Underpinning that is deterrence.*⁹¹⁸

The committee heard evidence that the FWO's approach to compliance, 'seems to be if we can catch a big fish and get all the penalties against them, the little fish will all be scared'.⁹¹⁹

In response to these claims, the FWO stated:

The evidence provided to the Committee regarding the agency's enforcement strategy (point 5 in your letter) is inaccurate and oversimplifies a complex issue. The FWO operates a nuanced compliance model that includes a range of activities tailored to address the behaviour we come across. Putting pressure on decision makers at the top of industry structures to take more responsibility for compliance is part of our approach...

*By engaging directly with the 'big fish', we secured commitments from companies with actual capacity to effect meaningful and system-wide change. Our efforts have resulted in compliance for employees up and down the supply chain and all around the nation.*⁹²⁰

Mr Justin Cobbett submitted that the FWO 'said they usually only investigate issues when they have received complaints from a number of employees'.⁹²¹ Another individual told the committee he was confused by the FWO's process, stating:

*Even though one person in that company might know that they are being underpaid, every individual has to pursue their own claim. That makes no sense to me at all.*⁹²²

Stakeholders raised issues with enforcement once an underpayment has been acknowledged. The committee heard of an employer who had agreed underpayment had occurred, but took no action to rectify the underpayment, and ignored the worker:

*My daughter called and texted [her employer] more than seventeen times in regards these issues. She received promises to correct the situation but never received any of these payments. I also called her and was guaranteed that my daughter would be paid what she was owed. When this did not occur and I pursued the issue, she would hang up on me or not answer (in the same manner as she treated [my daughter's] calls).*⁹²³

Even if found to be at fault and owing entitlements, the committee heard 'there are no laws around how long a company has to repay their workers the money they're owed. So, we have to keep fighting to receive the money that belongs to us.'⁹²⁴

⁹¹⁷ Parliament of the United Kingdom, Secretary of State for Employment, Chairman Lord Robens, *Safety and Health at Work – Report of the Committee 1970-72*, 1972, p 492; Hall Payne Lawyers, response to questions taken on notice at the hearing on 16 August 2018, p 2.

⁹¹⁸ Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 30.

⁹¹⁹ Mr Ian Scott, Principal Lawyer, JobWatch, public hearing transcript, Brisbane, 16 August 2018, p 20.

⁹²⁰ Australian Government, FWO, correspondence, 5 October 2018, p 4.

⁹²¹ Mr Justin Cobbett, submission 003, p 1.

⁹²² Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 17.

⁹²³ Name suppressed, submission 002, p 2.

⁹²⁴ YWH, submission 019, p 15 (Case Study E, Siva).

Most proposals for increasing the effectiveness and enforcement of the FWO's activities focused on the resourcing of the FWO, which is discussed in detail below.

Other suggestions included the monitoring of job advertisements⁹²⁵ or Facebook sites to identify employers that are not compliant,⁹²⁶ with the QTIC stating:

*There is support for investigative tools like stakeouts, new methods of reconstructing payrolls, interviewing workers as methods to contribute to enhanced enforcement capacities. These studies are important where employer records are incomplete or non-existent. With more social media highlighting non-compliance there are opportunities to utilise these conversations as a basis for where further investigation should be focused.*⁹²⁷

IR Claims suggested enforcement could be improved if the FWO appointed Queensland industrial inspectors⁹²⁸ as 'Fair Work Inspectors' under section 700 of the FWA.⁹²⁹ This could provide an ability to have inspectors which jointly administer the IR Act and FWA. IR Claims stated this would mean 'that no matter what happens at a federal level, Queensland workers will have greater protection from wage theft'.⁹³⁰

The Senate EERC inquiry into corporate avoidance of the FWA, concluded:

*... there is a need for increased monitoring and random checks to ensure compliance. The FWO has neither the resources nor the interest in regular engagement with these workplaces specifically on behalf of the workers.*⁹³¹

12.1.1.2 Inadequate resourcing

An underlying theme in commentary on compliance and enforcement in relation to the FWO, was a lack of resourcing to effectively undertake its role as a national regulator.⁹³² The majority of stakeholders who commented on the FWO's activities, suggested its functions could be improved by further resourcing. Some stakeholders indicated a lack of resourcing, particularly of Fair Work Inspectors, is limiting the effectiveness of deterrence provided by legislated penalties and other actions.⁹³³

JobWatch submitted its concerns about FWO resourcing:

... the FWO's ability to fully investigate and prosecute on behalf of individuals is limited as a result of its inadequate budget allocation and, taking this into account, JobWatch's opinion is that the FWO does an excellent job as regulator with the resources at its disposal. For instance, the result of FWO's inadequate budget is that the 250 inspectors it employs (93 of which investigate for compliance with the Fair Work Act) are responsible for 11.6 million workers who work in over 2.1 million workplaces. This amount of funding may be appropriate if there were alternative

⁹²⁵ Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 15.

⁹²⁶ QTIC, submission 022, p 11.

⁹²⁷ QTIC, submission 022, pp 10-11.

⁹²⁸ IR Act, s 899.

⁹²⁹ IR Claims, submission 013, p 55.

⁹³⁰ IR Claims, submission 013, p 55.

⁹³¹ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 72.

⁹³² See, for example: JobWatch, submission 016, p 14; NRA, submission 021, p 12; Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 6; Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, p 214.

⁹³³ IR Claims, submission 013, p 27.

*accessible methods via which an individual could enforce their legal entitlements. However, the reduction of a union presence and the complexity of the legal process mitigates against this.*⁹³⁴

Views on compliance were influenced by stakeholder perceptions that the FWO is under-resourced, and that a lack of adequate resourcing impacted on the FWO's ability to conduct its enforcement activities.⁹³⁵

The Queensland Council of Unions stated 'The Fair Work Ombudsman does not have the resources to deal with the extent of the problem. That is for certain'.⁹³⁶

The FWO was reported to be 'understaffed and under-resourced',⁹³⁷ with reports of 'common stories of people being told to go and talk to a lawyer, people being told that it will take many months to resolve their issue—many stories of frustration where, after many months, nothing has been done'.⁹³⁸

Ms Rachel Mackenzie of Growcom, noted the FWO is 'massively under-resourced' and that:

*... there have been numerous occasions where we have raised issues with Fair Work and part of the issue is that they are just not Fair Work issues; they are often visa issues, tax issues, all of those things. By the time Fair Works comes in—the seasons are so short—they are gone, they are back offshore, they are back in Taiwan. There is no-one there. Fair Work is like, 'Nothing to see here', when we know that there is a lot to see here.*⁹³⁹

The number of FWO inspectors relative to businesses was highlighted by stakeholders. IR Claims submitted that:

According to the Australian Bureau of Statistics, at the end of 2016-17, there were 868,248 employing businesses in Australia with 12,471,000 workers. We understand that the FWO has approximately 250 inspectors, or one inspector per 3,473 employing businesses, or one inspector for every 50,000 employed persons

*With those odds, why wouldn't you take the risk?*⁹⁴⁰

The NRA commented on staffing levels of the FWO, stating that 'a staff of approximately 745 people to regulate 2.2 million businesses across the country is pretty light on',⁹⁴¹ and questioning 'how can

⁹³⁴ JobWatch, submission 016, p 14.

⁹³⁵ See, for example: JobWatch, submission 016, p 14; R&CA, submission 017, p 3; NRA: submission 021, p 12; QTIC, submission 022, p 10; QNMU, submission 023, p 9; QCU, submission 033, p 33; .Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 55; Mr Joe Moro, President, Mareeba District Fruit and Vegetable Growers Association, public hearing transcript, Townsville, 28 September 2018, p 5; Ms Elise Ganley, Community Organiser, and Reverend Pauline Harley, Anglican Priest, QCA, public hearing transcript, Brisbane, 3 September 2018, pp 4-5; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 13; Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Relations Review*, vol.29, no. 2, 2018, p 214.

⁹³⁶ Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 6.

⁹³⁷ Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 10.

⁹³⁸ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 5.

⁹³⁹ Ms Rachel Mackenzie, Chief Advocate, Growcom, public hearing transcript, Brisbane, 17 September 2018 (morning), p 1.

⁹⁴⁰ IR Claims, submission 013, p 27.

⁹⁴¹ Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 55.

any side of Parliament expect the Fair Work Ombudsman to operate effectively when it has less than one enforcement officer for nearly every 3,000 businesses?'.⁹⁴²

The OIR outlined concerns about the number of FWO inspectors, particularly in regional Queensland. It estimated that 38 FWO inspectors regularly operate in Queensland, including 13 in regional areas.⁹⁴³ It submitted:

*... the scarcity of regional offices means that the coverage of FWO inspectors is severely limited outside of Brisbane, Cairns, the Gold Coast, Rockhampton and Toowoomba (FWO, 2018b). These inspectors cover 2,238,299 federal system employers, and 12,471,000 workers, (Australian Bureau of Statistics, 2018) though not all of these will be direct employees.*⁹⁴⁴

In comparison, the OIR had 71 inspectors prior to the industrial relations transition to the federal government in 2005.⁹⁴⁵ When service agreements with the FWO ceased in late 2012, inspectorate enforcement numbers dropped to approximately an inspectorate of 15.⁹⁴⁶ The OIR advised the committee it believed the Queensland industrial relations system applied to approximately 10 to 11 percent of Queensland workers,⁹⁴⁷ and that it is confident of its capabilities under existing resources.⁹⁴⁸

The OIR also commented on the FWO's resourcing, noting a decrease in funding to the FWO for its compliance activities, since its establishment in 2008.⁹⁴⁹

The Queensland Minister for Industrial Relations wrote to the former Commonwealth Minister for Small and Family Business, the Workplace and Deregulation, on 18 May 2018, seeking assurance of the FWO's capacity to investigate complaints, following reports of workers who contacted the FWO and were not satisfied with the assistance provided. In his response, the Hon Craig Laundy MP, then Minister for Small and Family Business, the Workplace and Deregulation, reiterated the FWO performance data from its 2016-17 annual report, and stated:

*With over 2.2 million businesses and around 12.5 million workers across Australia, the FWO is strategic and flexible in its approach to ensure it has a serious impact on compliance in these workplaces. The agency carries out its responsibilities in line with its Compliance and Enforcement Policy which can be found on the FWO's website.*⁹⁵⁰

Resourcing of the FWO was an area of concern to the Senate's EERC during its inquiry into temporary work visas. The EERC noted that many stakeholders had noted the smallness of the network of FWO inspectors and had expressed views that the FWO was under-resourced for its role. The EERC reported that it was 'left in no doubt that many groups viewed the FWO as woefully under-resourced',⁹⁵¹ and recommended the appointment of an independent panel to review the resources and powers of the FWO by 30 June 2016. The EERC also recommended the review consider the 'penalty, accessory

⁹⁴² NRA, submission 021, p 12.

⁹⁴³ Queensland Government, OIR, written briefing, 7 June 2018, p 8.

⁹⁴⁴ Queensland Government, OIR, written briefing, 7 June 2018, pp 8-9.

⁹⁴⁵ Queensland Government, OIR, written briefing, 7 June 2018, p 9.

⁹⁴⁶ Queensland Government, OIR, written briefing, 7 June 2018, p 9.

⁹⁴⁷ Dr Simon Blackwood, Deputy Director-General, OIR, public briefing transcript, Brisbane, 11 June 2018, p 3; Queensland Government, OIR, written briefing, 7 June 2018, p 3.

⁹⁴⁸ Dr Simon Blackwood, Deputy Director-General, OIR, public briefing transcript, Brisbane, 11 June 2018, p 4; Queensland Government, OIR, written briefing, 7 June 2018, p 1.

⁹⁴⁹ Queensland Government, OIR, written briefing, 7 June 2018, p 8.

⁹⁵⁰ Queensland Government, OIR, response to a question taken on notice at the briefing on 11 June 2018.

⁹⁵¹ Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, p 322.

liability, and sham contracting provisions under *the Fair Work Act 2009*.⁹⁵² It was proposed that this review make recommendations on matters including the powers of the FWO, appropriateness of penalties under the FWA, accessory liability provisions and sham contracting provisions.⁹⁵³ No such review has occurred.⁹⁵⁴

Increased resourcing to support the prevention of wage theft in Queensland, was proposed by a number of stakeholders.⁹⁵⁵ The NRA and R&CA strongly advocated for extra resourcing of the FWO, suggesting this would increase the efficiency of the regulator.⁹⁵⁶ The NRA submitted that ‘the key impediment to the Fair Work Ombudsman being an even more effective regulator is not the current state of the law, but the resources provided to the enforcement agency’.⁹⁵⁷

The QNMU recommended resourcing be provided by the Federal Government to the FWO.⁹⁵⁸

Some stakeholders did not agree that resourcing the FWO would on its own, sufficiently address the problem of wage theft in Queensland. The QLS stated:

*Certainly, on the one hand, greater funding for enforcement agencies would go a long way, but there is the perennial problem of funding versus outcomes. Inevitably, I suspect that public enforcement is only part of the answer.*⁹⁵⁹

Committee comment

The committee received extensive evidence indicating that the FWO is inadequately resourced to effectively undertake its role in compliance and enforcement of wage theft matters in Queensland. Of particular concern were reports about the FWO’s compliance approach and comparatively low level of enforcement activities.

The minimal number of FWO inspectors in Queensland was noted by various submitters, and is of particular concern.

The lack of action by the FWO is leaving workers in Queensland to pursue matters on their own. It is clear that there is a need for increased on the ground visibility and activity of the FWO, particularly in regional Queensland; and a move to a stronger compliance and enforcement model is necessary.

The committee notes it has been almost ten years since the establishment of the FWO, with no comprehensive review of its performance since that time.

Recommendation 11

The committee recommends the Federal Government take immediate steps to appoint additional Fair Work inspectors in Queensland under the *Fair Work Act 2009* (Cth).

⁹⁵² Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, p xiv.

⁹⁵³ Parliament of Australia, Senate EERC, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, p xiv.

⁹⁵⁴ Queensland Government, OIR, written briefing, 7 June 2018, p 9.

⁹⁵⁵ See, for example: R&CA, submission 017, p 3; NRA, submission 021, p 11; QNMU, submission 023, p 4; Dr Laurie Berg and Bassina Farbenblum, submission 042, p 4.

⁹⁵⁶ R&CA, submission 017, p 3.

⁹⁵⁷ NRA, submission 021, p 11.

⁹⁵⁸ QNMU, submission 023, p 4.

⁹⁵⁹ Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, p 14.

Recommendation 12

The committee recommends the Federal Government establish a full, independent review into the performance, resourcing and culture of the Fair Work Ombudsman to ensure that it can respond to wage theft and support affected workers in an effective and timely fashion.

Among other things, the review should consider the findings and recommendations of the Best Practice Review into Workplace Health and Safety Queensland which have driven a cultural shift from education to compliance.

12.1.2 Australian Taxation Office

The ATO may recover unpaid amounts it is entitled to, through powers such as using future refunds or credits, external collection agencies, issuing garnishee notices, director penalty notices, and statutory demands.⁹⁶⁰

The ATO considers litigation to be appropriate where:

- *there is a contentious or uncertain point of law that requires clarification and it is in the public interest to seek law clarification through litigation*
- *the behaviour involved is such that we need to send a strong message to the community*
- *there is a longstanding unresolvable debt*
- *the dispute is intractable, alternative means of resolving the dispute have been attempted but have not produced an acceptable outcome.*⁹⁶¹

The ATO's compliance action in 2015-16 resulted in \$670.4 million SG charge raised (including penalties and interest), \$341.3 million SG charge collected, 2,997 default assessments raised, and 877 Director Penalty Notices issued for SG debt of \$130 million.⁹⁶²

The ATO reported a rate of 75 percent community satisfaction with its performance in 2016-17,⁹⁶³ with a rate of 56 percent for perception of fairness in disputes.⁹⁶⁴

The ATO advised the committee of its increased capacity to focus on SG debt collection activities, and intention to continue to issue Director Penalty Notices where appropriate.⁹⁶⁵ It noted, however, that it can take up to 14 months for employer contributions to be reported to the ATO, and that 'this delay reduces the effectiveness of the ATO's compliance work and ability to monitor non-payment of SG'.⁹⁶⁶

Further, the ATO advised:

The ATO does not currently have any real time visibility over an employer's SG obligations to their employees. As indicated there are reporting reforms that will commence in late 2018 that will increase the regularity of reporting from superannuation funds on the payment of SG payments

⁹⁶⁰ Australian Government, ATO, 'If you don't pay', 14 June 2018, <https://www.ato.gov.au/General/Paying-the-ATO/If-you-don-t-pay/#Strongeraction>.

⁹⁶¹ Australian Government, ATO, 'Options for resolving disputes', 6 August 2018, www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Options-for-resolving-disputes/.

⁹⁶² Australian Government, ATO, submission to the Parliament of Australia, Senate Economics References Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 006, p 23.

⁹⁶³ Australian Government, ATO, *Commissioner of Taxation Annual Report 2016-17*, 2017, pp 75, 76.

⁹⁶⁴ Australian Government, ATO, *Commissioner of Taxation Annual Report 2016-17*, 2017, p 19.

⁹⁶⁵ Australian Government, ATO, correspondence, 19 July 2018, p 6.

⁹⁶⁶ Australian Government, ATO, correspondence, 19 July 2018, p 10.

