



GOVERNMENT OF  
WESTERN AUSTRALIA

# Inquiry into **Wage Theft in Western Australia**

June 2019



The Hon Bill Johnston MLA  
Minister for Industrial Relations  
Level 9 Dumas House  
2 Havelock Street  
WEST PERTH WA 6005

Dear Minister,

**Inquiry into Wage Theft in Western Australia**

The Inquiry into Wage Theft in Western Australia was announced on 23 January 2019. The Inquiry's nine Terms of Reference were published and the Inquiry commenced in February 2019.

The Inquiry is now complete, and I here present to you my Report.

The Report contains my findings and recommendations for each of the Terms of Reference and includes information on the conduct of the Inquiry and related matters.

I thank you for giving me the opportunity to inquire into the issue and report to you.

Yours faithfully,



Tony Beech

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## **Executive Summary and Recommendations**

### **Executive Summary**

The vast majority of employers in WA understand and either comply, or attempt to comply, with their legal obligations, whether these derive from legislation, an award or an industrial agreement. Nevertheless, I find court decisions, Industrial Inspector case studies, FWO cases and reports, a Horticulture Report and other reports reveal underpayment, and systematic and deliberate underpayment, of wages and entitlements occurring particularly in some industry sectors in WA.

The various forms of wage theft identified from the cases and case studies and submissions are predominantly:

- unpaid hours;
- non-payment of any wages, or allowances for work performed;
- underpayment of wages or entitlements;
- unauthorised or unreasonable deductions; and
- non-payment of superannuation.

Many underpayments do occur as a result of a lack of knowledge or genuine misunderstanding of employment obligations. However where a business has access to professional assistance in other areas of its operations, for example creating franchise agreements and registering trademarks, it is more difficult to accept when it comes to employment obligations, that a lack of knowledge or understanding explains the underpayment.

The reasons why systematic and deliberate underpayment of wages and entitlements is occurring include the lack of detection and enforcement of non-compliance, the intention of some employers to maximise financial return, the vulnerability of some workers, and a lack of knowledge of employment conditions by both workers and employers.

Systematic and deliberate underpayment makes it harder for workers to meet day-to-day living expenses, and can affect the individual's health, and have consequences for the worker's family. The unfair cost advantage achieved by underpaying businesses can undermine those businesses which are compliant, and this has consequences for the viability of the compliant business, its employees, and in a wider sense for the economy. As a community, we are the poorer because of businesses which systematically and deliberately underpay their employees.

The evidence of the cases and case studies points particularly to cafés and restaurants, retail and contract cleaning as sectors which demonstrate a higher likelihood of systematic and deliberate underpayment of wages and entitlements. The horticulture sector, with its reliance on workers who are vulnerable and/or sourced through labour hire, is also a particular industry sector where

wage theft is prevalent. Systematic and deliberate underpayment often involves permanent and temporary migrant workers.

Western Australia is unique amongst the States in that it has retained a State industrial relations system for private sector employers and employees. The Inquiry's terms of reference relate to all Western Australian workers and cover both the WA and national industrial relations systems.

The recommendations which follow include strategies to:

- raise the level of awareness of employment rights and obligations in WA among employers, employees and the community in those sectors where the likelihood of wage theft in employment covered by the WA industrial relations system in the private sector is high;
- provide a pathway for information, reporting wage theft and for seeking redress; and
- provide for greater detection and enforcement of underpayment of wages and entitlements.

They also identify matters for the State Government to recommend to the Commonwealth Government for its consideration.

### **Recommendations**

#### **Raising awareness of employment rights and obligations in Western Australia**

##### **Recommendation 1 (Page 105)**

I recommend that the State Government, in consultation with relevant employer and employee organisations and other stakeholders, conduct an information campaign, including by using social media, in those sectors where the likelihood of wage theft in employment covered by the Western Australian industrial relations system is high in order to raise the level of employer and employee awareness of employment rights and obligations and the pathways available for pursuing an underpayment.

##### **Recommendation 2 (Page 108)**

I recommend that in those sectors where the likelihood of wage theft in employment covered by the Western Australian industrial relations system in the private sector is high, the Department of Mines, Industry Regulation and Safety develops a collaborative working relationship with employer organisations and with employee organisations in order to assist them to extend their educative role to employers and employees in those sectors.



**Recommendation 3 (Page 108)**

I recommend that the State Government:

- consult with employer and employee organisations, and other stakeholders on the most effective means to educate young people and recently arrived persons about the employment obligations of employers and the rights of employees and to improve their understanding of Western Australia’s industrial relations framework; and
- consult with the Commonwealth Government regarding this issue for the national industrial relations framework.

**Recommendation 11 (Page 122)**

I recommend that as part of the State Government’s promotion of the measures it takes to address wage theft following this Inquiry, it provides information to umbrella community groups about the Western Australian industrial relations system so that those groups are aware of the avenues available to seek assistance and can provide that advice if requested.

**Recommendation 12 (Page 123)**

I recommend:

- that the State Government contribute increased funding to the Employment Law Centre of Western Australia to enable it to provide greater access to its services, and expand its work providing assistance, referrals, education and advocacy for vulnerable workers covered by the Western Australian industrial relations system.
- that the increased funding be given to the Employment Law Centre of Western Australia separately, and sustainably into the future.

**Recommendation 13 (Page 124)**

I recommend that the State Government continue and increase its funding for the Department of Mines, Industry Regulation and Safety Private Sector Labour Relations Division to provide education and compliance services, and give effect to recommendations in this Report.

**Providing a means for reporting wage theft in Western Australia**

**Recommendation 4 (Page 110)**

I recommend that the State Government create a separate wage theft website in different languages, a wage theft hotline with multi-lingual support, and a smartphone app, in order to receive complaints, including anonymous complaints, about wage theft in Western Australia.

**Recommendation 5 (Page 111)**

I recommend the State Government publish on its wage theft website, and as part of its smartphone app, the name of an employer who has been found by the Courts to have systematically and deliberately underpaid an employee.

## **Increasing the detection and prosecution of wage theft**

### **Recommendation 8 (Page 117)**

I recommend the State Government provide additional funding to significantly increase the numbers of Industrial Inspectors.

### **Recommendation 9 (Page 118)**

I recommend that the powers of Industrial Inspectors ensure that an Industrial Inspector may:

- visit a workplace either unannounced or in accordance with an announced intention;
- copy or require to be produced a list of current employees, and have the power to speak individually to each staff member at work, privately and confidentially on or off the premises, and to take copies of employment records and rosters;
- require business owners to provide information concerning labour hire providers used by the business; and
- post a notice in a workplace, including information about employment obligations, or a summary of contraventions of employment law, in a place where employees may see it. Removal or interference with any such notice should constitute an obstruction under s 102 of the *Industrial Relations Act 1979*.

### **Recommendation 10 (Page 121)**

I recommend that the *Industrial Relations Act 1979* provide:

- that in the performance and exercise of functions under the Act the Chief Executive Officer of the Department of Mines, Industry Regulation and Safety (DMIRS) must act in a manner that facilitates and encourages co-operation between DMIRS and the Fair Work Ombudsman (FWO) wherever appropriate and practicable;
- that State Industrial Inspectors may participate in joint campaigns or inquiries with FWO Fair Work Inspectors; and
- that DMIRS may confer and exchange information with the FWO in relation to participating in joint campaigns or inquiries with the FWO.

## **Amendments regarding the Industrial Magistrates Court of Western Australia (IMC) to address wage theft issues**

### **Recommendation 6 (Page 112)**

I recommend that the State Government fund the operation of the Industrial Magistrates Court of Western Australia to enable it to sit full time if necessary to increase the timeliness of matters being listed in the Industrial Magistrates Court.

**Recommendation 7 (Page 114)**

I recommend that the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* expressly provide that in appropriate circumstances, an originating claim, or a document, may be served by mobile telephone number.

**Recommendation 14 (Page 136)**

I recommend the establishment of a pre-lodgment conciliation process in the Industrial Magistrates Court.

**Recommendation 15 (Page 136)**

I recommend that a successful claimant in a case of systematic and deliberate underpayment be able to recover their legal costs.

**Recommendation 16 (Page 138)**

I recommend that the *Industrial Relations Act 1979* be amended so that an order of the Industrial Magistrates Court that requires the payment of money to a person, or an order that does not require the payment of money, would be enforceable in the Industrial Magistrates Court as if:

- the Industrial Magistrates Court is a court for the purposes of s 5 of the *Civil Judgments Enforcement Act 2004*; and
- an order of the Industrial Magistrates Court is a judgment under that Act.

**Recommendation 17 (Page 140)**

I recommend that in a case of proven systematic and deliberate underpayment of wages and entitlements, consideration be given to making non-compliance with an Industrial Magistrates Court order that the employer pay unpaid wages or an order that the employer pay a civil penalty to the employee, a contempt of the Industrial Magistrates Court unless the Industrial Magistrates Court determines that it is not a contempt of court.

**A denied contractual benefit in the Western Australian Industrial Relations Commission**

**Recommendation 18 (Page 141)**

I recommend that in a case of systematic and deliberate underpayment of wages and entitlements the Western Australian Industrial Relations Commission be given the power to award interest on a denied contractual benefit, and be given a general power similar to s 545(1) of the *Fair Work Act 2009* to make any order it considers appropriate.

**Introducing into Western Australian employment legislation provisions which already operate in Western Australia under the *Fair Work Act 2009*.**

**[Recommendation 19 \(Page 142\)](#)**

I recommend the State Government amend the existing provisions of the *Minimum Conditions of Employment Act 1993* similar to s 325(1) of the *Fair Work Act 2009* to prohibit an employer from asking for 'cash back' from a worker.

**[Recommendation 20 \(Page 143\)](#)**

I recommend:

- that Western Australian law recognise the right of a worker to query or make a complaint about their employment conditions and that an employer may not dismiss, demote, reduce hours of work or otherwise cause detriment to a worker who does so, based upon s 340 of the *Fair Work Act 2009*. A breach of the law is to be a civil penalty provision; and
- that s 23B of the *Industrial Relations Act 1979* be applied to this situation such that a third person may not prevent, hinder or interfere with the employment of the employee or the employment or transfer of the employee to work at a particular place or site.

**[Recommendation 24 \(Page 160\)](#)**

I recommend that the State Government prohibit employment being advertised at less than the applicable minimum wage for the position.

**[Recommendation 25 \(Page 161\)](#)**

I recommend the State Government introduce legislation similar to ss 357, 358 and 359 of the *Fair Work Act 2009* prohibiting representation by an employer to a worker that the contract of employment under which the worker is employed is a contract for services, and making it unlawful for an employer to dismiss an employee in order to engage them as an independent contractor to perform the same, or substantially the same, work under a contract for services.

**Whether wage theft should be a criminal offence**

I do not accept that unintentional underpayment of wages and entitlements as such should attract a criminal sanction. However, in principle, a criminal sanction should be considered by the State Government for the most serious cases of systematic and deliberate underpayment of wages and entitlements in Western Australia.

**[Recommendation 21 \(Page 150\)](#)**

I recommend that in principle, a criminal sanction should be considered by the State Government for the most serious cases of systematic and deliberate underpayment of wages and entitlements in Western Australia.

The State Government's consideration should include:

- the commitment of the Commonwealth Government to consider the circumstances and vehicle in which criminal penalties will be applied for the most serious forms of deliberate exploitation of workers;
- the constitutional issues arising from the application of a State law criminalising the most serious cases of systematic and deliberate underpayment of wages and entitlements in Western Australia to employment covered by the Commonwealth *Fair Work Act 2009*;
- the desirability of an employee being able to pursue, in a timely manner, a civil claim of underpayment of wages and entitlements without it being delayed by a criminal proceeding; and
- the need to devote sufficient funding and resources to receive and investigate complaints, and adequately and properly enforce the proposed law.

### **Labour hire licensing**

#### **Recommendation 22 (Page 156)**

I recommend the State Government should:

- introduce a licensing scheme in Western Australia for labour hire in the horticulture industry and, in consultation with stakeholders, give consideration to a licensing scheme for labour hire in other industries including the meat processing, cleaning, and security industries; and
- consult with the Commonwealth Government about its commitment to establish a national labour hire registration scheme for horticulture, meat processing, cleaning and security and take it into account in considering whether the State Government should introduce a State-based scheme.

### **State Government procurement**

#### **Recommendation 23 (Page 159)**

I recommend that the State Government give consideration to:

- ensuring that contracts it enters into for the provision of at least cleaning or security services, if not generally, contain terms which are aimed at addressing or minimising breaches of workplace law in relation to the workers actually providing the services to the Government;
- not entering into a contract for the provision of cleaning or security services, and generally, with a business which has been found by a court or tribunal to have systematically and deliberately underpaid their workforce, or with a business which has a director or owner who has been so found.

**Recommendation 28 (Page 173)**

I recommend that the State Government consult with key stakeholders as part of the State Government procurement process regarding whether a contractor on State Government building and infrastructure projects should be required to make a contribution into an Approved Worker Entitlement Fund to offset the redundancy pay obligations in the national and State on-site building and construction industry awards.

**Recommendations to the Commonwealth Government**

**Recommendation 26 (Page 167)**

I recommend the State Government recommend to the Commonwealth Government:

- 1) that there be greater funding for the Fair Work Ombudsman's presence in Western Australia;
- 2) that the rights of student or temporary visa holders to hold an Australian Business Number (ABN), or to be able to be a company director, be reviewed to address any abuse of the visa system, including by 'sham contracting' arrangements;
- 3) that:
  - a) in the performance and exercise of functions under the *Fair Work Act 2009* the Fair Work Ombudsman must act in a manner that facilitates and encourages cooperation between the Fair Work Ombudsman and the Chief Executive Officer of the Western Australian Department of Mines, Industry Regulation and Safety wherever appropriate and practicable;
  - b) Fair Work Inspectors may participate in joint campaigns or inquiries with State Industrial Inspectors; and
  - c) the Fair Work Ombudsman may confer and exchange information with the Western Australian Department of Mines, Industry Regulation and Safety in relation to participating in joint campaigns or inquiries with the Fair Work Ombudsman;
- 4) that superannuation be regarded as part of a worker's wages and entitlements, including for enforcement purposes in the event of non-payment of the Superannuation Guarantee contribution;
- 5) that a pre-lodgment conciliation process prior to enforcement action commencing be examined for application in the national regulatory framework;
- 6) that a person who has engaged in work in Australia for an employer that is contrary to the conditions of their visa, or who is an unlawful non-citizen, or where the contract is illegal and who is subject to systematic and deliberate underpayment of their wages or entitlements, should have the right to seek to remedy the underpayment under the *Fair Work Act 2009*;

- 7) that in cases of systematic and deliberate underpayment of wages, successful complainants in the national system be permitted to recover their legal costs; and
- 8) that the application of the Fair Entitlements Guarantee scheme, access by employee organisations to employment records in order to check that workers' wages and entitlements are being paid correctly, and the definition of 'employee', be optimised to assist to address the circumstances of wage theft identified in this Inquiry.

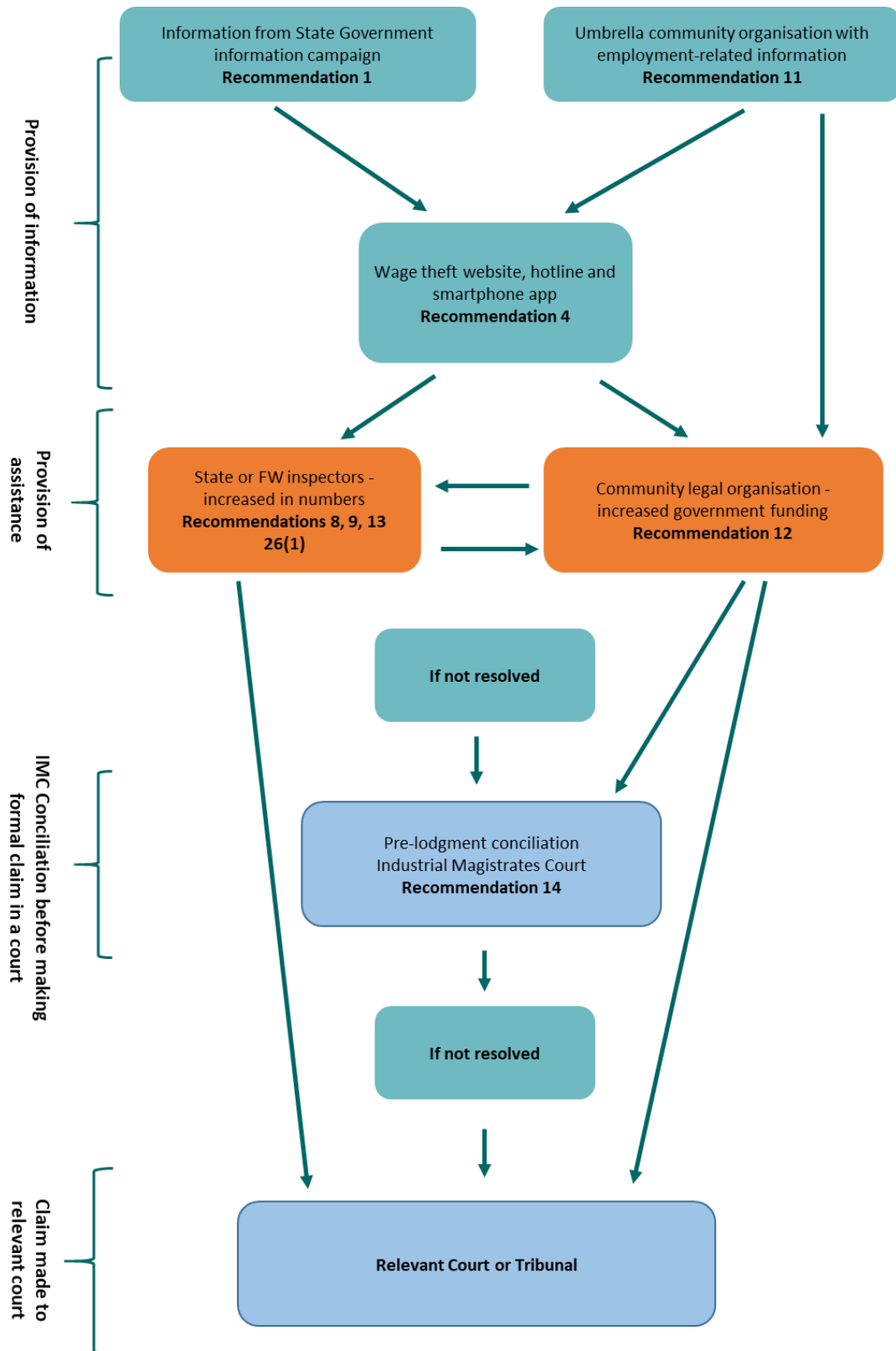
**Other incidental or relevant matters**

**Recommendation 27 (Page 172)**

I recommend that a provision broadly similar to s 192 of the *Workers' Compensation and Injury Management Act 1981* be included in the *Industrial Relations Act 1979* to address wage theft of employed sex workers in the sex industry in Western Australia.

The diagram on the next page sets out a pathway to follow, which results from the Recommendations, for an unrepresented and vulnerable worker seeking information and redress.

**Pathway for unrepresented worker seeking information and redress**





## Introduction - ‘Wage theft? What’s that?’

‘Wage theft? What’s that?’ This was the initial reaction of several persons I met with to seek submissions or informal comment.

The term ‘wage theft’ is a relatively new expression in Australia. The report of the Education, Employment and Small Business Committee of the Queensland Parliament entitled: *A fair day’s pay for a fair day’s work? - Exposing the true cost of wage theft in Queensland* (Queensland Inquiry) noted that:

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.<sup>1</sup>

Based upon the submissions made to this Inquiry, I respectfully agree.

### **The use of the term ‘wage theft’**

Some submissions to the Inquiry, and points made to me in some meetings, show not only that the use of the term ‘wage theft’ itself is an issue, but also that its use might even mean that an organisation will not make a submission to the Inquiry if, by doing so, it might be seen to be agreeing with or condoning its use.

Of those which did make a submission, the Australian Industry Group (Ai Group), the Master Builders Association of Western Australia (Master Builders), the Housing Industry Association (HIA) and the National Retail Association (NRA) referred in particular to the use of the term ‘wage theft’.

The Ai Group states that the term is misleading, and inappropriate, that it improperly intrudes into an area which is best handled by the civil law system, and risks inappropriately branding as criminals employers who mistakenly underpay their employees.<sup>2</sup>

The Master Builders submission considers the term emotive as it implies ‘an intent to deliberately steal or deprive an employee of some or, all of their lawful wages’, and suggests that it is an endemic problem in the WA labour market. Master Builders states it is unaware of any evidence to support these implications.<sup>3</sup>

The HIA considers the term ‘seeks to inappropriately criminalise the underpayment of wages’.<sup>4</sup>

The NRA regards the term as a rhetorical device with the potential to create a degree of ambiguity as to what comes under its umbrella. It understands the term to mean ‘the non-payment of

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<sup>1</sup> Parliament of Queensland Education, Employment and Small Business Committee, *A fair day’s pay for a fair day’s work? Exposing the true cost of wage theft in Queensland*, 2018, p 21.

<sup>2</sup> Submission of Australian Industry Group, p 3 and p 10.

<sup>3</sup> Submission of Master Builders Association of Western Australia, p 5.

<sup>4</sup> Submission of Housing Industry Association, p 5.

legislative and/or contractual entitlements’ and made its submissions on that understanding using the term ‘wage non-compliance’.<sup>5</sup> In my view, with respect, that is a perfectly acceptable means of the NRA presenting its submission to the Inquiry as it wishes to present it.

There is much to be said for the statement in the Queensland Inquiry Report that the term may have originated in the United States where wage theft Acts or ordinances can be found in at least the States of California, Illinois, Massachusetts, Minnesota and Texas, and in the cities of Philadelphia, Seattle, Boston and Washington DC.<sup>6</sup> The laws and ordinances reviewed vary slightly in how they define wage theft and provide for different levels of civil or criminal penalties. For example, the *Wage Theft Prevention Act* in New York State provides that where there has been a wilful failure to pay all wages due under the law, liquidated damages of up to 100% of the unpaid wages, as well as other civil penalties and interest, are payable.<sup>7</sup> In Seattle, wage theft is described as follows:

....the failure to pay workers the wages owed to them:

- Not paying minimum wage is a crime
- Not paying promised wages is a crime
- Making employees work unpaid overtime is a crime
- Making employees work off the clock is a crime.<sup>8</sup>

Victims of wage theft are encouraged to file a criminal complaint with the Seattle Police Department.<sup>9</sup>

While I acknowledge the reservations expressed in the submissions noted above, it is apparent that the use of the term ‘wage theft’ in Australia to describe underpayments of wages and entitlements has increased in recent years in parliamentary inquiries and reports. A few examples are sufficient illustration.

The Senate Economics References Committee’s May 2017 report into non-compliance with the Superannuation Guarantee system refers to wage theft in its title *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*.<sup>10</sup>

The Senate Education and Employment References Committee uses the term wage theft in its November 2018 report entitled: *Wage theft? What wage theft?! - The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies*.<sup>11</sup>

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<sup>5</sup> Submission of National Retail Association, p 3.

<sup>6</sup> USA Gov, Wage Theft, 2019. Retrieved via <https://search.usa.gov/search?affiliate=usagov&query=wage+theft>

<sup>7</sup> New York State Department of Labor, *Wage Theft Prevention Act Fact Sheet*, p 3.

<http://www.labor.ny.gov/formsdocs/wp/p715.pdf>

<sup>8</sup> Seattle Police Department, Wage Theft information, [www.seattle.gov/police/need-help/wage-theft](http://www.seattle.gov/police/need-help/wage-theft)

<sup>9</sup> Ibid.

<sup>10</sup> The Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, 2017.

<sup>11</sup> The Senate Education and Employment References Committee, *Wage theft? What wage theft?! The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies*, 2018.

The Queensland Inquiry Report already referred to above has a broad definition of wage theft: ‘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.’<sup>12</sup>

The March 2019 Australian Parliamentary Joint Committee on Corporations and Financial Services report *Fairness in Franchising* states:

The committee notes that wage theft continues to occur in many franchises: partly due to the business model franchisors operate and partly due to a range of socio-cultural problems. At times, wage theft was occurring as a way for franchisees to extract profits or service payments in order to stay afloat in a financially constrained business model (given wages are one of the greatest costs in the franchisee's control). In some instances wage theft was encouraged by franchisors. Whilst many franchisors cited greed as the primary motivation for wage theft, the committee notes that the issue is far more complex and partly inherent to the business models' structural breakdown of power and the imposition of cost controls. Some of the recommendations contained in this report, if implemented, will go a long way to indirectly rectify this issue by mitigating incentives to engage in wage theft.<sup>13</sup>

In *Fair Work Ombudsman v Ausinko Pty Ltd & Ors* the employer operated a car washing and café business in Southport and Labrador on the Gold Coast employing 58 employees who were underpaid.<sup>14</sup> Included was an employee paid an annual salary of \$49,330. The Court noted:

During the period of her employment, the first respondent paid that amount into her bank account in accordance with her employment contract and her agreed annual salary. However, each week, Ms Kang was required to pay amounts in cash back to representatives of the first respondent so that she was, in effect, paid between \$15 and \$18.50 per hour for each hour she worked.<sup>15</sup>

In considering the penalties to be ordered, the Court stated:

The conduct in this case, like so many others that come before this Court, is egregious. It amounts in the case of the 58 employees, to wage theft from those employees. In respect of Ms Kang it is express wage theft. She was expected to repay part of her wages to the first respondent at the direction of the second and third respondents. That was in circumstances where they had no legal authority to insist that be done.<sup>16</sup>

The term is not unknown in the Supreme Court of Victoria where Croft J in *Rotary Club of Melbourne Inc v Commissioner of State Revenue*, 29 November 2018, at 34 referred to ‘reports of widespread wage theft and other forms of exploitation of labour within Australia, especially of migrant workers, young people and other vulnerable groups’ as one of a number of issues which make patent the need for the promotion of ethical conduct in business and professions.<sup>17</sup>

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<sup>12</sup> Parliament of Queensland Education, Employment and Small Business Committee, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland*, 2018, p 22.

<sup>13</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Fairness in Franchising*, 2019, p xiv.

<sup>14</sup> [2018] FCCA 3524.

<sup>15</sup> *Ibid*, para 9.

<sup>16</sup> *Ibid*, para 72.

<sup>17</sup> [2018] VSC 699.

The term wage theft has been used in a number of news reports and academic articles and publications. On 1 June 2018 *The Guardian* newspaper reported that ‘The parliamentary inquiry into the franchise sector has been handed a “chilling” succession of similar stories by small-business owners who claim franchisors suggested they should steal wages from vulnerable workers.’<sup>18</sup>

In *Wage theft and young workers*, which is a chapter within a book titled *The Wages Crisis in Australia*, Keelia Fitzpatrick provides an expanded definition:

Wage theft is the colloquial term that describes under- or non-payment of minimum wages and entitlements that are rightfully owed to a worker. Employers commonly engage in practices of wage theft by paying a base hourly rate that is below the relevant award or minimum wage base rate, ignoring obligations to pay penalty rates for hours worked in the evenings, on weekends or on public holidays. Failing to comply with obligations to pay overtime rates or other incentive-based payments, bonuses or loadings also constitute wage theft. Other practices include failing to provide or pay out leave entitlements or failing to pay superannuation entitlements. It can also include ‘off-the-clock violations’ where staff are required to work beyond their scheduled or clocked-off finishing time, or to complete training relating to their employment without pay. Wage theft commonly occurs for young and/or migrant workers who are reliant on the statutory minimum wage or modern award system. But it can also take place where an employer fails to comply with the wage and entitlement provisions of an enterprise agreement.<sup>19</sup>

However in *The Criminalisation of Wage Theft as a Compliance Strategy*, Kennedy and Howe observe that:

Wage theft as a terminology is somewhat misleading because it suggests that the elements required to establish a crime, such as *mens rea*, are necessarily present in all these cases, and that a criminalised response is available for the conduct. In Australia no jurisdiction, Commonwealth or state, has a criminalisation model in place in relation to breach of employment standards at this stage.<sup>20</sup>

I record that Professors Allan Fels and David Cousins, writing as the Chair and Deputy Chair respectively of the March 2019 Migrant Workers’ Taskforce (MWTF) note in the Overview of the MWTF Report:

Wage underpayment may be inadvertent, but the outcome is no different as to when it is deliberate. The terms wage exploitation and wage theft are more emotive, but also apt descriptions of the problem, which in essence involves employers not complying with the minimum legal entitlements of their employees.<sup>21</sup>

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<sup>18</sup> Ben Smee, *Franchisees advised to steal workers’ wages, inquiry hears*, *The Guardian*, 1 June 2018, [www.theguardian.com/business/2018/jun/01/franchisees-advised-to-steal-workers-wages-inquiry-hears](http://www.theguardian.com/business/2018/jun/01/franchisees-advised-to-steal-workers-wages-inquiry-hears)

<sup>19</sup> Keelia Fitzpatrick, *Wage theft and young workers*, 2018 in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia, What it is and what to do about it*, 2018, The University of Adelaide Press, p 174.

<sup>20</sup> Melissa Kennedy and John Howe, *The Criminalisation of Wage Theft as a Compliance Strategy*, 2018, paper presented to the Australian Labour Law Association National Conference 2018, p 1.

<sup>21</sup> *Report of the Migrant Workers’ Taskforce*, 2019, p 5.

The MWTF Report notes:

Commentators are increasingly referring to wage underpayment matters as ‘wage theft’, arguing that wage underpayments are as serious and unacceptable as established theft offences attracting criminal penalties.<sup>22</sup>

It can be seen therefore, that the use of the term ‘wage theft’ has increased in recent years in Australia, although there is a degree of debate regarding its use. The lack of any common definition of the term ‘wage theft’ has meant that some of the submissions to the Inquiry, particularly from individuals, used the term to apply to any situation where they have not received what they think they should have received for work performed.

### **This Inquiry**

The Terms of Reference for this Inquiry define wage theft as follows:

Wage theft is the systematic and deliberate underpayment of wages and entitlements to a worker.

Therefore this Inquiry is not focused on unintentional underpayment, nor on whether a clause or a provision within an Act, award or registered agreement may be seen to be unfair or incorrect, although the Inquiry has received submissions, particularly from individuals, where some of those circumstances are present. Some submissions received urged the Inquiry to amend the definition to broaden its scope, however that is not possible.

This Inquiry is focused more upon the circumstances where the underpayment by the employer has been systematic and deliberate. The important distinction between an unintentional underpayment and a systematic and deliberate underpayment has been looked at in the United Kingdom where a National Minimum Wage is prescribed by law. In September 2017 a report titled *Non-compliance and enforcement of the National Minimum Wage* was published by the Low Pay Commission in the United Kingdom (UK Low Pay Commission Report) concerning the extent to which there had been ‘non-compliance’ with the requirement to pay the National Minimum Wage.<sup>23</sup> At page 8 of the Report, the distinction between ‘intentional’ and ‘unintentional’ non-compliance is referred to:

Non-compliance occurs when a worker is paid less than their legal entitlement - usually the headline hourly rate applicable for someone of their age, though there are also some cases where workers can legally be paid below it (for example, where employers who provide accommodation to workers are making deductions up to the daily level specified by the Accommodation Offset, the only benefit in kind allowable under the minimum wage).

To simplify we can divide non-compliance into two categories: intentional and unintentional. In the former case employers are aware that they are underpaying and research evidence<sup>1</sup> tells us that they give a variety of rationalisations for this: it may be that they are self-consciously

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<sup>22</sup> Ibid, p 87.

<sup>23</sup> Low Pay Commission (United Kingdom), *Non-compliance and enforcement of the National Minimum Wage*, 2017, p 8.

unscrupulous; it may be that their business is struggling and they say that they cannot afford it; they may blame competition from other businesses who they believe are non-compliant; in some cases they offer non-wage benefits, such as flexibility around hours/time of work, meals or travel which they believe compensates for any underpayment; some employers question why they should pay above this rate if workers are willing to work for less. At the most serious end intentional non-compliance involves organised crime and forced labour.

It should be noted however that in practical terms it can be very difficult to distinguish between intentional and unintentional non-compliance. An unscrupulous employer is likely to claim that any non-compliance was unintentional. Equally, there is a grey area between unintentional and negligent. And, importantly, regardless of the intention, in all cases of non-compliance it is the worker who loses out.<sup>24</sup>

<sup>1</sup> IPSOS MORI, 2012. *Non-compliance with the National Minimum Wage*. Research report prepared for the LPC.

I recognise that the consequence for a worker is the same whether the underpayment was intentional or unintentional. However, it is important to draw a clear distinction between an employer's deliberate and systematic non-compliance with the workplace obligations towards its workers on the one hand, and genuine mistakes and oversights which are likely to be corrected upon their discovery on the other, because the responses to, or sanctions arising from, the underpayment will differ according to the circumstances.

The Inquiry received many submissions alleging underpayment of wages and entitlements. As the contents of this Report will show, underpayment of wages and entitlements is occurring in WA, significantly in some sectors, and examples are referred to below. The Inquiry has taken into account all the submissions made to it, whether or not the underpayments referred to can be seen to be systematic and deliberate, however the focus of the recommendations is to attempt to address the underpayment of wages or entitlements which is both systematic, that is for example, not one-off or a relatively isolated occurrence, and deliberate.

An example of underpayment which is both systematic and deliberate is *Fair Work Ombudsman v Koojedda Carpentry Pty Ltd ACN 111 218 476 ATF The Gumley Trust & Ors (No.2)*. (*Koojedda Carpentry*)<sup>25</sup> In that matter the employer operated a café and a delicatessen in south-west WA and had made enquiries concerning the lawful minimum rates of pay. The Fair Work Ombudsman (FWO) had provided advice on the employment obligations. This advice had come on the back of complaints of non-payment of minimum rates of wages and entitlements. Nevertheless, some of the workers were not paid at all for various periods, and a number of them were paid less than that to which they were entitled. The Court found that this conduct 'had the characteristic of wilful disregard, or deliberateness, rather than reckless disregard, and particularly so with respect to those of the workers who were not paid at all for various periods.'<sup>26</sup>

From the submissions made to the Inquiry, and from research done in the course of the Inquiry, I can confidently say that even though there is not a universal acceptance of the term 'wage theft'

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<sup>24</sup> Low Pay Commission (United Kingdom), *Non-compliance and enforcement of the National Minimum Wage*, 2017.

<sup>25</sup> [2017] FCCA 2577 (26 October 2017).

<sup>26</sup> *Ibid*, para 58.

to describe underpayment of wages and entitlements, there is an almost unanimous view across all of the submissions received that the systematic and deliberate underpayment of wages and entitlements to a worker is to be condemned. Restaurant and Catering Australia's (R&CA) policy position states this aptly and, in my view, quite correctly:

Another key aspect of R&CA's overarching policy position is that the strongest possible sanctions under the law are warranted for any business-owners found to be deliberately and systematically avoiding compliance with their workplace obligations towards their staff. R&CA is dismayed and frustrated by these practices believing that they significantly undermine the integrity of the hospitality industry and unfairly disadvantage and penalise business-owners who operate their businesses legitimately and in full compliance with the law.<sup>27</sup>

The Ai Group similarly states that it 'does not support any deliberate underpayment of wages or other entitlements'.<sup>28</sup>

The systematic and deliberate underpayment of wages and entitlements to a worker is offensive to what might be called Australian values of a 'fair go all round'. It creates an unfair competitive disadvantage for the overwhelming majority of employers who pay, and endeavour to correctly pay, their employees. It deliberately causes financial and perhaps other hardship to employees and their families.

In my view, focusing on whether the use of the term 'wage theft' is or is not appropriate is a distraction from a real and important issue which has serious impacts on employers who do pay correctly, on workers, on the State and on the country as a whole. I have conducted this Inquiry on the basis that the discussion of the issues surrounding systematic and deliberate underpayment of wages and entitlements, and the things which should be done to address it, will be more productive if there can be a bi-partisan approach by all stakeholders, without a focus on whether the term wage theft is, or is not, appropriate to describe it.

I have endeavoured to avoid repeating the outcomes of the many other reviews and Inquiries undertaken by the Commonwealth and the States. My Report is intended to complement or supplement what is already in the public domain, not to repeat it.

I thank those persons and organisations who made a submission and those who met with me both formally and off the record to discuss the issues from their perspective and knowledge. I have appreciated their preparedness to think creatively about possible solutions to what is a difficult and complex problem.

Tony Beech

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<sup>27</sup> Submission of Restaurant and Catering Australia, p 2.

<sup>28</sup> Submission of Australian Industry Group, p 3.

## List of Abbreviations

ABCC	Australian Building and Construction Commission
ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ACTU	Australian Council of Trade Unions
ANZSCO	Australia and New Zealand Standard Classification of Occupations
ANZSIC	Australian New Zealand Standard Industrial Classification
AMWU	Australian Manufacturing Workers' Union – WA Branch
AMA (WA)	Australian Medical Association (Western Australia)
Ai Group	Australian Industry Group
AHA	Australian Hotels Association (WA)
ATO	Australian Taxation Office
AWEF	Approved Worker Entitlements Fund
CaLD	Culturally and linguistically diverse
CCIWA	Chamber of Commerce and Industry Western Australia
CFMEU	Construction, Forestry, Maritime, Mining and Energy Union, Construction and General Division (WA Branch)
CPSU/CSA	Community and Public Sector Union / Civil Service Association of WA
DMIRS	Department of Mines, Industry Regulation and Safety
ELC	Employment Law Centre of Western Australia Inc.
FCCA	Federal Circuit Court of Australia
FTE	Full time equivalent
FW Act	<i>Fair Work Act 2009</i> (Cth)
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
HIA	Housing Industry Association
HRMC	HM Revenue & Customs (United Kingdom)
IEU	Independent Education Union of Australia - WA Branch
IMC	Industrial Magistrates Court of Western Australia
WA IR Act	<i>Industrial Relations Act 1979</i> (WA)



LSL Act	<i>Long Service Leave Act 1958 (WA)</i>
Master Builders	Master Builders Association of Western Australia
MCE Act	<i>Minimum Conditions of Employment Act 1993 (WA)</i>
MUA	Maritime Union of Australia West Australian Branch
MWTF Report	Migrant Workers' Taskforce Report
NES	National Employment Standards in the <i>Fair Work Act 2009 (Cth)</i>
NRA	National Retail Association
PSLR	Private Sector Labour Relations Division of DMIRS
R&CA	Restaurant & Catering Australia
SWP visa	Seasonal Worker Programme visa
SDA	Shop, Distributive and Allied Employees' Association, Western Australian Branch
TFN	Tax File Number
The Minister	Hon. Bill Johnston MLA, Minister for Mines and Petroleum; Energy; Industrial Relations
WACOSS	Western Australian Council of Social Service
WAIRC	Western Australian Industrial Relations Commission
WHM visa	Working Holiday Maker visa

## Background to the Inquiry

### Establishment of the Inquiry

The Inquiry into Wage Theft in Western Australia (the Inquiry) was announced by the Hon Bill Johnston MLA, Minister for Industrial Relations (the Minister) on 23 January 2019. The Inquiry commenced on 18 February 2019.

The Minister appointed Mr Tony Beech, former Chief Commissioner of the Western Australian Industrial Relations Commission, to undertake the Inquiry. A Secretariat for the Inquiry was established within the Private Sector Labour Relations Division of the Department of Mines, Industry Regulation and Safety (DMIRS).

### Terms of Reference

The Terms of Reference for the Inquiry are:

The Western Australian Government is committed to ensuring there is a fair safety net of wages and entitlements for all workers and workers are not denied their legal pay and entitlements through employers engaging in wage theft. Wage theft is the systematic and deliberate underpayment of wages and entitlements to a worker.

The Inquiry into Wage Theft in Western Australia is to consider and make recommendations to Government on the following terms of reference:

1. Whether there is evidence of wage theft occurring in Western Australia, and the various forms wage theft may take.
2. What are the reasons wage theft is occurring, including whether it has become the business model for some organisations.
3. What is the impact of wage theft on workers, businesses which are compliant with employment laws, and the Western Australian community and economy.
4. Whether wage theft is more prevalent in particular industries, occupations, forms of employment/engagement or parts of the State.
5. Whether the current State and federal regulatory framework for dealing with wage theft is effective in combating wage theft and supporting affected workers.
6. Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.
7. Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.
8. Whether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the federal jurisdiction.
9. Other matters incidental or relevant to the Inquirer's consideration of the preceding terms of reference.

### Call for submissions

A notice seeking submissions to the Inquiry appeared in *The West Australian* newspaper on Saturday 16 February 2019, and in twelve Community Newspapers in the week commencing 18 February 2019.

A media statement was released by the Inquiry encouraging submissions from Western Australian workers, employers, industrial relations stakeholders and community organisations.

The Inquiry website was established which provided information on the Inquiry, including the terms of reference, and details on how to make a submission to the Inquiry via email or post.

A letter was sent to 60 key stakeholders and community organisations, and contact was made via email with backpacker hostels, university guilds, and student services at the metropolitan and regional TAFEs.

The Inquiry and the call for submissions was promoted on the DMIRS social media accounts between 18 February and 27 March 2019. Social media posts encouraged individuals to make a submission and/or complete the online survey.

Submissions were requested by 27 March 2019. This provided a period of approximately six weeks in which the public could provide information to the Inquiry.

Information on the Inquiry and how to make a submission was published on the website in Chinese (Traditional), Chinese (Simplified), Korean and Vietnamese.

### Submissions received

A total of 78 direct written submissions were received of which 47 submissions were from, or related to, individual workers, and 31 were from stakeholder organisations or academics.

In addition to the submissions from individuals made directly to the Inquiry, the Inquiry received a further 41 confidential individual submissions via UnionsWA.

Submissions from individuals were considered confidential, and the Inquiry has not published identifying details of workers or employers. Submissions from organisations were published on the Inquiry website in April 2019, unless confidentiality was requested. The Inquiry chose to not publish certain non-confidential submissions due to the nature of information contained in these submissions.

A list of all non-confidential submissions is at **Appendix 1**.

### Online survey

An online survey form was created on the Inquiry website to enable workers to provide details of their experience of wage theft to the Inquiry. The survey asked questions on the employment in which the worker experienced wage theft and a range of demographic questions.

The survey form is at **Appendix 2** and the results of the survey are analysed in **Appendix 3**. The survey closed on 27 March 2019, the same day as submissions closed.

## **Consultations**

The Inquiry was conducted by way of written submissions. In the course of the Inquiry, I also attended the Workplace Relations Forum hosted by the Chamber of Commerce and Industry of Western Australia (CCIWA) on 13 March 2019; and met with industrial officers representing a range of unions on 20 March 2019. In addition, I met with or spoke to, informally and confidentially, persons with specialist knowledge of some of the issues involved, and with employer organisations, community groups, legal practitioners with an employment law practice, the Chief Magistrate of the Magistrates Court of WA, the Chief Commissioner of the Western Australian Industrial Relations Commission (WAIRC) and the Clerk of the Court of the Industrial Magistrates Court of Western Australia (IMC).

I thank the CCIWA and UnionsWA for arranging for me to speak with them at the meetings they arranged, those persons and organisations who made a submission and also those persons and firms who met with me formally or confidentially. I found these discussions most helpful, and they will recognise in the recommendations in this Report many of the issues they raised with me.

## **Acknowledgements**

Claire Purcell, who was appointed as the Project Manager for the Inquiry, deserves my special thanks for her excellent management of all the administrative issues of the Inquiry and for her attention to detail. The secretariat she managed provided me with essential and professional support, and I thank Isi Somers and those who assisted me so well.

## CONSIDERATION OF THE TERMS OF REFERENCE

### Term of Reference 1

#### **Whether there is evidence of wage theft occurring in Western Australia, and the various forms wage theft may take.**

My consideration of this Term of Reference is set out as follows:

- Published decisions of courts
- Case studies provided by State Industrial Inspectors
- Cases referred to in Fair Work Ombudsman reports
- Fair Work Ombudsman campaign reports
- *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*
- The Inquiry's online survey
- Other reports and surveys
- Submissions made to the Inquiry from organisations
- Submissions made to the Inquiry from individuals
- Consideration

#### **Published decisions of courts**

A review of the cases shows evidence on the public record of systematic and even deliberate underpayment of wages and entitlements in workplaces in WA. The cases mentioned below are intended to be illustrative and are not an exhaustive list.

#### **Kandel v Rul's Pty Ltd t/as Raj Mahal and another<sup>29</sup>**

Mr Kandel was the chef at the Raj Mahal Indian restaurant in East Victoria Park in suburban Perth who was not paid anything at all for 10 months for work performed between October 2015 and August 2016. The report of Mr Kandel's case contains evidence of systematic and deliberate underpayment relevant to this Term of Reference.

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<sup>29</sup> 2018 WAIRC 00400; (2018) 98 WAIG 432.

Mr Kandel's case was the subject of a submission made to the Inquiry by Hall & Wilcox, the law firm which took his case pro bono, and which provided further background to the facts in the Court's decision. I express my thanks for the permission given by the firm to incorporate the submission and additional information into this report of the case. It is convenient to recount the whole of Mr Kandel's case in this Term of Reference even though parts of it raise issues of direct relevance to other Terms of Reference. It is referred to later in those other Terms of Reference.

Mr Kandel is a chef from Nepal who has a limited command of English. He specialises in Indian curries and tandoor. The submission states that he worked part time at the restaurant for an eight month period in 2015 earning a flat hourly rate which was below the minimum rate that applied to him under the national *Restaurant Industry Award 2010*. Mr Kandel's employer told him that superannuation contributions were being made on his behalf, but no evidence was ever provided of this and Mr Kandel never received any pay slips.

In October 2015, the restaurant owner offered Mr Kandel full time employment on wages of \$55,000 per annum subject to two conditions: firstly, that he would not be paid any wages at all until March 2016 at which time he would be back paid in full and, secondly, that if he accepted the offer, he would be sponsored by the restaurant for a permanent visa (at the time, Mr Kandel was on a bridging visa and entitled to work). Mr Kandel accepted the offer and commenced working full time. No written agreement applied to his employment.

From March 2016 onwards, Mr Kandel regularly asked the restaurant owner to pay the wages owed to him, as well as his ongoing wages, but no wages were paid. On 8 August 2016 the restaurant owner summarily terminated Mr Kandel's employment.

Mr Kandel and his wife spoke to some of their friends and they advised the couple that they should contact the FWO and they did so on 27 August 2016. The FWO conducted a mediation between him and the restaurant owner. No settlement was reached at the mediation, with the restaurant owner denying that he had employed Mr Kandel after September 2015.

The FWO gave Mr Kandel the number of Legal Aid WA and he spoke via telephone with them. With assistance from Legal Aid, on 15 December 2016 Mr Kandel lodged a general protections application involving dismissal in the FWC. This application was 'out of time', that is it was made well after the 21-day time limit had passed for lodging such an application. Mr Kandel's reasons for the delay (his poor command of English, his unfamiliarity with Australian law, and the delay arising as he waited for the FWO mediation) were not considered 'exceptional circumstances' to justify the exercise of the FWC's discretion to allow a further period for the application to be made, and his application was dismissed.

As a last resort, Mr Kandel contacted Law Access, a not-for-profit organisation that coordinates the giving of pro bono legal assistance by WA's legal profession. Hall & Wilcox, which has a specialty employment law practice, agreed to assist Mr Kandel.

In September 2017, the law firm filed an underpayment claim on Mr Kandel's behalf in the Industrial Magistrates Court of Western Australia (IMC). A claim of this nature may be made up

to six years after the event, and therefore was not made 'out of time'. Hall & Wilcox briefed a barrister, who acted also on a pro bono basis, to represent Mr Kandel at the hearing.

After two days of hearing, the IMC delivered judgment in favour of Mr Kandel, finding contraventions by both the restaurant and restaurant owner of civil remedy provisions in the *Fair Work Act 2009* (Cth) (FW Act). The non-payments resulted in a loss to Mr Kandel of \$45,609.98, equalling an underpayment of approximately \$1,060 per week over a period of 43 weeks. The IMC found that given the extent of the underpayment the contraventions can only be characterised as egregious and that they were deliberate: the company, through its director, took advantage of the vulnerable immigration status of Mr Kandel to secure a significant financial advantage to itself at the expense of Mr Kandel.

The IMC ordered the company to pay Mr Kandel the sum of \$50,697.86 (together with pre-judgment interest) being the outstanding amount owed to him under the Award. The IMC also ordered penalties against the company in the sum of \$245,864 and against the restaurant owner in the sum of \$49,176.

However, to date no money has been paid to Mr Kandel. Further, the penalties are payable to Mr Kandel, but to date, nothing has been paid. Therefore, despite obtaining an IMC judgment in his favour, together with an order to pay the outstanding amount owed to him and penalty orders totalling \$350,544.55, not a dollar has been paid to Mr Kandel.

Soon after judgment was entered, the Raj Mahal closed down. Efforts are being taken to enforce the IMC's orders. A statutory demand has been served on the company, (which was ignored) and Mr Kandel's lawyers, who continue to act on a pro bono basis, are currently applying for debt appropriation orders in the District Court of Western Australia.

The submission concludes that there is a very real chance that Mr Kandel will not be paid any of the wages he is owed by his former employer, let alone the penalties the IMC found to be justified in the circumstances.

### **Koojedda Carpentry**

In the *Koojedda Carpentry* case which was referred to in the Introduction, the respondent had employed eight persons in a café in Gelorup, and in a delicatessen in Dalyellup, both in Bunbury. The employees were covered by either the national *Restaurant Industry Award 2010* or the national *Fast Food Industry Award 2010*. The underpayments, which were found to be made by the employer deliberately, affected each of the workers, resulting in individual underpayments of between \$505.40 and \$5,193.50, amounting in total to \$20,036.48 over periods of employment lasting no longer than 16 weeks. Some workers were not paid any amount at all. The company was fined \$139,995 and the two directors were personally fined \$3,000 and \$12,000.<sup>30</sup>

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<sup>30</sup> *Fair Work Ombudsman v Koojedda Carpentry Pty Ltd ACN 111 218 476 ATF The Gumley Trust & Ors (No.2)* [2017] FCCA 2577 (26 October 2017).

**Fair Work Ombudsman v Orwill Pty Ltd & Ors<sup>31</sup>**

A deli/café business in High Wycombe, WA was operated on the basis of sponsoring workers under the subclass 457 business visa scheme to work there. The business operated from 2007 and ceased trading about October 2008. The Court found that two employees were often not paid for several months at a time, and even when lump sum payments were made, they were still delayed because payment was ordered to be on a “not before date” some weeks after the end of the period for which they were being paid. Therefore to the extent that the employees were not paid fortnightly, and on the evidence it appears that several months lapsed before they were paid wages, it is apparent that the employer had the benefit of labour for which it did not pay for a significant period of time, and that the employees did not have the benefit of fortnightly wages payments. The Court found no evidence that the contraventions were not deliberate, and did not accept that the contraventions were the result of ignorance on the part of the respondents. The Court imposed penalties of \$12,100 each on the two companies involved and \$2,420 and \$2,200 respectively for two directors.

**Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors<sup>32</sup>**

A company which operated a contract cleaning business in the Perth area, Commercial and Residential Cleaning Group Pty Ltd, deliberately underpaid, or did not pay, three adult workers who were employed on a full time basis as domestic cleaners. The underpayments were \$5,835.92, \$569.57 and \$5,106.17 respectively. The underpayments extended over the entire duration of each of the employees' respective periods of employment, and involved a failure to pay the employees their full and proper entitlements, or in the case of one employee any payment at all, in accordance with the national *Cleaning Services Award 2010* and the FW Act.

