The Senate

Economics References Committee

Systemic, sustained and shameful

Unlawful underpayment of employees' remuneration

March 2022
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(Chair, 4 July 2019–5 February 2020; 17 June 2020–13 May 2021)

Senator Kimberley Kitching  ALP, VIC
(Chair, 6 February 2020–16 June 2020)

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(Chair from 13 May 2021)

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### Abbreviations and acronyms

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<th>Full Form</th>
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<tbody>
<tr>
<td>ABC</td>
<td>Australian Broadcasting Corporation</td>
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<tr>
<td>ABCC</td>
<td>Australian Building and Construction Commission</td>
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<td>ABN</td>
<td>Australian Business Number</td>
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<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<td>ACCI</td>
<td>Australian Chamber of Commerce and Industry</td>
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<td>ACCR</td>
<td>Australasian Centre for Corporate Responsibility</td>
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<td>ACMA</td>
<td>Australian Communications and Media Authority</td>
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<tr>
<td>ACTU</td>
<td>Australian Council of Trade Unions</td>
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<td>AHEIA</td>
<td>Australian Higher Education Industrial Association</td>
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<td>AICD</td>
<td>Australian Institute of Company Directors</td>
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<td>ALC</td>
<td>Australian Law Council of Australia</td>
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<td>AMWU</td>
<td>Australian Manufacturing Workers' Union</td>
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<td>ARA</td>
<td>Australian Retailers Association</td>
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<td>ASIC</td>
<td>Australian Securities and Investments Commission</td>
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<td>ASU</td>
<td>Australian Services Union</td>
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<td>ATO</td>
<td>Australian Taxation Office</td>
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<td>BCA</td>
<td>Business Council of Australia</td>
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<td>BOOT</td>
<td>Better off overall test</td>
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<tr>
<td>CAANZ</td>
<td>Chartered Accountants Australia and New Zealand</td>
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<tr>
<td>CAPA</td>
<td>Council of Australian Postgraduate Associations</td>
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<tr>
<td>CCIWA</td>
<td>Chamber of Commerce and Industry Western Australia</td>
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<tr>
<td>CFMEU</td>
<td>Construction, Forestry, Maritime, Mining and Energy Union</td>
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<tr>
<td>COSBOA</td>
<td>Council of Small Business Organisations Australia</td>
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<tr>
<td>CPSU</td>
<td>Community and Public Sector Union</td>
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<tr>
<td>CUPUW</td>
<td>Casualised, Unemployed, and Precarious University Workers</td>
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<td>Cwlth</td>
<td>Commonwealth</td>
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<td>DESE</td>
<td>Department of Education, Skills and Employment</td>
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<td>Fair Work Act</td>
<td>Fair Work Act 2009</td>
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<tr>
<td>FCA</td>
<td>Federal Court of Australia</td>
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<td>FCFCA</td>
<td>Federal Circuit and Family Court of Australia</td>
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<tr>
<td>FEG</td>
<td>Fair Entitlements Guarantee</td>
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<td>FEG Act</td>
<td>Fair Entitlements Guarantee Act 2012</td>
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<tr>
<td>FSC</td>
<td>Financial Services Council</td>
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<td>FSU</td>
<td>Finance Sector Union of Australia</td>
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<td>FTE</td>
<td>Full-time equivalent (staff)</td>
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<td>FWC</td>
<td>Fair Work Commission</td>
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<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>FWO</td>
<td>Fair Work Ombudsman</td>
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<td>HIA</td>
<td>Housing Industry Australia</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization (United Nations)</td>
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<td>IR</td>
<td>Industrial relations</td>
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<td>Job security inquiry</td>
<td>Senate Select Committee on Job Security (46th Parliament)</td>
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<tr>
<td>LCA</td>
<td>Law Council of Australia</td>
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<tr>
<td>MQ Casual Collective</td>
<td>Macquarie [University] Casual Collective</td>
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<tr>
<td>MWC</td>
<td>Migrant Workers Centre</td>
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<tr>
<td>NES</td>
<td>National Employment Standards</td>
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<td>NFAW</td>
<td>National Foundation for Australian Women</td>
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<tr>
<td>NRA</td>
<td>National Retail Association</td>
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<tr>
<td>NTEU</td>
<td>National Tertiary Education Union</td>
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<tr>
<td>NTWWC</td>
<td>Northern Territory Working Women’s Centre</td>
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<tr>
<td>NUS</td>
<td>National Union of Students</td>
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<td>PC</td>
<td>Productivity Commission</td>
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<tr>
<td>Protecting Vulnerable Workers Act</td>
<td><em>Fair Work (Protecting Vulnerable Workers) Act 2017</em></td>
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<tr>
<td>R&amp;CA</td>
<td>Restaurant and Catering Australia</td>
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<tr>
<td>RBA</td>
<td>Reserve Bank of Australia</td>
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<tr>
<td>RO Act</td>
<td><em>Fair Work (Registered Organisations) Act 2009</em></td>
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<td>ROC</td>
<td>Registered Organisations Commission</td>
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<tr>
<td>SDA</td>
<td>Shop, Distributive and Allied Employees Association</td>
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<tr>
<td>SG</td>
<td>Superannuation Guarantee (ATO)</td>
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<tr>
<td>SGA Act</td>
<td><em>Superannuation Guarantee (Administration) Act 1992</em></td>
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<tr>
<td>SME</td>
<td>Small to medium-sized enterprise</td>
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<tr>
<td>TEQSA</td>
<td>Tertiary Education Quality and Standards Agency</td>
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<tr>
<td>UNSW</td>
<td>University of New South Wales</td>
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<tr>
<td>UWA</td>
<td>University of Western Australia</td>
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<tr>
<td>UWU</td>
<td>United Workers Union</td>
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<tr>
<td>Work Choices</td>
<td>System of industrial relations provisions introduced by the <em>Workplace Relations Amendment (Work Choices) Act 2005</em></td>
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List of Recommendations

Recommendation 1

6.9 The committee recommends that the Australian Government prioritise amendments to the *Fair Work Act 2009* to criminalise wage theft in Australia, and that such legislation:

- apply to the theft of all employee remuneration (including loadings, penalty rates, overtime, leave, allowances and superannuation guarantee);
- include penalties for the falsification of records; and
- is drafted in consultation with the states to ensure Commonwealth wage theft laws do not weaken existing state legislation.

Recommendation 2

6.10 The committee recommends that the Australian Government amend the *Fair Work Act 2009* to:

- increase civil penalties for wage theft;
- make it an offence for employers to advertise employment with a rate of pay less than the national minimum wage; and
- capture all parties and individuals that directly participate in wage theft, including those who knowingly or recklessly create an environment of wage theft (including franchisors, advisors, head contractors and other third-party participants in supply chains).

Recommendation 3

6.11 The committee recommends that the Australian Government consider tasking the Australian Competition and Consumer Commission to bring forward a legislative amendment to the *Competition and Consumer Act 2010* to incorporate wage theft as an anti-competitive practice.

Recommendation 4

6.12 The committee recommends that the Australian Securities and Investments Commission improve enforcement action and director disqualifications from managing a company, where companies use Superannuation Guarantee payments or wages owed to trade while otherwise insolvent.

Recommendation 5

6.17 The committee recommends that the Australian Government establish a small claims tribunal, ideally co-located with the Fair Work Commission, to create a simple, affordable, accessible, and efficient process for employees to pursue wage theft, including Superannuation Guarantee non-compliance.
Recommendation 6

6.18 The committee recommends that the Australian Government, through the Australian Taxation Office, review the taxation treatment of wages repaid to employees following incidents of wage theft to ensure they are treated no less favourably than if wages were paid when they were due.

Recommendation 7

6.22 The committee recommends that the Australian Government review whether employee representatives that hold ‘right of entry’ permits can be better utilised to inspect and investigate potential underpayments across workplaces.

Recommendation 8

6.23 The committee recommends that the Australian Government amend the Fair Work Act 2009 to include provisions relating to the production of documents to permit holders, to:

- introduce a penalty for individuals or entities that provide false or misleading documents to a permit holder exercising right of entry; and
- expand section 557C to apply to the failure to produce accurate documents to a permit holder exercising right of entry.

Recommendation 9

6.28 The committee recommends that the Australian Government consider bringing forward amendments to the Superannuation Guarantee (Administration) Act 1992 to:

- require Superannuation Guarantee payments to be aligned with the payment of wages;
- require Superannuation Guarantee payments to be made on every dollar earned to achieve simplicity and ease of compliance; and
- consider an incremental implementation strategy, similar to that used for the rollout of Single Touch Payroll, to ensure small businesses are adequately prepared for changes to the timing of Superannuation Guarantee payments.

Recommendation 10

6.32 The committee recommends that the Australian Government include superannuation in the National Employment Standards.

Recommendation 11

6.33 The committee recommends that the Australian government consider including superannuation in the Fair Entitlements Guarantee payments.
Recommendation 12

6.34 The committee recommends that the Australian Taxation Office improve its communication with individuals to keep them promptly and fully informed of the progress and outcomes regarding their Superannuation Guarantee non-compliance cases, including:

- that before entering into a payment plan to recover Superannuation Guarantee payments from a non-compliant employer, the Australian Taxation Office be required to notify the affected employee and gain their consent to the course of action; and
- that in determining a reasonable payment plan to recover Superannuation Guarantee payments from a non-compliant employer, the Australian Taxation Office must give primary consideration to the loss of retirement savings suffered by the employee.

Recommendation 13

6.35 The committee recommends that the Australian Government review all current compliance and recovery activities related to unpaid Superannuation Guarantee contributions, including:

- determining which cases should remain with the Australian Taxation Office, and which ones could be transferred to, or shared with, the Fair Work Ombudsman or an alternative body;
- directing the Fair Work Ombudsman to begin receiving and acting on Superannuation Guarantee non-payment complaints where appropriate, rather than simply referring the affected employees to the Australian Taxation Office;
- reviewing the Superannuation Guarantee contribution regime and its management by the Australian Taxation Office to ascertain whether it is adequately deterring underpayments and recovering unpaid Superannuation Guarantee entitlements; and
- improving proactive Superannuation Guarantee initiatives including strengthening and increasing penalties for deliberate and repeated acts of non-compliance, the inclusion of random audits, and the publication of enforcement activities in relation to Superannuation Guarantee payments.

Recommendation 14

6.36 The committee recommends that the Australian Government consider legislative options to give employees, or other parties acting on their behalf such as unions, superannuation funds, and legal representatives greater standing to assist in the recovery of unpaid superannuation.

Recommendation 15

6.41 The committee recommends that the Australian Government, as a priority:
• extend the Fair Entitlements Guarantee to all employees, including those on temporary visas, building on recommendation 13 of the Migrant Workers' Taskforce report; and
• implement a National Labour Hire Licensing Scheme, building on recommendation 14 of the Migrant Workers' Taskforce report. The National Labour Hire Licensing Scheme should build on existing frameworks, such as those schemes operating in Queensland and Victoria, to provide a nationally consistent framework.

Recommendation 16
6.42 The committee recommends that the Australian Government explore reform to visa laws to allow migrant workers who have been exploited or underpaid to remain in Australia until the relevant legal processes for recovery of lost wages or conditions is finalised.

Recommendation 17
6.43 The committee recommends that a formal, and legally binding firewall be established between the Fair Work Ombudsman and the Department of Home Affairs to protect whistle-blowers and temporary visa holders that report exploitation or wage theft to the Fair Work Ombudsman and extend protection to exploitation and wage theft claims progressed through the courts.

Recommendation 18
6.46 The committee recommends that the Australian Government act as a model procurer by ensuring that:
• government procurement powers are being used to support businesses that engage in fair, equitable, ethical and sustainable practices, including demonstrated compliance with labour laws; and
• wage theft does not occur within its own workforce, including in government funded sectors.

Recommendation 19
6.50 The committee recommends that the Australian Government improve protections for employees who engage in lawful activity to prevent wage theft, including joining a union, pursuing underpayments through established processes, publicly speaking out against poor workplace practices, exercising workplace rights, and engaging in industrial activity.
Chapter 1
Background

Inquiry referral and process
1.1 On 13 November 2019, the Senate referred an inquiry into the causes, extent and effects of unlawful non-payment or underpayment of employees’ remuneration by employers and measures that can be taken to address the issue, with particular reference to:

(a) the forms of and reasons for wage theft and whether it is regarded by some businesses as ‘a cost of doing business’;
(b) the cost of wage and superannuation theft to the national economy;
(c) the best means of identifying and uncovering wage and superannuation theft, including ensuring that those exposing wage/superannuation theft are adequately protected from adverse treatment;
(d) the taxation treatment of people whose stolen wages are later repaid to them;
(e) whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws;
(f) the most effective means of recovering unpaid entitlements and deterring wage and superannuation theft, including changes to the existing legal framework that would assist with recovery and deterrence;
(g) whether Federal Government procurement practices can be modified to ensure that public contracts are only awarded to those businesses that do not engage in wage and superannuation theft; and
(h) any related matters.¹

1.2 The committee was originally to report to the Senate by the last sitting day in June 2020. The inquiry was extended five times, partly due to the impacts of the COVID-19 pandemic, with the final extension granted on 10 February 2022 requiring the committee to report by 30 March 2022.²

¹ Journals of the Senate, No. 26, 13 November 2019, p. 806.
² Extensions were granted as follows: on 12 February 2020 the Senate granted an extension to report by 3 December 2020; on 15 June 2020 the Senate granted an extension to report by the last sitting day in June 2021 (i.e. by 24 June 2021); on 11 May 2021 the Senate granted an extension to report by 2 December 2021; on 24 November 2021 the Senate granted an extension to report by the last sitting day in February 2022 (i.e. by 10 February 2022), and finally, on 10 February 2022 the Senate granted an extension to report by 30 March 2022.

Submissions
1.3 The committee invited submissions from a range of relevant stakeholders, with submissions closing on 6 March 2020. The committee has accepted 130 submissions to date, from a broad range of stakeholders such as unions, peak bodies and associations, academics, state governments, federal bodies, the higher education sector, and legal representatives.

1.4 While interested in hearing about individual cases and circumstances, the committee noted that it was unable to resolve or intercede in such cases. The inquiry website therefore advised that such matters be directed to the Fair Work Ombudsman (FWO), or for matters relating minimum superannuation entitlements, to the Australian Taxation Office (ATO).

1.5 In the latter half of 2020, the committee wrote to several higher education institutions publicly implicated in underpayment disputes, or that were known to have undertaken audits of staff payments, inviting them to make written submissions to the inquiry. A total of 10 submissions from higher education institutions were received from the sector in response to the committee’s invitation (submissions 112–121).

1.6 Murdoch University and the University of Queensland declined to provide individual submissions on the basis that the Australian Higher Education Industry Association (AHEIA), the employer association for the sector, had made a submission on behalf of its member universities. Newcastle University and James Cook University did not take up the committee’s invitation. A number of universities provided responses to claims of wage theft made by other submitters, as published on the committee’s website.

Hearings
1.7 The committee held the following public hearings in relation to the inquiry:
- 18 September 2020, Canberra—academics, workers, unions, and government departments;
- 10 March 2021, Sydney—workers and unions;
- 11 March 2021, Melbourne—workers, unions, legal firms and social advocacy groups; and
- 22 February 2022, Canberra—workers, unions, a superannuation fund, universities, and their associated casual staff networks.

1.8 The names of witnesses who appeared at the hearings are listed at Appendix 2.

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3 The committee continued to accept submissions past the closing date on a case-by-case basis.

4 Public submissions accepted by the committee as well as associated attachments and responses are available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Underpaymentofwages
1.9 The committee sincerely thanks all submitters and witnesses for their input to the inquiry, especially those workers who shared their personal experiences of underpayment.

Scope of the inquiry

1.10 The evidence received by the committee allowed it to investigate the following issues:

- the nature and extent of underpayment;
- vulnerable workers, including women, migrants, young people, international students, and First Nations people;
- the impact of underpayment on workers, their families and wider society;
- the regulatory and enforcement framework;
- the role of unions; and
- underpayment in various sectors, particularly the higher education sector.

1.11 The issues relating to underpayment of employees and insecure work have been well considered both inside and outside the Parliament.

1.12 The matters of this inquiry were somewhat overtaken with matters relating to job insecurity, including wage theft, investigated by the Senate Select Committee on Job Security (the Job Security inquiry), which was appointed by resolution of the Senate on 10 December 2020. That committee produced several interim reports and tabled its final report on 11 February 2022.

1.13 Wage theft—including its causes, extent, impacts and remedies—was also considered as part of the Senate Education and Employment References Committee inquiry into Corporate avoidance of the Fair Work Act 2009, completed in 2017, as well as that committee’s 2018 inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies. The Senate Economics References Committee also investigated matters relating to underpayment, the use of lead contractors, and ‘phoenixing’ in its inquiry into insolvency in the Australian construction industry.

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5 Journals of the Senate, No. 81, 10 December 2020, pp. 2890–2891.


8 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, November 2018.

9 ‘Phoenixing’ refers to the practice liquidating, winding up or abandoning a company to avoid paying its debts, including unpaid wages and superannuation. A new company is then started to continue the same business activities without the debt.
1.14 Further, the committee notes that matters relating to migrant workers have also been recently considered by the Senate Standing Committee on Legal and Constitutional Affairs, which tabled their report into the Migration Amendment (Protecting Migrant Workers) Bill 2021 on 18 March 2022. This bill intends to establish criminal offences and civil penalties in relation to the intimidation of workers, prohibit sanctioned employers from employing migrant workers, and enable the Australian Border Force to issue compliance notices and enforceable undertakings for work-related breaches, amongst other things.10

1.15 On 10 December 2020, the Senate referred the provisions of the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 [Provisions] to the Education and Employment Legislation Committee which reported on 12 March 2021.11

1.16 The purpose of the bill among other things was to strengthen the Fair Work Act compliance and enforcement framework to address wage underpayments, ensure businesses have the confidence to hire and ensure employees receive their correct entitlements. Unfortunately, the committee observes, this portion of the bill’s amendments was unsuccessful.12

Structure of the report

1.17 This first chapter of the report outlines how underpayment and wage theft are defined, the extent of the underpayment problem in Australia, as well as high-risk industries affected by underpayments. The chapter then goes on to consider the categories of wage theft—including both deliberate and unintentional underpayment—and the factors contributing to underpayment.

1.18 The remainder of this report is structured as follows:

- Chapter 2—significant groups of Australians who are impacted by underpayment, as well as the impacts on their lives and wider society;
- Chapter 3—the current regulatory environment;
- Chapter 4—underpayments in universities;
- Chapter 5—potential measures to address underpayment; and
- Chapter 6—the committee’s views.

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Overview

1.19 There has long been reported instances of unlawful underpayment or non-payment of employee wages and entitlements—sometimes referred to as 'wage theft'—in Australia, even under the formerly centralised workplace relations system.13

1.20 Historical theft of indigenous wages in Australia goes back to the 1880s, with workers or their families still waiting for appropriate reparation.14

1.21 Wage theft on a broad scale is a relatively new phenomenon and creates significant problems for Australian labour market regulation. The rate of unlawful underpayment complaints and media reporting increased markedly from around 2015, with mounting evidence that wage theft practices have become widespread in the hospitality, retail, horticulture, franchise-heavy and higher education sectors.15

1.22 A 2015 joint ABC-Fairfax exposé of extensive underpayments in 7-Eleven franchises drew attention to the issue, with over 3 600 workers claiming over $150 million in unpaid wages, many of them vulnerable international students.16

1.23 In many industries, underpayment is deliberate and systematic, and often normalised, especially for migrant workers. Some research suggests that although many workers are aware that they are being underpaid, it is accepted as 'the norm',17 while for some employers it has become a 'cost of doing business' or a standard business model, impacting individuals and families.18

The following statement demonstrates this point:

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13 Dr Stephen Clibborn, Submission 89, Attachment A (Stephen Clibborn and Chris F. Wright, Employer theft of temporary migrant workers’ wages in Australia: why has the state failed to act?), p. 212.


17 Richard Robinson and Matthew Brenner, All these celebrity restaurant wage-theft scandals point to an industry norm, The Conversation, 10 February 2020 (accessed 28 February 2022).

18 Sarah Kaine and Emmanuel Josserand, Shocking yet not surprising: wage theft has become a culturally accepted part of business, The Conversation, 31 July 2019 (accessed 28 February 2022). See also Adele Ferguson and Klaus Toft, 7-Eleven investigation: Business model ripping off workers, former consumer watchdog says, ABC News, 31 August 2015
In hospitality, exploitation has become the norm ... I once complained to my boss about the overtime work. He said, 'Well, suck it up. Look around you! Everyone is working the same way. It's been like this forever'. I know my workplace rights, but I wouldn't dare to report my employer for underpayment. I know it will make no change because every hospitality business in Australia underpays workers. I am sure I will be known as someone who reported their boss to the authorities and get blacklisted. I cannot afford to never get another job in Australia.19

1.24 This has led to a vicious cycle of underpayments with wider societal and economic impacts:

... where wage theft gets hold as an industry model, competition means that it forces down wages across the board, so that wage undercutting becomes widespread and normalised.20

1.25 With increasing public scrutiny following numerous high-profile cases, wage theft and the operation of the Australian workplace relations framework has, as mentioned previously, become the focus of numerous government inquiries, reviews, and consultations in recent years, both at a federal and state level, with significant and wide-ranging recommendations for reform.

1.26 These inquires, alongside an increasing evidence base and plethora of media investigations, suggest that non-compliance with Australia’s minimum employment laws has become pervasive, as well as 'endemic' in certain sectors, and they highlight the need for government action.

What is ‘wage theft’?

1.27 There is currently no consistent working definition of 'wage theft', with other terms such as 'underpayment' or 'exploitation' also often used to describe such behaviour by employers. Broadly, wage theft is defined as:

... paying workers less than they are entitled to under Australia’s workplace relations system.

Its various forms include underpaying wages, penalty rates, superannuation, overtime, commissions and entitlements such as sick, annual or carers leave; or requiring workers to repay money earned or making unauthorised deductions from employee pay.21


19 Migrant Workers Centre (MWC), Lives in limbo: the experience of migrant workers navigating Australia’s unsettling migration system, November 2021, p. 41 (accessed 2 February 2022).

20 NFAW, Submission 37, p. 12.

21 Adele Ferguson and Ben Schneiders, 'Underpayment as business model: what is wage theft?', Sydney Morning Herald, 18 February 2020 (accessed 2 February 2022). See also Mr Liam O’Brien, Assistant Secretary, Australian Council of Trade Unions (ACTU), Committee Hansard, 18 September 2020, p. 14.
1.28 Descriptions of wage theft usually highlight the dishonesty and the deliberate nature of this behaviour, differentiating it from instances in which employers have made genuine and unintentional mistakes.\(^{22}\)

1.29 Others contend that whether underpayment of entitlements is deliberate is irrelevant when considering its implications:

> 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.\(^{23}\)

1.30 Some industry representatives have strongly objected to use of the term wage theft on the basis that it is misleading and inappropriate, arguing that it 'has the potential to unfairly brand every failure to correctly calculate an employee’s pay as criminal'.\(^{24}\) The Australian Retailers Association (ARA) submitted that it is 'disturbed by the phraseology and tone used in framing the Terms of Reference', explaining that:

> …the heavy use of emotive and loaded terms such as "theft," "stolen," "deterrence," and other formulations suggestive of serious criminal behaviour implies a level of prejudgement of, and guilt on the part of, business in general and our retail industry in particular that we reject in their entirety.\(^{25}\)

1.31 However, the probability of an inverse reality where employees deliberately conspire to work reduced hours yet take the same pay is highly improbable, as those who suffer the greatest are where power asymmetry is too well cast in the favour of the employer.

**What is not paid?**

1.32 Wage theft is characterised by non- or underpayment of wages, penalty rates, meals and other loadings, allowances, overtime, time off in lieu (TOIL) and, most importantly from a whole of economy point of view, superannuation, as no superannuation becomes a liability for future taxpayers covering pension payments.

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Extent of underpayment
1.33 It is difficult to get any accurate assessment of the extent of unlawful underpayment of workers’ entitlements because it is unlawful and not generally reported voluntarily. Further complicating this assessment is the fact that workers may not be engaged with the FWO, unions and others who may assist them, and because much of the non-compliance happens off the books—there are no records.

1.34 However, collectively a variety of sources indicate that underpayment affects thousands of workers, robbing them—and the Australian economy—of billions of dollars every year.

Fair Work Ombudsman
1.35 In 2020, the FWO reported the completion of a nationwide audit of 1,217 businesses across hospitality, domestic construction, retail, manufacturing, and administration services. The audit was established ‘after data consistently showed many businesses were failing the "basics" of workplace law compliance: paying staff their correct rates, providing proper payslips, and keeping proper employment records’. The FWO recovered $1.3 million for underpaid employees, finding that hospitality was the least compliant industry—with 61 per cent of businesses audited by the FWO found to be non-compliant.

1.36 In 2020–21, the FWO found 81 per cent non-compliance across 698 workplaces, including underpayment, failure to keep adequate records and pay slip non-compliance. However, considering this figure in isolation would exaggerate the extent of underpayment given the FWO focusses its activities on industries and areas in which the greatest compliance risks are present.

1.37 In 2020–21 the FWO completed 18,696 disputes and recovered nearly $148.4 million on behalf of nearly 70,000 workers.

Superannuation underpayment estimates
1.38 For 2018–19 (the latest figures available), the ATO estimated a net gap between superannuation guarantee (SG) contributions that should have been paid and

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27 Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, p. 25.


what was paid to be $2.5 billion.\textsuperscript{31} The ATO received 35,400 complaints about superannuation theft, resulting in over 17,000 cases, and with employers found to be compliant in just 25 per cent of cases.\textsuperscript{32}

1.39 As illustrated in Figure 1.1, Industry Super Australia (ISA) estimated the 2015–16 SG gap to be considerably higher than the ATO’s estimate of $2.79 billion (or 4.8 per cent), suggesting on a more detailed reconciliation that it could be closer to $5.9 billion.\textsuperscript{33} ISA’s estimate for 2018–19 was nearly $5 billion.\textsuperscript{34} It suggested that around one-quarter of the workforce was affected;\textsuperscript{35} in 2018–19, this was nearly three million people.\textsuperscript{36}

1.40 ISA argued that the two estimates are not inconsistent, as employees who received more than the statutory minimum SG would mask some of the underpayments, to give a net underpayment figure that was lower than actual underpayments.\textsuperscript{37}

\textbf{Other reports}

1.41 Inclusive of superannuation and wages, the Australian Council of Trade Unions (ACTU), estimated that the cost to the Australian economy could be between $6 billion and $12 billion annually, with wider, long-term impacts discussed in Chapter 2.\textsuperscript{38}

1.42 As summarised in Figure 1.2, the McKell Institute found that on average, 60 per cent of respondents to its survey had experienced wage theft. Furthermore, up to 76 per cent of young people surveyed were affected by underpayments—with these figures likely to be underestimates.\textsuperscript{39} The global pandemic and economic downturn further increased the risk of employers

\textsuperscript{31} Or 3.8 per cent of superannuation that should have been paid. ATO, \textit{Superannuation guarantee gap} (accessed 3 February 2022).

\textsuperscript{32} Mr John Ford, Acting Deputy Commissioner, Superannuation and Employer Obligations, ATO, \textit{Committee Hansard}, 18 September 2020, p. 5.


\textsuperscript{34} ISA, \textit{Supplementary submission 11.1}, p. 1.

\textsuperscript{35} Mr Matthew Linden, Deputy Chief Executive, ISA, \textit{Proof Committee Hansard}, 22 February 2022, p. 1.

\textsuperscript{36} ISA, \textit{Supplementary submission 11.1}, p. 1.


\textsuperscript{38} ACTU, \textit{Submission 38}, pp. 13–14.

\textsuperscript{39} McKell Institute, \textit{Submission 55}, Attachment 1 (McKell Institute, \textit{Ending Wage Theft: Eradicating underpayment in the Australian workplace}, March 2019), p. 17.
denying employee entitlements, resulting in an uptick in requests for assistance from the FWO.40

**Figure 1.1** Value of total underpayments (left) and underpayments as a proportion of the total SG base (right) from 2013-14 to 2018-19

![Graph showing underpayment values from 2013-14 to 2018-19.](Image)

*Source: ISA analysis of 2 per cent sample file, 2013-14 to 2018-19.*

ISA, Submission 11, Attachment 1 (ISA, Super scandalous: How to fix the $5 billion scourge of unpaid super), p. 5.

**Figure 1.2** Evidence of wage theft from surveys

![Table showing evidence from surveys.](Image)

*McKell Institute, Submission 55, Attachment 1 (McKell Institute, Ending Wage Theft: Eradicating underpayment in the Australian workplace, March 2019), p. 17.*

1.43 In 2020, PwC estimated that around 13 per cent of Australia’s total workforce were affected by underpayment, with higher rates in certain industries such as the hospitality sector. It used FWO data to estimate the cash value of underpayment by industry, estimating it to total around $1.35 billion per year:

For industries with a high prevalence of underpayment of workers’ entitlements, PwC has undertaken modelling using Fair Work Ombudsman data and estimates that there is in the order of ~$1.35 billion in underpayments per year. Sectors most at risk include construction (~$320 million), healthcare and social assistance (~$220 million), accommodation and food services (~$190 million) and retail (~$180 million). This estimate includes ~21% of the workforce in the selected industries, or ~13% of the total Australian workforce.41


1.44 The National Foundation for Australian Women (NFAW) neatly summarised the difficulties associated with relying on data when identifying the extent of the problem:

\[\ldots\] This [FWO data on recovered wages] is in fact a subset of a subset of a subset of a subset of those affected. Victims tend to be in very poor bargaining positions. Only a subset of victims of wage theft bring a complaint against their employer; only a subset of those have their complaints accepted and pursued; in only a subset of those cases do employers actually make payments (many just phoenix or rely on the prohibitive cost of enforcing orders); and in only a subset of those cases do the payments represent all that has been lost through the original wage theft.\(^{42}\)

1.45 However, as noted by Dr Stephen Clibborn, 'it is not necessarily itself watertight. It's the best estimate that we have'.\(^{43}\)

1.46 For vulnerable workers, the proportion of workers affected can be higher. For example, the 2017 survey of over 4,000 migrant workers—Wage Theft in Australia—found that one third of participants received around half the minimum pay to which they were entitled. It found that 15 per cent of participants picking fruit and vegetables and doing farm work earned $5 an hour or less, and one third earned $10 an hour or less.\(^{44}\)

**Industries with patterns of underpayment**

1.47 Deliberate underpayment is usually rife in industries which are labour intensive, have a high proportion of unskilled workers, and in which insecure employment arrangements are common. Often these industries have low levels of union membership, and they tend to employ a high proportion of workers on temporary visas, or undocumented migrants. They also lend themselves to fragmented value chains which make it possible to obscure who profits from underpayments; for example, labour supply arrangements featuring outsourcing, subcontracting, or labour hire operators, or platform or on-demand work.\(^{45}\)

\(^{42}\) National Foundation for Australian Women (NFAW), *Submission 37*, p. 10.