*to their members. However, currently the ATO only receives information on superannuation guarantee payments received by superannuation funds on an annual basis.*⁹⁶⁷

The IGT, in a 2016 report on a *Review into the ATO's Employer Obligations Compliance Activities*, raised concerns about the ATO's reliance on reporting by employers and employees to identify non-compliance.⁹⁶⁸ The IGT recommended the ATO undertake random audits as part of its non-compliance activities.⁹⁶⁹

The committee heard that although the ATO may secure money through fines, it does not directly secure money for workers:

*I made a verbal complaint to the Australian Tax Office before they went to receivership, about the company not paying the superannuation payments by Telephone and was advised that if I was to make a formal complaint the Australian Tax Office would fine the company but could not guarantee that the company would pay the superannuation payments. The money that was the fine would go to the ATO not to the persons who were owed the money.*⁹⁷⁰

The QLS highlighted the difficulties this creates for employees when pursuing recovery of unpaid superannuation, stating:

*As stated, currently, the options for an employee to recover superannuation benefits are not practical. If the employer is insolvent or bankrupt, it may be extremely difficult for action to be taken by the ATO. Compulsory superannuation entitlements arise independently of the obligations to pay wages and entitlements pursuant to minimum National Employment Standards or an award/enterprise agreement or contractual entitlement. The benefit of the superannuation entitlement is a deferred one for employees and some contractors, which is difficult to privately enforce. There is a policy issue to be considered as to whether the taxpayer (through the government) should cover the loss of compulsory superannuation contributions. However, whilst we acknowledge that superannuation benefits are different to a loss of wage or other entitlement, QLS's view is that there is an entitlement and there ought to be an available remedy where they are not paid.*⁹⁷¹

The QCU raised concerns about the process to recover unpaid superannuation, and proposed a recommendation to the Federal Government to 'ensure superannuation is treated as an industrial entitlement'.⁹⁷² It suggested this could be implemented by including superannuation as part of the National Employment Standards in the FWA, so that 'it can be pursued and prosecuted for like any other industrial entitlement.'⁹⁷³ The QCU noted this would also mean 'unions would be able to investigate stolen super' and 'be able to prosecute to make sure that superannuation is returned to workers'.⁹⁷⁴

⁹⁶⁷ Australian Government, ATO, correspondence, 19 July 2018, p 10.

⁹⁶⁸ Australian Government, Inspector-General of Taxation, *Review into the ATO's employer obligations compliance activities: A report to the Minister*, 2016, p vii.

⁹⁶⁹ Australian Government, Inspector-General of Taxation, *Review into the ATO's employer obligations compliance activities: A report to the Minister*, 2016, pp x, 76-77 (recommendation 4.20).

⁹⁷⁰ Susan Stapleton, submission 008, p 1.

⁹⁷¹ QLS, response to question taken on notice at the hearing on 16 August 2018, pp 2-3.

⁹⁷² Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

⁹⁷³ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

⁹⁷⁴ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

The QNMU suggested stronger powers be provided to the ATO to penalise non-compliant employers and recover unpaid contributions.⁹⁷⁵

IR Claims recommended the ATO introduce random audits of business in high risk industries, and more regular payments of superannuation contributions (suggesting alignment with payment of regular wages).⁹⁷⁶

The Senate Economics Reference Committee, in its inquiry into non-compliance of the SG, recommended the ATO consider more proactive SG initiatives such as random audits,⁹⁷⁷ and review ATO resource levels to ensure its effectiveness in compliance activities.⁹⁷⁸ Other recommendations for the SG systems included removal of the \$450 monthly threshold on SG eligibility,⁹⁷⁹ and an increase in frequency of SG payment requirements so that SG is be paid at least monthly.⁹⁸⁰

The QNMU submitted:

The implementation of new technologies has already been improving efficiencies within the default superannuation process. The introduction of SuperStream and Single Touch Payroll have been suitable mechanisms for streamlining and simplifying the interaction with super funds. The 2018/9 federal budget announced new powers for the ATO to proactively reunite lost and low balance inactive super accounts. This is a welcome move to address Australia's \$16 billion lost superannuation problem, however the ATO must be resourced adequately to implement this initiative. The QNMU supports the proposed policy changes that will promote SG payment compliance....⁹⁸¹

The Single Touch Payroll system was also noted by other submitters.⁹⁸² Mr Brian McCarrick, director of Ardent Security, commented that the system 'goes a long way to preventing the non-payment of superannuation because of the automated reporting from every company's payroll system straight to the ATO of each employees' PAYG and superannuation entitlements'.⁹⁸³

Stakeholders also raised concerns about the under-resourcing of the ATO. The Senate Economics References Committee's report *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee* described the ATO's approach to SG compliance activities as 'reactive rather than proactive',⁹⁸⁴ and highlighted evidence which suggested resourcing levels contributed to delays in

⁹⁷⁵ QNMU, submission 023, p 16.

⁹⁷⁶ IR Claims, submission 013, p 57.

⁹⁷⁷ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, recommendation 12, p xii.

⁹⁷⁸ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, recommendation 13, p xii.

⁹⁷⁹ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, recommendation 3, p xi.

⁹⁸⁰ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, recommendation 5, p xi.

⁹⁸¹ QNMU, submission 023, p 16.

⁹⁸² See, for example: MEA, submission 030, p 19; Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8; Ms Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association, public hearing transcript, Mackay, 29 August 2018, p 2.

⁹⁸³ Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8.

⁹⁸⁴ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, p 54.

investigations and lack of communications with complainants.⁹⁸⁵ The report recommended a review of ATO resource levels to ensure the agency could engage in effective and comprehensive compliance activities.⁹⁸⁶

Similarly, the QCU stated:

*When it comes to superannuation, of course the Australian Taxation Office is responsible for pursuing stolen super. We do not think they are properly resourced to do that, nor do we think they are properly motivated to do that.*⁹⁸⁷

The QNMU recommended further resourcing for the ATO ‘to carry out the initiatives making superannuation payments more transparent and employers accountable and to enforce compliance with the *Superannuation Guarantee (Administration) Act 1992*’.⁹⁸⁸

The committee notes the ATO has received funding to establish a Superannuation Guarantee Taskforce, which is intended to operate for three years, and complement the ATO’s compliance activities.⁹⁸⁹

Committee comment

The committee notes with concern, the issues raised in regards to the ATO’s compliance and enforcement activities, and frustrations expressed by many individuals with the process to recover unpaid superannuation.

Incorporation of the superannuation guarantee as a statutory national minimum entitlement under the FWA would allow for a clear process of recovery of unpaid superannuation entitlements.

Recommendation 13

The committee recommends superannuation be included as an industrial entitlement in the National Employment Standards.

12.1.3 Office of Industrial Relations

The OIR’s compliance and enforcement activities include investigations (including powers to enter premises and require information), and resolving issues through conciliation and arbitration in the QIRC, and litigation.⁹⁹⁰

In 2017, the OIR visited 32,816 workplaces and homes, recovered more than \$1.6 million in long service leave due to workers,⁹⁹¹ and completed 478 wage complaint investigations, which resulted in just over \$1.3 million in adjustments.⁹⁹² As a result of its activities, four wage recovery conferences were

⁹⁸⁵ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, pp 57 – 61.

⁹⁸⁶ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, recommendation 13, p 62.

⁹⁸⁷ Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 2.

⁹⁸⁸ QNMU, submission 023, p 16.

⁹⁸⁹ Australian Government, ATO, correspondence, 19 July 2018, p 6.

⁹⁹⁰ Queensland Government, OIR, written briefing, 7 June 2018, pp 1-3.

⁹⁹¹ Queensland Government, OIR, ‘Office of Industrial Relations’, 19 June 2018, https://www.oir.qld.gov.au/sites/g/files/net5141/f/5873-oir_overview.pdf?v=1533595818

⁹⁹² Queensland Government, OIR, written briefing, 7 June 2018, p 1.

completed in the QIRC, and one legal proceeding was undertaken, with an adjustment of wages of \$33,887 in legal proceedings.⁹⁹³

The OIR reported client satisfaction levels of 94 percent in its 2017 client satisfaction survey of employers and employees.⁹⁹⁴

Ms Sara Bartrum, who initiated claims through both the FWO for underpayment of wages and the OIR for long service leave, outlined her interactions with both agencies, and noted that while the FWO was initially helpful, after being unable to gain a response by the employer, suggested the only avenue was to proceed through a court process. The OIR was successful in recovering Ms Bartrum's long service leave entitlements, which Ms Bartrum attributes in part to the OIR's physical presence, and ability and willingness to approach her employer at his business residence.⁹⁹⁵ Ms Bartrum stated:

*The lady at Industrial Relations was wonderful. The whole thing was great. It took her time but she got there. But she could go and see him and I think that made a big difference. She said jokingly to me one day, 'I think the only reason he paid you is to get rid of us,' and I said 'Yes, probably because you keep turning up in his office.' She said, 'Yes and he can't ignore me when I am sitting in front of him.'*⁹⁹⁶

The QCA suggested an increase in labour hire inspectors may assist in identifying exploitative practices.⁹⁹⁷

Some submitters proposed further powers and resourcing be provided to the OIR to allow it to recover workers' entitlements, working collaboratively in enforcement action with the FWO.⁹⁹⁸ For example, Dr Tess Hardy stated:

*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.*⁹⁹⁹

IR Claims suggested:

*We would strongly recommend that inspectors be employed by Queensland and not caught up in the Ombudsman's bureaucracy. The problem with the Ombudsman is it is big, fat and expensive and is not doing its job in enforcement. Queensland inspectors—and I am old enough to remember the old section 666—were something to be feared and they did their job. They have a real role to play because once an inspector is involved, we are no longer in the education division; we are in the enforcement division.*¹⁰⁰⁰

Other stakeholders went further to suggest a new state-based regulatory authority should be developed. The ALHR suggested this could be based on a model similar to the FWO, and include a role of education and provision of advice, as well as undertake compliance activities and enforcement

⁹⁹³ Queensland Government, OIR, written briefing, 7 June 2018, p 1.

⁹⁹⁴ Queensland Government, OIR, written briefing, 7 June 2018, pp 2-3.

⁹⁹⁵ Ms Sara Bartrum, private capacity, public hearing transcript, Maryborough, 12 September 2018, p 2.

⁹⁹⁶ Ms Sara Bartrum, private capacity, public hearing transcript, Maryborough, 12 September 2018, p 2.

⁹⁹⁷ QCA, submission 035, p 3.

⁹⁹⁸ Maurice Blackburn and joint submitters, submission 033, pp 19, 32.

⁹⁹⁹ Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, 20 August 2018, p 20.

¹⁰⁰⁰ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 11.

action.¹⁰⁰¹ The Services Union suggested establishment of a new agency would assist in reducing resolution time for underpayment claims.¹⁰⁰²

However, other stakeholders did not feel that a state-based regulatory authority would be appropriate or effective. The MEA stated:

*A State regulatory agency for dealing with wage theft issues will be considerably hamstrung by the State's referral of powers resulting in all private employers in Queensland are subject to the national employment system under the Fair Work Act.*¹⁰⁰³

Ai Group agreed, and stated: 'The last thing we need is an even more complex system through the state government going alone on new wage compliance measure'.¹⁰⁰⁴

12.1.4 Australian Securities and Investments Commission

ASIC's primary role with respect to wage theft relates to its responsibilities for registering and de-registering companies and regulating insolvency proceedings.

A number of provisions under the Corporations Act can be used by ASIC to take action against company controllers whose behaviour has denied employees their entitlements. The first group of provisions is broad directors' duty provisions, such as the duty of care, the duty to avoid conflicts of interest, and the duty to act in good faith for a proper purpose. The second group is two provisions inserted in 2000, to capture transactions that deprive employees of their entitlements.¹⁰⁰⁵

Over the last five years, ASIC reported outcomes against stakeholders as: commenced court proceedings against two registered liquidators (seeking a Court inquiry), and four company directors for breaching their legal obligations or engaging in fraudulent conduct.¹⁰⁰⁶ It does however, have higher prosecution rates against individuals for offences of failing to keep appropriate books and records, with prosecution of 382 individuals for 734 offences in 2017-18, and prosecution of 50 individuals for 99 offences in 2018-19 to 1 September 2018.¹⁰⁰⁷

The Black Economy Taskforce recommended new and strengthened penalties for phoenixing, ABN fraud and sham contracting, including 'more visible and efficient prosecutions and fewer confidential settlements'.¹⁰⁰⁸

Mr Beau Malone, state organiser for the ETU Queensland and Northern Territory Branch, commented on the activities of ASIC, telling the committee:

Just quickly, ASIC sounds wonderful. They do not give a ... if it is to do with a company that is going broke, owing workers' entitlements, even if they have done it once or twice before, using their wife or their partner's name to start up a new business, because it is too small for them to take a vested interest in. While I say that, you can make application to try to raise it if you like so that they do deal with it, but they are not dealing with it. The general concept that we find as an

¹⁰⁰¹ ALHR, submission 051, pp 2-3, 12.

¹⁰⁰² The Services Union, submission 046, p 3.

¹⁰⁰³ MEA, submission 030, p 20.

¹⁰⁰⁴ Mr Shane Rodgers, Head – Queensland, Ai Group, public hearing transcript, Brisbane, 16 August 2018, p 45.

¹⁰⁰⁵ Helen Anderson, 'Corporate insolvency and the protection of lost employee entitlements: Issues in enforcement', *Australian Journal of Labour Law*, vol. 26, 2016, p 78.

¹⁰⁰⁶ Australian Government, ASIC, correspondence, 17 October 2018, p 10.

¹⁰⁰⁷ Australian Government ASIC, correspondence, 17 October 2018, p 10.

¹⁰⁰⁸ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 6.

*outcome is nothing, because they do not have the time or the resources to put into that end of town, which is where workers are having their wages stolen all the time.*¹⁰⁰⁹

Resourcing of ASIC was also commented upon by Dr David Morrison, who stated:

*...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.*¹⁰¹⁰

12.1.5 Agency Collaboration

Stakeholders noted the importance of collaboration by relevant Commonwealth and Queensland agencies in identifying and addressing wage theft.

The NRA commented on existing collaboration efforts, stating:

*We commend the Queensland government's engagement with the Fair Work Ombudsman's office to date. We think ongoing collaboration between the states and that office is essential to effective enforcement outcomes.*¹⁰¹¹

The OIR advised that although there is a cooperative relationship between the OIR and FWO, there is no formal information-sharing policy or procedure, or reporting relationship regarding wage theft issues.¹⁰¹² In most cases, if concerns are raised to the OIR regarding Commonwealth industrial relations matters, individuals are directly referred to the FWO, ATO or relevant Commonwealth agency.¹⁰¹³

In its written brief to the committee, the OIR advised that it received 747 enquiries in 2017 which were in relation to matters falling within the FWA, such as wages, employment conditions and unfair dismissal.¹⁰¹⁴ The OIR noted it had also referred approximately 20 emails a year and refers formal ministerial correspondence to the Commonwealth Government in relation to matters received from 'the general public, Queensland and Commonwealth parliamentarians, concerning underpayments, wage theft, bullying and sexual harassment'.¹⁰¹⁵

The OIR told the committee:

*The Fair Work Ombudsman and the Office of Industrial Relations enjoy a fairly close relationship in terms of sharing information and checking on compliance histories as required. We do have dedicated contacts in their office.*¹⁰¹⁶

The FWO in its submission, stated:

The FWO welcomes referrals and intelligence from the Queensland Office of Industrial Relations, and works closely with a range of State and Federal Government agencies to achieve whole of

¹⁰⁰⁹ Mr Beau Malone, State Organiser, ETU Queensland and Northern Territory Branch, public hearing transcript, Gold Coast, 10 September 2018, p 20.

¹⁰¹⁰ Dr David Morrison, Associate Professor, University of Queensland, public hearing transcript, Brisbane, 20 August 2018, p 24.

¹⁰¹¹ Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 55.

¹⁰¹² Queensland Government, OIR, written briefing, 7 June 2018, p 4.

¹⁰¹³ Queensland Government, OIR, written briefing, 7 June 2018, p 4.

¹⁰¹⁴ Queensland Government, OIR, written briefing, 7 June 2018, p 3.

¹⁰¹⁵ Queensland Government, OIR, written briefing, 7 June 2018, p 3.

¹⁰¹⁶ Mr Tony Schostakowski, Chief Inspector, Industrial Relations Regulation and Compliance, OIR, public briefing transcript, Brisbane, 11 June 2018, p 5.

*Government priorities and outcomes, including responding to the exploitation of vulnerable workers.*¹⁰¹⁷

The OIR advised that implementation of the recently introduced labour hire licensing scheme will include information sharing between agencies including the Queensland Government and the FWO and ATO, and that the LHLCU is finalising a memoranda of understanding with the FWO and Department of Home Affairs.¹⁰¹⁸ Instances of wage theft may be identified through the activities of the LHLCU, and the OIR has stated ‘future compliance activities are likely to involve joint engagement and field investigation activities with these agencies’.¹⁰¹⁹

ASIC advised the committee that it engages with other regulatory and enforcement agencies, including the FWO, ATO and state-based government revenue agencies, and that it works with key government agencies through the Phoenix Taskforce, Black Economy Taskforce and Serious Financial Crime Taskforce ‘to share intelligence and reduce and deter IPA [illegal phoenixing activity]’.¹⁰²⁰

Stakeholders stressed the use of collaboration to address wage theft, such as through development of formal information-sharing and other collaborative arrangements across other state and national agencies, including the FWO.¹⁰²¹

Dr David Morrison summarised:

*... the problem and drivers of wage theft in Queensland, is in broad terms, identical with the issues faced by other states and territories. Even if verifiable evidence as to the nature and extent of wage theft was available for Queensland, it does not change the way forward for dealing with the problem: namely a collaborative effort on the part of all government stakeholders.*¹⁰²²

In relation to unpaid superannuation, Hostplus suggested

*... perhaps greater proactive powers of the ATO and better collaboration between the ATO, ASIC and the Fair Work Ombudsman will also go a long way towards improving or supporting this issue.*¹⁰²³

12.2 Fair Work Commission

The Fair Work Commission has a limited role in enforcement and deterrence of federal industrial obligations, as the FWO is primarily responsible for compliance and enforcement of most matters under the FWA.