The Court’s decision notes that at the commencement of employment, the employer had told the employees that they would not be paid for the first few weeks of employment, and would receive payment for those first few weeks when their employment ended, a practice which is unlawful as employers cannot withhold wages. In any event, it was not honoured by the employer. When the employees did receive payments, those payments were on several occasions less than the full entitlement owing to them.

In this case, each of the employees was a vulnerable worker because they were all Taiwanese nationals in Australia on working holiday visas; they were all from non-English speaking backgrounds; and it may be inferred from the employees’ nationality, visa status and lack of English language skills, that they had limited experience in, and knowledge of, the Australian workplace relations regime and had limited choice in relation to employment positions.

The Court found that the contraventions were deliberate, as part of a deliberate business strategy to engage vulnerable employees, refusing to pay them during their first few weeks of employment, refusing to pay them their full entitlements when they fell due (or at all in one case),

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<sup>31</sup> [2011] FMCA 730 (28 September 2011).

<sup>32</sup> [2017] FCCA 2838 (22 November 2017).



and then refusing to pay outstanding wages owed on the termination of the employment relationship.

The Court noted the serious nature of the failure to pay (and to rectify non-payment of) wages and entitlements, failure to comply with a notice to produce documents, the deliberateness of the contraventions, the vulnerability of the employees, the absence of contrition and the need for specific deterrence in particular and ordered the company to pay penalties of \$361,200, and the two directors were ordered to pay penalties of \$72,240 and \$77,400 respectively.

### **Fair Work Ombudsman v Siner Enterprises Pty Ltd & Anor<sup>33</sup>**

Siner Enterprises operated an Indian restaurant trading as The Curry Tree in Nedlands in WA which deliberately did not pay any wages at all to a 24-year old Indian man on a bridging visa who wanted to gain employment with an employer to sponsor him for a skilled worker visa, and who was engaged as a cook between May 2012 and September 2012. The Court found that the employer knew of the legal obligations to pay the employee the minimum rate of pay and the various entitlements under the national *Restaurant Industry Award 2010* and made a deliberate decision not to pay those entitlements. The Court ordered the company and/or the director to pay the employee the underpayment of \$12,075.62, with interest and payment of the employee's superannuation contributions. The Court imposed penalties of \$174,075 on the company and \$34,815 on its director, and ordered them to be jointly and severally liable for the payment of compensation to the employee of \$17,885.38.

### **Case studies provided by State Industrial Inspectors**

The following case studies were provided to the Inquiry from the Private Sector Labour Relations Division (PSLR) of DMIRS, which is the division containing the State Industrial Inspectors.<sup>34</sup> The case studies are based on findings made by an Industrial Inspector and, given the statutory role of Industrial Inspectors to investigate and secure compliance with State industrial laws and instruments, I consider they have significant evidentiary value for the Inquiry.

#### **Case Study #1**

**Employee profile:** A 21 year-old female migrant worker, travelling around Australia on a 12-month working holiday visa (subclass 417). Towards the end of the visa period she sought to secure 88 days' paid employment in a regional centre to qualify for a further 12-month visa extension.

**Employment offered:** An online advertisement from a sole trader offered overseas workers 88 days farm work in regional Western Australia as a "volunteer" to secure the second year working holiday visa. It offered free accommodation, electricity, water, gas and meals, in addition to providing all paperwork required to prove paid employment (pay slips showing superannuation and taxation paid) in exchange for farm work and additional duties.

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<sup>33</sup> [2017] FCCA 2583 (26 October 2017) and [2018] FCCA 589 (15 March 2018).

<sup>34</sup> State Industrial Inspectors are designated as such pursuant to s 98 of the *Industrial Relations Act 1979* (WA).

**Employee experience:** Throughout the employment, the employee worked a minimum of 40 hours per week and lived in a guest farmhouse about 10 kilometres from the nearest town. The employee's duties included manual labour around the farm as well as domestic duties as directed by the employer.

**Evidence of alleged wage theft:** Although the employer signed the required Employment Verification Form confirming the completion of 88 days' specified work in a regional area, the employee did not receive any pay for the work performed.

After a number of requests for payment and pay slips by the employee, the employer did eventually provide records showing the employee had been paid. However, instead of receiving payment, the employee received an invoice from the employer for food and lodging expenses equalling the value of the employee's outstanding wages.

This model of employment, where an employee "volunteers" in exchange for free board and keep, is contrary to the State *Farm Employees' Award 1985*, which makes provision for a minimum wage and other entitlements. In this case, the employee was entitled to be paid \$692.90 for a 38-hour week, totalling approximately \$10,000 for the period worked.

### Case Study #2

**Employee profile:** A number of young overseas travellers in their 20s and 30s visiting Australia on various visa conditions, including student and holiday visas.

**Employment:** Five employees were engaged by a sole trader as casual food and beverage attendants at a café, which involved greeting customers, taking orders, preparing beverages, clearing tables, using the EFTPOS machine, handling cash and helping out in the kitchen if required.

**Employee experience:** Employees worked up to 20 hours a week on various day or evening shifts between 9am to midnight. In each case, within a few weeks of commencing work at the café the employer began to delay to pay, or only intermittently pay, employees their wages due to "cash flow" difficulties. Nevertheless, employees were asked to continue to work on the undertaking that the employer would pay what was owed to them when business improved. This continued even after the employer knew the business was no longer viable and was to cease trading permanently.

**Evidence of alleged wage theft:** Not only were the wage rates paid by the employer below the minimum wages of the State *Restaurant, Tearoom and Catering Workers Award 1979*, the employer did not pay the employees at all for significant periods worked, resulting in underpayments exceeding \$20,000 over the course of 12 months.

### Case Study #3

**Employee profile:** Two female hairdressers in Australia on various visa conditions, including 457 and working holiday visas.

**Employment:** The employees obtained employment with a sole trader hairdressing salon. The duties included providing advice on hair care and hairstyles, cutting, shaving, trimming and blow drying hair and handling payments from customers.

**Employee experience:** The employees were rostered to work day shifts of approximately 9 hours for normal trading and 11 hours for late night trading. The employees were paid \$100 per day for a significant number of haircuts. For every haircut over the specified number, they were paid extra in accordance with a payment chart. A workplace policy outlined complex rules used by the employer to make unauthorised deductions from pay, for reasons such as arriving late to work or receiving a customer complaint.

After the employees made inquiries about their entitlements, the employer dismissed one of the employees and reduced the other's working hours to one day a week.

**Evidence of wage theft:** The wage rates paid by the employer were significantly below the applicable wages in the State *Hairdressers Award 1989* and below the *Minimum Conditions of Employment Act 1993*. The low rate paid and frequent unauthorised deductions from wages resulted in a cumulative underpayment of approximately \$50,000 over the course of 24 months for the two employees.

### Case Study #4

**Employee profile:** A 32 year-old male migrant worker in Australia on a subclass 457 visa.

**Employment offered:** While still living overseas, a partner of an unincorporated partnership trading as a motor repair business offered the employee work in WA under the terms of a subclass 457 sponsorship visa. The duties included organising the pick-up and drop-off of cars from the workshop for detailing, preparing invoices, attending to customer enquiries, resolving customer service issues, training new employees and monitoring the maintenance of workshop equipment.

**Employee experience:** The employee worked a minimum of 60 hours per week. Although contracted to earn around \$50,000 per year in accordance with the Minimum Salary Level under the visa contract, the employee accepted less than half the amount so that the employer would apply for his permanent residency in Australia.

**Evidence of alleged wage theft:** This arrangement, where an employee "volunteers" or agrees to be paid well below their contractual rate in exchange for permanent residency in Australia, is contrary to the *Industrial Relations Act 1979* and the State *Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award*, which makes provision for a minimum wage and other entitlements.

The employer admitted to underpaying the employee an amount of \$30,352 (plus superannuation) over the course of 12 months and agreed to voluntarily rectify the identified underpayment.

### Case Study #5

**Employee profile:** An overseas couple working in regional Australia on various visa conditions, including a subclass 417 working holiday visa and a student visa.

**Employment:** The employees were engaged and sponsored by an unincorporated partnership as food and beverage attendants in a café. Their duties included preparing food and beverages, cleaning and general waiting duties.

**Employee experience:** The employees worked between 20-70 hours per week on various day and evening shifts between 7am and 7pm. When they commenced employment, the business owner asked them for a loan of \$25,000 because the business was struggling financially. The couple agreed out of fear of losing their visa sponsorship. The owner made small repayments towards the loan by cash and bank transfer in lieu of wages. The couple continued to work for the business in order to maintain their sponsorship and to recoup the amount loaned to the business.

**Evidence of alleged wage theft:** The employees were not paid any wages during their employment with the café. When they did request their wages, the employer made promises to pay when the business had the money to do so. However, the employer ultimately closed the business and moved interstate, advising that the business had no money and could no longer sponsor the visas. The employees were collectively owed around \$60,000 in unpaid wages.

### Case Study #6

**Employee profile:** A young male Australian citizen seeking an apprenticeship.

**Employment offered:** The employee was offered 'labourer' work under a first-year roofing apprenticeship with a sole trader. Duties involved assisting the employer in the construction of roofing frames for residential properties.

**Employee experience:** The employee undertook the work believing it would lead to him being signed up as an apprentice. The employee completed 38 hours with the employer before resigning his employment, as the employer did not provide him with apprenticeship documentation nor pay him for the hours worked.

**Evidence of alleged wage theft:** The *Minimum Conditions of Employment Act 1993* provides that employees are to be paid for each hour worked in a week and, if the apprenticeship had been submitted, the employee would have been entitled to award rates and penalties under the *State Building Trades (Construction) Award 1987*. In this case, the employer did not respond to numerous attempts to recover wages and the employee did not receive any payment for the hours he worked.

Other similar examples of wage theft observed in the WA industrial relations system include employers who offer a period of unpaid work experience, or work at apprentice wages, to workers on the understanding that an apprenticeship will follow the trial period. If the employer then terminates the employment or fails to offer the apprenticeship, the employee receives nothing or receives wages that are below the minimum wage stipulated under the *Minimum Conditions of Employment Act 1993*.

### Cases referred to in Fair Work Ombudsman campaign reports

The report of a FWO compliance campaign in April 2018 of Southern Perth and the Albany-Manjimup region noted it had commenced proceedings against two Han's Cafe franchises as a

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result of the campaign's findings.<sup>35</sup> In one of the restaurants where there had been underpayments of a total of \$67,161.51 for 27 employees over nine months, the Federal Court found the conduct was serious because it was the product of a deliberate decision by the company to deny weekend penalty rates.<sup>36</sup>

In the other restaurant 22 employees, including nine juniors aged between 17 to 19 and seven overseas workers, mostly international students from Vietnam, had been underpaid the sum of \$27,920.<sup>37</sup> The Federal Court found that even after the FWO had advised the employer in 2013 about minimum award wages after receiving an underpayment allegation from a worker, the employer 'chose to disregard her dealings with the FWO in November 2013 and continued to operate the defective wages payment system which she had inherited, recklessly indifferent as to whether she was, thereby, compliant with the Restaurant Award conditions.'<sup>38</sup>

The Court ordered the company to pay a penalty of \$37,500 and a director to pay \$7,500. The Court also ordered all persons engaged by the company who have managerial responsibility for decisions regarding wages and conditions to receive, at the company's expense, training in relation to compliance with wages and entitlements under the modern award and the National Employment Standards.

### Fair Work Ombudsman reports

I mention here some of the reports of the FWO investigations which included workplaces in WA.

#### The 'Harvest Trail' Inquiry

In 2018 the FWO reported on workplace arrangements along the 'Harvest Trail', which consists of the thousands of horticulture and viticulture businesses in every State and Territory in Australia.<sup>39</sup> It followed the seasonal harvesting of fresh fruit, vegetables and wine grapes and workers who follow those jobs around the country. Fair Work Inspectors completed 836 investigations, involving 444 growers and 194 labour hire providers across all states in Australia and the Northern Territory, recovering \$1,022,698 for 2,503 employees. The FWO believes the full extent of worker underpayments is significantly higher than this, but issues like poor record-keeping, cash payments and a transient workforce, meant that the Inspectors were unable to assess and determine the full extent of underpayments in many cases.<sup>40</sup>

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<sup>35</sup> Fair Work Ombudsman, *Western Australia – Southern Perth and Albany-Manjimup Regional Campaign Report*, 2018, p 15.

<sup>36</sup> *Fair Work Ombudsman v Phua & Foo Pty Ltd* [2018] FCA 137 (22 February 2018).

<sup>37</sup> Fair Work Ombudsman, *Western Australia – Southern Perth and Albany-Manjimup Regional Campaign Report*, 2018, pp 15-16.

<sup>38</sup> *Fair Work Ombudsman v Tac Pham Pty Ltd* [2018] FCA 120 (20 February 2018).

<sup>39</sup> Fair Work Ombudsman, *Harvest Trail Inquiry - A report on workplace arrangements along the Harvest Trail*, 2018.

<sup>40</sup> *Ibid*, pp 4-5.

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The FWO Harvest Trail Inquiry report does not specifically identify the extent to which worker underpayments resulted from deliberate conduct by an employer. However deliberate exploitation of seasonal workers engaged under the Seasonal Worker Programme was found. The details in the example (in this case not from WA) given at page 40 of the Harvest Trail Inquiry report shows how underpayments by a labour hire provider in horticulture can occur, and corroborate the similar findings in WA in the research report which is considered below at point 5.<sup>41</sup>

### **Woolworths Trolley Collection Services Inquiry**

In June 2016 the FWO published the report of its *Inquiry into trolley collection services procurement by Woolworths Limited*.<sup>42</sup> The report noted that its chief aim was:

...to comprehensively identify and address the levels and drivers of non-compliance with Australian workplace laws by businesses involved in Woolworths' labour supply chains.<sup>43</sup>

Examining 130 (or 13.5%) of Woolworths' supermarket sites across Australia, the FWO Inquiry found:

- more than 3 in every 4 (79%) of sites visited had indications of some form of non-compliance with workplace laws;
- almost 1 in every 2 (49%) of sites visited presented serious issues, that is multiple indicators of non-compliance;
- deficient governance arrangements contributing to a lack of award knowledge and sub-standard record keeping;
- false, inaccurate or misleading records;
- failure to issue pay slips to workers;
- workers being paid rates as low as \$10 an hour;
- cash payments which disguised the true identities of workers and actual amounts paid to workers;
- manipulation of the identity card system implemented by Woolworths;
- workers vulnerable to exploitation and often complicit in acts of non-compliance; and

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<sup>41</sup> Ibid, p 40.

<sup>42</sup> Fair Work Ombudsman, *Inquiry into trolley collection services procurement by Woolworths Limited*, 2016.

<sup>43</sup> Ibid, p 3.

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- complex labour supply chains with networks of corporate structures and intermediaries to facilitate cash payments, recruitment of vulnerable workers and production of false records.<sup>44</sup>

The FWO Inquiry found these characteristics indicative of an entrenched culture of non-compliance in the Woolworths trolley collection supply chain.<sup>45</sup> The FWO noted that some employees in WA were employed by a sole trader, which means that the employment was under the WA industrial relations system and thus outside the scope of the FWO Inquiry.<sup>46</sup>

### **Southern Perth and Albany-Manjimup Regional Campaign**

In April 2018 the FWO reported on its campaign across Armadale, Kwinana and Rockingham; and Albany, Denmark, Manjimup and their surrounding regions in the south-western tip of WA. The report noted:

Of the 148 businesses audited in the Southern Perth region during the campaign:

- 57 (39%) businesses were not compliant with all requirements
- 39 (26%) businesses were not paying their employees correctly
- 28 (19%) businesses were not compliant with record-keeping and payslip requirements
- \$40 391 was recovered from 21 businesses for 73 employees.

Of the 147 businesses audited in the Albany-Manjimup region during the campaign:

- 76 (52%) businesses were not compliant with all requirements
- 50 (34%) businesses were not paying their employees correctly
- 40 (28%) businesses were not compliant with record-keeping and pay slip requirements
- \$47 379 was recovered from 28 businesses for 147 employees.

A number of compliance and enforcement outcomes resulted from the campaign, including:

- 12 formal cautions were issued
- 14 infringement notices were issued totalling \$6 660
- four compliance notices were issued recovering \$31 324.17 for 20 employees
- the commencement of three litigations as a result of the campaign recovering \$300 491 from three businesses for 71 employees.<sup>47</sup>

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<sup>44</sup> Ibid, pp 3-4.

<sup>45</sup> Ibid, p 4.

<sup>46</sup> Ibid, p 3.

<sup>47</sup> Fair Work Ombudsman, *Western Australia – Southern Perth and Albany-Manjimup Regional Campaign Report*, p 5.

It was this campaign that resulted in the enforcement proceedings against the Hans Café franchises mentioned in point 3 above. It also resulted in enforcement proceedings against a security services company in Rockingham, south of Perth, for underpaying security guards. Underpayments for individual workers ranged from \$227 to \$20,174. Once the legal action had commenced the company back-paid 22 employees a total of \$205,408.40 it had underpaid them between December 2014 and January 2016.<sup>48</sup>

In that matter, Barker J stated:

While I accept there may have been no blatant design to circumvent the law, in a very practical sense it must be said there is little or no real excuse for the contraventions and they occur without any proper or indeed any regard for the award requirements.<sup>49</sup>

The Court imposed penalties of \$81,720 and also ordered workplace relations training for the company's managers.

### **The Kimberley, Augusta-Margaret River, Busselton and Manjimup regions**

In January 2019 the FWO reported on its visit to the Kimberley, Augusta-Margaret River, Busselton and Manjimup regions of WA and its audit of 130 businesses in those locations as part of its national remote and regional locations campaign.

Of these businesses, 90% were compliant with record keeping and pay slip requirements, and 83% of businesses were paying their staff correctly. The FWO recovered \$38,772 for 58 employees in 14 WA businesses included in the campaign.<sup>50</sup>

### **Gascoyne/Mid-West Regional Campaign**

In May 2016 the FWO reported on its education and compliance campaign in the Gascoyne and Mid-West regions of WA. It reported that of the 118 businesses audited during the campaign:

- 66 (56%) were compliant with all requirements; and
- 52 (44%) had at least one error:
  - 26 (22%) related to pay rates;
  - 17 (14%) related to pay slips/records; and
  - 9 (8%) related to both pay rates and pay slips/records.<sup>51</sup>

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<sup>48</sup> *Fair Work Ombudsman v Sureguard Security Pty Ltd* [2017] FCA 1566 (22 December 2017).

<sup>49</sup> *Ibid*, para 57.

<sup>50</sup> Fair Work Ombudsman, *National remote and regional locations campaign*, 2019, p 12.

<sup>51</sup> Fair Work Ombudsman, *WA – Gascoyne/Mid-West Regional Campaign 2015, 2016*, p 5.



The campaign identified 52 businesses with a total of 80 individual errors. The most common errors related to penalties, loadings and allowances (39%), followed by pay slip errors and underpayment of hourly rates (both 26%).<sup>52</sup>

### ***Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry***

A 2019 research report *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (Horticulture Report) authored by Joanna Howe, Stephen Clibborn, Alexander Reilly, Diane van den Broek and Chris F Wright provides further evidence of wage theft occurring in WA.<sup>53</sup> In this context, the term 'horticulture' covers farms that grow tree and vine crops such as pome fruit, stone fruit, citrus, wine and table grapes and vegetables.

The Horticulture Report notes the horticulture industry is reliant on workers to pick, pack and grade fresh produce with the bulk of the seasonal horticulture workforce in Australia drawn from different types of temporary visa holders. Evidence suggests that the workforce that sustains this industry is poorly regulated and managed. The research was conducted between 2016 and 2018, and involved a national survey of vegetable growers.<sup>54</sup>

Relevant to this Term of Reference, one of the regional case studies undertaken as part of the report is the Wanneroo production area north of Perth, an area characterised by a high number of small horticultural properties. It found that growers reported substantial challenges in meeting labour needs and relied heavily on intermediaries to access workers to pick their crops. The Horticulture Report states that many of the labour hire providers in Wanneroo either supplied undocumented workers or were reportedly not legally compliant in how they paid workers.<sup>55</sup>

Growers reported feeling powerless to ask to see pay slips of the employees, or require compliance with correct wages, as they felt the providers would then penalise them in the future by sending them fewer or poorer quality workers. They felt they had no alternative to non-compliant labour hire providers as otherwise they would not be able to source enough workers.<sup>56</sup>

The Horticulture Report noted one labour hire provider, which made a point of being compliant with wage rates and conditions, saying that although that provider did the right thing, they have not been able to grow in business because there are so many 'dodgy operators' in the industry.<sup>57</sup> The report noted that many growers relied on labour hire providers in order to avoid the time-

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<sup>52</sup> Ibid, p 7.

<sup>53</sup> Joanna Howe, Stephen Clibborn, Alexander Reilly, Dianne van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, University of Adelaide and University of Sydney, 2019.

<sup>54</sup> Ibid, p 2.

<sup>55</sup> Ibid, p 27.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid, p 28.

consuming administrative aspects of running a business, rather than as an explicit attempt to reduce labour costs.

A 'stakeholder perspective on labour hire non-compliant practices' from Wanneroo was the observation that many growers are stuck with labour hire providers renowned for phoenixing:<sup>58</sup>

So what they'll do is say okay I'm going to collect whatever it is, \$22 to \$23 an hour off the farmer where technically it needs to be \$27 for the money to cover all your obligations. But I know that some of these guys [labour hire intermediaries] charge out at may (sic) \$21, \$22, \$23 an hour. Now what they do is they pay cash to the workers so the worker ends up with about \$13–\$14 net ... they [the labour hire intermediary] don't pay payroll tax, they wait till the end of the financial year, they just close the company down before submitting any tax returns then start up another brand new company under their brother's name or some rubbish like that and then they just continue on.<sup>59</sup>

### The Inquiry's online survey

An overview of the Inquiry's online survey is provided in the Background to the Inquiry chapter, a copy of the survey is at **Appendix 2** and a detailed analysis of the survey results is at **Appendix 3**.

Approximately half (51.6%) of survey respondents to the Inquiry's online survey had experienced wage theft within the last year, with a further 24.2% experiencing the wage theft more than six years ago. The survey asked respondents to select one or more types of wage theft that they had experienced. The categories were:

- underpayment of base pay rates (being paid less than the legal minimum or award wage);
- unpaid hours (not being paid for all hours worked, including for time spent training and on work meetings, and unreasonable length of work trials);
- unpaid or underpaid penalty rates (not being paid penalty rates required by the relevant award for working on weekends, public holidays or outside of ordinary hours);
- unreasonable deductions (having part of your pay unlawfully withheld, or being unlawfully required to pay back an amount);
- withholding of other entitlements (not being allowed to take breaks, or not being paid leave to which you were entitled);
- unpaid superannuation; and

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<sup>58</sup> Illegal phoenix activity is when a new company is created to continue the business of a company that has been deliberately liquidated to avoid paying its debts, including taxes, creditors and employee entitlements. [www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/](http://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/)

<sup>59</sup> Joanna Howe, Stephen Clibborn, Alexander Reilly, Dianne van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, University of Adelaide and University of Sydney, 2019, p 31.

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- 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).

The most frequent forms of wage theft identified by respondents were:

- 18.2% unpaid or underpaid penalty rates;
- 17.6% underpayment of base pay rates; and
- 17.4% unpaid hours.

### Other reports and surveys

#### The National Temporary Migrant Work Survey

Two reports were published in 2017 and 2018 detailing the results of the National Temporary Migrant Work Survey.<sup>60</sup> This survey was a comprehensive study of wages and working conditions experienced by temporary migrant workers, undertaken by Laurie Berg from the University of Technology Sydney and Bassina Farbenblum from UNSW Sydney. The survey received a total of 4,322 responses covering workers in all States and Territories.

The 2017 report *Wage Theft in Australia – Findings of the National Temporary Migrant Work Survey* revealed that a substantial proportion of international students, backpackers and other temporary migrant workers were paid roughly half the legal minimum wage in their lowest paid job in Australia.<sup>61</sup>

The report noted that the study ‘confirms that 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.’<sup>62</sup> Key findings of the study were that:

- 30% of the survey participants were earning \$12 per hour or less for casual work, and 46% of survey participants were earning \$15 per hour or less;<sup>63</sup>

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<sup>60</sup> 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, 2017, and 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, 2018.

<sup>61</sup> Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia – Findings of the National Temporary Migrant Work Survey*, 2017, p 5.

<sup>62</sup> *Ibid*, p 7.

<sup>63</sup> *Ibid* p 24. At the time of the survey, the national minimum wage for a full time or part time worker was \$17.70 per hour, and casual worker was \$22.13 per hour. The award rate for an adult casual fast food employee was \$24.30 per hour Monday – Friday.

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- 38% of survey participants received their lowest wage while working in cafés, restaurants and takeaway shops, and other noticeably low paying businesses were convenience stores, petrol stations, car washes, and cleaning;
- large-scale wage theft occurred across a range of industries, with the worst paid jobs being fruit and vegetable picking and farm work jobs with almost 15% of survey participants earning \$5 per hour or less, and 31% earning \$10 per hour or less in these industries; and
- international students working more than 20 hours per week (potentially breaching visa conditions), were offered substantially lower wages than other students.<sup>64</sup>

## 7-Eleven

The increased attention being paid in Australia to the systematic and deliberate underpayment of wages and entitlements to a worker also resulted from the very public exposure of widespread and deliberate underpayment of employees of 7-Eleven franchisees. 7-Eleven franchises operate nationwide including in WA.

In June 2014 the FWO commenced an inquiry into 7-Eleven Australia following claims of systematic non-compliance in the 7-Eleven network. That inquiry found that a number of franchisees had been deliberately falsifying records to disguise the underpayment of wages and that 7-Eleven’s approach to workplace matters, while seemingly promoting compliance, did not adequately detect or address deliberate non-compliance.<sup>65</sup>

In the MWTF Report it was concluded that wage exploitation was systemic across the 7-Eleven network and that the majority of stores were involved.<sup>66</sup> The same conclusion was stated in *Remedies for Migrant Workers Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program* where Berg and Farbenblum state that ‘the exploitative and fraudulent practices, including systemic underpayment and falsification of pay records, appeared to be widespread across the 626 franchisee-run stores nationwide.’<sup>67</sup>

## Other reports

A number of scholarly studies and FWO reports which do not specifically focus on WA were drawn to the Inquiry’s attention and are referred to in my consideration of the later Terms of Reference. A bibliography is at **Appendix 4**.

In particular, I draw attention to the MWTF Report published in March 2019. The examples in the cases and case studies include many where the workers were migrant workers and temporary

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<sup>64</sup> Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia – Findings of the National Temporary Migrant Work Survey*, 2017, pp 5-7.

<sup>65</sup> Fair Work Ombudsman, *Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, 2016, p 4.

<sup>66</sup> *Report of the Migrant Workers’ Taskforce*, 2019, p 39.

<sup>67</sup> Laurie Berg and Bassina Farbenblum, *Remedies for Migrant Workers Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program* (2018) 41(3) Melbourne University Law Review.

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visa holders and the MWTF Report contains many conclusions which are relevant to the Inquiry. I refer to the MWTF Report in later Terms of Reference.

### **Submissions made to the Inquiry from organisations**

#### **Organisations representing workers**

Some of the submissions received from organisations representing workers include case studies which provide anecdotal evidence of wage theft in WA as seen by them. In each case, I refer only to one or two of the case studies submitted by way of illustration.

#### UnionsWA

UnionsWA undertook a survey of union members and supporters in the WA community in order to assess the extent of wage theft and find examples to provide the Inquiry with a comprehensive sense of the problems in WA. This was done using a relatively simple online survey tool. A total of 50 responses to that survey were provided to the Inquiry. An analysis of the results showed:

- 23 of the responses reported unpaid hours;
- 18 responses reported underpayment of base rates;
- 14 reported unpaid or underpaid penalty rates; and
- 13 reported unpaid superannuation.

#### Employment Law Centre

One of many 'case studies' ELC provided in its submission is the following:

Example: Case study of Yusuf (not his real name)

Yusuf was a newly arrived migrant from a NESB [Non-English Speaking Background] on a visa performing cleaning services on a permanent full-time basis for a labour hire company in regional Western Australia.

- Yusuf was required to work an average of 85 hours per week across seven days a week.
- He was paid approximately \$750 per week, equating to less than \$9 per hour, which is significantly below his minimum wage entitlement.
- He was never paid any penalty rates or overtime, which he was entitled to under an award, and did not receive any pay slips.
- Yusuf raised the issues of his wages, hours and pay slips with his employer.
- The employer responded by saying the employer would look to hire another worker if Yusuf was not happy.
- After repeated requests, the employer provided Yusuf with inaccurate pay slips, which stated Yusuf worked just 38 ordinary hours per week.

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- Yusuf sought legal advice and, when the employer found out about this, the employer terminated his employment.
- Yusuf is not currently pursuing his claim against the employer, as he is fearful that any action he takes could adversely impact upon his visa status.
- It is estimated Yusuf is owed tens of thousands of dollars in unpaid minimum entitlements including wages, penalty rates, and annual leave.<sup>68</sup>

ELC submitted that over the 2017 - 2018 financial year, ELC assisted a total of 4,336 callers. Of these 3,568 (representing 82.3%) raised issues of underpayment of wages and entitlements occurring in various forms. The main forms in ELC's experience are:

- non-payment or underpayment;
- unreasonable deductions (involving a worker having part or all of their pay unlawfully withheld or being unlawfully required to pay back an amount said to be due and owing, often in relation to accommodation, training, uniforms, food, transport and visa costs);
- withholding of entitlements;
- unpaid superannuation or taxation; and
- sham contracting arrangements.<sup>69</sup>

### Western Australian Council of Social Service (WACOSS)

In preparation for its submission, WACOSS sought real-life examples of incidents of wage theft from people throughout its networks. One example from the WACOSS submission is as follows:

We also received the stories of three Subclass 457 visa holders who had each been significantly underpaid and denied their entitlements. All three workers were employed as tilers.

The first, who was employed between June 2016 and May 2017, was not paid salary entitlements to the value of \$19,027.36. This included unpaid wages and annual leave. During that period, his employer failed to provide him with payslips and failed to make any contributions to the worker's superannuation fund. The employer alleged that the payments were delayed due to cash flow problems. After the worker engaged legal assistance, a settlement was negotiated and the employer paid the entire amount claimed.

The second tiler was the subject of wage theft from approximately May 2014 to April 2016. The employer hired him on the verbal agreement that in exchange for visa sponsorship he would not be paid the full salary stipulated in his contract of employment. Under his contract, his annual salary was \$94,400, but he was instead paid approximately \$60,000 per annum. In addition to unpaid wages and forced 'cash back' payments to his employer, the worker was

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<sup>68</sup> Submission of Employment Law Centre, p 15.

<sup>69</sup> Ibid, pp 13-16.

required to pay for his own insurance. That total value of his claim across his entire period of employment was approximately \$93,000. The matter was settled privately.

The third was the subject of wage theft from December 2016 to February 2019. He was required to pay all costs in relation to his Subclass 457 visa application, including:

- The Standard Business Sponsorship and Nomination application fees payable to the Department of Home Affairs;
- The migration agent's fees for the Standard Business Sponsorship and Nomination applications; and
- Payments towards staff training, as a requirement for the employer obtaining approval as a Standard Business Sponsor.

Under the Migration Act 1958, all of the above costs must be paid by the employer, not the visa applicant. The employer required the worker to pay all of these costs in exchange for visa sponsorship.

The worker was also required to make regular cash payments to his employer and was not paid for a number of hours worked. He was never paid annual leave, sick leave for any days absent from work due to illness, and was not paid all superannuation amounts owed to him. The worker calculated the amount owed to him to total approximately \$50,600. So far, no outcome has been reached.<sup>70</sup>

Referring to the 2017 National Temporary Migrant Survey, WACOSS submits:

The survey results outlined a number of other exploitative practices by employers of temporary migrant workers, including confiscating their passports, requiring them to pay money to obtain the job, threatening to report them to [the] Immigration Department, and requiring workers to return part of their payment to the employer in cash.<sup>71</sup>

### The Humanitarian Group

This WA not-for-profit organisation, which focusses on empowering vulnerable people by providing professional and accessible migration assistance, legal advice and education, also provided a submission to the Inquiry. The Humanitarian Group submission states that it has grown to be a primary provider of specialist legal services in Western Australia to people new to Australia from culturally and linguistically diverse (CaLD) backgrounds. The Humanitarian Group's clients are diverse in terms of culture, religion, level of education, language(s) spoken, levels of skills or qualifications and social or political backgrounds.

The Group's submission included nine case studies. The Group's submission is published, and I reproduce below one case study by way of illustration.

Prija came to Australia on a temporary partner visa. She spoke no English and was hired to work in a restaurant as a dishwasher. She had no formal contract of employment. She worked

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<sup>70</sup> Submission of Western Australian Council of Social Service, pp 1-2.

<sup>71</sup> Ibid, p 6.

in the kitchen for three weeks and was paid for the first two weeks in cash. However, no payments were made after that. She enquired about the missing pay with her employer and the employer stated that the business was not doing well therefore he could not afford to pay her. The employer denied that she was ever an employee and refused to engage in dispute resolution. Although Prija attempted to obtain assistance from the Fair Work Ombudsman, they were not able to assist because there was no proof of employment. Prija also attempted to obtain assistance from community legal centres but struggled to access services due to long wait times and difficulty accessing advice on telephone advice lines as a result of her language and cultural barriers. Prija's vulnerabilities meant that she did not feel confident in pursuing her unpaid wages.<sup>72</sup>

### United Voice

The United Voice submission states that employees' experiences of wage theft include:

- labour hire and outsourcing;
- unpaid hours;
- underpayment or non-payment of minimum entitlements;
- unpaid superannuation; and
- underpayment of temporary migrant workers.<sup>73</sup>

The United Voice submission refers to an example of a scenario where 'a large retail building may be cleaned regularly by cleaners, engaged by a labour hire firm, who are being underpaid or exploited, but ultimately the retailer bears no responsibility for those employees – or that exploitation.'<sup>74</sup> It describes the practice as being common in the security and cleaning industries.

United Voice refers to workers not being engaged as an employee, but rather being required to register as an independent business and be engaged as a contractor. The United Voice submission also refers to employers refusing to pay employees for the full number of hours worked. This frequently takes the form of refusing to pay for time spent preparing for work, for example handover time, or for cleaning up a workplace at the end of a day or shift. It is also where employees are required by their employer to work but their working hours are not recorded in full, for example where an employee is required to sign off but then continue working. This seems to be a particular issue for those on annualised salary in the hospitality industry.<sup>75</sup>

The United Voice submission also refers to:

- underpayment or non-payment of minimum entitlements, and gives an example of a care worker in a large aged care provider in a residential facility being required to complete

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<sup>72</sup> Submission of The Humanitarian Group, p 6.

<sup>73</sup> Submission of United Voice, pp 4-15.

<sup>74</sup> Ibid, pp 4-5.

<sup>75</sup> Ibid, p 7.



mandatory training online but given insufficient time during her work to do so, thus obliging the employee to complete the training online during her lunch break or later at home for which she is effectively not paid;

- classifying workers lower than their qualification;
- the non-payment of penalty rates in the hospitality industry, which the union describes as 'rife';
- issues of unpaid superannuation as being an associated part of the underpayment of wages. It believes that the current superannuation threshold of employers being required to pay superannuation to workers who earn more than \$450 per month is a problem when there is an increasing casualisation of workers. In some areas such as aged care and disability services, many workers now have to work for a number of employers in order to earn a living wage and, depending on the nature and availability of work from month to month, some may not earn the minimum threshold with some or all of their employers and therefore receive no superannuation payments; and
- the underpayment of temporary migrant workers and that these workers are more vulnerable to workplace exploitation than their local counterparts and also face higher barriers to accessing remedies. United Voice states that temporary migrants fear that any complaint about working conditions to a Fair Work Inspector will always be accompanied by the risk that the matter may also be reported to the Department of Immigration and Border Protection. International students also fare badly.<sup>76</sup>

The United Voice submission refers to the continuance of a variety of transitional instruments consisting mainly of old 'Work Choices' collective agreements and Australian Workplace Agreements which continue to have legal effect and which allow employers to pay below the modern award safety net minimum standard.<sup>77</sup>

United Voice also made a submission regarding junior rates where employers are engaging juniors between 16 to 21 years of age to save costs whilst maintaining the expectations that these employees would undertake the same duties as those paid at an adult rate of pay.<sup>78</sup>

The union also made submissions regarding the growing exploitation associated with labour hire, sham contracting and similar deregulated employment arrangements and government contracts. It made a number of suggestions and recommendations.<sup>79</sup>

#### Shop, Distributive and Allied Employees' Association Western Australian Branch (SDA)

In the retail industry, where the SDA submits that wage theft is prevalent, the SDA notes that wage theft often takes different forms depending on the employer. The SDA states that with

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<sup>76</sup> Ibid, pp 9-16.

<sup>77</sup> Ibid, p 17.

<sup>78</sup> Ibid, p 21.

<sup>79</sup> Ibid, p 23.

large employers, wage theft 'often takes the form of misclassification of a worker's role (such that they are on a lower pay bracket), non-payment of allowances and requiring workers to work through breaks or after their shifts have concluded.'<sup>80</sup>

The SDA submission provided a case study from 2016, in which the SDA represented a member born overseas with English as a second language who was working in the fast food industry on a higher education sector visa. The member's employer was a national system employer and a franchisee of a well-known fast food brand. The national *Fast Food Industry Award 2010* applied. When the member attended an interview with the employer, the employer asked the member if she wanted to work for cash or with a tax file number; inferred it could circumvent the visa requirement not to work more than 40 hours per fortnight by giving her more hours but concealing it on the roster; told the member she would receive a flat rate of \$15 per hour; and told the member she would be required to complete three days' unpaid training.

When the member commenced work the employer required the member to work 23 shifts for the employer in the first month but did not pay the member any wages. On two occasions the member asked the employer to be paid wages and after the second occasion the employer stopped rostering the member and when the member asked the employer why, the employer responded that there were concerns with the member's performance. The SDA instituted proceedings on the member's behalf which were discontinued by reason of the parties settling the matter.<sup>81</sup>

### Community and Public Sector Union / Civil Service Association (CPSU/CSA)

The CPSU/CSA submission defined wage theft broadly, being when an employee is denied the wages, salary or benefits that they are entitled to under law. The submission states that wage theft in the public sector is usually more invisible than wage theft in the private sector, but that CPSU/CSA members advise that wage theft in the public sector usually involves one or more of the following three features:

- underpayment of allowances such as on-call allowance;
- being classified at a lower level than is justified by the work value; and
- excessive hours including working into the evenings and weekends.<sup>82</sup>

The submission refers to workloads and unpaid overtime, and to the underpayment of on-call allowances for staff whose job duties regularly required them to be accessible and available on an on-call basis.<sup>83</sup>

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<sup>80</sup> Submission of Shop Distributive and Allied Employees' Association, p 12.

<sup>81</sup> Ibid, p 14.

<sup>82</sup> Submission of CPSU/CSA, p 3.

<sup>83</sup> Ibid, pp 4-6.

The CPSU/CSA submission referred to excessive hours of unpaid work, stating: ‘However, there is enormous pressure on staff to falsify their time sheets to ensure that they are seen as performing job duties well.’<sup>84</sup>

The union also referred to labour hire in the public sector, and the need for public sector departments and agencies to oversee the supply chain.<sup>85</sup>

### Independent Education Union (IEU)

The IEU refers to ever-increasing teaching and non-instructional workloads experienced by members without financial compensation or time in lieu, and provides examples. A specific example given related to a Groundsperson who was advised on engagement that there was no money in the budget to pay overtime for additional hours worked and he was directed to take time off in lieu of any payments. Over time the Groundsperson amassed approximately 100 hours of time off in lieu. When the Groundsperson then suffered a workplace injury and left the employment with a workers’ compensation settlement the employer refused to pay out any of the time in lieu.<sup>86</sup>

### Australian Manufacturing Workers' Union – WA Branch (AMWU)

The AMWU submits wage theft that affects employees or a group of employees in high-density union sites will tend to be more 'technical' breaches to do with the interpretation of an award or enterprise agreement provisions.<sup>87</sup>

The union made a submission regarding members in precarious work and migrant workers being particularly vulnerable to wage theft, recommending that the State Government invest resources into agencies or bodies that support migrant workers in employment law matters; support the recommendations in the MWTF Report; and consider greater industrial protections for workers engaged in precarious work.<sup>88</sup>

### Construction, Forestry, Maritime, Mining and Energy Union Construction and General Division WA Branch (CFMEU)

The CFMEU says that the building and construction industry is characterised by many small employers who compete within complex systems of contracting and subcontracting. It submits that intense competitive pressures amongst contractors lead to them seeking unfair competitive advantage in order to win contracts, and consequently wages and other employment entitlements become the predominant basis upon which the employers compete. The union

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<sup>84</sup> Ibid, p 8.

<sup>85</sup> Ibid, p 13.

<sup>86</sup> Submission of Independent Education Union, pp 3-4.

<sup>87</sup> Submission of Australian Manufacturing Workers’ Union, p 3.

<sup>88</sup> Ibid, p 5.

refers to the use of sham contracting, pyramid contracting, deliberate and pre-meditated use of corporate insolvencies and fraudulent phoenix activity.<sup>89</sup>

The union notes that the State Government outsources the delivery of projects and submits that it should do so ethically, responsibly and in line with expectations of proper behaviour.<sup>90</sup>

### Australian Medical Association (Western Australia) (AMA (WA))

The AMA (WA)'s submission is that doctors-in-training are regularly required to work additional hours beyond their contracted hours. An AMA (WA) survey in 2019 identified 61% of doctors-in-training had worked 81 hours or more the previous fortnight. However, although the unrostered overtime should be authorised and paid according to the provisions of the applicable Enterprise Agreement, the AMA (WA) believes only 7% of doctors-in-training 'always' claim payment for unrostered overtime.<sup>91</sup>

The AMA (WA) also referred to doctors-in-training being instructed to commence work prior to their officially rostered start time. These hours are not recorded by the employer and doctors-in-training are not remunerated for these additional hours and they are not paid any applicable overtime, shift or roster breach penalties that may apply to the hours worked.<sup>92</sup>

The submission also refers to the health system failing to pay a loading obliged to be paid under the Agreement where less than eight hours is available between periods of rostered duty; and to the misclassification of doctors.<sup>93</sup>

### Professionals Australia

The Inquiry received a submission from Professionals Australia, an organisation registered under the FW Act representing over 25,000 professionals including for example professional engineers, scientists and veterinarians, and also translating and interpreting professionals. The submission concerns the work of translators and interpreters.

It submits that the State Government employs interpreters 'through labour hire agencies for the public sector and government agencies ranging from education, health, justice, child protection and prisons'. The submission states that this is done in a way that 'encourages language service providers and government agencies to underpay interpreters' because suppliers of language services under the 'Common Use Arrangement' charge too little to be able to pay employee interpreters the minimum award entitlement. It suggests two options, namely that the State Government establish its own language service agency, and that future procurement contracts specify minimum wages and conditions.<sup>94</sup>

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<sup>89</sup> Submission of CFME, pp 2 -9.

<sup>90</sup> Ibid, p 12.

<sup>91</sup> Submission of Australian Medical Association (WA), pp 2- 3.

<sup>92</sup> Ibid, p 3.

<sup>93</sup> Ibid, p 4.

<sup>94</sup> Submission of Professionals Australia, pp 1-2.

## **Organisations representing employers or businesses**

### Housing Industry Association

In relation to whether there is evidence of wage theft occurring in WA, the HIA, which represents the interests of the residential building industry, states that it is ‘unaware of wage theft occurring in the residential building industry’ and that ‘In HIA’s experience employers in the residential building industry aim to do the right thing by their employees’.<sup>95</sup> It makes submissions which address other terms of reference, and those submissions are referred to later.

### Master Builders Association of Western Australia

Master Builders submits that ‘the proposition that there is ‘wage theft’ in the building and construction industry is unsubstantiated and not supported by evidence.’<sup>96</sup> It refers to the information on recovery of unpaid worker entitlements on the DMIRS website, FWO compliance checks, including the National Building and Construction Industry campaign 2014/15, and submits there is little hard evidence to warrant any implication of there being widespread or endemic deliberate wage theft in the WA labour market. Master Builders acknowledges there are some cases of worker exploitation, but these are not statistically significant compared to the number of employers nationally.<sup>97</sup>

### Australian Hotels Association (AHA)

The AHA, which represents over 80% of the hospitality industry in WA, submits that ‘there is no evidence of systemic, systematic or deliberate underpayment of pay and/or entitlements in Western Australia’ and that in AHA’s experience, ‘it is exceptional to liaise with any Members who are non-compliant, and avoiding their obligations as an employer, in a deliberate and systematic manner.’<sup>98</sup> Rather, any underpayment generally arises from lack of knowledge or understanding of employment obligations rather than from deliberate wrongdoing.

### Restaurant & Catering Australia

R&CA, the national industry association representing the interests of over 4,000 café, restaurant and catering businesses in WA, believes that the difficulties some business-owners experience in understanding their workplace obligations contributes to some genuine errors and oversights being made – termed in the submission as ‘accidental non-compliance’.<sup>99</sup>

### Ai Group

Ai Group, a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors, is strongly of the view

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<sup>95</sup> Submission of Housing Industry Association, p 4.

<sup>96</sup> Submission of Master Builders Association, pp 7-9.

<sup>97</sup> Ibid.

<sup>98</sup> Submission of Australian Hotels Association, p 3.

<sup>99</sup> Submission of Restaurant & Catering Australia, p 4.

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that ‘the vast majority of employers strive to pay their workers correctly and often join industry groups like Ai Group for advice about how to do so.’<sup>100</sup>

### NRA

The NRA observes that data on the incidence and extent of wage non-compliance is limited because it is impossible for government agencies to inspect the wage records of all businesses, and a business operator is unlikely to voluntarily disclose that they have engaged in such activity. The NRA submits that therefore the data that exists relates only to incidents of wage theft ‘reported, litigated or otherwise brought into the realm of public knowledge’.<sup>101</sup> Data in the form of the FWO audit reports, although only audits of samples, sheds some light on the incidence of wage theft around the nation. The NRA notes that comparing the campaigns by the FWO from the early days of the FW Act until the more recent campaigns in 2018 and January 2019, 76% of employers who had been previously audited were now fully compliant with their monetary obligations.<sup>102</sup>

The NRA submits that compared with other States and Territories, WA performed below average until 2019 when it became the best performer.<sup>103</sup> In the NRA's view, there are some business operators who by the material filed in the courts, unrepentantly engage in wage non-compliance. In the NRA's experience the overwhelming majority of businesses intend to be, and generally believe themselves to be, compliant.<sup>104</sup>

The NRA also notes that as far as WA is concerned, data from the FWO can only relate to employers in the national system and the absence of any data relating to employers in the WA industrial relations system means that only an incomplete picture of the incidence of wage non-compliance in WA is possible.<sup>105</sup>

The NRA considers three forms of wage non-compliance include: unpaid superannuation; the misuse of Australian Business Numbers (ABNs); and sham contracting. The submission notes that the misuse of ABNs and sham contracting typically go hand in hand ‘as unscrupulous entrepreneurs seek to take advantage of the mere fact that an employee has an ABN - regardless of whether the employee is actually operating a bona fide business.’ The NRA submits this is not something that the NRA sees occurring commonly in the retail sector. Rather, the submission notes that in that sector non-compliance is likely to be because of applying the wrong modern award, classifying the employee at too low a level under the modern award, or not paying discrete allowances as and when they are applicable, and classification creep.<sup>106</sup>

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<sup>100</sup> Submission of Australian Industry Group, p 7.

<sup>101</sup> Submission of National Retail Association, p 3.

<sup>102</sup> Ibid, p 4.

<sup>103</sup> Ibid, p 6.

<sup>104</sup> Ibid, p 7.

<sup>105</sup> Ibid, p 7.

<sup>106</sup> Ibid, p 7.

## **Submissions made to the Inquiry from individuals**

The Inquiry received 47 email submissions from individuals. Some submissions were written to ask for the Inquiry's assistance to resolve their particular circumstances. The Inquiry is not able to provide that assistance and in each case the writer was sent information about the appropriate State or Commonwealth Government department which is able to provide such assistance.

Some submissions do not indicate systematic and deliberate underpayment of the wages or entitlements lawfully due to the writer, and therefore I consider these are outside the scope of the Inquiry. Brief reference is made to them in **Appendix 5**.

In all cases however, I sincerely thank those who made a submission for the time and thought involved. In each case, the content of the submission gave an insight into the workplace issues seen by the writer as important enough to be drawn to the Inquiry's attention.

The following summary lists the form of the underpayment raised, and the industry or occupation of the writer. Some submissions raised more than one type of underpayment. The submissions represent merely the viewpoint of the writer and I make no findings of fact in relation to the submissions.

### **Underpayment of wages:**

- An anonymous submission wrote of a regional real estate business not paying their employees correctly, that 3 employees took legal action and had to pay their legal fees incurred in pursuing their entitlements, and other matters.
- A beauty therapist who signed a contract to be paid \$19 per hour was not paid for the time worked, and subsequently was advised the correct rate should have been \$25.48 per hour for weekdays.
- A casual employee in a call centre in the south-west of WA was paid less than the applicable award between February and December 2018, however the employer does not acknowledge which award is applicable, and no award is displayed in the workplace. The staff are merely informed that 'there would be a change to the pay structure and that we would no longer be being paid commissions'.

### **Unpaid work:**

- A nurse noted that casual nursing staff can have so much work to do during a shift that they may work up to an hour to complete tasks after handover. This happens every day, there is no overtime paid.
- A venue manager for a restaurant whose contract was for a 38 hour week was told by the employer that 50 hours per week minimum was expected for the wage being paid and if it was not worked the manager would be fired. The manager states that they rarely worked less than 40 hours per week, and usually worked 50 hours plus and even up to 75 hours in summer was not uncommon.

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- Activities associated with opening the business in the morning, taking between 20 and 40 minutes per day are required to be done in the employee's own time.
- An employee in a retail store was not paid to close up until recently but policy states that the tills or print reports cannot be counted until after the doors are shut, resulting in 10 to 30 minutes of unpaid labour per shift. Time sheets are adjusted so a clock-off at, for example, 5.07pm is adjusted back to 5pm. The employee was also required to attend unpaid quarterly team meetings.
- A child-care centre employee said staff are required to arrive early to set up prior to start time.
- Submissions from two individuals pointing out that they are required by their employer to do online inductions in their own time, and to attend drug/alcohol testing in their own time and at a location chosen by the employer, with no payment for travel time. Additionally, when required to undertake a breath test before starting work, they are required to do so in their own time, up to an hour before start time. Their submissions spoke also of labour hire, and I refer to it in Term of Reference 7.

### **Unpaid allowances:**

- An employee in a bakery franchise was required to complete training modules in their own time. No overtime is paid, allowances and loadings not paid, no pay slip is provided. When the writer rang the franchisor to ask questions and the franchisor spoke to the employer, the employer told staff 'if we have an issue with him or the bakery, that we should speak to him or quit.' There was no payment made for the modules, and still no allowances paid.
- A casual kitchen hand working mainly Sundays was paid a flat rate regardless of when or for how long he worked. No pay slips provided.
- A traffic controller claimed that no meal allowances are paid after working 10 hours straight.
- A retail employee was not paid the penalty rate when required to be at work by 7am the next day after working to 9pm in Christmas trading the day before.
- Another retail shop employee wrote of not receiving weekend allowances.
- A bar waiter wrote of not being paid the correct penalty rates.
- A submission was received based upon an informal survey between 4 March and 25 March 2019 of 18 contract cleaners across a range of State government agencies. The cleaners were approached in publicly available areas. The results of the survey suggested non-payment of allowances in a number of cases.