\(^{43}\) Dr Stephen Clibborn, Private capacity, *Committee Hansard*, 18 September 2020, p. 20.

\(^{44}\) Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey*, November 2017, p. 5.

1.48 The FWO identified the hospitality sector, as well as large corporates, horticulture, sham contracting\(^{46}\) (including workers employed in the gig economy) and franchises as high risk, and therefore priority sectors.\(^{47}\)

**Hospitality**

1.49 In its 2020 *National Compliance Monitoring* report, the FWO found that the sector with the highest non-compliance was accommodation and food services (57 per cent non-compliant).\(^{48}\) The hospitality sector has the highest rates of non-compliance and in 2020–21 comprised 36 per cent of all reports.\(^{49}\)

1.50 During its 2020–21 audits the FWO found non-compliance rates of between 78 and 88 per cent in hospitality businesses and recovered over $1 million in wages for 931 workers. Hospitality sector litigations secured a further $1.8 million from non-compliant companies.\(^{50}\)

**Retail**

1.51 Abuses in retail have had a great deal of publicity, especially the high-profile investigation into 7-Eleven referred to above. The retail industry has featured heavily in reports of underpayments, due to error as well as deliberate, exploitative underpayments. It accounted for 14 per cent of all reports to the FWO in 2020–21.\(^{51}\)

1.52 The *National Temporary Migrant Workers Survey* found that eight per cent of workers said their lowest paid job was in the category shop assistant/retail job/sales, and a further two per cent said convenience store/petrol station assistant.\(^{52}\)

**Horticulture**

1.53 Historically, horticulture has also featured heavily in both FWO and academic reports of underpayment, with heavy reliance on overseas workers—nearly 70 per cent of employers utilise migrant workers.\(^{53}\) Wages are also low, with...

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\(^{46}\) Sham contracting occurs when a person working as an employee is told they’re an independent contractor when they are not.


\(^{52}\) Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey*, November 2017, p. 21.

\(^{53}\) See, for example, Alexander Reilly, Joanna Howe, Diane van den Broek and Chris Wright, 'Working holiday makers in Australian horticulture: labour market effect, exploitation and avenues for reform', *Griffith Law Review*, vol. 27, no. 1, 2018, p. 115; FWO, *Harvest Trail Inquiry: a*
the *National Temporary Migrant Workers Survey* finding that for nine per cent of those surveyed, their lowest paid job was as a fruit or vegetable picker or packer, or farm worker.54

1.54 The FWO’s 2018 *Harvest Trail Inquiry* found very high rates of non-compliance in the sector with over 55 per cent of investigations determining that workplace laws had not been met, and nearly 30 per cent of investigations entailing wage theft.55 The FWO recently reported that its inspectors have revisited non-compliant businesses from that inquiry and found that around 46 per cent are still operating, and still non-compliant. On a positive note, the FWO also noted that there has been ‘an increase in the numbers of piece rate agreements being signed by workers, as well as improvements in record-keeping, especially among larger firms’.56

**Cleaning**

1.55 As an occupation, cleaners are frequently underpaid. In 2021–22 the FWO intends to continue its compliance and enforcement focus on contract cleaning businesses, given the high proportion of vulnerable workers, including low-paid migrant workers, the prevalent use of contractors and layers of subcontractors, and its high historical and ongoing non-compliance.57 As found by the *National Temporary Migrant Workers Survey*, nine per cent of participants named ‘cleaner’ as their lowest paid job.58

**Security**

1.56 Security workers also regularly feature in underpayment cases, possibly because the function is often outsourced, and largely managed by labour hire

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The United Workers Union (UWU) has estimated that more than 70 per cent of security guards are being underpaid.\(^{59}\)

1.57 In October 2021, the FWO reported that 41 per cent of audited security companies were non-compliant, including contractors engaged by state governments to provide security at COVID-19 quarantine hotels in Melbourne and Sydney.\(^{61}\) Across the period 2020–21 the FWO found a non-compliance rate of 53 per cent in the sector.\(^{62}\)

**Higher education**

1.58 Conversely, in the sector of the most educated, at least 21 of Australia's 40 universities have been implicated in the underpayment of their staff to date—primarily casual academic staff—and have been or are the subject of a FWO underpayment investigation.\(^{63}\) As highlighted earlier, due to the high rate of casualisation of the workforce, the ability to ensure that correct wages are paid without exploitation is difficult.

1.59 In 2020–21, the FWO initiated a strategy to address self-reported and media reported underpayments in Australian universities. The strategy involves engaging with government agencies and peak bodies to surface concerns about non-compliance, raising awareness of FWO resources, and encouraging universities to review and address their compliance.\(^{64}\)

1.60 As of 30 June 2021, there were 10 ongoing investigations into non-compliance in the higher education sector.\(^{65}\)

**Categories of wage theft**

1.61 Investigations by the committee have identified a range of categories of wage theft, with the ACTU noting that 'unfortunately, new schemes and new methods of committing wage theft emerge every day'.\(^{66}\)

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\(^{61}\) FWO, 'More than $300,000 recovered for security staff', *Media release*, 1 October 2021 (accessed 28 February 2022).


\(^{63}\) Michael Evans, NTEU, 'One third of Australian universities admit to wage theft', *Media release*, 27 October 2020; Julie Hare, 'Wage theft is "systemic": 21 universities under investigation', *Australian Financial Review*, 20 October 2021 (accessed 14 February 2022); Julie Hare, 'COVID Australia: University staff numbers fall as pandemic forces international students away', *Australian Financial Review*, 13 February 2022 (accessed 14 February 2022).


Deliberate non-payment or underpayment

1.62 Arguably, the most blatant form of deliberate wage theft is non-payment; that is, workers are simply not paid any wages at all. For instance, a FWO investigation into the Baiada Group involved workers who complained of having been paid nothing for several days’ work.67

1.63 However, other forms of non-payment and underpayment exist, including in relation to:

- non or underpayment of allowances and additional rates—the most common form of deliberate underpayment, including the non-payment or underpayment of overtime, casual loadings, and penalty rates;68
- payment below the minimum wage or applicable award rate;69
- misclassification—workers are paid at permanent, part time rates instead of casual rates;70 workers are misclassified as trainees so they can be paid at a lower rate;71 or workers are paid at one level of the award but expected to complete duties at a higher level which would attract a higher pay rate;72
- falsification of records—in some cases employers have falsified the number of hours worked by employees to misrepresent them being paid at higher rates of pay than they were actually paid;73
- cash-in-hand employment—characterised by lack of employment paperwork, no payslips, and no employer income statement, below minimum rates, and lack of superannuation;74

66 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 14.


For numerous examples, see FWO, News and media releases.


70 Keelia Fitzpatrick, ‘Wage theft and young workers’ [Keelia Fitzpatrick, Wage theft and young workers], in Andrew Stewart, Jim Stanford, Tess Hardy (eds), The wages crisis in Australia: what it is and what to do about it, University of Adelaide, pp. 176–177 (accessed 23 March 2022).

71 Velvet Winter, ‘Here’s a running list of Australian businesses that have underpaid staff in 2019’, SBS: The Feed, 9 December 2019, (accessed 28 February 2022); Adelle Ferguson, Wage scandals becoming the dark underbelly of the labour market, The Sydney Morning Herald, 14 December 2019 (accessed 28 February 2022); Kelly Hughes and Ben Nielsen, Class action launched against convenience store chain OTR over wage theft allegations, ABC News, 13 May 2020 (accessed 28 February 2022).

72 Per Capita, Submission 58, pp. 10–11.

73 FWO, Identifying and addressing the drivers of non-compliance in the 7-Eleven network, April 2016, p. 7.

74 Per Capita, Submission 58, pp. 9–10.
• expectation to complete unpaid work—for example, by working additional time to set up or close down a job, to attend training, to complete administrative tasks, where insufficient paid time has been allowed for work to be completed, travel time where this is integral to the work,75 and where staff have not been permitted to take rest breaks to which they are entitled. Key sectors affected include school cleaners,76 higher degree research students and sessional academics in the higher education sector,77 as well as employees of Subway, McDonalds, and CommBank;78

• excessive unpaid trials—where workers must complete unreasonable unpaid work, including internships and placements, to gain experience and/or employment;79

• cashbacks and payments to employers—where workers are paid but employers demand a proportion of the payment back; for example, for uniforms, food, transport, visas, accommodation, till shortages, or as security. While some payments are lawful if reasonable, agreed with the worker and included in a contract of employment, other payments, including upfront payments by prospective employees are not;80

• non-payment of superannuation—where employers do not pay superannuation guarantee contributions, despite, in some cases, contributions being shown on pay slips;81

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76 Keelia Fitzpatrick, Wage theft and young workers, p. 176.

77 Council of Australian Postgraduate Associations, Submission 44, pp. 5–6; University of Queensland Casuals’ Caucus, UQ Casuals’ Caucus Report on Wage Theft, September 2021, pp. 5 and 19–20 (accessed 28 February 2022); Witness 2, Sessional academic, Swinburne University of Technology, Proof Committee Hansard, 22 February 2022, p. 18; Dr Hayley Singer, Member, University of Melbourne Casuals’ Network, Proof Committee Hansard, 22 February 2022, p. 25.


80 FWO, Identifying and addressing the drivers of non-compliance in the 7-Eleven network, April 2016, p. 27; FWO, Deducting pay and overpayments (accessed 4 February 2022); FWO, A report on the Fair Work Ombudsman’s Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales, June 2015, p. 20; Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, Senate Education and Employment References Committee, Committee Hansard, 14 March 2017, p. 6

81 Witness 1, Member, UWU, Proof Committee Hansard, 22 February 2022, p. 7; Nassim Khadem, ‘How millions of Australian workers are being ripped off by their bosses’, ABC News, 29 October 2021 (accessed 3 March 2022); Queensland Government, Submission 19, p. 10.
• end of employment—workers can lose unpaid wages when they are made redundant, a business ceases, or where insolvency is used strategically (‘phoenixing’) to avoid payments to workers;82 and
• ‘sham’ contracting arrangements—where workers are required to register as a business with an ABN, although by all practical criteria they are an employee (see below).83

1.64 The extent of underpayment experienced across the various forms of wage theft is illustrated by Figure 1.3.

1.65 Many of the corporate self-reported underpayment cases reported over recent years have been attributed to administrative error. Generally, companies have self-reported to the FWO when they have discovered underpayments, and back pay has been made to affected workers, along with interest and superannuation, in consultation with the regulator.

1.66 The most common type of self-reported underpayment has been where a management contract has defined a total salary, and it has later been found not to have paid as much as if the worker had stayed on the relevant award and been paid per hour, with additional hours paid at higher rates or as overtime.

1.67 Major supermarkets are alleged to have used this method, as well as other practices, resulting in Woolworths underpaying its staff at least $571 million84 and Coles Supermarkets around $115.2 million.85

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83 The FWC found that Foodora’s delivery workers were employees, not independent contractors as Foodora maintained, due to the high degree of control exercised over them. This meant that workers were entitled to be paid annual leave, sick leave, superannuation and other entitlements, with workers receiving only 29 cents in the dollar after Foodora folded.


Sham contracting was considered in detail by the Senate Education and Employment References Committee, Corporate avoidance of the Fair Work Act 2009, September 2017, Chapter 7.


85 FWO, ‘FWO takes action against Coles Supermarkets’, Media release, 2 December 2021 (accessed 3 February 2022).
1.68 Other forms of underpayment to which workers have been subject may not be unlawful, as follows:

- where enterprise agreements have been found to be invalid, but it would not have been illegal for the employer to pay according to the agreement that was registered at the time;\(^\text{86}\)
- where legacy agreements (or ‘zombie’ agreements) are still in force and may result in very low, but not unlawful, rates of pay;\(^\text{87}\)
- where enterprise agreements that have passed their normal expiry date have been terminated, placing workers on the relevant industry award with lower terms and conditions, and disadvantaging workers in enterprise bargaining processes,\(^\text{88}\) and
- where employees are not covered by an award. For example, newly graduated lawyers were covered by an award for their first year, but not in

\(^{86}\) Andrew Probyn, ‘Coles worker could bring down enterprise bargaining system if wage challenge is successful’, ABC News, 4 April 2017, (accessed 28 February 2022).

\(^{87}\) Queensland Government, Submission 19, pp. 14–15. For example, the fact that Mantle Group Hospitality’s pay rates are less than the award and yet legal is discussed in The Courier Mail, Editorial, 3 December 2019, p. 24.

subsequent years. They routinely worked very long, unrecorded hours, for low salaries. This did not constitute unlawful underpayment unless the pay rates were below the minimum wage.89

Corporate self-disclosures

1.69 In the past, wage theft was considered to be limited to small to medium-sized enterprises (SMEs)—with over 99 per cent of Australian businesses classified as SMEs90—commonly without access to the specialist human resources, or payroll systems and advice available to larger enterprises.91

1.70 However, underpayments by large, high-profile corporate employers totalling hundreds of millions of dollars, and affecting thousands of employees over many years have become a significant issue of public concern.92 Some recent high-profile examples of corporate underpayments include household names:

- **Bupa**—according to a review of its payroll systems, it underpaid more than a third of its workforce (approximately 18,000 current and former staff) by as much as $75 million since 2014;93
- **Coles**—underpaid about 600 staff some $20 million over six years; although the FWO has claimed that Coles’ remediation program has ‘significantly underestimated’ amounts owed. On 1 December 2021 the FWO commenced Federal Court of Australia (FCA) proceedings claiming that underpayments between 2017 and 2020 totalled closer to $115.2 million;94
- **Wesfarmers**—reported staff underpayments totalling $30.1 million across its companies, including a $9 million underpayment of staff at Target and a

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91 CAANZ and other submitters suggest that underinvestment in systems and use of systems not designed for the Australian industrial relations framework contribute to underpayment of staff. FWO, Submission 39, p. 8; Chartered Accountants Australia and New Zealand (CAANZ), Submission 14, pp. 3–4; Associate Professor Anna Boucher, Private capacity, Committee Hansard, 18 September 2020, p. 28; CCIWA, Submission 41, p. 6.

92 Tess Hardy, *Criminal penalties for corporate wage theft are appealing, but won’t fix the problem on their own*, The Conversation, 20 February 2020 (accessed 3 February 2022); Adele Ferguson, *Australia’s shocking wage theft scandals keep coming by the truckload*, The Sydney Morning Herald, 13 March 2021 (accessed 3 March 2022).


$4 million underpayment of superannuation entitlements to Bunnings’ staff;95

- **Qantas**—self-disclosed the underpayment of 638 employees over eight years, totalling $7.1 million;96
- **National Australia Bank**—estimated that thousands of staff had been underpaid to the value of $128 million to 2012;97
- **CommBank**—revealed staff underpayments totalling some $53 million, affecting 41 000 current and former staff and dating back to 2010; 98
- **Super Retail Group**—the parent company of SuperCheap Auto, Rebel Sport and BCF, has set aside around $43 million to compensate retail store managers for underpayment of overtime and other allowances over six years;99 and
  - **Woolworths Group**—originally identified as underpaying approximately 5700 salaried staff $427 million over nine years, with a further 155 000 workers underpaid $144 million over the last three years. The total of underpayments to date is $571 million, with the potential for the ongoing review to discover further underpayments.100

1.71 Underpayments are not limited to the private sector, with the not-for-profit and government sectors also affected; for instance, the Australian Red Cross admitted to underpaying staff $20 million.101

1.72 The Australian Government sector has seen underpayments across a number of agencies including the Australian Broadcasting Corporation (ABC) which admitted to underpaying 2500 casual staff over a six-year period and set aside

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95 'Factbox: growing list of Australian companies underpaying staff', Reuters, 19 February 2020.
98 'Factbox: growing list of Australian companies underpaying staff', Reuters, 19 February 2020.
$23 million for repayments.\textsuperscript{102} Other government agencies affected include Aboriginal Hostels Limited, the National Library of Australia, the Department of Social Services, the Department of Finance, and the Department of Home Affairs.\textsuperscript{103}

1.73 The FWO has expressed its disappointment and frustration at the mounting number of large-scale corporate underpayments,\textsuperscript{104} and the impact this has had on other aspects of their work such as assisting small businesses and vulnerable workers.\textsuperscript{105}

1.74 The recent increase in self-disclosed underpayments amongst prominent corporate employers has emphasised the widespread nature of wage theft in Australia and forces consideration of its impacts on both individuals and Australian society.

Factors contributing to underpayment

1.75 Bearing in mind the two categories of wage theft outlined earlier—deliberate or negligent underpayment—there are a number of factors which make it possible for employers to exploit workers and allow errors to remain undetected, with the more vulnerable groups of workers susceptible to both forms of underpayment:

- Industrial relations reforms over the last 20 years have shifted the balance of power in favour of employers over employee, moving from a centralised industrial system to a system of individual rights.
- Insecure work has become more common.
- There are higher proportions of participation in the workforce by vulnerable workers.
- Union membership and the power of unions has declined.
- Complex employment relationships and supply chains make it possible to obscure employee status and hide the beneficiaries of underpayments.
- Changes in ethical outlooks have seen broader tolerance of exploitation.

\textsuperscript{102} Naaman Zhou, ‘\textit{ABC sets aside $23m for underpaid staff as union blames ‘budget pressures’},’ \textit{The Guardian}, 20 October 2019 (accessed 28 February 2022).

\textsuperscript{103} John Wilson, Hidden ‘\textit{Mastertheft’ case in government? Public servants can also be underpaid},’ \textit{The Canberra Times}, 6 August 2019 (accessed 8 March 2022); Aboriginal Hostels Limited, \textit{Media statement—EU}, 11 June 2021 (accessed 8 March 2022); FWO, ‘\textit{National Library signs enforceable undertaking},’ \textit{Media release}, 2 November 2020 (accessed 8 March 2022); Jackson Graham, ‘\textit{Department underpays workers $400,000 for after-hours work},’ \textit{The Mandarin}, 22 December 2021 (accessed 8 March 2022); Luke Henriques-Gomes, ‘\textit{Australian social services department underpaid dozens of staff $400,000 over five years},’ \textit{The Guardian}, 22 December 2021 (accessed 8 March 2022); Sally Whyte, ‘\textit{Home Affairs in court over alleged underpayment},’ \textit{The Canberra Times}, 22 April 2019 (accessed 8 March 2022).

\textsuperscript{104} FWO, \textit{Submission 39}, p. 11.

\textsuperscript{105} FWO, \textit{Submission 39}, p. 12.
Industrial relations changes shift the balance of power

1.76 In a simple economic model, it is assumed that businesses structure their operations so as to minimise operating costs and maximise profits. Other input costs such as rent and materials are largely fixed, while the costs of labour are less so and can be minimised.\(^{106}\)

1.77 Since Federation, Australia has relied on labour laws and unionisation to balance the power of employers and employees. Moves to enterprise bargaining in the 1990s, and individual agreements under WorkChoices legislation in 2005, represented a fundamental shift from centralised industrial relations to enterprise-based or individual arrangements.

1.78 In 1990, nearly 80 per cent of workers had their wages set by awards. This has subsequently dropped sharply, with figures from the Australian Bureau of Statistics (ABS) showing that since 2012, the percentage of workers employed under an award or collective agreement has fallen to around 59 per cent, with employees on individual arrangements resting between 36 and 39 per cent, and the remainder of employees being owner managers of incorporated enterprises.\(^{107}\)

1.79 Enforcement is increasingly reliant on individuals pursuing cases, with responsibility for policing resting principally on the FWO, creating resourcing challenges. Ms Natalie James, former FWO, observed:

> [Entrenched non-compliance with the Fair Work Act] is an industry-wide problem and it needs an industry-wide response. There are over 50,000 cafes, restaurants and takeaway outlets in Australia and the FWO cannot fix this one café at a time.\(^{108}\)

1.80 Widespread underpayments and other unfavourable work conditions indicate there is no longer a balance of power.

1.81 However, recent unfolding events including wage theft litigations, the COVID-19 pandemic, and the #MeToo movement have the potential to shift the balance in favour of employees. Media reports suggest that employees are growing in power, and that they are demanding conditions that better mesh with their values and personal lives.\(^{109}\) Whether this effect will be prolonged, and go so far as to reduce wage theft, remains uncertain.

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\(^{106}\) AMWU, Submission 51, p. [3].

\(^{107}\) Australian Bureau of Statistics (ABS), Employee Earnings and Hours: All employees, proportion of employees - method of setting pay, Australia, May 2021 (accessed 11 February 2022).


\(^{109}\) Tom Spiggle, The coronavirus and the balance of power between employers and employees, Forbes, 3 November 2021 (accessed 11 February 2022); Julie Battilana and Tiziana Casciaro, No, the pandemic hasn’t given workers more power. But that could change, The Washington Post, 26 August 2022 (accessed 11 February 2022); Andrea Willige, The rise of the ‘belief-driven’
Changing attitudes to wage theft

1.82 Hand-in-hand with industrial changes, some have argued that wage theft has evolved from a belief in the priority of markets. In this context setting wages at the ‘going rate’—rather than minimum or award rates—is merely an extension of this thinking. Ms James observed:110

It is a failure not only of legal responsibility, but moral and ethical leadership, for large corporates to seek to ‘contract out’ the wages and conditions of its workforce without ensuring good governance and compliance.111

1.83 Evidence provided by Mr Josh Bornstein, Principal Lawyer at Maurice Blackburn Lawyers, appears to support this view:

… sometimes a graph comes along and hits you in the forehead, and late last year Alan Kohler on ABC News presented one of his graphs, which was to show the source of share market gains over two periods … In the second period, between the late 80s until two or three years ago, the graph was radically different … it showed economic growth was responsible for only a minority of shareholder gains. The largest contributor to economic growth over the last 35 years was transfer from wages. In other words, what we've seen happen is business has fundamentally changed its behaviour and sought to maximise its profit by cost cutting and wage suppression—an entirely different approach to running a business and to making a buck.112

1.84 Workers, too, may have internalised this market ideology, with one worker submitting:

We're brainwashed into thinking bosses can't afford to pay us.113

1.85 Similarly, a survey commissioned by the FWO in 2016 found substantial numbers of migrant workers felt they had nothing to complain about, even when they knew they were being paid below minimum rates, because they felt lucky to have a job.114

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112 Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, *Committee Hansard*, 11 March 2021, p. 23.
The role of unions

1.86 Unions used to play a greater role in protecting workers, at both a systemic and an individual level, influencing the setting and enforcing of minimum standards across broad occupations. Unions had standing to contest potential awards breaches, so enforcement did not depend on an individual assertion of rights:

If we think about the role of the inspector, the inspectorate has been a recently modern feature. It is unions that have historically done the work in terms of compliance, and one of the reasons that we think that noncompliance and wage theft are on the rise is that they’re directly related to the fact that unions and their officials have had the rights to do that very important compliance work restricted.115

... dismantling an effective system of co-regulation of employment relations and replacing it with a command-and-control system. That is, we previously relied strongly on unions to support the state in setting and enforcing minimum wages. We now require the Fair Work Ombudsman to be the primary enforcer, but it is not adequately resourced to do that job. It receives less government funding now than it did 10 years ago, and that funding has reduced on a per-worker basis also.

In sum, government policies have simultaneously increased the supply of vulnerable labour and reduced the enforcement of employment laws.116

1.87 But, more recently, the institutional power of unions has declined: unions have fewer permissions to enter workplaces and inspect records, they have less representation on bodies which advise governments, and they have no special rights to bargain for pay and conditions at an enterprise level. The ACTU explained:

... we know that unions’ rights to enter workplaces have been restricted over the last two decades. That means that unions have limited rights on which they can enter workplaces. They can enter workplaces to hold discussions with workers and they can enter workplaces to conduct investigations in relation to suspected contraventions. However, our ability to obtain the evidence is also limited from where it was. We do have rights to seek member records, but ultimately it requires the member to disclose who they are.117

1.88 Ms Gooding from the NTEU also told the committee that identifying and addressing wage theft is difficult, with unions unable to do a standard time-and-wages check on both members and non-members, with current arrangements requiring them to disclose the identity of the worker, opening

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115 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 17.
116 Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, p. 20.
117 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 12.
them to adverse actions and making underpaid workers less likely to come forward.\footnote{118}

1.89 At the same time, union membership has declined dramatically, with direct correlations between low union membership and sectors commonly engaged in wage theft (and other non-compliance).\footnote{119} Dr Clibborn told the committee:

So, certainly, the reduction in union density over the last number of decades, combined with the limits on their ability to enter the workplace and be part of the enforcement solution, has contributed to the current rise in wage theft and other employer noncompliance.\footnote{120}

1.90 Unions are therefore less likely to be asked for advice, or be involved in workplaces, and less likely to identify non-compliance and abuses, arguably leading to higher instances of wage theft\footnote{121} as well as increasing the workload of the FWO.

**Complex employment relationships and supply chains**

1.91 The increasingly complex employment relationships, contracting, and supply chains are making it possible for the entity which ultimately benefits from a worker—and their underpayment—to hide or ‘pass the buck’.\footnote{122}

1.92 There are various ways of obscuring these relationships, including by utilising outsourcing, franchising, labour hire contractors and multiple layers of sub-contracting, complex corporate arrangements, and by using independent contractors. Lack of appropriate governance from the top merely complicates these arrangements further.\footnote{123}

1.93 The FWO’s *Harvest Trail Inquiry* report observed:

Since 2015, the FWO has conducted several inquiries into labour supply chain arrangements, including the contracting of trolley collection, cleaning and poultry processing services. These inquiries have generally

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\footnote{118} Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, pp. 6–7.

\footnote{119} Dr Stephen Clibborn, Private capacity, *Committee Hansard*, 18 September 2020, p. 21.

\footnote{120} Dr Stephen Clibborn, Private capacity, *Committee Hansard*, 18 September 2020, pp. 21–22.


\footnote{122} See, for example, Centre for Business and Social Innovations, University of Technology Sydney, *Submission* 34, p. 4; NFAW, *Submission* 37, pp. 18–19; ACTU, *Submission* 38, pp. 40–41; Associate Professor Anna Boucher, Umeya Chaudhuri and James Hall, *Submission* 43, pp. 11–16.

found that ineffective supply chain governance contributes to a culture of non-compliance by contractors throughout the labour supply chain.\textsuperscript{124}

**Insecure work**

1.94 The rise in insecure work and its impacts have been explored extensively by the Job security inquiry,\textsuperscript{125} with the report concluding that 'the committee finds that insecure and precarious forms of work have increased and are increasing'.\textsuperscript{126}

1.95 That inquiry found that most forms of insecure work—casual contracts, part time work, fixed term contracts, on-demand and independent contractors—have increased over the last 30 years, with vulnerable workers particularly impacted.\textsuperscript{127}

1.96 While business has argued this reflects the changing needs of companies and the economy, and improved flexibility, particularly as more women have entered the workforce, others have contended that this flexibility is one-sided in favour of employers. Per Capita told the Job Insecurity inquiry:

'Flexibility' is a term used to describe insecure work conditions: it is often portrayed as offering benefits to workers and employers equally, but in practice, the concept is sold to employers by labour hire companies as a way to reduce the 'ongoing burden of fixed costs'...it is of far greater benefit to business owners than it is to workers.\textsuperscript{128}

1.97 The Australia Worker's Union agreed, telling this inquiry that insecure arrangements are having a detrimental effect:

It is now clear that (a) non-direct-hire employment is increasingly prevalent and normalised across industry and (b) such arrangements have led to increasing job insecurity, worker exploitation and non-compliance with minimum standards.\textsuperscript{129}

**Labour demand, supply and constitution**

1.98 Labour demand, supply and constitution have changed considerably over the last 40 to 50 years, with reduced labour demand (and higher supply) potentially linked to lower wages and wage theft, particularly in certain high-risk sectors where underpayment has become embedded. These effects have


\textsuperscript{125} Parliament of Australia, *Senate Select Committee on Job Security* (accessed 28 February 2022).


\textsuperscript{127} Senate Select Committee on Job Security, *The job insecurity report*, February 2022, pp. 17, 75 and 77.

\textsuperscript{128} Per Capita, *Submission 30 to the Senate Select Committee on Job Security inquiry*, p. 10.

\textsuperscript{129} The Australian Workers Union, *Submission 73*, p. 10.
been particularly felt given other changes in the industrial relations landscape, and to the nature of work and productivity.  

1.99 Current ABS figures show that there is an ample supply of labour with workforce participation rates hovering around 66 per cent for the resident population, compared with 62 per cent in 1978 when the series began. The expansion in the workforce is due to a large number of factors, with increased participation by vulnerable workers.

1.100 Figures show increased workforce participation by women (from 44 per cent to 61 per cent over the period), and increased participation of people over 65, where the employment to population ratio has gone from seven percent to 15 per cent.

1.101 Additionally, there are approximately 1.7 million migrants with work rights on various temporary visas—although this is a significant drop from December 2019, just prior to the spread of COVID-19 in Australia, when there were around 2.4 million visa holders.

1.102 Figures for December 2021 show that one of the biggest groups of temporary migrant workers is international students, of whom there are about 316,000 in Australia (down from nearly 613,000 in March 2019 border closures). Most of these visa holders are entitled to work up to 20 hours a week during the academic term, and unlimited hours outside term.

1.103 There are about 19,300 working holiday makers (down from 149,000 in March 2019) and approximately 333,400 holders of bridging visas. The Seasonal Worker Programme accounted for around 15,200 workers in December 2021; considerably higher than September 2020 when it troughed at around 3,300.

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131 ABS, Labour force, Australia, detailed: Table 01. Labour force status by age, social marital status, and sex, Cat. No. 6291.0.55.001, 24 February 2022 (accessed 7 March 2022).


135 Department of Home Affairs, Temporary entrants visa holders pivot table at 31 December 2021—comparison with previous quarterly snapshots, 20 January 2022.
1.104 Temporary migration (rather than permanent migration) is fairly new to Australia, with figures showing that the number of temporary migrant workers has tripled since the late 1990s, as many hope for permanent residency and ultimately citizenship. These migrants are now treated more like guest workers.136

1.105 Migration has therefore been a source of a large increases in labour supply. Estimates vary, but migrant workers are thought to constitute between six per cent and 12 per cent of the Australian workforce.137

1.106 Migrants also tend to be young. Even in 2010, workers on temporary visas (not including New Zealanders) made up around one-fifth of the total labour force aged between 20 and 24.138 Additionally, students may be concentrated in university towns. For instance, one estimate suggests that students make up 10 per cent of Wollongong’s population, and thus a significant proportion of that city’s labour force.139

1.107 Chapter 2 considers who is affected by wage theft and how it impacts on their lives, as well as our wider society.


137 Stephen Clibborn and Chris Wright, ‘Employer theft of temporary migrant workers’ wages in Australia: Why has the state failed to act?’, vol. 29, no. 2, 2018, p. 212; Laurie Berg and Bassina Farbenblum, Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey, November 2017, p. 8; 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, November 2018, p. 3; Senate Select Committee on Job Security, The job insecurity report, February 2022, p. 77 (accessed 7 March 2022); Iain Campbell, ‘Temporary migrant workers, underpayment and predatory business models’, in Andrew Stewart, Jim Stanford, Tess Hardy (eds), The wages crisis in Australia: what it is and what to do about it, University of Adelaide, p. 190.