This is in contrast to the Queensland industrial relations framework, with the QIRC able to hear matters and make orders regarding the payment of an employee’s unpaid wages and superannuation, under the IR Act.¹⁰²⁴ The QIRC can require the parties to attend a conciliation conference, and if the matter

¹⁰¹⁷ Australian Government, FWO, submission 044, p 3.

¹⁰¹⁸ Queensland Government, OIR, written briefing, 7 June 2018, pp 4-5.

¹⁰¹⁹ Queensland Government, OIR, written briefing, 7 June 2018, pp 4-5.

¹⁰²⁰ Australian Government, ASIC, correspondence, 17 October 2018, p 5.

¹⁰²¹ Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 8.

¹⁰²² Dr David Morrison, submission 032, p 15.

¹⁰²³ Ms Helen Wood, Executive Manager, Client Relationships, Hostplus, public hearing transcript, Brisbane, 17 September 2018 (morning), p 10.

¹⁰²⁴ IR Act, ss 475-477.

remains unresolved, can conduct a formal hearing.¹⁰²⁵ Decisions of the QIRC are binding and enforceable by a court.¹⁰²⁶

This process can be used as an alternative to seeking recovery of unpaid wages through a Magistrates Court, under section 379 of the IR Act. If a person has sought recovery under section 379 of the IR Act, the matter can still be referred back to the QIRC for conciliation.

The FWC does not have powers to hear and decide matters regarding the recovery of wages and superannuation, unlike the QIRC.

12.3 Sham contracting

The committee heard from workers affected by ‘sham contracting’, where an employer deliberately misclassifies its workers as independent contractors, instead of ‘employees’ of the business. Sham contracting enables an employer to avoid many statutory requirements under the FWA including minimum wage, penalty rates, leave entitlements and superannuation.

The FWA includes penalties for employers who engage in sham contracting by: misrepresenting an employment as an independent contracting arrangement (section 357 of the FWA); dismissing employees in order to engage the worker as an independent contractor (section 358 of the FWA); and making misleading or false statements to persuade or influence a person to be engaged as an independent contractor (section 359 of the FWA).

However, the FWA includes a defence for an employer who misrepresents employment as independent contracting; for an employer who can prove that they did not know and were not reckless as to whether the contract was a contract of employment rather than a contract for services (section 357(2)). An employer is only in breach of the legislation if they have been found to have deliberately misrepresented an employment arrangement as a contracting arrangement.

This defence has been criticised, including during the 2012 review of the FWA,¹⁰²⁷ which recommended the removal of the ‘reckless defence’ from the provisions of the FWA.¹⁰²⁸ An inquiry into the workplace relations framework in 2015 by the Productivity Commission also found that the sham contracting provisions in the FWA mean it is ‘too easy under the current test for an employer to escape prosecution for sham contracting’¹⁰²⁹ and recommended the test be amended to replace the recklessness component with one of ‘reasonableness’.¹⁰³⁰ The Productivity Commission report stated:

Changing from a test of ‘recklessness’ to a test of ‘reasonableness’ would help discourage sham contracting, including through the regulators’ out-of-court actions. Such a change is also an important measure to limit the greater incentives for sham contracting that would arise when

¹⁰²⁵ QIRC, Information Sheets: Recovery of unpaid wages and superannuation, 28 September 2018, http://www.qirc.qld.gov.au/qirc/prod_form_leg/factsheets/fs_recovery.htm

¹⁰²⁶ Decisions under s 380 of the IR Act are enforceable under the *Justices Act 1886* (Qld) as an order for payment of money.

¹⁰²⁷ Professor Emeritus Ron McCallum AO, Hon Michael Moore and Dr John Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, Australian Government, 2012.

¹⁰²⁸ Professor Emeritus Ron McCallum AO, Hon Michael Moore and Dr John Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, Australian Government, 2012, p 243.

¹⁰²⁹ Australian Government, Productivity Commission, *Workplace Relations Framework Inquiry Report*, no. 76, vol. 1, 2015, p 3.

¹⁰³⁰ Australian Government, Productivity Commission, *Workplace Relations Framework Inquiry Report*, no. 76, vol. 1, 2015, p 47.

*terms in enterprise agreements that excluded subcontractors were prohibited (as recommended by the Productivity Commission).*¹⁰³¹

The Senate EERC also raised concerns regarding the reckless defence, and reported stakeholder concerns that the ‘burden of proof effectively rests with the employee, because no statutory presumption exists in the Act presuming the worker to be an employee in the event of a dispute’,¹⁰³² which makes the enforcement of the provisions difficult. The Senate EERC noted ‘with concern that the Act permits employers the opportunity to prove that mischaracterisation of employees as independent contractors was not done knowingly or recklessly’.¹⁰³³ It further noted that ‘the civil remedy for sham contracting established by the FWA is virtually powerless in dealing with employers who engage in the practice’, and that: ‘the regime is, as described by the ETU, ‘manifestly weak’, and contains broad loopholes for employers and corporations to reduce or avoid their obligations under the Act entirely’.¹⁰³⁴

The EERC, in its inquiry into avoidance of the FWA, reported inadequacies in the legislation to address sham contracting, suggesting it is made easier ‘by inadequacies within provisions of the FWA which apply to the practice’ and ‘is also inadvertently encouraged by taxation laws which provide a financial incentive for employment arrangements to be hidden in some cases’.¹⁰³⁵

The CFMEU, in its submission to the Senate EERC inquiry into avoidance of the FWA, explained its views about the structure of the offence provision:

*... the mere fact that an employment relationship exists but the employee is nonetheless treated as a contractor, does not establish a breach of the section. Whilst the High Court has recently determined that it is immaterial that the misrepresentation was as to the relationship between the employee and the employer or a labour hire company, the misrepresentation requirement is still central to the operation of the section.*¹⁰³⁶

Maurice Blackburn Lawyers and the Electrical Trades Union of Australia also provided evidence to the Senate EERC inquiry,¹⁰³⁷ expressing concern with ‘the “problematic” nature of sham contracting provisions as they stand under the FWA’¹⁰³⁸ and that ‘no definitive test exists at common law differentiating an employee from an independent contractor’.¹⁰³⁹

The Senate EERC noted these concerns, and the presumption in the FWA that workers are independent contractors unless the workers prove otherwise.¹⁰⁴⁰ The Senate EERC concluded:

The committee is firmly of the view that the existence of economic incentives encouraging sham contracting over employment and these must be addressed as the root cause of the growth of sham contracting, the Act must be amended to clearly set out a statutory definition of ‘employee’

¹⁰³¹ Australian Government, Productivity Commission, *Workplace Relations Framework Inquiry Report*, no. 76, vol. 1, 2015, p 47.

¹⁰³² Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p, 79.

¹⁰³³ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p, 80.

¹⁰³⁴ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p, 80.

¹⁰³⁵ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 78.

¹⁰³⁶ CFMEU, submission to the Parliament of Australia, Senate EERC, inquiry into corporate avoidance of the *Fair Work Act 2009*, 2017, submission 200, p 12.

¹⁰³⁷ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 79.

¹⁰³⁸ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 79.

¹⁰³⁹ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 79.

¹⁰⁴⁰ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 80.

*and 'contractor'. This would provide clarity and 'enable individuals to determine the nature of their employment without recourse to the Common Law test.'*¹⁰⁴¹

The QIRC can make an order declaring that persons working under a contract for services are employees, under section 465(1) of the IR Act. In considering the appropriateness of such a declaration, the QIRC can consider the following matters:

- (a) the relative bargaining power of the class of persons; or*
- (b) the economic dependency of the class of persons on the contract; or*
- (c) the particular circumstances and needs of low-paid classes of persons; or*
- (d) whether the contract is designed to, or does, avoid the provisions of an industrial instrument; or*
- (e) whether the contract is designed to, or does, exclude the operation of the Queensland minimum wage; or*
- (f) the particular circumstances and needs of particular classes of persons including women, persons from a non-English speaking background, young persons and outworkers; or*
- (g) the consequences of not making an order for the class of persons.*¹⁰⁴²

The FWC does not have a similar power to assess and determine the status of employment contracts under the federal jurisdiction.

Under the federal jurisdiction, determination as to whether a worker is an independent contractor or employee is a common law test, and so a matter for the court. Factors a court may consider when making a determination of employment status include the degree of control over work, hours of work, ability to delegate, basis of payment, provision of equipment and tools, responsibility of tax and superannuation payments, and leave.¹⁰⁴³

Committee comment

Sham contracting was consistently raised as an issue of concern during the inquiry.

The committee noted the additional powers of the QIRC compared with the FWC, including the ability to declare a worker under an employment contract to be an 'employee'. This can provide a more efficient and accessible avenue for workers who have been misclassified by their employer as an independent contractor, than undergoing a court process for a determination which is required in the federal jurisdiction. Although there are a number of provisions within the FWA to protect workers from sham contracting arrangements,¹⁰⁴⁴ these focus on deterrence rather than facilitating timely resolution of disputes regarding an employers' classification of workers.

Criticism of the sham contracting provisions in the FWA is of concern to the committee. Not only does the burden of proof rest with an employee to prove the employment relationship, the 'reckless defence' for contraventions of the FWA which can be used by employers, raises substantial concern.

¹⁰⁴¹ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 80.

¹⁰⁴² IR Act, s 465(3).

¹⁰⁴³ Australian Government, FWO, 'Independent contractors and employees', <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/independent-contractors-and-employees>; *Stevens v Brodribb Sawmilling Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Limited* (2001) HCA 44, 207 CLR 21.

¹⁰⁴⁴ See, for example: FWA, ss 357-359.

The committee notes a change in defence under section 357 of the FWA, from one based on recklessness, to a test of reasonableness, could assist to discourage and limit the incentives of sham contracting.

Recommendation 14

The committee recommends the Fair Work Commission be given the power to assess the status of an employment contract similar to that available to the Queensland Industrial Relations Commission under the *Industrial Relations Act 2016* (Qld), and, further consideration be given to removing the 'reckless defence' from the offence of sham contracting under section 357(2) of the *Fair Work Act 2009* (Cth) and introducing a new 'reasonable person' test for determining whether an employer has engaged in sham contracting.

12.4 Civil penalties

An employer found to have conducted wage theft can be subject to a range of penalties. Under the Queensland industrial relations framework, the IR Act contains penalties for breaches of employer obligations such as keeping time and wages records and providing pay advices to employees.¹⁰⁴⁵ It also contains various general offence provisions covering issues such as avoiding the IR Act's obligations, non-payment of wages and accepting reduced wages.¹⁰⁴⁶ These can be enforced in a Magistrates Court.

Breaches of the FWA can also incur penalties. For example, the current maximum penalties for a breach of a record-keeping or pay slip requirement are: \$1,260 for an individual or \$6,300 for a body corporate for breaches of the FWA; and \$420 for an individual or \$2,100 for a body corporate for breaches of the Regulations.¹⁰⁴⁷ A failure to comply with a compliance notice issued by the FWO can result in penalties of up to \$6,300 for an individual and \$31,500 for a company.¹⁰⁴⁸

Penalties for non-compliance under the FWA were increased in 2017, by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth). This included a tenfold increase in penalties for serious breaches involving evidence of deliberate and systematic underpayment of entitlements, and an increase in penalties for record-keeping failures.¹⁰⁴⁹ It has been noted however, that the new maximum penalty 'is only applicable when an employer 'knowingly' and 'systematically' underpays (s 557A(1)), likely requiring an employer to be caught by the FWO for multiple contraventions over a long period'.¹⁰⁵⁰

The reason for increasing civil penalties under the FWA was 'so the threat of being fined acts as an effective deterrent to potential wrongdoers'.¹⁰⁵¹

Effectiveness of penalties as a deterrence mechanism was discussed by a number of stakeholders. Some stakeholders believed the civil penalties to be ineffective at deterring wage theft,¹⁰⁵² including

¹⁰⁴⁵ IR Act, ss 339-343.

¹⁰⁴⁶ IR Act, ss 927, 539, 929; Queensland Government, OIR, written briefing, 7 June 2019, p 2.

¹⁰⁴⁷ Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 28.

¹⁰⁴⁸ Australian Government, FWO, *Compliance and Enforcement Policy*, October 2018, p 29.

¹⁰⁴⁹ Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, explanatory notes, p 3.

¹⁰⁵⁰ Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review*, vol. 29, no. 2, 2018, p 217.

¹⁰⁵¹ Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, explanatory notes, p ii.

¹⁰⁵² See, for example: IEU, submission 007, p 5; JobWatch, submission 016, p 16; ALHR, submission 051, p 11.

the IEU which suggested: 'Repeated non-payment of superannuation and underpayment of wages makes it clear that current penalties do not act as a deterrent'.¹⁰⁵³

Similarly, JobWatch submitted:

*Evidently, the penalties imposed for wage theft are not acting as a deterrent and there is evidence that employers are intentionally underpaying workers. The risk of prosecution by the FWO is remote and often when a regulator does become involved, prosecution is the last resort.*¹⁰⁵⁴

In contrast, the FWO promoted its use of civil penalties as a means of deterrence, stating:

*Court action and penalties send a strong message of deterrence, which is leveraged through the media and the agency's stakeholder networks to encourage small business to check their compliance.*¹⁰⁵⁵

The NRA supported the use of civil penalties as an effective means of deterrence, submitting that 'the threat of significant penalties and a compliance system geared towards employee self-representation generally act as a suitable deterrent against deliberate non-compliance'.¹⁰⁵⁶

In contrast, the OIR highlighted:

*... academic findings that small business operators were likely to be unaware of the scope of potential penalties for breach of workplace conditions, and that the penalties levied by the courts tended to achieve little in the way of general deterrence. Critically, the study found that 40% of the employers who reported the most awareness of the FWO's compliance activities believed that a hypothetical wage theft would go undetected, compared with 17% of those less familiar.*¹⁰⁵⁷

A number of proposals were made to increase penalties for breaches of the FWA,¹⁰⁵⁸ including by Australian Lawyers for Human Rights, which submitted:

*It is also recommended that consideration is given to a strengthened regime of penalties which will act as a deterrent and utilising the existing legislative regime, including criminal prosecution in appropriate cases, more effectively.*¹⁰⁵⁹

The introduction of aggravated damages was suggested by the QCU, to 'provide greater incentive for compliance'.¹⁰⁶⁰

Other submitters disagreed that increasing penalties would act as effective deterrence. For example, Tess Hardy, Melissa Kennedy and Professor John Howe submitted:

...recent survey research undertaken to explore the deterrence-effects of the FWO's enforcement activities, including civil remedy litigation, reveals that the relationship between higher penalties and perceptions of deterrence is not clear-cut. Rather, we found that businesses often could not

¹⁰⁵³ IEU, submission 007, p 5.

¹⁰⁵⁴ JobWatch, submission 016, p 12.

¹⁰⁵⁵ Australian Government, FWO, correspondence, 5 October 2018, p 5.

¹⁰⁵⁶ NRA, submission 021, p 9.

¹⁰⁵⁷ Queensland Government, OIR, written briefing, 7 June 2018, p 25.

¹⁰⁵⁸ See, for example: The Services Union, submission 046, p 3; ALHR, submission 051, p 12; QTIC, submission 022, p 11.

¹⁰⁵⁹ ALHR, submission 051, p 12.

¹⁰⁶⁰ QCU, submission 034, p 40.

*recall the target or amount of the penalty and could not therefore weigh this up against the costs associated with compliance.*¹⁰⁶¹

IR Claims suggested the FWA be amended so that penalties could be made payable directly to workers, to cover the costs of progressing a claim.¹⁰⁶²

The committee noted a recent increase in penalties available for non-payment of superannuation, including 12 months imprisonment for employers who ignore orders to pay back super.¹⁰⁶³

12.5 Criminalisation

Criminalisation of wage theft, that is to make wage theft a criminal offence, was supported by a large number of stakeholders,¹⁰⁶⁴ and was the subject of significant commentary, including its effectiveness as a deterrent.

The proposal to criminalise wage theft was acknowledged as a potential means by which to 'disincentivise wage theft' by correcting or re-balancing incentives for compliance.¹⁰⁶⁵ In this regard, JobWatch noted, 'by increasing the cost of non-compliance to an employer, committing wage theft therefore becomes less attractive and so the rate of wage theft should diminish'.¹⁰⁶⁶

The QCU, ETU, Hall Payne Lawyers and Maurice Blackburn and other submitters supported the criminalisation of wage theft where it is deliberate and or reckless.¹⁰⁶⁷ The QCU explained:

*We have had a look at that [criminalisation of wage theft] within the QCU, and we have come to the conclusion that that is certainly worthy of consideration and we are advocating for that. Why is that the case? It is to bring some balance to the employment relationship. If a worker steals from their employer, not only is it treated as theft but it is actually an aggravated offence under the Queensland Criminal Code. The thought that it is an aggravated offence for an employee to steal from the employer but it is dealt with as an administrative matter from the point of view of an employer stealing from an employee is fairly well stuck in the 18th century, from our point of view.*¹⁰⁶⁸

Maurice Blackburn and joint submitters advocated for the development of a 'Wage Theft Act', as 'a separate legislative scheme' to be 'implemented to criminalise wage theft, balancing the needs of business and the rights of workers'.¹⁰⁶⁹ It submitted that this legislation could include strict liability offences, tiered levels of conduct amounting to wage theft, and tiered levels of penalty.¹⁰⁷⁰

¹⁰⁶¹ Dr Tess Hardy, Melissa Kennedy and Professor John Howe, submission 050, p 6.

¹⁰⁶² IR Claims, submission 013, p 55.