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### Unauthorised deductions:

- A bus driver for a charter company had 30 minutes wages deducted for every 5 hours work over many years, until he complained. The deduction is stated 'on the books' as 'fatigue break' although he did not receive the break. In his view, the employer was stealing \$14 from approximately 75 drivers' wages for every 5 hours of driving, at least once a shift for most of the drivers, amounting to about \$380,000 per year.

### Non-payment of superannuation:

- An employee of a contractor to a State government department discovered that his employer has made only one part-payment to his nominated superannuation account, even though his pay slips say otherwise. He calculates his missing superannuation totals \$8,000. Upon querying this, he was told that the principal company 'had to divert cash resources' which left it 'short' in other subsidiaries.
- A mechanical fitter in the mining industry is paid superannuation only for 38 hours per week regardless of how many hours are actually worked, when it is required to be paid for an employee's ordinary time earnings. This occurs even though his charge-out rate is unchanged after 38 hours per week, which means the employer retains the superannuation component of the charge-out rate after 38 hours.

### Sham contracting:

- A compliance officer for a registered training company was engaged as a contractor but believed they were in reality an employee.
- A casual sales assistant in a shoe shop was told after three months' employment that she needed an ABN because the employer will not pay the tax, even though the employer had been deducting tax from her fortnightly pay. She writes that she has never received a pay slip.
- A driver for a delivery business wrote of not being given entitlements and not being paid for all hours worked.
- A German national working on a farm to renew a working holiday visa was engaged as a contractor.

### Consideration

In my experience the vast majority of employers in WA understand and either comply, or attempt to comply, with their legal obligations, whether these derive from legislation, an award or an industrial agreement. They make every endeavor to pay their employees correctly. Legislation and awards can be complex and confusing even for those who work in employment relations. Being aware of relevant legislation or an applicable award, and interpreting and applying their requirements, can be particularly confusing for small businesses, many, perhaps most, of whom

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may not have the resources to engage professional assistance. This is even more so in country or remote communities where access to local professional assistance is not readily available. Where there is a lack of resources for employers, it can be difficult for small and medium sized businesses to understand or to stay up to date with employment obligations.

Workers too may be uncertain about the legal identity of their employer, or which award or agreement is applicable in their case or what their minimum entitlements are. There is a lack of resources available to workers to help them to determine if they are being underpaid, and to discuss it with their employer with any confidence.

Generally, there must be a payment, or a benefit, which the worker is legally required to be paid or given as a result of the work the worker has performed. The legal requirement to pay can come from an applicable Act of the Commonwealth or State Parliaments, or from a national or State award, or from an agreement registered in either the Fair Work Commission (FWC) or the WAIRC. The requirement also can come from the employer and the employee agreeing that the employee will be paid a greater amount than that prescribed. Where the payment or benefit received is less than what is legally required, or where no payment at all has been made to the employee, the employer will have underpaid the employee.

One submission received, from the HIA, was that sham contracting is a stand-alone offence which should not be included in the term wage theft.<sup>107</sup> In my view however, the misclassification of workers as independent contractors instead of employees, sham contracting, is a form of systematic and deliberate underpayment, in that the deliberate engagement of a worker as a contractor when in law the worker is an employee, is done to avoid payment of award wages or other minimum entitlements, superannuation and tax.

It must come as no surprise to see results which show underpayment, and deliberate and systematic underpayment, of wages and entitlements is occurring in WA no differently than has been found in the rest of the country. I find that the court decisions, Industrial Inspector case studies, FWO cases and reports and the Horticulture Report and other reports above reveal underpayment, and systematic and deliberate underpayment, of wages and entitlements occurring in some industry sectors in WA. They are convincing when viewed in the context of reported cases of underpayments of businesses in other States and the reports and inquiries held by the Commonwealth and States into wage theft. The cases and case studies referred to are not isolated examples. Rather, they are illustrative of a broader problem revealed by the reports and inquiries.

The case studies provided by stakeholders and organisations, and the details provided in the individual submissions made to the Inquiry, and also in the survey undertaken by UnionsWA, do not carry the same weight as the court decisions, Industrial Inspector case studies, FWO cases and reports, however they are to be seen in that wider context. While these necessarily provide only the allegations or observations of the writers, and represent their viewpoint only, they add some weight given the established cases and case studies.

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<sup>107</sup> Submission of Housing Industry Association, p 12.

I find that the problem of deliberate and systematic underpayment of wages or entitlements is greater than suggested in the Master Builders' submission. Master Builders submits that there does not appear to be any factual basis to assert a claim of widespread wage theft, or suggest an endemic problem. It refers to the Department of Commerce (DMIRS) website in August 2018 which announced it had recovered \$300,000 in long service leave entitlements and \$137,000 in wages. It refers to FWO compliance checks as showing the majority of employers are complying with their award obligations. It submits that this shows there is little hard evidence of a wage theft problem in the WA labour market, although there are examples in for example, the MWTF Report, none of which involve the building and construction industry.<sup>108</sup>

The NRA noted that the 2019 FWO campaign found that 61% of businesses audited were compliant in all respects, and the overwhelming majority of businesses generally believe themselves to be compliant.<sup>109</sup> Also, a confidential submission from an employer organisation submits that there is no evidence of systemic, systematic or deliberate underpayment of pay and/or entitlements in WA.

I consider that the evidence and anecdotal evidence referred to earlier leads to the conclusion that there is more to the story than a comparison of numbers. In some sectors of the labour market, there is quite widespread underpayment of wages and entitlements, and systematic and deliberate underpayment. The DMIRS figures and the FWO compliance reports show the results where inspectors have recovered workers' unpaid entitlements, but the data is necessarily sample data rather than a complete census, as the NRA noted.<sup>110</sup> Informal discussions I have had with some employer organisations, and with State Industrial Inspectors, suggest most strongly that issues such as a lack of resources and the size of the labour market inevitably leave much that is unknown or underreported. Even so, it is not insignificant that the FWO itself described the nature of the non-compliance that it uncovered in the campaign in Perth and the Albany and Manjimup regions as 'significant'.<sup>111</sup>

The MWTF Report provides a comprehensive list of the forms exploitation can take:

#### **Exploitation of workers can take many forms**

- wage underpayment, or 'cash-back' arrangements
- pressure to work beyond the restrictions of a visa — e.g. student visa work limits
- up-front payment or 'deposit' for a job
- failure to provide workplace entitlements such as paid leave, superannuation
- tax avoidance through the use of cash payments to workers

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<sup>108</sup> Submission of Master Builders, pp 5-10.

<sup>109</sup> Submission of National Retail Association, pp 6-7.

<sup>110</sup> Ibid, p 12.

<sup>111</sup> Fair Work Ombudsman, *Western Australia - Southern Perth and Albany-Manjimup Regional Campaign Report*, p 17.

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- unpaid training
- working conditions that are unsafe
- unfair dismissal
- misclassification of workers as independent contractors instead of employees
- unfair deductions from wages for accommodation, training, food or transport
- threats to have a person's visa cancelled by authorities
- withholding of a visa holder's passport
- requiring migrant workers to use and pay for sub-standard on-site accommodation.<sup>112</sup>

The various forms of wage theft identified from the cases and case studies and submissions are predominantly:

- unpaid hours;
- non-payment of any wages, or allowances for work performed;
- underpayment of wages or entitlements;
- unauthorised or unreasonable deductions; and
- non-payment of superannuation.

In the subsequent Terms of Reference, I consider what arises from my findings.

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<sup>112</sup> *Report of the Migrant Workers' Taskforce*, 2019, p 33.

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## Term of Reference 2

### What are the reasons wage theft is occurring, including whether it has become the business model for some organisations.

A number of submissions about this Term of Reference were received. I refer to some of them here.

The submission of the AHA notes that the AHA's experience is that underpayment generally arises from a lack of knowledge and understanding of employment obligations, rather than from deliberate wrongdoing. The AHA submits there is frustration and concern amongst its members at the complexity of, and frequent changes to, employment obligations and the consequent administrative burden this places upon employers.<sup>113</sup>

Master Builders submitted that where shortcomings have occurred, it is often the result of a misunderstanding by the small business owner of:

- the award;
- whether the State or national award applies; or
- missing a national or State minimum wage rise increase.<sup>114</sup>

In Master Builders' view, the evidence of the FWO reports 'demonstrate the majority of employers are complying with their award obligations', so any attempt to suggest that employers are 'somehow involved in a business model to intentionally commit wages theft is an inaccurate and misleading portrayal of the labour market.'<sup>115</sup> The Master Builders submission notes that there are examples of exploitation of vulnerable workers in the MWTF Report and in the franchise sector, and that these high risk sectors are currently being addressed by the FWO.<sup>116</sup>

The Ai Group believes that many underpayments are the result of genuine misunderstandings and payroll errors.<sup>117</sup> It notes that:

In Western Australia, it is incumbent on employers covered by the Federal System to navigate a complex system of over 122 Federal industry and occupational awards, the lengthy and complex FW Act, State and Territory legislation governing long service leave and, depending on the organisation, an intricate web of common law contracts and policies. For those employers covered by an Award, it is worth noting that the FWC's 4 yearly review of modern awards has uncovered many competing interpretations of award terms, particularly in respect of coverage matters and calculations relating to penalties, overtime and allowances.<sup>118</sup>

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<sup>113</sup> Submission of Australian Hotels Association, p 3.

<sup>114</sup> Submission of Master Builders Association, p 12.

<sup>115</sup> Ibid, p 10.

<sup>116</sup> Ibid, p 13.

<sup>117</sup> Submission of Australian Industry Group, p 7.

<sup>118</sup> Ibid, p 7.

The Ai Group notes also, in relation to the WA industrial relations system, that the number and complexity of State awards has been highlighted as a major problem in the Interim Report of the recent Ministerial Review of the State Industrial Relations System. The Ai Group points out that many small and medium-sized businesses lack dedicated human resources personnel to assist in ensuring employees are paid correctly.<sup>119</sup>

The HIA's submission too is that its experience is that underpayments are generally the result of mistake or error, and where they are identified, and the employer agrees an underpayment has occurred, the employer remedies the situation. This submission notes that the WA workplace relations framework is complex; employers in WA have to contend with the national and State regulatory frameworks; and confusion as to the appropriate award coverage can cause payment problems. The calculation of pay rates can also be complex.<sup>120</sup>

Similarly the NRA is of the view that the substantial driver of non-compliance is the complexity inherent in the awards system, which also has flow-on effects into enterprise agreements. In the 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.<sup>121</sup>

The NRA denies however that it is a common practice for businesses to use wage non-compliance as a business model, 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.<sup>122</sup>

A confidential submission to the Inquiry from a business consultant in a contracting industry referred to a growing awareness in about 2010, as his clients lost work, of a company new to WA which deliberately engaged overseas students as their workers, paying them flat rates on an ABN or paying in cash. The model changed slightly when refugees were given visas to work, and the new company started deliberately to 'bring people in' on visas as a source of labour, and in one case had its 'own migration agency' for the purpose of 'education'.

UnionsWA submitted that while there has been no comprehensive study of the incidence and impact of wage theft in WA, such studies have been carried out in other parts of Australia. In the view of UnionsWA, employers know the chances of being caught engaging in wage theft are low because unions do not have sufficient powers to check breaches of workplace laws, and many workers are in a weak position (as casual or temporary visa workers, labour hire or on sham contracts) to ask for decent wages, especially as they have little protection themselves.<sup>123</sup>

UnionsWA submits that it is too hard for working people to recover stolen wages, particularly those in highly vulnerable positions where speaking out could see them punished or lose their

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<sup>119</sup> Ibid, p 7.

<sup>120</sup> Submission of Housing Industry Association, pp 6-7.

<sup>121</sup> Submission of National Retail Association, p 9.

<sup>122</sup> Ibid.

<sup>123</sup> Submission of UnionsWA, pp 4-5.

job. The UnionsWA submission states that it is 'deeply unfair and unrealistic' to expect underpaid workers to launch their own legal proceedings. Rather, their representatives should be able to check that their rights are being respected and their entitlements are being properly paid, which requires representatives to be able to talk to the workers and inspect the relevant work records.<sup>124</sup> UnionsWA submits that:

... the right of workers representatives to uphold rights and inspect records should be positively affirmed and protected by Australian industrial law. The current Fair Work Act does not adhere to ILO standards on Right of Entry. The regime of the WA Industrial Relations Act is far better and should in no way be 'watered down' to make it harder for unions to exercise. Rather it should be improved to make union access easier.<sup>125</sup>

United Voice submits that many United Voice members work in industries that are characterised by insecure and low paid work. The United Voice submission notes that exploitation is particularly evident when the job market is competitive; or when the employer operates within a highly competitive industry where the employer feels that the only means to save costs is by cutting corners on staff wages and benefits. Exploitation is also particularly evident where workers feel powerless to do anything to remedy the situation due to fear of losing their jobs, hours or residential status.<sup>126</sup>

The ELC sees common themes arising from the clients it assists and is of the view that the underpayment of wages and entitlements generally may be the result of workers:

- being relatively low paid and heavily reliant on those wages;
- being at the end of multiple layers of contractual relationships;
- being employed in various types of low paid work in areas such as hospitality, agriculture and cleaning which often involves work outside of normal business hours or in isolated areas;
- having a lack of access to employment records;
- being unable to easily secure alternative employment in a different occupation;
- being willing to acquiesce to unlawful conduct such as unpaid sick leave, or no overtime penalty rates being paid, because they are fearful of the consequences if issues are raised, and face the prospect of dismissal if they do not accept the unlawful conduct;
- having other vulnerabilities such as English as a second language, or literacy issues;

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<sup>124</sup> Ibid, pp 5-6.

<sup>125</sup> Ibid, p 6.

<sup>126</sup> Submission of United Voice, p 3.

- being from overseas and not familiar with Australia's workplace laws and modern award system.<sup>127</sup>

The SDA submission refers to the changes in the industrial relations system, fragmentation of business structures, casualisation, high turnover workforces and increasing employer hostility, all of which have reduced the capacity for unions to organise and prevent exploitation of workers by employers. A decreased union presence in a workplace increases a worker's chance of being exploited by the employer. The SDA considers that there are four reasons wage theft is occurring in WA. One is that regulatory bodies are lenient towards employers in instances of non-compliance. Another is that restrictive laws have adversely affected union presence in the workplace leading to lack of worker awareness of their rights and to increased vulnerability. A decreased union presence in a workplace increases a worker's chance of being exploited by the employer. The SDA also looks to the introduction of fragmented business structures in the form of subcontracting business and franchise models as a reason wage theft is occurring. Further, the SDA submits that the FWO is not adequately funded to deter non-compliance and resolve existing complaints.<sup>128</sup>

The CFMEU also identifies contracting as an issue, with 'intense competitive pressures' among contractors leading them to seek unfair competitive advantages in order to win contracts, together with the vulnerable status of labour hire workers, the use of sham contracting, pyramid contracting, and 'the deliberate and pre-meditated use of corporate insolvencies and fraudulent phoenix activity'.<sup>129</sup>

The AMWU submission emphasises the groups of workers who are particularly vulnerable to wage theft include 'workers in precarious work arrangements such as labour hire and casual work'.<sup>130</sup>

The CPSU/CSA submits that staff in those departments where the on-call allowance has not been paid are reluctant to raise these matters with management unless they can remain anonymous owing to 'the environment of budget cuts', and 'fear of becoming a target during yet another round of departmental redundancies'.<sup>131</sup>

WACOSS refers to the 2017 National Temporary Migrant Survey and submits:

Importantly, the findings of the survey make clear that temporary migrants are aware of the minimum wage rate and know that they are being underpaid, meaning that a lack of knowledge about their entitlements is not the cause of their underpayment. It is likely instead that the precarious nature of that employment and the significant power imbalance in the

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<sup>127</sup> Submission of Employment Law Centre, pp 22-23.

<sup>128</sup> Submission of the Shop, Distributive and Allied Employees' Association, pp 4-8.

<sup>129</sup> Submission of the CFMEU Construction & General Division (WA), pp 2-7.

<sup>130</sup> Submission of the Australian Manufacturing Workers' Union p 5.

<sup>131</sup> Submission of the CPSU/CSA, p 6.

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favour of the employer means that the employer considers that they are able to underpay those workers with impunity.<sup>132</sup>

Maurice Blackburn Lawyers states that it mainly sees wage theft in the following circumstances where:

- There is a pronounced power or status difference between the workers and the employer;
- The company operates in a highly competitive industry, where the employer feels that the only option to save costs is through cutting corners on staff wages and benefits;
- The workers feel powerless to do anything about it whether through fear of losing their jobs or their residential status; and
- There is competition for the jobs on offer.<sup>133</sup>

The firm refers to a 2016 audit by the FWO which found that 33% of cleaning businesses were paying their staff incorrectly and submits that from the employers' perspective, it is a deliberate business decision to contract out certain processes.<sup>134</sup> The submission also refers to research showing that union members are less likely to experience wage theft. Maurice Blackburn notes that conversely, a high turnover or availability of staff; a highly casualised workforce; antipathy or aggression from some employers about the role of unions; and fear amongst some cultural and minority groups of potential negative consequences of joining a union in the eyes of the employer make connections with unions difficult.<sup>135</sup>

The horticulture industry has its own reasons why wage theft occurs, and why it appears to have become a business model for some labour hire providers. The Horticulture Report notes:

There is evidence that in some instances, workers are forced into undocumented work through a complex network of offshore and onshore labour hire contractors and migration agents who have a business model of recruiting overseas workers on visas without work rights such as tourist visas.<sup>136</sup>

The Horticulture Report notes:

The horticulture labour market is segmented and produces a race to the bottom in labour standards. This segmentation is derived from the availability of a range of labour sources with different levels of regulation and oversight.<sup>137</sup>

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<sup>132</sup> Submission of Western Australian Council of Social Service, p 6.

<sup>133</sup> Submission of Maurice Blackburn Lawyers, p 4.

<sup>134</sup> Ibid, p 5.

<sup>135</sup> Ibid, p 14.

<sup>136</sup> Joanna Howe, Stephen Clibborn, Alexander Reilly, Dianne van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, University of Adelaide and University of Sydney, 2019, p 42.

<sup>137</sup> Ibid, p 9.

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Also at page 10, the authors note that growers interviewed reported rising costs but stagnant income in recent decades.<sup>138</sup>

In their 2017 report *Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry*, (Sustainable Solutions Report) co-authors Joanna Howe, Alexander Reilly, Diane van den Broek and Chris F Wright state that the vegetable industry workforce is a vulnerable one.<sup>139</sup> The Sustainable Solutions Report, which recognises the support of Horticulture Innovation Australia for the project ‘Investigating Labour Supply Options Across the Australian Vegetable Industry’, notes that:

Picking, packing and grading work is low-skilled, physically demanding, occurs in challenging weather conditions and is often characterised by long hours and a low level of trade union oversight and representation. The remote location of many vegetable farms compounds the inability of local workers to access jobs on these farms and the vulnerability and isolation of temporary migrant workers employed on them. As much of the vegetable industry’s workforce is temporary migrants on either a WHM [Working Holiday Maker] visa or a SWP [Seasonal Worker Programme] visa, they are less likely to be informed and to report instances of exploitation to the authorities for fear of losing their source of income or visa extension.<sup>140</sup>

Hardy and Kennedy, from the University of Melbourne, submit that there may be a range of factors including declining levels of unionisation, and increasing numbers of vulnerable workers in the labour market. They say:

Similar to broad trends identified in overseas jurisdictions, there is now mounting evidence in Australia to suggest that where vulnerable workers are employed in high risk, fragmented sectors, poor compliance outcomes are likely to abound.<sup>141</sup>

Some of the individual submissions received which referred to the reasons why they thought they were being underpaid mentioned maximising profit, greed, and the employer ‘keeping the money’. One said that ‘many employees in management are thrown into the deep end with little training’.

Some individual submissions on this Term of Reference referred to a fear of retaliation. A casual nurse referred to casual nurses being ‘too scared’ to chase the money owed to them. So did a truck driver, stating he has a fear of losing his job. Another truck driver stated at the end of his submission:

On Monday I am expecting to commence the last three years of my working life. If [the contractor] has other plans, I am powerless to challenge him, as (1) I am grateful for having had a job in this economic climate, and at this late stage in my career (2) I’m not the type to ruin somebody’s life through litigation.

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<sup>138</sup> Ibid, p 10.

<sup>139</sup> Joanna Howe, Alexander Reilly, Diane van den Broek and Chris F Wright, *Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry*, 2017, University of Adelaide and University of Sydney, p 11.

<sup>140</sup> Ibid, p 11.

<sup>141</sup> Submission of Tess Hardy and Melissa Kennedy, p 3.

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## Consideration

I consider there is substance in the submissions from employer organisations which refer to the complexity of employment obligations and frequent changes which occur. The Ai Group and NRA are quite correct, with respect, to refer to the number and complexity of State awards and to those businesses which might not have human resources staff. There certainly is room for the view that many underpayments do occur as a result of a lack of knowledge or genuine misunderstanding of employment obligations. Those circumstances are much more likely to fall under the category of ‘unintentional’ underpayment to which the UK Low Pay Commission referred.<sup>142</sup>

I am not so persuaded, however, that the non-payment of wages, or the systematic and deliberate underpayment of wages and entitlements, results from a lack of knowledge and understanding of employment obligations, or the complexity inherent in the system of awards leading to an administrative burden upon employers, when so many employers do comply or endeavour to comply with their employment obligations. Those factors certainly contribute to some underpayments. However, where a business has access to professional assistance in other areas of its operations, for example creating franchise agreements and registering trademarks, it is more difficult to accept when it comes to employment obligations, that a lack of knowledge or understanding explains the underpayment.

Two takeaway sushi outlets on the Central Coast of New South Wales underpaid sixteen casual employees during the six month period from 4 January 2016 to 3 July 2016. In imposing penalties of \$150,120 on the company, and \$30,024 on a director, the Court observed:

In other words, whilst Hasegawa & Ye and Ms Hasegawa ran a family business, it was a substantial family business which clearly had access when needed to reasonably sophisticated financial advisers who created reasonably complex and sophisticated Franchise Agreements and registered trademarks for Tokyo Sushi in 2013. In my view there is no excuse for a family business of this type to not pay its employees in accordance with law. Employees are entitled to respect and part of that respect is to pay them their full entitlements which must be recognised and known to the employer.<sup>143</sup>

In the case of underpayments generally, I do consider measures aimed at improving employers’ knowledge and understanding of employment obligations can have a positive role to play, and I address this later. However, in the case of systematic and deliberate underpayment, I am not persuaded that measures aimed at improving employers’ knowledge and understanding of employment obligations will be sufficient. The evidence in this Inquiry suggests more that systematic and deliberate underpayment of wages and entitlements results from a deliberate disregard of employment obligations rather than an honest misunderstanding of them.

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<sup>142</sup> Low Pay Commission (United Kingdom), *Non-compliance and enforcement of the National Minimum Wage*, 2017, p 8.

<sup>143</sup> *Fair Work Ombudsman v Hasegawa & Ye International Pty Ltd & Anor* [2019] FCCA 1424 (28 May 2019), para 23.

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The submissions show that there is no single reason why systematic and deliberate underpayment of wages and entitlements is occurring. In my view however, some factors are more significant than others in the submissions and examples which have been provided to the Inquiry.

### **The lack of detection of non-compliance and enforcement**

The first of those factors, and perhaps the most significant, is that where there are systematic and deliberate underpayments occurring, there is little to prevent it happening. The requirement that an employer must pay minimum conditions of employment, such as State and national minimum wages, award wage rates, allowances and other entitlements, to their employee is already prescribed in legislation, and the vast majority of employers comply with the requirement. However, that of itself is, evidently, insufficient to prevent the non-payment of wages (as in the case of Mr Kandel and others) or the systematic and deliberate underpayment of wages and entitlements occurring in some industry sectors.

So I am not persuaded that the threat of significant penalties and a compliance system geared towards employee self-representation generally act as a suitable deterrent against systematic and deliberate underpayment. The cases, case studies, examples and reports presenting instances of systematic and deliberate underpayments show little evidence that the threat of significant penalties has been any deterrent at all, nor that employee self-representation is itself an effective deterrent.

In my view, this is because to be effective, a law needs to be both known and adequately enforced. It is important to our society that a person understands that not obeying the law of the land, and especially deliberately not doing so, will have consequences for them. This is as true of employment law as it is of all laws. The importance of inspections by Fair Work Inspectors from the FWO or State Industrial Inspectors, and the application of a range of measures, including enforcement proceedings, by regulators, cannot be over-emphasised. It is illustrated by the facts in *Fair Work Ombudsman v Mai and another* where the wage theft came to light only by the persistence of the Fair Work Inspectors. The Court stated:

The investigations revealed that the first respondent, under Mr Lo's control, systematically exploited its employees by refusing to pay them according to the industrial award that governed their employment - the General Retail Industry Award 2010. The investigation discovered a sophisticated system of data manipulation and false record keeping designed to deceive the payroll processes that were part of the franchise arrangements with 7-Eleven Stores Pty Ltd. The first respondents' systems were also designed to deceive anyone investigating the employment practices of the first respondent.

And for a time they worked. But persistence on the part of the Fair Work Ombudsman and the relevant Fair Work Inspectors eventually revealed the extent of the first and second respondent's deception.<sup>144</sup>

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<sup>144</sup> [2016] FCCA 1481 (17 June 2016), paras 4 -5.

The lack of detection of non-compliance and of enforcement is in my view a significant factor because if, as I find, there is systematic and deliberate underpayment of wages and entitlements on a large scale in some sectors, including the restaurant sector, a visit from an Industrial Inspector or a Fair Work Inspector is the only current practical means for detecting it; it is not the role of employer organisations, nor of unions, to detect wage theft in industry generally and take enforcement action. Currently, too few workers report it, or understand their rights and how to report it.

There is little else which may cause those employers who systematically and deliberately underpay their workforce to alter their practices. Where the level of union membership is low there will be less likelihood of a union discovering instances of wage theft.

Enforcement is important because of its deterrent effect: a successful prosecution is public, and shows that there can be consequences if systematic and deliberate underpayment is detected. If a visit from an Industrial Inspector or a Fair Work Inspector, with its potential to lead to enforcement, is an effective method of detecting wage theft, and I consider that it is, the sheer number of businesses which would require visiting, and perhaps re-visiting, will be too great for the number of inspectors, even if, as I recommend later, their numbers are significantly increased. Enforcement in appropriate circumstances which results in a penalty can demonstrate that in addition to rectifying the underpayment there can be a consequence for underpaying workers, which may encourage an employer to rectify an underpayment without a visit from an inspector.

Hopefully, the recommendations I make in this Report will provide a pathway to address wage theft more adequately, but this will take time.

For the above reasons I find that one of the reasons, perhaps the most significant single reason, why wage theft is occurring is the lack of detection of non-compliance and of enforcement. This is an issue of resourcing, rather than of lack of intent, and I address this in Term of Reference 5.

### **Maximising financial return**

Maximising financial return as a reason for deliberately engaging in wage theft was recognised in *Fair Work Ombudsman v JS Top Pty Ltd & Anor*,<sup>145</sup> a case involving 7-Eleven franchisee employees. The Court described the circumstances as ‘serious and systematic contraventions of the most basic of the employees’ workplace rights.’ The Court noted that the facts reveal that the employer ‘established a business model that relied upon a deliberate disregard of the employees’ workplace entitlements and a course of conduct designed to conceal that deliberate disregard.’ The Court referred to *Fair Work Ombudsman v Amritsaria Four Pty Ltd & Anor* where Judge Smith observed:

As I have already noted, the contraventions were not accidental but, rather, part of a deliberate scheme aimed at maximising financial benefit to the respondents. In other words,

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<sup>145</sup> [2017] FCCA 1689 (21 July 2017).

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this was part of the respondents' business model. In my view, this approaches the worst type of each type of contravention.<sup>146</sup>

The wish to 'maximise profit' was referred to in some individual submissions as a reason why underpayments had occurred, and while it is natural that a business will wish to maximise its profit, unscrupulous businesses do profit by underpaying workers.

### **The vulnerability of workers**

This factor can then be linked to another significant factor, which is the vulnerability of certain workers. The evidence shows that employees who are recent arrivals to Australia may be uncertain as to what are their legal minimum employment entitlements. In *Fair Work Ombudsman v Xia Jing Qi Pty Ltd & Anor*,<sup>147</sup> the employer deliberately and deceitfully concealed the employees' repayment of cash back to the employer so that their effective wage was well below the applicable award rate, and provided the Fair Work Inspector with misleading records. The Court found that the employees were vulnerable to exploitation in the workplace, that the employer exploited this vulnerability, and that the employees did not know their lawful rates of pay.

The confidential submission to the Inquiry from a business consultant in a contracting industry, that a company new to WA started deliberately to 'bring people in' on visas as a source of labour, is supported by the case of the deli/café business in High Wycombe mentioned in Term of Reference 1. This business operated on the basis of employing workers it sponsored under the subclass 457 business visa scheme.<sup>148</sup> A deliberate decision was made to operate a business on the basis of employing only workers who are vulnerable.

Those workers who are temporary visa holders, those who do not speak English, or are less than fluent in English, those who are unable to understand what their rights and entitlements are under the law and what they are entitled to do if they are denied those conditions, are less likely to challenge an underpayment.

Cultural reasons also may mean a recently arrived person is less likely to query their entitlements with their employer or contact authorities.

The second report on the National Temporary Migrant Work Survey, *Wage Theft in Silence, Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, (Wage Theft in Silence Report) focused on the group of underpaid participants in the National Temporary Migrant Work Survey, seeking to identify the factors that stop migrant workers taking action to recover wage underpayments.<sup>149</sup>

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<sup>146</sup> [2016] FCCA 968 (29 April 2016), para 67.

<sup>147</sup> [2019] FCCA 83 (18 January 2019).

<sup>148</sup> *Fair Work Ombudsman v Orwill Pty Ltd & Ors* [2011] FMCA 730 (28 September 2011).

<sup>149</sup> 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 2018.

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The report notes that of the 2,250 survey participants who had experienced a form of underpayment, 91% had not attempted to recover unpaid wages and of the 194 participants who attempted to recover underpayments through any channel, only 16% were successful in recovering their full entitlements owed and 67% were unsuccessful in receiving any payments.<sup>150</sup> The report highlighted the key factors that stopped underpaid survey participants from trying to recover unpaid wages, some of which were:

- 42% of participants indicated they did not attempt to recover underpayments because they did not know what to do;
- 20% of participants did not believe employers would pay their entitlements even if successful in making a claim;
- 28% of participants were reluctant to recover unpaid wages when they had agreed to their rate of pay, even if they were being underpaid;
- 26% of participants did not attempt to recover unpaid wages because their peers were similarly receiving a low rate and were not attempting to recover underpayments;
- 25% of participants feared immigration consequences; and
- 22% of participants feared losing their job.<sup>151</sup>

One confidential submission to the Inquiry also stated that even with the underpayments occurring, for some overseas workers the working conditions and remuneration they receive in WA are likely to be better than in many of their home countries, and so the workers themselves are unlikely to complain, a submission supported by the findings in the 2018 journal article, *Multiple frames of reference: Why international student workers in Australia tolerate underpayment*, by Stephen Clibborn.<sup>152</sup>

In addition, where an employee is on a visa and is dependent on their employment for the visa, or is in breach of their visa, the employee is vulnerable to exploitation. Fear of losing the visa, or of being removed from Australia, are strong deterrents to an employee contacting the authorities.

Many of the examples arise from visa holders being exploited, and this suggests a need to examine whether there are aspects of the visa system which contribute to the prevalence of wage theft in particular industry sectors. An examination of the visa system has been done comprehensively by the MWTF in its March 2019 report, and I respectfully endorse its recommendations.

Beyond the category of visa holders, it is clear from the submissions received by the Inquiry that junior employees, casual employees, employees on fixed term contracts and any employee who

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<sup>150</sup> Ibid, pp 5-6.

<sup>151</sup> Ibid, pp 7-8.

<sup>152</sup> Stephen Clibborn, *Multiple frames of reference: Why international student workers in Australia tolerate underpayment*, 2018, Economic and Industrial Democracy, pp 1– 19.

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is in fear of losing their job, or of not being offered further work, if they raise an underpayment issue with their employer, also feel vulnerable. The fear of retaliation is real. One individual submission sent to the Inquiry concerned a relatively longstanding employee in a retail shop in Perth's suburbs who asked to be taken off weekend work because she was not paid penalty rates. She also sought her unpaid superannuation. The submission contained great detail, reconstructed from SMS messages, of the difficulties she encountered from her employer for doing so, including after she involved the FWO. She states she has lost hours, to keep her below the \$450 superannuation threshold, and considers she is being forced out of her job as an example to the other employees. She identifies greed as the reason why her employer systematically and deliberately underpays his employees.

In the context of wage theft, the term 'vulnerable worker' has been used to describe migrant workers, or visa holders including student visa holders; or those who do not speak English or are less than fluent in English; or those who are unable to understand what their rights and entitlements are under the law.

However vulnerable people of any background or occupation, including indigenous Australians, can be exploited in the workplace. The term 'vulnerable' should be seen to embrace any worker who is vulnerable in the workplace, and some groups such as migrant workers, visa holders or those who do not speak English or are less than fluent may be more vulnerable than others. One submission from a woman employed as a compliance officer in a registered training organisation noted that while she, and many other women were engaged on a sham contract, 'the men tended to have full time jobs with all the entitlements'. The submissions received from the AMA (WA) and IEU, and some of the individual submissions, reveal that even employees with a higher level of skill and responsibility such as teachers, nurses, tradespeople and even doctors-in-training, who would not be considered in this context 'vulnerable', may also be subject to underpayment of wages and entitlements and yet will not complain, perhaps because they consider they might prejudice their future career prospects in their chosen field by complaining. So the term 'vulnerable worker' should not be read restrictively.

The recommendations I make later, that WA law itself recognise the right of a worker to query their employment conditions and that an employer may not dismiss, demote, reduce hours of work or discipline an employee who does so, and to create a wage theft website/hotline/smartphone app where any employee, whether 'vulnerable' or not may inform the authorities of wage theft, including doing so anonymously, take this into account.

### **Lack of knowledge of employment conditions by workers and employers**

The evidence suggests also that many workers are not aware of their lawful entitlements. This issue was recognised in the United Kingdom in the 2017 UK Low Pay Commission Report. The report identified a worker's lack of awareness as one of the reasons for not complaining across all underpaid workers. It found that:

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Over half of low-paid workers think that the law allows them to agree to be paid less than the minimum wage. A similar proportion were unaware that tips cannot 'top up' pay to the minimum. Further, two fifths were unaware that they can legally claim back lost earnings.<sup>153</sup>

This is similar to my findings in this Inquiry. Some of the submissions from individuals to the Inquiry showed a lack of knowledge of what their minimum entitlements were, what their employer could, or could not, lawfully deduct from their earnings, or where they could go for further information. One respondent to the Inquiry's online survey wrote:

(Employer's name) purposely does not pay us sick leave, first aid allowance, leave loading etc. I believe that he does this purposely as he has never informed us about such entitlements. After becoming sick over a month ago my dad asked me if I got sick leave pay. Confused, I said that there is no such thing. Dad pointed out that I am part time and hence are entitled to sick leave pay. Following this, I asked (Employer's name) if I am in fact entitled to sick leave pay, with him replying yes. I got quite frustrated knowing that I have been lied to and asked him to back pay me for the times I was sick and gave him a medical certificate. The fact that he knew that I was entitled to sick leave pay yet had never ever given it to me in 3 years shows that he is well aware of our entitlements but chooses not to pay us due to our age and lack of knowledge.

This lack of knowledge on the part of employees is a contributing factor to why wage theft is occurring. It is not so in all cases, as is shown by the WACOSS submission that the findings of the 2017 National Temporary Migrant Survey makes clear that temporary migrants are aware of the minimum wage rate and know that they are being underpaid,<sup>154</sup> but the evidence in this Inquiry shows it to be a contributing factor.

Informing an employee of their employment rights does provide part of the answer to reducing the risk of wage theft occurring, but on its own it does not necessarily mean the employee is then likely to challenge an underpayment. They may also benefit from access to legal assistance to allow them to properly consider their position. One means of accessing this is through community legal centres with specialist employment expertise. They also may seek advice from a union or from the FWO or Wageline.

Many employers too will be assisted by improving their knowledge of their workplace obligations. It may be that some employers may themselves be persons recently arrived in Australia, for whom English is not well understood or spoken, and who do not fully understand Australian employment law, as was the case in some of the 7-Eleven prosecutions. They may not understand which award, or which conditions within an award, are actually applicable to their particular business. They may seek advice from the FWO or from Wageline. They also may seek advice from an employer organisation; in this regard, the FWO has observed that employers which are members of an employer organisation are more aware of employment obligations, and are far less likely to

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<sup>153</sup> Low Pay Commission (United Kingdom), *Non-compliance and enforcement of the National Minimum Wage, 2017*, p 4.

<sup>154</sup> Submission of Western Australian Council of Social Service, p 6.

systematically and deliberately underpay employees.<sup>155</sup> Some submissions from employer organisations emphasise the role they have in providing access to professional advice and support, and providing an educative service for their members.

Therefore raising the awareness of employers and employees of workplace obligations and rights will have a positive effect in addressing wage theft. When I consider later in this Report what the State Government might be able to do to assist to improve workers' and employers' knowledge of employment conditions, particularly of the WA industrial relations system, I refer to the educative role of employer and employee organisations.

### **Whether it has become the business model for some organisations**

Franchising has been shown to be a particular business model which can lead to a greater likelihood of wage theft occurring. That was the case in *Fair Work Ombudsman v JS Top Pty Ltd & Anor* which I referred to earlier. The MWTF noted:

Particular business models can also foster exploitative behaviours and severely hinder the pursuit of the wrong doer. For example, a franchising model can be structured in such a way that it might be difficult for a franchisee to run at a profit without underpaying wages. It has for example been argued that this was the case with the 7-Eleven franchising model.<sup>156</sup>

The quote from the *Fairness in Franchising* report, which I quoted in the Introduction, is worth referring to again in this context as it too points to the business model franchisors operate.

However, from the perspective of this Inquiry, I do think it is the lack of detection of non-compliance and enforcement of employment law which significantly contributes to the reasons why wage theft occurs. The lack of detection makes it easier for an employer in any business who chooses to do so, to ignore employment laws and to deliberately do so as a business model.

In contract cleaning, Lucev J in *Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors*<sup>157</sup> found that the underpayment, and in one case non-payment, of three adult cleaners was deliberate, as part of a deliberate business strategy to engage vulnerable employees, refuse to pay them during their first few weeks of employment, refuse to pay them their full entitlements when they fell due (or at all in one case), and then refuse to pay outstanding wages owed on the termination of the employment relationship.

Three-quarters of survey respondents to the Inquiry's online survey believed that the wage theft they experienced was part of a deliberate business strategy or model (75.0%) while a further 22.2% were unsure. The majority of survey respondents also indicated that they believed other employees had also experienced wage theft by the same employer (83.8%).

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<sup>155</sup> Fair Work Ombudsman, *Western Australia – Southern Perth and Albany-Manjimup Regional Campaign Report*, 2018, p 9.

<sup>156</sup> Report of the Migrant Workers' Taskforce, 2019, p 37, citing A Ferguson & K Toft, '7-Eleven investigation: Business model ripping off workers, former consumer watchdog says', ABC News, 31 August 2015.

<sup>157</sup> [2017] FCCA 2838 (22 November 2017).

**Term of Reference 2** – What are the reasons wage theft is occurring, including whether it has become the business model for some organisations.

In my view, there is much to be said for the view that employers who systematically and deliberately underpay staff are likely both to ignore the legal requirement and consider that there is little or no likelihood of being checked or caught. I find that there is inadequate detection of non-compliance and enforcement of employment law, owing to too few resources given to regulators, and this combined with the availability of vulnerable workers, creates an environment where employers in some sectors have chosen to establish and run their business on the basis that they will be able to underpay workers.

Addressing this is not straightforward because in some cases, particularly if the vulnerable workers are on a visa, or working in breach of a visa, neither they nor the employer are likely to inform anyone about it. As is shown in the following Term of Reference, this issue affects employers who are compliant with employment law, because the non-compliant employer has an unfair competitive advantage over the compliant employer. In other cases perhaps a former employee will decide to report a non-compliant former employer. My later recommendation to create a wage theft website/hotline/ smartphone app may provide a mechanism for reporting non-compliant employers, and this, together with other measures, may assist to address this issue.

### Term of Reference 3

#### **What is the impact of wage theft on workers, businesses which are compliant with employment laws, and the Western Australian community and economy?**

Many submissions addressed the various parts of this Term of Reference. It is convenient to set out what the submissions state, and then to discuss them as they relate to each part: workers, compliant businesses, and the State community and economy.

The observation of the R&CA, that the practices of businesses which underpay their workers 'significantly undermine the integrity of the hospitality industry and unfairly disadvantage and penalise business-owners who operate their businesses legitimately and in full compliance with the law', has been referred to in the Introduction.<sup>158</sup>

Master Builders similarly submits that employers which seek to avoid their lawful obligations when it comes to paying employees their correct wages and other employment entitlements not only disadvantage employees, but also 'seek to provide the employer involved in this unlawful conduct a commercial advantage over their competitors which do meet their legal obligations'.<sup>159</sup>

The NRA also submits that:

...wage non-compliance has the potential to generate an illegitimate competitive advantage for the non-compliant business.

In listed companies, or companies that have a relationship with a listed company such as a franchise, this can also result in illegitimately inflated reported profits, which in turn may affect share price and dividends paid to shareholders.

Whether in listed or unlisted companies, wage non-compliance and the subsequent reporting of illegitimate profits can result in increased investment, allowing for greater business growth. This then has the potential to propagate the non-compliant practice, as a practice which may have started out as a short-term process becomes part of the business model. Eventually, as such businesses grow, the extent of non-compliance can no longer be hidden.<sup>160</sup>

The NRA further submits that after systematic wage non-compliance has been identified in a business or business network, 'the value of the business decreases significantly as the value of goodwill declines drastically' and that 'speculation also arises with respect to listed companies as to the accuracy of reported profits, reducing the likelihood of future investment.' The NRA notes that this is particularly drastic in business networks such as franchise networks.<sup>161</sup>

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<sup>158</sup> Submission of Restaurant & Catering Australia, p 2.

<sup>159</sup> Submission of Master Builders Association of WA, p 12.

<sup>160</sup> Submission of National Retail Association, p 10.

<sup>161</sup> Ibid, p 11.

As to the effect on workers, UnionsWA submits that a common theme of most of the stories provided through the UnionsWA survey is ‘anxiety and outright fear’.<sup>162</sup> The anxiety arises from concern from workers about maintaining a regular income from their employment, even if they are a victim of wage theft, and UnionsWA notes that the fear arises ‘because employers will often use harassment, bullying, and other threats to ensure that their wage theft business practice continues.’<sup>163</sup>

UnionsWA also submits that wage theft has a wider effect across the community:

There are many explanations given about why consumption growth has been so sluggish in Australia, however the fact that it is so easy for businesses to avoid paying the wages that they are legally required to pay, must play a role in restraining the spending of poorer households, which are particularly vulnerable to the negative impacts of wage theft.<sup>164</sup>

The United Voice submission regarding the impact of wage theft on workers is that:

The impact on affected workers and the broader community is overwhelmingly one of unfairness – of a system stacked against them. It feeds into a lack of trust in our government and legal systems that ultimately damages our democracy.<sup>165</sup>

The SDA submits that workers in the fast food and retail industries are often some of the lowest paid in the country and therefore wage theft will often impact them more significantly, ‘given the rate of casualisation and underemployment typical of non-managerial workers in the retail and fast food industries.’ The SDA notes that wage theft often results in workers having to rely on welfare payments and social networks in order to make ends meet. The SDA submission also discusses the fact that wage theft can have psychological and social consequences and that the non-payment of superannuation entitlements, particularly in regard to young people, can seriously affect the end balance of superannuation at retirement.<sup>166</sup>

The CFMEU submits that ‘unpaid superannuation stands out amongst all the entitlements as the most significant loss for employees in dollar terms.’<sup>167</sup>

The IEU submits that wage theft directly affects employees and their families, preventing them from earning decent salaries. The lack of discretionary income then has a flow-on effect to the economy as individuals will be less likely to spend money on recreational goods and services. It can contribute to poor health which will impact the individual’s capacity to work, their family and social life and will also prevent their active participation in the community.<sup>168</sup>

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<sup>162</sup> Submission of UnionsWA, p 2.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid, pp 1-2.

<sup>165</sup> Submission of United Voice, p 2.

<sup>166</sup> Submission of Shop, Distributive and Allied Employees’ Association, Western Australian Branch, pp 9 -10.

<sup>167</sup> Submission of CFMEU Construction & General Division (WA), p 8.

<sup>168</sup> Submission of Independent Education Union, p 2.

The AMA (WA) says that the workplace culture that facilitates wage theft contributes to a disengaged and demoralised workforce, which in a clinical environment represents a risk to safe and quality clinical care.<sup>169</sup>

ELC stresses that ‘for vulnerable workers, a small underpayment can result in a disproportionately large impact on the worker’s financial stability.’<sup>170</sup> ELC refers to the stress on workers in wage theft situations who are finding it hard to pay bills, they would suffer in their general health and have their family life affected by stress. In 2015-16 ELC surveyed 92 workers who had sought assistance through ELC. The research found that of the workers surveyed:

- Many believed their work issue ‘made it hard to very hard to pay groceries, utilities, petrol or transport, rent or mortgage, education expenses, medical expenses, childcare and household essentials.’
- Nearly half believed their ‘general health had suffered as a result of their employment issue (for example: depression, anxiety, or other mental health issue).’
- 53 of the 92 workers stated ‘the work issue had affected their family life (for example: stress and marriage issues).’<sup>171</sup>

The ELC submission also notes that underpayment of superannuation has the potential for long-term significant impact at retirement.<sup>172</sup>

In relation to its effect on the WA community and economy, ELC makes the point that financial strain experienced by vulnerable workers ‘naturally couples with a reliance on government assistance.’ The ELC concludes that if an employment issue is resolved promptly, this will minimise reliance on State Government services and ease community strain.<sup>173</sup>

Maurice Blackburn refers to the McKell Institute report on wage theft, noting the McKell Institute’s findings that:

...wage theft has a much broader negative effect to Australia than the specific negative effect it has on workers subject to it. In particular, wage theft harms businesses who play by the rules and try to do the right thing.

These businesses may lose customers, tenders and government contracts to businesses that commit wage theft and are able to offer lower prices. Particularly in industries such as hospitality and fruit picking where wages make up a large portion of costs, businesses who pay a legal wage struggle financially against those who commit wage theft.<sup>174</sup>

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<sup>169</sup> Submission of Australian Medical Association (WA), p 8.

<sup>170</sup> Submission of Employment Law Centre, p 24.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid, p 26.

<sup>174</sup> Submission of Maurice Blackburn Lawyers, p 6, quoting from McKell Institute Victoria, *Ending Wage Theft: Eradicating Underpayment in the Australian Workplace*, 2019.

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In horticulture, the Sustainable Solutions Report states:

The continued operation of a sub-set of growers who do not comply with Australian workplace standards presents a danger to the future viability of the industry. These growers are able to undercut labour costs and sell produce to retailers at a lower price. Such growers exploit workers and take advantage of vulnerable groups in the labour market such as undocumented migrant workers or WHMs [Working Holiday Makers]. Non-compliance erodes the integrity of the law and the principle of fair competition that the efficiency of the market relies upon. Importantly, this undermines the ability of honest businesses that do the right thing to compete with unscrupulous businesses that profit on the basis of undercutting.<sup>175</sup>

Hardy and Kennedy state:

In our view, wage theft poses a significant threat to the wellbeing of Australian workers and their families. It also leads to an uneven playing field for businesses which are seeking to comply with their legal obligations and may have adverse, suppressive effects on the wider economy.<sup>176</sup>

The confidential submission to the Inquiry from a business consultant in a contracting industry states that the cost to workers can come in loss of job, loss of income and superannuation (as they are forced to take work from non-compliant employers) and loss of permanent employment, because of 'over supply of labour brought about by the importation of students and visa holders.' The submission states that the cost to employers is also devastating through the loss of their business, because 'paying the correct award rates takes them out of the market', or loss of their business, home and marriage. The submission also notes that the State Government is missing out on payroll tax, and the Commonwealth Government is missing out on PAYG tax, and that the community misses out on the workers' wages and employers' profits circulating through the economy.

I refer to some submissions from individuals which spoke about the effect their circumstances had upon them. A casual nurse spoke of overtime not paid unless it is approved, yet some days there are so many tasks to complete that notes are still being written up after shift handover. It makes the shift stressful, and the time involved adds up. She has been so upset over her treatment being a casual that she has not worked since. A venue manager wrote:

I ended up having to leave despite my love of the staff and job because the employer demanded much too much of me and I was burned out trying to balance life and work with so little life time and such excessive work time.

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<sup>175</sup> Joanna Howe, Alexander Reilly, Diane van den Broek and Chris F Wright, *Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry*, 2017, University of Adelaide and University of Sydney, p 11.

<sup>176</sup> Submission of Tess Hardy and Melissa Kennedy, p 4.

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A retail employee wrote:

My sense of self, my time, and my health and wellbeing has been taken from me - although my strong work ethic remains unchanged. I often burst into tears in my car after my shift, at times I feel utterly worthless, as though I am just another cog in the machine.

## **Consideration**

I set out the parts of the Term of Reference and consider them in the light of the submissions.

### **What is the impact of wage theft on workers**

UnionsWA's submission from its survey is that there is a common theme in most of the stories of 'anxiety and outright fear' is borne out by other submissions received by the Inquiry. The evidence suggests that the effect on workers generally, and upon individual workers specifically, of being underpaid, and systematically and deliberately underpaid, can be significant, and its effect should not be underestimated because it also it leads to wider effects. Some submissions mention 'bullying' and other threats used in response to any complaining.

Underpayment makes it harder to meet day-to-day living expenses, and can affect the individual's health, and have consequences for the worker's family. It lessens an individual's feeling of self-worth. This may be true of any worker receiving less than they should be paid, but is particularly so in relation to vulnerable workers.

Where a business fails to secure a tender due to the unfair competition from a non-compliant employer, job losses may result. Failure to pay the Superannuation Guarantee contribution leads to a worker having less superannuation available at retirement.

These findings are consistent with the comments in the Queensland Inquiry Report where the Committee stated:

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.<sup>177</sup>

### **What is the impact of wage theft on businesses which are compliant with employment laws**

The submissions show that the unfair cost advantage achieved by businesses which engage in wage theft can undermine those businesses which are compliant, and this has consequences for the viability of the compliant business, its employees, and in a wider sense for the economy. In those sectors where non-compliant businesses are more widespread, the effect can be to significantly undermine the integrity of the industry and unfairly disadvantage and penalise business-owners who operate their businesses lawfully. Compliant businesses may lose customers, or not win tenders, as customers and clients turn to those unfairly offering cheaper

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<sup>177</sup> Parliament of Queensland Education, Employment and Small Business Committee, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland*, 2018, p 66.