139 South Coast Labour Council, Submission 13—Attachment 1, p. 1.
Chapter 2
Underpayment victims and impacts

Who is underpaid?
2.1 Any workers at any level can be underpaid. In general, however, there is a 'relationship between low skill levels and underpayment' and underpayment is most common where workers have the least power. In a situation of strong labour supply, workers with low skill levels, and who are therefore considered easily replaceable, are vulnerable.

2.2 There is a direct link between insecure work and underpayment, reflecting the power imbalance between employers and worker, and workers’ fear of speaking out or seeking redress for fear of losing their jobs: 

… workers are very anxious about raising issues about their employment. If we think about the fact that one in three workers is in some form of insecure work, so a casual worker, there’s a direct relationship between raising your hand to outline a wage theft matter and whether you’re going to get a shift next week. There are general protection provisions but they are woefully inadequate.

2.3 This was a common theme in evidence received by the committee, with Ms Julien Gibson stating:

Whenever I asked for my entitlements, the typical response was, ‘Everyone is replaceable’ and ‘Do you want this job or not?’ The last straw for me was when I was sexually harassed. I left my dream job. It turned into my nightmare.

2.4 The committee also heard that the COVID-19 pandemic has magnified the impacts of underpayment of workers, given higher job losses, lack of access to social payments by temporary migrant workers, and the exclusion of temporary migrant workers, international students, and university staff from benefitting from JobSeeker and JobKeeper payments. Dr Tess Hardy explained that those exclusions:

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1 Associate Professor Anna Boucher, Private capacity, Committee Hansard, 18 September 2020, p. 27.
2 WEstjustice, Submission 47, p. 22.
3 Mr Liam O’Brien, Assistant Secretary, Australian Council of Trade Unions (ACTU), Committee Hansard, 18 September 2020, p. 17; See also Queensland University of Technology, Centre for Decent Work and Industry, Submission 127, p. 1.
4 Ms Julien Gibson, Member, Hospo Voice/ United Workers Union (UWU), Committee Hansard, 11 March 2021, p. 2.
5 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 15; Mr Mathew Kunkel, Director, Migrant Workers Centre (MWC), Committee Hansard, 11 March 2021, p. 17.
... are profound, because then employees are absolutely desperate for work, and that desperation drives this inability to complain and also a willingness to accept conditions well below the legal minimum. It really blows apart, I think, the safety net that is in existence.  

2.5 Vulnerable workers are at higher risk of exploitation due to a range of factors including gender, age, disability, ethnic or cultural background and language barriers, as discussed further below.

2.6 Certain industries employ a high proportion of vulnerable workers for which underpayment is significant, such as the hospitality, child, aged and disability care, cleaning and accommodation services, and higher education sectors.

2.7 For workers falling into more than one vulnerable category the impacts are magnified. The categories described below represent significant populations of vulnerable workers but are by no means exclusive.

**Women**

2.8 Women are vulnerable to wage theft due to higher rates of part time work casualisation and the higher rates of casualisation in the industries in which they are employed. This includes the healthcare and social assistance, accommodation and food services, and retail sectors. Women are already marginalised in equitable wage rates and generally have considerably less or no superannuation at the end of their working life.

2.9 There is some evidence that the gender pay gap gets bigger as incomes get smaller, disproportionally further disadvantaging women.

**Migrant workers**

2.10 Migrant workers, including international students, are commonly subject to underpayment, with a recent report finding that 65 per cent of people in this category had experienced wage theft, because the power imbalance between

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6 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 23.
7 McKell Institute, Submission 55, Attachment 1 (McKell Institute, Ending Wage Theft: Eradicating underpayment in the Australian workplace, March 2019), p. 22; Dr Kristin van Barneveld, Social Policy Committee Member, National Foundation for Australian Women (NFAW), Committee Hansard, 18 September 2020, p. 35; NFAW, Submission 37, p. 6.
8 Dr Kristin van Barneveld, Social Policy Committee Member, NFAW, Committee Hansard, 18 September 2020, p. 39.
9 NFAW, Submission 37, p. 12.
10 MWC, Lives in limbo: the experience of migrant workers navigating Australia’s unsettling migration system, November 2021, p. 6. See also McKell Institute, Submission 55, Attachment 1 (McKell Institute, Ending Wage Theft: Eradicating underpayment in the Australian workplace, March 2019), p. 22.
employers and works is greater. The FWO notes that they are often vulnerable to coercion and exploitation:

The over-representation of migrant workers in our disputes potentially reflects their unique situation: being new to the Australian labour market, not having baseline knowledge about workplace rights and entitlements, and potentially experiencing language and cultural barriers. Some migrant workers may also be reluctant to speak with public officials and may be concerned about their visa status if they raise issues. These factors can make migrant workers particularly vulnerable to exploitative practices from unscrupulous employers.

2.11 In addition to the factors above, the Law Council further submitted that migrant workers are more likely to suffer from trauma and fear of authorities, fear of deportation, job loss, and financial constraints. Many migrant workers, especially working in the horticulture sector, are located in regional, rural, and remote locations where it is more difficult for them to seek assistance.

2.12 Workers whose temporary visas depend on their employment status are inherently vulnerable to their employers and may depend on their support. An international student who fears that their employer will report they have worked more than the allowed 20 hours a week stands to lose their visa, enrolment, and the fees and study they might already have put into a degree. They are less likely to know their workplace rights and challenge their employer about rates of pay because of language and cultural barriers.

2.13 It should be noted that almost all workplaces that employ temporary migrant workers also employ local labour, and they are equally at risk of exploitation. However, certain industries have large participation rates for vulnerable workers—temporary migrant workers in particular—such as the horticulture, hospitality, cleaning and security sectors (as discussed below).

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11 MWC, Submission 53, p. 5.
13 Law Council of Australia (LCA), Submission 90, pp. 10–11.
14 MWC, Lives in limbo: the experience of migrant workers navigating Australia’s unsettling migration system, November 2021, p. 31.
15 See, for example, Mr Mathew Kunkel, Director, MWC, Committee Hansard, 11 March 2021, p. 13.
Young workers

2.14 Young workers tend to have easily replaceable skills, higher rates of casual employment, lower rates of union membership, and lower awareness of their workplace rights and obligations, making them vulnerable to underpayment.18

2.15 Younger workers also need to gain work experience and, as a result, may be prepared to accept less than minimum conditions for fear of losing work. High unemployment rates in regional areas may also cause younger workers to accept work in unfavourable conditions.19

2.16 Ms Felicity Sowerbutts from the Young Workers Centre reported to the committee that 'about 65 per cent of the young workers that we’ve assisted over the last five years have brought wage theft issues to our attention. That’s how rife it is...'20

2.17 Mr Shirley Jackson, Economist with Per Capita thought that young people need businesses to do more, with the support of government:

You can’t blame a drowning person for grasping at anything. Young people are facing wide-scale unemployment, underemployment, large competition for entry level jobs, declining graduate positions and increasing time spent in insecure industries—much longer than they need to. We can’t blame them for not being aware and not taking it into their own hands to go out and find out exactly what all the laws are. That is a responsibility that should always be on business.21

First Nations people

2.18 Aboriginal and Torres Strait Island people are also vulnerable to wage theft for several reasons.22

2.19 The Northern Territory Working Women’s Centre (NTWWC) reported that around six per cent of its enquiries relate to underpayment—commonly non-payment or underpayment of hourly rates, penalty rates and overtime, applying the wrong award or misclassification. The Centre highlighted key issues concerning its clients, noting that:

... it is more challenging for these women to establish what their rights are and where these rights comes [sic] from, due to difficulty interpreting legislation and Modern Awards and difficulty accessing services that can assist in this process. Secondly, it is more challenging for these women to

18 McKell Institute, Submission 55, Attachment 1 (McKell Institute, Ending Wage Theft: Eradicating underpayment in the Australian workplace, March 2019), p. 22 (accessed 3 February 2022).
20 Ms Felicity Sowerbutts, Director, Young Workers Centre, Committee Hansard, 11 March 2021, p. 14.
21 Mr Shirley Jackson, Economist, Per Capita, Committee Hansard, 11 March 2021, p. 32.
22 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 23; Northern Territory Working Women’s Centre (NTWWC), Submission 17, pp. [2–3].
enforce their rights as a result of discrimination, lack of skills or confidence advocating for their rights to their employer and again difficulty accessing services to assist.23

Regional, rural, and remote workers
2.20 Workers in regional areas may also be vulnerable as a result of fewer employment opportunities, generally higher rates of unemployment, and limited access to support services.24 Furthermore, regional horticultural and mining sectors, sectors are known respectively for the underpayment25 and increasing casualisation of its workforce.

Effects of underpayment

Impacts on people and their families
2.21 People who are underpaid—particularly low-paid workers—have less money to spend on things they need like ‘housing, utilities, groceries and other everyday essentials’, little scope to purchase ‘extras’ and luxuries, and less opportunity to plan for the future and save.26

2.22 Dr Hayley Singer told the committee:

I have been in that position ... when you put in a time card and it's rejected, and you know that you will not be able to pay your rent or you do not know where your money is coming from for the next fortnight. It is a really scary proposition.27

2.23 Mr Trent Whitehand-Willick told the committee of his experiences and the longer-term impacts:

I’ve worked as a casual bartender in the hospitality industry for eight years and have been paid correctly by one employer out of six. I spent over three years working for one of Australia’s largest hospitality companies, with

23 NTWWC, Submission 17, p. [3].

24 Including advice, legal services, unions, and interpreters. See Education and Employment References Committee, Corporate avoidance of the Fair Work Act, September 2017, Chapter 6; South Coast Labour Council, Submission 13; WEstJustice, Submission 47, p. 6; Finance Sector Union of Australia (FSU), Submission 65, p. 9; Australian Chamber of Commerce and Industry (ACCI), Submission 81, p. 12; LCA, Submission 90, p. 11.

25 Retail Supply Chain Alliance, Submission 74, p. 4.

26 Iain Campbell, The wages crisis in Australia, University of Adelaide Press, 2018, p. 196; Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 16; Alexander Reilly, Joanna Howe, Diane van den Broek and Chris Wright, ‘Working holiday makers in Australian horticulture: labour market effect, exploitation and avenues for reform’, Griffith Law Review, vol. 27, no. 1, 2018, p. 123; McKell Institute, Submission 55, Attachment 1 (McKell Institute, Ending Wage Theft: Eradicating underpayment in the Australian workplace, March 2019), pp. 22–23; Ms Emma Dawson, Executive Director, Per Capita, Committee Hansard, 11 March 2021, p. 31.

27 Dr Hayley Singer, Member, University of Melbourne Casuals’ Network, Proof Committee Hansard, 22 February 2022, p. 30.
neither casual loading nor penalties. Whenever I queried this, I was gaslit and made to feel undeserving of legal pay. I worked without receiving breaks or overtime pay and was forced to comply. I was asked, 'Do I want to let down my team?' I was told that other people would happily take the hours and that if I wanted to work less it could be arranged. 'It's the same everywhere,' they said. In my experience, they're not wrong. We most often have no option but to accept illegal pay. I find this even more so now in the COVID-19 economy, which gives hospitality employers a greater incentive to underpay. This gives me an impossible choice: accept pay that I know is not legal or remain on JobSeeker for the foreseeable future.28

2.24 Ms Julien Gibson also told the committee of the significance of the underpayment and subsequent recovery of unpaid wages:

For years every hospitality job was the same. After speaking with former colleagues, industry friends and union mates, we concluded it would seem that hospitality was never going to change ...

This is what you have to choose between as a chef: either you forfeit your self-respect and work for below the award or you forfeit your rights and entitlements and safety nets.

After a decade of experiencing wage theft, it took my fellow workmates and I to come together to fight back. I got back just over $18,000 for only two years out of my career. That money has been life-changing. It might not seem like much to you, but a safety net meant I could plan my future and make healthier choices for myself, which is something that chefs rarely have the opportunity to do.

...

We are tired and battle-weary from decades of fighting for our basic rights and entitlements. We've suffered gaslighting, wage stagnation and exploitation ...

...

My experiences are not unique.29

2.25 Underpayment particularly impacts low-income workers30 and any underpayment is likely to result in some degree of hardship. In one case in the Federal Circuit and Family Court (FCFCA):

...the court found the worker at the Aijin Ramen restaurant had been underpaid $9,616, from May and October 2016. The underpayments left the worker struggling to meet living expenses despite working four to six days per week, the Ombudsman said. She was back-paid in August 2017.31

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28 Mr Trent Whitehand-Willick, Member, UWU, Committee Hansard, 11 March 2021, p. 1.
29 Ms Julien Gibson, Member, Hospo Voice/UWU, Committee Hansard, 11 March 2021, p. 2.
30 ACTU, Submission 38, p. 12; UnionsWA, Submission 42, p. 2.
2.26 In cases of extreme underpayment, workers may live in conditions of dire poverty. The Australian Broadcasting Corporation quoted a farm worker:

'I was working 6:00am to 6:00pm driving tractors and eating bread and cordial for breakfast and lunch, and boiled mince meat for dinner. I lived in the shed with a dog,' he said.32

2.27 Poverty also makes it harder for vulnerable people—predominantly women and in particular Aboriginal and Torres Strait Islander women—to leave violent relationships and access assistance, extending and compounding the effects of domestic violence.33

2.28 Underpayment causes financial stress with impacts on physical and mental health.34 Working long hours and/or multiple jobs leaves workers with less time to spend with family and friends and access support networks, exacerbating mental health problems.35 In the longer term this can lead to social disconnection, with changed attitudes to training, education, employment, and even to the rule of law, given:

... getting people to do work and either not paying them at all or very clearly paying them trainee rates ... seems to me to be really sinister. You're taking advantage of someone who wants to pursue a good working life by making them give free labour to you so that you can benefit and turn a profit. The same thing goes for unpaid overtime and things like that.

... We value the time that we have away from work just as much as the time at work. It's about eight hours of work, but then also eight hours of rest and recreation. As a community, when we won those laws, we recognised that workers have the absolute right to enjoy their lives out of work. That's why we have these payments to compensate people for their very precious time.

2.29 There is a particular conflict for students. Furthermore, because underpayment often occurs alongside other forms of abuse it may lead to non-completion of apprenticeships, traineeships or other courses of study.36


33 NTWWC, Submission 17, pp. [3–4].

34 NTWWC, Submission 17, p. [4]; Unions NSW, Submission 31, p. 17; Council of Australian Postgraduate Associations, Submission 44, p. 6; McKell Institute, Submission 55, Attachment 1 (McKell Institute, Ending Wage Theft: Eradicating underpayment in the Australian workplace, March 2019), p. 23.

35 McKell Institute, Submission 55, Attachment 1 (McKell Institute, Ending Wage Theft: Eradicating underpayment in the Australian workplace, March 2019), p. 23.

2.30 The McKell Institute and Maurice Blackburn Lawyers observed that the impacts of wage theft go beyond the loss of income, to people’s sense of self, with victims experiencing a range of impacts from fear, shame and embarrassment, isolation, anger and frustration, and desperation.

2.31 UnionsWA observed:

A common theme of most of these [wage theft] stories was anxiety and outright fear. Anxiety because people were concerned to maintain a regular income from their employment, even if they were a victim of theft. Fear, because employers often used harassment, bullying, and other threats to ensure that their wage theft business practice continued.

2.32 Mr Trent Whitehand-Willick shared his experiences:

The overwhelming message that is sent to me is that we the employees are an unvalued means to financial success, which is reinforced by the government’s tacit acceptance of this culture. The hospitality industry’s inadequate regulation makes me feel like I exist in a political economy that views me as a means to an end and not worthy of being an equal stakeholder in the economy.

2.33 Witness 1 also told the committee about the ongoing impacts on her life:

Because I have missed out on over three years of super, I will potentially have to work longer into the future so that I have enough money to retire comfortably. When I found out that my employer wasn’t paying my super, I felt angry and betrayed as we were unaware for some months that this was occurring, as our payslips still indicated that we were receiving super. As an individual worker, I didn’t know how I could take steps to recover my super. I tried to get assistance from the ATO [Australian Taxation Office], but even when they performed an investigation they weren’t able to provide me with much information about how the super could be recovered … I feel betrayed by my employer and failed by the ATO for allowing this to happen for such a long time. I’m so frustrated that after such a long process it seems unlikely I’m ever going to see the super that’s owed to me.

2.34 The former Fair Work Ombudsman, Ms Natalie James, suggested that employer abuse, and underpayment in particular, has contributed to the growth of the gig economy. Employees would prefer 'being their own boss', however exploitative the conditions, to underpayment and disrespect.

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37 The McKell Institute, Submission 55, p. [2].
39 UnionsWA, Submission 42, p. 4.
40 Mr Trent Whitehand-Willick, Member, UWU, Committee Hansard, 11 March 2021, p. 1.
41 Witness 1, Member, UWU, Proof Committee Hansard, 22 February 2022, p. 7.
2.35 A lower income may mean an individual must work more hours and often multiple jobs to make ends meet. This also puts workers at serious risk of workplace injury, or endangering the safety of others.43

2.36 If underpayments are detected and restitution ordered, it can have an impact on an individual’s income tested welfare benefits, possibly retrospectively generating overpayments which have to be paid back. Despite the ATO advising of some lump sum payment protections for reimbursements,44 the committee heard of potential impacts relating to higher taxation amounts than otherwise have been levied,45 as well as changes to calculations associated with withholding tax,46 child care subsidies, social security payments, the Medicare levy and health card benefits.47 Dr Kristin van Barneveld from the National Foundation for Australian Women (NFAW) said:

Well, what we’re worried about is that if people end up getting a repayment of money that’s owed to them they could then be exposed to changing their income in the year in which that lump sum is paid, to their detriment. We don’t think—but we flag it—that the Medicare levy could be a particular issue, but it could affect family payments and a whole range of things, plus give people a potential tax burden that they otherwise shouldn’t have had, or they will be taxed at a different rate than they otherwise would have been taxed at.48

2.37 The Young Liberals NSW described employers that deliberately underpay their employees as 'preying on the vulnerable', going on to highlight the importance of reforming toxic culture and providing young workers with the opportunity to experience honest workplaces:

It is vital that young people experience honest workplaces; if nothing else, because they are the future leaders and future employers themselves who must learn to operate businesses with integrity…This [proper payment] is necessary for a productive society based on the rule of law and a society where individuals who work hard should be remunerated and given the opportunity to improve their lot in life.49

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43 MWC, Submission 53, p. 8.
44 Ms Kasey MacFarlane, Assistant Commissioner, Risk and Strategy Employer Obligations, Australian Taxation Office (ATO), Committee Hansard, 18 September 2020, p. 9.
45 Associate Professor Anna Boucher, Umeya Chaudhuri and James Hall, Submission 43, p. 11.
46 ATO, Submission 110, p. 11.
47 Wage Theft Australia, Submission 109, pp. 10–11. See also Chartered Accountants Australia and New Zealand (CAANZ), Submission 14, p. 8.
48 Dr Kristin van Barneveld, Social Policy Committee Member, NFAW, Committee Hansard, 18 September 2020, p. 38.
49 NSW Young Liberals, Submission 16, p. 4.
Missing superannuation

2.38 Non- and underpayment of superannuation have adverse impacts on individuals and families, forcing them to work longer and face additional hardship, with blue collar workers particularly affected,\(^{50}\) due to:

- loss of insurance cover for some members, because some disability and income protection insurance policies rely on regular contributions;
- loss of income and savings for temporary migrant workers who return home; and
- most significantly, reduced retirement balances, given the compounding effect of superannuation contributions.

2.39 The FSC suggests a reduction of 7.6 per cent for a typical member, while Industry Super Australia (ISA) estimates a 50 per cent difference in the superannuation balance of a person underpaid compared with a similar person who was paid.\(^{51}\) Furthermore is the impact on the Australian taxpayer of having to un-necessarily cover pension liabilities because there are no superannuation funds to support those retirees.

2.40 Two witnesses, who did not wish to use their names for fear of repercussions, told the committee about the effects of unpaid superannuation and how that fighting for superannuation entitlements had been stressful, taken a toll on their personal lives, and meant that they will now need to work longer in order to retire comfortably. Witness 1 said:\(^{52}\)

> My employer’s failure to pay superannuation has impacted my work and personal life greatly. Because I have missed out on over three years of super, I will potentially have to work longer into the future so that I have enough money to retire comfortably. … I feel betrayed by my employer and failed by the ATO for allowing this to happen for such a long time. I’m so frustrated that after such a long process it seems unlikely I’m ever going to see the super that’s owed to me.\(^{53}\)

2.41 Witness 3 also told the committee:

> The nonpayment of my superannuation by ECEC Management Services Pty Ltd has impacted me and my retirement. I am 59 years old and I don’t have a long time to accumulate superannuation. I was out of the workforce for 10 years whilst raising my children. Every cent of my superannuation

\(^{50}\) cbus, Submission 12, p. [1]; Industry Super Australia (ISA), Super scandal: unpaid super guarantee in 2016–17, [no date], p. 3.

\(^{51}\) ISA, Submission 11, Attachment 1 (ISA, Super scandalous: How to fix the $5 billion scourge of unpaid super), p. 3; Financial Services Council (FSC), Submission 87, pp. 1–2; ISA, Super scandal: unpaid super guarantee in 2016–17, [no date], p. 3; Nassim Khadem, ‘How millions of Australian workers are being ripped off by their bosses’, ABC News, 29 October 2021 (accessed 3 March 2022).

\(^{52}\) Witness 1 and Witness 3, Members, UWU, Proof Committee Hansard, 22 February 2022, p. 7.

\(^{53}\) Witness 1, Member, UWU, Proof Committee Hansard, 22 February 2022, p. 7.
matters. It's not just the unpaid money; it's the potential earnings on that money that I have lost.\textsuperscript{54}

2.42 Per Capita explained the impacts on young workers, particularly young women:

The theft of super represents a large threat to the eventual retirement of young workers, as the compound interest that is generated over time is crucial to ensuring an adequate super balance at the time of retirement. Super theft is particularly dangerous for young women, as research shows that women are more likely to earn less, work shorter hours and spend longer periods of time outside the paid labour market. By engaging in super theft, employers are actively contributing to the future likelihood of poverty, insecurity and homelessness of older women.\textsuperscript{55}

2.43 As well as impacting individuals, there are wider impacts for the economy and society into the future, with stolen superannuation placing an unnecessary burden on Australia's pension system and the workers and taxpayers of the future—the young people of today who are already financial disadvantaged when compared to their parents.\textsuperscript{56} Mr Matthew Linden from ISA told the committee:

Our analysis shows unpaid super affects around one-quarter of the workforce, costing each affected employee an average of $1,700 per year. Unpaid super is more likely to affect young workers and those working in certain industries, such as construction, hospitality and retail. A young person who experiences unpaid super could retire with $60,000 less in retirement savings in today's dollars.\textsuperscript{57}

2.44 Further impacts of underpayments on businesses and wider society are discussed below.

**Impacts on businesses**

2.45 Unpaid entitlements contribute to the profitability of businesses,\textsuperscript{58} presumably contributing to executive salaries, higher dividends for investors, and possible

\textsuperscript{54} Witness 3, Member, UWU, *Proof Committee Hansard*, 22 February 2022, p. 7.

\textsuperscript{55} Per Capita, *Submission 58*, p. 11.


\textsuperscript{57} Mr Matthew Linden, Deputy Chief Executive, ISA, *Committee Hansard*, 22 February 2022, p. 1.

\textsuperscript{58} Associate Professor Anna Boucher, Private capacity, *Committee Hansard*, 18 September 2020, p. 28; Associate Professor Anna Boucher, Umeya Chaudhuri and James Hall, *Submission 43*, p. 8; Ms Emma Dawson, Executive Director, Per Capita, *Committee Hansard*, 11 March 2021, p. 32.
expansion of the business. Mr Liam O’Brien from the Australian Council of Trade Unions (ACTU) observed:

I think this goes to the second driver of wage theft, which is the ability for employers to take profits by not complying or by not paying the necessary diligence to applying correct rates that would otherwise be there.59

2.46 Mr Mohammed Abdillahi, a member of the United Workers Union (UWU), agreed, saying:

Wage theft is actually rampant, as I said before. It's systematic. It's not always obvious. There are managers in large companies, like my employer currently at Melbourne Airport, whose KPIs [key performance indicators] are basically to save the company money.60

2.47 It also raises competition issues where those firms that have deliberately underpaid workers have acquired an economic advantage over their competitors who have done the right thing and paid the correct entitlements, as explained by Iain Campbell from the University of Melbourne:

Business models centred on underpayments aim to realise an unfair financial advantage, primarily by paying employees less than what is required by law but sometimes — in the case of undeclared work — with an additional bonus from avoiding taxation and superannuation liabilities. Employers may also be able to benefit from a shift in the effort bargain, confident in the expectation that labour supply will be endlessly replenished by new cohorts. Such business models can be described as predatory in two basic senses. First, they seek to take advantage of vulnerable employees, who are impeded in one way or another from challenging underpayments. Second, they seek to steal a march on competitors, who may be more reluctant to underpay or less capable of doing so.61

2.48 The McKell Institute and other submitters62 told the committee that wage theft is fundamentally unfair, with ISA suggesting it gives the underpaying business a competitive advantage of around 10 per cent.63 The McKell Institute thinks it should not be tolerated amongst businesses and workers doing the right thing, writing:

59 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 12.
60 Mr Mohammed Abdillahi, Member, UWU, Committee Hansard, 11 March 2021, p. 8.
61 Iain Campbell, ‘Temporary migrant workers, underpayment and predatory business models’, in Andrew Stewart, Jim Stanford, Tess Hardy (eds), The wages crisis in Australia: what it is and what to do about it, University of Adelaide, p. 193 (accessed 12 March 2022). See also Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, p. 22.
62 See, for example, Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 11; Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, Committee Hansard, 11 March 2021, p. 23; Ms Jo Briskey, Official, UWU, Committee Hansard, 11 March 2021, p. 9.
63 Mr Matthew Linden, Deputy Chief Executive, ISA, Committee Hansard, 22 February 2022, p. 3.
... wage theft is fundamentally unfair for the majority of small, medium and large business owners who pay their staff correctly. Underpayment is anti-competitive behaviour – there should be a unity ticket between workers and the majority of employers who do the right thing to bring underpayment to an end - restoring the rights of workers, yes, but ensuring anti-competitive behaviour is stamped out, too.64

2.49 Underpayments also keep marginal or insolvent businesses afloat by using employees’ entitlements for cash flow. Ms Melinda Bolton told the committee of one case:65

They admitted to not paying the superannuation. Their reason for not paying it was that the business was in trouble and they couldn’t afford it. That was the gist of their defence.66

2.50 It also shifts the profit risk to workers rather than business owners, and undercuts businesses which pay all entitlements, pressuring them to also underpay or pay low:67

no employer should be rendered uncompetitive because they seek to comply with workplace laws. Our system is letting good, honest, and diligent employers down. The rule of law means nothing in industrial relations when the system encourages or even compels employers to undertake wage theft just to remain in business.

... the reality is that the competitive pressure, in particular the ability to survive when all of your competitors are paying below the safety net, makes it very hard at a first level to even have the motivation to comply ... This essentially means that competitive pressures to comply with laws are so great that it potentially renders you uncompetitive. So the biggest drivers of wage theft that we see are those competitive pressures where noncompliance is widespread.68

2.51 The NFAW observed the flow on effects of this competitive disadvantage:

64 M cKell Institute, Submission 55, p. [i].
66 Ms Melinda Bolton, Industrial Officer, UWU, Committee Hansard, 22 February 2022, p. 8.
68 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, pp. 10–12.
If between 30 and 85 per cent of businesses in a given industry sector are
underpaying, competitive pressure alone would bring that fact to attention
of the remaining complying employers. Complying employers agree:
according to the Black Economy Task force, ‘firms that comply with tax,
workplace relations and other regulatory requirements have told us that
they are consistently being outbid by those who break the rules’.69

2.52 There are negative consequences for businesses which are found to underpay
their staff—including loss of reputation and customer loyalty—particularly
where their brand is founded on ethical concerns.70

2.53 However, the committee also heard evidence that adverse publicity about
underpayments can have a perverse effect, with courts known to reduce
penalties on employers where publicity has damaged their reputation.71

2.54 The Cheesecake Shop told the committee that the cost of their compliance
system is around $940 000 or $4000 per employee—‘a significant imposition on
compliant small businesses (our franchisees). Extrapolation of this to the
economy as a whole gives an indication of the economy-wide cost of
complexity’.72

2.55 The committee also heard that industries where wage theft is common are less
attractive, making it more difficult to source workers. The horticulture
industry relies upon temporary migrant workers because it finds it difficult to
attract local workers, as the Retail Supply Chain Alliance points out:

It is an open question whether so-called labour shortages in regional areas
are genuine or a simply an inevitable factor caused by the destruction of
employment conditions in the sector.73

Impacts on the economy
2.56 Wage theft, along with insecure work,74 reduces disposal income and
household spending leading to a reduction in consumer demand. Lower
consumer demand means less money flows to businesses, consumer prices are
kept low, there are fewer employment opportunities and wages stagnate—
creating a downward economic spiral.75

69 NFAW, Submission 37, p. 7.
70 Wage Theft Australia, Submission 109, p. 8; Chamber of Commerce and Industry WA (CCIWA),
Submission 41, p. 7.
71 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 23.
72 The Cheesecake Shop, Submission 5, p. 2.
73 Retail Supply Chain Alliance, Submission 74, (Attachment 1), p. 9.
74 Senate Select Committee on Job Security, The job insecurity report, February 2022, p. 32 (accessed
7 March 2022).
Labour Office, and World Trade Organization, Labour Markets, Institutions and Inequality: Building
2.57 Wage stagnation has been a major economic concern over recent years given its circular and overall stifling effect on Australia’s economy and its contribution to wage inequality and declining living standards, in both the short and medium term. Mr Josh Bornstein from Maurice Blackburn Lawyers explained:

The largest contributor to economic growth over the last 35 years was transfer from wages. In other words, what we’ve seen happen is business has fundamentally changed its behaviour and sought to maximise its profit by cost cutting and wage suppression—an entirely different approach to running a business and to making a buck.