¹⁰⁶³ IR Claims, submission 013, p 48.

¹⁰⁶⁴ See, for example: Justin Cobbett, submission 003, p 2; JobWatch, submission 016, p 16; Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 1; Mr Beau Malone, State Organiser, ETU Queensland and Northern Territory Branch, public hearing transcript, Toowoomba, 10 September 2018, p 10; Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn, public hearing transcript, Brisbane, 16 August, p 37; Hall Payne Lawyers, submission 027, pp 5, 18.

¹⁰⁶⁵ JobWatch, submission 016, p 16.

¹⁰⁶⁶ JobWatch, submission 016, p 16.

¹⁰⁶⁷ Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August 2018, p 1; Mr Beau Malone, State Organiser, Electrical Trades Union, Queensland and Northern Territory Branch, public hearing transcript, Toowoomba, 10 September 2018, p 10; Maurice Blackburn, public hearing transcript, Brisbane, 16 August, p 37; Hall Payne Lawyers, submission 027, pp 5, 18.

¹⁰⁶⁸ Dr John Martin, Research and Policy Officer, QCU, public hearing transcript, Brisbane, 16 August, p 2.

¹⁰⁶⁹ Maurice Blackburn and joint submitters, submission 033, p 2.

¹⁰⁷⁰ Maurice Blackburn and joint submitters, submission 033, pp 13-14.

The QCU qualified their call for the criminalisation of wage theft, explaining:

*In our submission it would not be intended to criminalise simple mistakes but rather the more egregious and deliberate actions on the part of an employer who is fully aware of the breach and continues regardless. Repeated behaviour might also give rise to the necessity to impose more significant sanctions against a recalcitrant employer.*¹⁰⁷¹

The QCU further noted:

*... we are not talking about situations of oversight. We are not talking about simple mistakes that are made, which we know occurs. This is to get to those employers who deliberately do not pay their workers.*¹⁰⁷²

IR Claims supported the criminalisation of wage theft, commenting that the FWO 'are an exceptional educator but they are not an enforcer, so we must bring enforcement to the table if the ombudsman will not'.¹⁰⁷³

Criminalisation was also supported by employers and industry bodies.¹⁰⁷⁴ Mr Allan Mahoney, Chairman of BFGV, supported criminalisation of wage theft, stating:

*To me it is criminal. We have spoken to everyone from the assistant commissioner of police right through to the Australian Federal Police. They put labour exploitation down as a victimless crime. There are victims every day. Just because that victim might get done for \$1,000 this week or \$500 next week—it is not good enough. We should see this as a crime and treat it as the billion dollar industry that it is...*¹⁰⁷⁵

*... Repeat offenders or repeat noncompliance needs to be taken as criminal. If someone is going to do it once, and unfortunately it happens, you make the sentence fit the crime. This is a criminal act and if it is a repeated criminal act it has to be treated as such. It does not take long.*¹⁰⁷⁶

Mr Paul Wessel, Managing Director of Wessel Petroleum, when asked about his views on criminalisation of wage theft where the conduct is intentional, stated: 'I think they should go to jail because the person who steals the money is stealing for themselves out of the till. These guys are making other workers suffer'.¹⁰⁷⁷

The NRA stated it would 'support criminalisation of wage theft only if it was limited to circumstances where the employer knowingly and deliberately declined to pay employees of all of their entitlements'.¹⁰⁷⁸

¹⁰⁷¹ QCU, submission 034, p 36.

¹⁰⁷² Mr Michael Clifford, Assistant Secretary, QCU, public hearing transcript, Brisbane, 16 August 2018, p 6.

¹⁰⁷³ Mr Miles Heffernan, Director, IR Claims, public hearing transcript, Brisbane, 3 September 2018, p 8.

¹⁰⁷⁴ See, for example: Mr Allan Mahoney, Chairman, BFGV,, public hearing transcript, Bundaberg, 12 September 2018; Mr Paul Wessel, Managing Director and Ms Amanda Coates, Finance and IT Manager, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 18; Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 54.

¹⁰⁷⁵ Mr Allan Mahoney, Chairman, BFGV, public hearing transcript, Bundaberg, 12 September 2018, p 2.

¹⁰⁷⁶ Mr Allan Mahoney, Chairman, BFGV, public hearing transcript, Bundaberg, 12 September 2018, p 6.

¹⁰⁷⁷ Mr Paul Wessel, Managing Director, Wessel Petroleum, public hearing transcript, Bundaberg, 12 September 2018, p 18.

¹⁰⁷⁸ Ms Lindsay Carroll, Legal Practitioner and Director, NRA, public hearing transcript, Brisbane, 16 August 2018, p 54.

On a number of occasions, submitters put forward the valid argument that it is inequitable that there is a specific criminal offence for employees who steal from their employers ('stealing by a servant'),¹⁰⁷⁹ but no equivalent offence for an employer who steals from its employees.¹⁰⁸⁰ IR Claims suggested that 'this is fundamentally an unfair playing field, weighted heavily in the employer's favour, and offers no deterrence, and allows them to commit wage theft with impunity'.¹⁰⁸¹

Avenues for criminalising wage theft were discussed in detail by Hall Payne Lawyers, who not only recommended criminal offences for intentional or reckless conduct of an employer to pay the entitlements of an employee, but also included a suggested criminal offence for 'the intentional concealing or falsification of records relating to wage theft'.¹⁰⁸² Hall Payne Lawyers proposed these offences be subject to the defence of 'mistake of fact', as provided in the Criminal Code.¹⁰⁸³ They clarified their intention that mistaken or reasonable conduct should not be captured in a criminal offence, however may still be subject to pecuniary penalty under the FWA.¹⁰⁸⁴

Hall Payne Lawyers' analysis noted potential constitutional issues if Queensland legislated a criminal offence for wage theft, as the jurisdiction for industrial relations laws are a matter for the Commonwealth. However, they argued these issues have 'limited prospects of success' and cannot rationally or sensibly be described as legitimate reasons for not legislating to criminalise wage theft'.¹⁰⁸⁵ In contrast, Master Builders Queensland did not believe it was within the state government's jurisdiction to act to 'fix, enforce or recover wages'.¹⁰⁸⁶

The committee heard suggestions for the maximum penalty that should apply if offence/s of wage theft were introduced. IR Claims suggested a reciprocation of the penalty for the existing offence of stealing by a servant, which carries a maximum penalty of 10 years imprisonment.¹⁰⁸⁷ Hall Payne Lawyers suggested treating wage theft as a serious criminal offence, which would therefore include a term of imprisonment 'that adequately reflects the public's denunciation of such conduct', and suggested penalties in the *Work Health and Safety Act 2011* could provide guidance.¹⁰⁸⁸ The QCU suggested a higher penalty be imposed for repeated behaviour.¹⁰⁸⁹

The committee heard proposals that existing penalties be strengthened, in combination with the introduction of criminal penalties.¹⁰⁹⁰

MEA suggested that if wage theft is criminalised, it should be so in the federal jurisdiction rather than a Queensland provision.¹⁰⁹¹

¹⁰⁷⁹ *Criminal Code 1899* (Qld), s 398.

¹⁰⁸⁰ QCU, submission 034, p 1, Maurice Blackburn and joint submitters, submission 033, p 12 ; Hall Payne Lawyers, submission 027, p 5; Mr Shane Rodgers, Head – Queensland, Ai Group, public hearing transcript, Brisbane, 16 August 2018, p 50.

¹⁰⁸¹ IR Claims, submission 013, p 6.

¹⁰⁸² Hall Payne Lawyers, submission 027, pp 5, 18.

¹⁰⁸³ Hall Payne Lawyers, submission 027, p 10; *Criminal Code 1899* (Qld), s 24.

¹⁰⁸⁴ Hall Payne Lawyers, submission 027, p 10.

¹⁰⁸⁵ Hall Payne Lawyers, submission 027, pp 7-8.

¹⁰⁸⁶ Master Builders Queensland, submission 045, p 2.

¹⁰⁸⁷ IR Claims, submission 013, p 55.

¹⁰⁸⁸ Hall Payne Lawyers, submission 027, p 15; *Work Health and Safety Act 2011*(Qld), ss 31-33.

¹⁰⁸⁹ QCU, submission 034, p 36.

¹⁰⁹⁰ See, for example: IEU, submission 007, p 6; YWH, submission 019, p 7; QTIC, submission 022, p 11..

¹⁰⁹¹ Mr Jason O'Dwyer, Manager Advisory Services, MEA, public hearing transcript, Brisbane, 20 August 2018, p 5.

JobWatch expressed concerns about the proposal to establish a criminal offence provision in relation to wage theft, which involved concerns about ‘adequate funding and a willingness and capacity to prosecute’:

*The amount of funding required may be high given the increased burden of proof on the prosecution in criminal trials and the general issues that the FWO currently faces in gathering evidence. Further, the evidence gathered will be incidental to the FWO’s work which raises questions of priority funding – particularly whether the disincentive to employers of any new criminal law is greater than the current civil penalties under the Fair Work Act should these be better enforced and/or, if wage theft is criminalised in Queensland, whether the FWO would focus its attention and resources elsewhere.*¹⁰⁹²

HIA and Ai Group disagreed that criminalisation of wage theft was appropriate.¹⁰⁹³ Ai Group submitted that ‘exposure to criminal penalties, including imprisonment, for underpayments would discourage investment and employment in Queensland.’¹⁰⁹⁴

Dr Laurie Berg cautioned against the introduction of a wage theft offence, suggesting it may not provide effective deterrence:

*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.*¹⁰⁹⁵

In an article exploring workplace contraventions and liability, Hardy commented on deterrence of penalties, particularly in relation to franchise networks, stating:

*... it is no longer readily apparent that punishment of the putative employer will be effective in addressing some of the key drivers of compliance behaviour, which may be determined by more powerful firms positioned higher in the supply chain or at the apex of the franchise network.*¹⁰⁹⁶

In response to the Black Economy Taskforce Report, the Commonwealth Government committed to review:

*... the current provisions that provide civil, criminal and administrative penalties for black economy activity to ensure sanctions available reflect the harm done. As part of this process, consideration will be given to developing more effective prosecution processes and introducing new criminal offences, civil penalties or administrative penalties.*¹⁰⁹⁷

Committee comment

Throughout inquiry hearings, witnesses repeatedly raised concerns in regard to the relative ineffectiveness of civil penalties to deter deliberate cases of wage theft.

¹⁰⁹² JobWatch, submission 016, p 16.

¹⁰⁹³ HIA, submission 043, p 4; Ai Group, submission 038, p 3.

¹⁰⁹⁴ Ai Group, submission 038, p 3.

¹⁰⁹⁵ Dr Laurie Berg, Senior Lecturer, University of Technology Sydney, public hearing transcript, Brisbane, 20 August 2018, p 23.

¹⁰⁹⁶ Tess Hardy, ‘Who Should Be Held Liable for Workplace Contraventions and on What Basis?’, *Australian Journal of Labour Law*, vol 29, no. 2, 2016, p 6.

¹⁰⁹⁷ Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report*, May 2018, p 10.

Evidence regarding the lack of enforcement by the FWO for breaches of the FWA, was also consistently raised as a key issue in addressing the prevalence of wage theft.

There is a clear need for further deterrence, to stop employers engaging in forms of wage theft.

While some stakeholders suggested increasing civil penalties, the committee noted that this approach has been criticised by a number of stakeholders who believe a financial penalty is insufficient to provide the level of deterrence necessary.

While acknowledging that such a recommendation signals a move from punitive measures traditionally contained in the civil, to the criminal space, the committee noted that almost all stakeholders (including employer organisations and industry bodies) supported criminalisation of wage theft in Queensland where conduct is proved to have been deliberate or reckless.

Further, such a move provides a strong statement in regard to the weight that Parliament applies to the seriousness of deliberate and/or reckless cases of wage theft perpetrated against Queensland workers.

The committee believes criminalising wage theft is an appropriate way to deter the very worst and deliberate instances of wage theft by employers, to protect workers' entitlements. An offence/s with tiered penalties, based on the seriousness of the conduct, would provide a proportionate response to employers' conduct.

The Queensland government should note and consider the different models for criminalisation raised through this inquiry, including any resource implications.

Recommendation 15

The committee recommends the Queensland Government legislate to make wage theft a criminal offence, where the conduct is proven to be deliberate or reckless.

The Queensland Government should consider the variety of models and approaches for criminalising wage theft that were presented to the inquiry and consult further with stakeholders in regard to a preferred model.

12.6 Naming and shaming

Some submitters proposed the introduction of a public register which names employers who have been found to engage in wage theft, as a means of deterrence, and to assist workers in choosing employers. Support was provided by the IEU which suggested 'details of employer misconduct should be recorded on a public register so that employees can make informed decisions regarding where they apply for employment'.¹⁰⁹⁸

The threshold for listing on a register was not commented on extensively, however, IR Claims proposed the register be used for 'employers who have been given breach notices under the Fair Work Act, and who have been fined with pecuniary penalties for wage theft'.¹⁰⁹⁹ It also suggested the register be available on a dedicated website, similar to the 'Rate My Boss' website in Victoria.¹¹⁰⁰

The QTIC noted that social media is already used as a way to 'name and shame employers that are underpaying or committing other forms of wage theft', and that this provides an avenue for employees to speak up about their employers and unfair work conditions. It argued that the potential reputational damage provides deterrence for employers.¹¹⁰¹

¹⁰⁹⁸ IEU, submission 007, p 5.

¹⁰⁹⁹ IR Claims, submission 013, p 57.

¹¹⁰⁰ IR Claims, submission 013, p 57.

¹¹⁰¹ QTIC, submission 022, p 10.

The committee heard from an individual in Townsville who suggested public naming of non-compliant employers, explaining:

*When people apply for a job, employers usually want two or three contactable work referees, yet for the prospective employee, they have no idea what the company they are going to go to work for is like. Why can it not go both ways? Why should we not be able to find out whether this company has a dodgy track history and they have a record of underpayment or anything like that? That needs to be out there so that people can make an informed decision as to whether that would be a company they would want to work for in the first place.*¹¹⁰²

Dr David Morrison noted that a process of ‘naming and shaming’ exists in England, ‘where employer’s details are published in the press, where they are identified by the business name and the amount’.¹¹⁰³

This already occurs in Queensland to an extent, as the media often report instances and allegations of wage theft, including publishing the names of companies and individual employers. The FWO also publishes news and campaign reports online, and judgments of the Federal Circuit Court are generally publicly available.

Dr Morrison’s submission referred to the ‘Wage Thieves Register’ created by Unions NSW, which lists businesses in NSW that have advertised jobs with wages below the minimum award rate.¹¹⁰⁴

Dr Morrison cautioned, however, that:

*...the name and shame tactic is useful only where it can be accessed and known by as many people as possible. There is no evidence of a name and shame strategy that is universally applied and/or used in Australia. Further, were one created, it is not clear how the message would reach those most in need.*¹¹⁰⁵

The name and shame tactic was discussed by the Black Economy Taskforce in regard to its recommendation for a targeted, stronger and more visible enforcement strategy.¹¹⁰⁶ The Taskforce considered the creation of a public central register which publishes details of deliberate tax evaders, however, it concluded that this approach was not necessary if its other proposals for increasing visibility of enforcement were accepted.¹¹⁰⁷ These proposals included increased multi-agency cooperation and information sharing, greater publicity of actions and outcomes, and enhanced collaboration with industry to improve education and compliance.¹¹⁰⁸

¹¹⁰² Mr Chris McCoomb, private capacity, public hearing transcript, Townsville, 28 August 2018, p 17.

¹¹⁰³ Dr David Morrison, submission 032, p 18.

¹¹⁰⁴ Unions NSW, ‘Wage Thieves Register’, <http://www.wagethieves.com.au/wp/wage-thieves-register/>

¹¹⁰⁵ Dr David Morrison, submission 032, p 18.

¹¹⁰⁶ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, pp 181 – 185.

¹¹⁰⁷ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 185.

¹¹⁰⁸ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, pp 181 – 185.

13 Other jurisdictions

13.1 Australian jurisdictions

Recent regulatory developments aimed at addressing wage theft in other Australian jurisdictions have largely centred on efforts to enhance deterrence by strengthening enforcement powers, and imposing stronger sanctions for non-compliant employers, including through criminalisation.