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prices or tender quotes. It can distort reported financial returns and affect share prices and dividends.

In sectors which are heavily reliant on seasonal manual labour for picking, packing, harvesting and so on, businesses which systematically and deliberately underpay workers are a danger to the future viability of the industry.

On the impact of wage theft on businesses compliant with employment laws, the Queensland Inquiry Report similarly noted:

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. 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.<sup>178</sup>

### **What is the impact of wage theft on the Western Australian community and economy**

As a community, we are the poorer because of businesses which systematically and deliberately underpay their employees. Non-compliant businesses do not just deliberately underpay their workers, they also will not be paying the full rate of taxation, both State and Commonwealth. In this regard, the State Government’s Department of Finance, Office of State Revenue, informs the Inquiry:

In the 2018-19 financial year, focussing mainly on the horticulture and primary production industries, we identified 44 unscrupulous labour hire firms operating in WA. By tracing payments made to these firms, which was in excess of \$40 million, we estimated that unpaid payroll tax amounted to almost \$1 million, of which \$330K has been collected to date mostly from garnishee actions. It is likely that the balance will not be collected as the firms involved have ceased operations and their owners cannot be located.<sup>179</sup>

Businesses which systematically and deliberately underpay their workforce may be non-compliant in other areas. They may be more likely to close their businesses to avoid paying employee entitlements and other obligations, and then re-start another business. Businesses engaging in underpayment have the potential to inflate reported profits, thus affecting share price and dividends paid to shareholders.

Underpayment necessarily reduces the amount that employees would otherwise have to spend in the economy. The non-payment of the Superannuation Guarantee contribution will, over time, impose a greater cost to the taxpayer as those who have less in their superannuation at retirement are more likely to seek tax-payer funded pension payments. The Federal Circuit Court in *Fair Work Ombudsman v Haider Pty Ltd & Anor*, which dealt with breaches of federal

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<sup>178</sup> Parliament of Queensland Education, Employment and Small Business Committee, *A fair day’s pay for a fair day’s work? Exposing the true cost of wage theft in Queensland*, 2018, p 62.

<sup>179</sup> Office of State Revenue, Information provided to the Inquiry, May 2019.

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employment legislation in one of the 7-Eleven franchises in Queensland, observed, appropriately, that:

The “victims” of such breaches may be seen by most to be the individuals affected but, in truth, the real “victim” is the community who has dictated, through the Parliament, what is the acceptable industrial regime of this nation.<sup>180</sup>

These impacts, taken together, show that wage theft affects all of us, in some cases, indirectly. The systematic and deliberate underpayment of wages and entitlements of employees in WA, and indeed in the country as a whole, is an issue we all have an interest in addressing. This has been recognised by the Commonwealth Government in its *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* and in accepting in principle all the MWTF Report’s 22 recommendations.<sup>181</sup>

Given the common interest the State Government, employer organisations and employee organisations share in addressing wage theft, I endeavour in two of the recommendations which follow later to provide the framework for collaborative engagement to tackle the issue in this State.

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<sup>180</sup> [2015] FCCA 2113 (30 July 2015).

<sup>181</sup> Australian Government response: Report of the Migrant Workers’ Taskforce, March 2019.

**Term of Reference 3** – What is the impact of wage theft on workers, businesses which are compliant with employment laws, and the Western Australian community and economy.

## Term of Reference 4

### **Whether wage theft is more prevalent in particular industries, occupations, forms of employment/engagement or parts of the State.**

In relation to this Term of Reference, Master Builders acknowledges there have been examples of exploitation of vulnerable workers and refers to page 35 of the MWTF Report, where there are eight major examples identified of ‘migrant or visa workers being exploited by certain specialist sector groups.’ However, Master Builders points out that, notably, none of those examples involve the building and construction industry.<sup>182</sup>

Further, Master Builders also states it is encouraged by ‘the numerous observations made by the FWO that employers which are a member of employer groups have a greater understanding of award entitlements and wage rates.’<sup>183</sup> The submission notes that while Master Builders can comment only in relation to its knowledge of the WA building and construction industry, the evidence suggests that the building and construction industry is therefore likely to have higher levels of compliance than other industries. Master Builders additionally submits that it has anecdotal evidence from its employer members that employers are paying employees well over the minimum award wage rates.<sup>184</sup>

HIA submits that it is unaware of wage theft occurring in the residential building industry and that in HIA’s experience, ‘employers in the residential building industry aim to do the right thing by their employees.’<sup>185</sup>

The NRA submission notes that in NRA’s view:

There is insufficient data to state categorically whether wage non-compliance is more likely to occur in one part of the State than another.

However the data available from the Fair Work Ombudsman indicates that the hospitality industry is particularly susceptible to wage non-compliance...<sup>186</sup>

NRA notes that the hospitality industry is an industry which includes a high proportion of young workers who are ‘more likely to be unaware that they are being exploited due to the lack of education provided about their minimum entitlements.’<sup>187</sup>

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<sup>182</sup> Submission of Master Builders Association, p 10.

<sup>183</sup> Ibid, p 12.

<sup>184</sup> Ibid.

<sup>185</sup> Submission of Housing Industry Association, p 4.

<sup>186</sup> Submission of National Retail Association, p 11.

<sup>187</sup> Ibid, p 12.

NRA points to other industry-specific campaigns by the FWO identifying rates of non-compliance in WA in the hair and beauty industry, accommodation, pubs, taverns and bars, the pharmacy industry and the children's services sector.<sup>188</sup>

UnionsWA submits there are examples of wage theft occurring within child care, universities, local government, the not-for-profit sector, and the public sector. The UnionsWA submission asserts that there are obvious examples of the types of workers who are more vulnerable to wage theft, and notes research by the Victorian Trades Hall Young Worker Centre which has found that the younger these workers are, the more vulnerable they become.<sup>189</sup> The types of workers include:

- casual workers;
- temporary contract workers;
- labour hire employees;
- migrants and international students;
- tourism, retail and hospitality workers; and
- workers employed on 'probation', or as 'interns'.<sup>190</sup>

The SDA submits that wage theft is most commonly observed in vulnerable populations of workers and amongst those who are already the lowest paid. It is common in the un-unionised sections of the:

- fast food;
- hair and beauty; and
- retail industries.<sup>191</sup>

The SDA submits that 'Instances of wage theft can also be observed in the beauty industry, where there is a high proportion of workers who are young female migrants, who speak a language other than English.'<sup>192</sup> The SDA notes that migrant workers, regardless of age, are more vulnerable to wage theft, and international students are also marginalised.<sup>193</sup>

The SDA refers to the November 2018 FWO report into its second national compliance monitoring campaign, which re-evaluated employers previously found to be non-compliant. The SDA submission notes that the FWO campaign found that 'of the 479 employers re-audited, 38% were found to still be in breach of workplace laws' and that '24% of these were uncorrected

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<sup>188</sup> Submission of National Retail Association, p 12.

<sup>189</sup> Submission of UnionsWA, p 7.

<sup>190</sup> Ibid.

<sup>191</sup> Submission of Shop Distributive and Allied Employees' Association, p 12.

<sup>192</sup> Ibid, p 14.

<sup>193</sup> Ibid, pp 15-16.

underpayments.’ The SDA states that many of the case examples in the FWO report are from nail salons and fast food businesses and involve vulnerable populations of workers.<sup>194</sup>

The submission of the CPSU/CSA refers to the underpayment of allowances and other entitlements, excessive hours of unpaid work, misclassification of employees (i.e. classifying an employee group at a lower level than the work value warrants) and the use of labour hire in the public sector. In each case, examples were given.<sup>195</sup>

United Voice refers to the principal industries where wage theft is prevalent as being:

- property maintenance;
- contract cleaning;
- security;
- manufacturing; and
- hospitality-related areas, including the fitness industry.<sup>196</sup>

United Voice also notes that the industries where the exploitation of visa holders is most prominent are cleaning, horticulture, retail, meat and poultry processing, hospitality and accommodation services, and that these are ‘the industries in which labour-hire, subcontracting and sham contracting are most common, and where union density is low.’<sup>197</sup>

The AMWU says its experience is that high-density union sites will have very different wage theft issues compared to non-union workplaces. Most instances of wage theft affecting high-density union sites are generally attributed to ‘technical breaches to do with the interpretation of Award or enterprise agreement provisions.’<sup>198</sup>

The IEU submits that in the non-government schools sector wage theft is prevalent in most schools amongst both teaching and support staff.<sup>199</sup>

The Maritime Union of Australia West Australian Branch (MUA) submission refers to employees competing for the same work, and notes that low paid or low skilled workers in the maritime sector who are most easily replaced are the most impacted, and that even those workers who are more highly paid or highly skilled are being increasingly affected.<sup>200</sup>

ELC submits that based on its experience, the underpayment of wages and entitlements occurs across all industries, occupations, forms of employment and in all parts of the State. The ELC

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<sup>194</sup> Ibid, p 7.

<sup>195</sup> Submission of the CPSU/CSA, p 2.

<sup>196</sup> Submission of United Voice, p 5.

<sup>197</sup> Ibid, p 15.

<sup>198</sup> Submission of Australian Manufacturing Workers’ Union, p 3.

<sup>199</sup> Submission of Independent Education Union, p 3.

<sup>200</sup> Submission of Maritime Union Australia WA Branch, p 10-11.

submission notes that 'The most prevalent characteristic in the exploitation of Western Australian workers in this area is their vulnerability.'<sup>201</sup>

ELC has identified trends amongst callers experiencing wage theft, which include a higher number of calls from:

- workers in the industries of hospitality, beauty, retail, health, manufacturing and agriculture;
- workers in the occupations of labourer, sales, administration, hospitality worker, cleaner, care worker and chef.<sup>202</sup>

ELC submits that, in its experience, migrant workers:

- have reported receiving less favourable pay and conditions than Australian workers;
- have been exploited on threat of deportation – e.g. they have been required to pay for vehicle damage for which they were not responsible, or which could have been recovered on insurance;
- have been subjected to assaults, underpayment of entitlements, unreasonable working hours and other forms of mistreatment;
- have been threatened by their employers that they will have to repay visa fees and other associated costs if they leave their employment within a certain period of time; and
- have been selected for redundancy and they consider that they were selected because they were temporary work visa holders.<sup>203</sup>

The submission from The Humanitarian Group points out the particular vulnerabilities of persons from culturally and linguistically diverse (CaLD) backgrounds that need to be considered when implementing strategies to address wage theft:

- the vulnerabilities of temporary visa holders who hold real fears that their visas could be cancelled when they complain about an employer, particularly in circumstances where their visa is tied to a particular employer;
- that where CaLD workers suffer negative visa consequences as a result of making a complaint, this effectively means that the employee is punished for complaining instead of the employer;
- the vulnerabilities of those who do not have rights to work in Australia and who are subject to threats and exploitation by unscrupulous employers as a result;

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<sup>201</sup> Submission of Employment Law Centre, p 27.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

- the interaction between employment and trafficking, slavery and slavery-like practices in which CaLD clients are particularly vulnerable and exploited;
- the lack of understanding of the Australian legal systems, particularly where clients have come from countries of origin where there is no strong history of protection of employee rights and where authorities are unable to protect employees who are exploited;
- the language and cultural factors which make it particularly difficult for clients to access services;
- the need for appropriate funding of community legal centres assisting CaLD clients who require intensive and specialised assistance;
- the challenges for clients who depart Australia in pursuing legal avenues to recoup lost wages.<sup>204</sup>

WACOSS refers to the 2017 National Temporary Migrant Survey and similarly submits that:

Research has demonstrated that temporary migrant workers are at significant risk of underpayment, especially in food services, and the fruit and vegetable picking industries.<sup>205</sup>

The Maurice Blackburn submission says that migrant populations are often the victims of sham contracting arrangements. It refers to the Wage Theft in Silence Report that noted that temporary migrant workers comprise up to 11% of the Australian labour market and that underpayment within this workforce is both widespread and severe.<sup>206</sup> Maurice Blackburn submits that the conditions of their visas are often used against temporary migrant workers to claw back salaries or to underpay workers, and that temporary migrant workers are led to believe that 'if they complain about working arrangements, or if they are paid too much, they will be deported.'<sup>207</sup>

Maurice Blackburn emphasises that there are three types of working arrangements, in the gig economy, in the transport industry, and in businesses operating under franchising arrangements, which can often involve companies purposefully developing business models such as sham contracting arrangements that are aimed at ensuring that the relevant workers 'do not enjoy the minimum employment standards (including pay) that Australians have come to expect.'<sup>208</sup>

Slater and Gordon Lawyers (Slater and Gordon) submits that complaints about underpayment of wages and entitlements are 'less common in workplaces with a relatively higher proportion of unionised staff and/or where the employer is signatory to an enterprise agreement.'<sup>209</sup> The submission notes that in Slater and Gordon's experience, the 'more serious or blatant examples

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<sup>204</sup> Submission of The Humanitarian Group, p 8.

<sup>205</sup> Submission of Western Australian Council of Social Service, p 5.

<sup>206</sup> Submission of Maurice Blackburn Lawyers, p 7.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid, p 9.

<sup>209</sup> Submission of Slater and Gordon Lawyers, p 3.

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of wage theft' tend to come from vulnerable clients who have a relatively lower level of formal education or for whom English is a second language.<sup>210</sup>

In their submission to the Inquiry, Hardy and Kennedy state that while complaints data is a somewhat flawed indicator of compliance levels, the FWO has nevertheless reported that the proportion of 'disputes' resolved by the FWO involving visa holders (who comprise approximately 6% of the total Australian workforce) has increased from around 5% of dispute forms lodged in 2011/12 to 18% in 2016/17.<sup>211</sup> Hardy and Kennedy further note that:

Similar to broad trends identified in overseas jurisdictions, there is now mounting evidence in Australia to suggest that where vulnerable workers are employed in high risk, fragmented sectors, poor compliance outcomes are likely to abound. More specifically, patterns of wage theft have been found to be especially prevalent in hospitality and food services, and especially severe in the horticulture industry. Further, it appears that certain business models, such as labour hire arrangements and franchising, appear to be predisposed to high levels of non-compliance. For example, the FWO has observed that 'the most serious examples of exploitation often involve vulnerable migrant workers employed for an operator who is part of a much bigger supply chain or network.'<sup>212</sup>

## **Consideration**

### **Whether wage theft is more prevalent in particular industries**

The evidence detailed in Term of Reference 1, and the submissions referred in this Term of Reference, suggest that underpayment of wages and entitlements, including requiring employees to work additional unpaid hours beyond their contracted hours, is occurring across a wide range of sectors.

The workplaces in the evidence, case studies and examples submitted to the Inquiry more frequently include cafés and restaurants, retail, health and beauty, truck driving, contract cleaning and security.

The submissions to the Inquiry from individuals were categorised by industry, and the top five industries were:

- retail trade;
- health care and social assistance;
- accommodation and food services;
- mining; and

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<sup>210</sup> Ibid.

<sup>211</sup> Submission of Tess Hardy and Melissa Kennedy, p 3.

<sup>212</sup> Ibid, pp 3-4.



- construction.

An analysis of the survey provided by UnionsWA shows that nine of the 50 responses came from the hospitality sector, four from the fast food sector, four from retail and three from labour hire. The horticulture sector, with its reliance on workers who are vulnerable and/or sourced through labour hire, is also a particular industry sector where wage theft is prevalent.

Amongst the respondents to the online survey conducted by the Inquiry, the highest proportion of survey responses were from workers within the following industry:

- health care and social assistance (19.8%);
- public administration and safety (17.5%);
- retail trade (10.4%); and
- accommodation and food services industry (9.9%).

As noted in **Appendix 3** which discusses the survey results, a high number of respondents from certain occupation groups has skewed the results for this survey question towards the top two industries listed.

For comparison, I note that the Queensland Inquiry Report lists the top five industries for the incidence of wage theft as:

- accommodation and food services;
- other services (which includes personal care such as hair and beauty services);
- retail trade;
- construction, and
- health care and social assistance.<sup>213</sup>

The Federal Circuit Court in *Fair Work Ombudsman v Siner Enterprises Pty Ltd & Anor (No.2)* stated that:

The maintenance of the safety net is particularly pertinent in an industry such as the restaurant and hospitality industry, where it is now almost notorious that there are significant pockets of non-compliance in relation to the payment of wages and entitlements, either at all or correctly...<sup>214</sup>

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<sup>213</sup> Parliament of Queensland Education, Employment and Small Business Committee, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland*, 2018, p 50.

<sup>214</sup> [2018] FCCA 589 (15 March 2018), para 57.

In *Fair Work Ombudsman v Kojima & Anor*,<sup>215</sup> the Court stated:

In many cases before this Court over the last number of years it has been repeatedly identified that there is a significant risk of underpayments and breaches of workplace legislation in the restaurant and hospitality industry, where vulnerable employees such as foreign nationals on visas are employed.

I note too the information provided to the Inquiry by the Office of State Revenue which identified the horticulture and primary production industries. The Office of State Revenue further stated:

When looking at these results, it is worth noting that we are aware that similar issues exist in many other industries, such as security, cleaning and meat processing, where workers are providing 'unskilled' labour.<sup>216</sup>

My overall consideration of the evidence in this Inquiry leads me to conclude that cafés and restaurants, retail, contract cleaning and security, and horticulture are the sectors which demonstrate a higher likelihood of systematic and deliberate underpayment of wages and entitlements.

#### **Whether wage theft is more prevalent in particular occupations**

The Inquiry's online survey asked respondents for their occupation or job title. Within the Clerical and Administrative Workers group, survey respondents mainly consisted of general administration officers and account officers.

Within the Community and Personal Service Workers group, survey respondents consisted of:

- waiters and bar attendants;
- security officers; and
- café workers.

Within the Labourer occupation group, occupations consisted of:

- kitchenhands;
- farm hands; and
- traffic controllers.

The November 2015 Productivity Commission inquiry report into the workplace relations framework highlighted the higher risks of exploitation for permanent and temporary migrant workers owing to factors including their:

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<sup>215</sup> [2013] FCCA 976 (1 August 2013).

<sup>216</sup> Office of State Revenue, Information provided to the Inquiry, May 2019.

... 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.<sup>217</sup>

I find too that systematic and deliberate underpayment often involves permanent and temporary migrant workers. Below are three examples from the Inquiry's online survey about the type of wage theft experienced by visitors to Australia:

Most migrants have this issue. People take advantage of us because they know we need them to stay here. I worked in this company for over 5 years using my ABN. Underpaid, being discriminated, no sick leave or superannuation. And every time I requested time off or complained about something my boss would say I gave you the visa so you have to do that.

They would call people for trial in their restaurant and make you work for free for one week then just recycle desperate job-seekers every week and effectively get free labour.

Staff at the company are forever complaining - yet nothing is being done. I am on a visa 457 and feel like I have not got a leg to stand on. My agreed yearly salary which the company contracted to me and immigrations did not match, they under paid me for 6 months however did not do this to others in the same situation as me. I am still chasing this up!

### **Whether wage theft is more prevalent in particular forms of employment/engagement**

Of the 216 survey respondents in the Inquiry's online survey, three-quarters were directly employed by an employer (75.3%) and a further 16.7% were employed via an agency or labour hire provider. As of August 2018, 3.9% of all WA employees were registered with a labour hire firm or an employment agency (44,200 employees).<sup>218</sup> At the time of their wage theft experience, survey respondents were more likely to be employed on a casual basis (41.2%) or on a full time basis (36.1%). A number of survey respondents in the 'other' category identified that they could apply multiple categories.

The evidence, particularly from individual submissions and the understanding I have gained from informal discussions with industry representatives, leads me to conclude that labour hire in horticulture is a form of employment or engagement where underpayment of wages and entitlements, including requiring workers to work additional unpaid hours, is significant.

### **Whether wage theft is more prevalent in particular parts of the State**

In the Inquiry's online survey, the majority of respondents identified that their wage theft experience occurred in the Perth Metropolitan area (85.6%). As viewed in Figure 1, one in five

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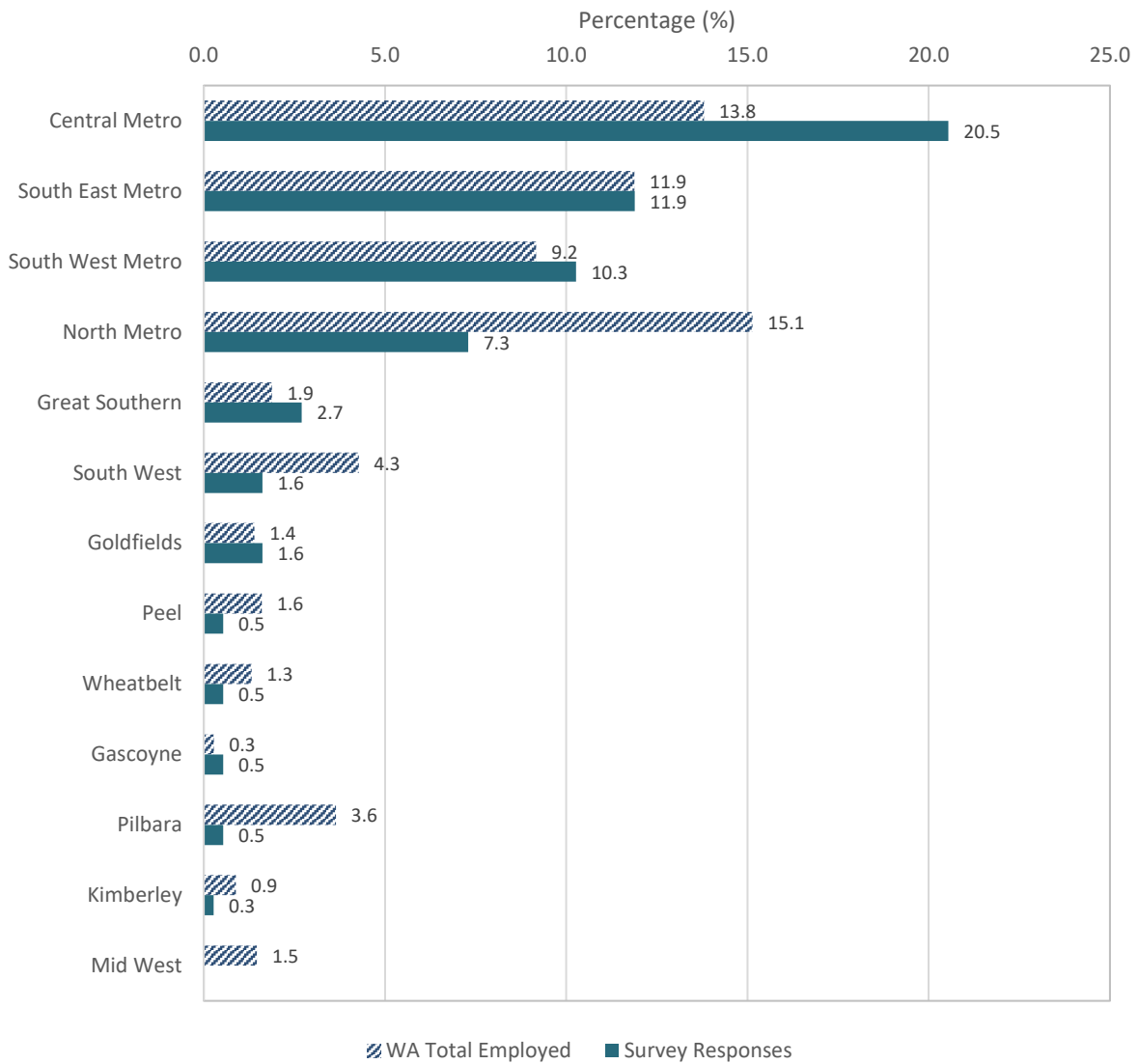
<sup>217</sup> Australian Government, Productivity Commission, *Workplace Relations Framework: Final Report*, no. 76, vol. 1, November 2015, p 48.

<sup>218</sup> ABS (2018) *Characteristics of Employment, Australia, August 2018*, catalogue number 6333.0, Table 13.

survey respondents experienced wage theft within the Central Metropolitan area, which includes the City of Perth (20.5% compared to 13.8% of the total employed population of WA).<sup>219</sup>

Other regions where survey respondents highlighted wage theft occurring higher than the general employed population was in the South West Metropolitan area (10.3% compared to 9.2% WA total employed) and the Great Southern region (2.7% compared to 1.9% WA total employed).<sup>220</sup>

**Figure 1: Proportion of survey respondents by region of employment compared to total employed, Western Australia<sup>221</sup>**



<sup>219</sup> ABS (2017) *2016 Census of Population and Housing, Working Population Profiles, Western Australia.*

<sup>220</sup> Ibid.

<sup>221</sup> ABS (2017) *2016 Census of Population and Housing, Working Population Profiles, Western Australia.*

**Term of Reference 4** – Whether wage theft is more prevalent in particular industries, occupations, forms of employment/engagement or parts of the State.

## Term of Reference 5

### Whether the current State and federal regulatory framework for dealing with wage theft is effective in combating wage theft and supporting affected workers.

An outline of the submissions received about this Term of Reference is set out below.

In the HIA's view the current regulatory framework for dealing with underpayment of wages is appropriate. The HIA submission refers to the FW Act provisions under which the underpayment of wages is a civil offence and penalties can be imposed where such actions have occurred, and that the penalties for the underpayment of wages where the actions are deliberate and systemic have significantly increased. HIA notes that the FW Act provides a range of options for employees to recover unpaid wages, including the FWO offering free services to employers and employees to assist with compliance.<sup>222</sup> HIA also states that the *Industrial Relations Act 1979 (WA)* (WA IR Act) provides a range of options to respond to the underpayment of wages, and notes that penalties can be imposed for a contravention of an award, agreement or statutory minimum condition.<sup>223</sup>

HIA sees value in having industry/occupational divisions within the FWO Infoline for the handling of queries, given the specific complexities in the residential building industry, and the HIA submission suggests that the same approach could be mirrored in the WA industrial relations system.<sup>224</sup>

Master Builders contends the FWO compliance reports and the information on the DMIRS website on compliance statistics provide evidence of how the regulatory framework is working. The submission notes that a further consideration in the building and construction sector is 'the role the Australian Building and Construction Commission (ABCC) plays in a compliance and enforcement function of employee wages and entitlements.'<sup>225</sup> Master Builders states that, in the building and construction sector, employers are subject to the FWO jurisdiction and also the ABCC, and therefore, those employers have to meet 'more requirements than most other industries when it comes to compliance checks of employee wages and entitlements.'<sup>226</sup> The Master Builders submission states that:

Arguably, the FWO compliance check reports and Migrant Workers' Taskforce Report combine to demonstrate the federal regulatory enforcement and compliance regime is working, though Master Builders accepts it can be better resourced. Add then the ABCC compliance checks in

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<sup>222</sup> Submission of Housing Industry Association, p 12.

<sup>223</sup> Ibid, p 13.

<sup>224</sup> Ibid, p 15.

<sup>225</sup> Submission of Master Builders Association WA, p 15.

<sup>226</sup> Ibid, p 16.

the building sector in addition to what other industries have, and Master Builders must submit the regulatory systems is working well in the industry.<sup>227</sup>

R&CA, which has a collaborative working relationship with the FWO to address issues of non-compliance across the hospitality sector, argues that ‘the resources of the FWO should be significantly bolstered so that it is properly equipped to pursue businesses who continually fail to comply with their various legal and regulatory obligations.’<sup>228</sup>

NRA submits that although the FWO is often criticised for its ‘selective approach to prosecution’, the FWO has all the legislative tools it needs to be an effective regulator, and ‘the generally high level of compliance is a testament to that office’s effectiveness in this respect.’<sup>229</sup> The submission outlines the NRA’s view that the key impediment to the FWO being an even more effective regulator is ‘not the current state of the law, but the resources provided to the enforcement agency.’<sup>230</sup> The submission also notes that academics, industry and unions have long lamented the critical under-resourcing of the FWO, and concludes that instead of changes to employment legislation, there needs to be a change in fiscal policy to provide for greater funding and resources.<sup>231</sup>

UnionsWA submits that vulnerable workers have difficulty speaking up about their situations and refers to the Australian Council of Trade Unions’ (ACTU) submission to the Queensland Inquiry into Wage Theft that noted:

The current approach to redressing worker underpayment and Fair Work Act protections are not working. The system relies heavily on individuals reporting underpayments. There is no recognition of how difficult and dangerous it is to take this first step. Many workers are scared to come forward with a complaint.<sup>232</sup>

The UnionsWA submission notes, therefore, that relying on vulnerable workers to make individual complaints of wage theft will not work. Rather, regulators need to be proactive in finding such workers, and unions need stronger rights of entry to workplaces in which wage theft is more likely to occur.<sup>233</sup>

The UnionsWA submission is summarised in its recommendation relating to Term of Reference 5:

That the powers of both the WA Industrial Relations Commission, and the Fair Work Commission, be increased in order to provide an effective avenue to hold employers to account. Where there are specific categories of workers and industries that are identified as more vulnerable, workplace regulators should be fully funded, empowered, and proactive, and unions and not-for-profit organisations should also be supported, in their work of combatting

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<sup>227</sup> Ibid.

<sup>228</sup> Submission of Restaurant and Catering Australia, p 3.

<sup>229</sup> Submission of National Retail Association, p 13.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid, p 14.

<sup>232</sup> Submission of UnionsWA, p 5, quoting ACTU, *Wage Theft: The exploitation of workers is widespread and has become a business model* (August 2018) p 1.

<sup>233</sup> Submission of UnionsWA, p 7.

wage theft. Compensation for wage theft should be funded by employers as an additional penalty for their breaches of both the Fair Work Act and WA Industrial Relations Act.<sup>234</sup>

The SDA submission is that there is not currently adequate funding for the FWO 'to deter non-compliance and resolve existing complaints.'<sup>235</sup> Specifically in relation to Term of Reference 5, the SDA submits that:

The current regulatory framework does not sufficiently deter wage theft, nor does it adequately address existing complaints in a manner that is timely or just. This is illustrated in the upper-level penalties being issued and trends of increasing wage theft. The only conclusion that can be drawn is that the current legislative framework does not deter or discourage wage theft.<sup>236</sup>

United Voice states that only the most serious offences are likely to attract enforcement action because a worker is likely to report only serious matters, and the FWO's protocols mean that many matters are dealt with through informational education and mediation processes rather than compliance and enforcement tools.<sup>237</sup>

United Voice refers to the difficulties workers face in proving underpayment because of scarce documentation and employer denial. The union refers also to delays gathering evidence and entering a workplace, and submits that for a worker court proceedings 'are daunting, time consuming and expensive.'<sup>238</sup> The United Voice submission notes:

In our experience, the combination of high cost legal proceedings in the Federal Circuit Court (including the Small Claims jurisdiction), the often drawn out mediation process and the very limited resources available to most workers renders legal costs an insurmountable obstacle to wage theft recovery.<sup>239</sup>

The IEU believes that the current enforcement system for matters of wage theft is 'too complicated and cumbersome' and the IEU proposes that greater powers be given to the WAIRC under s 44 or s 46 to enable the WAIRC to deal with wage theft matters in a simpler and more efficient way.<sup>240</sup>

The AMWU called for additional funding and resources to be given to community legal centres that provide free or subsidised services in employment law and that a general protection scheme be introduced into the WA IR Act analogous to Part 3-1 of the FW Act.<sup>241</sup>

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<sup>234</sup> Ibid, p 9.

<sup>235</sup> Submission of Shop, Distributive and Allied Employees' Association, p 7.

<sup>236</sup> Ibid, p 17.

<sup>237</sup> Submission of United Voice, p 22.

<sup>238</sup> Ibid, p 22-23.

<sup>239</sup> Ibid, p 23.

<sup>240</sup> Submission of Independent Education Union, p 3.

<sup>241</sup> Submission of Australian Manufacturing Workers' Union WA Branch, p 17.

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The CFMEU recommends that the State Government ‘immediately appoint additional Industrial Magistrates to the Industrial Magistrates’ Court of Western Australia.’<sup>242</sup>

The MUA believes the current regulatory framework for dealing with wage theft is inadequate for dealing with or discouraging wage theft because employees are too scared to pursue a claim and that most employers target a particularly vulnerable sub-group of their workers. The MUA submission notes that the union is not able to initiate a dispute unless an employee raises the issue first.<sup>243</sup>

The AMA (WA) submits that recommendations involving ‘improving employer accountability and eliminating impunity for engaging in wage theft’ will have a positive impact. It notes that ‘the financial penalties for breaching provisions of an industrial agreement are small’.<sup>244</sup>

ELC states in its experience, the underpayment of wages and entitlements is occurring and is a significant issue for vulnerable workers.<sup>245</sup> The ELC submission notes:

Necessarily, if the framework is ineffective in dealing with underpayment of wages and entitlements, it will be ineffective in dealing with wage theft, being an egregious category of underpayment of wages and entitlements.<sup>246</sup>

ELC makes the point that education and information cannot minimise wage theft because the underpayment is not occurring due to a lack of understanding of employment laws or an innocent mistake, but rather ‘an intentional act to circumvent the law.’<sup>247</sup>

ELC observes that in theory the regime provided for in the current State and federal employment law regulatory framework should protect vulnerable employees, however this does not mean that it is effective in doing so. ELC says a regulatory framework must be easy to understand and easy to enforce, which, in ELC’s experience, is not the case with the current system.<sup>248</sup> The framework should evolve to accommodate changing workplace patterns. ELC also submits that for the State and federal regulatory frameworks to be effective they need to be aligned because the dual jurisdiction of industrial relations in WA ‘adds a layer of complexity and a source of confusion for many workers.’<sup>249</sup>

Slater and Gordon states that in its experience almost every client who has sought the advice of the law firm with respect to wage theft is not aware of the existence of the IMC and its function, nor is there an awareness of the jurisdiction of the WAIRC to deal with claims for the enforcement of a contract of employment. The submission also notes that almost every client, if not all clients, covered by the WA industrial relations system who have sought Slater and Gordon's advice in

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<sup>242</sup> Submission of CFMEU Construction & General Division (WA), p 14.

<sup>243</sup> Submission of Maritime Union of Australia, p 11.

<sup>244</sup> Submission of Australian Medical Association (WA), p 9.

<sup>245</sup> Submission of Employment Law Centre, p 29.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid, p 33.

<sup>248</sup> Ibid, pp 29 - 30.

<sup>249</sup> Ibid, p 30.



relation to wage theft is not aware of the existence of the DMIRS Industrial Inspectorate and the system in place to assist in the recovery of underpayments of industrial entitlements.<sup>250</sup> Slater and Gordon considers that 'low paid and vulnerable employees are in need of a system that can provide fast and low-cost determination and enforcement of basic entitlements.'<sup>251</sup>

Some of the submissions to the Inquiry made by individuals are relevant here. In some cases, particularly where the submission sought assistance from the Inquiry itself to resolve the writer's problem, the writer seemingly was unaware of the options open to them under the current State or federal regulatory framework. When acknowledging receipt of individual submissions, the Inquiry did provide general information on the options for addressing individual situations of underpayment of wages and superannuation, however their submissions help illustrate the issue addressed in this Term of Reference, and I have taken them into account here.

## Consideration

A question which arises from the case of *Kandel*, which is referred to in detail in Term of Reference 1, is compelling: can it be said that the current legal and regulatory framework for dealing with wage theft is adequate when, even after approaching the FWO, the FWC and finally obtaining specialist legal assistance which helped secure a court judgment in his favour, Mr Kandel has not been paid any of the wages he is owed? Hall & Wilcox, the law firm that represented Mr Kandel, consider the current legal and regulatory framework for dealing with wage theft is inadequate, and I agree with them.

Mr Kandel's employment was governed by the national system, however in his case, it was a State court which heard and determined his case. Mr Kandel was dismissed in August 2016 and by the time he made an application to the FWC, he was out of time for lodging the application. It took him time to find Law Access, which led him to a commercial law firm which was prepared to assist him pro bono, so that by the time the claim was made to the IMC on his behalf it was more than a year after his dismissal. The submission noted that his former employer closed the business almost immediately after the IMC decision in Mr Kandel's favour was made, and there are very limited means open to a vulnerable worker like Mr Kandel to enforce a court's orders. The company has not been wound up, however Mr Kandel does not have the money to spend on a liquidator.

The enforcement of IMC orders not resulting in the payment to the underpaid employee is also referred to by the Private Sector Labour Relations Division of DMIRS (PSLR). It states:

Even if an order is made in favour of an employee, in PSLR's experience the employee may not recover any monies because the employer is no longer trading and can demonstrate they do not have the money or assets to meet the judgment debt (this includes companies that have ceased to trade and/or are insolvent). In the case of wage theft, if the employer cannot meet the judgment debt and any accompanying pecuniary penalties, then there is effectively no meaningful deterrent or consequences for that employer. This is clearly an undesirable

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<sup>250</sup> Submission of Slater and Gordon, p 3.

<sup>251</sup> Ibid, p 4.

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outcome, particularly given the employer may have profited significantly through their wrongdoing.<sup>252</sup>

Further, and significantly for the Inquiry, the process of enforcing the IMC orders obtained by Mr Kandel was found not to be straightforward even with specialist legal assistance.

The evidence and submissions made to the Inquiry, together with the reports, journal articles and media reports show that the systematic and deliberate underpayment, and the fruitless results of the enforcement in *Kandel*, cannot be regarded as an isolated example. The issue of businesses closing down to avoid paying employee entitlements, as well as other financial payments including taxation, is of such significance for Australia as a whole that it has resulted in the Phoenix Taskforce being established, comprising 34 Commonwealth, State and Territory government agencies to combat illegal phoenixing.<sup>253</sup>

Some of the submissions referred to above which suggest changes be made to the current regulatory framework, and some of the circumstances in the individual submissions, show that some changes should be made in order to more effectively address wage theft and support affected workers, and also to assist employers in understanding the current regulatory system.

### **The current State and federal regulatory framework**

I recognise the point made by HIA that both the FW Act and the WA IR Act provide options for addressing wage theft. However the evidence to the Inquiry as a whole shows that in many cases those options are not known, or are seen as inaccessible. In my view the current State and federal regulatory framework in WA is confusing to those who do not work in it, or who have never had to deal with it before. It is confusing to workers, but it is confusing to employers too. What follows is a brief outline of the issues to illustrate the point.

#### **Does the State or the national system apply?**

Western Australia is unique amongst the States in that it has retained a State industrial relations system for private sector employers and employees. The Inquiry's terms of reference relate to all Western Australian workers and cover both the WA and national industrial relations systems.

The WA industrial relations system covers employers that are sole traders, unincorporated partnerships, trusts where the trustee is a natural person, incorporated associations that are not trading or financial corporations and other not-for-profit organisations that are not trading or financial corporations, and their employees, as well as the State public sector, and some local governments in Western Australia.

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<sup>252</sup> DMIRS Private Sector Labour Relations Division, Information provided to the Inquiry, May 2019.

<sup>253</sup> Australian Taxation Office, *Phoenix Taskforce*, 2019 retrieved from: [www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/](http://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/).

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The national system covers constitutional corporations, that is Pty Ltd businesses that are trading or financial corporations, trusts where the trustee is a company, incorporated associations that are trading or financial corporations and other not-for-profit organisations that are trading or financial corporations, as well as the Commonwealth Government, and their employees. Some Western Australian local governments operate in the national system.

The industrial relations legislation in the WA industrial relations system includes the WA IR Act, the *Minimum Conditions of Employment Act 1993 (WA)* (MCE Act) and the *Long Service Leave Act 1958 (WA)* (LSL Act). The MCE Act applies to most employees in the WA industrial relations system and underpins all State awards and agreements. The State LSL Act also applies to the majority of national system employers and employees in Western Australia.<sup>254</sup>

The primary legislation in the national system is the FW Act. The FW Act contains the National Employment Standards which apply to all employees in the national system, and underpin all national modern awards and enterprise agreements.

### **The extent of coverage of the WA industrial relations system**

There is no definitive data on how many employers and employees are covered by the WA industrial relations system. Information provided to the Inquiry by DMIRS indicates that potentially between 21.7% and 36.2% of WA employees are in the WA industrial relations system. These figures include the state public sector.<sup>255</sup>

Employers and employees in the WA industrial relations system are more numerous in those industries or sectors which historically have not had high rates of company business structures. Agriculture and horticulture in WA for example are industry sectors where there is a greater number of employers that are not companies. During the course of this Inquiry it has been suggested to me that the proportion of employers in some agricultural or horticultural sectors covered by the WA industrial relations system may even be as high as 90%. According to DMIRS the awards in hospitality, retail, construction, hairdressing, clerical and metal trades industries are amongst the most widely utilised in the WA system.<sup>256</sup>

The evidence before the Inquiry shows that systematic and deliberate underpayment of wages and entitlements to employees occurs in both the WA and national industrial relations systems. The case studies from the State Industrial Inspectors are evidence from the WA industrial relations system. The court decisions and the FWO cases and reports are evidence from the national system.

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<sup>254</sup> The LSL Act applies to national system employers unless there are long service entitlements in a federal pre-modern award that would have covered the employer and its employees before 1 January 2010 or in some circumstances when a federal registered agreement applies.

<sup>255</sup> DMIRS, *Coverage of the State Industrial Relations System Information Paper*, provided to the Inquiry February 2019.

<sup>256</sup> Information provided by DMIRS on downloads of State awards summaries from the DMIRS website.

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The fact that there are two industrial relations systems in the private sector in WA, with the consequent need to determine which one applies in any particular case is still not widely understood by all employers and employees. I would not be surprised if most workers, and even a reasonable number of employers, would not know what a constitutional corporation is. For example, in its 2016 report of its regional campaign in the Gascoyne and Mid-West of WA<sup>257</sup> the FWO reported a case study in which the owner of a supermarket was ‘unaware that there was a difference in the State and federal industrial relations system in WA’, and was unaware that the business was covered by the FW Act. He was paying employees under a State award instead of the applicable national modern award. I cite this merely as an example of the lack of understanding of industrial relations regulation which can, and in my past experience does, occur.

Actually, for the vast majority of businesses in WA it will be clear which system applies because it will be clear whether they are a constitutional corporation. However, on occasion, particularly for organisations in the not-for-profit sector, even with professional advice the situation may not be clear because of the question of whether the organisation is engaging in sufficiently substantial trading to constitute a trading corporation. For example, the issue of whether or not the Aboriginal Legal Service of WA is a trading corporation eventually had to be decided by three Supreme Court justices sitting as the WA Industrial Appeal Court.<sup>258</sup>

Where the employer has not provided the employee with any pay slips or other documentation the employee may not know the legal identity of their employer. Even with that knowledge, the employee may be faced with the same uncertainty about the applicable industrial relations system which an employer may face. In addition, there are the issues of finding out where an entitlement is prescribed, for example in an award, an agreement or in legislation.<sup>259</sup> In most cases, the worker or the employer will seek assistance, including from organisations, from the FWO or Wageline at DMIRS, or from community groups or community legal organisations, which underlines the significance of their roles.

### **Recovering unpaid wages and entitlements**

The enforcement mechanisms for recovery of unpaid wages and entitlements are dependent on the relevant industrial relations jurisdiction. Not all entitlements are enforced in the same court. For example, an employee may need to commence proceedings in the Federal Circuit Court of Australia (FCCA), or the IMC or, in the case of denial of contractual benefits, the WAIRC.<sup>260</sup> Which avenue is the correct one will be determined by the source of the entitlement to be pursued. Even if the national system applies, an employee’s entitlement in WA to long service leave is generally to be found in the LSL Act and is enforceable through WA enforcement mechanisms. The summary which follows illustrates this:

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<sup>257</sup> Fair Work Ombudsman, *WA – Gascoyne/Mid-West Regional Campaign 2015*, May 2016, p 6.

<sup>258</sup> *Aboriginal Legal Service of WA Inc v Lawrence* 2008 WASCA 254; (2008) 89 WAIG 243.

<sup>259</sup> The National Employment Standards are found in the FW Act Part 2-2.

<sup>260</sup> Claims for enforcement of contracts of employment are non-excluded matters under the FW Act s 27(2)(o) so the jurisdiction of the WAIRC to deal with those claims is not overridden.

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**Table 1 – Summary of enforcement of employment entitlements in Western Australia**

Which system applies to employee?	Entitlements	Court/Tribunal to claim entitlement	Jurisdiction for enforcement of order if non compliance
National industrial relations system	Entitlements under modern award, National Employment Standards (NES) or enterprise agreement	Federal Circuit Court	Federal Circuit Court
		Federal Court	Federal Court
		Industrial Magistrates Court (WA)	Court of competent jurisdiction (usually Magistrates Court, based on quantum of order)
		Magistrates Court	Magistrates Court
		District Court	District Court
	Safety net contractual entitlement <sup>261</sup>	Federal Circuit Court	Federal Circuit Court
		Federal Court	Federal Court
Long service leave entitlement <sup>262</sup>	Industrial Magistrates Court (WA)	Court of competent jurisdiction (usually Magistrates Court, based on quantum of order)	
Claim for a denied contractual benefit <sup>263</sup>	WA Industrial Relations Commission	Industrial Magistrates Court (WA)	
WA industrial relations system	Entitlements under <i>Minimum Conditions of Employment Act 1993</i> (WA), State award or agreement	Industrial Magistrates Court (WA)	Court of competent jurisdiction (usually Magistrates Court, based on quantum of order)
	Long service leave entitlement <sup>264</sup>		
	Claim for a denied contractual benefit (a benefit not arising under a State industrial instrument)	WA Industrial Relations Commission	Industrial Magistrates Court (WA)
	Entitlements under FW Act <sup>265</sup> (extended NES entitlements)	As above for NES entitlements for national system	As above for NES entitlements for national system

<sup>261</sup> A contractual entitlement that relates to a provision of the NES, a term of a modern award, enterprise agreement, workplace determination, national minimum wage order or equal remuneration order.

<sup>262</sup> For entitlements under LSL Act.

<sup>263</sup> Under section 29(1)(b)(ii) of the WA IR Act; i.e. an entitlement not arising under an industrial instrument (if salary does not exceed the prescribed amount – \$166,680 from 1 July 2019).

<sup>264</sup> For entitlements under the LSL Act (WA).

<sup>265</sup> Pursuant to FW Act, Part 6-3.

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At first instance, employees in both systems are encouraged to attempt to resolve underpayments directly with their employer. If that is unsuccessful both the FWO and DMIRS assist in mediation/conciliation processes for employees in the national system and WA industrial relations system respectively. In the event an employer does not agree to voluntary mediation or conciliation, or the process does not resolve the complaint, and the employee wishes to pursue recovery of underpaid wages or entitlements, the avenue for doing so will need to be known. Table 1 above illustrates the likelihood that a worker or employer will need to seek assistance to understand what applies in their particular circumstances.

In the WA industrial relations system, State Industrial Inspectors at DMIRS, unions or an employee on their own behalf can institute proceedings claiming unpaid entitlements. Industrial Inspectors can investigate breaches of State awards, agreements, orders, the MCE Act and LSL Act, and if appropriate initiate proceedings against employers. In the national system, proceedings for contraventions can be taken by the FWO, individual employees or employee organisations in various courts (Federal Court of Australia, FCCA or an eligible State or Territory court, which includes the IMC, Magistrates Court of WA and District Court of WA).

### **Improving the current regulatory framework**

Although I have concluded that the current regulatory framework is inadequate, there is much to be said for the framework. The submissions of HIA, Master Builders, R&CA and NRA which include observations, essentially, that the problem is not with the current state of the law but with the lack of resources provided to regulators, are not dissimilar to those parts of the UnionsWA, SDA and CFMEU submissions about the regulators. I address this in what is to follow.

Some submissions, including UnionsWA<sup>266</sup> seek greater powers for the WAIRC ‘to stop employers’ who underpay their workforce. However, the provisions of the FW Act which override the WA IR Act make this problematic.<sup>267</sup> Other issues raised in submissions and, in some cases, some suggestions made for improvement, together with my experience particularly of the WA industrial relations system, and the discussions I have had with others, lead me to suggest that there are a number of strategies that the State Government should consider which, taken together, should help to improve the effectiveness of the current regulatory framework to address wage theft in WA, particularly for employment covered by the WA industrial relations system.

Increasing the outdated monetary penalties in the WA IR Act to reflect contemporary standards is one strategy which has been addressed in the Final Report of the Ministerial Review of the State Industrial Relations System<sup>268</sup> and I do not wish to add anything to it.

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<sup>266</sup> Submission of UnionsWA, p 8.

<sup>267</sup> Fair Work Act 2009 (Cth) s 26(1) states: ‘This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer’.

<sup>268</sup> *Ministerial Review of the State Industrial Relations System Final Report*, June 2018.

Strategies which will require administrative amendments, or minor legislative amendments, to implement are:

- a State Government information campaign to raise employer and employee awareness of employment obligations, rights, and the pathways available for pursuing an underpayment in WA;
- assisting employer organisations and employee organisations to extend their educative role to employers and employees in those sectors where the likelihood of wage theft in employment covered by the WA industrial relations system is high;
- establishing a wage theft website/hotline and smartphone app;
- publishing the name of an employer found by the courts to have systematically and deliberately underpaid a worker;
- increasing the sitting days of the IMC;
- ensuring IMC court documents can be served by mobile phone number;
- significantly increasing the number of Industrial Inspectors and their powers; and
- providing community organisations with employment-related information and funding legal centres which provide employment-related assistance.

Strategies which involve new legislation are dealt with in the next Term of Reference.

The strategies in the recommendations to follow are also aimed at establishing a pathway an underpaid worker might follow to seek information and to pursue an underpayment which is set out in a diagram in the [Executive Summary](#).

**A State Government information campaign to raise employer and employee awareness of employment obligations, rights, and the pathways available for pursuing an underpayment**

I consider that the current regulatory framework in WA to address wage theft will be made more effective if additional proactive steps are taken in industry sectors where wage theft is prevalent to:

- increase awareness of the employment obligations of employers, and the consequences of not obeying those requirements; and
- increase the awareness of the employment rights of employees.

There is a lack of understanding of the framework by some employers in some industry sectors, particularly employers which are not members of an industry association. In relation to workers' awareness, the submission from Slater and Gordon in particular makes the point that there is a significant lack of understanding of the framework, and it is a point inherent too in submissions from ELC and other community groups, as well as in individual submissions.

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I acknowledge the point made by Hardy and Kennedy that ‘enhanced information and educational initiatives directed towards employers are likely to be somewhat futile in relation to firms who are systematically seeking to avoid their legal obligations and evade enforcement efforts.’<sup>269</sup> ELC makes a similar point that underpayment is not occurring due to a lack of understanding of employment laws, but due to an intentional act.<sup>270</sup> However I consider that steps taken to raise the level of employer and worker awareness of employment rights and obligations in those sectors where the likelihood of wage theft is high still can have a positive result.

This has been the finding of the September 2017 UK Low Pay Commission Report into non-compliance and enforcement of the UK National Minimum Wage which noted:

Lack of awareness is one of the reasons for not complaining across all underpaid workers. Over half of low-paid workers think that the law allows them to agree to be paid less than the minimum wage. A similar proportion were unaware that tips cannot ‘top up’ pay to the minimum. Further, two fifths were unaware that they can legally claim back lost earnings.