We see that every day now. We will comfortably make a decade of wage stagnation in this country.

2.58 The Governor of the Reserve Bank of Australia (RBA), Mr Philip Lowe, warned recently that while wages are expected to grow, inflation is pegged to overtake any wage increases. The RBA is also anticipated to raise interest rates. Head of the ANZ Bank, Mr Shayne Elliott warned that high inflation will persist for some time, resulting in weaker confidence, and longer-term shifts in consumer behaviour.

2.59 Mr Lowe advised that Australians will effectively be hit with a real pay cut of 1.5 per cent this year because sluggish wages growth won’t meet the anticipated surge in inflation and soaring prices, putting families under further pressure.
2.60 A more equal wage distribution encourages productivity improvements and specialisation in higher value-adding industries, while low wage, low value-adding industries cannot compete.82

2.61 Underpayments and low wages also appear to be contributing to the failure to complete apprenticeships. This has the effect of reducing the flow of qualified local staff, leading employers to argue for more temporary migrant workers to fill the gaps.83

2.62 Low incomes increase reliance on taxpayer support through pensions, payments, and offsets available through the tax system,84 while at the same time negatively impacting tax revenues at both state and federal levels.85 Dr Stephen Clibborn puts it this way:

The victims of wage theft and other employer noncompliance are certainly not just the workers: they are the compliant employers, robbed of a level playing field; they are government coffers, for tax benefits; and they are all of us, in terms of receiving the benefits from those taxes.86

2.63 Wage theft is unlawful and has a detrimental effect on workers and can be an indicator of modern slavery.87 WEstjustice told the committee:

There have also been numerous reports of ‘slave-like conditions’ by visa holders, and our services have significant concerns about the increase in exploitation of workers, including instances of underpayments, sexual harassment and sexual assault …88

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82 McKell Institute, Submission 55, Attachment 1 (McKell Institute, Ending Wage Theft: Eradicating underpayment in the Australian workplace, March 2019), pp. 22–23; Ms Emma Dawson, Executive Director, Per Capita, Committee Hansard, 11 March 2021, p. 31. See, for example, James Galbraith, Inequality and Instability: a study of the world economy just before the great crisis, Oxford University Press, 2012.


84 Maurice Blackburn Lawyers, Submission 48, p. 13; FSC, Submission 87, pp. 1–2.

85 Maurice Blackburn Lawyers, Submission 48, p. 13; Ms Emma Dawson, Executive Director, Per Capita, Committee Hansard, 11 March 2021, p. 31.

86 Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, p. 22.


88 WEstjustice, Submission 47, p. 15.
2.64 The Law Council of Australia (LCA) similarly submitted that 'acute cases of underpayment' may constitute 'modern slavery', requiring disclosure under the Modern Slavery Act 2018, and worth of consideration and greater enforcement under the Criminal Code Act 1995.\textsuperscript{89}

2.65 The next chapter considers the current regulatory framework and how it both protects workers and facilitates underpayment.

\textsuperscript{89} LCA, Submission 90, pp. 9–10.
Chapter 3
Current regulatory framework

Overview
3.1 The current workplace relations landscape in Australia is largely characterised by decentralised enterprise level arrangements. The national workplace relations system (the Fair Work system) was introduced by the *Fair Work Act 2009* (Fair Work Act) and commenced on 1 July 2009. It replaced the highly controversial *Workplace Relations Amendment (Work Choices) Act 2005* and retained the general structure of a unitary national system.¹

3.2 Broadly, the Fair Work system establishes a safety net comprising the national minimum wage, workplace protections, and nationally applicable awards for specific industries and occupations, as well as establishing the agencies responsible for regulation of the system. The national framework also includes a civil penalty regime designed to ensure compliance.

3.3 The fair work system assumes that established checks and balances will deter employer non-compliance in the first instance and provide avenues for redress for workers where non-compliance does occur.² However, there is a growing body of evidence showing significant, sustained, increasing levels of employer non-compliance with minimum National Employment Standards (NES)³ and other aspects of the Fair Work system.

System coverage
3.4 In 2009 all Australian states and territories (except Western Australia), referred a substantial portion of their employment law powers to the Commonwealth.⁴ As such, the Fair Work system covers the majority of workplaces in Australia,

¹ See: Senate Education and Employment References Committee, *Corporate avoidance of the Fair Work Act 2009*, September 2017, Chapter 2. Australia’s industrial relations framework was examined in more detail in this Senate inquiry.


³ The national minimum wage and the NES make up the minimum entitlements for employees in Australia. An award, employment contract, enterprise agreement or other registered agreement can’t provide for conditions that are less than the national minimum wage or the NES. It is illegal for them to exclude the NES. See https://www.fairwork.gov.au/employment-conditions/national-employment-standards.

⁴ The Constitution does not confer on the Commonwealth (Cwth) Parliament the power to make laws on all subjects. Instead, it lists the subjects the Cwth Parliament can make laws. Section 109 of the Constitution provides that if a valid Cwth law is inconsistent with a law of a State (or Territory) Parliament, the Cwth law operates and the State law is invalid to the extent of the inconsistency.
with an estimated 87 percent of employees across the country covered by the national system.\(^5\)

**Regulatory bodies and organisations**

3.5 The two key regulatory bodies with responsibility for the administration of the Fair Work system—the Office of the Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC) were established under the Fair Work Act in 2009 and 2014 respectively.\(^6\) Other organisations that make up the Fair Work system include:

- the Registered Organisations Commission (ROC);
- the Australian Building and Construction Commission (ABCC);
- the Federal Court of Australia (FCA); and
- the Fair Work Division of the Federal Circuit and Family Court of Australia (FCFCA).\(^7\)

**Office of the Fair Work Ombudsman**

3.6 The FWO is an independent statutory office with primary responsibility for promoting and monitoring compliance with the Fair Work Act and associated instruments. Its stated purpose is to 'promote harmonious, productive, cooperative and compliant workplace relations in Australia and compliance with the Act and fair work instruments'.\(^8\)

3.7 To achieve this purpose, the FWO's functions, as set out under section 682 of the Fair Work Act broadly include:

- providing education, assistance and advice to employees, employers, fly-in fly-out workers and their employing organisations;
- promoting and monitoring compliance with workplace laws;
- investigating any breaches of the Fair Work Act;
- taking appropriate enforcement action;
- referring matters to relevant authorities; and
- performing its statutory functions efficiently, effectively, economically, and ethically.\(^9\)

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5 For details of workplaces not covered by the Fair Work system see Fair Work Ombudsman (FWO), *The Fair Work system* (accessed 7 March 2022).


6 The Fair Work Commission and FWO are established under Part 5–1 and Part 5–2 of the Fair Work Act respectively. FWO, *Australia’s industrial relations timeline* (accessed 22 March 2022).


FWO Resourcing

3.8 A number of submissions received considered the resourcing of the FWO and recommended that funding be increased to enable it to effectively perform its functions. In the period 2009–10 to 2015–16, government resourcing for the FWO decreased by $36.6 million (approximately 25 percent), dropping to the lowest level of funding since its inception at less than $108 million.

3.9 In 2016–17 the FWO’s budget was combined with that of the ROC. Since the lowest point in 2015–16, the FWO and ROC’s combined budget has increased by just under 11 percent to approximately $119.6 million in 2018–19, as illustrated in Figure 3.1.10

Figure 3.1 FWO and ROC—revenue from government 2009–10 to 2021–22

Graph developed from figures provided by Dr Stephen Clibborn, Submission 89, p. 5.

3.10 At a public hearing for the inquiry, Associate Professor Anna Boucher pointed to the United Nations’ International Labour Organization’s (ILO) recommendation for one inspector for every 10,000 workers. Associate Professor Boucher observed that in 2020 the FWO were ‘doing a very good job’ notwithstanding low inspector levels of 16 inspectors per one million workers, and internationally lower levels of inspections’.11

3.11 A broad range of stakeholders informed the committee that funding of the FWO is inadequate and additional resourcing is required.12 Highlighting this

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10 Dr Stephen Clibborn, Submission 89—Attachment 6, [p. 3].
11 Associate Professor Anna Boucher, Private capacity, Committee Hansard, 18 September 2020, pp. 28 and 32.
12 See, for example, Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, pp. 20 and 22; Ms Melissa Kennedy, Submission, 3, p. 9; WA Government, Submission 7, pp. 6–8; Queensland Government, Submission 19, pp. 5 and 10; Chamber of Commerce and Industry WA (CCIWA), Submission 41, pp. 11–12; WEstjustice, Submission 47, p. 40; Community and Public Sector Union (CPSU), Submission 56, p. [2]; Restaurant and Catering Australia (R&CA),
point in his verbal evidence to the committee, Mr Mathew Kunkel, Director of the Migrants Workers Centre stated:\textsuperscript{13}

Sorry to our colleagues of the FWO, who are working hard, but they don’t have enough money and they don’t have enough resources, and the way they’re set up is not to be that cop in the first place …

… there should be some other additional resources, because there’s such a widespread issue with wage theft in this community.

3.12 A minority of other witnesses advised that sufficient additional funding could never be provided, and that, rather, structural changes are required. On this point, Mr Liam O’Brien, Assistant Secretary of the Australian Council of Trade Unions (ACTU) advised the committee:\textsuperscript{14}

We’ve seen increased funding to the Fair Work Ombudsman, including increased civil penalties potentially, but we are still seeing a rise in noncompliance.

The Fair Work Ombudsman cannot be in every workplace. They cannot be in every workplace to support workers to firstly identify whether they’ve been paid incorrectly and then to take action to remedy it.\textsuperscript{15}

3.13 This evidence was supported by data provided by Mr Sunil Kemppi from the ACTU:

... we detailed ... the amount of money recovered, taken from their annual reports, by the Fair Work Ombudsman. If you look at those figures—about $30-odd million per year—it's quite a small figure compared to the estimated billions of dollars in wage theft that is committed each year. That gives an example of the scale of the inspectorate's ability to pursue wage theft versus the actual problem in itself. The 4½ thousand-odd permit holders would certainly be able to have a much greater effect if given the power to do so.\textsuperscript{16}

3.14 The FWO's enforcement and compliance activities and their impact are discussed later in this chapter.

\textit{Fair Work Commission}

3.15 The FWC is Australia's national workplace relations tribunal. Its functions and powers are stipulated in section 576 of the Fair Work Act and include:

\textit{Submission 70, p. [9]; Business Council of Australia (BCA), Submission 69, p. 5; Law Council of Australia (LCA), Submission 90, pp. 13–14.}

\textsuperscript{13} Mr Mathew Kunkel, Director, Migrants Workers Centre, \textit{Committee Hansard}, 11 March 2021, p. 15.

\textsuperscript{14} See, for example, Dr Tess Hardy, Melbourne Law School, \textit{Submission 85}, p. [10]; Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, \textit{Committee Hansard}, 11 March 2021, pp. 21 and 24.

\textsuperscript{15} Mr Liam O’Brien, Assistant Secretary, Australian Council of Trade Unions (ACTU), \textit{Committee Hansard}, 18 September 2020, p. 12.

\textsuperscript{16} Mr Sunil Kemppi, Legal and Industrial Officer, Australian Council of Trade Unions (ACTU), \textit{Committee Hansard}, 18 September 2020, p. 17.
• setting the national minimum wage and wages in modern awards;
• making, reviewing and varying modern awards;
• facilitating the bargaining and making of enterprise agreements;
• dealing with general protections,\textsuperscript{17} unlawful termination of employment, anti-bullying, and unfair dismissal claims;
• issuing orders to cease or suspend industrial action;
• determining applications for right of entry permits;
• resolving collective and individual workplace disputes through alternative dispute resolution procedures; and
• undertaking other functions conferred under the Fair Work Act.\textsuperscript{18}

\textbf{Registered Organisations Commission}

3.16 The ROC was established in 2017 by the \textit{Fair Work (Registered Organisations) Act 2009} (RO Act) to increase the financial transparency, governance and accountability of registered organisations such as employer or occupational associations, unions and enterprise associations.\textsuperscript{19} Working closely with the FWC, its functions and powers include:

• promoting the efficient management of registered organisations;
• providing education, help and advice to organisations and members;
• monitoring, conducting inquiries and investigating organisations; and
• enforcing compliance.\textsuperscript{20}

\textbf{Australian Building and Construction Commission}

3.17 The ABCC was established by the \textit{Building and Construction Industry (Improving Productivity) Act 2016} (BCIIP Act) on 2 December 2016. Complementing the role of the FWO, the ABCC has the primary responsibility of monitoring compliance with and enforcing Commonwealth workplace relations laws that apply to the building and construction industry, including those relating to wages and entitlements and coercion.\textsuperscript{21} Its jurisdiction is defined under the BCIIP Act as a 'building industry participant' who is involved in 'building work'.\textsuperscript{22}

\textsuperscript{17} There is no cap on compensation for general protections claims made to the FWC.


\textsuperscript{19} ROC, \textit{Our role} (accessed 8 March 2022); ROC, \textit{Find a registered organisation} (accessed 8 March 2022).

\textsuperscript{20} ROC, \textit{Our role} (accessed 8 March 2022).

\textsuperscript{21} ABCC, \textit{Overview} (accessed 8 March 2022).

\textsuperscript{22} The terms 'building industry participant' and 'building work' are defined under sections 5 and 6 of the BCIIP Act respectively. See also ABCC, \textit{Our jurisdiction} (accessed 8 March 2022).
Federal Court of Australia

3.18 The FCA has jurisdiction over all civil and criminal matters arising under the Fair Work jurisdiction.23

3.19 Where applications relating to an unfair dismissal, termination of employment, or contravention of protected rights at work (or general protections) cannot be conciliated at the FWC, an applicant may then commence proceedings in the FCA, or alternatively, in the Fair Work Division of the FCFC.

Federal Circuit and Family Court of Australia

3.20 Since 1 July 2009, all matters that fall under the jurisdiction of the Fair Work Act can be heard in the Fair Work Division of the FCFCA.

3.21 The FCFCA was established to provide a simple and accessible alternative to litigation in the FCA and aims to operate informally and to use streamlined procedures to finalise matters in federal jurisdictions promptly and efficiently.24

3.22 The effectiveness of underpayment litigation and the small claims process are discussed later in this chapter.

Australia's system of wages and entitlements

3.23 Importantly, the Fair Work system undertakes the role of setting out minimum wages and conditions for employees in Australia as follows:25

- **national minimum wage**—currently $20.33 per hour, with additional loadings applicable for casual work, and special rates of pay for junior employees, employees with a disability, apprentices and others in training;
- **National Employment Standards (NES)**—11 minimum standards relating to hours of work and leave entitlements set out in the Fair Work Act. Casual employees are only eligible for some entitlements. Of relevance to this inquiry are the provisions relating to:
  - maximum weekly hours of work—38 hours per week, plus reasonable additional hours;
  - notice of termination and redundancy pay—up to five weeks' notice of termination and up to 16 weeks' redundancy pay, both based on length of service;

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23 The Employment and Industrial Relations National Practice Area of the Federal Court of Australia (FCA) deals with matters arising under the Fair Work jurisdiction, including matters transferred or appealed from the Federal Circuit and Family Court (FCFCA) or the FWC.

24 FCFCA, About the Federal Circuit Court (accessed 8 March 2022).

25 Noting that the national minimum wage and NES are generally unable to be overridden by awards and enterprise agreements under s.55 of the Fair Work Act.
public holidays—a paid day off on a public holiday, except where reasonably requested to work; and
other entitlements—relating to leave, and the provision of the Fair Work Information Statement to all new employees;26

- **general workplace protections**—workplace rights, industrial activities, and unlawful discrimination so that workers are protected from threats or actual adverse actions in relation to their employment, coercion, misrepresentation of workplace rights, and undue influence or pressure to change conditions of employment;27

- **modern awards**—legally enforceable arrangements that set minimum pay rates, entitlements, and conditions on top of the minimum wage and NES applicable to classifications of workers in particular industries, or in some cases, particular occupations. There are currently 123 modern awards of general application;28

- **registered agreements**—including enterprise agreements and registered agreements. Where such agreements exist awards do not apply, however agreements are subject to the 'better off overall test' (BOOT) requiring that no employee be worse off under the agreement than they would be under the NES or the relevant award;29

- **employment contracts**—individual terms and conditions of employment, including pay and entitlements set out in a written or verbal employment contract between an employer and employee. These terms and conditions are also subject to the BOOT with regard to the NES, or any modern award, enterprise agreement or other registered agreement that may apply.30

3.24 Together these aspects work together or provide a 'safety net' of entitlements for employees covered by the Fair Work system, as illustrated by Figure 3.2.

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26 For full entitlements and casual exclusions provided for by the NES see: FWO, *National employment standards* (accessed 8 March 2022).
29 Other than enterprise agreements, examples of registered agreements include collective, greenfields, certified, Australian workplace, and individual transitional employment agreements. Enterprise bargaining is the process by which one or more employers and employees and their bargaining representatives negotiate the terms and conditions which will be included in an agreement.
3.25 Legislative amendments have been passed in recent years to:

- increase certain penalties;
- change entitlements and obligations for casual employees;
- change liabilities for franchisees or subsidiaries in relation to employees;
- create new entitlements in relation to family and domestic violence, parental and compassionate leave;
- improve protections against sexual harassment;
- ensure the regular review of modern awards; and
- enact temporary changes relating to the pandemic.31

Performance of the ‘safety net’

Is it a highly complex system?

3.26 The committee heard a range of evidence about the complexity of Australia’s award system, with some blaming excessive complexity and frequency of changes for ignorant or inadvertent employee underpayments.32

3.27 For example, the Institute of Certified Bookkeepers (ICB) and the National Retail Association told the committee that many employers want to ‘do the

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32 See, for example, Australian Retailers Association, Submission 72, p. 3; BCA, Submission 69, p. 1; Young Liberals Movement of Australia, NSW, Submission 16, p. 3; Chartered Accountants Australia and New Zealand (CAANZ), Submission 14, pp. 1 and 2–3; Mr Glenn Hutchinson, Submission 26, pp. 1–7; Master Grocers Australia Ltd, Submission 28, p. 7; National Foundation for Australian Women (NFAW), Submission 37, p. 7; CCIWA, Submission, pp. 2 and 5–6; Housing Industry Association (HIA), Submission 66, pp. 5–8.
right thing’ but the complexity of the system makes this difficult. They outlined the considerations employers need to make when engaging an employee, with the ICB advising that ‘it is a prohibitively costly process to endeavour to ensure that all possible implications of an employment arrangement have been considered and applied’.

3.28 The Institute argued that tools provided by the FWO are in themselves complex, and that there is uncertainty and ambiguity in how awards and requirements are imposed, even when advice is sought directly from the FWO or court precedents.

3.29 Ai Group and the Cheesecake Shop submitted that this complexity increases compliance costs and contributes to inadvertent underpayment—particularly for small businesses. The Cheesecake Shop told the committee:

Not even large businesses can get it right. What hope do Mum and Dad operators have? We have found that compliance is best achieved from within, by ensuring all stakeholders are clear on their obligations. Employees are the best and cheapest form of compliance audit – provided they know what they are entitled to. Simplify the minimum wage and award system to improve compliance and lower compliance costs.

3.30 As discussed in Chapter 1, some employers have also blamed errors on their payroll system.

3.31 In line with Ai Group, the Chartered Accountants Australia and New Zealand (CAANZ) advised that the introduction of Single Touch Payroll has ‘helped increase employers’ focus on payroll’, as well as providing more data

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33 Institute of Certified Bookkeepers (ICB), Submission 4, pp. 3–5; National Retail Association, Submission 49, pp. 5–8.

34 ICB, Submission 4, pp. 3–5. See also Mr Glenn Hutchinson, Submission 26, pp. 4–5; CCIWA, Submission, pp. 6–8.

35 Ai Group, Submission 62, pp. 2–3.

36 The Cheesecake Shop, Submission 5, p. 2.

37 For example, CommBank and Lush blamed an error in the system, while Woolworths blamed the ‘complexity and lack of flexibility in the industrial relations system’.


38 Ai Group, Submission 62, p. 4.

39 CAANZ, Submission 14, pp. 3–4.
to assist the Australian Taxation Office (ATO) and FWO identify non-compliance.\textsuperscript{40}

3.32 Other evidence maintained that the Fair Work system is not overly complex, illustrated by the fact that many employers pay their employees properly.\textsuperscript{41} Nevertheless, some witnesses stated that meeting staff payment obligations is a requirement and responsibility for business owners. Witnesses also pointed to the public expectation that large corporations in particular, meet their obligations, in the same way they are required to meet other obligations such as those relating to taxation.\textsuperscript{42}

3.33 In 2020, the FWO expressed its impatience with non-compliant employers:

... the results [of its audits] were a wakeup call to employers that they need to prioritise workplace law compliance.

"Nearly three quarters of employers that breached the law said they weren't aware of the rules, which is not an excuse. Businesses are failing the basic requirements of being a responsible employer if they are not carrying out adequate due diligence before hiring".\textsuperscript{43}

3.34 Unions NSW agreed with this point, noting that employers competently meet other, far more complex business obligations including commercial leases, sale and purchase, taxation and tax minimisation, safety, and other sector-specific requirements.\textsuperscript{44}

3.35 Underlining the same view, the UNSW Law Society observed:

... in comparison to the complexity of tax laws and lease agreements managed by these businesses, the streamlined Modern Award system has been considered by legal and business professionals as unlikely to cause genuine confusion.\textsuperscript{45}

3.36 However, despite the more recent simplification and modernisation of awards,\textsuperscript{46} a 2015 Productivity Commission (PC) review found elements of complexity remain in the industrial relations system:\textsuperscript{47}

\textsuperscript{40} Mr John Ford, Acting Deputy Commissioner, Superannuation and Employer Obligations, Australian Taxation Office (ATO), \textit{Committee Hansard}, 18 September 2020, p. 5.

\textsuperscript{41} Maurice Blackburn Lawyers, \textit{Submission} 48, p. 2.

\textsuperscript{42} See, for example, NSW Society of Labor Lawyers, \textit{Submission} 23, pp. 3–4; Finance Sector Union of Australia, \textit{Submission} 65, p. 9; BCA, \textit{Submission} 69, p. 1.

\textsuperscript{43} FWO, \textit{Audits recover $1.3 million for underpaid workers}, \textit{Media release}, 11 March 2020 (accessed 28 February 2022).

\textsuperscript{44} Unions NSW, \textit{Submission} 31, pp. 7–8.

\textsuperscript{45} UNSW Law Society, \textit{Submission} 36, pp. 10–11.

\textsuperscript{46} Mr Liam O’Brien, Assistant Secretary, ACTU, \textit{Committee Hansard}, 18 September 2020, p. 11; NSW Young Labor, \textit{Submission} 54, p. 5; Mr Matthew Linden, Deputy Chief Executive, ISA, \textit{Committee Hansard}, 22 February 2022, p. 3. For example, the number of awards has decreasing from around 3 000 to just 122, and the introduction of Single Touch Payroll.
People are confused by the system, and some parties that should have a bigger voice in it — consumers, the unemployed and underemployed — have marginal influence. There are unquestionable inefficiencies, remnant unfairness, some mischief and absurd anachronisms ... The bulk of stakeholders and this inquiry’s analysis suggests that ... the system needs renovation, not a 'knockdown and rebuild'.

3.37 The 2021 Global Payroll Complexity Index found that Australia’s payroll complexity is not terribly high, rating it 21 out of 40 countries, 'based on mandatory legislative, reporting, process and security regulations'. Moreover, research has shown that, in countries with simpler wage systems, migrants also bring high rates of claims for underpayment.

3.38 Other witnesses told the committee that underpayments do not result from system complexity:

It’s often trotted out that the award system is too complex for business owners and that they are often misclassifying employees, because of the complexity of awards. This is a nonsense argument. Effectively, most small businesses do not have multiple awards that they need to deal with. Large businesses may, but large businesses can afford to get it right.

3.39 Mr Mathew Kunkel, Director of the Migrants Workers Centre agreed, saying:

Complexity is not the issue; it’s the greed of employers, and it’s the race to the bottom because everyone else is doing it. If we want to lift the standard for all workers in this country, we have to end this wage theft pandemic.

3.40 The ACTU also agreed, stating 'the system today has never been simpler for employers to comply with', with ready access to awards online, additional tools and advice also available.

3.41 In other instances, underpayment of employees has been blamed on poor employer processes and inadequate recordkeeping.

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47 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 11; NSW Young Labor, Submission 54, p. 5; Mr Matthew Linden, Deputy Chief Executive, ISA, Committee Hansard, 22 February 2022, p. 3.


50 Associate Professor Anna Boucher, Umeya Chaudhuri and James Hall, Submission 43, p. 8.

51 Ms Emma Dawson, Executive Director, Per Capita, Committee Hansard, 11 March 2021, p. 32.

52 Mr Mathew Kunkel, Director, Migrants Workers Centre, Committee Hansard, 11 March 2021, p. 16.

53 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 11. See also NFAW, Submission 37, p. 8.

54 University of Sydney, Employee payments review, 22 October 2021 (accessed 4 February 2022); Finance Sector Union of Australia, Submission 65, p. 9.
Overpayments

3.42 In support of claims of system complexity causing underpayments, the Australian Payroll Association revealed in 2020 that 27 of 39 audits on clients’ pay processes in the previous 18 months had uncovered overpayments, with some errors estimated to cost employers millions of dollars.

3.43 This was supported by evidence from corporate entities such as the Australian Retailers Association (ARA), Qantas and Wesfarmers, and the former FWO, Ms Natalie James, who advised that ‘overpayments often arose in the firm’s audits but that clients and the FWO were primarily concerned with underpayments’. Most employers do not seek the return of overpayments, given the costs associated with recovery.

3.44 However, the National Foundation for Australian Women (NFAW) stated that it ‘is deeply sceptical of the "honest mistake" response made by many employers and employer associations to findings of systemic wage theft’. This echoed the findings of a previous Senate committee inquiry into corporate avoidance of the Fair Work Act. That committee observed that the frequency and quantum of overpayments are not as prevalent as underpayments, as might be expected from a so-called complex system:

The committee is not persuaded by arguments suggesting that underpayment is usually the result of oversight, or that the law is too complex for employers to understand. While genuine errors do occur, these tend not to consistently favour the pecuniary interests of one side only—employees may be mistakenly underpaid or overpaid. As the committee did not receive any evidence suggesting that thousands of vulnerable workers have been enjoying millions of dollars’ worth of accidental overpayment it is not convinced that the levels of underpayment are due to ‘administrative errors’.

55 Australian Retailers Association, Submission 72, p. 3.

56 Aurizon, Qantas, University of Sydney and Bupa appear to be well publicised cases that have involved overpayments as well as underpayments. Other examples include overpayments only, such as the overpayment of Australian Communications and Media Authority (ACMA) executive Chris Jose See, for example, Anthony Klan, Josh Frydenberg caught out in salary scandal', Independent Media, 18 January 2022 (accessed 4 February 2022).


58 National Foundation for Australian Women, Submission 37, p. 19. See also Shop, Distributive and Allied Employees Association (SDAEA), Submission 75, p. 33; Unions Tasmania, Submission 79, p. 12.

Fair Entitlements Guarantee

3.45 Established under the *Fair Entitlements Guarantee Act 2012* (FEG Act), the Fair Entitlements Guarantee (FEG) is the evolution of the General Employee Entitlements and Redundancy Scheme (GEERS) set up in 2000 by the Howard Government. The scheme is a legislative safety net compensation scheme of last resort that ensures eligible employees receive payment for certain basic employment entitlements, where their employer is unable to pay because they have gone into liquidation or become bankrupt. Its coverage includes:

- wages—capped at 13 weeks;
- annual and long service leave;
- payment in lieu of notice—capped at five weeks; and
- redundancy pay—capped at four weeks per full year of service.60

3.46 After employment entitlements have been paid to an employee under the FEG scheme, the FEG Act allows for the Commonwealth to take the place of the employee as the subrogated creditor, with priority of claims in the liquidation, over other unsecured creditors.61

3.47 Current eligibility requirements to receive financial assistance under the FEG scheme require that employees are either an Australian citizen or are/were the holder of a permanent visa or special category visa that allows them to stay and work in Australia (at the time their employment ceased).62

3.48 Notably under the FEG, unpaid Superannuation Guarantee (SG) contributions cannot be claimed. Individuals must pursue unpaid SG contributions through the ATO.

Protections for independent contractors

3.49 Employment arrangements of independent contractors and sham contracting were considered extensively by the Senate Select Committee on Job Security.63

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60 Contractors are not eligible for FEG assistance and unpaid superannuation guarantee payments are not covered by the FEG scheme.

The indexed maximum weekly wage cap threshold under the FEG scheme is currently $2,529.


Under the *Corporations Act 2001*, employees of insolvent employers are assigned priority ahead of other creditors in a company's liquidation.


63 Arrangements in relation to independent contractors and sham contracting were considered extensively by the Senate Select Committee on Job Security.
Box 3.1 Recent court cases overturn precedents

Recent cases about the nature of employment relationships have overturned the long-held precedent for courts to look beyond a worker’s contract to the reality of the work relationship (provided it is not a sham arrangement). In this case the court relied almost solely on the terms of the agreement.

The High Court of Australia held that two truck drivers who worked 9-hour days for a company for almost 40 years under a partnership arrangement were not employees entitled to minimum pay and conditions, including superannuation and leave.

Chief Justice Kiefel and Justices Keane and Edelman stated ‘the only kinds of rights with which courts of justice are concerned are legal rights. The employment relationship with which the common law is concerned must be a legal relationship. It is not a social or psychological concept like friendship’.

Businesses welcomed this decision, citing greater certainty for employers, with the decision giving support to Uber and Deliveroo’s claims that their drivers are not employees, however it is expected to encourage the engagement of more contractors in insecure employment arrangements in the longer term, and, with clever contract drafting, ensure that businesses avoid meeting minimum pay and conditions.

In other similar matters, the High Court found in Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] and Workpac v Rossato [2021] that a formal agreement primarily determines the nature of an employment relationship, with all three cases having profound implications for employment law.64

The FWO is considering its advice further in light of the findings.65

3.50 The Independent Contractors Act 2006 provides some workplace protections for contractors, however competition laws impact their ability to collectively bargain and establish better conditions.66


Senate Select Committee on Job Security, First interim report: on-demand platform work in Australia, June 2021, Chapter 5.


65 FWO, Independent contractors.
Sham contracting

3.51 The Fair Work Act also protects individuals in circumstances of sham contracting. Its provisions make it unlawful for employers to:

- misrepresent an employment relationship as a contract for services;
- dismiss an employee in order to re-engage them as an independent contractor to perform the same, or substantially the same, work; and
- knowingly making a false statement in order to persuade an individual to enter into a contract for services under which that individual will perform particular work as an independent contractor and where that work is, or has at any time, been performed by an employee.