In July 2017, the NSW Labor party announced its intention to criminalise deliberate wage theft if elected at the 2019 state election. The proposal, which was the centrepiece of a package of reforms to address the underpayment of workers in NSW, would see the *Crimes Act 1900 No 40 (NSW)* amended to introduce criminal penalties, including fines and the possibility of imprisonment for up to 14 years, ‘for individuals who are found guilty of systematic, ongoing and widespread failure to pay wages and other employee entitlements’.¹¹⁰⁹ In addition, the party announced an intention to also widen the powers of workplace inspectors to undertake wage audits.¹¹¹⁰

In May 2018, the Victorian Government announced plans to introduce new laws to create an offence for employers who deliberately underpay or don’t pay their workers, with a maximum penalty of 10 years imprisonment.¹¹¹¹ The proposed laws would cover ‘employers who deliberately withhold wages, superannuation or other employee entitlements, falsify employment records, or fail to keep employment records’ and include penalties of fines of \$190,284 for individuals, \$951,420 for companies, and up to 10 years imprisonment.¹¹¹² The proposal also included reforms to expedite the process of wage recovery, making it ‘faster, cheaper and easier’ for employees to recover money owed by an employer, such that claims of up to \$50,000 would be heard within 30 days.¹¹¹³ The current Andrews Government plans to pursue the criminalisation of wage if re-elected at the state election on 24 November 2018,¹¹¹⁴ following consultation with employer groups and unions on the proposed bill.¹¹¹⁵

¹¹⁰⁹ NSW Labor, ‘A new law to criminalise wage theft’, www.nswlabor.org.au/a_new_law_to_criminalise_wage_theft

¹¹¹⁰ NSW Labor, ‘A new law to criminalise wage theft’, www.nswlabor.org.au/a_new_law_to_criminalise_wage_theft

¹¹¹¹ Hon Daniel Andrews MP, Premier of Victoria, ‘Dodgy employers to face jail for wage theft’, media release, Victorian Government, 26 May 2018, <https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>; See also: Ben Knight, ‘Victorian Government vows to crack down on wage theft, with penalties of up to 10 years in jail’, *ABC News*, 26 May 2018, <https://www.abc.net.au/news/2018-05-26/victorian-government-vows-to-crack-down-on-wage-theft/9802072>

¹¹¹² Hon Daniel Andrews MP, Premier of Victoria, ‘Dodgy employers to face jail for wage theft’, media release, Victorian Government, 26 May 2018, <https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>

¹¹¹³ Hon Daniel Andrews MP, Premier of Victoria, ‘Dodgy employers to face jail for wage theft’, media release, Victorian Government, 26 May 2018, <https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>

¹¹¹⁴ Ben Knight, ‘Victorian Government vows to crack down on wage theft, with penalties of up to 10 years in jail’, *ABC News*, 26 May 2018, <https://www.abc.net.au/news/2018-05-26/victorian-government-vows-to-crack-down-on-wage-theft/9802072>

¹¹¹⁵ Ben Smee and AAP, ‘Victorian government pledges to introduce jail terms for wage theft’, *The Guardian*, 26 May 2018, <https://www.theguardian.com/australia-news/2018/may/26/victorian-government-pledges-to-introduce-jail-terms-for-wage-theft>

The Victorian Government has allocated \$22 million in the 2018-19 Budget for the establishment of the 'Victorian Wage Inspectorate' with investigation and enforcement powers, including oversight of labour hire licencing and enforcement.¹¹¹⁶

The former South Australian Labor government announced on 17 March 2018 that amendments to the *Criminal Law Consolidation Act 1935* (SA) would be introduced to criminalise wage theft if Labor was elected in the state election, however the SA Labor party was unsuccessful in the election.

Developments at a federal level include the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* which commenced on 15 September 2017 and includes increased financial penalties for serious contraventions of the FWA, and granted the FWO new powers of investigation (as mentioned in chapter 12). Other actions by the federal government to deter and reduce wage theft have resulted from inquiries and reports, such as those outlined in the final report of the Black Economy Taskforce.

In response to the work of the Black Economy Taskforce, the Commonwealth Government announced changes to the Single Touch Payroll System, to assist reporting to the ATO. From 1 July 2019, the system will be expanded to cover three new industries, those being: security providers and investigative services, road freight transport, and computer system design and related services. These industries were identified as high risk of non-reporting or under-reporting. Businesses within these industries will be required to report to the ATO about payments made to contractors. The goal is to assist the ATO in ensuring compliance of contractors with their tax obligations.¹¹¹⁷

In its response to the Black Economy Taskforce report, the Commonwealth Government committed to consultation on a new ABN framework, including the potential introduction of an ABN renewal scheme.¹¹¹⁸

ASIC advised the committee that the legislating of a Director Identification Number by the Commonwealth Government is a 'major Government reform initiative to assist ASIC, other agencies and the wider market combat IPA [illegal phoenix activity] involves',¹¹¹⁹ and that the 'Government aims to deliver this reform via its Registry Modernisation initiative'.¹¹²⁰

The impact of these reforms is yet to be evaluated.

Activities to assist in compliance and enforcement also include the establishment of a cross-agency Migrant Workers' Taskforce established in October 2016 to 'identify further proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify any cases of migrant worker exploitation'.¹¹²¹ Further, 'Taskforce Cadena' is a Joint Agency Taskforce established in 2015 comprising the Department of Immigration and Border Protection, Australian Border Force and the Fair Work Ombudsman aiming to 'detect and disrupt criminal syndicates that profit from the criminal exploitation of foreign workers and Australia's migration system'.¹¹²²

¹¹¹⁶ Hon Daniel Andrews MP, Premier of Victoria, 'Dodgy employers to face jail for wage theft', media release, Victorian Government, 26 May 2018, <https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>

¹¹¹⁷ Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report*, May 2018, p 7.

¹¹¹⁸ Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report*, May 2018, p 6.

¹¹¹⁹ Australian Government, ASIC, correspondence, 17 October 2018, p 6.

¹¹²⁰ Australian Government, ASIC, correspondence, 17 October 2018, p 6.

¹¹²¹ Australian Government, Department of Jobs and Small Business, 'Migrant Workers' Taskforce', 3 September 2018, <https://www.jobs.gov.au/migrant-workers-taskforce>.

¹¹²² Australian Government, Australian Border Force, *Taskforce Cadena*, <https://www.abf.gov.au/about-us/taskforces/taskforce-cadena>

Other legislative changes include recent proposals by the Commonwealth Government to amend legislation, including the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018, which proposes ‘reforms that will increase visibility, transparency; accountability and fairness of the superannuation guarantee system’.¹¹²³ It was noted that the Bill was yet to be considered by the parliament.

The federal government has not responded to a number of significant reports regarding wage theft matters by the Australian Parliament, although it is required to respond to Senate committee reports within three months of the report being tabled.¹¹²⁴ Responses are outstanding for the 2017 Senate EERC *Corporate Avoidance of the Fair Work Act*; the Senate Economics References Committee’s 2017 inquiry report *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*; and the Senate EERC’s 2016 report *A National Disgrace: The Exploitation of Temporary Work Visa Holders*.¹¹²⁵ The federal government’s response to the Select Committee on the Future of Work and Workers’ report *Hope is not a strategy – our shared responsibility for the future of work and workers* is due in December 2018.

13.2 International jurisdictions

Wage theft is not unique to Australia, and has been reported in countries around the world, with recent changes to policy and regulation in attempts to address the issue.¹¹²⁶ Limited commentary about recent developments in other jurisdictions however, was provided to the committee during the inquiry, with comments focused on deterrence and penalties

Mr Stevenson of the QLS suggested a possible ‘general trend towards the criminalisation of extreme conduct of any sort’ throughout international jurisdictions’.¹¹²⁷

In the UK, the *National Minimum Wage Act 1998 (United Kingdom)*, sets out the statutory framework for workplace conditions and entitlements including the national minimum wage, record keeping and enforcement action for underpayments, and penalties for non-compliance.¹¹²⁸ Dr Hardy noted that the UK framework includes criminal proceedings of a broad nature, with statutory defences available for employers who have underpaid workers inadvertently or accidentally.¹¹²⁹ Dr Morrison commented on the UK government’s ‘name and shame’ strategy, whereby the UK Department for Business, Energy

¹¹²³ Australian Government, ATO, correspondence, 19 July 2018, p 9.

¹¹²⁴ Parliament of Australia, *President’s Report to the Senate on the status of government responses to parliamentary committee reports as at 30 June 2018*, August 2018, p 1.

¹¹²⁵ Parliament of Australia, *President’s Report to the Senate on the status of government responses to parliamentary committee reports as at 30 June 2018*, August 2018, pp 5, 6.

¹¹²⁶ For example, In New Zealand in 2017, changes were introduced to immigration systems which prevents employers from recruiting migrant workers if the employers have been found to breach its employment laws, including the underpayment of employee wages. In the US, a Bill introduced to the Commonwealth of Massachusetts, entitled *An Act to Prevent Wage Theft and Promote Employer Accountability*, is being considered by the Senate. See: New Zealand Government, Ministry of Business, Innovation and Employment, *Employers who have breached minimum employment standards*, 7 November 2018, <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/employers-who-have-breached-minimum-employment-standards/>; Commonwealth of Massachusetts, *An Act to Prevent Wage Theft and Promote Employer Accountability*, <https://malegislature.gov/Bills/190/S2327>

¹¹²⁷ Mr Rob Stevenson, Member, Industrial Law Committee, QLS, public hearing transcript, Brisbane, 16 August 2018, p 12.

¹¹²⁸ United Kingdom Government, *History of National Minimum Wage and Overview of Legislation: The National Minimum Wage Act 1998*, November 2016, <https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm01020>

¹¹²⁹ Dr Tess Hardy, Senior Lecturer, University of Melbourne, public hearing transcript, Brisbane, 20 August 2018, p 23.

and Industrial Strategy publish names of businesses who have failed to pay employees the national minimum wage or national living wage.¹¹³⁰

Mr John Payne of Hall Payne Lawyers spoke about the frameworks in Seattle and Colorado in the US, which he described as ‘more of a code for the police to prosecute on’.¹¹³¹ The US and Australian legal systems are vastly different, with Mr Payne cautioning against the drawing of parallels from the state and federal jurisdictions of the US in regards to wage theft matters.¹¹³²

Mr Payne also made reference to the legal system in Canada, whose Criminal Code previously included a criminal offence for employment obligation non-compliance, including wage payment of employees at less than the minimum wage.¹¹³³ The offence was however, repealed in 1955, with only one record of attempted prosecution, which was unsuccessful.¹¹³⁴

¹¹³⁰ Dr David Morrison, submission 032, p 18.

¹¹³¹ Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 32.

¹¹³² Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 32.

¹¹³³ Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 32; Hall Payne Lawyers, response to questions taken on notice at the hearing on 16 August 2018, p 3.

¹¹³⁴ Mr John Payne, Principal Lawyer, Hall Payne Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 32; Hall Payne Lawyers, response to questions taken on notice at the hearing on 16 August 2018, p3.

14 Exploitation of legal framework

Inquiry stakeholders sought to highlight a range of activities which, while not unlawful, were a form of exploitation of the legal framework. Workers reported that employers had taken advantage of flexibilities in the statutory framework, and engaged in conduct which adversely affected the employee.

Issues were raised with the difficulties in terminating EBAs, and the use of zombie agreements which do not meet minimum employment entitlements and conditions under the FWA, and can substantially disadvantage both the employees covered by the agreement, and the businesses which operate under modern awards and agreements that meet stricter tests of fairness.

Evidence was also provided regarding workplace conditions and lack of protection of workers in less traditional forms of employment such as gig economy work.

This chapter also outlines illegal phoenix activity, whereby employers are deliberately avoiding tax and other statutory obligations at the expense of workers, businesses and the broader economy. It has been noted that there has been a ‘massive increase’ in such activity, with the costs being absorbed by taxpayers.¹¹³⁵

14.1 Workplace agreements

14.1.1 Termination of workplace agreements

The termination of EBAs is an issue which has previously been the subject of various reports, including by Australian parliamentary committees. As stipulated by the FWA, enterprise agreements must contain a nominal expiry date of up to four years. The agreements continue to remain in effect after the expiry date, until new agreements have been approved, or they are terminated by the FWC.

The decision to terminate an agreement is made by the FWC, which must approve the termination request if it is satisfied that it is not contrary to the public interest to do so, and the FWC considers it appropriate, taking into account all circumstances, including the likely affect the termination will have on employees, employers and organisations.¹¹³⁶

The QNMU highlighted the practice of terminating EBAs during the inquiry, stating that employers sought termination so that ‘workers revert to lower award wages’, which they considered tantamount to ‘legal’ wage theft, and often made possible ‘when they exploit a labour market with high rates of insecure jobs, low wages growth, a hamstrung union movement and limited institutional enforcement’:

*The current characteristics of the labour market and its regulation work to create an environment where employers have many means of deceitfully denying workers their lawful entitlements yet also have the capacity to act within the regulatory framework to reduce wages and conditions. For these reasons, the QNMU, like other affiliated unions, supports the Australian Council of Trade Union’s (ACTU) Change the Rules campaign.*¹¹³⁷

¹¹³⁵ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 13.

¹¹³⁶ FWA, s226.

¹¹³⁷ QNMU, submission 023, p 5.

The effects of termination of EBAs was raised in the Senate EERC inquiry into corporate avoidance of the FWA. The Senate EERC heard various cases ‘where employers have seemingly sought to unilaterally terminate enterprise agreements that have passed their nominal expiry date’ and stated:

*It is apparent that this is done by employers in order to significantly reduce employee wages and conditions, often for the purpose of obtaining an advantage in negotiations for a replacement agreement.*¹¹³⁸

Frustration with the FWC’s powers in relation to enterprise agreements, was expressed by Ms Sevegne Newton, who detailed the experience of a young man in her care who worked in the hospitality industry and was paid what appeared to be unusually low wages under a workplace agreement. Ms Newton contacted the FWO and FWC regarding the issue, and provided the following commentary on their powers in relation to EBAs:

Yesterday I ... [was informed] that the Fair Work Commission did not have the power to enforce Employers to pay the rates in Agreements that they had ratified and there was nothing they could do for me. As I didn’t think I had heard correctly, I reiterated that the Ombudsman couldn’t do anything because it was an Agreement not an Award and the Commission could do nothing because they had no power to enforce Agreements that Employers had entered into with them. His reply was “yes” When I asked what I should do next he said “take it up with Parliament”.

*So we have the case of a National Chain of Restaurants taking advantage of young workers by not paying them the wages they had gone to the trouble of going to the Fair Work Commission and do a legally binding Agreement with, yet the same organisation is completely powerless to make Employers comply. The Fair Work Commission says no employee will be worse off under an agreement than under an award, well this is quite clearly not true as young workers are being exploited.*¹¹³⁹

Under the Queensland industrial relations framework, disputes about certified agreements are heard by the QIRC. The QIRC assists the parties to come to an agreement through its conciliation conferences, and then to a formal hearing if required. Matters heard by the QIRC include the proposed termination of certified agreements.¹¹⁴⁰ Under the IR Act, an employer may apply to the QIRC to terminate the agreement if the agreement has not yet expired, however, after the expiry date of an agreement, applications for termination can be made by a ‘valid majority of the relevant employees’¹¹⁴¹ or employee organisation ‘to which the agreement or determination applies and that has at least one member who is a relevant employee’.¹¹⁴² The QIRC must approve the termination of the agreement if:

- all persons to whom the agreement applies have been provided notice of the intention to terminate the agreement,¹¹⁴³
- the parties to the agreement agree to it being terminated, and
- termination of the agreement or determination is not contrary to the public interest¹¹⁴⁴

¹¹³⁸ Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, p 27.

¹¹³⁹ Sevegne Newton, submission 1, pp 1-2.

¹¹⁴⁰ IRA, ss 227, 228.

¹¹⁴¹ IRA, s 228(1)(b).

¹¹⁴² IRA, s 228(1)(c).

¹¹⁴³ IRA, s 228(2).

¹¹⁴⁴ IRA, s 228(2),(3). Note, if the agreement provides that it may be terminated if particular conditions are met, section 228(3)(a) applies instead.

14.1.2 ‘Zombie agreements’

The committee heard negative commentary by stakeholders regarding the use of EBAs made before the introduction of the FWA and the significant changes it made to industrial relations laws,¹¹⁴⁵ colloquially known as ‘zombie agreements’. The use of zombie agreements was reported by a range of stakeholders including unions, business owners and workers in the security and hospitality industries.¹¹⁴⁶

Zombie agreements are nominally expired agreements which were made under the *Workplace Relations Act 1996* (Cth) after amendments in 2006 by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*‘Work Choices’*). The Work Choices legislation removed the ‘no disadvantage test’¹¹⁴⁷ under which no workplace agreement could be approved if it provided in effect that there was a less favourable net outcome for employees under the proposed workplace agreement than under a relevant award.

These EBAs created before commencement of the FWA (‘pre-2010 EBAs’) were transitioned to the FWA in their original form (not required to be renewed or terminated),¹¹⁴⁸ and so have not been subject to an equivalent minimum standards test such as the BOOT, or the NES and other requirements under the FWA.

As the Work Choices agreements had a five-year nominal expiry date, even if an agreement was lodged in 2009 it still should have expired in 2014. Workers on these agreements could be losing significant amounts in wages and superannuation over the longer term.

It is legal for companies to be operating under zombie agreements, as provided by the FWA. However, the committee heard that ‘zombie agreements are a legal form of wage theft which allows the person who has the zombie agreement to then undercut everyone else in that playing field and that market’.¹¹⁴⁹

In the recent FWO inquiry into the procurement of security services by local governments, the FWO reported that four of the 21 agreements (19 percent), ‘were approved prior to 7 May 2007, and were therefore not subject to assessment against the full award entitlements’.¹¹⁵⁰

Melbourne’s Young Workers Centre has reported that there were about 4000 agreements struck between 2006 and 2009 under Work Choices in Australia, many of which have not been terminated, particularly at franchise stores.¹¹⁵¹ Accordingly, it has been estimated that ‘tens of thousands of Australian employees are still unwittingly trapped in so-called “zombie” workplace contracts written

¹¹⁴⁵ Note, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, contains a transition provision which provides that agreements made under previous legislation continue to have effect.

¹¹⁴⁶ YWH public hearing transcript, Gold Coast, 10 September 2018, pp 4 - 5; CFMEU Queensland, submission 039, Executive Security Group submission 029, Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 7

¹¹⁴⁷ Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), explanatory memorandum.

¹¹⁴⁸ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

¹¹⁴⁹ Mr Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), p 25.

¹¹⁵⁰ Australian Government, FWO, *An inquiry into the procurement of security services by local governments*, June 2018, p 24.