For this reason the Government’s recent communications campaign around the April 2017 upratings was welcome. Our analysis suggests that this campaign may have led to lower underpayment following the introduction of the NLW [National Living Wage] than otherwise would have been the case.<sup>271</sup>

The UK Low Pay Commission Report referred to further government action:

Government should fully evaluate its communications efforts and look to repeat them each year alongside the NMW (National Minimum Wage) and NLW upratings if they are shown to raise awareness and reduce underpayment. This should be combined with a broader approach aimed at raising the number of formal complaints made by workers to the ACAS [Advisory, Conciliation and Arbitration Service] helpline, which remain low relative to our estimates of the scale of underpayment. This includes better publicity around the third party complaints process, developing case studies and/or guidance based around successful complainants and publicising the improvements in the time taken to resolve a case.

For employers we recommend improved guidance around the technical errors that other employers have made, so they can learn from each other’s mistakes. But we also need action on recalcitrant employers, so efforts to both increase the number of prosecutions and publicise those that do occur would be welcome.<sup>272</sup>

If, as a result of greater information and educational initiatives, there is a greater community awareness that systematic and deliberate underpayment of wages and entitlements is unlawful, and if there is an understanding that resources are being devoted to its enforcement, it will commence to change the attitude of employers who consider underpaying workers is not a serious, or unlawful, matter. Having an information campaign in those sectors where the

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<sup>269</sup> Submission of Tess Hardy and Melissa Kennedy, p 2.

<sup>270</sup> Submission of Employment Law Centre, p 33.

<sup>271</sup> Low Pay Commission (United Kingdom), *Non-compliance and enforcement of the National Minimum Wage*, 2017, p 4.

<sup>272</sup> Ibid.



likelihood of wage theft in employment covered by the WA industrial relations system is high, conducted in consultation with relevant employer organisations and unions, and using social media to publicise the increase in enforcement activity, will all be positive measures.

Steps which will make employers and employees in those sectors more aware of what the minimum entitlements are, where to go for information and what options are available to them if they are concerned that wage theft is taking place will also tend to improve the effectiveness of the State and national regulatory framework. An example from the US State of Minnesota as to how such information might be provided is attached at **Appendix 6** for illustration. The information should be made available in different languages.

An information campaign should utilise the same internet sites and social media used by job seekers, and which carry advertisements for jobs. This can have the capacity to publicise the number of complaints or the number of cases investigated, by sector and locality. More than one-third of survey respondents to the Inquiry's online survey had found their job via word of mouth (38.6%) and another one-third (33.5%) via an online employment site.

In *Layered vulnerability: Temporary migrants in Australian horticulture*, Elsa Underhill and Malcolm Rimmer, note:

... job search is aided by communication through the internet and social media. Several websites carry advertisements for harvest jobs. Amongst these are *Gumtree*, *FruitPickingJobs*, *Harvest Trail*, *Harvest Bites Labour* and *Workabout Australia* as well as some websites in Asian languages. Also popular with WHMs are backpacker hostel websites which advertise both jobs and accommodation (WHM interviews, 2013).<sup>273</sup>

A State Government information campaign should focus primarily on the WA industrial relations system. DMIRS should discuss with the FWO co-ordinating with the FWO in relation to the national system. Relevant employer and employee organisations and other stakeholders should be consulted about the content and mode of delivery of the campaign.

### Recommendation 1

I recommend that the State Government, in consultation with relevant employer and employee organisations and other stakeholders, conduct an information campaign, including by using social media, in those sectors where the likelihood of wage theft in employment covered by the Western Australian industrial relations system is high in order to raise the level of employer and employee awareness of employment rights and obligations and the pathways available for pursuing an underpayment.

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<sup>273</sup> Elsa Underhill and Malcolm Rimmer, *Layered vulnerability: Temporary migrants in Australian horticulture*, Journal of Industrial Relations 2016, Vol. 58(5) 608–626, p 616.

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**Assisting employer organisations and employee organisations to extend their educative role to employers and workers in those sectors where the likelihood of wage theft in employment covered by the WA industrial relations system is high**

Some of the submissions from organisations refer to the need for greater education about the workplace.

AHA offers industrial relations advice to members and acts proactively by regularly informing members of the efforts of regulators in enforcing compliance. AHA submits that there needs to be greater support and communication provided to employers, particularly in relation to changes to employer obligations and employee entitlements. In the view of AHA, this can assist employees to receive the applicable wages and entitlements and avoid underpayments.<sup>274</sup>

R&CA 'acknowledges and emphasises' its educative role and that it takes a proactive approach in performing the role, maintaining a workplace relations advisory service staffed by industrial relations specialists.<sup>275</sup>

I note that Master Builders provides a range of services to its members on award rates and employment conditions. Master Builders recommends the WA Government considers funding employer groups like the Master Builders to conduct education campaigns to non-member employers on the relevant award and employment conditions in particular industries.<sup>276</sup> Through its submission, Master Builders states:

To this end, Master Builders believes there is potential to educate small employers on the complexity of awards and overcome any demonstrable instances of unintentional wages or employment entitlement errors.<sup>277</sup>

The NRA submitted that it is important for employees to be aware of exploitative behavior and wage non-compliance so that it can be reported to the FWO. The submission notes that young employees in particular are less likely to report instances or personal experiences of wage non-compliance due to a lack of awareness about their rights and entitlements. NRA is of the view that education of young people and new arrivals to Australia is required to improve their understanding of Australia's industrial relations framework and that any investment in formalising education in workplace rights would have a significant effect in improving the effectiveness of the current legislative provisions.<sup>278</sup>

UnionsWA suggests that training about workplace rights and safety should be embedded in WA education for students year 10 and above, including all apprentices, trainees and other VET students,<sup>279</sup> and this view is also supported by United Voice which recommended information on

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<sup>274</sup> Submission of Australian Hotels Association, p 4.

<sup>275</sup> Submission of Restaurant & Catering Australia, p 2.

<sup>276</sup> Submission of Master Builders Association, p 17.

<sup>277</sup> Ibid, p 8.

<sup>278</sup> Submission of National Retail Association, p 15.

<sup>279</sup> Submission of UnionsWA, p 10.

industrial relations be part of the Australian Curriculum and core content for vocational qualifications.<sup>280</sup>

Maurice Blackburn suggests that in many cases wage theft is allowed to occur because the workforce is unaware of their rights, fearful of making a complaint or unaware of the procedure for making a complaint about underpayment. It recommends that ‘the Government ensure that workers have appropriate access to union advice and support’, and that the Inquiry should ensure that ‘community legal services are appropriately resourced to ensure that the power balance and the claims process is levelled.’<sup>281</sup>

In its Southern Perth and Albany-Manjimup Regional Campaign Report, the FWO found that:

...businesses are more likely to be compliant with workplace laws when they have access to specialised workplace relations advice such as through membership to an employer organisation, or access to accounting or legal advice or a dedicated human resources professional within the business. Larger businesses are more likely to have the resources to employ a human resources or payroll professional in house.<sup>282</sup>

In my view, those employer organisations in sectors where the likelihood of wage theft in employment covered by the WA industrial relations system in the private sector is high should be consulted and, where appropriate, assisted to extend their educative role more broadly within those sectors to non-members. This will assist to level the playing field. In the case of employment covered by the WA industrial relations system, the State Government should consider providing funding to those employer organisations for this purpose.

I note too the submission of R&CA which refers to the collaborative working relationship it has with the FWO to address issues of non-compliance across the hospitality sector.<sup>283</sup> I consider that it will be helpful if DMIRS develops a collaborative working relationship with employer organisations in those sectors where the likelihood of wage theft is high in order to address issues of non-compliance in the WA industrial relations system by the provision of information.

Employee organisations too can have an educative role to play in addressing wage theft. In the case of employment covered by the WA industrial relations system, the State Government should consider providing funding to those employee organisations for this purpose.

The Horticulture Report concluded:

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<sup>280</sup> Submission of United Voice, p 25.

<sup>281</sup> Submission of Maurice Blackburn Lawyers, pp 13 – 14.

<sup>282</sup> Fair Work Ombudsman, *Western Australia – Southern Perth and Albany-Manjimup Regional Campaign Report*, 2018, p 9.

<sup>283</sup> Submission of Restaurant & Catering Australia, p 3.

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Thus, it is vital that industry and unions work collaboratively with government to develop a tripartite approach to addressing challenges associated with the horticulture industry's structural reliance on undocumented workers.<sup>284</sup>

I respectfully agree, and consider a tripartite approach between the State Government, employer and employee organisations would assist in addressing wage theft: there is significant agreement between employer organisations and employee organisations that systematic and deliberate underpayment of wages is completely unacceptable, even though they have, perhaps, less agreement between them about the best way of addressing it. It may be possible, depending on the circumstances and the organisations involved, for the State Government to facilitate a tripartite agreement for how employer and employee organisations might undertake a pro-active educative role in an industry sector. If there are practical difficulties with agreeing a tripartite approach, the State Government should deal separately with employer and with employee organisations for this purpose.

It has been suggested to me during informal consultations with a business group that the process of granting an ABN include the requirement for completion of an online module regarding employment rights and obligations under Australian employment law. This suggestion has not been the subject of other submissions; however, in the context of addressing wage theft, it is a suggestion I note.

### Recommendation 2

I recommend that in those sectors where the likelihood of wage theft in employment covered by the Western Australian industrial relations system in the private sector is high, the Department of Mines, Industry Regulation and Safety develops a collaborative working relationship with employer organisations and with employee organisations in order to assist them to extend their educative role to employers and employees in those sectors.

### Recommendation 3

I recommend that the State Government:

- consult with employer and employee organisations, and other stakeholders on the most effective means to educate young people and recently arrived persons about the employment obligations of employers and the rights of employees and to improve their understanding of Western Australia's industrial relations framework; and
- consult with the Commonwealth Government regarding this issue for the national industrial relations framework.

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<sup>284</sup> Joanna Howe, Stephen Clibborn, Alexander Reilly, Dianne van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, University of Adelaide and University of Sydney, 2019, p 46.

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### **Establishing a wage theft website/hotline/smartphone app**

Presently, the State Government Wageline service within DMIRS provides advice to both employers and workers. It has the capacity to deal with a complaint of underpayment. However, the submissions to the Inquiry, particularly from individuals including those who participated in the surveys conducted by the Inquiry, UnionsWA and ELC, but also from organisations such as IEU and AMA (WA) which refer to professional employees who are reluctant to be seen to complain, show that more is needed in order to address the wage theft issues raised.

When this Inquiry was announced, before it was actually established, two enquiries were received about how a submission might be made. After the Inquiry and its website were established, the responses from individuals suggest to me that a forum for them to advise of their own circumstances, or to advise of wage theft occurring to others, including by a business referring a competitor which underpays its employees, is a necessary initiative.

I consider this is best able to be achieved by the State Government establishing a dedicated WA Wage Theft website, hotline and smartphone app to address wage theft. It will be able to provide information about whether employment is in the WA or the national industrial relations systems and be a reporting tool for reporting wage theft.

It is most important that the WA Wage Theft website be promoted and be available in different languages and that the hotline have the multi-lingual support which will allow individual workers of different nationalities to anonymously report instances of wage theft. This is intended also to complement the FWO's 'online anonymous tool' which:

...lets members of the community notify us of businesses or individuals who may be breaching workplace laws, without identifying themselves. In the last year, this tool was available in 16 priority languages (in addition to English). This enabled more migrant workers, one of our most vulnerable cohorts, to report issues to us in their language. The release of this tool was supported by a digital and traditional media campaign to raise awareness of the resource among migrant workers.<sup>285</sup>

Given the majority of private sector employment is in the national system, a high proportion of reports will be about employment covered by the national system. A protocol between the FWO and DMIRS should be entered into so that calls/notifications made to the website/hotline which should have been made to the similar service operated by the FWO are directed there, and vice versa – the caller should not have to make the same call twice. In this way, the effect of the distinction between the WA and national industrial relations systems is lessened, which assists to address a point raised particularly by ELC.

The WA Scamnet website was developed by DMIRS Consumer Protection as one method of combatting the problem of scams, ripoffs and frauds, and a WA Wage Theft website might follow a similar pattern.<sup>286</sup>

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<sup>285</sup> Fair Work Ombudsman, *Annual Report 2017-18*.

<sup>286</sup> [www.scamnet.wa.gov.au](http://www.scamnet.wa.gov.au)

My attention has been drawn to the operation of a ‘Safe Car Wash’ smartphone app in the UK as part of the Church of England’s approach to eradicating modern slavery.<sup>287</sup> It has been established to assist the public to identify conditions of modern slavery involving people being ‘forced to work long hours, for little or no pay, and under threat of violence in hand car washes’ and it may provide a model for consideration.<sup>288</sup> Its format and operation illustrate how an app can be used in this context.

By this means, an issue of wage theft in the WA industrial relations system can be reported, and investigated by an Industrial Inspector, without the need for a employee to identify themselves and make a complaint. It will also provide the means for the public, including other businesses, to report instances of wage theft.

The creation of the website, hotline and smartphone app should be featured in the State Government’s information campaign which is Recommendation 1.

This, together with my later recommendation regarding significantly increasing the number of State Industrial Inspectors, will be an important measure in addressing wage theft in WA.

#### **Recommendation 4**

I recommend that the State Government create a separate wage theft website in different languages, a wage theft hotline with multi-lingual support, and a smartphone app, in order to receive complaints, including anonymous complaints, about wage theft in Western Australia.

#### **Publishing the name of an employer found to have systematically and deliberately underpaid a worker**

The UK Low Pay Commission Report states that ‘naming’ employers is used increasingly, and has helped to raise the profile of enforcement activity and awareness of workers’ rights:

A key plank of the UK Government’s efforts to both raise awareness and discourage underpayment is naming, whereby all employers for which an underpayment has been identified by HMRC [HM Revenue & Customs] are publicly named.<sup>289</sup>

The WA Department of Health maintains a web-based publication that lists food businesses and individuals that have been convicted of an offence under the *Food Act 2008* (WA) and subsidiary legislation relating to the handling or sale of food.<sup>290</sup> The purpose of maintaining the list is to

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<sup>287</sup> The Clewer Initiative, *Safe Car Wash*, 2019, retrieved from: [www.theclewerinitiative.org/safecarwash](http://www.theclewerinitiative.org/safecarwash)

<sup>288</sup> Alex Strangwayes-Booth, *Safe Car Wash app reveals hundreds of potential slavery cases*, BBC News Online, April 2019.

<sup>289</sup> Low Pay Commission (United Kingdom), *Non-compliance and enforcement of the National Minimum Wage*, 2017, p 27.

<sup>290</sup> Department of Health WA, *Publication of Names of Offenders Policy*, Government of WA, October 2010.

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provide consumers with information to enable them to make informed decisions about where they buy food in WA. Similar websites are also available in other States and Territories.

In my view, the current focus in Australia on wage theft has been largely driven by the very public exposures by the media of the exploitation of employees in franchises, in the horticulture sector and in hospitality. Public exposure of wrongdoing is a powerful tool to counter wage theft. I consider it quite likely that many Australians would shun a business which is known to have exploited its staff. It follows to my mind that publishing the names of employers found to have systematically and deliberately underpaid their workers can act as a deterrent to do so. Correspondingly, prospective employees will be able to access this information, and take it into account, if they are considering whether to seek employment from a particular employer.

Accordingly, I consider the State Government should publish on its wage theft website, and as part of its smartphone app, the name of an employer who has been found by the Courts to have systematically and deliberately underpaid a worker.

#### **Recommendation 5**

I recommend the State Government publish on its wage theft website, and as part of its smartphone app, the name of an employer who has been found by the Courts to have systematically and deliberately underpaid an employee.

### **The Industrial Magistrates Court of WA**

The IMC is an ‘eligible State court’ for compliance and enforcement under the FW Act (FW Act s 12 and Chapter 4). It is also the court for the enforcement of State employment legislation and awards. It is therefore a part of both the State and the federal regulatory framework for dealing with wage theft. The IMC has been commented on with approval in both discussions and written submissions as a means of enforcing entitlements under federal legislation and instruments in WA. Its pre-trial conference process has been described to me as a very informal, important and successful process.

The IMC is a court established under WA legislation (s 81 of the WA IR Act) which means the WA Parliament is able to make legislative changes to the WA IR Act which may assist in addressing wage theft in WA.

From that perspective, two issues regarding the IMC which are of an administrative nature are in my view worthy of consideration.

#### **Increasing the available sitting days of the IMC**

The first is that it is considered desirable for the IMC to be able to sit full time. This has been variously expressed as a submission either for more appointments to the IMC or an increase in the sitting days from its current two days per week. These submissions are not critical of the IMC; in fact the reverse is the case. In submissions made to this Inquiry, taking enforcement proceedings in the IMC is seen as a preferable alternative to taking enforcement proceedings in

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the federal courts. The sentiment behind the submissions reflects the need for matters to be listed sooner; this in turn suggests there needs to be additional judicial resources dedicated to the IMC, particularly if wage theft is to be more effectively addressed.

The availability of more sitting times may also assist where an expedited hearing is requested because there is the prospect of a party leaving the jurisdiction to return overseas.

Ultimately, the issue is one of funding and that is for the State Government to consider. From the point of view of addressing wage theft in WA more effectively, and reducing the time for the hearing and determination of cases of underpayment, the State Government should consider providing additional funding for the operation of the IMC to enable it to sit full time if necessary.

A factor in this consideration will be that, given the significant majority of prosecutions of wage theft in the IMC will be about employment covered by the national system, a correspondingly significant part of the expense incurred by the State in providing additional funding for the operation of the IMC will be for enforcing Commonwealth legislation, not its own legislation. However, in the context of effectively addressing wage theft in WA, it is important that the IMC be available to sit more frequently if necessary.

In this context, to be appointed as an Industrial Magistrate, a person must already hold office as a Magistrate.<sup>291</sup> Some members of the WAIRC meet the requirements to be appointed as a Magistrate<sup>292</sup> and perhaps the dual appointment of a suitably qualified member of the WAIRC as an Industrial Magistrate may provide an option for consideration. Such a dual appointment would be cost effective for the State. It would require legislative amendment.

### **Recommendation 6**

I recommend that the State Government fund the operation of the Industrial Magistrates Court of WA to enable it to sit full time if necessary to increase the timeliness of matters being listed in the Industrial Magistrates Court.

### **Ensuring IMC court documents can be served by mobile phone number**

In relation to the service of documents, the State Industrial Inspectors in PSLR observe that:

It is not uncommon in PSLR's experience for employers who are the subject of an investigation to stop trading, move residential residence and avoid engaging with PSLR. However, in many instances PSLR will have an email address and/or mobile phone number for these employers which would facilitate substituted service.<sup>293</sup>

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<sup>291</sup> *Industrial Relations Act, 1979 (WA)* s 81B(2).

<sup>292</sup> By Schedule 1 of the *Magistrates Court Act 2004 (WA)* s 2(2) a person is qualified to be appointed as a magistrate of the Court if he or she has had at least 5 years' legal experience; and is under 70 years of age.

<sup>293</sup> DMIRS Private Sector Labour Relations Division, Information provided to the Inquiry, May 2019.

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It is therefore desirable in those cases that the IMC be able to order, in appropriate circumstances, that service of the originating claim, or a document, may be effected by email and/or mobile phone number where it is possible to do so.

Service by email if a party to proceedings has provided an email address for the purposes of service is provided for in reg 58 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA). Service by mobile telephone number is not specifically provided for, although it may be arguable that the requirement in reg 53(2) that a document ‘may be served by delivering it to the person personally’ is enough to hold that receipt of an SMS message alone is sufficient compliance with that requirement, relying on the decision of Blaxell J in *Prout v La Rosa*.<sup>294</sup>

It is one thing to serve a document by email, or for that matter by mobile telephone number, where a person who is already party to proceedings provides an address, or mobile phone number, for that purpose; it is another thing to serve the originating claim in the IMC by email or mobile telephone number when the intended respondent has not consented to that method of service. Indeed, the intended respondent may be unwilling to be found, let alone be co-operative.

The circumstances referred to by PSLR reflect a modern circumstance where an employer may successfully operate an unregistered business in an elusive manner with the use of technology. That circumstance is specifically relevant too to successfully countering wage theft in, at least, the horticulture industry. The Horticulture Report, noting the Victorian Inquiry into the Labour Hire Industry and Insecure Work, states:

Many non-compliant labour hire providers were found to lack visibility by not operating under a registered business or corporate entity. They would use technology (such as mobile phones and the Internet) to avoid the detection of unlawful practices, and operate outside the reach of the regulators.<sup>295</sup>

This issue is repeated later in the Horticulture Report where a caravan park owner in Queensland providing accommodation for workers in horticulture is reported as stating:

We now rarely will touch a contractor who’s got one name and a mobile phone number and even if they ring us, we’ll go “no we haven’t got anybody”, because you can’t track them down later on.<sup>296</sup>

It may well be likely that there will be a non-compliant labour hire business in the WA horticulture industry operating in this manner. Serving an originating claim physically in such circumstances is likely to prove ineffective and if the only known means of contacting the business is by the mobile phone number, then in my respectful view, consideration should be given to providing for

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<sup>294</sup> [2007] WASC 63; BC200701678.

<sup>295</sup> Joanna Howe, Stephen Clibborn, Alexander Reilly, Dianne van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, University of Adelaide and University of Sydney, 2019, p 32.

<sup>296</sup> *Ibid*, p 87.

an originating claim in the IMC to be served using that number where it is electronically possible to do so.

Service of the originating claim is the responsibility of the applicant/plaintiff and will be valid only if service occurs in accordance with the applicable regulations or any order for substituted service. Therefore, I recommend that the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)* expressly provide that in appropriate circumstances, an originating claim, or a document, may be served by mobile telephone number.

#### **Recommendation 7**

I recommend that the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* expressly provide that in appropriate circumstances, an originating claim, or a document, may be served by mobile telephone number.

### **The role of the State Industrial Inspectors and the Fair Work Inspectors**

I consider the role of State Industrial Inspectors and Fair Work Inspectors to be the single most important factor in the effective regulatory response to wage theft. There are a number of reasons for this.

Submissions to the Inquiry have been received which indicate that individual employees often will not report being underpaid. This applies to different sectors and across many different skill levels. In the *Wage Theft in Silence Report* the authors identified seven broad reasons why migrant workers do not recover their unpaid wages:

- capacity, competence and lack of knowledge about how to recover wages;
- social perceptions and relational factors;
- fear of immigration consequences;
- fear of job loss;
- pessimism about outcome;
- perception that the amount of unpaid wages is not significant; and
- temporariness of stay in Australia.<sup>297</sup>

Therefore I consider UnionsWA is quite correct in its observation that one cannot rely on individual complaints to identify employees vulnerable to wage theft.<sup>298</sup> Also, employers who deliberately ignore the legal requirement to pay their employees the wages and entitlements

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<sup>297</sup> 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 2018, pp 7-8.

<sup>298</sup> Submission of UnionsWA, p 7.

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earned are not easy to locate or identify in the absence of a complaint from an employee. The ability of an Industrial Inspector to visit a workplace and inspect the time and wages records is therefore of great significance.

I am reinforced in my view by the comments made to me in private conversations with, on the one hand, a lawyer with extensive experience representing vulnerable workers and, on the other, a senior person in an employer organisation, each of whom expressed the personal opinion that the most effective way to counter wage theft was a visit from an Industrial Inspector or a Fair Work Inspector. The most reliable means of checking award or minimum conditions of employment compliance is for an Inspector to visit the business.

However, the lack of adequate funding means there are too few Industrial Inspectors to adequately do so.

**State Industrial Inspectors**

Information provided by DMIRS is that the Private Sector Labour Relations Division Industrial Inspectors finalised three enforcement proceedings in 2017/2018 and these proceedings achieved \$28,280 in penalties/fines:

**Table 2 Industrial Inspector claims**

<b>Industrial Inspector claims</b>	<b>2017/2018</b>	<b>2016/2017</b>
Enforcement proceedings finalised	3	1
Enforcement proceedings discontinued	2	-
Value of orders (incl disbursements)	\$18,502	\$121
Penalties/fines (number of matters)	2	1
Value of penalties/fines	\$28,280	\$4,000

In addition to enforcement proceedings, State Industrial Inspectors assisted WA workers to recover a total of \$458,290 in unpaid wages and entitlements in 2017/18 in reactive compliance activities. This amount included nearly \$300,000 in unpaid long service leave and \$137,000 in wages and other entitlements under State awards, such as annual leave and tool allowances.

Industrial Inspectors also recently conducted a proactive compliance campaign which focused on small businesses in the nail and beauty industry. Industrial Inspectors analysed employment records in 50 nail and beauty salons in the WA industrial relations system to check that employees are being paid correctly and that the mandatory employment records are being kept. Of these salons a total of 12 businesses, or nearly 25%, were found to have underpaid one or more employees. Nail salons in the WA industrial relations system are award free and a total of \$15,877

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from underpaying the minimum wage was recovered and returned to employees. A subsequent more extensive proactive campaign in this industry is underway.<sup>299</sup>

However, there has been a steady decline in the number of Industrial Inspectors in WA. A decline in numbers after the coverage of the WA industrial relations system was significantly reduced by Commonwealth legislation in 2006 is not unexpected. However, the numbers in 2012/13 were halved from 18 to nine. This is illustrated in the following table.

**Table 3 Numbers of State Industrial Inspectors**

Financial Year	Industrial Inspectors (FTEs) <sup>300</sup>
2007/08	26
2008/09	15
2009/10	18
2010/11	15
2011/12	18
2012/13	18
2013/14	9.2
2014/15	9.1
2015/16	8.4
2016/17	8.55
2017/18	7.75

There are currently nine Industrial Inspectors (8.4 FTE) for the whole of WA, although an additional five staff in DMIRS PSLR are also designated Industrial Inspectors and assist with investigations and progressing matters into court. That number is far, far fewer than is needed to address wage theft in the WA industrial relations system effectively.

The campaign and enforcement activities undertaken by Industrial Inspectors are both positive and welcome. However, to effectively uphold the rule of law and address the problem of wage theft in the WA industrial relations system, and to give effect to my recommendations in this Inquiry, there will need to be more Industrial Inspectors and more inspections.

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<sup>299</sup> DMIRS, *Compliance campaign results in over \$15,000 in unpaid wages returned to workers in nail and beauty industry*, October 2018, retrieved from: [www.commerce.wa.gov.au/announcements/compliance-campaign-results-over-15000-unpaid-wages-returned-workers-nail-and-beauty](http://www.commerce.wa.gov.au/announcements/compliance-campaign-results-over-15000-unpaid-wages-returned-workers-nail-and-beauty)

<sup>300</sup> A full time equivalent (FTE) indicates the staffing level if all employees were full time.

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I understand this will be a significant cost to Government. However there are potential gains to the State from such an investment to effectively address an issue which is hurting not just employees and compliant employers, but the State economy too.

### **Recommendation 8**

I recommend the State Government provide additional funding to significantly increase the numbers of Industrial Inspectors.

### **Powers of Industrial Inspectors**

Increasing the powers of DMIRS Industrial Inspectors is recommendation 68 of the Final Report of the Ministerial Review of the State Industrial Relations System.<sup>301</sup> In response, the State Government has proposed to provide Industrial Inspectors with a range of enforcement tools, including the ability to issue infringement notices and compliance notices as per the FW Act.<sup>302</sup> I respectfully endorse this response. From the point of view of this Inquiry, the State Government also should include an ability for Industrial Inspectors to share information with other government regulatory agencies (such as the Australian Tax Office and the Australian Border Force). This was Recommendation 75 of the Ministerial Review of the State Industrial Relations System,<sup>303</sup> and I respectfully endorse it here.

The powers of Industrial Inspectors are contained in s 98(3) of the WA IR Act. I consider they are quite broad enough to cover some of the points I now make, however, from the point of view of this Inquiry, it is important to put here comments made to me in private discussion, and upon which I place weight. They are that to improve the deterrent effect of increasing the numbers of Industrial Inspectors, the WA IR Act should explicitly provide that an Industrial Inspector has the power to:

- visit a workplace either unannounced or in accordance with an announced intention;
- require a list of current employees, and to have the power to speak individually, privately and confidentially to each staff member on or off the premises and to seize or take copies of employment records and rosters;
- issue compliance notices, and to give an employer a reasonable opportunity to address any issues found;
- require business owners to provide information concerning labour hire providers used by the business; and
- post notices in a workplace of minimum employment conditions and workplace rights, or containing a summary of contraventions of employment laws, in a place where

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<sup>301</sup> *Ministerial Review of the State Industrial Relations System Final Report*, June 2018, pp 443-444.

<sup>302</sup> Government of Western Australia, *Proposed Reforms in response to the Ministerial Review of the State Industrial Relations System*, April 2019.

<sup>303</sup> *Ministerial Review of the State Industrial Relations System Final Report*, June 2018, p 445.

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employees may see it. Removal or interference with any such notice should constitute an obstruction under s 102 of the WA IR Act.

### Recommendation 9

I recommend that the powers of Industrial Inspectors ensure that an Industrial Inspector may:

- visit a workplace either unannounced or in accordance with an announced intention;
- copy or require to be produced a list of current employees, and have the power to speak individually to each staff member at work, privately and confidentially on or off the premises, and to take copies of employment records and rosters;
- require business owners to provide information concerning labour hire providers used by the business; and
- post a notice in a workplace, including information about employment obligations, or a summary of contraventions of employment law, in a place where employees may see it. Removal or interference with any such notice should constitute an obstruction under s 102 of the *Industrial Relations Act 1979*.

### FWO activities

Many of the submissions to the Inquiry referred to the work of the FWO in WA. The FWO has provided information to the Inquiry, for which I express my thanks and appreciation. The information addresses the FWO's operating model and records that in the 2017–18 financial year, across Australia, the FWO completed 28,275 requests for assistance involving a workplace dispute, and recovered more than \$29.6 million for more than 13,000 employees.<sup>304</sup> It refers to the FWO's 'online anonymous tool' which I have referred to above.<sup>305</sup>

In relation to WA specifically, the FWO advises that 2,282 of the more than 28,000 workplace disputes the FWO completed in 2017–18 involved employees working in WA and states that:

Over one third of these disputes were related to underpayment or non-payment of wages, with 13% of employees alleging underpayment of their hourly rate and 19% alleging non-payment for time worked. Assisting with the resolution of these disputes led to the recovery of over \$2.03 million in unpaid wages and entitlements for employees in Western Australia in 2017-18.<sup>306</sup>

The FWO also advises that it has taken 43 litigations in WA, resulting in a number of significant outcomes, including:

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<sup>304</sup> Fair Work Ombudsman, *Information provided to the Inquiry into Wage Theft in Western Australia*, April 2019.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

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- securing record penalties of \$510,840 against a contract cleaning company and its directors for systematic and deliberate underpayment and exploitation of vulnerable local and overseas workers; and
- a landmark case in the High Court of Australia that clarified the law relating to sham contracting, in the context of underpayments to workers at a South Perth accommodation provider. In the substantive proceedings, the FWO secured penalties in excess of \$60,000 against entities and individuals involved in a sham arrangement misrepresenting two employee housekeepers and a receptionist as independent contractors.<sup>307</sup>

This information, together with the cases taken by the FWO concerning employers and employees in WA referred to in Term of Reference 1 and the reports of the FWO inquiries in WA, show steps being taken by the FWO to address underpayment of wages and entitlements in WA. They reveal the extent of compliance and non-compliance by employers audited and the steps taken to ensure future compliance and to assist workers to be paid their correct wages and entitlements, including backpay. The FWO's publicly reported cases of enforcement, and its campaign reports, are critical in raising public awareness of the problem of wage theft. Without them the breadth of the problem would not be widely known. The FWO's activities and resulting reported enforcement proceedings provide the core of the evidence showing wage theft occurring in WA.

One theme common to submissions to the Inquiry from organisations representing employers, and also from those representing employees, is that the FWO should be given increased funding and resources for its work in WA. For example, R&CA argues that 'the resources of the FWO should be significantly bolstered so that it is properly equipped to pursue businesses who continually fail to comply with their various legal and regulatory obligations.'<sup>308</sup> The SDA submission is that there is not currently adequate funding for the FWO 'to deter non-compliance and resolve existing complaints.'<sup>309</sup>

I agree with those submissions. Necessarily, the businesses audited by the FWO in WA can be only a sample of businesses, and increased funding will allow FWO to devote greater resources to that task.

On this issue, the MWTF Report states:

We are of the view, given the scale and entrenched nature of the problem, that there needs to be a much stronger enforcement response than has been evident to date. Having said this, we recognise that the FWO has responded strongly to the problem in recent times. It would, nevertheless, be useful for the Government to undertake a public capability review of the FWO to ensure it has the resources, tools and culture necessary to combat effectively the wage underpayment problem particularly affecting temporary migrant workers.<sup>310</sup>

I respectfully agree in the context of WA.

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<sup>307</sup> Ibid.

<sup>308</sup> Submission of Restaurant & Catering Australia, p 3.

<sup>309</sup> Submission of Shop, Distributive and Allied Employees' Association, p 7.

<sup>310</sup> *Report of the Migrant Workers' Taskforce*, 2019, p 6.

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The resourcing of the FWO in WA is a matter for the Commonwealth Government, and strategies which the State Government could recommend to the Commonwealth are matters for Term of Reference 8. My recommendation, that the State Government recommend to the Federal Government that there be greater funding for the FWO's presence in WA, is in Term of Reference 8.

### **Co-operation between the Industrial Inspectors and the Fair Work Inspectors in WA**

Systematic and deliberate underpayment of wages and entitlements in WA occurs in employment covered by both the State and national systems. On occasions, during an inquiry or a campaign, a Fair Work Inspector or a State Industrial Inspector will visit a business which is not in their jurisdiction, for example when the FWO's inquiry into Woolworths trolley collection services found that employees in WA were employed by a sole trader and therefore engaged outside the jurisdiction of the FW Act. The FWO providing such information to DMIRS, and correspondingly DMIRS providing information about their finding a national system employer during an inquiry or a campaign, shows that promoting discussion and co-operation between the State and federal regulatory bodies in WA is important.

There is already a significant degree of formal and informal contact between the two organisations. The FWO information provided to the Inquiry is that the FWO works in co-operation with DMIRS to:

... ensure that employees and employers receive the best service possible to assist them with their workplace relations queries or concerns, regardless of which workplace relations system is legally applicable to their circumstances. The FWO welcomes referrals and information from our Western Australian colleagues.<sup>311</sup>

There is also the close co-operation between DMIRS and Australian Border Force to allow joint investigations which has resulted from a Joint Agency Agreement in June 2018. There are monthly stakeholder meetings designed to remove barriers to information sharing.

I consider that there are efficiencies to be gained in having even greater co-operation between the State and federal regulatory systems. For example, it would assist in addressing wage theft in WA if State Industrial Inspectors and Fair Work Inspectors in WA worked together more frequently on proposed campaigns or inquiries in WA in sectors where employment covered by the WA industrial relations system is high. It might be practicable for a State Industrial Inspector to work jointly with a Fair Work Inspector in a campaign or inquiry, so that a campaign or inquiry would have the capacity to investigate and deal with all businesses to be visited, irrespective of jurisdiction.

The WA IR Act makes no provision for close co-operation between DMIRS and the FWO. In the context of this Inquiry, I consider legislative recognition of the desirability for that close co-operation will assist the State and federal regulatory bodies in WA to more efficiently address wage theft by conferring and exchanging information, and facilitating joint campaigns or inquiries.

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<sup>311</sup> Fair Work Ombudsman, *Information provided to the Inquiry into Wage Theft in Western Australia*, April 2019.



I note that the Ministerial Review of the State Industrial Relations System recommended that the WA IR Act provide for the ability of Industrial Inspectors to share information acquired during an investigation within DMIRS or with other State Government or Commonwealth departments or agencies, or to obtain relevant information within DMIRS or from another State Government department or agency or any Commonwealth department or agency, to the extent permitted by any Commonwealth law, and I respectfully repeat that here.<sup>312</sup>

I also include in Term of Reference 8 that the State Government recommend to the Commonwealth Government a reciprocal recognition.

#### **Recommendation 10**

I recommend that the *Industrial Relations Act 1979* provide:

- that in the performance and exercise of functions under the Act the Chief Executive Officer of the Department of Mines, Industry Regulation and Safety (DMIRS) must act in a manner that facilitates and encourages co-operation between DMIRS and the Fair Work Ombudsman (FWO) wherever appropriate and practicable;
- that State Industrial Inspectors may participate in joint campaigns or inquiries with FWO Fair Work Inspectors; and
- that DMIRS may confer and exchange information with the FWO in relation to participating in joint campaigns or inquiries with the FWO.

### **The role of community organisations and legal centres**

For the reasons given above, the complexity of the current State and federal regulatory framework in WA means that the advisory role of community organisations and community legal centres is crucial too in the effective addressing of wage theft.

#### **Community organisations**

Community organisations can be one of the initial sources of information for those who might not know how to access information on employment rights and obligations, whether they are migrants, recently arrived persons or those with no, or limited, knowledge of English, or whether they are an employer or a worker.

My discussions with some community organisations suggest to me that where the employer and a worker both come from the same culture or background, there might be some hesitation for reasons of confidentiality to turn to their community organisation for employment-related advice. In that circumstance, a person might more readily turn to an umbrella community

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<sup>312</sup> *Ministerial Review of the State Industrial Relations System Final Report, 2018, Recommendation 75, p 445.*

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organisation which represents a number of cultures, such as the Ethnic Communities Council of WA.

I consider therefore that as part of the State Government's promotion of the measures it takes to address wage theft following this Inquiry, it provides information and assistance to umbrella community organisations regarding the WA industrial relations system so that those organisations are aware of the avenues available to persons seeking assistance about employment-related matters, and can provide that advice to community members if approached for information.

In this way, community organisations will be part of a pathway available to vulnerable, unrepresented workers, seeking information about their employment rights. It will also be a pathway for those who, as an employer, seek information about employment obligations of employers.

### **Recommendation 11**

I recommend that as part of the State Government's promotion of the measures it takes to address wage theft following this Inquiry, it provides information to umbrella community groups about the Western Australian industrial relations system so that those groups are aware of the avenues available to seek assistance and can provide that advice if requested.

### **Community legal centres**

In my view, vulnerable unrepresented workers in particular will rely upon community legal centres to provide the necessary advice and assistance. This is reflected in the submission of The Humanitarian Group, that strategies to address wage theft need to address 'the need for appropriate funding for community legal centres' assisting people new to Australia from culturally and linguistically diverse backgrounds who require intensive and specialised assistance.<sup>313</sup>

In the context of this Inquiry, the community legal centre which is particularly relevant is that providing employment law advice. ELC is the only not-for-profit legal service in Western Australia offering free employment law advice, assistance, education and representation.<sup>314</sup> DMIRS has a three-year funding agreement with ELC to 2019-20 to enable the ELC to provide legal services on employment-related matters to vulnerable WA industrial relations system employees.<sup>315</sup>

DMIRS PSLR provides education and compliance services to private sector employers and employees, and in my view provides an essential role in doing so. The role of ELC complements, and does not duplicate, the statutory role of Industrial Inspectors to investigate and secure compliance with State industrial laws and instruments. There is a co-operative relationship

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<sup>313</sup> Submission of The Humanitarian Group, p 8.

<sup>314</sup> Submission of Employment Law Centre of WA, p 49.

<sup>315</sup> The Hon. Bill Johnston MLA, Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement, *Funding for Employment Law Centre restored* (Media Statement, 29 June 2017).

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between DMIRS and ELC which includes each referring persons to the other where applicable, in order to ensure there is no overlap in service provision.

People new to Australia from culturally and linguistically diverse backgrounds may be quite unwilling to approach a government department for assistance, but be willing to approach a community legal organisation. ELC provides independent legal advice, which is not the function of DMIRS, and moreover, ELC is part of a holistic, co-operative, network of community legal centres so that a vulnerable person presenting with an employment-related issue, and who may also have accommodation or financial debt issues, is able to be provided with independent legal advice within that network on the different issues, needing to tell their story only once.

ELC therefore has an important role, separate from the role provided by DMIRS, in addressing wage theft in WA. It adopts a multi-faceted approach, including conducting community legal education, information and training sessions across the State. However, notwithstanding the funding received from DMIRS, ELC is underfunded: it is only able to answer a small proportion of calls on its advice line, and it is unable to offer further assistance by way of representation for a large number of callers, due to lack of resources.<sup>316</sup>

That important role will need to expand as the measures I recommend to raise awareness of employment rights and obligations, and to establish the pathway for unrepresented workers seeking information and redress that I refer to in the Executive Summary, come into being.

For those reasons, I recommend that the State Government contribute increased funding to ELC to enable it to provide greater access to its services, and expand its work providing assistance, referrals, education and advocacy for vulnerable workers covered by the WA industrial relations system.

The current funding comes from the DMIRS budget, which in turn reduces the funds available to DMIRS to address wage theft. Further, the ELC funding is only until 2020. My recommendation is that State Government funding be given to ELC separately, and sustainably into the future.

### **Recommendation 12**

I recommend:

- that the State Government contribute increased funding to the Employment Law Centre of Western Australia to enable it to provide greater access to its services, and expand its work providing assistance, referrals, education and advocacy for vulnerable workers covered by the Western Australian industrial relations system.
- that the increased funding be given to the Employment Law Centre of Western Australia separately, and sustainably into the future.

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<sup>316</sup> Submission of Employment Law Centre of WA, pp 50 - 51.

### **DMIRS Private Sector Labour Relations Division (PSLR)**

PSLR provides education and compliance services to private sector employers and employees and designates Industrial Inspectors. It operates Wageline. Its role will expand, and it will be central to the effective operation of the recommendations arising out of this Report going to provision of information and the operation of the wage theft website, hotline and smartphone app, raising the awareness of the WA industrial relations system, the strategies to address wage theft and to make the WA regulatory system more effective.

I consider that PSLR services, which can provide assistance to employers and workers respectively, are important in effectively addressing wage theft in WA and, in my view, the funding for PSLR needs to be continued and increased.

#### **Recommendation 13**

I recommend that the State Government continue and increase its funding for the Department of Mines, Industry Regulation and Safety Private Sector Labour Relations Division to provide education and compliance services, and give effect to recommendations in this Report.

## Term of Reference 6

### Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.

The previous Term of Reference considered and recommended strategies to improve the effectiveness of the current regulatory framework to address wage theft in WA which will require administrative amendments, or minor legislative amendments, to implement. This Term of Reference continues that process by considering and recommending strategies which will require new legislation. I commence with an overview of the submissions relevant to this Term of Reference.

The AHA submits that it is not appropriate to criminalise wage theft in WA and that the maximum penalty of \$63,000 per breach in the national industrial relations system, which is a substantial amount for small to medium sized businesses, ‘already acts as a substantive deterrent to non-compliance.’<sup>317</sup>

R&CA’s submission notes that a key aspect of its overarching policy position is that ‘the strongest possible sanctions under the law are warranted for any business-owners found to be deliberately and systematically avoiding compliance with their workplace obligations towards their staff.’<sup>318</sup>

Master Builders submits that ‘there are adequate enforcement and compliance laws in place now, and that creating new ones will not be helpful to the industry. Arguably, the existing compliance tools are adequate but need the necessary resources to make them effective.’<sup>319</sup> It is Master Builders’ view that it is not responsible government policy to legislate criminal penalties rather than pursue effective enforcement and compliance measures under the existing regime.<sup>320</sup> The submission also notes that there is minimal evidence that would ‘suggest a prevalence or business model amongst the wider employer community to deny wages of employees.’<sup>321</sup>

HIA submits that criminalising matters of an industrial nature is inappropriate and there is no jurisdiction in Australia where wage theft is currently a criminal offence. The HIA submission notes that to do so would be a major departure from traditional civil remedy provisions relating to underpayment issues that would require significant justification. HIA submits that such justification is not currently available.<sup>322</sup> The submission states that:

The offence of theft (whether that occurs in the workplace or in a non-industrial context) is a matter of criminal law. Prosecutions for theft and other criminal offences should only be

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<sup>317</sup> Submission of Australian Hotels Association, pp 3-4.

<sup>318</sup> Submission of Restaurant & Catering Australia, p 2.

<sup>319</sup> Submission of Master Builders Association of Western Australia, p 16.

<sup>320</sup> *Ibid*, pp 16-17.

<sup>321</sup> *Ibid*, p 17.

<sup>322</sup> Submission of Housing Industry Association, p 5.

instituted by public prosecutors and should take place before a proper criminal court with a criminal onus of proof and normal rights of appeal.<sup>323</sup>

HIA notes that the use of the term 'theft' [as in 'wage theft'] seeks to 'inappropriately attach criminal intent to an employment related matter' and HIA opposes such an approach.<sup>324</sup>

The NRA notes that at a State level, the criminalisation of wage non-compliance, insofar as it relates to non-compliance within the national system, presents a constitutional issue. The NRA submission notes that although it may be open to the WA Government to criminalise wage non-compliance in those businesses within the WA industrial relations system, the data on wage non-compliance in this sector is not adequate to allow a considered determination to be made on this point without further investigation.<sup>325</sup> The NRA submission states that:

Leaving the constitutional question to one side, NRA agrees in principle that wage non-compliance should be treated in the same manner as other anti-competitive practices under the Competition and Consumer Act 2010 (Cth) and similar legislation. The NRA notes that recently the McKell Institute issued a report which included, among other recommendations, a call for the Australian Law Reform Commission to investigate this possibility.

However, the NRA caveats this in that criminal liability should only attach to circumstances where there is sufficient proof of 'malice aforethought' in relation to non-compliance. Only deliberate and calculated non-compliance ought to attract criminal sanction.<sup>326</sup>

The NRA submits that 'incompetence or misapprehension of workplace laws ought not to attract criminal sanction at least in the first instance', but notes that once an employer has been made aware that their practices are not compliant, the continuation of those practices may be considered deliberate and calculated thereafter.<sup>327</sup>

The Ai Group's submission presents an overview of the existing statutory regime but cautions that 'any perception that the penalties for non-compliance within the WA IR Act are insufficient should be dealt with via adjustments to the quantum of the applicable penalties, as opposed to the imposition of criminal liability.'<sup>328</sup>

The Ai Group submission refers to the amendments to the FW Act made by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* and notes that Ai Group considers that the existing federal regulatory regime would not be improved by State legislation directed at addressing underpayments, which would add yet another layer of complexity through the

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<sup>323</sup> Submission of Housing Industry Association, p 5.

<sup>324</sup> Ibid, p 4.

<sup>325</sup> Submission of National Retail Association, p 14.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Submission of Australian Industry Group, p 5.

introduction of wage theft laws applicable to employees covered by both the national and WA industrial relations systems.<sup>329</sup> Ai Group notes:

The treatment of underpayment of wages and entitlements as a criminal offence is incongruous with the history of industrial relations law in Australia and harmful to the 'balanced framework for co-operative and productive workplace relations' the FW Act endeavours to establish...<sup>330</sup>

Ai Group submits that characterising underpayments as wage theft is likely to discourage employers from self-disclosing underpayments they have discovered due to error. In this regard, Ai Group submits that even businesses which 'promote themselves on the basis of a social conscience agenda, and/or with being closely aligned with unions have been identified as making very large underpayments to employees, allegedly due to errors or misunderstandings of legal entitlements'.<sup>331</sup>

Ai Group submits that it is 'necessary to take into account how wide the net may be cast in any prosecution relating to criminal offences concerning underpayment', and that criminalisation of underpayment has the potential to place 'various procedural barriers between an underpaid worker and their receipt of appropriate compensation'.<sup>332</sup> The submission notes that a criminal offence requires a higher burden of proof and that 'it is arguable whether the number of convictions would justify both the burden on the court system, delay of recovery and injustice experienced by employers'.<sup>333</sup> Rather Ai Group submits 'the increased penalties introduced in the case of a 'serious contravention' of a civil remedy provision by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* more appropriately balances the interests of employers, employees and the broader community'.<sup>334</sup>

UnionsWA submits that wage theft should be treated 'with the seriousness of a criminal offence'. It recognises that there are some complex issues with making wage theft a criminal offence, referring to a too rigid definition of wage theft which might prevent broader examples of wage theft from being addressed. UnionsWA submits that there are legal changes that could be introduced that would greatly assist in addressing wage theft in WA, for example:

- reversing the onus of proof for the contravention of a statute or industrial instrument;
- requiring companies to monitor supply chains and franchisors; and
- amending the definition of 'employee' in WA industrial law to 'bring WA into line with other States in Australia'.<sup>335</sup>

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<sup>329</sup> Ibid, p 6.

<sup>330</sup> Ibid, p 7.

<sup>331</sup> Ibid, pp 7 - 8.

<sup>332</sup> Ibid, p 8.

<sup>333</sup> Ibid, p 9.

<sup>334</sup> Ibid.

<sup>335</sup> Submission of UnionsWA, pp 9 - 10.

UnionsWA refers to the process for claims for a denied contractual benefit made to the WAIRC needing to be improved so that workers do not have to bear their own legal costs, and notes that conciliation 'could be made quicker and easier' if it could occur without the need for vulnerable workers to 'serve' their employer with the notice of claim, which 'can also be a difficulty for vulnerable workers'.<sup>336</sup>

United Voice recommends considering introducing measures to criminalise wage theft, including significant fines and penalties and the potential 'for custodial sentences'. Legislative change should bolster the obligations on employers to provide 'clear, thorough and understandable time and wages records'.<sup>337</sup> United Voice also recommends a 'dedicated, low cost, user-friendly underpayment and wage recovery mechanism with sitting judicial members who are skilled in dealing with contemporary industrial matters.'<sup>338</sup>

The SDA recommends that the State Government work to criminalise wage theft and that an appropriate way to do so would be through the introduction of a 'Wage Theft Act'. This Act could prescribe penalties based on the seriousness of the employer's conduct, and should take into consideration 'the chain of command for multi-faceted, fragmented business structures'.<sup>339</sup>

The AMWU believes the following considerations are important when reviewing methods for pursuing wage theft:

- who can access the system?
- how easy is the system to navigate?
- how much will it cost to run a matter?
- how much time will it take, will the worker get the money they are owed?<sup>340</sup>

The AMWU then asks whether the method that results would create general and specific deterrence against wage theft?<sup>341</sup>

The AMWU also made submissions regarding attempting to rectify underpayments through the FWC, and via the WAIRC. It called for the State Government to give the WAIRC the power to award penalties in denial of contractual benefit matters.<sup>342</sup> The AMWU also referred to the low level of fines applicable in the IMC. The AMWU recommended that there should be accessorial liability inserted into the WA IR Act, an increase in penalties, and called for more resources to be

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<sup>336</sup> Submission of UnionsWA, p 10.

<sup>337</sup> Submission of United Voice, p 26.

<sup>338</sup> Ibid.

<sup>339</sup> Submission of Shop, Distributive and Allied Employees Association, pp 18-19.