How are independent contractors impacted by wage theft?

3.52 The committee heard that employers use independent contracting arrangements and sham contracting to underpay workers, with Dr Kristin van Barneveld from the NFAW telling the committee:

> Workers are being pushed into those arrangements so as to avoid things like paying workers comp premiums, potentially being able to pay them less than the award rate of pay, avoiding having to pay tax on their behalf and those sorts of things. Vulnerable workers can be easily pushed into these sorts of scenarios, as you would well know.

3.53 WEstjustice submitted that ‘the exploitation of members of newly arrived and refugee communities through the use of sham contracting arrangements is rife’. The Australian Services Union (ASU) agreed, elaborating that insecure work and the unequal power balance means that these workers will ‘often “accept” a wage that is under the legal minimum for their industry’ and miss out on paid leave, and superannuation contributions.

3.54 The committee also heard that workers may not be aware of the significant differences between an employee and an independent contractor. Moreover, understanding and applying the multi-factor test to determine the type of

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69 Dr Kristin van Barneveld, Social Policy Committee Member, NFAW, Committee Hansard, 18 September 2020, p. 40.

70 WEstjustice, Submission 47, p. 17.

71 Australian Services Union (ASU), Submission 61, p. 8.

72 Attorney-General’s Department, Submission 80, p. 7.

73 See, for example the ATO’s version of the multi-factor test at ATO, Employee/contractor decision tool (accessed 22 March 2022).
employment relationship can be difficult, particularly for vulnerable workers. Workers who are found to be independent contractors have 'extremely limited' avenues for assistance, as they fall outside the remit of the FWO and many community legal centres.74

3.55 Ms Gabrielle Gooding from the National Tertiary Education Union (NTEU) also revealed that workers are being pushed even further, being forced to form companies so that employers can 'dodge the independent contractors' obligations'. She told the committee:

We say that sham contracting is the most egregious form of wage theft. Not only does it prevent the individual being paid the correct award amount, which almost uniformly happens in the higher education providers, but also it means that they don't [receive] any superannuation; therefore, they don't get any temporary or permanent disability payment if they have a serious illness or injury, and they don't have any workers compensation. Their only choice is to sue their employer if they're negligent. 75

Wages compliance and enforcement regime

3.56 Encouraging compliance and an enforcement regime are vital to ensuring that workers are paid appropriately, with a review of international jurisdictions indicating that:

If the compliance rate [with minimum wages] is too low then the ability of minimum wages to reduce inequality or to have spillover effects in other sectors is compromised. The fact remains that 'simply legislating a minimum wage will not make it happen'.76

3.57 Wage underpayment is a civil offence under the Fair Work Act,77 which the FWO and ABCC are responsible for pursuing, and they do so on a strategic, risk-based basis.78

3.58 Regulators attempt to address the issue of underpayments through tailored education and assisted dispute resolution, with the intent of resolving workplace issues and returning monies owed to employees quickly. This

74 WESTjustice, Submission 47, pp. 19 and 24; See also Maurice Blackburn Lawyers, Submission 48, p. 7.
75 Ms Gabrielle Gooding, National Assistant Secretary of the National Tertiary Education Union (NTEU), Committee Hansard, 10 March 2021, p. 6.
78 The FWO's Compliance and Enforcement Policy is available online at: https://www.fairwork.gov.au/about-us/our-policies
approach also enables the FWO to focus its resources on matters deemed more serious, and warranting general and specific deterrence.\textsuperscript{79}

3.59 However, the committee heard that mediation, as an avenue for resolving an underpayment claim, is voluntary and does not always result in positive outcomes for claimants:

When a worker reports breaches such as wage theft to the FWO, which is responsible for promoting compliance with workplace laws, its response in most cases is merely inviting the employer and the worker to participate in mediation. The mediation is a voluntary process, and some employers nonchalantly refuse to participate in it. Even when the mediation takes place, it could fail to produce any conclusion, in which case the FWO advises the worker to take the complaint to court. Most workers find court procedures (including small claims tribunals) too complex, costly, and time consuming and reluctantly give up pursuing justice.\textsuperscript{80}

3.60 More targeted campaigns are undertaken by the FWO where industry intelligence indicates non-compliance in a particular region or a sector.\textsuperscript{81} The FWO commonly reserves the use of its statutory enforcement tools for cases involving serious non-compliance, and matters considered to be in the public interest. This includes instances where there has been a blatant disregard of the law, or exploitation of vulnerable workers, or where systemic issues of non-compliance exist. These enforcement processes include:

- workplace investigations;
- compliance notices;
- infringement notices;
- compliance partnerships;
- enforceable undertakings; and
- litigation.\textsuperscript{82}

3.61 The enforcement work of the FWO is broadly discussed in Chapter 1, including its recovery of underpayments through a variety of avenues. In June 2019, Ms Parker noted that enforceable undertakings and contrition payments would thereafter be the default position of the FWO in cases of larger, corporate underpayments that are self-reported to the regulator:

Our default position now is that an enforceable undertaking with the FWO will be required, as a minimum, and those enforceable undertakings will require the employer to meet the cost of getting their underpayments verified by experts contracted to the FWO, so that the burden of calculating what is owed is not put onto the taxpayer.

\textsuperscript{79} FWO, Submission 39, p. 5.

\textsuperscript{80} Migrant Workers Centre (MWC), Submission 53, pp. 5–6.

\textsuperscript{81} Fair Work Act 2009, s. 708–709.

\textsuperscript{82} FWO, Compliance and enforcement (accessed 9 March 2022).
Employers that self-report should also expect to make a contrition payment reflecting the seriousness of their contravening conduct, because it is simply not acceptable for businesses to throw their hands up when they’ve been underpaying workers and expect to move on without consequences once the back pay is in the workers’ accounts.83

3.62 Where the FWO decides not to pursue a matter, or where a workplace issue cannot otherwise be resolved voluntarily, workers have the option of initiating small claims proceedings in a state or territory court or the FCFCA. The small claims process is available where:

- the claim is for up to $20,000;
- the entitlement is covered under Australian workplace laws; and
- the statutory time limit has not expired (usually six years from when the entitlement was due to be paid).84

3.63 In its March 2019 report, the Migrant Workers’ Taskforce discussed the apparent under-utilisation of the small claims process, commenting that it ‘should be straightforward enough to encourage underpaid employees to bring their own claims, without lawyers or other legal assistance’.85 The Taskforce recommended that the Government commission a review of the small claims process set out under the Fair Work Act to examine how it can become a more effective avenue for wage redress.86

**ABCC underpayment recoveries**

3.64 As previously outlined, the ABCC has a complementary role to the FWO with regard to the building and construction industry. The committee received evidence that the ABCC is not focussed on its core work:

… the construction sector as [sic] the biggest sector encountering underpayment. It is also a sector which is in some segments highly unionised, and yet we still have this underpayment problem. As many of you are familiar with, the ABCC in theory has responsibility for overseeing wage payments in that sector, but its priorities are on union monitoring. Wage underpayment is very much down their list of priorities.

… In actual fact, they have brought proceedings against unions for taking unlawful industrial action when that industrial action was being taken in relation to underpayment.87

3.65 Echoing evidence received by the Senate inquiry into job security, the committee heard that the ABCC is aware of ‘significant wage theft’ in the building and construction industry but that it targets its efforts at union

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84 Fair Work Act 2009, s. 548; FWO, Legal action in the small claims court (accessed 10 March 2022).
87 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, pp. 25–26.
members and union ‘wrongdoing’ rather than employer non-compliance.\textsuperscript{88} The committee noted that the Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) recommends the ABCC be abolished.\textsuperscript{89}

3.66 Dr Tess Hardy told the committee that despite the construction sector being heavily unionised, wage recoveries by the ABCC are small when compared with the extent of industry non-compliance.\textsuperscript{90}

A 2019–20 ABCC audit revealed that close to 80 per cent of labour hire companies are not compliant with workplace laws—64 per cent in relation to remuneration—with nearly $565,000 recovered for employees over the course of the audit.\textsuperscript{91} This is a surprisingly small figure given the extent of non-compliance. In fact, the ABCC has recovered just $4 million in unpaid wages since 2016. The ABCC told the committee that its focus is on ‘industry sectors to check the general level of compliance’, rather than focussing on individual complaints.\textsuperscript{92}

Effectiveness of the compliance and enforcement regime

3.67 The committee received evidence about the effectiveness of the regime in preventing and addressing underpayment, including ease of access to entitlements and justice for underpaid employees.

3.68 A review of the evidence suggests that the current regime is not functioning as well as it could, as demonstrated by the high and increasing levels of wage theft—which systemic in some sectors.\textsuperscript{93} Ms Jo Briskey from the United Workers Union (UWU) observed:

I would say that the current arrangements and the regulations that exist have clearly demonstrated that they are not effective in addressing the issues around wage theft, because it continues to be an issue. We have laws and we have regulations; yet we know that companies are doing it as part

\textsuperscript{88} Senator Jess Walsh, Senate Economics References Committee and Mr Liam O’Brien, Assistant Secretary, ACTU, \textit{Committee Hansard}, 18 September 2020, p. 15; Ewin Hannan, ‘ABCC defends focus on pursuing unions’, \textit{The Australian}, 23 January 2020, p. 4.

\textsuperscript{89} Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), \textit{Submission 106}, p. 5.

\textsuperscript{90} Dr Tess Hardy, Private capacity, \textit{Committee Hansard}, 18 September 2020, pp. 25–26.

\textsuperscript{91} ABCC, \textit{Labour hire: campaign report}, June 2020, p. 6 (accessed 8 March 2022); ABCC, ’Wake up call for labour hire employers on wages’, \textit{Media release}, 19 June 2020 (accessed 8 March 2022); ABCC, ’\textit{ABCC recovers more than $1 million in workers’ wages in past 5 months}’, \textit{Media release}, 1 December 2021 (accessed 8 March 2022); Mr Liam O’Brien, Assistant Secretary, ACTU, \textit{Committee Hansard}, 18 September 2020, pp. 11–12.

\textsuperscript{92} ABCC, \textit{Submission 32}, p. 6.

\textsuperscript{93} Ms Jo Briskey, Official, United Workers Union (UWU), \textit{Committee Hansard}, 11 March 2021, pp. 1 and 4; Dr Carina Garland, Assistant Secretary, Victorian Trades Hall Council, \textit{Committee Hansard}, 11 March 2021, p. 15.
of their work. The main point that I would make is that what we have currently is not effective needs addressing.\footnote{Ms Jo Briskey, Official, UWU, Committee Hansard, 11 March 2021, p. 4.}

3.69 Dr Hardy highlighted the value of enforcement both to individual workers and the wider community:

... in my view, the need for effective enforcement of minimum wage, superannuation and other employment related entitlements is stronger than ever.

Enforcement is not only critical for maintaining and sustaining the safety net and upholding the rule of law; it's also essential for protecting the health and safety of workers and the community more generally.\footnote{Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 19.}

3.70 Somewhat in contrast, Associate Professor Anna Boucher advised that the regulator is effective, noting that the FWO could do more inspections but that it brings more litigation cases and has a higher rate when compared with regulators in some overseas jurisdictions.\footnote{Associate Professor Anna Boucher, Private capacity, Committee Hansard, 18 September 2020, p. 31.}

**Barriers for wage theft victims**

3.71 A range of witnesses advised the committee that there are significant barriers to recovering unpaid wages for victims, particularly those engaged in a 'David and Goliath' contest with large, well-resourced corporate entities. Barriers to redress including:

- **lack of awareness or education**—in relation to their entitlements. Where workers are aware of their entitlements, they may not know how to progress a claim. Contractors, young people and migrants are especially at risk;\footnote{Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, pp. 10–11; ASU, Submission 61, p. 11; Dr Stephen Clibborn, Submission 89, p. 7; Young Liberals NSW, Submission 16, pp. 3–4; WEstJustice, Submission 47, p. 13; Australian Government, Report of the Migrant Workers’ Taskforce, March 2019, pp. 93–95; The Cheesecake Shop, Submission 5, p. 2.}

- **lack of confidence**—may impede workers from taking action because they believe it is too onerous, the amount of unpaid wages is insignificant, pessimism about the outcome, or because of their ability to navigate complex rules and procedures;\footnote{ASU, Submission 61, p. 11; Attorney-General’s Department, Submission 80, pp. 10–11; Young Liberals NSW, Submission 16, p. 6; WEstJustice, Submission 47, p. 13; Australian Government, Report of the Migrant Workers’ Taskforce, March 2019, pp. 93–95.}

94 Ms Jo Briskey, Official, UWU, Committee Hansard, 11 March 2021, p. 4.

95 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 19.

96 Associate Professor Anna Boucher, Private capacity, Committee Hansard, 18 September 2020, p. 31.

97 Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, pp. 10–11; ASU, Submission 61, p. 11; Dr Stephen Clibborn, Submission 89, p. 7; Young Liberals NSW, Submission 16, pp. 3–4; WEstJustice, Submission 47, p. 13; Australian Government, Report of the Migrant Workers’ Taskforce, March 2019, pp. 93–95; The Cheesecake Shop, Submission 5, p. 2.

98 ASU, Submission 61, p. 11; Attorney-General’s Department, Submission 80, pp. 10–11; Young Liberals NSW, Submission 16, p. 6; WEstJustice, Submission 47, p. 13; Australian Government, Report of the Migrant Workers’ Taskforce, March 2019, pp. 93–95.
• **mistrust and fear of reprisals**—of workers may mistrust regulators or unions, fear reprisals from their employers including loss of hours or jobs required for subsistence, ‘blocklisting’, or immigration consequences;\(^{99}\)

• **insufficient evidence**—workers paid in cash or subject to record falsification may have insufficient evidence to take any action;\(^{101}\)

• **high costs**—‘prohibitive’ costs including small claims fees, court filing fees, and lawyers may prevent workers seeking redress;\(^{102}\)

• **low small claims threshold**—currently capped at $20 000, denying access to redress through this avenue for some claimants;\(^{103}\)

• **inability to recover costs**—small claimants are unable to recover costs, with the added disadvantage that offending employers are not subject to penalties,\(^{104}\) and costs are unable to be recovered by a lead applicant and class members unless the proceeding was instituted vexatiously, without reasonable cause, or in another special circumstance—making it less feasible to commence a private action through class proceedings relating to underpayment;

• **inability to take action**—temporary migrant workers may have insufficient time to initiate action because of time limits on their visa;\(^{106}\) or workers have employer to take action against it has gone into liquidation or bankruptcy; or individual workers are unable to take broader action because of the short-term nature of their appointment and inability to organise;\(^{107}\)

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\(^{99}\) ‘Blacklisting’ is a non-preferred term because it perpetuates racial stereotyping.

Shoalcoast Community Legal Centre Inc, *Submission 84*, pp. [2–3]; Dr Liam Kane, Casualised, Unemployed, and Precarious University Workers, *Committee Hansard*, 10 March 2021, p. 15.

\(^{100}\) ASU, *Submission 61*, p. 11; Dr Stephen Clibborn, *Submission 89*, p. 7; WEstjustice, *Submission 47*, pp. 13 and 16; Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, pp. 5–6; Dr Anastasia Kanjere, Committee Member CUPUW, 10 March 2021, p. 10; Queensland Government, *Submission 19*, p. 14; ACTU, *Submission 38*, pp. 50–53.


\(^{103}\) Mr Liam O’Brien, Assistant Secretary, ACTU, *Committee Hansard*, 18 September 2020, p. 14.


\(^{105}\) NSW Society of Labor Lawyers, *Submission 23*, p. [6].


\(^{107}\) Dr Yaegan Doran, *Proof Committee Hansard*, 22 February 2022, p. 21.
• **requirement for mutual consent**—consent is required from both parties to enable arbitration actions with the FWC. Actions are restricted to interpretation and are exclusive of back payment or enforcement;\(^{108}\) and

• **restriction to current employees**—disputes may only be heard by the FWC in relation to current, not ex-, employees, limiting claims\(^ {109}\) and potentially perpetuating exploitative arrangements.

3.72 As previously discussed, vulnerable workers are deemed to be less likely to pursue underpayments because of the power imbalance with employers, and for fear of repercussions.\(^ {110}\) Mr O’Brien recounted his experiences in observing this fear:

My experience as an official—and indeed it should be well understood to most people—is that workers are very anxious about raising issues about their employment. If we think about the fact that one in three workers is in some form of insecure work, so a casual worker, there’s a direct relationship between raising your hand to outline a wage theft matter and whether you’re going to get a shift next week.\(^ {111}\)

3.73 Ms Dawson agreed with this point of view, telling the committee:

Certainly, the loss of bargaining power and the loss of union representation is probably the biggest factor in driving that power imbalance … even prior to the pandemic, individual workers on low rates of pay, particularly when they’re not guaranteed shifts, think, ‘If I speak up and ask for a pay rise or say that I think they’re not paying me properly, I just won’t be rostered on next week.’ They do not have that power.\(^ {112}\)

3.74 Ms Annie Wang told the committee that after she spoke up about unpaid wages, she received unjustified and never heard before warnings about her performance:

I left that place because I felt like I had no option but to walk away from a situation where I was being harassed, all because I had asked to be paid my entitlements.\(^ {113}\)

3.75 The committee heard that migrant workers face particular barriers, particularly where temporary skilled visas are linked with employer sponsorship. This makes it very difficult for these workers to pursue

\(^{108}\) Mr Liam O’Brien, Assistant Secretary, ACTU, *Committee Hansard*, 18 September 2020, p. 13; Australian Manufacturing Workers’ Union (AMWU), *Submission 51.1*, p. [8].

\(^{109}\) AMWU, *Submission 51.1*, p. [8].

\(^{110}\) Mr Liam O’Brien, Assistant Secretary, ACTU, *Committee Hansard*, 18 September 2020, p. 18; Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, *Committee Hansard*, 11 March 2021, p. 20; Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, p. 5.

\(^{111}\) Mr Liam O’Brien, Assistant Secretary, ACTU, *Committee Hansard*, 18 September 2020, p. 17.

\(^{112}\) Ms Emma Dawson, Executive Director, Per Capita, *Committee Hansard*, 11 March 2021, p. 32.

\(^{113}\) Ms Annie Wang, Private capacity, *Committee Hansard*, 11 March 2021, p. 12.
underpayment claims. Furthermore, the committee heard that migrant workers have no mechanism to maintain their residency in Australia until claims are addressed.\footnote{MWC, \em Submission 53, p. 10.} Mr Mathew Kunkel from the Migrant Workers Centre (MWC) provided further details:

Lots of workers come to us. We tell them that they’ve got a case, but ultimately they don’t want to go ahead with it because if they raise their issues they get fired and if they get fired they have 60 days to either find a new employer or leave the country.\footnote{Mr Mathew Kunkel, Director, Migrants Workers Centre, \em Committee Hansard, 11 March 2021, p. 13.}

The committee heard that it is also difficult for workers to pursue underpayments because the system is ineffective, with one witness, who did not wish for his name to be made public, writing:

Again I went through all the technicalities with a fine tooth comb. This time I sought assistance & was not surprised that my suspicions of Wage Theft were confirmed... My next move was to once again confront management. However this time I was not there to argue. I was there however to extract the information I required to make a formal complaint to The Fair Work Ombudsman. Twice now I have attempted to have this matter exposed. On both occasions I have explained the situation & been sent back a reply which tells me that I must now take it up with management. Back to square One. Thank you for Nothing.

I no longer have the energy or am in a position to put my Family’s income in jeopardy. I am currently in the process of joining a Union. My working hours are such that I have not been able to do so.\footnote{Unions NSW, \em Submission 31, Attachment 3.3 (Name withheld, p. [3]).}

The committee also heard that redress processes are not affordable, accessible, or efficient for workers:

Some of the problems that I can see are that when you encounter an underpayment of wages that automatically means that you have suffered nonpayment or underpayment of your superannuation. Because of the way the system is currently structured, it’s the case that you might have to go to the Fair Work Ombudsman to pursue your wage underpayment and then go to the ATO to pursue your unpaid super. I see that that is inefficient and is not the most effective way to recover that entitlement on behalf of the employee, particularly when the ATO is overwhelmed.\footnote{Dr Tess Hardy, Private capacity, \em Committee Hansard, 18 September 2020, p. 25.}

\section*{Accessorial liability and supply chains}

Unions NSW advised that increased business competition has given rise to the use of multiple layers of sub-contracting, ‘supply chain outsourcing’ or ‘fissured workplaces’,\footnote{Maurice Blackburn Lawyers, \em Submission 48, p. 6.} for example through labour hire firms.\footnote{Maurice Blackburn Lawyers, \em Submission 48, p. 6.} The FWO
likewise advised that it has seen complex sub-contracting arrangements used by companies in order to avoid employer obligations.\textsuperscript{120} This has been particularly apparent in sectors such as cleaning, construction, apparel, and road transport.\textsuperscript{121}

3.79 The FWO and Retail Supply Chain Alliance believe that ‘ineffective supply chain governance’, contributes to non-compliance by contractors.\textsuperscript{122} The Queensland Council of Unions and the CFMEU submitted that tight margins place businesses at the bottom, or direct employers under financial pressure, leading to the non-payment of employees.\textsuperscript{123} The Centre for Business and Social Innovations emphasised:

… at each stage in the contracting chain the obligations imposed by the lead firm (such as maximum amount of money to pay for the work and maximum amount of time to perform the work) are passed down the chain and each business in the chain takes its cut of profit. As Johnstone et al explain:

‘these arrangements enable firms at or near the apex of the chain to avoid the legal proximity with workers that may attract various obligations and liabilities, but at the same time enable them to maintain effective commercial control over the work performed’.\textsuperscript{124}

3.80 The Fair Work Act allows liability for contraventions of workplace laws to be extended to a person (or company) deemed to be ‘involved in’ a contravention, with this accessorial liability extended to franchisees and holding companies since September 2017.\textsuperscript{125}

3.81 The UNSW Law Society Inc and WEstjustice\textsuperscript{126} suggested that current accessorial liability provisions do not go far enough, with the UNSW Law Society noting that experiences of the Quebec construction industry have shown that ‘third party liability in subcontracting chains can prevent underpayment and wage theft’.

3.82 They contended that the current provisions apply in only certain circumstances, requiring a high threshold for liability and thereby limiting

\textsuperscript{119} See also Centre for Business and Social Innovations, UTS, Submission 34, p. 3.

\textsuperscript{120} FWO, 'Woolworths trolley collection services', Media release, 25 June 2016 (accessed 10 March 2022); Unions NSW, Submission 31, pp. 20–21.

\textsuperscript{121} Centre for Business and Social Innovations, UTS, Submission 34, pp. 4 and 9.

\textsuperscript{122} FWO, 'Woolworths trolley collection services', Media release, 25 June 2016 (accessed 10 March 2022); Retail Supply Chain Alliance, Submission 74.1 pp. 18–19.

\textsuperscript{123} Queensland Council of Unions, Submission 97, p. 10; Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), Submission 106, p. 8.

\textsuperscript{124} Centre for Business and Social Innovations, UTS, Submission 34, p. 4.

\textsuperscript{125} Fair Work Act 2009, ss. 550(2) and s. 558B.

\textsuperscript{126} WEstjustice, Submission 47, p. 29.
accessorial liability for lead contractors and other companies at the top of supply chains.\footnote{UNSW Law Society Inc, \textit{Submission 36}, pp. 7–8; WEstjustice, \textit{Submission 47}, pp. 29–32.} WEstjustice wrote:

By requiring actual knowledge, section 550 serves to reward corporations who deliberately remain uninformed about the conduct of others in their supply chain/business model. The law should not reward those who turn a blind eye to exploitation – especially those who are directly benefitting from the exploitation and in a position to take reasonable steps to stop it.\footnote{WEstjustice, \textit{Submission 47}, p. 29.}

Efficacy of current civil penalties

3.83 The committee received evidence that the current penalties are out of line with community expectations. Only civil penalties are available for wage theft, and these are ultimately determined by the courts in accordance with section 557 of the Fair Work Act. The legislation requires courts to 'group' contraventions such that only a single penalty is awarded.\footnote{Attorney-General's Department, \textit{Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance}, September 2019, pp. 3–4.} The FWO has noted that this feature of the civil penalty regime can lead to the public interest being unsatisfied when it comes to underpayment cases:

Public commentary suggests a misunderstanding of the penalty regime applicable to underpayments under the Fair Work Act, where it is the number of contraventions rather than the value of the underpayments that is most relevant to the penalty imposed.\footnote{FWO, \textit{Submission 39}, p. 12.}

3.84 The committee heard from a number of submitters that deterrence is a 'critical component of enforcement':

When the chances of being caught are minimal and the consequences are simply to repay the stolen wages, we shouldn't be surprised that so many employers engage in wage theft. There is minimal deterrence. This has been the result of deliberate policy decisions by the government.\footnote{Mr Liam O'Brien, Assistant Secretary, ACTU, \textit{Committee Hansard}, 18 September 2020, p. 10.}

3.86 However, Dr Hardy stated that research shows that the risk of detection and the swiftness of the time between contravention, and detection and penalty is more powerful in changing behaviour than larger and harsher penalties, particularly when coupled with administrative sanctions.\(^{134}\)

Proactive detection has been found to cast a longer shadow than an investigation triggered by complaints. It is better placed to address the systemic drivers of the noncompliance rather than just resolving the individual concerns of the complainant, even though this, in itself, is an important objective of any enforcement regime.\(^{135}\)

3.87 In contrast, other witnesses told the committee that higher rates of self-disclosure underline the effectiveness of current controls.\(^{136}\) The National Retail Association defended the current arrangements, saying 'no reform is required to deter wage non-compliance as a result of mistake or misapprehension', and that public disclosures indicate that existing penalties, particularly those relating to 'serious contravention' are sufficient.\(^{137}\)

**Superannuation Guarantee**

3.88 The SG requires employers to pay a minimum percentage of employee’s salary into their complying superannuation fund or retirement savings account.\(^{138}\) From 1 July 2014 to 30 June 2021, the amount of SG payable was equal to 9.5 per cent of an employee’s ordinary time earnings.\(^{139}\) However, from 1 July 2021, the SG rate rose to 10 per cent, with the rate scheduled to progressively increase to 12 per cent by July 2025.\(^{140}\) It is administered by the Commissioner of Taxation, with the support of the ATO.\(^{141}\)

3.89 The SG is payable at least four times a year after an employee's salary and wages are paid. Where payments are not made, employers are liable to pay the SG charge to the ATO and lodge a SG charge statement. Some superannuation funds, awards and contracts require superannuation contributions to be paid more regularly, for example, on a monthly basis.

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\(^{134}\) Dr Tess Hardy, Private capacity, *Committee Hansard*, 18 September 2020, p. 19; See also ACTU, *Submission 38*, pp. 42–43.

\(^{135}\) Dr Tess Hardy, Private capacity, *Committee Hansard*, 18 September 2020, p. 19.


\(^{137}\) National Retail Association, *Submission 49*, p. [18].

\(^{138}\) Some modern awards and agreements specify higher superannuation payments. s. 16, *Superannuation Guarantee (Administration) Act 1992*.

\(^{139}\) *Superannuation Guarantee (Administration) Act 1992*, ss. 19(2). Ordinary time earnings (OTE) are the salary and wages an employee earns for their ordinary hours of work, including commissions, shift loadings and allowances. OTE do not include bonuses or overtime payments.

\(^{140}\) ATO, *Super guarantee rate rising 1 July*, 8 June 2021 (accessed 15 February 2022).

\(^{141}\) ATO, *Submission 110*, p. 5.
Monitoring and compliance

3.90 The ATO is responsible for monitoring and enforcing compliance with minimum SG obligations, with the FWO and employee responsible for seeking additional superannuation entitlements under an award or agreement.142

3.91 The extent of SG non-compliance was considered in Chapter 1. The ATO reported that employers have a high levels of awareness in relation to SG contributions. It cited cash flow issues as the main reason provided for non-payment of employees. This features in 70 per cent of non-payments, poor recordkeeping in around 20 per cent of cases, with the remaining 10 per cent explained as misunderstanding, active delay or avoidance, and wilful non-compliance.143 Failure to comply with a direction to pay outstanding SG charge amounts within a specified period is a criminal offence.144

3.92 Legislative change in 2019 enabled the Commissioner to issue directions to employers to pay unpaid SG, and disclose more information about SG non-compliance to affected employees, including where they may be unaware of non-payment or have not lodged a complaint.145

3.93 Between 24 May 2018 and 7 September 2020, the ATO provided a SG amnesty for employers to disclose unpaid SG without Part 7 penalties applying.146

3.94 The ATO has argued that since the completion of the amnesty there is now 'a legislative base … for the Commissioner to remit a penalty below 100 per cent when we commence an audit' with penalty reductions for voluntary disclosures. However, it advised that from September 2020 the penalty will be 100 per cent ‘except in exceptional circumstances’.147

3.95 With Single Touch Payroll, introduced across 2018 and 2019, the ATO now has greater visibility of SG liabilities and payments, data of which is used to


143 ATO, Submission 110, p. 9.

144 As 22 February 2022, the Commissioner of Taxation had not yet issued any directions to pay to employers in relation to SG liabilities. ATO, Answer to question on notice 27, Legislative restrictions around disclosure of unpaid superannuation status, 22 February 2022 (received 10 March 2022).

145 As well as other measures to manage non-compliance. ATO, Submission 110, pp. 13–14.

146 ATO, Answer to question on notice, 7: W7: Superannuation amnesty penalties, 18 September 2020 (received 29 October 2020).

147 Mr John Ford, Acting Deputy Commissioner, Superannuation and Employer Obligations, ATO, Committee Hansard, 18 September 2020, p.6.
Inform investigations and enforcement actions. In 2019–20 use of Single Touch Payroll data resulted in an additional $28.1 million in SG payments.148

Enforcement actions

3.96 However, the ATO’s enforcement actions over the same period were less impressive. During 2019–20:

- 12,110 payment plans were established, valued at $461 million;
- 21 per cent (or 2,500) plans were cancelled, or defaulted after 120 days; and
- 73 per cent of employers who failed to pay full entitlements received no penalty, with most of the remainder required to pay less than a 51 per cent penalty.149

3.97 At the public hearing on 18 September 2020, the committee heard that the ATO had considered using the direction-to-pay power on 40 occasions but ultimately failed to do so, stating ‘on each of these occasions the employer has entered into liquidation or insolvency and/or has entered into a payment arrangement’.150

3.98 The ATO also advised that it had issued 2,233 SG director penalty notices to directors of 1,572 companies for a value of $146 million, but that it had only collected $20.6 million of that amount—a mere 14 per cent recovery rate.151

3.99 On 22 February 2022, Ms Rosenzweig told the committee that the ATO was stepping up its actions:

… we’ve been working with businesses through the impacts of the pandemic … we have not aggressively pursued debt collection and have been trying to support businesses to sustain them through the pandemic … we are starting to renew our activity in debt collection and re-engage with businesses who owe us money. As part of that, we are thinking about the full suite of tools that we have available and when it’s appropriate to use them.152

148 ATO, Answer to question on notice, 12: W4: Unpaid superannuation complaints, 18 September 2020 (received 18 February 2021); Mr John Ford, Acting Deputy Commissioner, Superannuation and Employer Obligations, ATO, Committee Hansard, 18 September 2020, pp. 5–6 and 8.