¹¹⁵¹ Nick Toscano, ‘Thousands stuck on WorkChoices deals: analysis’, *The Sydney Morning Herald*, 2 January 2017, <https://www.smh.com.au/business/workplace/thousands-stuck-on-workchoices-deals-analysis-20170102-gtk6y.html>

during the Work Choices era'.¹¹⁵² Then federal Minister for Jobs and Small Business, Hon Craig Laundy MP, has previously advised that the Department of Jobs and Small Business' Workplace Agreements Database could not confirm how many zombie agreements remained in place.¹¹⁵³

In a hearing of the Senate EERC during its inquiry into corporate avoidance of the FWA, Ms Keelia Fitzpatrick, Coordinator of the Young Workers Centre described exploitation of young workers as a result of zombie agreements, and stated:

*... the Fair Work Commission and the Fair Work Ombudsman cannot give you a concrete number of how many of these agreements still exist today. As a result, we see this loophole, meaning that hundreds of young people, who may not be completely familiar with our employment law and industrial system, are simply not understanding that they are missing out on pay and entitlements...*¹¹⁵⁴

In a submission to the Senate EERC inquiry into corporate avoidance of the FWA, the Australian Services Union noted it had encountered numerous examples of zombie agreements including in the contract call centre, and that these agreements:

*...have the effect of denying workers important employment conditions such as penalty rates, overtime and public holiday rates in the relevant Modern Award. By never renewing these pre-reform agreements, employers are denying their workforce the higher safety net available under the Fair Work Act and unfairly undercutting their competitors.*¹¹⁵⁵

The committee also heard that zombie agreements provide an unfair advantage in commercial competition.¹¹⁵⁶ Mr Andrew Bourke, Managing Director of Executive Security Group, stated in this regard:

*I have lost multimillion-dollar contracts to multinational companies that gain these contracts through quoting cost and then using zombie agreements or ABN holders as part of their method of operation. They then sublet a quarter of that contract or half that contract or the whole contract to the zombie agreement holder or a company that engages ABN... If you look at corporate Australia, there are some major companies that have been caught such as Caltex, which was recently in the paper regarding a \$5.7 million back pay. When major companies like that are engaging in wage theft, it is hard for a family business like mine to operate and compete in the marketplace.*¹¹⁵⁷

Security industry operator Mr Jeffrey Jones, spoke to the commercial impacts of zombie agreements, stating:

¹¹⁵² Nick Toscano, 'Thousands stuck on WorkChoices deals: analysis', *The Sydney Morning Herald*, 2 January 2017, <https://www.smh.com.au/business/workplace/thousands-stuck-on-workchoices-deals-analysis-20170102-gtk6y.html>

¹¹⁵³ Stephen Smiley, 'Employees stuck in 'outdated', 'zombie' contracts of WorkChoices era', *ABC News*, 16 April 2018, <https://www.abc.net.au/news/2018-04-16/employees-stuck-in-zombie-contracts-of-workchoices-era/9660988>

¹¹⁵⁴ Ms Keelia Fitzpatrick, Coordinator, Young Workers Centre, testimony to the Parliament of Australia, Senate EERC, inquiry into corporate avoidance of the FWA, public hearing transcript, Melbourne, Wednesday 15 March 2017, p 56.

¹¹⁵⁵ Australian Services Union, submission to the Parliament of Australia, Senate EERC, inquiry into corporate avoidance of the FWA, 2017, submission 205, p 10.

¹¹⁵⁶ Mr Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), p 25.

¹¹⁵⁷ Mr Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), p 25.

*Someone can be on \$25 an hour working on a Sunday or a public holiday and the award rate for a casual is something like \$56 an hour. What hope is there for an employer who has to pay by the award—they cannot do anything other than pay by the award—to compete against somebody who has a zombie agreement or employers who are using ABN holders?*¹¹⁵⁸

EBA's can be terminated under section 226 of the FWA, on application to the FWC by an employer, employee or employee organisation. In considering the termination of an EBA, including a pre-2010 EBA, the FWC considers the public interest, views of employees, employers and employer organisations; and the likely effect of termination of the agreement on employees, employers and employer organisations.¹¹⁵⁹

Stakeholders submitted that it is extremely difficult to terminate zombie agreements,¹¹⁶⁰ and that the process can take years.¹¹⁶¹ For example, Mr Andrew Bourke stated:

*... they have no expiry date on them, so then they just keep going until a staff member puts in a complaint to terminate that agreement... It is a very daunting process and you have to face up to the boss. It is not an easy process, so those agreements just keep going. There is no expiry date.*¹¹⁶²

Ms Mele Tulimaiau, a food-manufacturing worker, told the committee that even though she and other employees knew of their employer's zombie agreement and wanted it replaced:

*...there is very little we can do to change it. The only way we are going to be able to receive our entitlements is through a majority support petition with our union or by allowing our company to concoct a new and improved agreement that benefits all its employees. The likelihood of that taking place is minimal. Why would they want to update our agreement and bring us all up to the award minimum and improve the pay conditions for all employees when they can legally pay us a flat rate of \$21.50 forever?*¹¹⁶³

Mr Jeffrey Jones, drawing on his experience as a union official and industrial consultant, also highlighted the challenges of the termination process and explained that the decision not to pursue termination, even where it is recognised the zombie agreement provides for inferior remuneration and conditions, may be a practical one:

I actually supported not terminating the agreement for the simple reason that this employer had 600-odd security officers and once that agreement was terminated we knew what would happen to the security officers: most of them lost their job. The process of doing that took around 18 months. The union sent a letter to the company to terminate the agreement. Then it just went on and on. The process was unbelievably long. We went to the commission about three or four times before it was eventually terminated by consent.

*In the process it would have cost the union—it certainly cost the employer—quite a bit of money to get that agreement terminated.*¹¹⁶⁴

¹¹⁵⁸ Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

¹¹⁵⁹ *Fair Work Act 2009*, s 226.

¹¹⁶⁰ Executive Security Group, submission 029, p 7; YWH, public hearing transcript, Gold Coast, 10 September 2018, pp 4, 8-9; Mr Jeffrey Jones, public hearing transcript, Brisbane, 17 September 2018

¹¹⁶¹ Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

¹¹⁶² Mr Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), p 26.

¹¹⁶³ Ms Mele-Otufale Tulimaiau, Food manufacturing worker, public hearing transcript, Gold Coast, 10 September 2018, p 3.

¹¹⁶⁴ Mr Jeffrey Jones, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

If a zombie agreement is terminated, it has been reported that the employer will just ‘shop around’ for another zombie agreement which is still in force.¹¹⁶⁵

Stakeholders proposed an end to these outdated agreements,¹¹⁶⁶ with Mr Jeffrey Jones suggesting ‘the only way for it to be fair is for all zombie agreements to be terminated at the same time’,¹¹⁶⁷ and recommending a sunset clause in the FWA which terminates new agreements six months after their expiry date.¹¹⁶⁸ Mr Jones stated:

*We have written to the federal government several times going back many, many years now—2014—to put a sunset clause in the Fair Work Act so that all agreements must be terminated six months after their nominal expiry date. That would put everybody on an even keel. At the moment it is very unfair because there are three classes of contractors out there: one that pays the award, one that uses a zombie agreement and one that uses ABN holders. The people paying the award have no hope of tendering for contracts, and this includes state government contracts and local government contracts, and I have had issues with one council. That is the only way you are going to get a fair system, particularly with the employers and the employees, for them all to be on an equal rate of pay.*¹¹⁶⁹

An individual told the committee in a private hearing:

*... that would certainly be a very strong recommendation—that any agreements that have not been made since the Fair Work Act came in, because that is the current legislation, be cancelled and be replaced with an updated EBA, or the modern award apply.*¹¹⁷⁰

Committee comment

The committee heard accounts of zombie agreements across a wide range of industries. These appear to be facilitating employment conditions that do not meet minimum employment entitlements and conditions under the FWA. The committee noted the significant adverse impacts on workers under these agreements, the commercial effect of the agreements which allows undercutting of competitors by unfairly reducing staffing costs, and the difficulties in terminating the agreements. The practice may not strictly be in contravention of the FWA, but it is undoubtedly in contravention of both the intent and spirit of the law.

An appropriate timeframe should be provided for businesses to develop new EBAs which comply with legal requirements, potentially through the introduction of a sunset clause in the FWA.

The committee noted an apparent lack of action by the Fair Work Ombudsman and Fair Work Commission to address this issue.

Recommendation 16

The committee recommends an automatic termination date be legislated for remaining *Work Choices* ‘zombie’ agreements, with consideration given to necessary transitional arrangements and protections to ensure no workers are disadvantaged as a result.

¹¹⁶⁵ Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

¹¹⁶⁶ Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8; Andrew Bourke, Managing Director, Executive Security Group, public hearing transcript, Brisbane, 17 September 2018 (morning), pp 25-26; private hearing transcript, regional hearing, 2018.

¹¹⁶⁷ Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

¹¹⁶⁸ Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

¹¹⁶⁹ Mr Jeffrey Jones, private capacity, public hearing transcript, Brisbane, 17 September 2018 (evening), p 8.

¹¹⁷⁰ Private hearing transcript, regional hearing, 2018.

14.2 Precarious employment and the gig economy

14.2.1 Casualisation of the workforce

The ‘casualisation’ of the workforce can be used to describe the increasing proportion of workers employed on a casual or fixed term basis. A more limited range of NES entitlements apply to casual employees, who are not entitled to permanent employee benefits such as leave entitlements.

The Australian Parliament’s research into characteristics and use of casual employees in Australia, found there were just under 2.5 million casual employees in Australia in August 2016 and that , casual workers are ‘much more likely to face irregular and insufficient hours of work and fluctuations in earnings’.¹¹⁷¹

Mr Brian McCarrick of Ardent Security spoke to the committee about the differences in entitlements and protections he sees in the security industry between his employees at Ardent Security and the labour hire employees employed on a casual basis by other security companies:

*The impact of wage theft to the economy is much greater than you would think. In doing a comparison between a labour hire employee and the employees of my business, a labour hire employee ... would be on a flat rate of \$24 an hour. Over a 40-hour week that is \$960 gross. At Ardent, an employee’s average over the roster is \$28.20 an hour for a 40-hour week which is \$1,128 gross, a difference of \$168 per week. However, when a labour hire employee has a day off sick then there is a difference of \$326.40. If the labour hire employee takes one week’s leave, the difference for the week is \$1,325.40 as the labour hire employee has no leave entitlements... Add to this the difference in superannuation payments of \$16.80 per week less, then over the working life of the employee this runs into many tens of thousands of dollars. Not only are employees affected by this theft as the economy is all about money; the effect is far reaching.*¹¹⁷²

QAI suggested intentional classification of a worker as a casual rather than a permanent employee ‘can also be a form of wage theft as it can deprive people of industrial entitlements including sick, annual and long service leave’ and that ‘the payment of casual loading is not sufficient to negate the disadvantage associated with this form of employment’.¹¹⁷³

A number of stakeholders suggested correlations between increased casualisation of the workforce and wage theft.¹¹⁷⁴ It was suggested to the committee that workplace instability contributes to difficulties in maintaining accurate records (for both employees and employers) and can contribute to incorrect or vague employment classification.¹¹⁷⁵

The IEU reported issues in the education sector, stating:

The norm of casualisation has become so pervasive that employers have been known to advertise for ‘permanent casuals’. Under these conditions, professionals can expect to work for years on a casual basis for the same employer with no job security or leave benefits associated with ongoing contracts of employment. Yet, for these ‘permanent casuals’, fear of losing their job prevents

¹¹⁷¹ Geoff Gilfillan, ‘Characteristics and use of casual employees in Australia’, Australian Parliamentary Library, Research Paper Series, 2017-18, 19 January 2018, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/CasualEmployeesAustralia

¹¹⁷² Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 7.

¹¹⁷³ QAI, submission 026, p 7.

¹¹⁷⁴ See, for example: IEU, submission 007, p 3; Dr David Morrison, submission 032, p 4; Maurice Blackburn and joint submitters, submission 033 p 10; Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 22.

¹¹⁷⁵ IEU, submission 007, p 3.

*many from taking time off if they are sick, need to care for a family member or simply to take a break from teaching.*¹¹⁷⁶

A related issue was raised by the ETU, when speaking to the committee about local issues in Toowoomba, which stated ‘...with casualisation of workers, workers are scared to join unions when they are casual because they can get sacked with four hours notice’.¹¹⁷⁷

To address casualisation of the workforce, stakeholders submitted that employees should be entitled to a permanent position at some threshold to prevent exploitation of casual employment conditions and job insecurity. The IEU specified:

*Businesses should no longer be allowed to deny people basic rights by denying them permanent positions. Education professionals, their families, communities and the wider economy will all benefit from secure work and fair wages and conditions.*¹¹⁷⁸

Mr Dan McGaw, branch president of QCU Toowoomba, and ETU state organiser (South West Queensland) clarified the issue, stating:

*There is always going to be a place in businesses for labour hire and casual workers, but as unions we believe that casual workers should be used for peaks in work, not the whole way through. If there is a big push to finish your job for the next six weeks, well let's get 20 labour hire guys in on casual rates to do that for that specific time, but not using them for nine months to build a solar farm.*¹¹⁷⁹

14.2.2 Gig economy

The term ‘gig economy’ refers to employment arrangements where individuals work independently on a task-by-task basis. It is a type of freelance work where workers are usually attached to a digital platform, linking the worker with the employer and the tasks.¹¹⁸⁰ Examples of gig economy jobs include those making an earning from Airbnb, Whizz, Airtasker, Freelancer and care.com; ridesharing platforms such as Uber; food delivery services like Deliveroo; and other platforms for sourcing workers to complete jobs such as graphic design and cleaning.¹¹⁸¹

While this is not a new type of employment, flexible working arrangements in the digitally-enabled marketplace are becoming increasingly popular, especially amongst young Australians.¹¹⁸²

Gig employment methods are similar to independent contracting in that the worker is not generally considered an employee, and does not get paid leave, insurance, or have any security as to income or hours, as well as being responsible for their own superannuation. Workers in the gig economy generally work outside of regulatory frameworks, such that the worker is not covered by a federal award, or the national minimum employment standards.

¹¹⁷⁶ IEU, submission 007, p 2.

¹¹⁷⁷ Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 22.

¹¹⁷⁸ Independent Education Union, submission 007, p 5.

¹¹⁷⁹ Mr Dan McGaw, Branch President, QCU Toowoomba Branch, State Organiser (South West Queensland), ETU, public hearing transcript, Toowoomba, 10 September 2018, p 11.

¹¹⁸⁰ Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, September 2018, p 73.

¹¹⁸¹ Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, September 2018, p 73-74.

¹¹⁸² See Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, September 2018, p 17; Ai Group, *The Emergence of the Gig Economy*, August 2016, pp 3-6.

Maurice Blackburn and joint submitters raised concerns that current legislative frameworks are not sufficiently flexible to accommodate the changes to the employment landscape associated with the operation of the gig economy,¹¹⁸³ submitting that:

*Gig-economy entities have leveraged new technology and exploited out-of-date legislative frameworks to circumvent industrial laws and have sought to engage workers as independent contractors in the delivery of services previously performed by employees.*¹¹⁸⁴

Maurice Blackburn and its joint submitters suggested the prevalence of gig economy work is increasing every year,¹¹⁸⁵ and that action is required to address the circumstances which allow gig economy operators to ‘structure the arrangements by which they engage workers to circumvent an employment relationship’.¹¹⁸⁶ It suggested ‘the Federal Government has demonstrated no intent to regulate or to address the systemic worker exploitation and market distortion caused by the advent of “gig-economy” entities’.¹¹⁸⁷ In its submission to the inquiry it made a number of proposals including that the QIRC be provided powers to make determinations regarding food delivery services, similar to the New South Wales Industrial Relations Commission, which has a determination for ‘contracts for carriage’ which place obligations on local delivery owner drivers.¹¹⁸⁸ It also recommended amendment to provisions of the *Independent Contractors Act 2006* (Cth) to allow for state regulation of independent contractors,¹¹⁸⁹ and suggested options for regulation of the ride-sharing industry.¹¹⁹⁰ In particular, Maurice Blackburn and joint submitters recommended that options be investigated at state and federal levels for workers of the gig economy food delivery services to be considered employees.¹¹⁹¹

Ms Helen Wood of Hostplus stated that the ‘rise of the gig economy and those working highly casualised and multiple jobs’ would affect the estimated unpaid super gap, suggesting if action is not taken that it could ‘more than double by 2027’.¹¹⁹²

The ACTU, in its submission to the Senate Economics Reference Committee’s inquiry into non-compliance with the superannuation guarantee, suggested SG non-payment is likely to occur in employment in the gig economy, due to reasons including uncertainty as to whether SG liability arises, and the responsible party for ensuring compliance.¹¹⁹³ It suggested compliance could be improved by a specific co-ordinated approach by the ATO and FWO, including representation from superannuation industry bodies.¹¹⁹⁴

¹¹⁸³ Maurice Blackburn and joint submitters, submission 033, p 8; Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 39.

¹¹⁸⁴ Maurice Blackburn and joint submitters, submission 033, pp 7-8.

¹¹⁸⁵ Maurice Blackburn and joint submitters, submission 033, p 7.

¹¹⁸⁶ Maurice Blackburn and joint submitters, submission 033, pp 14-15.

¹¹⁸⁷ Maurice Blackburn and joint submitters, submission 033, p 16.

¹¹⁸⁸ Maurice Blackburn and joint submitters, submission 033, pp 16 - 17.

¹¹⁸⁹ Maurice Blackburn and joint submitters, submission 033, pp 18.

¹¹⁹⁰ Maurice Blackburn and joint submitters, submission 033, pp 18 - 19.

¹¹⁹¹ Maurice Blackburn and joint submitters, submission 033, p 32.

¹¹⁹² Ms Helen Wood, Executive Manager, Client Relationships, Hostplus, public hearing transcript, Brisbane, 17 September 2018, p 8.

¹¹⁹³ ACTU, submission to the Parliament of Australia, Senate Economics Reference Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 51, p. 6.