<sup>340</sup> Submission of Australian Manufacturing Workers' Union WA Branch, p 9.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid, p 12.



allocated to the IMC. The submission also suggested there should be more FCCA judges and that the fees for filing be reviewed.<sup>343</sup>

The MUA is of the view that making wage theft a criminal offence would be an effective deterrent, although it acknowledges the potential for this to compound the financial impact on already vulnerable workers. Nevertheless, the union sees the benefits as far outweighing the disadvantages.<sup>344</sup>

The IEU considers that wage theft should be deemed a criminal offence.<sup>345</sup>

WACOSS submits that an employer deliberately not paying wages to which a worker is entitled should be considered a form of theft and thus a criminal action, saying that:

If a worker should steal money from their employer, it would be treated as a criminal offence. When an employer deliberately underpays the wages or entitlements of a worker, they have likewise effectively stolen from that worker and their position in the employment relationship does not in any way reduce the severity of that action.<sup>346</sup>

WACOSS observed that criminalisation alone may not be sufficient to prevent wage theft, and it needs to be accompanied by 'an appropriately funded agency that can receive complaints, undertake investigations and take legal action where necessary'.<sup>347</sup>

ELC states there are the twin issues of trying to prevent wage theft occurring and, where it has occurred, facilitating the worker's easy and expeditious recovery of the underpayment. Strengthening one aspect can detract from the other.<sup>348</sup>

ELC submits there is a third aspect: that the offender should be penalised for their offending conduct. However, ELC's experience is that their clients' primary objective is typically recovery, and punishing the employer is only a secondary objective.<sup>349</sup>

The ELC submission examined in detail whether wage theft should be a criminal offence addressing how wage theft should be defined, the importance of the deterrent effect of penalising wage theft, and the complexity arising from civil and criminal claims arising out of the same facts, including the potential delay of the civil claim while the criminal offence is prosecuted.<sup>350</sup> ELC considers that the issue of wage theft being a criminal offence is complex, but on balance submits that wage theft should be a criminal offence provided that:

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<sup>343</sup> Ibid, pp 14-15.

<sup>344</sup> Submission of Maritime Union of Australia, WA Branch, p 12.

<sup>345</sup> Submission of Independent Education Union of Western Australia, p 3.

<sup>346</sup> Submission of Western Australian Council of Social Service, p 7.

<sup>347</sup> Ibid, p 7.

<sup>348</sup> Submission of Employment Law Centre, p 32.

<sup>349</sup> Ibid.

<sup>350</sup> Ibid, pp 33- 39.

- there is a mechanism for a worker to separately pursue their underpayment claim at the same time (without prejudicing any criminal prosecution);
- there is an express mitigating factor in sentencing where the employer has promptly and fully rectified the underpayment at an early stage; and
- the regulator responsible for prosecuting a wage theft criminal claim:
  - (a) has relevant and specialist expertise in employment matters and is dedicated for that purpose;
  - (b) is the same regulator for the purpose of pursuing any civil underpayment claims (and must take into account and give precedence to the expeditious recovery of the underpayment of wages and entitlements on behalf of the worker); and
  - (c) has the same powers of investigation for both the civil and criminal claims.<sup>351</sup>

ELC made a number of recommendations going to the provision of employment records and pay slips to workers; reversing the onus of proof where an employer has failed to keep employment records; an expedited process for courts and tribunals to deal with claims of underpayment where the worker may be leaving the jurisdiction to return overseas; increasing penalties in the WA IR Act; making court and tribunal procedures flexible enough to allow claimants to pursue a claim easily even if they are not in Australia; and Industrial Inspectors' powers and enforcement options. ELC recommends that accessorial liability provisions be used to combat wage theft.<sup>352</sup>

Slater and Gordon considers that low paid and vulnerable employees are in need of a system that can provide 'fast and low cost determination and enforcement of basic entitlements.'<sup>353</sup> The Slater and Gordon submission draws a parallel between the current predicament of low-paid and vulnerable workers and the circumstances that brought about the introduction in the 1980's of the Commonwealth child support scheme to establish a system of administrative assessment and enforcement of child support. For certain entitlements that are clearly set out within legislation or an industrial instrument, Slater and Gordon suggests:

...it could be cost effective for a government office such as the Industrial Inspectorate to be empowered to consider evidence provided by an employee and an employer and then make a determination that could be enforced as a court order.<sup>354</sup>

Under the proposal made by Slater and Gordon, the Industrial Inspectorate could also be empowered to impose penalties for non-compliance at first instance, and disputed determinations of the Industrial Inspectors should be able to be challenged in a court.<sup>355</sup>

Slater and Gordon suggests there should be a reverse onus of proof on an employer to establish that they did not underpay a worker who has made an underpayment claim or otherwise it is to

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<sup>351</sup> Ibid, p 40.

<sup>352</sup> Ibid, pp 41 - 46.

<sup>353</sup> Submission of Slater and Gordon Lawyers, p 4.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

be presumed the underpayment is made out. The submission notes this would address the issue where, after the employee has been dismissed, their access to documents is limited and often there is no ability to access documents. In the absence of documents, it is difficult for the former worker to satisfy evidentiary requirements to make out a wage theft claim.<sup>356</sup> Slater and Gordon also recommends that penalties for breaches under the WA IR Act be increased.<sup>357</sup>

Slater and Gordon suggests that wage theft should be a criminal offence but in very limited circumstances where the wage theft has been the result of aggravated and intentional conduct on the part of the employer.<sup>358</sup> The submission notes that if all wage theft is made a criminal offence, this could be disadvantageous to workers making claims because the standard of proof is 'beyond a reasonable doubt' instead of the civil 'balance of probabilities'; further, some employers may genuinely have erred in providing workers' entitlements and they should not be subject to criminal sanctions.<sup>359</sup>

Slater and Gordon's experience is that even with a successful judgment for the recovery of industrial entitlements, some employers simply do not pay the judgment ordered or any amount at all. Enforcement proceedings in the District Court under the *Civil Judgments Enforcement Act 2004* (WA) are complex for a lay person, and using legal representation to do so is often not financially viable. Slater and Gordon suggests an online register could be developed that lists employers who have participated in wage theft and failed to comply with a judgment to pay the employee.<sup>360</sup>

Maurice Blackburn submits that a comprehensive legislative scheme be introduced to criminalise wage theft. It should have strict liability offences, with various penalties dependent on the nature of the wage theft and industrial organisations should be given standing to prosecute wage theft. Its application should be broad enough to encapsulate new and emerging methods of engagement, such as the gig economy.<sup>361</sup>

The consultant in the contracting industry submitted that there are more than enough rules, regulations and mechanisms to deal with wage theft and that it is far better to level the playing field rather than introduce new rules.

Most submissions from individuals did not make specific suggestions for new laws. However, I have taken into account the issues raised in their submissions in considering whether a new law is appropriate to address an issue raised.

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<sup>356</sup> Ibid.

<sup>357</sup> Ibid, p 5.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid.

<sup>361</sup> Submission of Maurice Blackburn Lawyers, pp 12-13.

## Consideration - Overview

In this Term of Reference, I consider whether the State Government should introduce new laws in WA to address the systematic and deliberate underpayment of wages and entitlements to employees in WA. In my view, it is desirable that, where possible, differences between State laws applying to employment covered by the WA industrial relations system, and Commonwealth laws applying to employment covered by the national system, are minimised. Organisations representing employers and those organisations and groups representing workers have each commented about the complexity arising from employment in the private sector in WA being covered by two systems. ELC in particular submits that to be effective, the State and federal regulatory systems should be aligned.<sup>362</sup>

I find that the two systems in the private sector add complexity to the employment issues in WA which employers need to understand, particularly those in small business and in the not-for-profit sectors. The two systems also make it considerably more difficult for workers in those sectors trying to understand their employment rights and seek redress.

Therefore, the recommendations below include changes to the WA IR Act to include relevant provisions found in the FW Act but for which there is no provision in the WA IR Act. In Term of Reference 8, I recommend the State Government discuss with the Commonwealth Government amending the FW Act to include issues I recommend for inclusion in the WA IR Act for which there is no provision in the FW Act.

## Consideration

A number of the submissions just raised issues which they consider needed addressing, while others suggested solutions to the issues they raised. Some submissions raised similar issues and looked at those issues from a slightly different perspective, which I have found helpful. It is not practicable to set out and critically examine each and every individual issue raised in the submissions, including those from individuals, and make a separate recommendation in each case.

Some submissions raise issues which the State Government has indicated it will address following its consideration of the Final Report of the Ministerial Review of the State Industrial Relations System. These include that the definition of ‘employee’ in WA industrial law should be amended to ‘bring WA into line with other states in Australia’; submissions that suggest the penalties in the WA IR Act should be increased, and providing for similar accessorial liability provisions as are in the FW Act, so that a person who is ‘involved’ in a contravention may also be held liable; and providing a reverse onus of proof in enforcement proceedings where the employer has failed to keep the required employment records.

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<sup>362</sup> Submission of Employment Law Centre, p 30.

The recommendations which follow address the submissions broadly. In some cases, a recommendation may, if it is accepted, require the State Government to further consult with stakeholders about the detail which will be necessary to give effect to the recommendation.

### **IMC - A pre-lodgment conciliation process**

A number of the submissions from organisations and community groups have commented in relation to this Term of Reference, and in others, that it is difficult for workers to access the systems available in WA for the enforcement of minimum conditions of employment. For example, United Voice refers to the need for a 'dedicated, low cost, user-friendly underpayment and wage recovery mechanism with sitting judicial members who are skilled in dealing with contemporary industrial matters.'<sup>363</sup> United Voice submits that court proceedings for a worker are daunting, time consuming and expensive. ELC points to simplification, procedural informality, evidentiary requirements and the powers of the tribunal to be actively involved in investigating the facts of the case as issues to be considered.<sup>364</sup>

These comments are similar to the comments in the MWTF Report which noted that only a small number of temporary migrant workers avail themselves of the small claims procedure in the FW Act because there is 'an inherent problem of excessive legalism of process and procedure' within which the procedure works.<sup>365</sup>

In Term of Reference 5 I have recommended that the powers and numbers of Industrial Inspectors be increased, so that the system for dealing with underpayment of wages and entitlements does not depend mostly upon individual workers having to initiate claims. Where a worker in either the WA industrial relations system or the national system reaches a point where they do consider pursuing an underpayment, in my view, there should be a simple first step available for them to consider. In this way, the process a worker needs to follow if a court process is the only remaining option, may be made less daunting.

I acknowledge that it can be daunting for a worker, particularly a vulnerable worker, to take the step of filing a complaint of underpayment against their employer, or former employer. In the Wage Theft in Silence Report, the authors Farbenblum and Berg found that individual remedies remain beyond the reach of most exploited migrant workers in Australia.<sup>366</sup> However, the data considered by the authors indicated to them that:

...if the costs, effort and risks involved in wage recovery are reduced and the probability of achieving a satisfactory outcome is increased, a greater number of migrant workers would likely report underpayment and seek to recover the wages they are owed. Indeed, for participants who were open to trying to recover their wages, concerns about lack of knowledge

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<sup>363</sup> Submission of United Voice, p 26.

<sup>364</sup> Submission of Employment Law Centre, p 44.

<sup>365</sup> *Report of the Migrant Workers' Taskforce*, 2019, p 93.

<sup>366</sup> 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 2018, p 8.

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or capacity were more significant barriers than social perceptions and relational factors that are harder to address.<sup>367</sup>

When informal approaches to wage recovery have proved unsuccessful, and the only option is to approach the court or tribunal with the jurisdiction to enquire into and deal with the underpayment, the first step is usually the preparing and lodging of the claim to be filed.

To address submissions referred to above, I consider that the creation of a pre-lodgment conciliation process in the IMC would serve to make the prospect of going to a court or tribunal less daunting for workers. The pre-lodgment conciliation process is, as its name suggests, a step prior to actually lodging a claim. A similar pre-lodgment mediation process exists in the Magistrates Court of South Australia (Civil Division) where a person may lodge a 'Final Notice' stating to the intended recipient their intention to file a money claim against them (for a sum not exceeding \$12,000), and stating the reason for the claim.<sup>368</sup> The Final Notice can be lodged either online, or in the Registry of the Court. It is served by the applicant. Either the applicant or the recipient may request a mediation, which is held by a mediator. The cost of the mediation is shared equally between the parties. The Final Notice is not a formal claim made in the Magistrates Court of South Australia and there is no legal obligation on the recipient to respond or take legal action, however, it provides an opportunity for voluntary mediation.

To address the issues raised in this Inquiry, I consider the principle of a pre-lodgment process to be a very useful process for unrepresented employers and workers, including vulnerable workers. In order to utilise such a process in WA to address wage theft, however, I consider some changes to the Magistrates Court of South Australia model ought to be made. The *Kandel* case, other cases where it is clear that the employer is unwilling to discuss the claim, and some of the individual submissions, persuade me that a voluntary mediation process is not likely to assist where there has been systematic and deliberate underpayment of wages and entitlements.

In my experience, the compulsory conference process in the WAIRC (s 44 of the WA IR Act) is a most useful and practical process. It is commenced by completing one simple form. The WA IR Act makes it compulsory for the parties to attend the conference, and the conference itself can be held within a few days of the application form being filed. Experience shows that it can be most useful for all concerned to have the applicant and the respondent to an industrial matter present in the same room, at the same time, in the presence of an impartial person with knowledge of employment matters. I therefore consider it should be compulsory to attend the proposed pre-lodgment conciliation in the IMC, for the purpose of seeing whether an agreement is able to be reached.

I mentioned previously that the existing pre-trial conference process in the IMC is regarded as a very informal, important and successful process. A party must attend a pre-trial conference in person: regulation 20 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005*

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<sup>367</sup> Ibid.

<sup>368</sup> See <http://www.courts.sa.gov.au/ForLawyers/Pages/Magistrates-Court-Civil-Forms.aspx> Form 1A.

(WA), so making it a requirement that a person must attend a pre-lodgment conciliation applies an already existing requirement.

The pre-lodgment conciliation process I recommend, which is designed to address wage theft, combines the principle of the process in the Magistrates Court of South Australia with the principle of the compulsory conference process of the WAIRC with the following elements:

- the conference would be available for any claim that is able to be made in the IMC;
- the availability of the conference would be promoted on information and fact sheets about wage theft in WA as well as the IMC website and be available in different languages;
- it would be commenced by the worker completing online a simple Final Notice advising the recipient of an intention to make a claim against them in the IMC unless the other person agrees to settle the claim within 21 days;
- there would be a nominal fee;
- the Final Notice would be 'served' on the recipient by the Clerk of the Court in the same way that claims made in the WAIRC are now served by the Registrar (following an amendment to Reg 24(1) of the *Industrial Relations Commission Regulations 2005* on 5 March 2019);
- the Clerk of the Court would be able to convene a conciliation conference which would be held before the Clerk of the Court or a conciliator appointed by the Clerk of the Court. Both the person who filed the Final Notice and the recipient would be under the same compulsion to attend as is required for a pre-trial conference;
- the conciliation conference would be called as soon as practicable after the 21 days, and legal practitioners and registered Industrial Agents would not be permitted to appear;
- the conference would be 'without prejudice' to the employer's and the worker's respective rights under the law and be an informal process and be confidential; and
- the conciliator would have the power to enquire into the claim and any response to it in order to clarify the issues; to make orders which would encourage the parties to exchange or divulge attitudes or information which in the opinion of the conciliator would assist in the resolution of the matter in question; and to make final orders to give effect to any agreement reached.

At the conclusion of the pre-lodgment conciliation, if the claim is settled, the matter will be closed and the worker would have no need then to make a formal claim in the IMC; if the claim is not settled, the employer and the worker each still have their options under the law and can seek further advice regarding options if the worker decides to make a formal claim in the IMC or in another court or tribunal.

I consider that the pre-lodgment conciliation process can make the process of dealing with an issue of underpayment of wages and entitlements less daunting, and less formal, for employers

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and for workers. It is a process which is likely to resolve matters. Its informality should make this stage of dealing with a claim of underpayment of wages or entitlements less daunting and time consuming for both unrepresented employers and employees. Even if the pre-lodgment conciliation conference does not succeed in resolving the matter, both the employer and employee will have gained knowledge and awareness of the issues and processes involved if a formal claim is to be made subsequently, which will be of assistance to them.

#### **Recommendation 14**

I recommend the establishment of a pre-lodgment conciliation process in the Industrial Magistrates Court.

#### **IMC - Application fees and costs**

Some submissions, including from Hardy and Kennedy, suggested that consideration be given to reducing the fees that apply when lodging an application in the IMC, or revising the costs rules to enable recovery of legal costs for applicants seeking rectification of underpayment through the court system.

I appreciate that for any person considering filing a claim in a court registry, the filing fee may be a significant cost, including for a worker in the circumstances outlined, for example, in the case of *Kandel* who had not received wages at all. The filing fee to make a claim in the IMC is \$40,<sup>369</sup> which is not a significant filing fee and is less than the \$50 fee to file a claim of unfair dismissal or of denied contractual benefit in the WAIRC.<sup>370</sup>

As to costs, s 83C of the WA IR Act provides, relevantly, that the IMC may order that legal costs be paid by a party only if the case has been frivolously or vexatiously instituted or defended by a party.<sup>371</sup> In the ordinary course of events therefore, a successful claimant is not able to recover legal costs.

However, as this Inquiry reveals, it is quite unlikely that a worker who is the victim of wage theft, particularly a vulnerable worker, will know of the IMC or how to prepare the claim to the IMC to suit their circumstances without legal assistance. The case of *Kandel* illustrates this point also. In a proven case of systematic and deliberate underpayment of wages, I consider a successful claimant should be able to recover their legal costs.

#### **Recommendation 15**

I recommend that a successful claimant in a case of systematic and deliberate underpayment be able to recover their legal costs.

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<sup>369</sup> Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA), Schedule 1, Division 1.

<sup>370</sup> Industrial Relations (General) Regulations 1997 (WA), Schedule 1.

<sup>371</sup> Also see Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA), r 11.



## **Failure to comply with IMC final orders**

### **The current procedure for enforcement of IMC money orders**

If an order of the IMC which requires the payment of money is not complied with, as is the case in *Kandel*, s 81CB(2) of the WA IR Act provides as follows:

- (2) A person to whom money is to be paid under a judgment of an industrial magistrate's court made in the exercise of general jurisdiction may enforce it by lodging a copy of it, certified by a clerk of the court, and an affidavit stating to what extent it has not been complied with, with a court of competent jurisdiction.

The process of enforcement in *Kandel* in the District Court has shown that, at least on some occasions, the procedural steps required to enforce a judgment are not easy to understand or to use, and at least so far in *Kandel*, the process has not been effective. This is not an isolated example, as the Slater and Gordon submission, that the proceedings are complex for a lay person and using legal representation may be not financially viable, illustrates.

The focus of this Inquiry is on the occurrence of systematic and deliberate underpayment of wages and entitlements, and it has revealed that many of the workers affected are likely to be unrepresented and considered to be unfamiliar with court procedures. This is recognised by the helpful facts sheets and user-friendly guides which are available in the Magistrates Court to assist parties wanting to enforce an order.

In my view it is also worth considering whether there might be an alternate, and possibly more user-friendly, mechanism for the enforcement of orders where, after the IMC has found an employer has underpaid a worker, an order that the employer pay unpaid wages or entitlements, or an order that the employer pay a civil penalty to the employee, is not complied with and requires enforcement. Slater and Gordon suggest an online register that lists employers who have failed to comply with a judgment to pay an employee.<sup>372</sup> This suggestion is encompassed within Recommendation 5.

### **Consideration of whether the IMC should enforce its own orders**

The IMC does not enforce its own orders. The procedure for the enforcement of a money order or civil penalty order of the IMC is set out in the *Civil Judgments Enforcement Act 2004* Part 4. In the context of an order from the IMC that the employer pay unpaid wages or entitlements, or an order that the employer pay a civil penalty to the employee, the employee is required to apply to a different court for an enforcement order.<sup>373</sup>

This requires the employee to go somewhere other than the IMC in order to enforce the IMC order because, although the *Civil Judgments Enforcement Act 2004* s 9(1) requires an application or request in relation to a judgment must be made to the court that gave the judgment, and at the registry of that court where the documents relating to the action or matter in which the

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<sup>372</sup> Submission of Slater and Gordon Lawyers, p 5.

<sup>373</sup> *Civil Judgments Enforcement Act 2004* (WA), s 19.

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judgment was given are being held, the WA IR Act does not provide for the IMC to enforce its own orders.

There is much to be said, in my opinion, for the view that the enforcement of money orders and civil penalty orders of the IMC should be by the IMC itself, rather than, as currently, by another, different court. It is desirable that the procedure to be undertaken by an underpaid worker to enforce an IMC money order in their favour be simpler, particularly for self-represented litigants.

Currently, the IMC does not have the mechanism to enforce its own orders. The WA IR Act could provide that the *Civil Judgments Enforcement Act 2004* applies either to an IMC order that requires the payment of money to a person or an order that does not require the payment of money, as though:

- the IMC is a court for the purposes of s 5 of the *Civil Judgments Enforcement Act 2004*,<sup>374</sup> and
- an order of the IMC is a judgment under that Act.<sup>375</sup>

Further, it is most desirable that the IMC Registry be the registry for the enforcement procedure because it would be less complicated for unrepresented litigants, employer as well as employee, to return to the same registry, and to the same court, that they have been dealing with in relation to the lodging of documents and to the hearing of the substantive claim. In this way, some of the difficulties of going to court which confront a lay person will be lessened. Provision will need to be made for the Registry staff of the IMC to be trained in the process, and for producing the necessary fact sheets and user-friendly guides on how to enforce IMC orders.

The additional workload on the IMC and its registry is an additional reason for my recommendation that the State Government fund the operation of the IMC to enable it to sit full time if necessary.

#### **Recommendation 16**

I recommend that the *Industrial Relations Act 1979* be amended so that an order of the Industrial Magistrates Court that requires the payment of money to a person, or an order that does not require the payment of money, would be enforceable in the Industrial Magistrates Court as if:

- the Industrial Magistrates Court is a court for the purposes of s 5 of the *Civil Judgments Enforcement Act 2004*; and
- an order of the Industrial Magistrates Court is a judgment under that Act.

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<sup>374</sup> This section applies the *Civil Judgments Enforcement Act* to the judgments of the Supreme Court, the District Court and the Magistrates Court in the exercise of their civil jurisdiction.

<sup>375</sup> These orders of the IMC are referred to in the IR Act s 81CB(2) and (3).

### **Consideration whether non-compliance with an IMC money order should be a contempt of court**

Currently, as *Kandel* illustrates, where the IMC has found that an employer has underpaid a worker, and makes the appropriate orders for payment of unpaid wages and entitlements, or for a penalty, there is no consequence for an employer who simply ignores the orders and closes the business, unless and until the worker takes the steps required by law to enforce a judgment by way of the usual steps which might lead to the sale of property or the winding up of a company. The taking of those steps will, if my recommendation that the enforcement of IMC orders be by the IMC itself is accepted, be simpler than it is currently, however the procedure for enforcement under the *Civil Judgments Enforcement Act 2004* itself has not been effective thus far in *Kandel*.

After a number of informal discussions about the issue, I am of the view that part of the problem may be the reluctance on the part of the person required to pay to engage with any enforcement process. Of course, sometimes a judgment debtor will not have the means or the assets to pay, however that is not so much the issue here; it is engaging the attention of the person. In such a case, the enforcement process may be made effective if there is a more immediate consequence for non-compliance with an order from the IMC that the employer pay unpaid wages or entitlements, or an order that the employer pay a civil penalty to the employee.

The process of enforcement under the *Civil Judgments Enforcement Act 2004* Part 4 goes through a number of stages which can include the Court making an order for payment by a certain date or for payment by instalments.<sup>376</sup> Where a time for payment order or an instalment order has been disobeyed, the judgment creditor may apply for a default inquiry to be held in respect of the judgment debtor.<sup>377</sup> If a default inquiry establishes that the judgment debtor had the means to pay a judgment debt, or payment instalment, but did not pay it and did not have a reasonable excuse for not paying, he or she is guilty of a contempt of court; in the case of a corporation, the corporation is guilty of a contempt of court and each officer of the corporation may be guilty of a contempt of court.<sup>378</sup> Punishment for contempt of court can include a period of imprisonment.<sup>379</sup> Contempt of court therefore is a very serious matter.

In the context of this Inquiry, in a case where it is proven that an employer has systematically and deliberately underpaid wages and entitlements, where the IMC has made an order that the employer pay unpaid wages, or an order that the employer pay a civil penalty to the former employee, and the employer has not complied with the IMC orders, one option for the enforcement of the IMC orders might be to provide that non-payment of the IMC orders be a contempt of court unless the IMC determines that it is not a contempt of court, in which case the usual procedures under the *Civil Judgments Enforcement Act 2004* would then apply.

This option would reflect the seriousness of not complying with IMC orders in a case of deliberate and systematic underpayment of wages and entitlements, and would reflect the public policy

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<sup>376</sup> *Civil Judgments Enforcement Act 2004* (WA), ss 32, 33.

<sup>377</sup> *Ibid*, s 88(1).

<sup>378</sup> *Ibid*, s 90.

<sup>379</sup> *Ibid*, s 90(3).

objective of ensuring compliance with court orders. If an option for the enforcement of an order in the IMC is to commence the enforcement procedure with a summons to a default inquiry, which is provided for in Division 8 of the *Civil Judgments Enforcement Act 2004*, ignoring the orders can lead sooner to a serious consequence than the current enforcement procedure.

Currently, non-payment of IMC money orders can eventually lead to a finding of contempt of court; this option brings that possibility forward as an option in order to address the issue of the reluctance on the part of the person required to pay to engage with any enforcement process.

### **Recommendation 17**

I recommend that in a case of proven systematic and deliberate underpayment of wages and entitlements, consideration be given to making non-compliance with an Industrial Magistrates Court order that the employer pay unpaid wages or an order that the employer pay a civil penalty to the employee, a contempt of the Industrial Magistrates Court unless the Industrial Magistrates Court determines that it is not a contempt of court.

### **Underpaid entitlements under a contract of employment**

An entitlement to a wage or allowance may derive from the contract of employment between the employer and the employee, not from legislation or from an award. Where an employee is entitled to a wage that is in excess of the award rate, or in excess of the minimum wage, the whole amount is a single contractual debt. For example, if the minimum wage is \$19.66 per hour and the employer and the employee agree to the employee being paid \$24 per hour, then the employee's entitlement to be paid \$24 per hour comes from that agreement. In other words, the entitlement comes from the contract of employment between the employer and the employee. A systematic and deliberate underpayment of that sum may be enforced in the WAIRC as a denied contractual benefit.

The orders available to the WAIRC in a case of underpayment of a benefit due under a contract of employment, including a systematic and deliberate underpayment, are not specified. While the WAIRC has, where appropriate, made an order requiring the payment of the benefit which has been underpaid, it is not clear that it has any other power to, for example, order interest to be paid on the outstanding sum.<sup>380</sup> This means that although the employer is obliged to pay what should have been paid, the employer retains any benefit resulting from having had the sum in their possession, and correspondingly the worker has been denied the benefit of the use of that entitlement.

In my view, the WAIRC should have the power to order interest to be paid on the outstanding sum, and a general power similar to s 545(1) of the FW Act to 'make any order they consider appropriate' in any denied contractual benefit matter; however the scope of this Inquiry limits also the scope of the recommendations to be made from it.

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<sup>380</sup> See *Dixon v Ministry of Justice* (1996) 76 WAIG 4144.

### Recommendation 18

I recommend that in a case of systematic and deliberate underpayment of wages and entitlements the Western Australian Industrial Relations Commission be given the power to award interest on a denied contractual benefit, and be given a general power similar to s 545(1) of the *Fair Work Act 2009* to make any order it considers appropriate.

### Further amendments to the WA IR Act

Some issues raised in submissions are addressed by the FW Act in relation to employment covered by the national system, but there is no corresponding provision in the WA IR Act to address them in relation to employment covered by the WA IR system.

#### 'Cash back' arrangements

The FW Act s 325(1) is expressly designed to clarify that an employer may not ask for 'cash back' from an employee. This is where the employer pays the employee the wages which they are entitled to, but then requires the employee to pay back a part of the payment in cash to the employer. This has the effect of underpaying the employee while showing in the employer's records that the employee has been correctly paid. Such a requirement by an employer was found to be 'clearly fraudulent' by the Supreme Court of New South Wales in *Chahal Group Pty Ltd & Anor v 7-Eleven Stores Pty Ltd*.<sup>381</sup>

There is no explicit provision in WA legislation to address this circumstance. The MCE Act provides:

- in s 17B that an employee is not to be directly or indirectly compelled by an employer to accept goods of any kind, accommodation or other services of any kind, instead of money as any part of his or her pay, unless authorised or required under an award, agreement, EEA, or order of the WAIRC, contract of employment or written law;
- in s 17C that to the extent that an employee receives his or her pay in money, the employee is entitled to be paid in full; and
- in s 17D that an employer may deduct from an employee's pay an amount the employer is authorised to deduct and pay on behalf of the employee.

Arguably, the provisions of ss 17B, 17C and 17D read together prevent cash back arrangements, however, the FW Act makes it clear that, in the national system, an employer cannot make such a request of the employee. In my view, it is preferable that WA legislation states clearly that an employer may not ask for 'cash back' from an employee.

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<sup>381</sup> [2017] NSWSC 532 (4 May 2017) at [239]. (An appeal against this decision was dismissed: *Chahal Group Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] NSWCA 58 (27 March 2018)).

### **Recommendation 19**

I recommend the State Government amend the existing provisions of the *Minimum Conditions of Employment Act 1993* similar to s 325(1) of the *Fair Work Act 2009* to prohibit an employer from asking for 'cash back' from a worker.

### **Employer not to take adverse action if employee queries employment conditions**

Case study #3 in Term of Reference 1 is an example of when two female hairdressers queried their employment entitlements, the employer dismissed one of the employees and reduced the other's working hours to one day a week. Some individual submissions to the Inquiry described reluctance on the part of a worker to query an employment condition, and also having suffered a detriment for having done so. An employee in a bakery franchise mentioned in Term of Reference 1 wrote about her employer taking her to one side to ask her whether it was she who had complained to head office, and that this was not acceptable. A truck driver stated that most drivers are too scared to speak out in fear of losing their jobs. Another truck driver wrote that after he complained about not being paid for all hours actually worked, he was 'banned' by the principal contractor from further work. A retail worker, who eventually approached the FWO to assist her, wrote that she has had her hours reduced.

One way of attempting to reduce wage theft is to inform employers and employees of their workplace rights and obligations. As part of that, an employee who wishes to query whether they are being paid correctly should be able to raise the issue with their employer without fear of retribution.

The FW Act s 340 provides that an employer must not take adverse action against another person because they have exercised, or they propose to exercise, a workplace right, or to prevent them from exercising a workplace right, which by s 341(1)(c) includes making a complaint or an inquiry in relation to their employment.

There is no corresponding provision in the WA IR Act, and the evidence in the context of this Inquiry shows that there should be, and I recommend accordingly.

Further, there is at least some anecdotal evidence from an individual submission to the Inquiry that a principal contractor has 'banned' from further work a driver of a sub-contractor who had asked to be paid for all time worked. The WA IR Act s 23B(2) already gives power to the WAIRC in a case of unfair dismissal to order a third party to 'refrain from preventing, hindering or interfering with, or doing anything that would have the effect of preventing, hindering or interfering with' the employment of an employee, including transfer of the employee to work at a particular place or site. It is appropriate that the principle of s 23B be incorporated into the provision to be inserted into WA legislation to address such a situation if it arises.

**Term of Reference 6** – Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.

### Recommendation 20

I recommend:

- that Western Australian law recognise the right of a worker to query or make a complaint about their employment conditions and that an employer may not dismiss, demote, reduce hours of work or otherwise cause detriment to a worker who does so, based upon s 340 of the *Fair Work Act 2009*. A breach of the law is to be a civil penalty provision; and
- that s 23B of the *Industrial Relations Act 1979* be applied to this situation such that a third person may not prevent, hinder or interfere with the employment of the employee or the employment or transfer of the employee to work at a particular place or site.

### Whether wage theft should be a criminal offence

I consider, similar to the ELC submission on this point, that there are two fundamental issues to be addressed by the Inquiry, namely what should be recommended to the State Government:

- to try and reduce or prevent systematic and deliberate underpayment of wages and entitlements from occurring; and
- to ensure that a worker receives the wages and entitlements which should have been paid to them.

If making wage theft a criminal offence may assist to address those issues, it deserves to be considered.

It has been considered by the Commonwealth Government which has said in response to recommendation 6 of the MWTF Report that for the very first time criminal sanctions will be added to the penalties available for ‘the most egregious forms of workplace conduct’.<sup>382</sup> The MWTF Report recommended that ‘for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.’<sup>383</sup> The Commonwealth Government committed to considering ‘the circumstances and vehicle in which criminal penalties will be applied for the most serious forms of deliberate exploitation of workers’, describing this as complementing ‘existing offences for serious criminal forms of labour exploitation, including forced labour, servitude and debt bondage in the *Criminal Code 1995 (Cth)*’.<sup>384</sup>

The Victorian Government is proposing to introduce new laws for fines of up to \$190,284 for individuals, \$951,420 for companies and up to 10 years’ jail for employers who deliberately

<sup>382</sup> Australian Government response: Report of the Migrant Workers’ Taskforce, March 2019, p 3.

<sup>383</sup> *Report of the Migrant Workers’ Taskforce*, 2019, p 88.

<sup>384</sup> Australian Government response: Report of the Migrant Workers’ Taskforce, 2019, pp 2-3.

**Term of Reference 6** – Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.

withhold wages, superannuation or other employee entitlements, falsify employment records, or fail to keep employment records.<sup>385</sup>

The Queensland Government has supported in principle the recommendation of the Queensland Inquiry that wage theft be made a criminal offence where the conduct is proven to be deliberate or reckless, subject to further consideration of the constitutional jurisdiction and implementation implications.<sup>386</sup>

The Governments of New South Wales, South Australia and Tasmania have not indicated an intention to criminalise wage theft.

### **Overview of submissions received**

I note the strong opposition to criminalising wage theft from the AHA, Master Builders, HIA and Ai Group. The submissions pointed out, for example, that penalties in the FW Act have recently been significantly increased, which should act as a substantive deterrent to underpayment; that increasing resources to make the existing compliance requirements more effective is a better solution; and that to make underpayment a criminal offence would be a departure from the traditional civil penalty regimes in the FW Act (and for that matter the WA IR Act).

R&CA's policy position, while not specifically addressing criminalisation, does seek 'the strongest possible sanctions' for business owners 'deliberately and systematically' avoiding compliance.<sup>387</sup> The *Competition and Consumer Act 2010* (Cth), to which the NRA submission referred,<sup>388</sup> provides in Part IV for financial penalties for corporations and individuals for some anti-competitive practices, and for civil or criminal penalties for individuals found guilty of cartel conduct.<sup>389</sup> The NRA agrees in principle that wage non-compliance should be treated in the same manner as other anti-competitive practices under that Act, but that only deliberate and calculated non-compliance ought to attract criminal sanction.<sup>390</sup>

I note too the submissions of those organisations which seek the criminalisation of wage theft, and their reasoning for doing so. The SDA proposes criminalisation via a Wage Theft Act prescribing penalties based upon seriousness of the conduct, and taking 'chain of command' into account.<sup>391</sup> The IEU, MUA and WACOSS support making wage theft a criminal offence. Maurice Blackburn supports a comprehensive legislative scheme to criminalise wage theft, with various penalties.<sup>392</sup> United Voice recommends considering introducing measures to criminalise wage theft, including significant fines and penalties and the potential 'for custodial sentences'.

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<sup>385</sup> Hon Daniel Andrews MP, *Dodgy employers to face jail for wage theft*, Media Release, 26 May 2018.

<sup>386</sup> Parliamentary Inquiry into Wage Theft in Queensland, Queensland Government Response, February 2019, p 4.

<sup>387</sup> Submission of Restaurant and Catering Australia, p 2.

<sup>388</sup> Submission of the National Retail Association, p 14.

<sup>389</sup> Australian Competition and Consumer Commission, Information on fines and penalties, accessed at [www.accc.gov.au/business/business-rights-protections/fines-penalties](http://www.accc.gov.au/business/business-rights-protections/fines-penalties)

<sup>390</sup> Submission of the National Retail Association, p 14.

<sup>391</sup> Submission of Shop, Distributive and Allied Employees' Association Western Australian Branch, p 18.

<sup>392</sup> Submission of Maurice Blackburn Lawyers, p 12.

**Term of Reference 6** – Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.



UnionsWA submission that wage theft should be treated ‘with the seriousness of a criminal offence’ recognises that there are some complex issues with doing so,<sup>393</sup> as does ELC which concludes on balance that wage theft should be a criminal offence, with certain provisos addressing the ability to also pursue an underpayment claim, that prompt payment of an underpayment be a mitigating factor, and matters concerning the regulator.<sup>394</sup>

Slater and Gordon’s suggestion that wage theft should be a criminal offence restricts the offence to aggravated and intentional conduct by the employer. Its submission cautions against making all wage theft a criminal offence, recognising that employers should not be subject to criminal sanctions where they have genuinely erred in providing workers’ entitlements.<sup>395</sup>

A number of the submissions, from organisations representing employers and employees, recognised that criminalisation of wage theft is not a simple issue. ELC in particular highlighted that the twin issues of preventing wage theft, and of recovering underpaid wages and entitlements, ‘do not necessarily point in the same direction and strengthening one aspect can detract from the other’.<sup>396</sup> I quite agree.

### Consideration

#### Recovery of unpaid entitlements

ELC notes that its clients’ primary objective is typically recovery – to recover unpaid entitlements as quickly as possible.<sup>397</sup> I give weight to this objective, which is consistent with the understanding I have from the *Kandel* case, and from my discussions with community groups and DMIRS. Making wage theft a criminal offence may delay the recovery of an underpayment for the worker or workers because, in part, criminal proceedings taken against an employer may cause any civil case taken against that employer to recover the underpayment to be adjourned while the criminal case proceeds first.<sup>398</sup>

Criminal offences are required to be proved beyond reasonable doubt, which is a higher standard of proof than in a civil case where the standard is proof on the balance of probabilities. The time and resources needed to bring a criminal case can be more onerous than in a civil case, and the hearing of the criminal case may mean a considerable delay to the civil case. An underpaid employee may wait for some time, perhaps measured in years rather than months, before being able to pursue their lawful wages and entitlements.

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<sup>393</sup> Submission of UnionsWA, p 9.

<sup>394</sup> Submission of Employment Law Centre, p 39.

<sup>395</sup> Submission of Slater and Gordon Lawyers, p 5.

<sup>396</sup> Submission of the Employment Law Centre, p 32.

<sup>397</sup> Ibid.

<sup>398</sup> FW Act s 553(1) provides that proceedings for a pecuniary penalty order against a person for a contravention of a civil remedy provision are stayed if criminal proceedings are commenced or have already commenced against the person for an offence; and the offence is constituted by conduct that is substantially the same as the conduct in relation to which the order would be made.

**Term of Reference 6** – Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.

The experience in the UK is similar – the UK Low Pay Commission Report observation is that:

We are also aware that the cost of bringing such cases is estimated to be £50,000 on average and that not only do workers have to wait longer to get their money back, they do not always receive the same financial recompense as if they went down the civil route – the courts can take an employer’s ability to pay into account before setting the penalty.<sup>399</sup>

This is a significant issue given the submissions to the Inquiry, which I accept, that most underpaid workers want simply to have the underpayment rectified, and that punishing the employer is not the worker’s objective.

Further, in a criminal case there is every likelihood that the worker will be compelled to give evidence against their employer. I suspect the prospect of giving evidence in a criminal matter may be daunting for a worker, and more so in the case of a vulnerable worker, which may lead to a reluctance to go to the authorities about an underpayment. I note too the submission of Ai Group that characterising underpayments as wage theft is likely to discourage employers from self-disclosing underpayments they have discovered due to error.<sup>400</sup>

### Constitutional considerations

There are other considerations. What is being asked in this Term of Reference is whether the State Government should consider passing a State law to make systematic and deliberate underpayment of wages and entitlements in WA a criminal offence. However, approximately 85% of the private sector workforce in WA may be covered by the FW Act which is a Commonwealth law. The FW Act provides penalties for underpayment of wages and entitlements by national system employers. The Australian Constitution provides in s 109 that when a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law shall prevail, and the State law shall, to the extent of the inconsistency, be invalid. There will be a question whether a State law providing a criminal penalty for underpayment of wages and entitlements in WA will be valid with respect to workers covered by the national system. These issues are explained in greater detail, and examined more thoroughly, by Kennedy and Howe in *The Criminalisation of Wage Theft as a Compliance Strategy*.<sup>401</sup> There is no suggestion in any of the submissions that the State Government should consider criminalising wage theft only in the WA IR system and I would not recommend it do so.

In relation to employers and workers in WA covered by the national system, the interaction between the federal enforcement framework and any State enforcement framework needs to be considered. Having civil and criminal claims arising out of the same facts can be problematic. For example, the prosecution of a WA criminal law would be undertaken by a WA prosecutor. However, where the worker has made contact initially with the FWO, it is not clear how a complaint would be made to the WA prosecutor which would be necessary to commence criminal

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<sup>399</sup> Low Pay Commission (United Kingdom), *Non-compliance and enforcement of the National Minimum Wage*, 2017, pp 25-26.

<sup>400</sup> Submission of Australian Industry Group, p 8.

<sup>401</sup> Melissa Kennedy and John Howe, *The Criminalisation of Wage Theft as a Compliance Strategy*, Australian Labour Law Association National Conference, Gold Coast, 9-10 November 2018.

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prosecution. The WA criminal sanction would not be the final penalty in a suite of penalties available to a federal court hearing a matter brought by the FWO - it would be a stand-alone penalty.

### Need for high level of federal and State communication and co-operation

In my view, both the federal and State regulators would need a high level of communication and co-operation if a stand-alone WA criminal penalty is to be effective in the case of wage theft occurring in WA in the national system. The federal and State regulators each could be pursuing matters against the same individual based on the same facts from their quite different laws, perspectives and objectives. There could be a duplication of effort between federal and State regulators when gathering evidence for their respective jurisdictions, which is undesirable.

Given the decision of the Commonwealth Government to consider applying criminal penalties for the most serious forms of deliberate exploitation of workers, there is the potential for a federal criminal sanction to apply in WA. If Commonwealth legislation is passed, then, depending on its terms, the State Government would need to consider only the creation of a complementary criminal penalty for wage theft occurring in the WA industrial relations system.

### Are current laws effective?

Although the criminalisation of wage theft in WA raises some complex issues the quite widespread, and even entrenched, wage theft which is occurring in certain sectors is happening under laws which are already in place. Arguably, those laws are not effective in deterring wage theft. This was a conclusion reached by the MWTF when it examined criminal penalties for underpayments. The MWTF Report stated that there is a growing perception that the current regulatory model is unable to tackle serious and systemic underpayments of workers.<sup>402</sup> It noted, as has the Ai Group and HIA submissions, that historically the national workplace relations system has relied on civil remedies for breaches of employment standards, and that there has been a long-standing bipartisan approach at the Commonwealth level of not criminalising workplace relations matters.<sup>403</sup>

The MWTF Report concluded on this issue:

Clearly, the criminalisation of wage underpayment is gaining increasing support, particularly in cases of deliberate, serious and intentional contraventions. However, there are complexities in adopting such an approach. The Taskforce considers that criminal sanctions can form an important part of a suite of enforcement tools available to address migrant worker exploitation. The introduction of criminal sanctions would provide a clear signal to unscrupulous employers that exploitation of migrant workers is unacceptable, and the consequences of doing so can be severe.

Given that there are currently widespread levels of non-compliance with relevant laws, criminal sanctions to tackle serious and systematic underpayments of workers, would usefully

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<sup>402</sup> Report of the Migrant Workers' Taskforce, 2019, pp 86-87.

<sup>403</sup> Ibid p, 87.

form part of the regulatory toolkit. However, careful design will be required to ensure these are an effective addition to regulators existing powers. For example, these powers should aimed at dealing with exploitation that is clear, deliberate and systemic. Consideration should also be given to the most appropriate legislative vehicle for these offences, noting that the Fair Work Act is underpinned by a predominantly civil penalty regime and may not be suitable.<sup>404</sup>

The decision of the Commonwealth Government strongly suggests that the increased penalties introduced by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* are no longer seen by the Commonwealth Government as sufficient to appropriately balance the interests of employers, workers and the broader community; the Commonwealth Government now sees the need to send ‘a strong and unambiguous message to those employers who think they can get away with the exploitation of vulnerable employees’.<sup>405</sup>

The recommendation to which the Commonwealth Government responded, that criminal sanctions be introduced for the most serious forms of exploitative conduct, arose out of a comprehensive examination of the circumstances of migrant workers. Issues relating to migrant workers form a significant part of the submissions received in this Inquiry, and the MWTF Report and the response of the Commonwealth to it, are persuasive in relation to whether wage theft in WA should be made a criminal offence.

I have little doubt that the continuing exposure of wage theft in the media and from reported prosecutions in the courts will cause governments to devote greater resources to the current regulatory framework. The view that new laws are not necessary, and that what is necessary is more robust and effective enforcement of the existing laws, is a view which has been put to me in informal meetings, and there is something to be said for that view. However I am not aware that, following the significant increase in penalties in the FW Act, there is evidence that an attitudinal change is becoming evident in those sectors which have the most evidence of systematic and deliberate underpayments occurring.

### A criminal law sends a message

The evidence I have referred to in Term of Reference 1, including in this context the Horticulture Report and the many circumstances described anecdotally in the individual submissions to the Inquiry, demonstrate that some employers do not regard the law requiring them to pay their workers the minimum wages, penalty rates and other entitlements, including superannuation contributions, as applying to them. Those employers who know the law does apply to them, but who still systematically and deliberately underpay, apparently consider the risk of being caught and brought to account is small enough to disregard the law. Yet it is deliberate law-breaking. In the cases and examples shown, the employer deliberately takes labour for which they have an obligation to pay, without paying for it in accordance with the law.

Even though these practices are not widespread in all sectors, the systematic and deliberate underpayment of workers, the problems it causes for those employers who do pay their workers

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<sup>404</sup> Ibid, p 87.

<sup>405</sup> Australian Government response: Report of the Migrant Workers’ Taskforce, 2019, p 3.

correctly, and the effect on the community as a whole, are such that it needs to be dealt with more strongly than it is at present.

A criminal offence is more serious and weighty than a civil offence. Making the most serious systematic and deliberate underpayment of wages and entitlements a criminal offence sends a message that it is treated more seriously. I consider it can play a role in more effectively trying to reduce or prevent systematic and deliberate underpayment of wages and entitlements from occurring, which is one of the two fundamental issues I refer to above.

### Criminal laws directed to the most serious forms of wage theft

It is significant in my view that the Commonwealth, Victorian and Queensland Governments' proposed sanctions are not directed to underpayment of wages and entitlements as such, but are directed towards 'the most serious forms of deliberate exploitation of workers', or employer conduct that is 'reckless' or 'deliberate'. In doing so, they are consistent with the observation in the UK Low Pay Commission Report that:

Current Government thinking is that the civil powers – including penalties and naming – are sufficient in most cases of non compliance, but there is the option of criminal prosecution for more serious cases. BEIS's [Department for Business, Energy and Industrial Strategy] policy is that prosecution is appropriate where employers are persistently non-compliant and refuse to cooperate with compliance officers during an investigation. Use of prosecutions is limited: there have been just thirteen successful cases since 2007.<sup>406</sup>

What needs to be addressed are, as R&CA identified, 'business-owners found to be deliberately and systematically avoiding compliance with their workplace obligations towards their staff'<sup>407</sup> deserving the strongest possible sanctions under the law.

The Governments' positions are consistent with some submissions in this Inquiry, for example from the NRA, that only deliberate and calculated non-compliance ought to attract a criminal sanction, and from Slater and Gordon that wage theft should be a criminal offence where the wage theft has been the result of aggravated and intentional conduct on the part of the employer.

Underpayments do occur from unintentional mistakes owing to a range of issues, including the complexity of awards and legislation, misunderstandings and errors. There is a regulatory framework in place to address this, and for which the civil penalties have recently been significantly increased in the national system, and are to be significantly increased in the WA industrial relations system. Except in a case of serious systematic and deliberate underpayment of wages and entitlements, the significant resources which would be required to successfully prosecute a criminal charge would, in my view, be better devoted to making the current civil framework operate more effectively.

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<sup>406</sup> Low Pay Commission (United Kingdom), *Non-compliance and enforcement of the National Minimum Wage*, 2017, p 25.

<sup>407</sup> Submission of Restaurant & Catering Australia, p 2.

**Term of Reference 6** – Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.

## Conclusion

For the reasons stated above, I do not accept that unintentional underpayment of wages and entitlements as such should attract a criminal sanction. However, in principle, a criminal sanction should be considered by the State Government for the most serious cases of systematic and deliberate underpayment of wages and entitlements in WA.

The State Government's consideration should include:

- the commitment of the Commonwealth Government to consider the circumstances and vehicle in which criminal penalties will be applied for the most serious forms of deliberate exploitation of workers;
- the constitutional issues arising from the application of a State law criminalising the most serious cases of systematic and deliberate underpayment of wages and entitlements in WA to employment covered by the Commonwealth FW Act;
- the desirability of an employee being able to pursue, in a timely manner, a civil claim of underpayment of wages and entitlements without it being delayed by a criminal proceeding; and
- the need to devote sufficient funding and resources to receive and investigate complaints, and adequately and properly enforce the proposed law.

### Recommendation 21

I recommend that in principle, a criminal sanction should be considered by the State Government for the most serious cases of systematic and deliberate underpayment of wages and entitlements in Western Australia.

The State Government's consideration should include:

- the commitment of the Commonwealth Government to consider the circumstances and vehicle in which criminal penalties will be applied for the most serious forms of deliberate exploitation of workers;
- the constitutional issues arising from the application of a State law criminalising the most serious cases of systematic and deliberate underpayment of wages and entitlements in Western Australia to employment covered by the Commonwealth *Fair Work Act 2009*;
- the desirability of an employee being able to pursue, in a timely manner, a civil claim of underpayment of wages and entitlements without it being delayed by a criminal proceeding; and
- the need to devote sufficient funding and resources to receive and investigate complaints, and adequately and properly enforce the proposed law.

**Term of Reference 6** – Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.

## Term of Reference 7

### **Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.**

The following strategies are examined in this Term of Reference:

- labour hire licensing;
- due diligence and accountability in WA government contracts;
- increasing awareness of employment obligations; and
- banning employers advertising employment for less than the applicable minimum wage.

#### **Labour hire licensing**

In Term of Reference 4, I noted the evidence particularly from individual submissions, and the understanding I have gained from informal discussions, which has led me to conclude that labour hire in horticulture, is a form of employment or engagement where underpayment of wages and entitlements is occurring.

In relation to horticulture, the Horticulture Report notes that growers' reliance on labour hire providers to provide workers has emerged in the last two decades and has coincided with the significant growth in temporary migrant workers in the horticulture industry. The report notes that several accounts and cases have identified that 'many labour hire contractors in the horticulture industry do not comply with Australian labour standards and thus profit from large-scale worker exploitation.'<sup>408</sup>

The authors conclude that:

- 1) The horticulture industry relies on non-compliant labour hire contractors;
- 2) There is a legitimate role that labour hire contractors can play in the management of labour;
- 3) The absence of national regulation governing labour hire contractors in the horticulture industry has contributed to the growth of non-compliant labour hire contractors; and

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<sup>408</sup> Joanna Howe, Stephen Clibborn, Alexander Reilly, Dianne van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, University of Adelaide and University of Sydney, 2019, p 25.