149 ATO, Answer to question on notice, 12: W4: Unpaid superannuation complaints, 18 September 2020 (received 18 February 2021).

150 Mr John Ford, Acting Deputy Commissioner, Superannuation and Employer Obligations, ATO, Committee Hansard, 18 September 2020, p. 4.

151 Mr John Ford, Acting Deputy Commissioner, Superannuation and Employer Obligations, ATO, Committee Hansard, 18 September 2020, p. 4.

152 Ms Emma Rosenzweig, Deputy Commissioner, Superannuation and Employer Obligations, ATO, Committee Hansard, 22 February 2022, p. 14.
Pursuit of complaints

3.100 In October 2021, the ATO advised that for the 2020–21 year, the average elapsed time from an employee complaint to closure was eight months, with half of the liabilities owed paid within three months. The ATO also advised that additional resources and process changes recently put in place will help address the delays experienced in 2021–22.\(^{153}\)

3.101 As mentioned earlier, unpaid SG contributions cannot be claimed under the FEG when businesses go bust and individuals have to pursue unpaid contributions through the ATO.

3.102 Trustees or funds also struggle to recover unpaid superannuation, with only the ATO able to pursue SG breaches, and trustees excluded from recovering unpaid superannuation under an award or enterprise agreement. Trustees can only act to recover unpaid superannuation contributions when an enforceable agreement exists between a trustee and an employer.\(^{154}\)

How effective is SG payment compliance and enforcement?

3.103 While the 3.8 per cent SG gap discussed in Chapter 1 means that most employers are paying superannuation. However, $2.5 billion in missing payments is significant, especially considering the multiplier effect on superannuation at the time of retirement and the broader impacts on the tax and social services systems.\(^{155}\) The ACTU highlighted this issue, cautioning that underpayment is:

> … also about the estimated billions of dollars in superannuation that is also not paid to workers. This is just as significant for workers because it not only deprives them of income today but deprives them of the retirement savings necessary to ensure a comfortable retirement.\(^{156}\)

3.104 Industry Super Australia (ISA) noted that the Australian Government has taken some positive steps to improve SG compliance, but the ISA and others believe that the ATO is not sufficiently enforcing existing penalties.\(^{157}\) The ISA


\(^{154}\) ISA, Submission 11, p. 6; cbus, Submission 12, pp. [2–3]; Australian Super, Submission 20, p. [1]; Industry Fund Services, Submission 76, pp. [1–2].


\(^{156}\) Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 14.

\(^{157}\) Mr Matthew Linden, Deputy Chief Executive, and Mr James Gunn, Senior Public Affairs Adviser, ISA, Committee Hansard, 22 February 2022, pp. 2 and 4; ISA, Submission 11, p. 5; cbus, Submission 12, p. [2]; ACTU, Submission 38, p. 34.
suggested that around three-quarters of Part 7 penalties are remitted by the ATO, and the ATO does not publish its enforcement actions so the deterrence effects of enforcement activities is limited.158

3.105 Witness 3—a victim of unpaid superannuation—highlighted the gravity and injustice of their experience of the current system:

These companies need to be accountable, and government needs to enforce these obligations and ensure strong penalties are applied to deter employers from stealing our entitlements. If I were to steal money from [my employer] ECEC Management Services, I would be in jail. It needs to work both ways.159

3.106 The Queensland Government also submitted that the system is not working effectively, saying:

Currently, the ATO is responsible for unpaid super and the evidence to the [Queensland] wage theft inquiry confirmed it has not been an effective force in recovering these entitlements for workers, with this being attributed to factors such as a lack of resources and a failure to conduct proactive, random audits.160

3.107 As with unpaid wages, unpaid superannuation is used by employers to fund other liabilities and obligations in lieu of sufficient cash flow. This is done at the expense of employees, with little or no recourse for recovery when companies become insolvent or bankrupt.161 Figures from the Australian Securities and Investments Commission (ASIC) show that in 2018–19 nearly 19 per cent of insolvencies involved unpaid wages, while a whopping 48 per cent of insolvencies involved unpaid SG contributions.162

3.108 The Tax Commissioner, Mr Chris Jordan told the Senate Economics Legislation Committee during Senate estimates that:

… [Businesses] have to pay wages or people won’t turn up. They have to pay their overdraft or whatever to the bank or the bank will foreclose. They have to pay suppliers because they’ll supply only with cash on delivery. When businesses are not going as well, or the cashflow is not as good as they’d like, there are three things that tend to accumulate

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158 Mr Matthew Linden, Deputy Chief Executive, and Mr James Gunn, Senior Public Affairs Adviser, ISA, Committee Hansard, 22 February 2022, pp. 2 and 4; ISA, Submission 11, pp. 5–6.

159 Witness 3, Member, UWU, Proof Committee Hansard, 22 February 2022, p. 7.


161 Mr Matthew Linden, Deputy Chief Executive, ISA, Committee Hansard, 22 February 2022, p. 2; Ms Melinda Bolton, Industrial Officer, UWU, Committee Hansard, 22 February 2022, pp. 8–9; ICB, Submission 4, p. 7; Mine Super, Submission 6, p. 6.

together—not repatriating the pay-as-you-go, not repatriating the GST [goods and services tax] they collected on sales and \textit{not paying the superannuation} [emphasis added].

... It's pragmatic. It's just recognising the pragmatic nature of a business who makes choices to survive.$^{163}$

3.109 Ms Melinda Bolton, from the UWU demonstrated this point by explaining a case, which affected 10 of its members:

... the employer still didn't make any payments, despite the court orders.

Then, earlier this month, we received confirmation that the employer has now been placed into liquidation. So at this point the prospects of our members receiving the superannuation that they're owed seem relatively poor. Our members are now reliant on the investigations being undertaken by the liquidators in relation to the assets that the company held to see if there is any possibility of the superannuation being paid from any assets that might be able to be liquidated.$^{164}$

\textbf{Challenges facing victims}

3.110 The committee heard about challenges facing victims of SG underpayment. The ATO observed that there are delays in reporting superannuation non-payment, with 'a high level of ex-employees reporting their previous employer to the ATO', because they are unaware they have been unpaid, they fear employment reprisals, or they are not interested in their superannuation until closer to retirement.$^{165}$

3.111 Evidence from numerous witnesses highlighted that employees do not always know that their SG payments are not being made, because contributions appear on their payslips but may only be made to their fund quarterly, or not at all. Despite measures to improve transparency, such as reporting through MyGov, many employees remain ignorant of underpayment.$^{166}$

\begin{quote}
When I found out that my employer wasn’t paying my super, I felt angry and betrayed as we were unaware for some months that this was occurring, as our payslips still indicated that we were receiving super.$^{167}$
\end{quote}

3.112 The committee heard that this delay in identification and reporting prevents the ATO acting in some cases,$^{168}$ with some delays amounting to years.$^{169}$

\begin{flushright}
$^{163}$ Mr Chris Jordan, Commissioner, ATO, Senate Economics Legislation Committee, 2021–22 Supplementary Budget Estimates Committee Hansard, 27 October 2021, p. 60.
$^{164}$ Ms Melinda Bolton, Industrial Officer, UWU, Committee Hansard, 22 February 2022, p. 8.
$^{165}$ ATO, Submission 110, p. 9; CAANZ, Submission 14, p. 4.
$^{166}$ ATO, Submission 110, pp. 6–7; Mr Matthew Linden, Deputy Chief Executive, ISA, Committee Hansard, 22 February 2022, pp. 2–3; CAANZ, Submission 14, p. 4.
$^{167}$ Witness 1, Member, UWU, Committee Hansard, 22 February 2022, p. 7.
\end{flushright}
Several witnesses explained how difficult it is for employees to pursue unpaid superannuation, including:

- where the employee is unsure of their employment status and whether they are eligible for SG payments;\(^{170}\)
- slow action and lack of communication with victims of SG theft including from the ATO and superannuation funds;\(^{171}\)
- delayed obligation, with unpaid wages not incurring SG payments until they are paid (if they are paid);\(^{172}\)
- inability to act, with SG payments owed to superannuation funds, not employees directly, giving them limited avenues for redress;\(^{173}\)
- lack of options, with the ATO the primary place for workers with unpaid SG payments to go for recovery;\(^{174}\)
- low recovery rates, especially for low value claims;\(^{175}\) and
- structural issues which prevent workers knowing about SG theft in their workplace, and an inability to take joint action.\(^{176}\)

Need for ATO to improve communication

The committee heard from representatives of the UWU, who told the committee that communication with the ATO in relation to unpaid superannuation claims was limited:

> We have very limited information about the action that the ATO were taking prior to our filing proceedings. We were advised by the ATO via phone—it would have been before February 2020—that the employer had agreed to enter into a payment plan for the amounts that were owed up until that point. But our members and the union weren’t provided


\(^{169}\) CAANZ, *Submission 14*, p. 4.


\(^{171}\) Ms Melinda Bolton, Industrial Officer, UWU, *Committee Hansard*, 22 February 2022, pp. 8 and 10; Mr Maxim Zitchenko, *Submission 15*, p. [1]; ACTU, *Submission 38*, pp. 34 and 36–37; Mr Robb Preston, Principal Advisor, Retirement Income Policy Division, Department of the Treasury (Treasury), *Committee Hansard*, 18 September 2020, p. 6.

\(^{172}\) See, for example, Dr Tess Hardy, Private capacity, *Committee Hansard*, 18 September 2020, p. 25; Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, *Committee Hansard*, 11 March 2021, p. 20; Ms Annie Wang, Private capacity, *Committee Hansard*, 11 March 2021, p. 12.

\(^{173}\) Ms Melinda Bolton, Industrial Officer, UWU, *Committee Hansard*, 22 February 2022, p. 10.

\(^{174}\) Mr Matthew Linden, Deputy Chief Executive, ISA, *Committee Hansard*, 22 February 2022, p. 2.

\(^{175}\) Dr Tess Hardy, Private capacity, *Committee Hansard*, 18 September 2020, p. 25; ISA, *Submission 11*, p. 6.

\(^{176}\) Ms Melinda Bolton, Industrial Officer, UWU, *Committee Hansard*, 22 February 2022, pp. 7–10.
information about the time frame for that payment plan, or even whether any payments had actually been made.¹⁷⁷

I’ve received maybe two letters in the last three years, and they were just sort of stating where they were at with their investigation. I received my last letter last week, on Friday, to say that it had been finalised. But still no payment.¹⁷⁸

I think I got three letters all up from the ATO, basically saying they’d received the complaint, they were working on the complaint and now the complaint was closed.¹⁷⁹

3.115 After questioning by the committee, the ATO explained that there are barriers to releasing information about payment recovery because the employees do not have direct standing in the matter—it’s a matter between the ATO and the employer.

3.116 However, on notice the ATO advised that legislative changes which took effect from 1 April 2019, permit more information to be released to employees, including the start and end dates of a payment arrangement, payment frequency and the amount of SG being collected.¹⁸⁰

3.117 Furthermore, the ATO is able to tell employees that an employer has entered into a payment arrangement in relation to SG liabilities and explain the payment arrangements at a high level. Nevertheless, there remains some information which the ATO is not permitted to disclose, including information that relates to the general financial affairs of the employer, including where other employees may also not have been paid, or the employer’s financial position.¹⁸¹

3.118 The committee heard that the ATO has chosen not to tell workers what is being done to recover their money and how their claim is progressing—information that could, for example, enable them to decide whether it’s in their interest to stay with an employer.¹⁸²

3.119 After questioning from the committee, the ATO committed to reviewing its correspondence with a view to providing more information to employees.¹⁸³

3.120 HIA were also dissatisfied with communications from the ATO, explaining that the way in which the ATO publicised regulatory changes relating to SG

¹⁷⁷ Ms Melinda Bolton, Industrial Officer, UWU, Committee Hansard, 22 February 2022, p. 8.
¹⁷⁸ Witness 1, Member, UWU, Committee Hansard, 22 February 2022, p. 8.
¹⁷⁹ Witness 3, Member, UWU, Committee Hansard, 22 February 2022, p. 10.
¹⁸⁰ ATO, Answer to question on notice SQ21-000708, 22 February 2022, p. 2 (received 10 March 2022).
¹⁸¹ ATO, Answer to question on notice SQ21-000708, 22 February 2022, p. 2 (received 10 March 2022).
¹⁸² Witness 1, Member, and Ms Melinda Bolton, Industrial Officer, UWU, Committee Hansard, 22 February 2022, p. 8.
¹⁸³ ATO, Answer to question on notice SQ21-000708, 22 February 2022, p. 2 (received 10 March 2022).
payments and annual leave loading payments 'highlights the complexity of the system'. They further emphasised that the ATO did not notify its change of position in relation to SG payments to business directly and said that 'changes of this nature should be treated more precisely and more openly by the regulators'.

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\[184\] HIA, Submission 66, p. 10.
Chapter 4
Underpayment in universities

4.1 Over the course of this inquiry the committee heard a range of evidence relating to the extent and range of underpayments in the higher education sector, including by independent education providers and public universities.

4.2 As discussed in Chapter 1, around half of Australia’s universities have been implicated in underpayment of staff, with underpayments affecting both casual academic and professional staff. The majority of the evidence received by the committee relates to underpayment of academic staff in public universities and forms the basis of this chapter.

Setting the scene

4.3 The Senate inquiry into job security considered the higher education sector across four chapters of its second report on publicly-funded jobs. It examined the value of higher education, including to Australia’s economy, as well as the funding and structure of the sector, and extend of underpayments.

4.4 Whilst it is difficult to gain a full picture from the data, the latest figures from the Department of Education, Skills and Employment (DESE) show that universities employ 129,178 full-time equivalent (FTE) staff, inclusive of casual, limited term, tenurial and other staff. The headcount of staff employed is likely to be considerably higher, as outlined in Table 4.1.

4.5 Full-time equivalent staffing has dropped by more than eight per cent since 2020 as a result of the pandemic, and the decline in international student

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1 Michael Evans, National President, National Tertiary Education Union (NTEU), ‘One third of Australian universities admit to wage theft’, Media release, 27 October 2020; Julie Hare, Wage theft is "systemic": 21 universities under investigation’, Australian Financial Review, 20 October 2021 (accessed 14 February 2022); Julie Hare, ‘COVID Australia: University staff numbers fall as pandemic forces international students away’, Australian Financial Review, 13 February 2022 (accessed 14 February 2022); Dr Alison Barnes, NTEU, Committee Hansard, 22 February 2022, p. 15; Professor Stephen Garton AM, Vice-Chancellor and Principal, University of Sydney, Committee Hansard, 10 March 2021, p. 30.

2 See, for example, NTEU, Submission 105, pp. 2 and 6–8; Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, pp. 1–2 and 7.

3 Senate Select Committee on Job Security, Second interim report insecurity in publicly-funded jobs, October 2021, Part 2, Chapters 7–10.

4 Senate Select Committee on Job Security, Second interim report insecurity in publicly-funded jobs, October 2021, pp. 145 and 148.
numbers.\textsuperscript{5} Job losses especially impacted casual staff, with numbers falling by more than 15 per cent, or 4,500 FTE staff.\textsuperscript{6}

4.6 The job security inquiry reported on key trends in the higher education sector and employment within universities—all of which are linked with higher levels of underpayment:\textsuperscript{7}

- increasing insecure work arrangements and casualisation of the workforce;\textsuperscript{8}
- disproportionate numbers of women in insecure work at lower levels;\textsuperscript{9} and
- higher proportions of younger workers in insecure work at lower levels.\textsuperscript{10}

4.7 The evidence of underpayments in universities received by this inquiry corresponds with and expands on the evidence and findings of the Select Committee on Job Security’s second report.\textsuperscript{11}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|}
\hline
 & Casual FTE & Limited term FTE & Tenurial & Total FTE & \% FTE & Head count \\
& & & & & & \\
\hline
Female & n/a & 21 455 & 40 772 & 62 227 & 57 & 70 806 \\
Indeterminate & n/a & 56 & 49 & 106 & <1 & 128 \\
Intersex & n/a & 16 690 & 29 850 & 46 541 & 43 & 50 430 \\
Unspecified & n/a & 22 007 & 45 850 & 67 857 & 60 & 121 364 \\
\hline
Male & n/a & 22 007 & 45 850 & 67 857 & 60 & 121 364 \\
\hline
Total & 20 305 & 38 202 & 70 672 & 108 874 & 100 & 121 364 \\
\hline
\% & 15.7 & 29.6 & 54.7 & 84.3 & & \\
\hline
\end{tabular}
\caption{University employment figures, 2021}
\end{table}

Source: DESE, \textit{Selected Higher Education Statistics—2021 staff data: Tables 1.1, 1.4, 1.6, 1.9, 2.5}, 20 October 2021 (accessed 11 March 2022). Note: Numbers in FTE-related tables may not add to the total due to rounding errors.

\textsuperscript{5} Senate Select Committee on Job Security, \textit{Second interim report insecurity in publicly-funded jobs}, October 2021, pp. 175–181.

\textsuperscript{6} Department of Education, Skills and Employment (DESE), \textit{Selected Higher Education Statistics—2021 staff data: Tables 1.1, 1.4, 1.6, 1.9, 2.5}, 20 October 2021 (accessed 11 March 2022).

\textsuperscript{7} As discussed in Chapter 1.

\textsuperscript{8} Senate Select Committee on Job Security, \textit{Second interim report insecurity in publicly-funded jobs}, October 2021, pp. 145–146, 149–152.


\textsuperscript{10} Senate Select Committee on Job Security, \textit{Second interim report insecurity in publicly-funded jobs}, October 2021, p. 154.

\textsuperscript{11} Senate Select Committee on Job Security, \textit{Second interim report insecurity in publicly-funded jobs}, October 2021, Part 2, Chapters 7–10 (in particular Chapter 8).
Jobs in universities are estimated to have dropped by around 40,000 positions, with job losses in the early part of the pandemic particularly affecting casual staff, and later losses affecting higher proportions of ongoing staff. There is some evidence that universities have started rehiring, but are employing staff on a temporary basis, potentially exacerbating insecure work in the sector.12

**Underpayment as a business model**

4.9 Supported by similar findings from the University of Sydney Casuals’ Network, Dr Anastasia Kanjere, from the Casualised, Unemployed, and Precarious University Workers (CUPUW) explained to the committee that:

> Wage theft is systemic in higher education. In our experience, wage theft is not an aberration, nor is it an accident, it is core to the university business model.13

4.10 Similarly, Dr Alison Barnes, National President of the NTEU stated:

> We’re absolutely aware that apart from those 14 universities [in which underpayments are already being investigated by the FWO] wage theft is both systematic and appears to be the business model upon which our public universities appear to be running.14

4.11 However, Australian Higher Education Industrial Association (AHEIA) members 'took great exception' and 'great offence' to this characterisation, with Mr Stuart Andrews of AHEIA saying that while underpayment does occur, 'there have been very few disputes with respect to underpayment' and it is not deliberate nor systematic within the university sector:

> AHEIA takes exception to the NTEU’s unsubstantiated assertions that Australian universities operate under a 'business model' that involves the deliberate underpayment of their staff. To the contrary, universities are earnest in their endeavours to ensure that their staff are paid correctly and are active in investigating payment issues and taking necessary remedial action to rectify any underpayment that might occur.15

4.12 The University of Sydney also rejected the notion that wage theft is systemic, stating:

> The University does not agree with the written submissions provided by the NTEU to the Committee that employees in public universities are

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13 Dr Anastasia Kanjere, Committee Member, Casualised, Unemployed, and Precarious University Workers (CUPUW), *Committee Hansard*, 10 March 2021, p. 9; Dr Yaegan Doran, University of Sydney Casuals’ Network, *Committee Hansard*, 10 March 2021, p. 11.

14 Dr Alison Barnes, National President, NTEU, *Committee Hansard*, 22 February 2022, p. 16.

15 Mr Stuart Andrews, Executive Director, Australian Higher Education Industrial Association (AHEIA), *Committee Hansard*, 10 March 2021, pp. 25 and 28; AHEIA, *Submission 113*, p. [3].
subject to "large scale wage theft" and that the high rates of casualisation in tertiary education drive wage theft.\textsuperscript{16}

4.13 The committee heard that underpayments in the sector are due to system complexity—in relation to both wages and superannuation—legitimate redesignation of teaching (e.g. from tutorials to workshops), inaccurate recordkeeping, inconsistent application of rates.\textsuperscript{17} Rates of casualisation were justified by the need for universities to maintain flexible staffing arrangements.\textsuperscript{18}

4.14 Mr Andrews told the committee that universities are taking proactive steps to self-report and ensure staff are being paid their entitlements, for example through reviews and audits, saying 'we see universities as being very responsible, of their own volition'.\textsuperscript{19}

4.15 Professor Stephen Garton, Vice-Chancellor of University of Sydney agreed that the university had been proactive in identifying underpayments and advised that it had identified inadequate or inconsistent practices and payroll system deficiencies as causes of underpayments.\textsuperscript{20}

4.16 In contrast, a 2020 survey of 2,174 professional and academic staff carried out by the NTEU supported assertions about the widespread nature of underpayments in the higher education sector. The survey found that close to four out of five academic respondents (78.4 per cent) claimed they had been subject to some form of underpayment:

Most said this was because of unrealistic marking rates, while 39.1 per cent also alleged underpayment through tutorials being described as "information sessions, seminars, practice classes or workshops" which attract a lower rate of pay.\textsuperscript{21}

\textsuperscript{16} University of Sydney, \textit{Submission 116}, p. 2.
\textsuperscript{17} Ms Dionne Higgins, Senior Vice-President Strategy and Operations, RMIT University, \textit{Committee Hansard}, 22 February 2022, p. 41.
\textsuperscript{18} Monash University, \textit{Submission 117}, p. [5]; Professor Margaret Gardner, President and Vice-Chancellor, Monash University, \textit{Committee Hansard}, 22 February 2022, p. 52; Professor Brigid Heywood, Vice-Chancellor and Chief Executive Officer, University of New England, \textit{Committee Hansard}, 22 February 2022, p. 35.
\textsuperscript{19} Mr Stuart Andrews, Executive Director, AHEIA, \textit{Committee Hansard}, 10 March 2021, pp. 25–29.
\textsuperscript{20} Professor Stephen Garton, Vice-Chancellor and Principal, University of Sydney, \textit{Committee Hansard}, 10 March 2021, p. 30.
4.17 The NTEU has recovered around $35 million in underpayments to university staff, predominantly casuals.22

4.18 The NTEU does not support arguments of undue complexity, contending that universities negotiated the arrangements and resisted attempts to clarify certain definitions and clauses in enterprise arrangements:23

Some of the university submissions claim that the employment arrangements are complex and difficult to administer, yet each of these employers has negotiated them into their own university-specific enterprise agreements. These are not small business cafe owners navigating an industry award. They are large enterprises with sophisticated personnel resources who are claiming an inability to administer clauses they themselves negotiated. That claims just does not stand up.

... approximately 40 percent of public universities. Given that this is only the number where the issues were publicly known in September [2020], this would seem to support our assertions that underpayments are widespread. There is a limit to the number of times that they can collectively describe each of these events as one-off errors.24

4.19 Moreover, Dr Yaegan Doran from the University of Sydney Casu als’ Network explained that because casuals are paid on the basis of a system which routinely underpays them for their work, and the universities rely on this system, wage theft is absolutely embedded in the business model of universities.25

4.20 Universities spoke of some of the ways in which they are changing the way they engage staff and address underpayments outside of existing reviews and audits, such as:

- establishing a dedicated claims line;
- setting up time recording systems to record actual hours;
- conducting annual audits;
- implementing new payroll systems and processes;
- clarifying definitions of academic tasks;
- stopping the use of piece rates;26
- training for staff;

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22 Dr Alison Barnes, National President, NTEU, Committee Hansard, 22 February 2022, p. 15.

23 Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 3.

24 Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 1.

25 Dr Yaegan Doran, University of Sydney Casuals’ Network, Committee Hansard, 10 March 2021, p. 11.

26 Senator Mehreen Faruqi, Senate Economics References Committee, Committee Hansard, 22 February 2022, p. 21.
• reducing casual staff; and
• the creation of new academic roles for teaching-only staff to facilitate the conversion of casual teaching staff to part time and full-time employment.\(^{27}\)

4.21 By way of example, Professor Brigid Heywood, Vice-Chancellor of the University of New England told the committee:

> We have worked, I think, very positively with the support of Fair Work to use our system of setting up a special committee and having a member of council present to be part of the process not only to do the review of the underpayment and of how to reconcile that but also to bring the learning and good practice from that process forward into the organisation.\(^{28}\)

4.22 Faced with the enormous task of reviewing nearly 100,000 timesheets and pay records and inconsistencies in the way rates had been applied, RMIT agreed to increase each standard marking rate over the period of the review to the academic judgement rate, ‘irrespective of the type of assessment actually completed’.\(^{29}\)

4.23 Monash University advised it has steps to reduce casualisation rates, creating new forms of employment, converting staff from fixed-term and casual employment to ongoing roles, with contracts made longer rather than shorter where possible. They have also committed to provide more secure employment to Monash PhD students.\(^{30}\)

**Failure of governance**

4.24 Senator Paul Scarr asked witnesses whether underpayments and related practices reflect basic corporate values of respect, integrity, and valuing staff. The overwhelming majority of academic staff who spoke to the committee responded with a resounding ‘No!’ Dr Yaegan Doran said, ‘the overarching value that drives the university is to pay as little as possible for as much work as they can get’\(^{31}\) and Dr Hayley Singer from the University of Melbourne Casuals’

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\(^{27}\) Professor Ian Jacobs, President and Vice-Chancellor, University of New South Wales, *Committee Hansard*, 10 March 2021, p. 48; Professor Brigid Heywood, Vice-Chancellor and Chief Executive Officer, University of New England, *Committee Hansard*, 22 February 2022, pp. 32–33 and 35; Ms Dionne Higgins, Senior Vice-President Strategy and Operations, RMIT University, *Committee Hansard*, 22 February 2022, p. 38; Professor John Dewar, Vice-Chancellor, Ms Regan Sterry, Executive Director, Human Resources, La Trobe University, *Committee Hansard*, 22 February 2022, pp. 43–45; Professor Gardner, President and Vice-Chancellor, Monash University, *Committee Hansard*, 22 February 2022, p. 48.

\(^{28}\) Professor Brigid Heywood, Vice-Chancellor and Chief Executive Officer, University of New England, *Committee Hansard*, 22 February 2022, p. 32.

\(^{29}\) Ms Dionne Higgins, Senior Vice-President Strategy and Operations, RMIT University, *Committee Hansard*, 22 February 2022, p. 38.

\(^{30}\) Professor Gardner, President and Vice-Chancellor, Monash University, *Committee Hansard*, 22 February 2022, pp. 48–49.

\(^{31}\) Dr Yaegan Doran, Member, CUPUW, *Committee Hansard*, 22 February 2022, p. 22.
Network observing that 'it does not feel controversial to me to say that the university is operating through a culture of theft and that theft happens in many ways'.

4.25 Shockingly, the committee heard that some casual academic staff have been paid in gift certificates, instead of the wages, loadings, leave and superannuation to which they are legally entitled. Dr Singer told the committee:

I contested this at the time because I know I can't pay rent, pay for transport or pay for medical bills with gift cards. Senior academics pushed back against this, too, and still it went ahead. This is how casual and insecurely employed academics are treated when we bring our professionalism and our expertise onto campus and into the classroom.

... [university management] could not believe that there would be a problem with paying professionals, highly specialised people, with a gift card.

4.26 The NTEU and CUPUW, amongst others, suggested that the devolution of financial responsibilities to schools and faculties had incentivised the reclassification of work to improve the bottom line, with employment of casual academic staff being cheaper and easier than under more secure arrangements.

4.27 This view appears to concur with that of Professors Dewar, Gardner, and Garton, and the University of NSW which agreed that the delegations framework which sees contract approvals pushed to a faculty level has resulted in misinterpretations, inconsistencies and errors. The University of New England has now stopped this practice, in contrast to the University of

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32 Dr Hayley Singer, Member, University of Melbourne Casuals' Network, Committee Hansard, 22 February 2022, p. 25.
33 Dr Hayley Singer, Member, University of Melbourne Casuals' Network, Committee Hansard, 22 February 2022, pp. 25 and 27.
34 Dr Hayley Singer, Member, University of Melbourne Casuals' Network, Committee Hansard, 22 February 2022, p. 27.
35 Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 1; Dr Liam Kane, CUPUW, Committee Hansard, 10 March 2021, p. 17.
36 Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 2.
37 Professor Stephen Garton, Vice-Chancellor and Principal, University of Sydney, Committee Hansard, 10 March 2021, p. 33; Professor Brigid Heywood, Vice-Chancellor and Chief Executive Officer, University of New England, Committee Hansard, 22 February 2022, p. 32; Professor John Dewar, Vice-Chancellor, La Trobe University, Committee Hansard, 22 February 2022, p. 45; Professor Margaret Gardner, President and Vice-Chancellor, Monash University, Committee Hansard, 22 February 2022, p. 50; UNSW, Submission 114, p. 1.
38 Professor Brigid Heywood, Vice-Chancellor and Chief Executive Officer, University of New England, Committee Hansard, 22 February 2022, p. 32.
Melbourne, where the practice appears to be continuing with the blessing of the leadership team.\textsuperscript{39}

4.28 Mr Andrews agreed that the costs associated with permanent employment are high, thus explaining higher rates of casualisation. However, he also pointed to uncertain ongoing need, staff having insufficient research output, or lack of credentials to undertake research as a full-time permanent appointment as explanations for the engagement of casual staff.\textsuperscript{40}

4.29 After hearing a range of evidence from witnesses, it was suggested by Senator Scarr that there has been a failure of leadership and governance in universities, with the Senator suggesting:

\begin{quote}
There’s a moral dimension to this: the senior leadership of the organisation has a moral obligation, in my view, to do a deep dive into the experience of the casual staff and see what’s actually happening and whether or not people are self-censoring their time sheets and not actually claiming that which they should be claiming. To me, this connotes a failure of leadership.\textsuperscript{41}
\end{quote}

\begin{quote}
… (a) it was a gross administrative cock-up across the board … or (b) there was a systemic issue here in terms of conscious decisions being made by whoever has the authority within the organisation to try and err on the side of paying at the lesser rate …\textsuperscript{42}
\end{quote}

4.30 In response, universities defended their leadership and governance, admitting that there had been errors, but denying that there had been failures in this regard.\textsuperscript{43} For example, Professor Sherman Young, Deputy Vice-Chancellor Education at RMIT University contended:

\begin{quote}
We have taken responsibility and what we have now got in place, to mitigate against those challenges … So, yes, we have taken that responsibility. We have learnt that lesson, and we acknowledge that we have now progressed.
\end{quote}

\textsuperscript{39} Conor Duffy, 'Union calls for backpay and apology after University of Melbourne faculties cut PhD rates for casuals', ABC News, 21 March 2022 (accessed 23 March 2022).
\textsuperscript{40} Mr Stuart Andrews, Executive Director, AHEIA, Committee Hansard, 10 March 2021, p. 29.
\textsuperscript{41} Senator Paul Scarr, Deputy Chair, Senate Economics References Committee, Committee Hansard, 22 February 2022, p. 22.
\textsuperscript{42} Senator Paul Scarr, Deputy Chair, Senate Economics References Committee, Committee Hansard, 22 February 2022, p. 41.
\textsuperscript{43} Professor Brigid Heywood, Vice-Chancellor and Chief Executive Officer, University of New England, Committee Hansard, 22 February 2022, p. 36; Ms Dionne Higgins, Senior Vice-President Strategy and Operations, RMIT University, Committee Hansard, 22 February 2022, p. 39.
I don’t disagree that things could have been improved, and we have improved them. I think casting them as a failure are words that I will not choose to use.44

4.31 Importantly, La Trobe University acknowledged the prevalence of underpayments and the impacts on its staff:

We were extremely disappointed by these findings and sincerely apologised to all affected staff. Although the underpayments were unintentional, we deeply regret that this has occurred …

We took immediate action to pay all identified current casual staff who had been underpaid up until the end of 30 June 2021 …

We know from the review that there were also very likely to be overpayments. However, La Trobe has not quantified these and does not intend to recoup them.