¹¹⁹⁴ ACTU, submission to the Parliament of Australia, Senate Economics Reference Committee, inquiry into non-compliance with the superannuation guarantee, 2017, submission 51, p. 6.

The OIR highlighted decisions by the FWC regarding gig economy workers being considered independent contractors rather than employees, and noted:

*In its decisions, the FWC noted that the current rules for determining the existence of an employment relationship developed prior to the emergence of the gig economy, and no longer reflect the current economic circumstances. It has taken the position, however, that developing the law in this area is a matter for the legislature.*¹¹⁹⁵

The Senate Select Committee on the Future of Work and Workers was established on 19 October 2017 to 'inquire and report on the impact of technological and other change on work and workers in Australia'.¹¹⁹⁶ Evidence provided to the Select Committee during the inquiry included arguments for regulation of the gig economy and strengthened protections in industrial laws.¹¹⁹⁷ The Select Committee made 24 recommendations in its final report *Hope is not a Strategy – Our shared responsibility for the future of work and workers* (Hope is not a Strategy Report), including that 'the Australian Government make legislative amendments that broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system' (recommendation 10).¹¹⁹⁸

Similarly, the Senate EERC, in its inquiry into corporate avoidance of the FWA, recommended that 'the government, as a matter of priority, bolster the employment conditions of workers engaged in the gig economy by requiring platform providers to verify all platform users comply with minimum standards',¹¹⁹⁹ and that:

*... the Fair Work Act be amended to ensure that all workers have the protections of the Act and access to the labour standards, minimum wages and conditions established under the Act, so that these rights accrue to dependent and on demand contracting, preventing those arrangements from being disguised as independent contracting. These amendments should capture the dependant contractor who is dependent upon a labour hire company, a company using a work allocation platform or a major corporation using a relationship power imbalance to exercise control over the worker.*¹²⁰⁰

Committee comment

While not directly captured by the committee's definition of the term 'wage theft', the committee acknowledges the concerns raised by stakeholders regarding the gig economy, increased casualisation of the workforce, and the changing employment landscape.

The committee notes employment conditions of workers engaged in the gig economy and other insecure or uncertain employment, is a topical issue, and one which requires action.

The committee accordingly supports the Commonwealth's consideration of recommendations made by the Senate Select Committee on the Future of Work and Workers in its *Hope is not a Strategy*

¹¹⁹⁵ Queensland Government, OIR, written briefing, 7 June 2018, p 19.

¹¹⁹⁶ Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, 19 September 2018, p 1. See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/Future_of_Work/Report

¹¹⁹⁷ Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, September 2018, pp 73-81, 91.

¹¹⁹⁸ Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, 19 September 2018, Recommendation 10, pp 8, 92.

¹¹⁹⁹ Recommendation 27, pp xiii, 106.

¹²⁰⁰ Recommendation 25, pp xiii, 70.

Report¹²⁰¹ and the Senate EERC'S report, *Corporate avoidance of the Fair Work Act 2009*. In particular, the committee supports amendment of legislation to ensure workers all workers, regardless of their employment type, are provided protections under Australia's industrial relations system.¹²⁰²

Recommendation 17

The committee recommends reform of the *Fair Work Act 2009* (Cth) to more adequately accommodate emerging forms of non-traditional employment.

This should include consideration of law reform to broaden the definition of worker and provide broader access to the benefits of collective bargaining, minimum standards for pay and conditions, and access to the Fair Work Commission.

14.3 Illegal phoenixing activity

In addition to reports by workers who were left unpaid by employers due to insolvency, the committee received evidence of illegal phoenix activity.

Phoenix activity involves the registration of a new company to take over the failed or insolvent business of a previous company.¹²⁰³ This process can be a legitimate corporate action, for example where a company fails despite the responsible operation of its director. It can also, however, be an illegal activity used to avoid payment of creditors and other legal obligations.¹²⁰⁴

Illegal phoenix activity can be described as:

... the deliberate and systematic liquidation of a corporate trading entity which occurs with the illegal or fraudulent intention to

- *avoid tax and other liabilities, such as employee entitlements*
- *continue the operation and profit taking of the business through another trading entity.*¹²⁰⁵

When a company engages in illegal phoenix activity, employees are often not only left without their employment with little to no notice, but are not paid their entitlements, including annual leave and superannuation, as well as unpaid wages.¹²⁰⁶

Similar to forms of wage theft, illegal phoenix activity impacts on industry, providing an unfair advantage over other businesses who are required to pay employees their entitlements pay taxes and

¹²⁰¹ Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, 19 September 2018, pp 9, 92.

¹²⁰² Parliament of Australia, Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, 19 September 2018, pp 9, 92, Recommendation 10, pp 9, 92; Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017, Recommendation 25, p xii.

¹²⁰³ Australian Government, ASIC, *Illegal phoenix activity*, information sheet 212, 1 September 2017, <https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/>

¹²⁰⁴ Australian Government, ASIC, *Illegal phoenix activity*, information sheet 212, 1 September 2017, <https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/>

¹²⁰⁵ PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, p ii.

¹²⁰⁶ PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, p ii.

creditors, has a detrimental effect on suppliers or creditors who may no longer receive what they are owed by the business, and creates lost revenue to the government.¹²⁰⁷

According to the Commonwealth Minister for Revenue and Financial Services, phoenixing costs the Australian economy up to \$3.2 billion per year.¹²⁰⁸

A report commissioned by the FWO in 2012 notes a lack of significant data but suggests the impact of illegal phoenix activity costs between \$1.78 and \$3.19 billion per annum.¹²⁰⁹ This figure includes cost to employees, business and government revenue, with the cost to employees estimated to be between \$191 and \$655 million.¹²¹⁰

ASIC advised the committee that ‘for the five years to November 2017, more than 3,700 individuals, controlling over 12,000 insolvent entities’, were identified as being involved in phoenix activity.¹²¹¹

Dr David Morrison noted the prevalence of illegal phoenix activity, suggesting that it is widespread and ‘particularly phoenixing by some small businesses, is firmly entrenched as part of “usual” business practice within Australia’.¹²¹²

A person may report phoenix activity to both ASIC and the ATO (if superannuation entitlements have not been received).

ASIC has powers to disqualify directors and commence court proceedings against directors, however it states it does not ‘act on behalf of individuals to help them recover lost money, including money lost through illegal phoenix activity’.¹²¹³

ASIC advised the committee that it undertakes activities to deter and prevent illegal phoenix activity, such as:

- writing to directors of companies ‘that become subject to winding up applications warning them about untrustworthy advisers’,
- using data and intelligence to identify directors that are likely to engage in future illegal phoenix activity, including by conducting approximately 60 surveillances each year, and
- appointing a reviewing liquidator under the Corporations Act,¹²¹⁴ ‘to inquire, investigate and report on suspected illegal phoenix activity including the conduct of the appointed external administrator where the external administrator appears to facilitate or has facilitated the activity through a lack of independence, or by not conducting adequate investigations and reporting both to creditors and ASIC’.¹²¹⁵

¹²⁰⁷ PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, pp ii, 15.

¹²⁰⁸ Hon Kelly O’Dwyer MP, Minister for Revenue and Financial Services, ‘A comprehensive package of reforms to address illegal phoenixing’, media release, 12 September 2017, <http://kmo.ministers.treasury.gov.au/media-release/090-2017/>

¹²⁰⁹ PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, pp ii, iii.

¹²¹⁰ PwC, *Phoenix activity: Sizing the problem and matching solutions*, report to the FWO, Australian Government, June 2012, p iii.

¹²¹¹ Australian Government, ASIC, correspondence, 17 October 2018, p 4.

¹²¹² Dr David Morrison, submission 032, p 8.

¹²¹³ Australian Government, ASIC, *Illegal phoenix activity*, information sheet 212, 1 September 2017, <https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/>

¹²¹⁴ Corporations Act, Schedule 2, s 90-23.

¹²¹⁵ Australian Government, ASIC, correspondence, 17 October 2018, p 4.

Dr Morrison noted the difficulties in proactively identifying phoenix behaviour.¹²¹⁶

ASIC relies on a number of sources to report instances of illegal phoenix activity, including liquidators, creditors, employees and other Government agencies,¹²¹⁷ however advised the committee that ‘this information does not provide conclusive data’.¹²¹⁸

It uses education programs to assist the market to ‘identify companies potentially at risk of engaging in phoenix activity to ensure they are aware of their legal obligations’¹²¹⁹ and engages with industry representatives in order to raise awareness of phoenix activity.

There is no specific offence for illegal phoenix activity,¹²²⁰ however, other legislative provisions may be used against employers where phoenixing has taken place. This includes section 596AB of the *Corporations Act 2001*, which ‘imposes criminal liability on directors who enter arrangements with the intention of depriving employees of their entitlements’.¹²²¹ This section of the Corporations Act has however, been criticised ‘because of its requirement that the directors’ intention be assessed subjectively and proved beyond reasonable doubt, and no cases, successful or otherwise, have been pursued by ASIC’¹²²²

The CFMEU commented on the use of section 596AB of the Corporations Act in its submission to the Senate Economics References Committee’s inquiry into insolvency in the Australian building and construction industry, noting that ‘there has not been a single prosecution taken under s 596AB of the Corporations Act – a section directed to agreements or transactions that prevent the recovery, or reduce the amount of, recoverable employee entitlements’.¹²²³

ASIC is a member of the Phoenix Taskforce, which is comprised of 29 commonwealth, state and territory government agencies, including the ATO, FWO, and the Commonwealth Department of Jobs and Small Business. According to the taskforce’s website, its ‘strategies include early intervention work, targeting specific industries, and working with key supply chain entities to close off opportunities and temptation’.¹²²⁴

¹²¹⁶ Dr David Morrison, submission 032, p 8.

¹²¹⁷ Australian Government, ASIC, correspondence, 17 October 2018, p 3; ASIC, *Illegal phoenix activity*, information sheet 212, 1 September 2017, <https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/>.

¹²¹⁸ Australian Government, ASIC, correspondence, 17 October 2018, p 4.

¹²¹⁹ Australian Government, ASIC, *Illegal phoenix activity*, information sheet 212, 1 September 2017, <https://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/>

¹²²⁰ Australian Government, ASIC, correspondence, 17 October 2018, pp 3, 4.

¹²²¹ Helen Anderson, ‘Understanding the phoenix landscape for employees’, *Australian Journal of Labour Law*, vol 29, no. 3, 2016, p 260.

¹²²² Helen Anderson, ‘Understanding the phoenix landscape for employees’, *Australian Journal of Labour Law*, vol 29, no. 3, 2016, p 260.

¹²²³ CFMEU, submission to Parliament of Australia, Senate Standing Committees on Economics, inquiry into insolvency in the Australian construction industry, 2015, submission 15, p 3.

¹²²⁴ Australian Government, ATO, *Phoenix Taskforce*, 3 September 2018, <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/>

Data reported by the taskforce provides that from 1 July 2017 to 31 March 2018:

- seven criminal convictions were obtained
- 263 audits and review cases were conducted, and
- \$240 million in liabilities was raised.¹²²⁵

Illegal phoenix activity was explored as part of the Black Economy Taskforce which acknowledged phoenixing as a rising problem in the black economy, and recommended strengthened penalties and 'better early detection and asset clawbacks'.¹²²⁶

The Commonwealth Government recently announced a package of reforms to combat phoenix activity, including the introduction of a Director Identification Number (DIN) to provide directors with a unique identification number, allowing for more transparent and easier monitoring of the relationship between individuals and companies, new offences and extended penalties, stronger powers for the ATO to recover from phoenix operators, and establishment of a phoenix hotline as a means of reporting phoenix activity.¹²²⁷

¹²²⁵ Australian Government, ATO, *Phoenix Taskforce*, 3 September 2018, <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/>

¹²²⁶ Australian Government, *Black Economy Taskforce*, Final Report, October 2017, p 6.

¹²²⁷ Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, 'A comprehensive package of reforms to address illegal phoenixing', media release, 12 September 2017, <http://kmo.ministers.treasury.gov.au/media-release/090-2017/>; Australian Government, ASIC, correspondence, 17 October 2018, pp 5-6.

15 Other concerns

Other issues were raised by stakeholders during the inquiry which were considered to be beyond the direct scope of the committee's inquiry terms of reference, but were recognised as exerting influence on the employment environment and remuneration of workers within it.

The QNMU raised issues with employers deliberately contracting-out services and changing the nature of the employment relationship, which then erodes wage rates and employment conditions and provides less protections for employees.¹²²⁸

The QNMU also reported exploitation of the superannuation threshold to avoid requirements to pay compulsory superannuation contributions, providing:

*To be eligible for superannuation guarantee (SG) contributions from an employer, an employee must be aged 18 or over and earning over \$450 a month in ordinary time earnings (OTE). This threshold excludes a potentially significant number of employees and can easily be exploited by employers to avoid their SG obligations. For example, an employer may deliberately roster staff in ways to keep them under the \$450 threshold.*¹²²⁹

The Association of Superannuation Funds of Australia has argued that the \$450 per month earnings threshold for superannuation penalises low income earners, permanent part-time workers and people with multiple jobs. It has estimated that 'about 365,000 individuals, 220,000 women and 145,000 men, are having their retirements compromised by the threshold', and noted that the more people engage in gig economy work, 'the more likely they are to lose out because of this threshold'.¹²³⁰ The Senate Economics References Committee in its inquiry into the impact of non-payment of the Superannuation Guarantee, recommended the Commonwealth Government consider the removal of the \$450 monthly threshold,¹²³¹ noting stakeholder concerns in particular to cohorts such as employees who work in multiple, low paid jobs.¹²³²

Some stakeholders raised concerns with their relevant award,¹²³³ with the IEU claiming the Educational Services (Post-Secondary Education) Award which applies to most casual practitioners in the Vocational Education and Training (VET) and English Language Intensive Courses for Overseas Students (ELICOS) sectors, 'is deficient due to the lack of specific provisions for teachers, in particular casual teachers' and that 'shortcomings in the Award, together with privatisation of the two sectors, continue to erode workplace conditions'.¹²³⁴

Mr Brian McCarrick told the committee there is an issue with the improper use of greenfields agreements (agreements registered for a particular enterprise, before employees are employed), which are then being used by an employer for other purposes when its services extend to other business activities.¹²³⁵ He also noted the use of unregistered agreements, stating:

¹²²⁸ QNMU, submission 023, p 9.

¹²²⁹ QNMU, submission 023, p 15.

¹²³⁰ Association of Super Funds of Australia, 'ASFA calls for gig economy super solutions', media release, 2 February 2018, <https://www.superannuation.asn.au/media/media-releases/2018/media-release-2-february-2018>

¹²³¹ Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, recommendation 3, pp xi. 33.

¹²³² Parliament of Australia, Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, May 2017, p 33.

¹²³³ IEU, submission 007, p 1; private hearing transcript, Brisbane, 2018.

¹²³⁴ IEU, submission 007, p 1.

¹²³⁵ Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8.

*Companies make an employment document and then have their employees sign. These documents all have rates or entitlements that are not in line with the award and employees think they have signed a binding agreement.*¹²³⁶

In addition to the matters discussed above, other matters raised by witnesses and submitters that were considered to be outside the committee's terms of reference, included:

- broader commentary about the exploitation of migrant workers, including instances of employers holding workers' passports and engaging in intimidation and abuse, workers being forced to live in overcrowded accommodation for exorbitant rents, employers providing fewer hours than promised with impacts on the workers' financial wellbeing, and other various practices¹²³⁷
- employees being unfairly dismissed from their employment, as a tactic by an employer to avoid paying accrued employee entitlements,¹²³⁸ including just prior to 10 years' service in order to avoid long service leave obligations.¹²³⁹ In this regard the committee heard of a worker who was dismissed after nine years and 10 months for 'failure to attend a cake ceremony' which her employer classed as 'serious misconduct'¹²⁴⁰
- in addition to concerns about the suppressive effect on industry wages of the lack of recognition of gig economy workers as employees, concerns were raised about other associated financial impacts associated with the rise of gig economy employment arrangements, including the de-regulation of the taxi industry¹²⁴¹
- stolen wages amongst first nations Queenslanders¹²⁴²
- the development of a Human Rights Act or Bill of Rights, to provide further protections for vulnerable persons,¹²⁴³ and
- various reforms to address structural barriers to employment for people with a disability, including improved engagement of disabled people in the workforce.¹²⁴⁴

¹²³⁶ Mr Brian McCarrick, Director, Ardent Security, public hearing transcript, Townsville, 28 August 2018, p 8.

¹²³⁷ See, for example: Mr Ronald Weston, Queensland Branch, AMIEU, public hearing transcript, Ipswich, 11 September 2018, p 11; Mr Allan Mahoney, Chairman, BFVG, public hearing transcript, Brisbane, 12 September 2018, p 6; Maurice Blackburn and joint submitters, submission 033, p 22.

¹²³⁸ Dr David Morrison, submission 032, pp 3-4.

¹²³⁹ Ms Jayne Carter, Industrial Officer, Working Women Queensland, public hearing transcript, Brisbane, 17 September 2018 (morning), pp 18-20.

¹²⁴⁰ Ms Jayne Carter, Industrial Officer, Working Women Queensland, public hearing transcript, Brisbane, 17 September 2018 (morning), p 20.

¹²⁴¹ See for example, Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers, public hearing transcript, Brisbane, 16 August 2018, p 37; Dr David Morrison, submission 032.

¹²⁴² Mr Ken Taylor, President, QLS, public hearing transcript, Brisbane, 16 August 2018, p 9.