- 4) The introduction of labour hire licensing in a number of international jurisdictions has reduced non-compliance with labour standards by contractors involved in the horticulture industry.<sup>409</sup>

The Horticulture Report notes further that:

There is a growing consensus that there needs to be some form of regulation of labour hire licensing in the Australian horticulture industry.<sup>410</sup>

The Horticulture Report also notes that the Victorian Inquiry into the Labour Hire Industry and Insecure Work specifically identified the horticulture industry as requiring a labour hire licensing scheme.<sup>411</sup>

The issue of whether there should be a labour hire licensing scheme in the horticulture industry was also examined by the Migrant Workers' Taskforce. The MWTF Report noted that evidence shows that 'unscrupulous labour hire practices exist to help take advantage of vulnerable workers, particularly in the horticulture, cleaning, meat processing and security industries.'<sup>412</sup>

The MWTF Report notes that cases in which migrant workers have been exploited by unscrupulous labour hire providers in the horticulture industry have been widely publicised and were covered in the FWO's 2018 Harvest Trail Inquiry.<sup>413</sup> The MWTF Report also noted that the horticulture industry established the Fair Farms Initiative to try to ensure that all horticulture workers, including migrant workers, are treated fairly.<sup>414</sup>

The MWTF Report notes the introduction of labour hire licensing schemes in Queensland, in South Australia and in Victoria. The Queensland *Labour Hire Licensing Act 2017* commenced on 16 April 2018; all labour hire providers operating in Queensland need to be licensed under the scheme.<sup>415</sup> The South Australian scheme requires all labour hire providers operating in South Australia to be licensed by 1 November 2019.<sup>416</sup> The Victorian labour hire licensing scheme commenced on 29 April 2019, with penalties applying from October 2019 to labour hire providers who do not have a licence, or a licence application pending, and to businesses that use unlicensed providers.<sup>417</sup>

The Migrant Workers' Taskforce was of the view that the schemes 'impose a significant regulatory burden on the entire labour hire industry and the host employers using them.'<sup>418</sup> The Migrant Workers' Taskforce also commented that it is 'unclear to what extent the laws as drafted will

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<sup>409</sup> Ibid.

<sup>410</sup> Ibid, p 32.

<sup>411</sup> Ibid.

<sup>412</sup> *Report of the Migrant Workers' Taskforce*, 2019, p 99.

<sup>413</sup> Ibid, p 102.

<sup>414</sup> Ibid, p 114.

<sup>415</sup> <https://www.labourhire.qld.gov.au/about-the-licensing-scheme>

<sup>416</sup> <https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire-licence>

<sup>417</sup> <https://labourhireauthority.vic.gov.au/>

<sup>418</sup> *Report of the Migrant Workers' Taskforce*, 2019, p 105.



achieve their objective of protecting vulnerable workers.<sup>419</sup> The Taskforce was of the view that a single national regulatory scheme would be preferable over different and overlapping State-based schemes, and recommended that the Commonwealth Government establish a national labour hire registration scheme focused on labour hire providers in four high risk industries: horticulture, meat processing, cleaning, and security.<sup>420</sup> In its response to the MWTF Report, the Commonwealth Government has committed to establish a national labour hire registration scheme for those four industries.<sup>421</sup>

I note the submission of Master Builders that ‘so long as the labour hire providers are meeting the relevant award conditions and other employment arrangements, there can be no criticism of wages theft or denial of employment conditions under labour hire’,<sup>422</sup> however the evidence before the Inquiry shows that this does not appear to be the case in relation to labour hire providers in horticulture where wage theft is such a significant issue that some licensing regime is necessary to address it.

I am persuaded that the quite central role of labour hire providers in supplying the workers for the horticulture industry, the difficulties which the growers have in trying themselves to ensure that employment standards of those workers are observed, and the vulnerability of the workers, all mean that in order to address the systematic and deliberate underpayment of workers attention needs to be paid now to the labour hire providers. The Horticulture Report and the Sustainable Solutions Report are compelling. The case studies in the Horticulture Report put stakeholder perspectives on labour hire non-compliant practices in the horticulture industry. They are completely supported by the findings in the FWO Harvest Trail Inquiry, and the Victorian Inquiry into the Labour Hire Industry and Insecure Work.

Unscrupulous labour hire providers undercut the responsible labour hire providers. The Office of State Revenue states:

Aside from the issue of underpaid workers and State taxes, we have also received information from legitimate labour hire businesses that are being financially hurt and disadvantaged, where they are being undercut by these labour hire firms offering reduced rates to businesses for the provision of labour.

There is also an issue with the businesses engaging these labour hire firms having an unfair competitive advantage over businesses that use legitimate labour hire firms charging normal market rates. We often find that certain businesses in WA continue to use unscrupulous labour hire firms repeatedly as they have become aware that any action taken will be against the labour hire firm and not themselves. As a result, there is no financial incentive for them to take any responsibility for the type of labour hire firm that they are engaging. For this reason, we strongly support the introduction of a mandatory licensing regime for labour hire firms, similar

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<sup>419</sup> Ibid, p 104.

<sup>420</sup> *Report of the Migrant Workers’ Taskforce*, 2019, Recommendation 14, p 106.

<sup>421</sup> Australian Government response: Report of the Migrant Workers’ Taskforce, 2019.

<sup>422</sup> Submission of Master Builders Association, p 15.

to that in Queensland and Victoria, which imposes penalties on businesses who engage unregistered labour hire firms.<sup>423</sup>

Although requiring labour hire providers in those industries to be licensed will impact upon those labour hire providers who are paying their employees correctly, over time, licensing should greatly assist in creating a level playing field for the supply of labour in the industry. Similar problems about unscrupulous labour hire providers in the UK have been addressed by the *Gangmasters (Licensing) Act 2004* which was introduced to deal with the failure to supply workers with written statements of employment practices, infringement of agricultural wages board agreements and the national minimum wage, and denying workers' rights to paid holiday and sick pay.

In my view, the material before the Inquiry shows that there should be a licensing scheme for labour hire in the horticulture industry.

I note that the MWTF Report, and the Commonwealth Government commitment, is for a national labour hire registration scheme not just for the horticulture industry, but also for meat processing, cleaning and security.<sup>424</sup> There is not the same level of material before the Inquiry in relation to those other industries, however there is sufficient for the Inquiry to recommend that consideration be given also to a licensing scheme for labour hire in other industries, including the meat processing, cleaning and security industries.

I reach this conclusion taking into account the Office of State Revenue's information to the Inquiry, which is referred to in Term of Reference 3. This focused mainly on the horticulture and primary production industries, but noted that similar issues exist in many other industries such as security, cleaning and meat processing:

In the vast majority of these cases, these labour hire firms are intentionally avoiding their employment obligations. They are often set up with 'straw man' directors and false addresses, which impedes our investigations and makes the collection of payroll tax difficult and/or unlikely. Often, when they become aware that we are investigating them, they simply 'disappear' and stop providing services.<sup>425</sup>

The United Voice submission refers to cleaners in a large retail building engaged by a labour hire provider who are being underpaid or exploited, but that ultimately the retailer bears no responsibility for those employees for that exploitation. It describes the practice as being common in the security and cleaning industries.<sup>426</sup> United Voice also notes that the industries where the exploitation of visa holders is most prominent are cleaning, horticulture, retail, meat and poultry processing, hospitality and accommodation services, and that these are 'the

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<sup>423</sup> Office of State Revenue, Information provided to the Inquiry, May 2019.

<sup>424</sup> *Report of the Migrant Workers' Taskforce*, 2019, Recommendation 14, p 106.

<sup>425</sup> Office of State Revenue, Information provided to the Inquiry, May 2019.

<sup>426</sup> Submission of United Voice, pp 4-5.

industries in which labour-hire, subcontracting and sham contracting are most common, and where union density is low.<sup>427</sup>

Labour hire was also the subject of one of the submissions from individuals referred to in Term of Reference 1 which stated:

Even worse is the labour hire industry that has been out of control for many years, one of the forms of wage theft that is common revolves around training and inductions, these companies from time to time require workers to do online inductions and then refuse to pay the workers any hourly rate for time spent doing this training even though it is made clear on the Fairwork Australia website that workers have the right to be paid for training.

The MWTF Report stated that ‘Cases of serious exploitation by unscrupulous labour hire operators have recently been found in the horticulture, meat processing, cleaning, and security sectors.’<sup>428</sup> The Report recommended the establishment of a national labour hire registration scheme which focuses on the horticulture, cleaning, meat processing and security industries, and recommended consultation:

The Taskforce recommends that the Government agree to the principles of the proposed Scheme and then consults stakeholders on the details of the Scheme to ensure it is fit for purpose and will address the problems it seeks to address. This includes consultation on the relevant sectors, policy settings and interactions with other industry or state-based schemes.<sup>429</sup>

The purpose behind recommending licensing of labour hire operators in these sectors is to create a more level playing field and protect those labour hire operators who do comply with their employment obligations from unfair competition from unscrupulous operators, and that is not unreasonable. On this material, I consider the State Government should introduce a licensing scheme in WA for labour hire in the horticulture industry, and in consultation with stakeholders give consideration to a licensing scheme for labour hire in other industries including the meat processing, cleaning, and security industries.

The State Government should consult with the Commonwealth Government about its commitment to establish a national labour hire registration scheme for horticulture, meat processing, cleaning and security and take it into account in considering whether the State Government should introduce a State-based scheme.

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<sup>427</sup> Ibid, p 15.

<sup>428</sup> *Report of the Migrant Workers’ Taskforce, 2019*, p 101.

<sup>429</sup> Ibid, p 106.

**Term of Reference 7** – Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.

### Recommendation 22

I recommend the State Government should:

- introduce a licensing scheme in Western Australia for labour hire in the horticulture industry and, in consultation with stakeholders, give consideration to a licensing scheme for labour hire in other industries including the meat processing, cleaning, and security industries; and
- consult with the Commonwealth Government about its commitment to establish a national labour hire registration scheme for horticulture, meat processing, cleaning and security and take it into account in considering whether the State Government should introduce a State-based scheme.

### Due diligence and accountability in WA Government contracts

In Term of Reference 1, I noted a submission from an employee of a contractor to a State Government department who discovered that his employer has made only one part-payment to his nominated superannuation account, even though his pay slips say otherwise. He calculates his missing superannuation totals \$8,000. This is yet another example of the non-payment of superannuation which has become so widespread that it caused the Australian Senate to hold an Inquiry into non-payment of the Superannuation Guarantee which reported in 2017 with the report titled *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*.<sup>430</sup>

I noted too the submission from Professionals Australia concerning the State Government employing interpreters through labour hire agencies for the public sector and government agencies, but that too little is charged to pay employee interpreters their award entitlements, and also the submission regarding an informal survey of 18 contract cleaners across a range of State government agencies which referred to unpaid allowances. I make no findings in this regard; I merely note the issue they have raised.

It is becoming increasingly recognised that businesses may have a moral duty, if not a legal duty, to ensure that contractors or franchisees pay their employees their lawful entitlements. The *Modern Slavery Act 2018* (Cth) requires larger Australian businesses, which have an annual consolidated revenue of more than \$100 million, to report annually on their actions to assess and address the risks of modern slavery not just in their own operations but also in their supply chains.

Section 558B of the FW Act, following the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* amendments, provides that a company, or an officer of the company, contravenes the FW Act if a franchisee entity or subsidiary does not follow workplace laws and they knew or could

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<sup>430</sup> The Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, 2017.

**Term of Reference 7** – Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.

reasonably be expected to have known that the contravention by the franchisee entity or subsidiary would occur.

The MWTF has recommended that the Commonwealth Government consider ‘additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws’, and makes reference to extending the accessorial liability provisions of the FW Act to also cover ‘situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies.’<sup>431</sup>

The Commonwealth Government, in response, will ‘examine options for ensuring responsible companies cannot contract out of their workplace obligations, for example by extending accessorial liability to companies in appropriate circumstances.’<sup>432</sup>

### **Contract terms aimed at minimising breaches of employment conditions**

In these circumstances it would be prudent for the State Government to consider ensuring that contracts it enters into for the provision of cleaning or security services, and generally, contain terms which are aimed at addressing or minimising breaches of workplace law in relation to the workers actually providing the services to the Government. This will also assist in providing a level playing field for the tenderers to State Government contracts.

The Inquiry is aware of the *Enhance Public Sector Procurement* project currently underway in the State Government which is a series of initiatives aimed at addressing the recommendations from multiple reviews into Government procurement, as well as maximising social and economic outcomes through Government spend. The State Department of Finance is developing an Ethical Procurement Framework, and Phase one is a *Responsible Supplier Pact* which ‘is a set of principles and a supplier code of conduct that outline the minimum ethical standards that suppliers will aspire to meet when doing business with the State.’<sup>433</sup>

In the context of this Inquiry, where the State Government is considering what may be done to more effectively address wage theft in WA, it would be appropriate if the State Government considers including in the *Enhance Public Sector Procurement* project measures to signal to businesses seeking to tender for State Government contracts that contractors and subcontractors are to abide by employment conditions for the employees providing the services. This might be done, for example, by providing in a contract a term that a contractor or any subcontractor must comply with workplace law including the Superannuation Guarantee contribution.

A similar clause already exists in the WA Department of Finance’s *Request Conditions and General Conditions of Contract* document:

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<sup>431</sup> *Report of the Migrant Workers Taskforce, 2019*, Recommendation 11, p 93.

<sup>432</sup> Australian Government response to the Report of the Migrant Workers’ Taskforce, p 3.

<sup>433</sup> Department of Finance website

[www.finance.wa.gov.au/cms/Government\\_Procurement/Public\\_Sector\\_Reform/Responsible\\_Supplier\\_Pact](http://www.finance.wa.gov.au/cms/Government_Procurement/Public_Sector_Reform/Responsible_Supplier_Pact)

**Term of Reference 7** – Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.

### **18.3 Awards, Workplace Agreements**

The Contractor must ensure that the remuneration and terms of employment of all Contractor Personnel for the duration of the Customer Contract will be consistent with the remuneration and terms of employment that reflect the industry standard as expressed in awards and agreements and any code of practice that may apply to a particular industry.<sup>434</sup>

The submission mentioned at the commencement of this part, from an employee of a contractor to a State government department who discovered that his employer has made only one part-payment to his nominated superannuation account, was not from cleaning or security, and this shows that consideration is to be given to including such a term in contracts other than for cleaning and security services. This may be able to be included in consultations with stakeholders in other area of goods and services, and in works procurement, as part of the development of the *Enhance Public Sector Procurement* project.

#### **Contract terms aimed at precluding certain tenderers**

The Senate Education and Employment References Committee in its report *Wage theft? What wage theft?! The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies*, recommended that Commonwealth procurement rules preclude a tenderer from entering a contract with any corporation or an associated entity that has been penalised on more than one occasion for being non-compliant with any employee entitlement laws.<sup>435</sup>

In the context of this Inquiry, it would be appropriate for the State Government to consider providing similarly in its procurement rules. Consideration could be given not to enter into a contract for the provision of cleaning or security services, and generally, with a business which has been found by a court or tribunal to have systematically and deliberately underpaid their employees, or with a business which has a director or owner who has been so found. In this way, the provision would not apply to circumstances where the underpayment has been inadvertent or unintentional.

#### **Monitoring contract provisions**

It has been put to me that the effective operation of the provisions I have mentioned is likely to be dependent on how well they can be monitored, however, it is impractical for the State Government to monitor all of its many contracts on a regular basis as to whether contractors or sub-contractors providing services to it are indeed complying with their employment obligations to the employees actually delivering the services. The resources required to do so would be significant, and would require a level of knowledge of employment law which is not necessarily found in contract administrators.

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<sup>434</sup> Department of Finance, Request Conditions and General Conditions of Contract, 2018.

<sup>435</sup> The Senate Education and Employment References Committee, *Wage theft? What wage theft?! The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies*, 2018, Recommendation 9, pp 41-42.

**Term of Reference 7** – Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.

Monitoring can include random checks and there may be scope for some involvement of the State Industrial Inspectors, particularly if my recommendation for a significant increase in the numbers of Industrial Inspectors is accepted. Therefore, from the point of view of this Inquiry, I consider that consideration should be given to how a contract term aimed at minimising breaches of employment conditions might be able to be monitored.

Similarly, consideration could be given about how to appropriately empower government agencies to make decisions giving effect to any rule not to enter into a contract for the provision of cleaning or security services, and generally, with a business which has been found by a court or tribunal to have systematically and deliberately underpaid its employees.

### Conclusion

In my view, these recommendations will assist to create a level playing field where businesses which act responsibly and fairly to their employees are not undercut by unscrupulous competitors. They also provide an opportunity for contractors, and sub-contractors, to develop a good relationship with their client, the State Government, by demonstrating that they are compliant with employment standards. This will assist with consideration for future contracts.

The issues raised in this part of the Report may, if thought appropriate, form the basis of discussions with key stakeholders in the context of the *Enhance Public Sector Procurement* project.

### Recommendation 23

I recommend that the State Government give consideration to:

- ensuring that contracts it enters into for the provision of at least cleaning or security services, if not generally, contain terms which are aimed at addressing or minimising breaches of workplace law in relation to the workers actually providing the services to the Government;
- not entering into a contract for the provision of cleaning or security services, and generally, with a business which has been found by a court or tribunal to have systematically and deliberately underpaid their workforce, or with a business which has a director or owner who has been so found.

### Advertising work for less than the minimum wage

Case study #1 in Term of Reference 1 shows that an online advertisement from a sole trader offered overseas workers 88 days' farm work in regional Western Australia as a "volunteer" to secure the second-year working holiday visa. It offered free accommodation, electricity, water, gas and meals, in addition to providing all paperwork required to prove paid employment (pay slips showing superannuation and taxation paid) in exchange for farm work and additional duties.

**Term of Reference 7** – Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.

I note that the UK Low Pay Commission Report states that:

In addition HMRC can build on its work to identify underpaying employers through online adverts. HMRC should consider establishing systems to search online and send out ‘nudge’ letters automatically to those employers and recruitment agencies that appear to be advertising non-compliant jobs.<sup>436</sup>

I consider this to be a worthwhile consideration.

I note too that the MWTF Report recommendation 4 is that legislation be amended to prohibit persons from advertising jobs with pay rates that would breach the FW Act.<sup>437</sup>

I consider the State Government should enact similar legislation to apply to employment in the WA industrial relations system.

#### **Recommendation 24**

I recommend that the State Government prohibit employment being advertised at less than the applicable minimum wage for the position.

### **Sham contracting**

Examples of sham contracting as a form of wage theft were given in Term of Reference 1. Submissions from organisations and from individuals wrote of employment offered on the basis that the person be regarded as a contractor when in all likelihood, the arrangement would be in law an employment relationship. The NRA stated that the misuse of ABNs and sham contracting typically go hand in hand as ‘unscrupulous entrepreneurs seek to take advantage of the mere fact that an employee has an ABN - regardless of whether the employee is actually operating a bona fide business.’<sup>438</sup> UnionsWA, United Voice, the CFMEU and ELC all referred to sham contracting. Maurice Blackburn referred to sham contracting in the context of the ‘gig’ economy as a business model aimed at ensuring that the relevant workers ‘do not enjoy the minimum employment standards (including pay) that Australians have come to expect.’<sup>439</sup>

The FW Act ss 357, 358 and 359 address misrepresenting employment as an independent contracting arrangement and operate to render unlawful an employer dismissing an employee in order to engage them as an independent contractor to perform the same, or substantially the same, work under a contract for services. There is no corresponding provision in WA legislation, and the evidence suggests that there needs to be.

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<sup>436</sup> Low Pay Commission (United Kingdom), *Non-compliance and enforcement of the National Minimum Wage*, 2017, p 27.

<sup>437</sup> *Report of the Migrant Workers’ Taskforce*, 2019 p 85.

<sup>438</sup> Submission of National Retail Association, p 7.

<sup>439</sup> Submission of Maurice Blackburn Lawyers, p 9.

**Term of Reference 7** – Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.



**Recommendation 25**

I recommend the State Government introduce legislation similar to ss 357, 358 and 359 of the *Fair Work Act 2009* prohibiting representation by an employer to a worker that the contract of employment under which the worker is employed is a contract for services, and making it unlawful for an employer to dismiss an employee in order to engage them as an independent contractor to perform the same, or substantially the same, work under a contract for services.

## Term of Reference 8

### Whether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the federal jurisdiction.

I set out below some of the points from submissions which directly address this Term of Reference.

The R&CA submission is that the FWO's resources should be significantly increased so that the FWO is 'properly equipped to pursue businesses who continually fail to comply with their various legal and regulatory obligations.'<sup>440</sup>

The HIA noted that 'an examination of the role of the FWO in order to provide further dispute resolution processes or mediation outside court process is a worthwhile exercise.'<sup>441</sup>

The NRA made a submission regarding franchisors increasingly taking a greater interest in the activities of their franchisees, and suggested that the WA Government may wish to recommend to the Commonwealth Government that:

...the *Franchising Code of Conduct* be amended in such a fashion as to allow franchisors to terminate franchise agreements following a fair process in circumstances where contraventions of workplace relations laws have been identified but declined to be rectified, without fear of the franchisor contravening their obligations under that Code.<sup>442</sup>

The NRA also suggested that making wage non-compliance an anti-competitive behaviour might be referred to the Australian Law Reform Commission for consideration, and that a change to Commonwealth budgetary policy should enable the FWO to 'more effectively police the workplace relations practices of Australian employers'.<sup>443</sup>

UnionsWA submitted that WA's right of entry provisions, allowing representatives to check that workers' rights are being respected and entitlements properly paid, are better than the comparable provisions in the FW Act, and recommended that the WA Government should 'positively argue' at the national level for those provisions. UnionsWA recommended the WA Government argue for reforms to pay slip content for national system employees to require a pay slip to identify the relevant industrial instrument and the worker's classification, as this would improve worker and employer knowledge about wage rates. UnionsWA also submitted that the

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<sup>440</sup> Submission of Restaurant & Catering Association, p 3.

<sup>441</sup> Submission of Housing Industry Association, p 14.

<sup>442</sup> Submission of National Retail Association, p 16.

<sup>443</sup> Ibid.

WA Government could support the establishment of a national licensing scheme for the labour hire industry.<sup>444</sup>

ELC submitted that the requirements in the *Fair Entitlements Guarantee Act 2012* (Cth) that an employee be an Australian citizen or the holder of a certain visa type be removed.<sup>445</sup> It submitted too that the accessorial liability provisions in the FW Act should be reviewed with the specific objective of applying those provisions to contractual supply chains and that the legal definition of ‘employee’ be modified to provide employment law protections to workers performing services in the gig economy.<sup>446</sup>

United Voice made recommendations in relation to superannuation, the Fair Entitlements Guarantee scheme and that the process associated with applying for and working under an ABN should be subject to closer scrutiny.<sup>447</sup>

Hardy and Kennedy in their submission also addressed broadening the definition of ‘employee’, extending the liability of persons beyond the employer, introducing a labour hire scheme, strengthening sanctions and penalties, recovery of legal costs in underpayment claims and providing a more efficient, cost-effective and user-friendly option for recovering underpayments.<sup>448</sup>

Slater and Gordon<sup>449</sup> and Maurice Blackburn<sup>450</sup> also made submissions regarding recommendations to the Commonwealth Government.

## Consideration

As the significant majority of private sector employment in WA is covered by the national system, addressing wage theft in WA will largely be a matter for the Commonwealth. Some of the matters canvassed in the submissions above have been dealt with in other Terms of Reference. I consider other matters in what is to follow.

I also include in this Term of Reference my recommendations for changes to the WA industrial relations system which I consider the State Government should also recommend that the Commonwealth Government consider making to the FW Act, as well as recommendations in relation to matters which are purely the responsibility of the Commonwealth.

With regard to the NRA submissions about the Franchising Code of Conduct, I have insufficient before me in the Inquiry to consider the context of the suggestion. The role a franchising model itself can contribute to the systematic and deliberate underpayment of wages has been comprehensively examined by the *Parliamentary Joint Committee on Corporations and Financial*

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<sup>444</sup> Submission of UnionsWA, p 11.

<sup>445</sup> Submission of Employment Law Centre, p 52.

<sup>446</sup> Ibid, pp 54-55.

<sup>447</sup> Submission of United Voice, p 27.

<sup>448</sup> Submission of Tess Hardy and Melissa Kennedy, p 15.

<sup>449</sup> Submission of Slater and Gordon, p 6.

<sup>450</sup> Submission of Maurice Blackburn, pp 14-15.

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*Services - Fairness in Franchising* Inquiry which reported in March 2019. The Committee noted that 'wage theft continues to occur in many franchises: partly due to the business model franchisors operate and partly due to a range of socio-cultural problems.'<sup>451</sup>

The Committee concluded:

Some of the recommendations contained in this report, if implemented, will go a long way to indirectly rectify this issue by mitigating incentives to engage in wage theft.<sup>452</sup>

The recommendations I make in this Inquiry address the examples of wage theft which are in the submissions I have received, including where it has occurred within a franchise.

Further, there is insufficient information before the Inquiry to deal effectively with the NRA's suggestion that wage non-compliance might be able to be considered anti-competitive behaviour.

The outcome of my consideration of other issues can be found in the following recommendations.

### **Greater funding for the FWO's presence in WA**

This issue was also raised in Term of Reference 5. In my opinion, a visit from a Fair Work Inspector is one of the most effective ways to counter wage theft; it is entirely consistent with my opinion that the number of Fair Work Inspectors in WA should be increased, as it is with my recommendation in Term of Reference 5 that the number of State Industrial Inspectors also should be increased. This does not reflect upon the work the FWO already undertakes in WA; it recognises the size of the State and the inherent difficulties in having inspectors visit businesses throughout the State.

I acknowledge that the Commonwealth Government, as part of its response to the MWTF Report, stated that it had recently provided an additional \$14.4 million to the FWO to focus on the protection of migrant workers and this follows an extra \$20.1 million provided to the FWO to crack down on law breaking.<sup>453</sup> In the context of this Inquiry, I recommend that the State Government recommend to the Commonwealth Government that there be greater funding for the FWO's presence in WA.

I note the HIA's submission that the FWO Infoline have industry/occupational divisions for the handling of queries,<sup>454</sup> however I have insufficient before me to conclude that this is an issue which needs to be addressed.

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<sup>451</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Fairness in Franchising*, 2019, p (xiv).

<sup>452</sup> Ibid.

<sup>453</sup> Hon Kelly O'Dwyer MP, Minister for Jobs and Industrial Relations, Media Release, *Standing up for vulnerable workers*, 7 March 2019.

<sup>454</sup> Submission of Housing Industry Association, p 15.

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### **Non-payment of the Superannuation Guarantee contribution**

In relation to the superannuation guarantee contribution, I note that recommendation 14 in the *Superbad – Wage theft and non-compliance of the Superannuation Guarantee* report is for consideration to be given to allowing employees or their representatives to take enforcement action in relation to unpaid superannuation payments.<sup>455</sup> It is appropriate, given the examples submitted in this Inquiry, and I include the submission from Maurice Blackburn to this effect, that the non-payment of the Superannuation Guarantee contribution be regarded the same as non-payment of wages and entitlements.

I recommend that the State Government recommend to the Commonwealth Government that payment of the Superannuation Guarantee be treated the same as wages and entitlements for enforcement purposes in the event of non-payment of the Superannuation Guarantee contribution. In this way, the pay slip received by the worker would show whether the required superannuation has been paid, and the regulatory framework for the enforcement of minimum conditions of employment should be available in the event of non-payment of the Superannuation Guarantee contribution.

### **A pre-lodgment conciliation process**

Submissions referred to in other Terms of Reference that vulnerable workers find the prospect of taking legal action against their employer, or former employer, daunting, as well as the HIA suggestion that dispute resolution processes or mediation outside court process be examined,<sup>456</sup> may be able to be addressed by my recommendation in Term of Reference 6 that a pre-lodgment conciliation process be created. Therefore, I recommend that the State Government recommend to the Commonwealth Government that a pre-lodgment conciliation process prior to enforcement action commencing be examined for application in the national regulatory framework.

### **Workers working illegally in Australia**

The vulnerabilities of those who do not have the right to work in Australia, and who are subject to threats and exploitation by unscrupulous employers as a result, is part of the submission by The Humanitarian Group.<sup>457</sup> It refers to persons who:

- may not have work rights in Australia, making them fearful of accessing services or reporting their employer;
- may not have a valid visa, making them fearful of accessing services or reporting their employer;

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<sup>455</sup> The Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, 2017.

<sup>456</sup> Submission of Housing Industry Association, p 14.

<sup>457</sup> Submission of The Humanitarian Group, pp 2-7.

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- may be on a temporary visa and unable to pursue legal avenues to recover stolen wages due to departing Australia or from overseas;...<sup>458</sup>

In circumstances where an employee performs work, but the employee does not have standing to seek redress for an underpayment, the only beneficiary is the unscrupulous employer.

I accept that this raises public policy issues regarding the enforcement of claims based on an illegal contract of employment. However, I am of the view that it represents an area where wage theft is likely to be rife because a worker who works when they do not have the right to work, or where the contract is illegal, is more likely to be exploited by an unscrupulous employer. It would be remiss not to at least examine the issue from this perspective.

The difficulty of the issue is recognised in the Ministerial Review of the State Industrial Relations System.<sup>459</sup> The Review recommended that the WA IR Act be amended to allow:

...enforcement proceedings under the Amended IR Act to be taken by or on behalf of people who are, under the *Migration Act 1958* (Cth) either unlawful non-citizens in Australia who have engaged in work for an employer, or who are lawful non-citizens in Australia who have engaged in work for an employer that is contrary to the conditions of their visa.<sup>460</sup>

This Term of Reference is directed to strategies and legislative changes that the State Government could recommend to the Commonwealth Government to deal with wage theft in the federal jurisdiction. As the issue involves the *Migration Act 1958*, which is Commonwealth legislation, this Inquiry can raise it for the State Government to consider raising with the Commonwealth in the context of wage theft.

I note in relation to temporary migrant workers that the Commonwealth Government has accepted in principle the MWTF Recommendation 3 that legislation be amended to clarify that temporary migrant workers working in Australia are entitled at all times to workplace protections under the FW Act.<sup>461</sup> I recommend that the State Government recommend to the Commonwealth Government that a person who has engaged in work in Australia for an employer that is contrary to the conditions of their visa, or who is an unlawful non-citizen, or where the contract is illegal and who is subject to systematic and deliberate underpayment of their wages or entitlements, should have the right to seek to remedy the underpayment under the FW Act.

### **Recovery of legal costs in wage theft matters**

The need for vulnerable workers to access legal representation for the enforcement of their employment conditions is already referred to in Term of Reference 6. I recommend that the State Government recommend to the Commonwealth Government that in cases of systematic and

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<sup>458</sup> Ibid, p 3.

<sup>459</sup> *Ministerial Review of the State Industrial Relations System Final Report*, 2018, p 268.

<sup>460</sup> Ibid, Recommendation 49, p 278.

<sup>461</sup> Australian Government response: Report of the Migrant Workers' Taskforce, March 2019.

**Term of Reference 8** – Whether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the federal jurisdiction.

deliberate underpayment of wages or entitlements, successful complainants in the national system be permitted to recover their legal costs.

### Temporary visa holders

The fact that temporary visa holders are able to hold an ABN or be a company director has been raised in submissions. United Voice for example, submits there should be greater scrutiny of the use of ABNs in industries where there are high levels of sham contracting, such as the contract cleaning and security industries, and that in particular, holders of international student and holiday-making visas should be ineligible for ABNs.<sup>462</sup>

The visa system itself I consider to be broader than the Inquiry's Terms of Reference, however, in the context of sham contracting where a person may be required to obtain an ABN in order to be 'engaged' as a contractor when in law they would be an employee, I recommend that the State Government recommend to the Commonwealth Government that the rights of student or temporary visa holders to hold an ABN, or to be able to be a company director, be reviewed to address any abuse of the visa system, including by 'sham contracting' arrangements.

### General

A number of issues in the submissions regarding federal matters deal more indirectly with wage theft and its consequences and I consider that it is appropriate that the State Government discuss these with the Commonwealth Government. I recommend that the State Government discuss with the Commonwealth Government the application of the Fair Entitlements Guarantee scheme, access by employee organisations to employment records in order to check that workers' wages and entitlements are being paid correctly, and the definition of 'employee', to optimise their application to the circumstances of wage theft identified in this Inquiry.

#### Recommendation 26

I recommend the State Government recommend to the Commonwealth Government:

- 1) that there be greater funding for the Fair Work Ombudsman's presence in Western Australia;
- 2) that the rights of student or temporary visa holders to hold an Australian Business Number (ABN), or to be able to be a company director, be reviewed to address any abuse of the visa system, including by 'sham contracting' arrangements;
- 3) that:
  - a) in the performance and exercise of functions under the *Fair Work Act 2009* the Fair Work Ombudsman must act in a manner that facilitates and encourages cooperation between the Fair Work Ombudsman and the Chief Executive Officer of the Western

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<sup>462</sup> Submission of United Voice, p 23.

- Australian Department of Mines, Industry Regulation and Safety wherever appropriate and practicable;
- b) Fair Work Inspectors may participate in joint campaigns or inquiries with State Industrial Inspectors; and
  - c) the Fair Work Ombudsman may confer and exchange information with the Western Australian Department of Mines, Industry Regulation and Safety in relation to participating in joint campaigns or inquiries with the Fair Work Ombudsman;
- 4) that superannuation be regarded as part of a worker's wages and entitlements, including for enforcement purposes in the event of non-payment of the Superannuation Guarantee contribution;
  - 5) that a pre-lodgment conciliation process prior to enforcement action commencing be examined for application in the national regulatory framework;
  - 6) that a person who has engaged in work in Australia for an employer that is contrary to the conditions of their visa, or who is an unlawful non-citizen, or where the contract is illegal and who is subject to systematic and deliberate underpayment of their wages or entitlements, should have the right to seek to remedy the underpayment under the *Fair Work Act 2009*;
  - 7) that in cases of systematic and deliberate underpayment of wages, successful complainants in the national system be permitted to recover their legal costs; and
  - 8) that the application of the Fair Entitlements Guarantee scheme, access by employee organisations to employment records in order to check that workers' wages and entitlements are being paid correctly, and the definition of 'employee', be optimised to assist to address the circumstances of wage theft identified in this Inquiry.



## Term of Reference 9

### Other matters incidental or relevant to the Inquirer's consideration of the preceding terms of reference.

#### Wage theft in the WA sex industry

The Inquiry received a submission from Magenta, WA's sex worker support project, which provides health, advocacy and education services to people working in the WA sex industry. The submission explains that although the provision of sexual services itself is legal in WA, the sex industry is regulated 'under a criminalised model which prohibits many common practises associated with sex work, such as employing security, or working in a group'.<sup>463</sup>

Magenta provides examples of wage theft. These include:

- arbitrary deductions from sex workers' earnings for petty policy infringements by the owner/operator of sex industry premises, ranging from putting their shoes on the furniture, to wearing clothing which does not match the establishments' décor, to refusing known violent clients;
- owners/operators of sex industry premises changing payment policies maliciously or arbitrarily, such as management changing the 'cut' they are supposed to pay a driver while the sex worker is actually in the room with a client, which results in the worker receiving less than the agreed payment. Magenta submits that this practice is common in larger sex work premises, and 'represents a clear tactic of wage theft employed by management who have rewritten the rules while their employees' backs are literally turned'; and
- clients simply underpaying the agreed rate, or attempting to take back money, including by using intimidation and violence.<sup>464</sup>

Magenta makes the point that in each of the above cases, the primary reason for the wage theft occurring is that these examples are 'broadly legal' because the criminalised model means sex workers are excluded from the industrial and civil laws applicable to employees in society generally which are designed to prevent exploitation of workers in the workplace.<sup>465</sup>

Of significance to this Inquiry, Magenta submits that where a sex worker has been underpaid, sex workers have no recourse: interactions with police around this issue often focus unnecessarily on the topic of sexual consent, without recognising a sex worker's labour, and sex workers are

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<sup>463</sup> Submission of Magenta, p 1.

<sup>464</sup> Ibid, p 2.

<sup>465</sup> Ibid, p 1.

generally told no crime has been committed when a client has underpaid them, and there is the pervasive stigma against sex workers that flourishes in a criminalised society.<sup>466</sup>

Magenta states that ‘Police officers are the unofficial Human Resources department for the sex industry in this regard’, which creates an inappropriate relationship between police and the WA sex industry because the police are also the one prosecuting sex workers for non-compliance.<sup>467</sup> It submits:

As the body usually specialised in the investigation of crimes, the police are not appropriate and generally unwilling in the investigation of industrial cases such as wage disputes, workplace bullying, unfair dismissals, and wage thefts. These are not functions that police are neither trained in nor willing to provide to sex workers, and would be inappropriate for any other regulated industry.<sup>468</sup>

Magenta states that:

Above all else, the single most important step in reducing the instances and impacts of wage theft against sex workers, is to enact the full decriminalisation of the sex industry. This includes effective regulation under appropriate industrial and civil laws.<sup>469</sup>

Magenta submits that ‘Any other effort to reduce instances of wage theft amongst sex workers, or to reduce the impacts of these on sex workers’ lives, is ineffective in the face of improper sex industry regulation.’<sup>470</sup>

## Consideration

This Inquiry is concerned with the systematic and deliberate underpayment of an employee by their employer. One of the examples above provided by Magenta uses the language of ‘employee’ and ‘worker’ when it refers to ‘the worker receiving less than the agreed payment’, or changing payment policies ‘while their employees’ backs are literally turned’.

Accepting for the present that the example does indeed refer to an employment relationship in the usual meaning of those words, historically contracts for providing sexual services for reward have been held to be contrary to public policy, and are therefore void and unenforceable, as discussed by Angus Macauley in *Contracts Against Public Policy: Contracts For Meretricious Sexual Service*,<sup>471</sup> (although the author contends that in NSW in 2018 at least, that is not necessarily correct). I note too that the Final Report of the Ministerial Review of the State Industrial Relations

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<sup>466</sup> Ibid, p 3.

<sup>467</sup> Ibid, p 5.

<sup>468</sup> Ibid, p 6.

<sup>469</sup> Ibid.

<sup>470</sup> Ibid, p 8.

<sup>471</sup> Angus Macauley, *Contracts Against Public Policy: Contracts For Meretricious Sexual Service* [2018] SydLawRw 21; (2018) 40(4) Sydney Law Review 527.

System observed that the WA IR Act and the MCE Act ‘may well not presently apply to sex workers, in whole or part, due to the illegality of at least some of the work involved’.<sup>472</sup>

Whether the sex industry in WA should be decriminalised raises issues beyond an Inquiry into wage theft. There may well be merit in decriminalisation being considered: some submissions to the Ministerial Review of the State Industrial Relations System supported it, and quite recently, the nursing profession in the UK has done so.<sup>473</sup>

Although the Magenta submission raises the issue of deliberate underpayment, I regard it as incidental to the Terms of Reference because of the ‘criminalised model’ Magenta describes. Nevertheless, the above examples allege arbitrary deductions from earnings, and if these occurred in a conventional employment relationship, the regulatory mechanisms would allow it to be addressed. The principle that an employer cannot arbitrarily, and without authorisation, make deductions from an employee’s earnings should be just as applicable to an employee sex worker as to any other employee. In my view, there should be some consideration given to how those issues can be addressed.

In WA if a worker claims workers compensation but it appears to the arbitrator that the contract under which the injured worker was engaged at the time was illegal, the *Workers’ Compensation and Injury Management Act 1981* s 192 allows the arbitrator, if it is appropriate, to deal with the claim as if the worker had been under a valid contract. This provision appears to be recognition by the WA Parliament that, at least in relation to workplace injury, the public policy reasons for not allowing the enforcement of an illegal contract should not prevent a worker working under an illegal contract who is injured in the workplace from claiming workers’ compensation in appropriate circumstances. A similar provision in the WA IR Act would extend this recognition to a claim of wage theft by an employed sex worker covered by the WA industrial relations system.

I note that the Ministerial Review of the State Industrial Relations System recommended that a provision broadly similar to the *Workers’ Compensation and Injury Management Act 1981* s 192 be included in the WA IR Act, in that case to allow enforcement proceedings to be taken by or on behalf of people who are, under the *Migration Act 1958* (Cth) either unlawful non-citizens in Australia who have engaged in work for an employer, or who are lawful non-citizens in Australia who have engaged in work for an employer that is contrary to the conditions of their visa.<sup>474</sup>

In the context of addressing wage theft in WA, I respectfully repeat that here.

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<sup>472</sup> Ministerial Review of the State Industrial Relations System Final Report, 2018, p 275.

<sup>473</sup> Denis Campbell, *Nurses vote to back decriminalisation of prostitution*, The Guardian. 21 May 2019 [https://www.theguardian.com/society/2019/may/20/royal-college-of-nursing-votes-decriminalise-prostitution-sex-worker-health?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/society/2019/may/20/royal-college-of-nursing-votes-decriminalise-prostitution-sex-worker-health?CMP=Share_iOSApp_Other)

<sup>474</sup> Ministerial Review of the State Industrial Relations System Final Report, 2018, Recommendation 49, p 278.

### Recommendation 27

I recommend that a provision broadly similar to s 192 of the *Workers' Compensation and Injury Management Act 1981* be included in the *Industrial Relations Act 1979* to address wage theft of employed sex workers in the sex industry in Western Australia.

### Provision for redundancy entitlements in the building and construction industry

The directors of Reddifund, formerly the WA Construction Industry Redundancy Fund, which gives effect to award provisions providing redundancy entitlements to WA building and construction workers, submitted that there is a lack of compliance and enforcement mechanisms to ensure workers are paid their redundancy entitlements in clause 17 of the national *Building and Construction General On-site Award 2010*.<sup>475</sup>

The submission notes 'a concerning trend' in the rising number of entitlement claims made to the Fair Entitlements Guarantee scheme (which, according to Reddifund, exposes the Fair Entitlements Guarantee Scheme to further payouts, and does not address the issue of non-compliance by companies. Reddifund submits that this means workers have not been paid their full entitlements under the award 'as employers have clearly shown that they are either unwilling or unable to provide for redundancy.' An Approved Worker Entitlement Fund (AWEF) provides a mechanism to ensure these entitlements are paid.<sup>476</sup>

Reddifund calls for all State Government building and infrastructure projects to require worker redundancy entitlements to be lodged with an AWEF, of which there are eight in Australia, including Reddifund.<sup>477</sup>

### Consideration

I note that Reddifund is 'sponsored' by the CFMEU, Master Builders, the Master Plumbers and Gas Fitters Association of WA and the Construction Contractors Association of WA. I regard its submission as having broad support from both employer and employee organisations in the building and construction industry. The national *Building and Construction General On-site Award 2010* clause 17 provides for an industry-specific redundancy scheme for the on-site building, engineering and civil construction industry.

Clause 17.3 sets out the redundancy pay that a redundant employee is entitled to receive. Clause 17.4(a) allows an employer to offset that entitlement by contributing to a redundancy pay scheme, which is to be an AWEF. A similar provision is in the State *Building Trades (Construction) Award 1987* clause 51(5).

As I understand the submission, the rising number of entitlement claims made to the Fair Entitlements Guarantee scheme is because of claims on the scheme for a redundancy payment

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<sup>475</sup> Submission of Reddifund, p 2.

<sup>476</sup> *Ibid*, p 5.

<sup>477</sup> *Ibid*.

for which an employer has not made any provision. In the case of the worker being made redundant, there is no money for the redundancy pay to which the worker is entitled.

Reddifund's submission would address this for employees of contractors on State Government building and infrastructure projects by making it a requirement that a contractor must make a contribution into an AWEF to ensure, in the event the contractor makes a worker redundant, there are funds in the AWEF to satisfy the award requirement to pay a redundancy/severance entitlement.

The award does not oblige an employer to contribute to an AWEF. The employer's liability under clause 17 of the national award, and under the State award, can be an accrual on its balance sheet. Reddifund's submission would oblige a contractor on a State Government building and infrastructure project to actually make a contribution, thereby removing the accrual option.

I consider the issue raised by Reddifund is incidental to the Terms of Reference in that although non-payment of a redundancy entitlement when it is due under an award is an underpayment, the option of accrual or contribution does not mean that the underpayment was systematic or deliberate; an employer may choose to accrue the entitlement with every intention of paying it.

Giving effect to the submission will remove the accrual option provided under the awards, which has a cost implication for contractors. The fact that Reddifund is sponsored by key employer and employee organisations in the building and construction industry may indicate that the submission may have broad support. It has the potential to help level the playing field in relation to tendering for State Government building and infrastructure projects because a tenderer that factors in the cost of lodging worker redundancy entitlements with an AWEF would not be unfairly disadvantaged by a competitor that does not do so and that may have no intention of paying the entitlement.

Making it a requirement for all State Government building and infrastructure projects would be done as part of the State Government procurement process, which is currently being comprehensively reviewed in the *Enhance Public Sector Procurement* project being undertaken by the State Government's Department of Finance. It is therefore appropriate that the State Government consult with key stakeholders about the Reddifund submission as part of that project, in order to give appropriate consideration to whether to give effect to the submission.

### **Recommendation 28**

I recommend that the State Government consult with key stakeholders as part of the State Government procurement process regarding whether a contractor on State Government building and infrastructure projects should be required to make a contribution into an Approved Worker Entitlement Fund to offset the redundancy pay obligations in the national and State on-site building and construction industry awards.

## Appendix 1 – List of non-confidential submissions

The Inquiry received 24 non-confidential submissions, which are listed below in alphabetical order. The Inquiry chose to not publish certain non-confidential submissions due to the nature of information contained in these submissions.

- Australian Manufacturing Workers' Union – WA Branch (AMWU)
- Australian Medical Association (Western Australia) (AMA (WA))
- Australian Industry Group (Ai Group)
- Australian Hotels Association (WA) (AHA)
- Construction, Forestry, Maritime, Mining and Energy Union, Construction and General Division (WA Branch) (CFMEU)
- Community and Public Sector Union / Civil Service Association of WA (CPSU / CSA)
- Dr Tess Hardy, Co-Director of the Centre for Employment and Labour Relations Law at the Melbourne Law School; and Ms Melissa Kennedy, Research Assistant at the Melbourne School of Government; PhD Candidate at the Melbourne Law School.
- Employment Law Centre of Western Australia (ELC)
- Housing Industry Association (HIA)
- Independent Education Union of Australia WA Branch (IEU)
- Magenta
- Maritime Union of Australia West Australian Branch (MUA)
- Master Builders Association of Western Australia (Master Builders)
- Maurice Blackburn Lawyers
- National Retail Association (NRA)
- Professionals Australia
- Reddifund
- Restaurant & Catering Australia (R&CA)
- Shop, Distributive and Allied Employees' Association, Western Australian Branch (SDA)
- The Humanitarian Group
- UnionsWA
- United Voice WA
- Slater and Gordon Lawyers
- Western Australian Council of Social Service (WACOSS)

## Appendix 2 – Online survey questionnaire

The online survey was available through the Inquiry website between 16 February 2019 and 27 March 2019.

### Online Survey on Wage Theft in Western Australia

This online survey form allows you to provide information about a current or previous employment experience in which you have experienced a systematic and deliberate underpayment of wages or entitlements.

Your survey responses will be confidential. Data collected from the survey may be published in the Inquiry Report. Names and email addresses will not be published or used to identify particular persons or organisations.

Survey responses will be used to assist the Inquiry to determine:

- whether there is evidence of wage theft occurring in Western Australia;
- the reasons wage theft is occurring, including whether it has become the business model for some organisations; and
- the impact of wage theft on workers.

The Inquiry is not able to assist you to investigate or remedy individual situations of underpayment of wages and entitlements. For information on possible options open to you regarding underpayment of wages or entitlements please contact:

- [Wageline](#) at the Department of Mines, Industry Regulation and Safety via [wageline@dmirs.wa.gov.au](mailto:wageline@dmirs.wa.gov.au) or phone 1300 655 266 if your query is about:
  - wages or leave entitlements if working for a state system employer (a sole trader, unincorporated partnership, unincorporated trust or an incorporated association or other not-for-profit organisation that is not a trading or financial corporation); or
  - long service leave.
- the [Fair Work Ombudsman](#) via phone 13 13 94 if your query is about underpayment of wages or leave entitlements (other than long service leave) by a national system employer (a Pty Ltd company or incorporated association or other not-for-profit organisation that is a trading or financial corporation).
- the [Australian Taxation Office](#) via phone 13 28 65 for queries regarding unpaid superannuation contributions or taxation issues.

The last day survey responses will be accepted is Wednesday 27 March 2019, after which the survey will be closed.

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### 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.
- Survey answers may be used to inform the Inquiry into Wage Theft in Western Australia, and may also be used for subsequent reporting or analysis.
- 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 Inquiry into Wage Theft will access 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](#).

### Survey questions

These questions relate to the employment in which you experienced a systematic or deliberate underpayment of wages or entitlements.

1. What was your age group at the time of your employment?

- under 18 years
- 18 to 24 years
- 25 to 34 years
- 35 to 44 years
- 45 to 54 years
- 55 to 64 years
- 65 and over

2. What is your gender?

- Female
- Male
- Other

3. Do you have an ongoing disability?

- Yes
- No

4. Do you identify yourself as:

- Aboriginal
- Torres Strait Islander
- Aboriginal and Torres Strait Islander
- None of the above

5. Do you speak a language other than English at home?

- Yes
- No

If yes, which language?

6. Was your employer a:

- Sole trader
- Partnership
- Pty Ltd company
- Incorporated association
- Unsure



7. When were you employed in this job?

- Within the last year
- More than a year ago but within the last 3 years
- Between 3 years and 6 years ago
- More than 6 years ago

8. How did you find this job?

- Online employment site
- Online marketplace site
- Newspaper advertisement
- Public noticeboard
- Word of mouth (eg from a friend or work mate)
- Other (please provide detail below)

9. How were you hired?

- Directly by the employer as an employee
- Through an agency/labour hire arrangement
- As an independent contractor / sub contractor
- Unsure

10. At the time of your employment, where was your employer located? Please provide a postcode

11. At the time of your employment were you:

- An Australian resident
- A visitor to Australia

12. At the time of your employment, was your employment status:

- Full time
- Part time
- Casual
- Contract
- Unsure

Other Information (optional)

13. At the time of your employment, were you a member of a union?

- Yes
- No

14. What was your occupation or job title?

15. Which industry were you were working in?

- Agriculture, Forestry and Fishing (includes farming, horticulture and aquaculture)
- Mining
- Manufacturing
- Electricity, Gas, Water and Waste Services
- Construction (includes construction of residential and commercial buildings and earthmoving and land preparation)
- Education and Training
- Health Care and Social Assistance
- Arts and Recreation Services
- Other Services (includes hair dressing, beauty services, working in a private home; selected repair and maintenance activities)
- Wholesale Trade
- Retail Trade
- Accommodation and Food Services (includes restaurant, fast food and café workers, and hotel workers)
- Transport, Postal and Warehousing (includes ride share drivers and food delivery riders)
- Information Media and Telecommunications
- Financial and Insurance Services (includes persons in banking, investment)
- Rental, Hiring and Real Estate Services
- Professional, Scientific and Technical Services (includes scientific research, architecture, engineering, computer systems design, law, accountancy and veterinary science)
- Administrative and Support Services (includes cleaning services, pest control services and gardening services)
- Public Administration and Safety (includes persons working in State or Local Government, executive and judicial activities; persons working in security services)

16. What types of underpayment of wages or entitlements did you experience?

(select more than one if appropriate):

- Underpayment of base pay rates  
*Being paid less than the legal minimum or award wage.*
- Unpaid hours  
*Not being paid for all hours worked, including for time spent training and in work meetings, and unreasonable length trials.*
- Unpaid or underpaid penalty rates  
*Not being paid penalty rates required by the relevant award for working on weekends, public holidays or outside of ordinary hours.*
- Unreasonable deductions  
*Having part of your pay unlawfully withheld, or being unlawfully required to pay back an amount.*

- Withholding of other entitlements  
*Not being allowed to take breaks, or not being paid leave to which you were entitled.*
- Unpaid superannuation
- 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 provide details below)

17. Do you believe this underpayment was part of a deliberate business strategy or model?

- Yes
- No
- Unsure

18. If yes, why do you believe this?

19. Did this occur to others at your workplace?

- Yes
- No
- Not sure

20. Did you report your issue?

- No
- Yes, to Wageline at the Department of Mines, Industry Regulation and Safety
- Yes, to the Fair Work Ombudsman
- Yes, to the employer or business owner
- Yes, to the Australian Taxation Office
- Yes, to another organisation or person (please specify below)

21. If no to question 20, why did you choose not to report your issue?

22. If yes to question 20, was your issue resolved?

- Yes
- No
- N/A

23. If yes to question 22, were you satisfied with the resolution?

- Yes
- No
- N/A

24. If you wish to tell us more about your experience, please provide further information below.

25. Would you be interested in talking to the Inquiry about your experience?

- Yes
- No

26. Please indicate if you would like to receive updates on the Inquiry via email

- Yes, I would like to receive updates through my email address
- No, I would not like to receive updates through my email address

27. Please provide a valid email address.

*Note: all surveys will be treated anonymously and data provided will not be used to identify particular persons.*

Thank you for taking the time to complete this survey. Further information on the Inquiry is available at [www.dmirs.wa.gov.au/wagetheftinquiry](http://www.dmirs.wa.gov.au/wagetheftinquiry)

## Appendix 3 – Results of the online survey

This appendix details the results from the online survey questionnaire conducted by the Inquiry between 16 February and 27 March 2019. The aim of the survey was to provide an opportunity for workers to provide details of their experiences of wage theft directly to the Inquiry.