As a result of the Review and our further analysis, La Trobe has acted to simplify and automate our systems and processes to ensure accurate payments to casual staff and to avoid future errors.45

4.32 Professor Margaret Gardner, Vice-Chancellor of Monash University likewise apologised for underpayments to staff:

I just want to say a couple of other things. I have apologised, and I reiterate my apology unreservedly to all the staff and to the NTU as representative of them, and that apology was issued on 23 September 2021.46

… [let me reiterate] Monash’s commitment to ensuring that all staff are paid accurately and in a fully compliant manner; to attempt, as much as we can, to reduce the insecurity of employment both for fixed-term and casual staff and to put in place proposals to deliver that; and to improve support for staff, not just with greater employment security and ensuring that all employment conditions are fair and equitable but to ensure that they’re completely aware of all the mechanisms available to them to raise complaints and grievances, either individually or collectively.47

4.33 Professor Gardner went on to explain the importance of changing the culture and the value of leadership from the highest levels of the university:

… I would agree with you that culture is important. One of the reasons for doing the review … [is] saying, ‘It’s very important that we have this proposal, that we have people in more secure employment not less.’ It's all

44 Professor Sherman Young, Deputy Vice-Chancellor Education, RMIT University, Committee Hansard, 22 February 2022, p. 42.

45 La Trobe University, Opening Statement tabled by the La Trobe University at a public hearing on 22 February 2022, p. 2 (tabled 22 February 2022); Professor John Dewar, Vice-Chancellor of La Trobe University, Committee Hansard, 22 February 2022, p. 43.

46 Professor Gardner, President and Vice-Chancellor, Monash University, Committee Hansard, 22 February 2022, p. 48.

47 Professor Gardner, President and Vice-Chancellor, Monash University, Committee Hansard, 22 February 2022, p. 49.
about signalling and culture, and making people feel that they can raise the issue. Yes, I agree with you that culture is important; it’s important that culture is right. However people might think it should be, whether it’s based on past experience or current experience, you have to keep signalling that there is the opportunity to raise the issue and know that it will be listened to and actioned, and that you will be treated fairly and equitably.

4.34 Professor Dewar agreed that the underpayment of staff is absolutely unacceptable and pointed to changes that would help address the culture of underpayment:

We’re implementing all of the recommendations of the audit, which include clearer guidance to our academic managers about how they should apply different payment rates to different staff. We will check that those guidelines are being adhered to; improve training for the academic staff who have to administer this system; make sure the casuals know what they’re entitled to; and, as we referred to, create this third-party route for casuals to query payments where they think they’re inaccurate. We think a combination of those things, coupled with improved systems that will make it harder for either party to enter inaccurate information leading to underpayment, will collectively start to shift the culture.

4.35 However, it appears that changing the underpayment culture is slow and difficult, with ABC News reporting on further underpayments in mid-March 2022. Ms Sarah Roberts, NTEU Assistant Secretary stated:

'The level of outrage has kind of built more and more over the long period of time this has been happening…

'... many universities, just don’t actually have control over what’s happening in their business. They make public commitments to fixing up these problems but they’re not prepared to invest in enforcement and compliance'.

4.36 The Victorian Government appeared to be unconvinced that staff underpayment is being addressed, with the Hon Gayle Tierney MP, the Victorian Minister for Higher Education reportedly writing to the state’s Vice-Chancellors in March asking for evidence of compliance. The Minister expressed her concern at the impacts of underpayments on the economy,
international trade, and research, with particular emphasis on potential reputational damage to the sector.  

**Structure of underpayments**

4.37 The committee received evidence of widespread underpayments occurring within universities across the country as a result of longer term underfunding of the sector, and the rise of precarious employment arrangements.  

4.38 A range of witnesses told the committee that work is regularly underpaid or not paid at all, due to the way work is structured and accounted for.

**Inappropriate redesignation of teaching work**

4.39 A number of witnesses told the committee that in university recording systems teaching work has been redesignated—for example from a tutorial to an information session, seminar, practice class or workshop—to avoid paying the higher rate. Under this arrangement work may be paid at one-third to one-half of the rate under the original designation. Furthermore, evidence received by the committee indicated that academic staff have been coerced into misclassifying work, with the object of paying them at lower rates.  

4.40 Highlighting the significant impact this has had, NTEU’s survey found that nearly 40 per cent of academic staff surveyed have been affected by these arrangements. Providing an example of the situation at the University of Western Australia (UWA), the NTEU submitted that:

> …contrary to the terms of the relevant enterprise agreement, since 2014 at least, some academic casuals have been denied payment at the rate applicable to tutorials under that agreement, by the sham redesignation of tutorials as “information sessions” (or similar names) which would attract a

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51 Conor Duffy, 'Union calls for backpay and apology after University of Melbourne faculties cut PhD rates for casuals', *ABC News*, 21 March 2022.  

52 Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, p. 2.  


55 Senator Mehreen Faruqi, Senate Economics References Committee, and Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, p. 3; NTEU, *NTEU surveys staff on wage theft (Connect 13 02)*, 8 September 2020.
rate-of-pay between one-half and two-thirds lower than that applicable at the proper rate of pay.  

4.41 Commenting on a similar case involving Macquarie University, the NTEU submitted:

NTEU has recently recovered over $50,000 for staff at Macquarie University after the Department of Mathematics and Statistics unilaterally reclassified tutorials as an activity that attracts a lower pay rate, on the same basis as was described above for the University of Western Australia and the University of Melbourne. This was despite the activity having undergone no substantive change.  

4.42 Andrew X, a Delegate from Monash Casuals’ Network, told the committee that casuals are being expected to do more work than the rate at which they are being paid, and he argued that definitions of teaching work need to be more clearly defined.  

4.43 AHEIA, however, maintained that where universities decide to deliver courses via different delivery modes it is a matter of legitimate business decision, not underpayment—with this position upheld by the Fair Work Commission (FWC).  

Undervalued piece rates with unreasonable performance expectations

4.44 In relation to the use of piece rates the NTEU submitted that this practice is widespread in the university sector, despite relevant enterprise agreements providing for employees to be paid for marking on a time-taken basis. Dr Kanjere told the committee that 'all teaching labour performed by casual academics is paid by the piece rather than the hour', indeed making this approach common.  

4.45 Universities apply a formula for calculating the hours worked for different types of work, based on what they believe is a reasonable or standard performance expectation, regardless of how long the work actually takes to

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56 NTEU, Submission 105, p. 10.
57 NTEU, Submission 105, p. 12.
58 Andrew, Delegate, Monash Casuals’ Network, Opening statement tabled by Andrew X from University of Melbourne Casuals’ Network at a public hearing on 22 February 2022, pp. 1–2 (tabled 22 February 2022).
59 Mr Stuart Andrews, Executive Director, AHEIA, Committee Hansard, 10 March 2021, p. 28.
60 Employees paid piece rates and commission payments are paid by results instead of an hourly or weekly pay rate. Under this arrangement an employee can be hired to work a mix of piece rates and hourly rate shifts.
FWO, Piece work & commission payments (accessed 22 March 2022).
61 NTEU, Submission 105, p. 11.
62 Dr Anastasia Kanjere, CUPUW, Committee Hansard, 10 March 2021, p. 10.
complete. Rates can also vary, with less experienced staff allowed to claim additional words per hour, effectively meaning more experienced staff are paid less. Witnesses told the committee that the time allowed for these activities is consistently underestimated and 'reducing all the time'.

4.46 Articulating the reality of the situation, the NTEU further stated:

Nevertheless, the University of Melbourne and many others instead have payment systems which automatically assign an amount of pay for each piece of work marked, or sometimes for each student irrespective of the actual hours worked. Moreover, these estimates of time taken are often seriously inadequate.

4.47 Furthermore, the University of Sydney Casuals' Network found in its audit of work and time recording, that 'work allocated to casual staff consistently cannot be completed in the time allocated to undertake the work', with casual staff paid, on average, for only 57 per cent of the work completed, with higher rates of underpayment for women.

4.48 Echoing this, media investigations into underpayments of university staff have reported that 'tutors at some of Australia’s sandstone universities are being told to do a "poor job" and "skim read" student essays to meet impossible marking pay rates'. Indeed, students at Murdoch University were purportedly told that parts of their assessments would not be marked, due to the amount of time allocated for marking and providing feedback having been reduced by one third.

4.49 Universities argued that staff who took longer to prepare or mark work did so by their own choice and not with the agreement of the university, and that performance expectations are set with the agreement of unions.

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63 Dr Giles Fielke, Member organiser, CUPUW, Committee Hansard, 10 March 2021, p. 12; Ms Nicole Gower, Vice-President, People and Services, Macquarie University, Committee Hansard, 10 March 2021, p. 40; CAPA, Submission 44, p. 5.

64 Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 3; Dr Anastasia Kanjere, CUPUW, Committee Hansard, 10 March 2021, p. 10; Dr Yaegan Doran, University of Sydney Casuals' Network, Committee Hansard, 10 March 2021, p. 11; Dr Hayley Singer, Member, University of Melbourne Casuals' Network, Committee Hansard, 22 February 2022, p. 25; NTEU, Submission 105, p. 9.

65 NTEU, Submission 105, p. 11.

66 University of Sydney Casuals' Network, Submission 124, p. 2.


68 See, for example, Monash University, Submission 117, p. [5]; University of Technology Sydney, Submission 112, p. 1; Professor Stephen Garton, Vice-Chancellor and Principal, University of Sydney, Committee Hansard, 10 March 2021, p. 34.
Dr Pooja Sawrikar discovered that the university would not accept her claim for all hours worked, on the basis that the hours had not been approved:

I began keeping an accurate daily time-stamped time diary [of work associated with teaching]. The person who rejected this evidence did so on the grounds that 'no one is allowed to work overtime without written permission'.

4.50 The University of Sydney defended its decision not to pay staff for work they had undertaken, saying:

... that's not an order from the university. That's the person deciding to take longer to prepare, over and above, what is prescribed in the enterprise agreement. The university hasn't asked them to do that extra work.

4.51 Professor Garton also argued that the basis of payment arrangements are known and have been in place and 'enshrined' for a long time (40 years or more). However, under questioning from Senator Tony Sheldon the Professor agreed that academic staff are dealing with greater complexities which have added to their already high workloads, for example much higher proportions of international students, including those with English as a second language, and students generally requiring higher levels of support.

4.52 In addition, staff who receive negative reviews from students, who have complained that they have received inadequate feedback and support—because lecturers are not familiar with coursework, because they don't receive sufficient feedback on their assessments, or because staff do not have time to provide pastoral care—risk losing future employment.

**Failure to pay minimum engagement provisions**

4.53 The committee also received evidence that universities are not meeting minimum engagement provisions as stipulated in workplace agreements. For example, the committee was advised that it is not uncommon for staff to be paid 45 minutes or possibly an hour, for their time in cases where a minimum two-hour engagement is required.

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69 Dr Pooja Sawrikar, *Submission 130*, p. 4.

70 Professor Stephen Garton, Vice-Chancellor and Principal, University of Sydney, *Committee Hansard*, 10 March 2021, pp. 33–34; See also Ms Nicole Gower, Vice-President, People and Services, Macquarie University, *Committee Hansard*, 10 March 2021, p. 40; Professor Ian Jacobs, President and Vice-Chancellor, University of New South Wales, *Committee Hansard*, 10 March 2021, p. 45.

71 Senator Tony Sheldon, Senate Economics References Committee and Professor Stephen Garton, Vice-Chancellor and Principal, University of Sydney, *Committee Hansard*, 10 March 2021, pp. 37–38. See also Dr Yaegan Doran, Member, CUPUW, *Committee Hansard*, 22 February 2022, p. 22.

72 La Trobe Casuals’ Network, *Submission 123*, p. 4.

73 David, Sessional academic, Swinburne University of Technology, *Committee Hansard*, 22 February 2022, pp. 16–17.

74 Dr Giles Fielke, Delegate, Monash Casuals’ Network, *Committee Hansard*, 22 February 2022, p. 29.
**Unpaid work**

4.54 Academic staff explained that they are routinely expected to complete a variety of unpaid work. This includes preparing for and attending lectures, coordinating courses, attending staff meetings, communicating with students, administrative work, mandatory training, and partaking in requisite professional development activities.\(^{75}\)

4.55 Staff also undertake additional work to adjust courses for students living with a disability, or for whom English is a second language, and large numbers of staff worked hard to convert courses to online delivery during the pandemic.\(^{76}\)

4.56 The committee heard that casual staff have been prevented from submitting timesheets which record the actual hours they worked. The CUPUW provided an example:

> ... when details of the self-audit were released, it was revealed that it was based on casual timesheets – timesheets where casually employed staff were not in fact allowed to submit the actual hours they worked, only the hours pre-determined by managers.\(^{77}\)

4.57 Staff submitting timesheets in accordance with the two-hour minimum engagement provisions have also been told that they have overcharged for their time and their time recording has been rejected.\(^ {78}\)

4.58 Accordingly, such underpayments remain hidden and are not identified in any payroll review or audit because hours and pay reconcile.\(^ {79}\) In its own audit of actual hours versus paid hours the University of Sydney Casual’s Network found a significantly high number of casual staff (approximately 90 per cent) performed unpaid work. While the university officially denied knowledge of further underpayments:

> ... managers eventually acknowledged privately that some casual staff may not be being paid for all of their work, but they also argued that this was the fault of casual staff themselves. It was argued that casual staff

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\(^{75}\) Dr Yaegan Doran, University of Sydney Casuals’ Network, *Committee Hansard*, 10 March 2021, p. 11; Dr Siobhan Irving, Macquarie Casual Collective (MQ Casual Collective), *Committee Hansard*, 10 March 2021, pp. 14–15; Dr Hayley Singer, Member, University of Melbourne Casuals’ Network, *Committee Hansard*, 22 February 2022, p. 25; Dr Anastasia Kanjere, CUPUW, *Committee Hansard*, 10 March 2021, p. 9; La Trobe Casuals’ Network, *Submission 123*, p. 2; University of Sydney Casuals’ Network, *Submission 124*, Attachment 2 (University of Sydney Casuals’ Network and the NTEU Sydney University Branch, *The tip of the iceberg: a report into wage theft and underpayment of casual employees at the University of Sydney*, May 2021), p. 13.

\(^{76}\) Mr Errol Phuah, National President, Council of Australian Postgraduate Associations (CAPA), *Committee Hansard*, 10 March 2021, p. 23; NTEU, *Submission 105*, p. 9.

\(^{77}\) CUPUW, Opening Statement tabled by the Casualised, Unemployed and Precarious University Workers (CUPUW) at a public hearing on 22 February 2022, p. 1 (tabled 22 February 2022).

\(^{78}\) Dr Giles Fielke, Delegate, Monash Casuals’ Network, *Committee Hansard*, 22 February 2022, p. 29.

\(^{79}\) Dr Lisa Irving, Representative, CUPUW, *Committee Hansard*, 22 February 2022, p. 19.
could have claimed for all their hours that were worked the whole time they just chose not to. This was, of course, patently false—

Overreliance on post-graduate students and honorary affiliates

4.59 Universities also appear to have over relied on post-graduate students and honorary research affiliates to deliver what is arguably core business for universities. These staff have been used regularly to undertake work that is more traditionally and appropriately completed by researchers or technical staff—for example, supervising PhD students, assisting on field trips, training new students, preparing laboratories, or developing safety documentation. Dr Doran said that while he finds honorary affiliate work rewarding, it is unpaid, with staff who lose their jobs regularly offered an honorary affiliate 'as a kind of conciliatory measure'.

4.60 Universities characterised the use of these cohorts of students for casual teaching as an opportunity for them to earn supplementary income and to develop teaching experience.

Undue pressure, fear and reprisals

4.61 Post-graduate students and academic staff have the pressures of studying, researching and publishing academic work, while at the same time pursuing a career as an academic and teaching. Students and staff pursuing an academic career are heavily reliant on positive feedback and goodwill from their supervisors and students for references, reviews, and further employment.

4.62 As such, the capacity of casual academic staff, in particular, to complain about their employment arrangements and pay is ‘very low’ for fear of jeopardising

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80 Dr Lisa Irving, Representative, CUPUW, Committee Hansard, 22 February 2022, p. 19; See also Dr Yaegan Doran, Member, CUPUW, Committee Hansard, 22 February 2022, pp. 20–21.

81 Dr Yaegan Doran, University of Sydney Casuals’ Network, Committee Hansard, 10 March 2021, p. 18.

82 Mr Errol Phuah, National President, Council of Australian Postgraduate Associations (CAPA), Committee Hansard, 10 March 2021, p. 19.

83 CAPA, Submission 44, p. 5; University of Melbourne Graduate Student Association, Submission 59, p. 2.

84 Dr Yaegan Doran, University of Sydney Casuals’ Network, Committee Hansard, 10 March 2021, p. 18.

85 Professor S Bruce Dowton, Vice-Chancellor and President, Macquarie University, Committee Hansard, 10 March 2021, p. 39.

86 Dr Yaegan Doran, University of Sydney Casuals’ Network, Committee Hansard, 10 March 2021, p. 18.

87 Mr Errol Phuah, National President, Council of Australian Postgraduate Associations, Committee Hansard, 10 March 2021, pp. 20–21.
their future.\textsuperscript{88} The NTEU and CUPUW, amongst other inquiry participants, advised that a 'considerable number' of higher education sector workers wished to pursue their wage theft claims anonymously 'demonstrating the fear that prevents casual staff in this sector from pursuing wage justice'.\textsuperscript{89} In fact, a number of witnesses to this inquiry also chose to provide their evidence anonymously for fear of reprisals.

4.63 Notably, a survey initiated by the La Trobe Casuals’ Network in 2020 found that close to 50 per cent of respondents ‘feared repercussions if they asked to be paid for all hours worked’,\textsuperscript{90} with one respondent commenting:

‘... I was] constantly being asked to claim less than what I was paid. Doing the job of the unit coordinator because she had so much extra work to do and was swamped also. In a strange way I was relieved to be unemployed this semester because it greatly helped my mental health, despite now being broke’.\textsuperscript{91}

4.64 On the subject of the cost and time take to deal with university wage theft after the fact, and on an ad hoc basis, Dr Kanjere stated:

At every single university where we have seen a big win for workers, we have also seen specific rank-and-file casual activists targeted personally. That is a cost that is baked into this post hoc way of dealing with this pressing issue.\textsuperscript{92}

4.65 The committee heard of the difficulty of speaking up and the consequence of not being re-employed, particularly when staff are already casual and are not reappointed, and when there is a ready supply of academics to fill their vacancy.\textsuperscript{93} Dr Doran advised ‘there is a lot of anecdotal evidence’ of employment consequences,\textsuperscript{94} with the committee hearing similar evidence from Dr Liam Kane from CUPUW:

\textsuperscript{88} Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 2.\textsuperscript{89} Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 1.\textsuperscript{90} La Trobe Casuals’ Network, Submission 123, p. 2.\textsuperscript{91} La Trobe Casuals’ Network, Submission 123, p. 3.\textsuperscript{92} Dr Anastasia Kanjere, Committee Member, CUPUW, Committee Hansard, 22 February 2022, p. 20; CUPUW, Opening Statement tabled by the Casualised, Unemployed and Precarious University Workers (CUPUW) at a public hearing on 22 February 2022, p. 1 (tabled 22 February 2022).\textsuperscript{93} Dr Yaegan Doran, University of Sydney Casuals’ Network, Committee Hansard, 10 March 2021, p. 15; Greg, Delegate, Monash Casuals’ Network, Committee Hansard, 22 February 2022, p. 28–29. See also Witness 6, Delegate, Monash Casuals’ Network, Committee Hansard, 22 February 2022, p. 30.\textsuperscript{94} Dr Yaegan Doran, University of Sydney Casuals’ Network, Committee Hansard, 10 March 2021, p. 15; Dr Ellyse Fenton, Member, CUPUW, Committee Hansard, 10 March 2021, pp. 15–16. See also Greg, Delegate, Monash Casuals’ Network, Committee Hansard, 22 February 2022, p. 28–29.
... it was not necessarily uncommon to hear people, at the very least, mentioning that they were scared that, if they were to do a certain thing, it would adversely affect their employment. I heard stories in some faculties of universities where people had been blacklisted [sic]. There was some kind of record kept somewhere by management, whether it be in physical form or just verbally, and people could not get employment at this particular part of the university.

4.66 Dr Giles Fielke from the Monash Casuals’ Network summed this point up succinctly:

... the only real way to ensure you’re paid your wages on time in that two-weekly cycle is to do what you’re told and not ask questions, otherwise you might end up not getting paid anything at all.

**Impacts on academics**

4.67 Academic staff suffer from the same impacts of underpayment as other employees, as discussed in Chapter 1. However, for many academic staff the impacts are magnified because of the passion they have for their work, academic life's unique connection between work and identity, and the difficult ethics of their choices:

The undervaluation of teaching embodied in [inaudible] leaves casual academics in a difficult position. Do we work strictly to the hours set in our contract, knowing we are short-changing students who, understandably, expect their teachers to be well resourced, or do we commit to unpaid work, knowing we are participating in an exploitative system and consenting to the further normalisation of wage theft? If every one of us worked strictly to the hours set in our contract, we would provide a shallow and diminished education. Important work like providing feedback to students would simply not occur. Most casual academics accept exploitation for the sake of their students and their scholarly integrity.

4.68 The committee heard that generally, academic staff are 'passionately involved in their discipline', care deeply about their students, and want to develop their own teaching and research career. They need to work as academics to build their experience—often with few employment opportunities in highly

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95 Dr Liam Kane, CUPUW, Committee Hansard, 10 March 2021, p. 15.
96 Dr Giles Fielke, Delegate, Monash Casuals’ Network, Committee Hansard, 22 February 2022, p. 29.
97 See also Senate Select Committee on Job Security, Second interim report insecurity in publicly-funded jobs, October 2021, pp. 164–172.
98 Dr Anastasia Kanjere, CUPUW, Committee Hansard, 10 March 2021, p. 10.
99 Dr Yaegan Doran, University of Sydney Casuals’ Network, Committee Hansard, 10 March 2021, p. 11.
specialised fields—and to obtain this experience they take on casual academic work, sometimes over extended periods of time.\textsuperscript{100}

4.69 The opportunities for academics to be re-employed elsewhere are also low, with many academic staff already working across multiple universities and employers to 'cobble together sufficient income to live on'.\textsuperscript{101}

4.70 David, a witness to the inquiry who did not wish to use his full name, told the committee about his experiences as a dedicated casual academic staff member:

A problem with the sector is that it relies on my goodwill and my love for teaching and my care for the students to do work that would be minimum requirements. The university itself doesn't pay me to meet those minimum requirements, so to speak. I'm supposed to give good feedback on an assignment. I'm supposed to give detailed understanding and focus to what a student is creating or making or if they're having out-of-hours issues or problems ... I'm underpaid in almost every aspect. The catch-22 with this is, if I did my job according to the standard to which I'm paid at university, I would be considered a pretty poor teacher. The university could then turn around to me and say, 'Well, you're not very good, your student feedback doesn't give you a very good recommendation, and therefore we can let you go'.\textsuperscript{102}

**Impacts on students**

4.71 Witnesses told the committee that casual academic staff provide a range of work that is core to universities, which go well beyond teaching, tutoring, and marking, including providing supervision, coordinating courses, developing courses, and providing feedback and pastoral care to students: 'We build relationships that can change a student’s [life]. We are the workers who educate the next generation of young people'.\textsuperscript{103}

4.72 The committee heard that underpayment of academic staff constitutes a 'deep disrespect' for students, affecting education quality and impacting their future careers.\textsuperscript{104} Dr Singer explained her situation:

\begin{itemize}
\item Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, pp. 2 and 5.
\item Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, p. 6.
\item David, Sessional academic, Swinburne University of Technology, *Committee Hansard*, 22 February 2022, pp. 16–17.
\item Dr Anastasia Kanjere, CUPUW, *Committee Hansard*, 10 March 2021, p. 10. See also *Senate Select Committee on Job Security, Second interim report insecurity in publicly-funded jobs*, October 2021, pp. 172–174.
\item Dr Giles Fielke, Delegate, Monash Casuals’ Network, *Committee Hansard*, 22 February 2022, p. 24; Dr Anastasia Kanjere, Committee Member, CUPUW, *Committee Hansard*, 22 February 2022, pp. 22–23.
\end{itemize}
I know that I am not alone when I say that I have been, and am still, in an impossible situation: either I undertake work for free, which amounts to wage theft, or my students receive a substandard education, which amounts to education theft. I will not compromise on what I offer students. The university relies on this, so for now the wage theft continues.105

**Impacts on future capability of the sector**

4.73 In a view shared by CUPUW,106 Ms Gabrielle Gooding, from the NTEU explained that 'significant and longstanding underfunding by the federal government' is at the root of the problem, requiring universities to do more with less.107

4.74 CUPUW suggested that universities are well aware of the wage theft occurring in their institutions, saying 'it contributes to the cheapness of academic labour and, along with the fees extracted from international students, has been enabling university services in an underfunded sector for years'.108

4.75 Underpayment is known to have resulted in experienced, professional staff leaving the sector,109 denying students the opportunity to be taught knowledgeable and dynamic staff and raising questions about the future sustainability of the sector.110

4.76 The Council of Australian Postgraduate Associations (CAPA) suggested that Australian universities have become over-reliant on international student fees for income, making universities susceptible to changes in student numbers—as highlighted by the pandemic111—and resulting in understaffing, and reliance on insecurely employed staff and unpaid work. This view was supported by Ms Zoe Ranganathan from the National Union of Students.112

4.77 Professor Dowton also highlighted the funding issues for universities, advising that research grants have become more competitive over time and that

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105 Dr Hayley Singer, Member, University of Melbourne Casuals’ Network, *Committee Hansard*, 22 February 2022, p. 25.
106 Dr Ellyse Fenton, Member, CUPUW, *Committee Hansard*, 10 March 2021, p. 18.
107 Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, p. 3.
108 Dr Anastasia Kanjere, CUPUW, *Committee Hansard*, 10 March 2021, p. 10.
109 Dr Pooja Sawrikar, *Submission 130*, p. 4.
111 See Chapter 1.
112 CAPA, *Submission 44*, p. 5; Ms Zoe Ranganathan, President, National Union of Students, *Committee Hansard*, 10 March 2021, p. 23.
consequently universities must look outside public institutions for research funding.\textsuperscript{113}

4.78 Mr Errol Phuah from CAPA highlighted the longer-term challenges for the sector as courses and students receive less support, the quality of education diminishes, and course offerings fall. He noted that students are less likely to receive the quality of education that they have paid for, and come to Australia for, with flow on effects to their future careers and employment.\textsuperscript{114}

4.79 Given the value of the sector to the Australian economy—$37.4 billion—not to mention the importance of universities to knowledge, innovation, and societal change,\textsuperscript{115} the evidence received by this inquiry begs the question how might wage theft be addressed?

\begin{footnotesize}
\begin{enumerate}
\item Professor S Bruce Dowton, Vice-Chancellor and President, Macquarie University, \textit{Committee Hansard}, 10 March 2021, p. 43.
\item Mr Errol Phuah, National President, Council of Australian Postgraduate Associations (CAPA), \textit{Committee Hansard}, 10 March 2021, p. 23.
\item Senate Select Committee on Job Security, \textit{Second interim report insecurity in publicly-funded jobs}, October 2021, pp. 139–140.
\end{enumerate}
\end{footnotesize}
Chapter 5
Potential measures to address underpayment

5.1 The committee heard that everyday Australians want to see more measures put in place, particularly by government, to protect them from inadvertent as well as unscrupulous and deliberate wage theft:

Workers like me want to see the government fix the problems that currently make it easy for companies to take advantage of workers and underpay them.¹

5.2 Submitters and witnesses to the inquiry proposed a range of measures for consideration.

Improving protections for workers

Improving support payments

5.3 The committee heard from Ms Zoe Ranganathan, President of the National Union of Students (NUS), that basic protection of workers could be improved through increases to minimum social support payments to enable workers to leave abusive workplace relationships and still be able to afford somewhere to live and food to eat.²

Protecting vulnerable workers

Extending the Fair Entitlements Guarantee

5.4 The committee heard that additional protections should be considered for vulnerable workers, including the extension of the Fair Entitlements Guarantee (FEG). As currently constituted, the FEG does not apply to contractors or to temporary visa holders.

5.5 The Migrant Workers’ Taskforce recommended that the FEG scheme be expanded to include temporary visa holders in order to protect them when companies go broke, or they are exposed to phoenixing activity. Following this report, in March 2019, the Australian Government agreed that it would:

... examine whether to extend the FEG to migrant workers with work rights. Where these workers have been doing the right thing by satisfying their taxation obligations, the Government considers it reasonable that

¹ Mr Mohammed Abdillahi, Member, United Workers Union (UWU), Committee Hansard, 11 March 2021, p. 2.