¹²⁴³ ALHR, submission 051, pp 3, 12. It is worth noting that the Human Rights Bill 2018 was introduced in the Queensland Parliament on 31 October 2018, enshrining 23 human rights. The aim of the Bill is to better protect and preserve Queenslanders' fundamental human rights, including requiring courts to 'interpret legislation in a way that is compatible with human rights, along with requiring the Parliament, including Parliamentary Committees, to consider whether bills are compatible with human rights' (Hon Yvette D'Ath, Attorney-General and Minister for Justice, 'Human rights bill honours another Palaszczuk Government election commitment', media release, Queensland Government, 31 October 2018, <http://statements.qld.gov.au/Statement/2018/10/31/human-rights-bill-honours-another-palaszczuk-government-election-commitment>)

¹²⁴⁴ QAI, submission 26, pp 3, 7-9.

Appendix A – Submitters

Sub#	Submitter
001	Sevegne Newton
002	Name suppressed Name suppressed – supplementary
003	Justin Cobbett
004	East Coast Apprenticeships
005	Confidential
006	Julie Riding-Hill
007	Independent Education Union – Queensland and Northern Territory
008	Susann Stapleton
009	Clare and Glenn Bergin
010	Saskia Lawrence
011	Dr Stephen Clibborn
012	<i>Number not allocated</i>
013	Industrial Relations Claims
014	Name suppressed
015	Lisa Morse
016	Job Watch Inc.
017	Restaurant & Catering Australia
018	<i>Number not allocated</i>
019	Young Workers Hub
020	Fair Work Employment Lawyers
021	National Retail Association
022	Queensland Tourism Industry Council
023	Queensland Nurses and Midwives' Union
024	Confidential
025	Serena Swan
026	Queensland Advocacy Incorporated
027	Hall Payne Lawyers
028	LawRight
029	Executive Security Group Pty Ltd
030	Master Electricians Australia
031	Name suppressed
032	Dr David Morrison

- 033 Maurice Blackburn, Australian Manufacturing, Workers Union Queensland, the Australian Meat Industry Employees Union Queensland, the Together Union Queensland, the Transport Workers Union Queensland, United Voice Queensland and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia – Plumbing Division Queensland
- 034 Queensland Council of Unions
- 035 Qld Community Alliance
- 036 Name suppressed
- 037 *Number not allocated*
- 038 Australian Industry Group
- 039 CFMEU Queensland
- 040 Queensland Law Society
- 041 Confidential
- 042 Dr Laurie Berg and Bassina Farbenblum
- 043 Housing Industry Association
- 044 Fair Work Ombudsman
- 045 Master Builders Queensland
- 046 The Services Union
- 047 *Number not allocated*
- 048 Confidential
- 049 Franchise Redress
- 050 Dr Tess Hardy, Melissa Kennedy and Professor John Howe
- 051 Australian Lawyers for Human Rights
- 052 Confidential
- 053 Name suppressed

Appendix B – Officials at public departmental briefing

Office of Industrial Relations, 11 June 2018

- Dr Simon Blackwood, Deputy Director-General
- Ms Tricia Rooney, Director, Industrial Relations Strategic Policy
- Mr Tony Schostakowski, Chief Inspector, Industrial Relations Regulation and Compliance
- Ms Natalie Wakefield, Director, Labour Hire Licensing Unit

Appendix C – Witnesses at public hearing

Brisbane, 16 August 2018

Queensland Council of Unions

- Mr Michael Clifford, Assistant Secretary
- Dr John Martin, Research and Policy Officer
- Mr David, Carter, Worker/Chef

Queensland Law Society

- Ms Kate Brodnick, Senior Policy Solicitor
- Mr Rob Stevenson, Member, Industrial Law Committee
- Mr Ken Taylor, President

JobWatch Inc

- Mr Ian Scott, Principal Lawyer

Young Workers Hub

- Ms Imogen Barker, Founder
- Mr Martin de Rooy, Founder
- Ms Katherine Hamburg, Hospitality Worker
- Ms Sivaiala Lemisagele, Food Manufacturing Worker

Hall Payne Lawyers

- Mr John Payne, Principal Lawyer
- Ms Ellie Bassingthwaighe, Solicitor

Maurice Blackburn Lawyers and joint submitters

- Mr Giri Sivaraman, Principal Lawyer, Maurice Blackburn Lawyers
- Ms Kelly Fiedler, Industrial Officer, Australian Manufacturing Workers' Union
- Ms Shannon Fogarty, Industrial Officer, Communications, Electrical, Plumbing Union
- Mr Dermot Peverill, Industrial Officer, United Voice
- Mr Peter Biagini, Secretary, Transport Workers Union
- Mr Michael Rickards, Member, Transport Workers Union
- Mr Ken McKay, Advocate, Together Union

Australian Industry Group

- Mr Shane Rodgers, Head – Queensland
- Mr Stewart Rinkevich, Workplace Relations Lawyer

National Retail Association

- Ms Lindsay Carroll, Legal Practitioner and Director

Brisbane, 20 August 2018

Queensland Advocacy Inc.

- Mr Nick Collyer, Systems Advocate
- Ms Emma Phillips, Senior Lawyer

Master Electricians

- Mr Jordon Carlisle, Workplace Relations Adviser
- Mr Jason O'Dwyer, Manager Advisory Services

East Coast Apprenticeships

- Mr Alan Sparks, Chief Executive Officer

Academic panel

- Dr Laurie Berg, Senior Lecturer, University of Technology Sydney
- Dr Tess Hardy, Senior Lecturer, University of Melbourne
- Dr David Morrison, Associate Professor, University of Queensland

Cairns, 27 August 2018

Private capacity

- Ms Debra McPherson
- Reverend Karen Hawthorne

Townsville, 28 August 2018

Mareeba District Fruit and Vegetable Growers Association

- Mr Joe Moro, President

Ardent Security

- Mr Brian McCarrick, Director

Private capacity

- Mr Chris McCoomb
- Mr Noel Ambler

Mackay, 29 August 2018

- Bowen Gumlu Growers Association
- Ms Cherry Emerick, Industry Development Officer

Rockhampton, 30 August 2018

- Private capacity
- Mr Bruce Craig
- Member for Rockhampton
- Mr Barry O'Rourke MP

Brisbane, 3 September 2018

Queensland Community Alliance

- Mr Sergio Duran, Member
- Ms Elise Ganley, Community Organiser
- Reverend Pauline Harley, Anglican Priest
- Ms Luz Mosquera, Member
- Mr Palani Thevar, Member

Industrial Relations Claims

- Mr Miles Heffernan, Director
- Ms Catherine Black
- Ms Kay Clifton
- Mr Jamie Gardiner-Hudson
- Mr Kym Rake

Gold Coast, 10 September 2018

Young Workers Hub

- Ms Imogen Barker, Founder
- Ms Taylor Bun, Food Manufacturing Worker
- Mr Martin de Rooy, Founder
- Mr Lucas Halkeas, Hospitality Worker
- Ms Mele-Otufale Tulimaiau, Food Manufacturing Worker

National Union of Workers

- Mr Ben Hargreaves, Food Processing Worker
- Mr Amandio Nunes, Food Processing Worker
- Ms Karthika Raghwan, National Union of Workers Organiser

Electrical Trades Union, Queensland and Northern Territory Branch

- Mr Beau Malone, State Organiser

Franchise Redress

- Mr Michael Fraser, Investigator and Researcher
- Ms Maddison Johnstone, Investigator and Researcher

Private capacity

- Mr Jason Spectre

Toowoomba, 10 September 2018

Toowoomba Chamber of Commerce

- Ms Jo Sheppard, Chief Executive Officer

Queensland Council of Unions and Electrical Trade Unions

- Mr Dan McGaw, Branch President, Queensland Council of Unions Toowoomba Branch; State Organiser (South West Queensland), Electrical Trades Union

Together Union

- Mr Lloyd Abbott, South West Organiser

Ipswich, 11 September 2018

Australasian Meat Industry Employees Union

- Mr James Cottrell-Dormer, Queensland Branch
- Mr Ronald Weston, Queensland Branch

Private capacity

- Name suppressed

Sunshine Coast, 11 September 2018

Private capacity

- Ms Clare Bergin
- Mr Glenn Bergin
- Mr Peter O’Hanlon
- Dr Jennifer Fraser

Maryborough, 12 September 2018

Private capacity

- Ms Sara Bartrum
- Mr Blade Clark
- Ms Michelle Lovett

Bundaberg, 12 September 2018

Bundaberg Fruit and Vegetable Growers

- Mr Allan Mahoney, Chairman

Private capacity

- Mr Moe Turaga

Wessel Petroleum

- Ms Amanda Coates, Finance and IT Manager,
- Mr Paul Wessel, Managing Director

Brisbane, 17 September 2018

Growcom

- Ms Rachel Mackenzie, Chief Advocate

Hostplus

- Ms Helen Wood, Executive Manager, Client Relationships

The Services Union

- Mr Lee Wordsworth, Member

Working Women Queensland

- Ms Jayne Carter, Industrial Officer
- Ms Lee Matahaere, Senior Industrial Officer
- Ms Isabella Morosan, Industrial Officer

Executive Security Group

- Mr Andrew Bourke, Managing Director

Independent Education Union

- Ms Vaishi Rajanayagam, Industrial Officer
- Mr Aaron Watson, Growth Organiser

Brisbane, 17 September 2018

Private capacity

- Ms Jessica Prouten
- Mr Jeffrey Jones

Appendix D – Survey Questions

This survey is being conducted by the Queensland Parliamentary Education, Employment and Small Business Committee (committee). The committee is investigating the problem of wage theft in Queensland and has developed this survey as one way to find out more about Queenslanders' experience of wage theft.

Wage theft may take various forms such as underpayment of wages, having entitlements such as leave and penalty rates withheld, and an employer not making required superannuation contributions on an employee's behalf.

Survey responses will be used to inform the committee's investigation, and collated data as well as quotes from survey input may be published in the committee's report. Names and email addresses will not be published. To understand how your data will be collected and used, please read the following privacy disclaimer.

This survey is intended to provide us with a snapshot from the perspective of affected individuals. Substantive written submissions are also invited, from any interested party. To make a written submission to the committee, please follow the steps on the committee website at <http://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/current-inquiries/Wagetheft>.

Privacy Disclaimer

By completing the survey, you are acknowledging and agreeing to the following:

Survey results will only be published in a de-identifying format, and your survey answers will not be published with your name or email address.

Survey answers may be used to inform the committee regarding its inquiry into wage theft in Queensland, and may also be used for subsequent reporting or analysis. This may be for an unlimited amount of time and survey content may be distributed or supplied by the committee in its de-identified format, during and after the inquiry.

The survey is being conducted using SurveyMonkey which is based in the United States of America. Information you provide on this survey will be transferred to SurveyMonkey's server in the United States of America. By completing this survey, you agree to this transfer. The committee accesses the data collected through the survey in accordance with the survey policy and terms of use provided by SurveyMonkey. You can access SurveyMonkey's terms of use [here](#).

* 1. Please provide a valid email address.

Note: all surveys will be treated anonymously and data provided will not be used to identify particular persons

* 2. Please indicate if you would like to receive updates on the inquiry, including notice of any public hearings.

- Yes, I would like to receive updates through my email address
- No, I would not like to receive updates through my email address

* 3. Would you be interested in talking to the committee about your experience?

Note: the committee may conduct private hearings to receive information confidentially

- Yes
- No

* 4. Do you identify yourself as:

- Aboriginal
- Torres Strait Islander
- Aboriginal and Torres Strait Islander
- None of the above

* 5. What is your age?

- under 15 years
- 15 to 24 years
- 25 to 34 years
- 35 to 44 years
- 45 to 54 years
- 55 to 64 years
- 65 and over

* 6. What is your gender?

- Female
- Male
- Other

* 7. Do you have an ongoing disability?

Yes

No

* 8. Do you speak a language other than English at home?

Yes

No

Yes (please specify)

* 9. Please indicate if you have experienced any of the following types of wage theft (select multiple if appropriate):

Unpaid Hours
This might include not being paid for all hours worked, including for time spent training and in work meetings, and unreasonable length trials; or being paid less than the agreed wage.

Unpaid superannuation

Unreasonable deductions
This might include having part of your pay unlawfully withheld, or being unlawfully required to pay back an amount.

Unpaid penalty rates

Withholding of other entitlements
This might include not being allowed to take breaks, or not being paid leave to which you are entitled.

Sham contracting
Where you have been made to use an ABN and act as a contractor, when you should have been considered as an employee.

Other (please specify in 'further information')

Further information:

* 10. Please indicate whether you were hired:

Directly by the employer as an employee

Through an agency/labour hire arrangement

As an independent contractor

Not sure

* 11. Please indicate in which industry the employment took place:

- Agriculture, Forestry and Fishing (including horticulture and aquaculture)
- Mining
- Manufacturing
- Electricity, Gas, Water and Waste Services (for example, persons engaged in the collection, treatment and disposal of waste materials)
- Construction (including those mainly engaged in the construction of buildings and other structures, demolition or wrecking of buildings and other structures, landfill, levelling, earthmoving, excavating, land drainage and other land preparation)
- Wholesale Trade
- Retail Trade
- Accommodation and Food Services (including hospitality and hotel workers)
- Transport, Postal and Warehousing (including Uber drivers and food delivery riders)
- Information Media and Telecommunications
- Financial and Insurance Services (including persons in banking, investment)
- Rental, Hiring and Real Estate Services
- Professional, Scientific and Technical Services (including scientific research, architecture, engineering, computer systems design, law, accountancy and veterinary science)
- Administrative and Support Services (including recruitment, cleaning services, pest control services and gardening services).
- Public Administration and Safety (including persons working in State or Local Government, executive and judicial activities; persons working in security services)
- Education and Training
- Health Care and Social Assistance
- Arts and Recreation Services
- Other Services (includes a broad range of personal services including; religious, civic, professional and other interest group services; selected repair and maintenance activities; and private households employing staff)

12. In what location did the issue/s occur? Please provide a postcode.

Note: all surveys will be treated anonymously and data provided will not be used to identify particular persons

* 13. Please indicate the closest time frame for the issue/s occurring:

- Within the last year
- More than a year ago but within the last 6 years
- More than 6 years ago

* 14. At the time of the issue/s were you:

- An Australian resident
- A visitor to Australia

* 15. What was your employment status at the time of the issue/s:

- Permanent full-time
- Permanent part-time
- Not sure
- Casual
- Contract

Other information (optional)

* 16. Did you report your issue?

- No
- Yes, to the Fair Work Ombudsman
- Yes, to the employer or business owner
- Yes, to the Australian Taxation Office
- Yes, to another entity (please specify)

* 17. If yes to question 16, was your issue resolved?

- Yes
- No
- N/A

* 18. If yes to question 17, were you satisfied with the resolution?

- Yes
- No
- N/A

* 19. At the time of your issue, were you a member of an industrial organisation such as a union or employer registered body?

- Yes
- No

20. If you wish to tell us more about your story, please provide further information (optional).

Note: this response may be quoted in publications or other committee activities. Responses will be treated anonymously and will not be published alongside personal details.

This survey is intended to provide us with a snapshot from the perspective of affected individuals.

Substantive written submissions are also invited, from any interested party. To make a written submission to the committee, please follow the steps on the committee website at

<http://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/current-inquiries/Wagetheft>.

Statement of Reservation

LNP Non-Government members Statement of Reservation Wage Theft Inquiry 2018

The LNP fundamentally believes that workers deserve to be paid what they are entitled to. No one wants to see workers being ripped off.

However, the motivations behind this inquiry have been spurious to say the least, since the very beginning.

When the terms of reference were first moved, the LNP attempted to include workers and contractors under direct control of the Queensland Government.

The Palaszczuk Government voted down sensible amendments that would have compelled the inquiry to investigate Labor's on-going health payroll debacle, as well as the underpayment of security guards and other contractors at the Commonwealth Games and the use of contractors in the public service – an issue that has been consistently raised by the Together Union.

The LNP put forward sensible amendments to address the problems faced by thousands of Queensland workers – but Labor can't stand scrutiny of its own record.

We maintain that the inquiry is a wasted opportunity because it ignored the plight of current and former nurses who are still suffering from Labor's health payroll disaster.

Bizarrely, the inquiry focussed on federal employment issues over which the state Labor Government ceded jurisdiction to Canberra in 2009.

The Queensland Government is only responsible for industrial relations of state public servants and local government workers. The remainder of Queensland's workforce is governed by Julia Gillard's Fair Work Act.

It was Cameron Dick as the former Industrial Minister who introduced legislation in the Bligh Government to refer most of our industrial relations jurisdiction. It was passed in November 2009, with the LNP opposing the Bill.

We maintain that Labor should clean up its own employment record before it looks at every other employer.

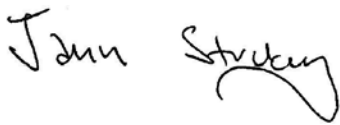
There was a series of regional public hearings, however a number of these had extremely poor turnouts with witnesses recanting and redacting their statements.

The LNP strongly maintains our opposition to union activism being taught in Queensland schools. Our schools are places for learning, not union recruitment drives.

We have concerns about recommendations for a national labour hire licensing approach, given there has been no review of the effectiveness of Queensland's new laws.

We also have concerns about making wage theft a new criminal offence as there are already existing criminal code offences that are sufficient and should be enforced. Anyone who deliberately underpays workers needs to face the consequences of their actions.

As we said from the outset, the LNP fundamentally believes that workers deserve to be paid what they are entitled to, however this inquiry was politically motivated and not inclusive of workers controlled by the Queensland Government.

Handwritten signature of Jann Stuckey in black ink.

Jann Stuckey MP

Handwritten signature of Simone Wilson in black ink.

Simone Wilson MP