The survey questionnaire is at **Appendix 2**.

### Survey sample

The online survey received a total of 310 responses from across the country. Interstate respondents have been excluded from the analysis because the Inquiry is into wage theft occurring in WA.

As the online survey was available to the general public, the Inquiry does not consider survey respondents and their responses representative of the wider Western Australian workforce or of all employees who may have experienced wage theft in Western Australia. Where appropriate the survey responses have been compared with the wider total employed population of Western Australia to provide greater context.

Of the 216 respondents located in Western Australia, the majority (97.7% or 211 respondents) were Australian residents. The other five respondents indicated that they were visitors to Australia. Examples of respondent comments have been included below to provide further context to the type of wage theft experienced by visitors to Australia.

Most migrants have this issue. People take advantage of us because they know we need them to stay here. I worked in this company for over 5 years using my ABN. Underpaid, being discriminated, no sick leave or superannuation. And every time I requested time off or complained about something my boss would say I gave you the visa so you have to do that. (Respondent #48)

They would call people for trial in their restaurant and make you work for free for one week then just recycle desperate job-seekers every week and effectively get free labour. (Respondent #86)

Staff at the company are forever complaining- yet nothing is being done. I am on a visa 457 and feel like I have not got a leg to stand on. My agreed yearly salary which the company contracted to me and immigrations did not match, they under paid me for 6 months however did not do this to others in the same situation as me. I am still chasing this up! (Respondent #107)

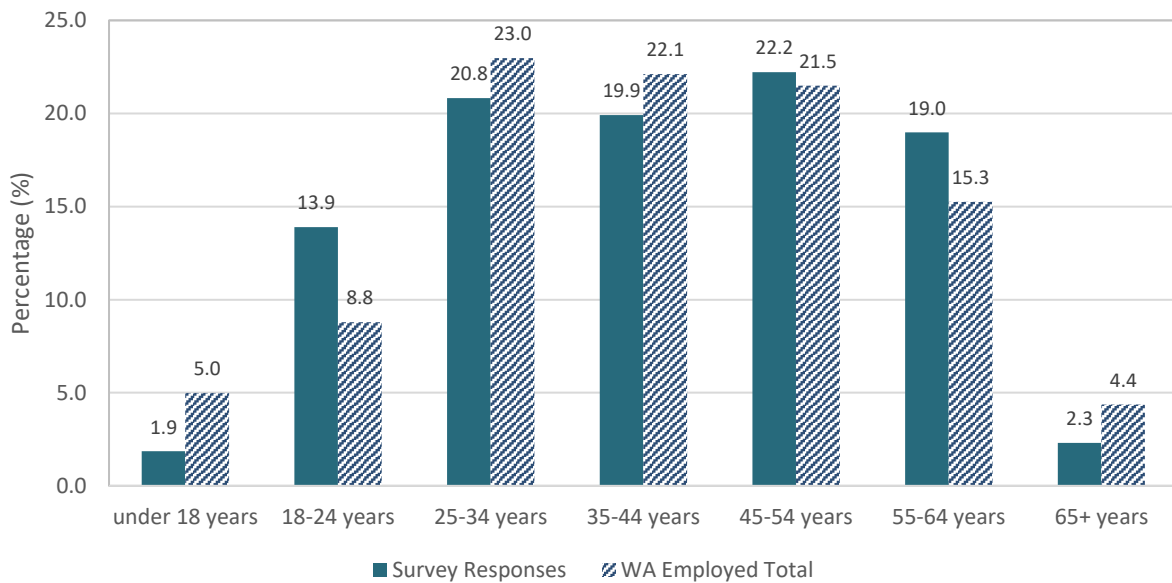
Five respondents (2.3%) identified as Aboriginal (compared to 1.6% WA total employed) and 6.9% identified that they had a disability (compared to 0.7% WA total employed).<sup>478</sup>

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<sup>478</sup> ABS (2017) *2016 Census of Population and Housing, Indigenous Population Profiles, Western Australia*, Table 14 and *Working Population Profiles, Western Australia*, Table 24.

As viewed in Figure 1, there was a higher proportion of survey respondents between the ages of 18 to 24 years (13.9% of survey respondents compared to 8.8% WA total employed), and the ages of 55 to 64 years (19.0% of survey respondents compared to 15.3% WA total employed) than proportions in the WA workforce.<sup>479</sup>

**Figure 1: Proportion of survey respondents by age group compared to total employed, Western Australia<sup>480</sup>**



Just over half of the respondents identified as male (52.3%) and 47.7% as female (compared to 54.2% male and 45.8% female WA total employed).<sup>481</sup> Female respondents were more likely to be aged between 25 to 34 years of age (28.0% compared to 19.6% of males), whereas males were more likely to be aged 45 years and over (48.2% compared to 40% for females).

Of the 216 respondents, 20.4% spoke a language other than English at home (18.8% for WA total employed).<sup>482</sup>

As viewed in Figure 2, almost one-third of survey respondents spoke a Southern European language (30.4% compared to 14.3% of WA total employed). Survey respondents were more likely to speak Eastern European and Southwest and Central Asian languages compared to the WA employed total.<sup>483</sup> Language groups were categorised from survey responses according to the Australian Bureau of Statistics' *Australian Standard Classification of Languages*.<sup>484</sup>

<sup>479</sup> ABS (2019) *Labour Force, detailed monthly, Australia, February 2019*. Catalogue number 6291.0.55.001, data cube LM1.

<sup>480</sup> Ibid.

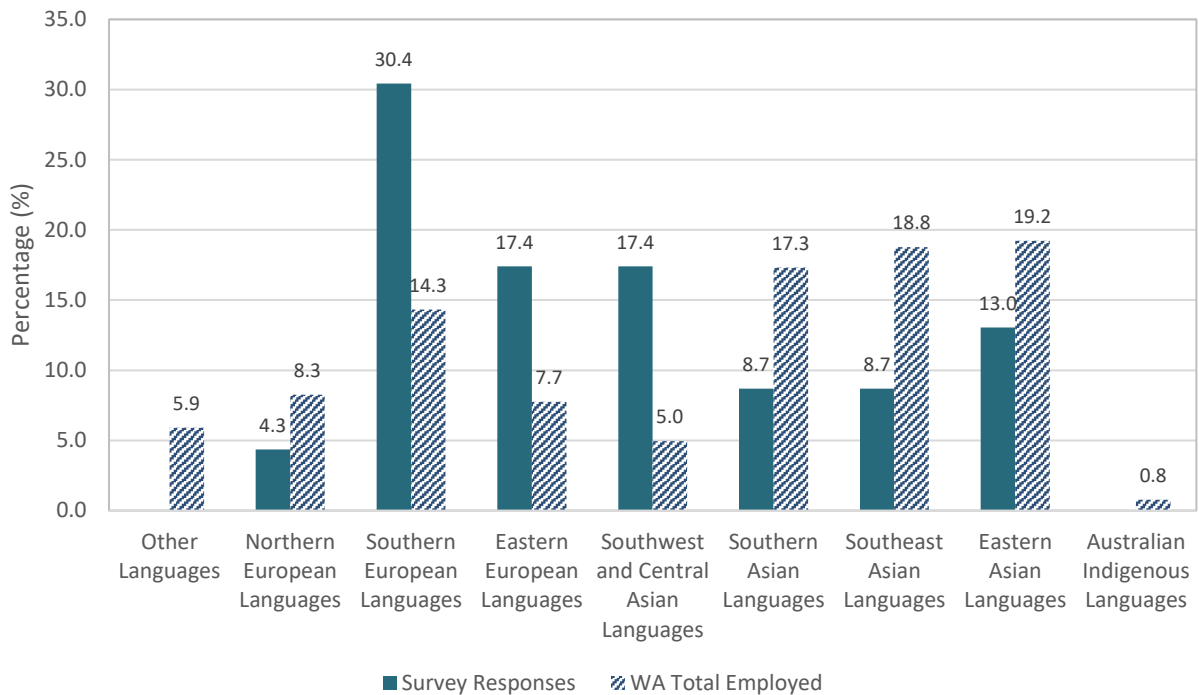
<sup>481</sup> Ibid.

<sup>482</sup> ABS (2017) *2016 Census of Population and Housing*, Table builder accessed 8 April 2019.

<sup>483</sup> Ibid.

<sup>484</sup> ABS (2017) *Australian Standard Classification of Languages, 2016*. Catalogue number 1267.0.

**Figure 2: Proportion of survey respondents by language group spoken compared to total employed, Western Australia<sup>485</sup>**



## Wage theft experiences of Western Australian workers

### Time of experience

Approximately half (51.6%) of survey respondents had experienced wage theft within the last year, with a further 24.2% experiencing the wage theft more than 6 years ago.

### Location

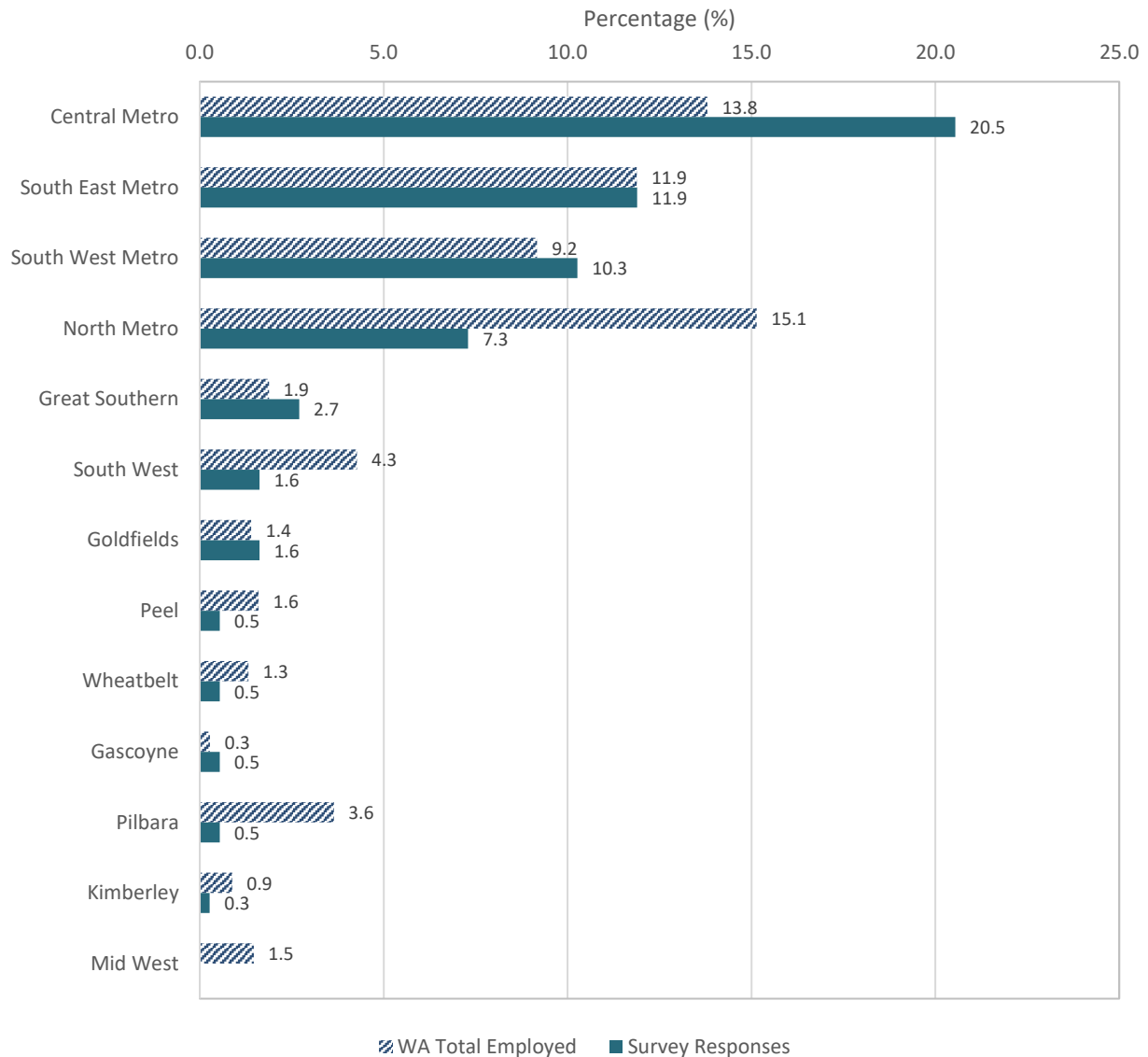
The majority of respondents identified that their wage theft experience occurred in the Perth Metropolitan area (85.6%). As viewed in Figure 3, one in five survey respondents experienced wage theft within the Central Metropolitan area, which includes the City of Perth (20.5% compared to 13.8% WA total employed).<sup>486</sup> Other regions where survey respondents highlighted wage theft occurring higher than their representation in the general employed population were in the South West Metropolitan area (10.3% compared to 9.2% WA total employed) and the Great Southern region (2.7% compared to 1.9% WA total employed).<sup>487</sup>

<sup>485</sup> ABS (2017) *2016 Census of Population and Housing*, Table builder accessed 8 April 2019.

<sup>486</sup> ABS (2017) *2016 Census of Population and Housing, Working Population Profiles*, Western Australia.

<sup>487</sup> Ibid.

**Figure 3: Proportion of survey respondents by region of employment compared to total employed, Western Australia<sup>488</sup>**



### How the worker was hired

Of the 216 survey respondents, three-quarters were directly employed by an employer (75.3%) and a further 16.7% were employed via an agency or labour hire business. As of August 2018, 3.9% of all WA employees were registered with a labour hire firm or an employment agency (44,200 employees).<sup>489</sup>

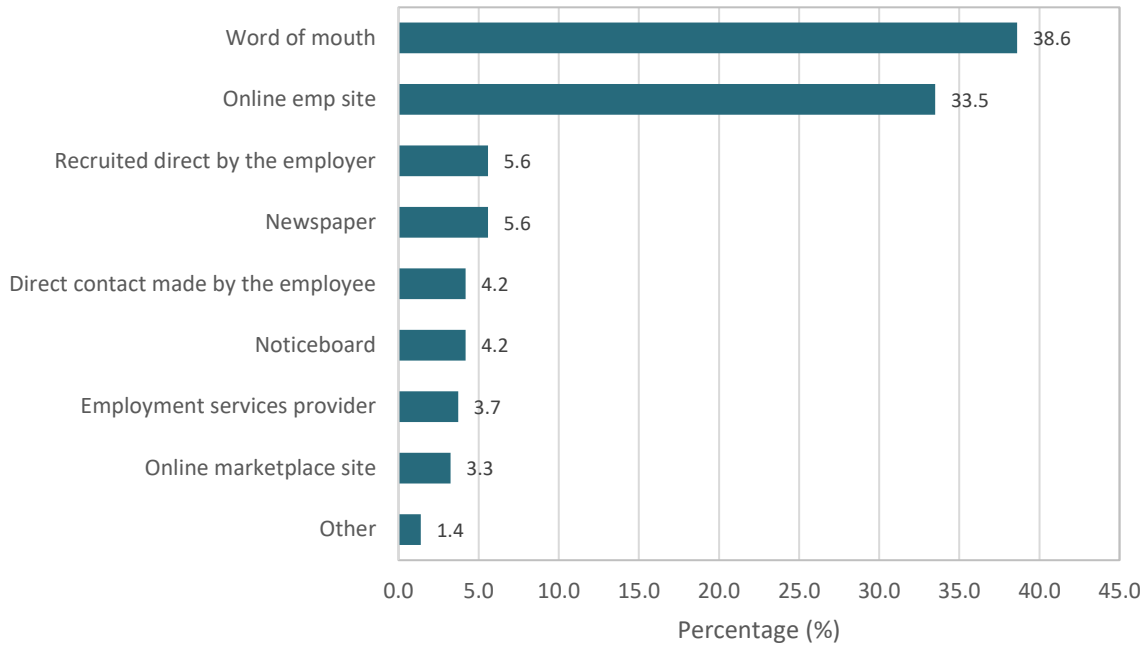
As viewed in Figure 4, more than one-third of survey respondents had found their job via word of mouth (38.6%) and another one-third (33.5%) via an online employment site.

<sup>488</sup> ABS (2017) *2016 Census of Population and Housing, Working Population Profiles, Western Australia*.

<sup>489</sup> ABS (2018) *Characteristics of Employment, Australia, August 2018*, catalogue number 6333.0, Table 13.



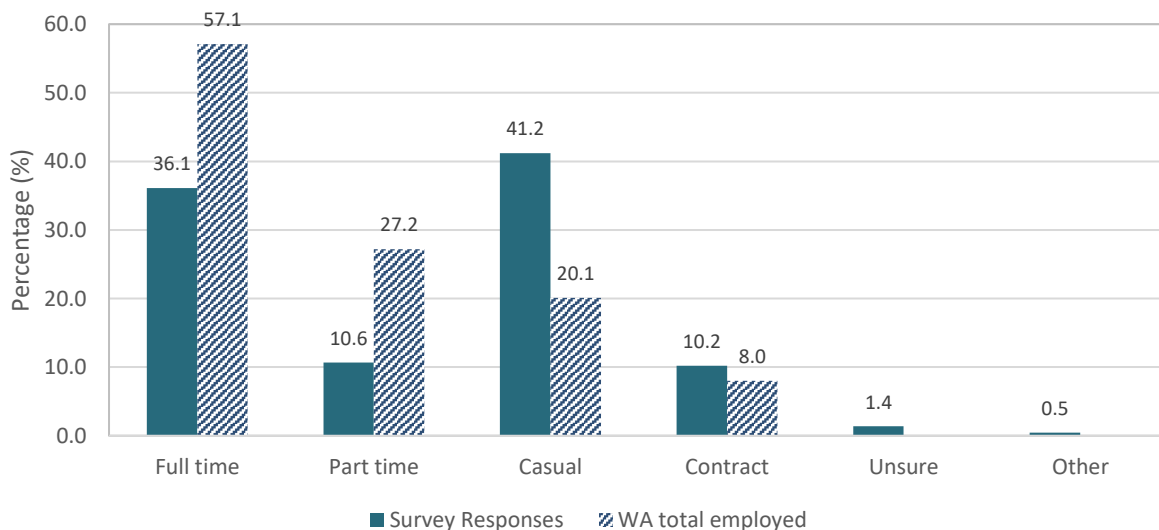
**Figure 4: Proportion of survey respondents by method of how they found their job**



### Employment status

At the time of their wage theft experience, survey respondents were more likely to be employed on a casual basis (41.2%) or on a full time basis (36.1%). A number of survey respondents in the other category, identified that they could apply multiple categories.

**Figure 5: Proportion of survey respondents by employment status compared to total employed, Western Australia<sup>490</sup>**



<sup>490</sup> ABS (2018) *Characteristics of Employment, Australia, August 2018*, catalogue number 6333.0, Tables 9 and 1B.

Examples of respondent comments have been included below to provide further context employment status identified by survey respondents.

Was employed full time but paid casual. (Respondent #6)

I was hired as a contractor, but was required to be present in the office and under the same work conditions such as hours I should be present, and the employer supplied my desk and computer. (Respondent #212)

### **Forms of wage theft**

The survey asked respondents to select one or more types of wage theft that they had experienced. The categories were:

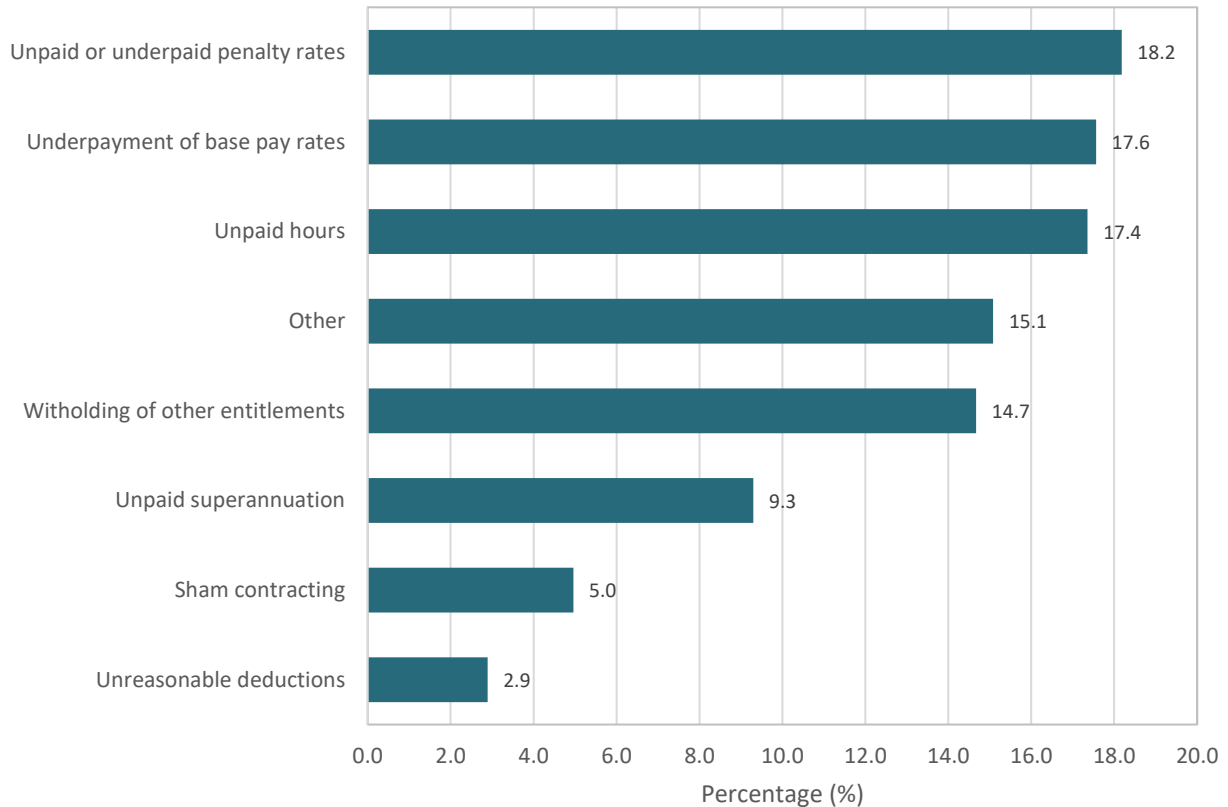
- underpayment of base pay rates (being paid less than the legal minimum or award wage);
- unpaid hours (not being paid for all hours worked, including for time spent training and on work meetings, and unreasonable length trials);
- unpaid or underpaid penalty rates (not being paid penalty rates required by the relevant award for working on weekends, public holidays or outside of ordinary hours);
- unreasonable deductions (having part of your pay unlawfully withheld, or being unlawfully required to pay back an amount);
- withholding of other entitlements (not being allowed to take breaks, or not being paid leave to which you were entitled);
- unpaid superannuation; and
- 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).

As viewed in Figure 6, the most frequent forms of wage theft identified by respondents were:

- 18.2% unpaid or underpaid penalty rates;
- 17.6% underpayment of base pay rates; and
- 17.4% unpaid hours.

A number of free text responses were re-categorised based on the information that respondents provided.

**Figure 6: Proportion of survey responses by the form of wage theft experienced**



Examples of respondent comments have been included below to provide further context to the type of wage theft experienced by survey respondents.

Fuel money paid directly in cash, for less than the standard by the taxation office. (Respondent #2)

Unpaid travel time when travelling to and from jobs in a company vehicle. (Respondent #7)

All employees were rostered for unpaid 'On Call' shifts and threatened with a formal warning leading to termination if we did not accept the shift (even when given less than the legal requirement of 3 hours' notice). (Respondent #104)

Original hours paid per day were reduced without any notice or consultation but actual hours worked per day never changed also hourly rate was reduced without notice or consultation even though job remained the same. Superannuation not paid on full hours worked only on 38hrs even though required work hours were set by roster up to 108hrs a week on a pre-set roster. Superannuation received was different for the same job and hours worked depending on which day you commenced your weeks rostered work (i.e. if you started on Mondays you received no super but if your roster was from Thursday who were paid 38hrs super. (Respondent # 143)

## Was wage theft a deliberate business strategy or model?

Three-quarters of survey respondents believed that the wage theft they experienced was part of a deliberate business strategy or model (75.0%) while a further 22.2% were unsure. The majority of survey respondents also indicated that they believed other employees had also experienced wage theft by the same employer (83.8%). Several comments included by respondents have been included below to demonstrate why survey respondents believed that the wage theft was a deliberate business strategy or model.

Yes. It was deliberate and an attempt to save money at every turn. This included instances such as, me covering for the manager for 6 weeks and only being compensated for the additional work load with a \$50 bonus and 2 bottles of wine. Tasks included all ordering and stock taking, all staff training and management, all till procedures, while being paid as a Level 1 employee, they chose to pay 'above award rate' at \$23 - \$25 an hour. All staff received a flat rate. No penalty rates for weekends, only ever on public holidays. This was justified by again, stating that everyone was being paid above award rate. But the employment level never matched the actual tasks people were expected to do. Whenever anyone raised the issue of pay, it was immediately used as a threat to change everyone over to permanent part-time, including people who wished to stay casual. No one, not even the general manager, was on a fixed contract. On several occasions we were underpaid penalty rates, like 150% instead of 200%. While this was rectified when I brought it up, it happened regularly and was a structural concern. (Respondent #166)

He was taking advantage of desperate people looking for work - me for my young age but all the other guys were foreigners and he would threaten to deport them. (Respondent #169)

Pressure is put onto store managers to not have any over time resulting in overtime being lost or being given as time in lieu which you are never able to take. Breaks are not properly given for working over ten hours, along with store managers never being paid for hours over 38 hours. Not being paid for time taken to close the store after the rostered time is a company policy even though you are required to stay open if customers are in the store. (Respondent #183)

(Employer's name) purposely does not pay us sick leave, first aid allowance, leave loading etc. I believe that he does this purposely as he has never informed us about such entitlements. After becoming sick over a month ago my dad asked me if I got sick leave pay. Confused, I said that there is no such thing. Dad pointed out that I am part time and hence are entitled to sick leave pay. Following this, I asked (Employer's name) if I am in fact entitled to sick leave pay, with him replying yes. I got quite frustrated knowing that I have been lied to and asked him to back pay me for the times I was sick and gave him a medical certificate. The fact that he knew that I was entitled to sick leave pay yet had never ever given it to me in 3 years shows that he is well aware of our entitlements but chooses not to pay us due to our age and lack of knowledge. (Respondent #202)

## Incidences within occupations

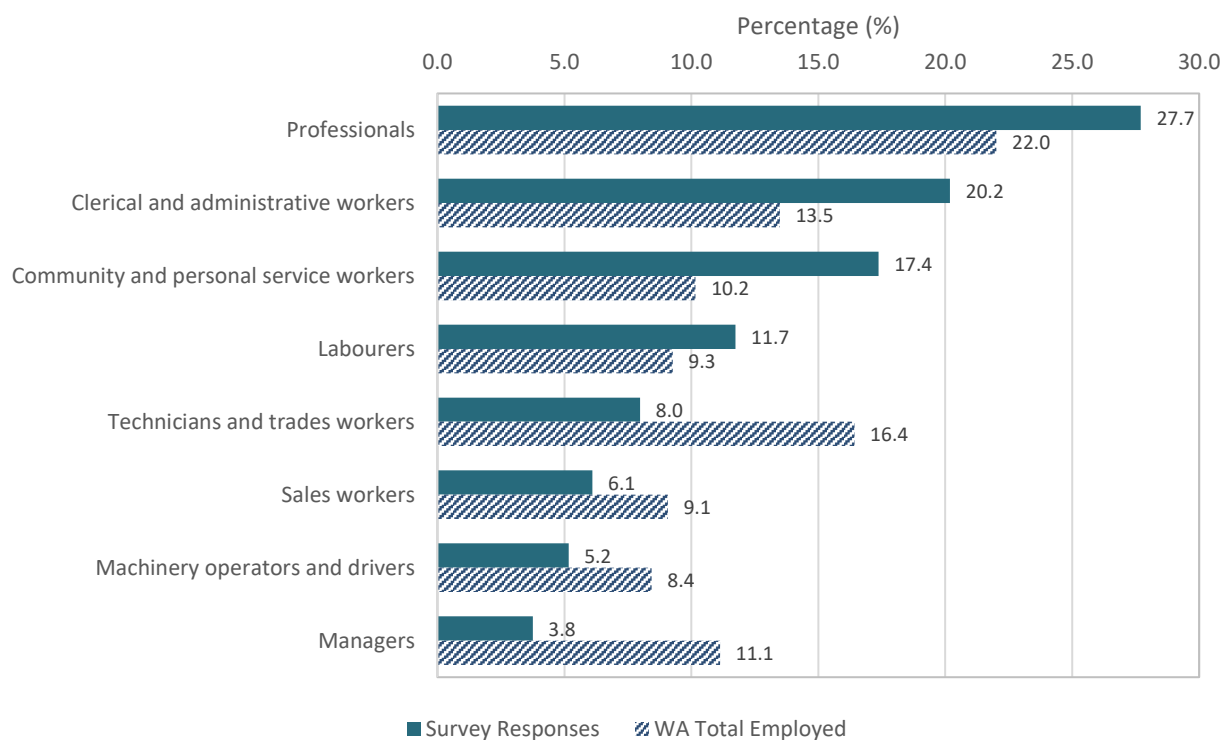
Survey respondents were asked to report their occupation or job title which was categorised according to the Australian Bureau of Statistics', *Australian and New Zealand Standard*

*Classification of Occupations (ANZSCO)*.<sup>491</sup> As viewed in Figure 7 below, the occupation groups with greater representation compared to the WA total employed population were Professionals (27.7%), followed by Clerical and Administrative Workers (20.2%), Community and Personal Service Workers (17.4%) and Labourers (11.7%).

Within the Professional occupation group, a significant number of survey respondents identified that they had been employed as interpreters and translators (62.7%). The high representation of this occupation group has skewed the results for this survey question.

Within the Clerical and Administrative Workers group, survey respondents mainly consisted of general administration officers and account officers. Within the Community and Personal Service Workers group, survey respondents consisted of waiters and bar attendants, security officers and café workers. Within the Labourer occupation group, occupations consisted of kitchenhands, farm hands and traffic controllers.

**Figure 7: Proportion of survey responses by occupation group compared to total employed, Western Australia<sup>492</sup>**



<sup>491</sup> ABS (2013) *Australian and New Zealand Standard Classification of Occupations (ANZSCO), 2013, Version 1.2*, Catalogue number 1220.0.

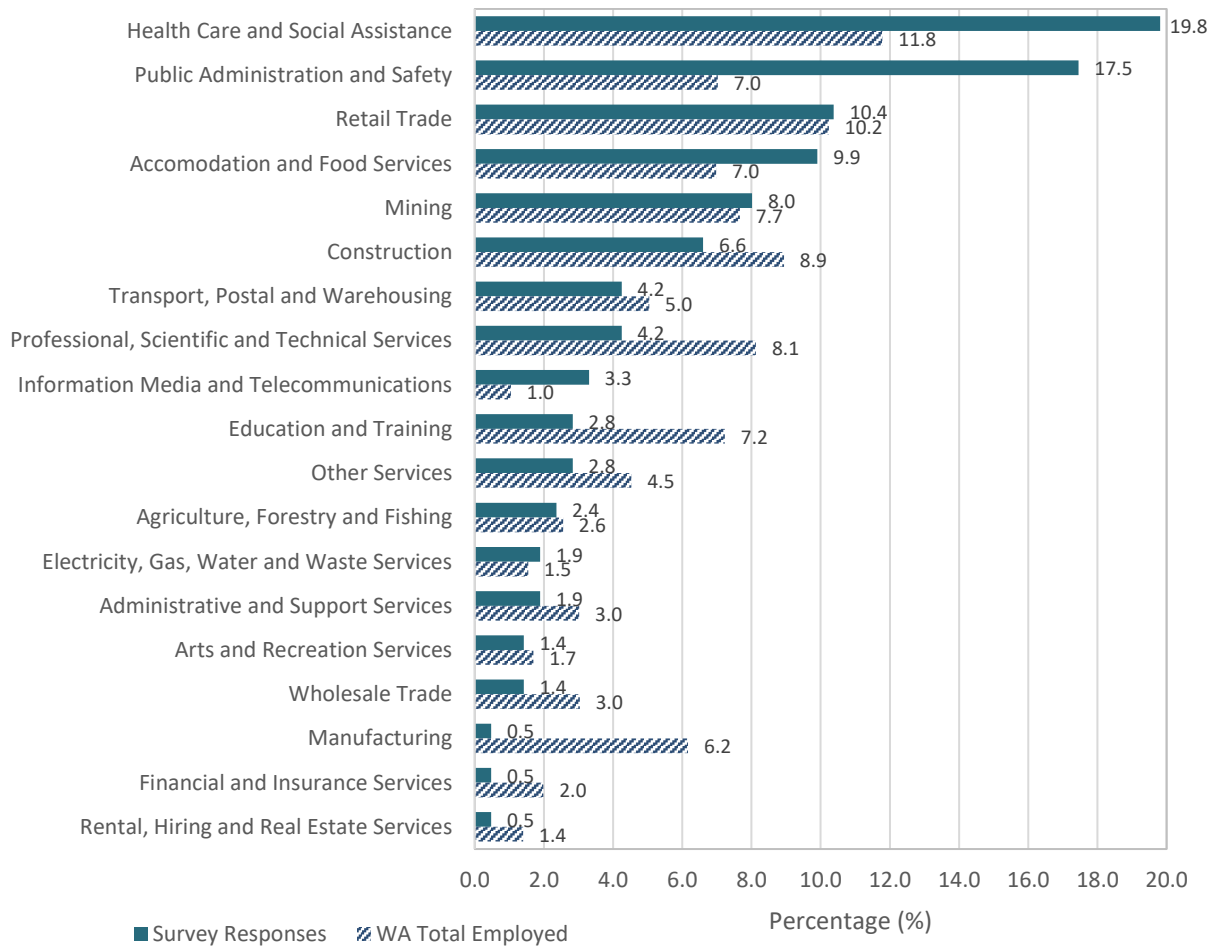
<sup>492</sup> ABS (2019) *Labour Force, Australia, Detailed, Quarterly, February 2019*, catalogue number 6291.0.55.003, Data cube EQ08.

### Incidence within industries

Survey respondents were asked to identify their industry of employment according to the Australian Bureau of Statistics', *Australian and New Zealand Standard Industrial Classification* (ANZSIC).<sup>493</sup>

As viewed in Figure 8, survey respondents were more likely to work in the industries of Health Care and Social Assistance (19.8%) and in Public Administration and Safety (17.5%). As mentioned under the occupation category analysis, interpreters and translators are heavily represented (69% of all Health and Social Assistance respondents), which has skewed the results for both the occupation and industry responses. The Public Administration and Safety industry consisted mainly of administration and security officers.

**Figure 8: Proportion of survey responses by industry group compared with total employed, Western Australia<sup>494</sup>**



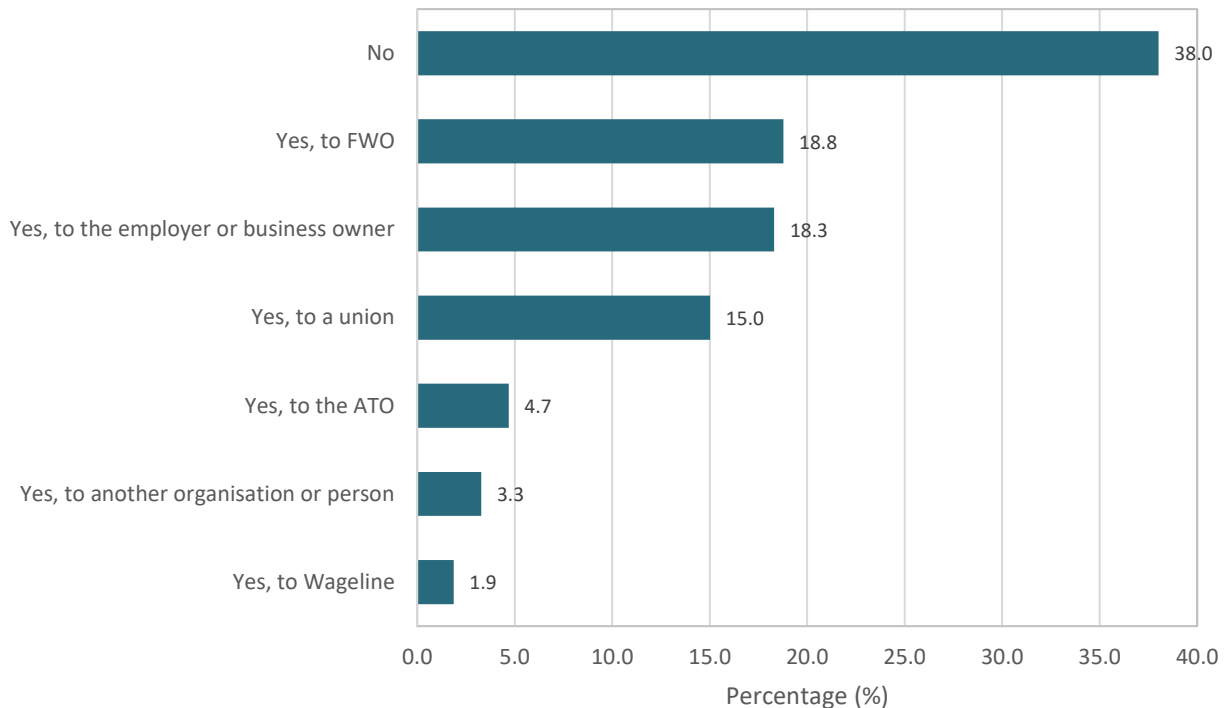
<sup>493</sup> ABS (2013) *Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006, Revision 2.0*, Catalogue number 1292.0.

<sup>494</sup> ABS (2019) *Labour Force, Australia, Detailed, Quarterly, February 2019*, catalogue number 6291.0.55.003, Table 4.

## Reporting of wage theft

Of the 216 survey respondents who had experienced wage theft, more than half had reported their experiences (61.1%). As viewed in Figure 9, survey respondents were more likely to report their experiences to the Fair Work Ombudsman (18.8%) and internally to their employer or a business owner (18.3%) as well as to a union (15.0%).

**Figure 9: Proportion of survey responses by whether reported wage theft experience**



More than half of the respondents indicated that their concerns were not resolved when they reported their wage theft experience (59.7%) with only three respondents indicating that they were satisfied with the final resolution (1.4%).

Of the respondents who did not report their wage theft experiences, many reported that they were either ignorant that the wage theft was occurring at the time, or that they did not know who to contact to report their experiences (30.5%). A large proportion also feared that they would lose their jobs or have their hours reduced if they made a complaint (29.5%).

Unsure of how to go about it don't want to lose my job as took years to find one and don't want to be treated badly or unfairly for reporting them. (Respondent #33)

Because when people complain about the wages and rates you stop getting work and reducing your hours in the hope that you just drift away or you shut up and put up with the crap cause you have got bills to pay and food to put on the table!!!! (Respondent #68)

Some respondents also did not report their experiences due to general apathy or a lack of confidence in organisations to do anything to assist them (13.3%).

Business as usual, didn't want to make a fuss. The norm. (Respondent #142)

Pointless - every labour hire company does it and every mining company also does it. No travel time, no stand down even when stuck on their site. (Respondent #172)

Other respondents also reported that bullying by their employer was a leading factor in why they did not report their experiences (7.6%).

I was injured. Felt intimidated. Threatened. And power in balance. Combined with unsure that SHE was actually presenting such an inconceivable act of dishonesty. I was bewildered, in shock disbelief and denial someone could do that. I believed at the time No she couldn't do that. And belief a higher superior would question her. I was naïve. (Respondent #189)



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## Appendix 5 – Submissions considered to be outside the scope of the Inquiry

I consider some submissions received refer to circumstances which are outside the scope of the Inquiry. Brief reference is made to them here.

- **Historical stolen wages:** The WACOSS submission included a reference that the WA Government was able until 1972 to hold up to 75% of an Aboriginal person's wages, and that these monies were often not returned to them and used instead to subsidise departmental activities.
- **'Reasonable' overtime:** A submission that a term in a contract of employment providing for 'reasonable overtime' is 'widely interpreted and often abused'. The working of reasonable additional hours is prescribed in the *Minimum Conditions of Employment Act, 1993* (WA) s 9B.
- **Being paid according to an Act, award or agreement:** A submission that payment for pro rata long service leave should include a higher duties allowance; that a casual relief teacher is underpaid compared to teachers for equivalent periods of work because their base salary is calculated according to a formula in the applicable award or agreement; and a submission that a worker is being paid according to their classification, but should be re-classified due to experience or work value, do not show underpayment of what is lawfully due under the Act, award or agreement.
- **Agreements made under former Commonwealth legislation:** Submissions addressed the issue of employers who are able to operate their business with lower employment costs than their competitors only because they are party to agreements (such as Australian Workplace Agreements) which were made under the former Work Choices legislation. These agreements allow those employers to lawfully pay entitlements to their employees that might be less than those prescribed by the currently applicable modern award.

As the confidential submission to the Inquiry from a business consultant in a contracting industry pointed out, those employers on FW Act agreements that necessarily do render employees 'better off overall' than the applicable modern award are disadvantaged as a result because they are required by those later agreements to pay a rate that is higher than the rate a competitor employer, on an agreement made under the former Work Choices legislation, can lawfully pay. If an employer on an FW Act agreement pays that lower rate in order to competitively tender, that employer would be underpaying and would risk prosecution for doing so.

However, employers party to Work Choices-era agreements are, under the current state of the law, entitled to continue to remunerate employees who are also party to those agreements in accordance with the terms of those agreements. Provided they are in fact complying with the terms of those agreements, their employees are receiving their correct entitlements. Those employers are not engaging in wage theft as that term is

understood in the context of this Inquiry even though their employees might be receiving entitlements which are less than those prescribed by the applicable modern award.

- Award-free employees who are being paid according to their contract.
- Past events: Submissions seeking to remedy past individual circumstances.

## Appendix 6 – Example of wage theft notices providing information for workers and employers, Minnesota Department of Labor and Industry, Minnesota, United States

### Wage theft in Minnesota: Worker information

Most Minnesota employers correctly pay their employees for the work they perform. However, there are some that do not. When an employer fails to pay all wages earned by employees, it is **wage theft**.

#### Common illegal wage-theft practices

- Paying less than the minimum wage
- Requiring or allowing work off the clock without pay
- Not paying time-and-a-half for overtime
- Not paying a final check upon separation of employment
- Not paying earned tips
- Misclassifying employees as independent contractors
- Deducting pay for short rest breaks
- Paycheck deductions for loss of or damage to property

#### How to get help

1. If you or someone you know is dealing with any of these issues, contact Labor Standards at the Minnesota Department of Labor and Industry at 651-284-5075 or [dli.laborstandards@state.mn.us](mailto:dli.laborstandards@state.mn.us). Labor Standards is open from 7:30 a.m. to 6 p.m., Monday through Friday.
2. Stay up to date by subscribing to Labor Standards' emailed newsletter Wage and Hour Bulletin at [www.dli.mn.gov/business/employment-practices/minnesota-wage-and-hour-bulletin](http://www.dli.mn.gov/business/employment-practices/minnesota-wage-and-hour-bulletin) and view our fact sheets and additional information at [www.dli.mn.gov/wagetheft](http://www.dli.mn.gov/wagetheft).
3. Invite Labor Standards to meet with an organization in your community. We meet with businesses, nonprofit organizations and others to give presentations about Minnesota labor standards law.

#### Wage-claim process

Labor Standards initiates wage claims to resolve cases of unpaid wages.

#### More information

Our website provides information about state laws regarding wage theft, plus child labor, minimum wage and overtime, nursing mother accommodations, parental leave, payroll recordkeeping requirements, tip regulations and more – [www.dli.mn.gov/laborlaw](http://www.dli.mn.gov/laborlaw).

#### Protect yourself against wage theft

1. **Track your hours.** Write down or use a smartphone app to track your shift start time, end time and clocked-out break times. Check your times against those on your paycheck. If there are differences, your employer may not be paying you for all hours worked.
2. **Review your paycheck deductions.** Regularly review your paycheck to make sure all deductions make sense. While many deductions are allowed under state law, others need to be refunded when you leave your job or should never be taken in the first place.

- 3. Know your hourly rate of pay.** While employers may give their employees a raise or a reduction in their hourly pay, employers may not alter the rate of pay on the final paycheck, or avoid or reduce a required overtime payment.
- 4. Keep copies of any employment agreements.** Most employers issue written job descriptions, employee handbooks and other paperwork about the terms of employment. These typically include the rate of pay, vacation and paid-time-off (PTO) policies, raise schedules or processes and information about paycheck deductions.
- 5. Understand rest and meal-break laws.** Minnesota requires employers to let employees use the restroom at least once every four hours and have time to eat a meal if working at least eight continuous hours. Break times of fewer than 20 minutes need to be paid; any break of 20 minutes or more needs to be uninterrupted to be unpaid.
- 6. Know overtime requirements.** Federal law requires most employees to be paid overtime after 40 hours in a workweek. Workers exempt from the federal law are required to be paid overtime after 48 hours in a workweek in Minnesota. Employers are not required to pay overtime after eight hours in a workday unless required under prevailing-wage law or a union contract.
- 7. Take action if you are not paid all wages due.** If you are unable to resolve any of these issues by talking to your employer, contact Labor Standards at the Minnesota Department of Labor and Industry at 651-284-5075 or [dli.laborstandards@state.mn.us](mailto:dli.laborstandards@state.mn.us). We can help determine if you were paid correctly and help you get unpaid wages if laws have been broken. Other agencies and organizations that address wage and hour issues include the following.
  - U.S. Department of Labor, Wage and Hour Division: 612-370-3341
  - City of Minneapolis, Labor Standards Enforcement Department: 612-673-3012
  - City of Saint Paul, Human Rights and Equal Employment Opportunity – Labor Standards: 651-266-8900
  - A private attorney, legal services provider or legal self-help center; learn about self-help centers on the Minnesota Judicial Branch website: [www.mncourts.gov/Help-Topics/Self-Help-Centers.aspx](http://www.mncourts.gov/Help-Topics/Self-Help-Centers.aspx).
  - A local nonprofit or community organization that addresses employment issues.



Labor Standards • 443 Lafayette Road N. • St. Paul, MN 55155  
651-284-5075 • 800-342-5354 • 651-284-5099 (Spanish) • [www.dli.mn.gov](http://www.dli.mn.gov) • [dli.laborstandards@state.mn.us](mailto:dli.laborstandards@state.mn.us)

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## Wage theft in Minnesota: Employer information

Most Minnesota employers correctly pay their employees for the work they perform. However, there are some that do not. When an employer fails to pay all wages earned by employees, it is **wage theft**. The Minnesota Department of Labor and Industry (DLI) estimates more than 39,000 workers suffer from wage theft statewide each year. This has an impact of \$11.9 million of wages owed, but not paid to Minnesota workers.

### Common illegal wage-theft practices

- Paying less than the minimum wage
- Not paying time-and-a-half for overtime
- Not paying earned tips
- Deducting pay for short rest breaks
- Requiring or allowing work off the clock without pay
- Not paying a final check upon separation of employment
- Misclassifying employees as independent contractors
- Paycheck deductions for loss of or damage to property

### How to avoid committing wage theft

Employers that commit wage theft are breaking the law and undercutting competing employers, hurting business and revenue of those operating under the law. They are also open to additional liabilities under labor standards laws. The following advice will help employers avoid committing wage theft.

- Pay your employees at least the state minimum wage. Minnesota's 2019 minimum-wage rates are \$9.86 an hour for large employers and \$8.04 an hour for small employers. For additional details about the state's minimum-wage rates, visit [www.dli.mn.gov/business/employment-practices/minimum-wage-minnesota](http://www.dli.mn.gov/business/employment-practices/minimum-wage-minnesota). New rates take effect Jan. 1 each year. Employers operating in Minneapolis or St. Paul should understand the requirements of the minimum-wage ordinances in those cities.
- Pay your employees for all hours worked. Employees must be paid for employer-required training and for time needed to prepare to perform work, such as restocking supplies and performing safety checks. If you require employees to meet at a centralized location before driving to a worksite, pay the employee for the drive-time from the location to the worksite. Employers cannot require employees to remain at work and "punch in" only when it gets busy, "punching out" when business gets slow.
- Pay your hourly employees for overtime. Federal law requires most hourly employees to receive overtime after working 40 hours in a workweek. Some employees are exempt from this requirement, but still need to be paid overtime after 48 hours in a workweek under Minnesota law.
- Pay your employees at least every 31 days, on a regularly scheduled payday that they are notified of in advance.
- Do not misclassify employees as independent contractors. Such misclassification not only adversely impacts employees, it also creates a competitive disadvantage for employers that comply with state laws related to workers' compensation, unemployment insurance and tax withholding.

- Do not take unlawful deductions from your employees' paychecks. Deductions that generally *cannot* be made include: property loss or damage; cash shortages; and tool or uniform expenses.
- Do not require your employees to pool or share tips.

### Wage-claim process

Labor Standards initiates wage claims to resolve cases of unpaid wages. This process reduces the likelihood of further investigation, litigation or penalties, which is mutually beneficial to employers and employees.

### DLI's Labor Standards is here to help

1. Visit DLI's Employment Practices webpage at [www.dli.mn.gov/business/employment-practices](http://www.dli.mn.gov/business/employment-practices) for information about child labor, minimum wage, nursing mother accommodations, overtime, parental leave, payroll recordkeeping and tips regulations, plus other important labor standards issues.
2. Subscribe to the Labor Standards *Wage and Hour Bulletin* at [www.dli.mn.gov/business/employment-practices/minnesota-wage-and-hour-bulletin](http://www.dli.mn.gov/business/employment-practices/minnesota-wage-and-hour-bulletin).
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4. Invite Labor Standards to meet with your company or business association. We meet with businesses, nonprofits and others to explain Minnesota labor standards law.



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