² Ms Zoe Ranganathan, President, National Union of Students (NUS), Committee Hansard, 10 March 2021, p. 24.
they, in turn, be protected by the FEG program. Consultation will soon commence on this proposal.³

5.6 However, as no further action appears to have been taken, several witnesses reiterate the need for this measure, noting the Australian Government’s inaction.⁴ The Migrant Workers Centre (MWC) explained to the committee:

It was clear that in a liquidation, this was after we’d raised recovery action with this business, they had stripped the assets, leaving insufficient funds to pay the workers their leave, but also their accrued leave and their stolen wages. Because temporary migrants were excluded from the Fair Entitlements Guarantee they walked away with just cents in the dollar for their accrued leave.⁵

5.7 The National Foundation for Australian Women (NFAW) and others also spoke of the need for regulatory reform to address contract workers, as they are also ineligible to access the FEG.⁶

**Wage insurance scheme**

5.8 WEstjustice recommended the establishment of a wage insurance scheme, funded by employer premiums, compulsory insurance and/or penalties for breaches of the *Fair Work Act 2009* (Fair Work Act). It argued that such a scheme should be accessible to workers who are unable to access their unpaid wages via other legal frameworks.⁷

**Protections for migrant workers**

5.9 A number of witnesses told the committee that protections for migrant workers need to be put in place to ensure that they do not either fear or suffer negative immigration outcomes as a result of pursuing underpayments. It was recommended that the existing Assurance Protocol between the Fair Work Ombudsman (FWO), the Australian Taxation Office (ATO), and the Department of Home Affairs be strengthened, and a strong firewall be established to ensure that underpaid workers are not at risk of having their


⁵ Mr Mathew Kunkel, Director, Migrant Workers Centre (MWC), *Committee Hansard*, 11 March 2021, p. 11.

⁶ NFAW, *Submission 37*, p. 23; Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, *Submission 102*, p. 20.

visa cancelled. However, as was pointed out, this could result in reduced abilities of agencies to collect intelligence about workplace laws and other criminal activity and may, in any case, not fully address temporary workers’ concerns.

5.10 The McKell Institute went further, recommending that the Fair Work Act be amended to ensure that workers who breach visa conditions be protected by workplace protections under the Act. The Institute, and other witnesses recommended that visa conditions which create vulnerability be eliminated—for example, by removing conditions which make workers dependent on their sponsoring employer, removing the required 88 days of agricultural work for Working Holiday Makers, and extend the time a Working Holiday Maker can stay with the one employer. The MWC also called for the root causes of migrant worker vulnerability to be removed, suggesting:

... reform [be] focused on recognising the social inclusion benefits of permanent migration and clear pathways from temporary to permanent; assessing skills shortages independently and addressing them through more coordinated education and immigration policies rather than just by employer demand; and increasing workers’ rights to move between employers so that they can leave exploitative situations. Another is to legislate to confirm that all employees are entitled to minimum employment standards regardless of visa status ...

5.11 Witnesses, including the McKell Institute and WEstjustice, and Associate Professors Laurie Berg and Bassina Farbenblum, additionally recommended the introduction of a temporary bridging visa to enable temporary migrants to stay in Australia to resolve underpayment claims.

5.12 The McKell Institute warned that a comprehensive revision of the temporary migration program is needed in order to better protect migrant workers.

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8 Mr Mathew Kunkel, Director, MWC, *Committee Hansard*, 11 March 2021, p. 11; MWC, *Submission 53*, p. 14; Dr Stephen Clibborn, Private capacity, *Committee Hansard*, 18 September 2020, p. 20; Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, *Submission 102*, pp. 15–16; Unions New South Wales (NSW), *Submission 31*, p. 4.

9 Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, *Submission 102*, p. 16.


11 Dr Stephen Clibborn, Private capacity, *Committee Hansard*, 18 September 2020, p. 20.


5.13 Some submitters, such as Dr Stephen Clibborn, called for other measures relating to education, enforcement, and support to assist migrant workers.\textsuperscript{14} These measures, which have the potential to benefit workers more broadly, are discussed below.

\textit{Enhanced adverse actions protection}

5.14 Mr Liam O’Brien, Assistant Secretary with the Australian Council of Trade Unions (ACTU), told the committee that ‘there are general protection provisions but they are woefully inadequate’ at protecting workers against adverse actions.\textsuperscript{15} The Australasian Centre for Corporate Responsibility (ACCR) and LUCFR Super shared these concerns for workers making allegations of underpayment.\textsuperscript{16}

5.15 Noting that adverse actions like loss of hours or not being re-employed can be notoriously difficult to prove,\textsuperscript{17} witnesses, including the National Tertiary Education Union (NTEU) and the Queensland Government, advised that enhanced adverse actions protections for workers and workplace representatives are required.\textsuperscript{18}

5.16 The National Retail Association (NRA) proposed that protections be achieved by extending whistle-blower protections to the Fair Work Act to cover individuals disclosing information about wage theft.\textsuperscript{19}

5.17 However, the Australian Chamber of Commerce and Industry (ACCI) submitted that existing protections under the Fair Work Act, and available via court injunctions, are sufficient to protect workers and argued against reforms, remarking:\textsuperscript{20}

\begin{quote}
Employees querying their wages enjoy substantial protections, and cannot be sacked or, punished.\textsuperscript{21}
\end{quote}

\textsuperscript{14} Dr Stephen Clibborn, Private capacity, \textit{Committee Hansard}, 18 September 2020, p. 20.

\textsuperscript{15} Mr Liam O’Brien, Assistant Secretary, Australian Council of Trade Unions (ACTU), \textit{Committee Hansard}, 18 September 2020, p. 12. See also Ms Gabrielle Gooding, National Assistant Secretary, NTEU, \textit{Committee Hansard}, 10 March 2021, pp. 5–6.

\textsuperscript{16} Australasian Centre for Corporate Responsibility (ACCR) and LUCFR Super, \textit{Submission 86}, p. [3].

\textsuperscript{17} Dr Yaegan Doran, University of Sydney Casuals’ Network, \textit{Committee Hansard}, 10 March 2021, p. 15; Dr Liam Kane, CUPUW, \textit{Committee Hansard}, 10 March 2021, p. 15.


\textsuperscript{19} NRA, \textit{Submission 49}, p. [14].

\textsuperscript{20} ACCI, \textit{Submission 81}, pp. 17–19.

More accessible avenues for justice

5.18 The committee received extensive evidence showing that current avenues for redress and justice do not meet the needs of underpaid workers, particularly low-paid and vulnerable workers—with existing options proving variously intimidating, inaccessible, costly, complex, inefficient and ineffective.22

5.19 Ms Annie Wang, a victim of wage theft, said:

We need tough wage theft laws nationally to deal with the root of the problem and to provide a quick and accessible process for workers to recover their stolen wages.23

5.20 The committee heard that few private firms offer employment law advice on a ‘no win no fee’ basis, given the time required to run such investigations and cases, and that there is limited public funding for employment law services.24 Furthermore, some community-based services are advice-only services and cannot provide legal representation.25

5.21 At odds with a number of submitters, the Ai Group maintained that, in relation to superannuation, strong laws and appropriate mechanisms already exist to ensure that payments are made to workers and that any underpayments are recovered.26

5.22 Dr Tess Hardy and others, proposed that a deeper review of the redress systems is needed, including the split of responsibilities between regulators, in order to help stem the underpayment of employees.27

Improving small claims

5.23 The committee received a range of evidence highlighting the need for improvements to the small claims process for claimants, including:

• increases to the jurisdictional limit of the Fair Work Division of the Federal Circuit and Family Court (FCFCA), between $30,000 and $100,000 to enable it to hear a wider range of claims;28

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22 See, for example, MWC, Submission 53, p. 9; Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, pp. 10–11.

23 Ms Annie Wang, Private capacity, Committee Hansard, 11 March 2021, p. 12.

24 WEstjustice, Submission 47, pp. 35–36.

25 Northern Territory Working Women’s Centre (NTWWC), Submission 17, p. [5].

26 Ai Group, Submission 62, pp. 11–12.

27 Dr Tess Hardy, Submission 85, p. [13]; Associate Professor Anna Boucher, Umeya Chaudhuri and James Hall, Submission 43, p. 3.

28 Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 11; Associate Professor Anna Boucher, Umeya Chaudhuri and James Hall, Submission 43, p. 18; WEstjustice, Submission 47, p. 9; JobWatch Inc, Submission 92, p. 8.
• extension of small claims procedures to local courts, civil tribunals and/or state industrial tribunals;29
• a dedicated list for underpayment matters, preferably with dedicated (and additional) judges;30
• the ability to lodge group complaints or representative proceedings, to reduce the resources required to bring and hear matters relating to the one employer or employer group;31
• reduction or abolition of filing fees for underpayments claims;32
• prescribed timeframes for complaint resolution;33
• simplified court processes and a reduction of evidentiary burdens on workers;34 and
• provisions enabling civil penalties against employers;35
• the expansion of remedies to include compensation for workers,
• remedial orders to achieve reform (e.g. requiring employers to undergo training);36 and
• the establishment of a restructured small claims process with low fees, simplified court processes and strict time limits—either as a new jurisdiction

29 NRA, Submission 49, p. [17].

30 Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 11; Law Council of Australia (LCA), Submission 90, pp. 13–14.

31 Plus enabling class action proceedings for larger claims. Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 11; NSW Society of Labor Lawyers, Submission 23, p. 6.

32 Unions NSW, Submission 31, p. 5; Associate Professor Anna Boucher, Umeya Chaudhuri and James Hall, Submission 43, p. 18; Work Lawyers, Submission 10, p. 3.

33 Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 11.

34 Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 12; Victorian Trades Hall Council, Submission 67, p. 11.

35 Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 12; Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), Submission 106, p. 23; University of New South Wales (UNSW) Law Society, Submission 36, pp. 15–16.

36 Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 12.
within or alongside the Fair Work Commission (FWC), 37 or a separate small claims tribunal. 38

Allow for recovery of costs

5.24 Maurice Blackburn Lawyers and Dr Tess Hardy, amongst others, supported the notion that successful complainants be able to recover their legal costs. 39

Mr Josh Bornstein from Maurice Blackburn Lawyers said:

… one of the reasons it’s so expensive and difficult to go to court about wage theft is that, even when you win, you still have to pay your legal costs. If the system were changed so that, if you win your case, the legal costs are paid by the other side, which is often the case in litigation, that would defray the expense of doing so. 40

5.25 Dr Hardy supported holistic reforms to the institutional frameworks at both state and federal levels, 41 and called for the sharing of justice, compliance, and enforcement functions across a wider range of bodies, including unions, legal practitioners, and community legal centres. 42 She suggested that cost shifting be made one-way to prevent adverse costs orders being made against claimants, 43 postulating, along with the NSW Society of Labor Lawyers, that this may encourage or enable more third parties—legal practitioners, unions and community legal centres—to assist claimants. 44

Improving education and advocacy

5.26 Witnesses highlighted the role of civil society organisations including unions, migrant community organisations, and community advisory and legal centres—but also suppliers, lead companies, consumers, and others—in

37 Finance Sector Union of Australia (FSU), Submission 65, p. 12; Associate Professor Anna Boucher,Umeya Chaudhuri and James Hall, Submission 43, p. 4; NSW Young Labor, Submission 54, p. 6; Woolworths Group, Submission 71, p. [7]; LCA, Submission 90, pp. 13–14; NUS, Submission 91, p. [3]; CFMEU, Submission 106, p. 23; UNSW Law Society, Submission 36, pp. 15–16; ACTU, Submission 38, pp. 37 and 57–59.

38 NSW Society of Labor Lawyers, Submission 23, p. 2. See also The Law Society of NSW Young Lawyers, Submission 27, p. [7]; NFAW, Submission 37, p. 4. See also LCA, Submission 90, pp. 13–14; ACTU, Submission 38, p. 37. NFAW, Submission 37, p. 4. See also LCA, Submission 90, pp. 13–14; ACTU, Submission 38, p. 37.

39 Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, Committee Hansard, 11 March 2021, p. 25; Dr Tess Hardy, Submission 85, p. [13]; Ms Melissa Kennedy, Submission 3, p. 9; Western Australian (WA) Government, Submission 7, p. 8; Work Lawyers, Submission 10, p. 3.

40 Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, Committee Hansard, 11 March 2021, p. 25.

41 Dr Tess Hardy, Submission 85, pp. [13–14].

42 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 25.

43 Dr Tess Hardy, Submission 85, p. [13]; See also NSW Society of Labor Lawyers, Submission 23, p. 6.

44 Dr Tess Hardy, Submission 85, p. [13]; See also NSW Society of Labor Lawyers, Submission 23, p. 6.
addressing underpayments, a view supported by workplace relations research:

Another recurring theme in much of the latest literature ... has been how non-state actors may contribute to and be enrolled in the regulatory process. This includes not only the traditional IR [industrial relations] stakeholders, such as employer associations and unions, but institutional investors, company boards, lead firms—those firms which sit on the top of supply chains or at the head of franchise networks—private practitioners, civil society organisations and others. In my view, a more holistic and inclusive approach to enforcement is essential for ensuring that compliance will continues [sic] even after an inspector moves on.

5.27 The committee heard that, for migrant workers afraid of government authorities, community-based organisations are likely to be more effective, supporting witnesses’ recommendations for additional funding for these bodies for the purpose of both education and representation. WEstjustice recommended recurrent funding for community legal services, advising:

The value of community organisations in assisting vulnerable workers has been widely recognised. In 2009 the FWO conducted a review of the need for and provision of Community-Based Employment Advice Services in the light of the introduction of the Fair Work regime (Booth Report). The Report highlights the importance of Community-Based Employment Advice Services for vulnerable workers.

5.28 Community legal centres have an important role in educating workers about their rights to fair pay and conditions, as well as how to address underpayments and other workplace abuses. Furthermore, they can provide advocacy and representation in order to change the balance of power between workers and employers and change workplace culture. Ms Annie Wang spoke of the importance of these resources:

I also want to share this experience with the committee to encourage more support and funding for organisations like the Fair Work Ombudsman and the Young Workers Centre, because, as much as I hate to say this, so many

45 Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 17; MWC, Submission 53, p. 15; Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, p. 20; ACCR and LUCFR Super, Submission 86, pp. [3–5].

46 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 19.

47 MWC, Submission 53, p. 15.


49 WEstjustice, Submission 47, pp. 36–37.

50 MWC, Submission 53, p. 11.

51 Ms Julien Gibson, Member, Hospo Voice/UWU, Committee Hansard, 11 March 2021, p. 2; LCA, Submission 90.0, p. 14; ACCR and LUCFR Super, Submission 86, p. [3].
Australian workers are being exploited every day, and without these free legal services many of them will continue to be exploited. Everyone deserves a fair go, including every single Australian worker.\footnote{Ms Annie Wang, Private capacity, \textit{Committee Hansard}, 11 March 2021, p. 12.}

5.29 Submitters supported increases in funding to support education campaigns—both government and community led—including for specific sectors (for example, for migrant workers),\footnote{Associate Professor Anna Boucher, Umeya Chaudhuri and James Hall, \textit{Submission 43}, p. 3; WESTjustice, \textit{Submission 47}, p. 24; MWC, \textit{Submission 53}, p. 11; ACCI, \textit{Submission 81}, p. 14; ACCR and LUCFR Super, \textit{Submission 86}, p. [3].} with the NFAW emphasising the need for a ‘properly resourced education campaign to ensure both employers and employees know their rights and obligations’.\footnote{NFAW, \textit{Submission 37}, p. 20.} Mr Shirley Jackson from Per Capita said:

\begin{quote}
We should be aiming for prevention, not retribution. It should never get to that stage. The best way we can prevent these things happening is by having an educated workforce with a strong collective voice at work, making sure that small businesses who are entering this space have the support they need to go out and learn exactly what their responsibilities are.\footnote{Mr Shirley Jackson, Economist, Per Capita, \textit{Committee Hansard}, 11 March 2021, p. 33.}
\end{quote}

5.30 Submitters clearly linked improvements in education of both workers and employers to preventing and identifying wage theft, with the NFAW noting that ‘no penalties alone are likely to have a broad impact on employer conduct’.\footnote{NFAW, \textit{Submission 37}, pp. 20–21; NRA, \textit{Submission 49}, p. [12]; Dr Kristin van Barneveld, Social Policy Committee Member, NFAW, \textit{Committee Hansard}, 18 September 2020, p. 37; Queensland Nurses and Midwives’ Union, \textit{Submission 78}, p. 9.} Unions also spoke to their role in educating workers and employers about wages and employment conditions, and their positive impact on reducing wage theft.\footnote{See, for example, Australian Manufacturing Workers’ Union (AMWU), \textit{Submission 51}, pp. [3–4]; MWC, \textit{Submission 53}, p. 11.}

5.31 The Young Workers Centre, the South Coast Labour Council, the Queensland Government, the UNSW Law Society, and others supported the inclusion of employment literacy as a mandatory part of the secondary school curriculum, given the high proportion of wage theft affecting young workers.\footnote{Unions ACT, Young Workers Centre, \textit{Submission 57}, pp. [3–4]; South Coast Labour Council, \textit{Submission 13}, p. [3]; Queensland Government, \textit{Submission 19}, p. 7; UNSW Law Society, \textit{Submission 36}, p. 10; NRA, \textit{Submission 49}, p. [12].}

5.32 Likewise, the ATO acknowledged the importance of education in its work:

\begin{quote}
One of the things we do try to do with employers is to work, firstly, to make sure that they really understand their obligations and that we can
\end{quote}
support them to meet those obligations. Our focus on our communications with employers in relation to unpaid super is primarily about helping them to get it right, making sure they can meet those obligations and ensuring that they are prepared to come and talk to us if they are having trouble meeting those obligations so that we can get them to lodge a charge statement and then work with them to enter a payment plan if they need that to get those amounts paid. Our focus really is more on helping them get it right and supporting them where they are struggling with paying.\(^{59}\)

**More effective compliance and enforcement**

5.33 Ms Arabella Wauchope from the NUS, contended that existing penalties have not deterred employers from underpaying staff, particularly international students, and that stronger penalties—along with improved collaboration and education—would reduce underpayments and improve outcomes for workers.\(^{60}\) Mr Trent Whitehand-Willick stressed that, at present:

> The overwhelming message that is sent to me is that we the employees are an unvalued means to financial success, which is reinforced by the government's tacit acceptance of this culture.\(^{61}\)

**Improve regulator resourcing**

5.34 As discussed in Chapter 3, a number of witnesses shared the view that resourcing of regulators is not sufficient, and they recommended that additional resources be allocated to the FWO and FWC so they can proactively undertake underpayment recoveries and enforcement activities.\(^{62}\) Dr Clibborn underscored the importance of this recommendation:

> On the investment in the Fair Work Ombudsman that you mentioned: I see this from the government point of view, of having to invest in resources to solve this problem. Those resources can be monetary, with an extremely high investment in the Fair Work Ombudsman, or, ideally, a combination of an increase and allocating those resources to others outside of the state to be part of that enforcement solution.\(^{63}\)

5.35 This recommendation was supported by the ACCI, which argued for additional inspectors to assist companies to meet their obligations and address

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60 Ms Arabella Wauchope, Welfare Officer, NUS, Committee Hansard, 10 March 2021, p. 24.

61 Mr Trent Whitehand-Willick, Member, UWU, Committee Hansard, 11 March 2021, p. 1.

62 See, for example, Westjustice, Submission 47, pp. 39–40; Associate Professor Angela Knox, Submission 33, p. 3; Chamber of Commerce and Industry WA (CCIWA), Submission 41, p. 11, Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 3; Mr Stuart Bonds, Submission 45, pp. 5–6; Shop, Distributive and Allied Employees Association (SDA), Submission 75, pp. 6 and 27–28.

63 Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, p. 22.
complaints. They also argued for more reliable, legally reliable advice—similar to the ATO's public and private rulings.

5.36 Additionally, Dr Clibborn highlighted the value of supporting co-monitoring and enforcement as a way of sharing the compliance load and improving its effectiveness, though for example, an increased role for unions.

**Increased role for unions**

5.37 The Australian Manufacturing Workers’ Union (AMWU) noted a link between the curtailing of union powers and enforcement and increases in wage theft—with worker isolation, the decline of industrial disputation, and reductions in rights of entry and inspection of records corresponding with higher prevalence of underpayments. Mr Bornstein highlighted that one ready-made solution already exists—in the form of trade unions—a view shared by Dr Carina Garland from the Victorian Trades Hall Council:

> … we think that the federal government needs to reinstate the union right of entry powers for inspection in the IR legislation. We think that any rights enshrined in legislation are meaningless if you can’t enforce them. Employers are already obliged to pay workers their minimum entitlements, and they don’t. That suggests there’s a problem with enforcement, and we know that unions are a really important part of enforcing workplace rights. When I say ‘unions’, I mean both the institution of unions but also the unions that exist in the workplace as organised labour, as members of unions with delegate and HSR [health and safety representatives] structures in workplaces. Unions must be involved in investigating instances of wage theft.

5.38 Ms Emma Dawson and Mr Jackson from Per Capita explained how the effectiveness of unions in reducing wage theft is recognised in other developed nations. Dr Clibborn summarised:

> … in relation to the sectors where we find employer noncompliance and wage theft to be most common, they are sectors with very low union density. The advantage of unions being involved in enforcement is not only their role as an inspector, if you will, but also the fact that workers, as union members, as part of the union, are within the workplace already, so

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64 ACCI, *Submission 81*, p. 15.
66 Dr Stephen Clibborn, Private capacity, *Committee Hansard*, 18 September 2020, p. 22.
67 AMWU, *Submission 51*, pp. [3–5];
68 Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, *Committee Hansard*, 11 March 2021, p. 21.
69 Dr Carina Garland, Assistant Secretary, Victorian Trades Hall Council, *Committee Hansard*, 11 March 2021, p. 15.
70 Ms Emma Dawson, Executive Director, and Mr Shirley Jackson, Economist, Per Capita, *Committee Hansard*, 11 March 2021, pp. 28 and 33.
that increased threat to an employer of an inspection of some kind or, rather, detection in general will provide a deterrent factor.  

5.39 The committee heard that greater rights of entry, access and inspection for unions would help to address underpayments by:

- providing a deterrence effect on employers;  
- raising awareness of underpayment;  
- identifying and uncovering wage theft;  
- facilitating the resolution of complaints within the workplace, reducing demands on other processes, as well as costs for workers, employers, and the taxpayer;  
- enabling workers to unite and provide avenues for addressing wage theft; and  
- reducing the burden on regulators, enabling them to redeploy their resources elsewhere.

5.40 Expanding on these points, the ACTU highlighted the importance of unions in identifying and addressing wage theft, with Mr O’Brien telling the committee:

I think this is why it is so important in those sectors to empower the unions that are incentivised to identify and rectify wage theft, because of the membership models that we have and, indeed, to have stewardship of industries as well. The way in which our unions are structured across industries means that we are the most appropriate people to go out there and combat this scourge.

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71 Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, pp. 21–22.

72 NSW Society of Labor Lawyers, Submission 23, pp. 4–5; MWC, Submission 53, p. 11; Ms Julien Gibson, Member, Hospo Voice/UWU, Committee Hansard, 11 March 2021, p. 2.

73 Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, pp. 21–22. See also Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, Committee Hansard, 11 March 2021, p. 25.

74 NSW Society of Labor Lawyers, Submission 23, p. 5.

75 MWC, Submission 53, p. 11; Ms Julien Gibson, Member, Hospo Voice/UWU, Committee Hansard, 11 March 2021, p. 2.

76 Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, Committee Hansard, 11 March 2021, p. 25.

77 UNSW Law Society, Submission 36, pp. 9–10; MWC, Submission 53, p. 11; Ms Julien Gibson, Member, Hospo Voice/UWU, Committee Hansard, 11 March 2021, p. 2.

78 NSW Society of Labor Lawyers, Submission 23, p. 5; ABCC, Submission 32, p. 4.

79 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 16.
5.41 Mr Bornstein from Maurice Blackburn Lawyers explained that regulator resourcing would never be sufficient to address underpayment, and that empowering workers to act collectively is vital:

Even in a strongly unionised workplace, with a collective bargaining culture and collective agreements, you will find it's not a guarantee that there won't sometimes be problems with underpayment. But, where these problems arise, they will be addressed far more quickly, cost-effectively and efficiently than in environments which involve huge disparities in power, where there is not a collective bargaining culture.

5.42 Numerous witnesses proposed that union powers be extended, to enable them to advocate for both members and non-members (if they so choose), including:

- permitting the FWO to refer underpayments complaints to a trade union—where the complainant agrees;
- amending right of entry provisions—to allow trade unions to monitor, audit and investigate suspected underpayments for all employers within that workplace (preventing individual workers being victimised); and
- improving provisions relating to access to records— including penalties for providing false or misleading records, as well as enabling access to records of former employees, and amendments to reflect technological changes in how information is stored and retrieved (e.g. cloud-based payroll information).

5.43 Mr O’Brien pointed out the benefits of union involvement:

... [if registered representatives of workers were permitted to do inspections] there would be thousands of representatives of working people having the same powers to inspect wages and recover money as the ombudsman. Then I dare say we would have significantly less wage theft in this country and we would have a significantly higher national income, given the income that would then flow to working people.

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80 Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, Committee Hansard, 11 March 2021, p. 24.

81 Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, Committee Hansard, 11 March 2021, p. 25.

82 Dr Kristin van Barneveld, Social Policy Committee Member, NFAW, Committee Hansard, 18 September 2020, p. 40.

83 NSW Society of Labor Lawyers, Submission 23, p. 4.

84 NSW Society of Labor Lawyers, Submission 23, p. 5; Dr Kristin van Barneveld, Social Policy Committee Member, NFAW, Committee Hansard, 18 September 2020, p. 36; Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 7.

85 NFAW, Submission 37, pp. 3 and 13–14; CFMEU, Submission 106, p. 18; ACTU, Submission 38, pp. 5–6.

86 Mr Liam O’Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 16.
Enforcement

5.44 Several witnesses told the committee that they do not think employment laws are being sufficiently enforced to prevent the underpayment of employees.\textsuperscript{87} ACCR and LUCFR Super observed that voluntary compliance initiatives and self-regulation are insufficient,\textsuperscript{88} while Per Capita stated that lack of enforcement 'is sending a message that it [government] is soft on crime provided you run a business'.\textsuperscript{89}

5.45 Dr Clibborn advised the committee of the attributes of an effective system, including that enforcement is more effective than penalties:

\begin{quote}
... research tells us that measures directed at enforcement are more likely to increase employer compliance than are those focused on penalty. We should make employers believe that they are likely to be caught and increase the legitimacy of our laws by being seen to enforce them seriously. This will take an increase in resources, both monetary and other resources—first, significantly increased funding to the Fair Work Ombudsman.\textsuperscript{90}
\end{quote}

5.46 Mr O'Brien was of the opinion that currently, businesses have a low expectation of being caught for underpayment:

If the likelihood of being caught is so low—and, again, if we were to think of the Fair Work Ombudsman and the small fraction of society that they can touch with their audit and compliance work, the likelihood of being caught is low. Finally, there are the consequences. Deterrence plays a role, and indeed consequences, whether they be civil or criminal, are important in terms of deterring conduct. But, if the consequences as they are today are largely—firstly, if I do get caught, which, as I've explained, is pretty rare, the worst-case scenario often for me is that I'll be expected to repay the money. In some cases I might be hit with a contrition payment, which at many levels might not even equate to the interest that they would have earnt on the stolen wages.\textsuperscript{91}

5.47 Witnesses suggested that enforcement mechanisms could be improved by implementing a more focussed strategy and fixed penalties for high risk sectors and repeat offenders,\textsuperscript{92} ‘on-the-spot’ inspections of employers in order

\textsuperscript{87} See, for example, LCA, Submission 90, p. 13; Mr Stuart Bonds, Submission 45, p. 16; Mr Shirley Jackson, Economist, Per Capita, Committee Hansard, 11 March 2021, p. 27; Mr Liam O'Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 12.

\textsuperscript{88} ACCR and LUCFR Super, Submission 86, p. [3].

\textsuperscript{89} Mr Shirley Jackson, Economist, Per Capita, Committee Hansard, 11 March 2021, p. 27.

\textsuperscript{90} Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, p. 20.

\textsuperscript{91} Mr Liam O'Brien, Assistant Secretary, ACTU, Committee Hansard, 18 September 2020, p. 12.

\textsuperscript{92} Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 24; ACCI, Submission 81, p. 15; CFMEU, Submission 106, p. 24.
to better monitor and detect wage theft, and by establishing a wage theft inspectorate to supplement the FWO’s existing role, with powers to inspect records, investigate and press criminal charges where civil actions fail.

**Extending penalties**

5.48 Some witnesses supported penalty increases for the underpayment of workers, particularly in relation to systemic and repeated instances. They also argued that the likelihood of employers being caught for underpayment is low, and if they do get caught, worse-case scenario is merely repayment of monies owed. They submitted that, while penalty payments may be levied on occasion, they may be so low that it 'might not even equate to the interest that they would have earnt on the stolen wages' and are considered 'the cost of running a business' and a risk worth taking.

**Increasing penalties**

5.49 ACCR and LUCFR Super, the Financial Services Council (FSC), the NTEU and others supported measures to increase penalties for underpayment of employees, to serve as a deterrent to employers. For example, Ms Gabrielle Gooding, National Assistant Secretary of the NTEU warned that 'I don't think anything other than penalties and substantial back payments and public opprobrium is going to impact the universities' behaviour'.

5.50 However, Ai Group and Housing Industry Australia (HIA) rejected this approach. Ai Group advised that penalty increases would create

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93 WESTjustice, *Submission 47*, p. 24.; Dr Tess Hardy, Private capacity, *Committee Hansard*, 18 September 2020, p. 23; Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, *Submission 102*, p. 20.


95 Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, p. 6; Mr Liam O’Brien, Assistant Secretary, ACTU, *Committee Hansard*, 18 September 2020, p. 12; Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, *Committee Hansard*, 11 March 2021, p. 25; ACCR and LUCFR Super, *Submission 86*, p. [3]; NTEU, *Submission 105*, p. 2.

96 Mr Liam O’Brien, Assistant Secretary, ACTU, *Committee Hansard*, 18 September 2020, p. 12. See also Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, *Committee Hansard*, 11 March 2021, p. 25.


99 Ms Gabrielle Gooding, National Assistant Secretary, NTEU, *Committee Hansard*, 10 March 2021, p. 7.
inconsistencies and unfairness between state and territory and federal penalties, that changes to the system should be evidence based, and it is too soon to gauge the impacts of penalty increases made in 2017. Furthermore, they argued that substantial increases in the number of self-reported underpayments suggests that compliance and enforcement activities are working as intended.100

5.51 HIA said that it would support the continued use of voluntary compliance measures, partnerships, and cooperation to improve compliance and change employer behaviours.101

5.52 Dr Hardy questioned the value of increased penalties, highlighting that her research has found other approaches to have a greater deterrence effect:

I found that deterrence is, of course, a critical component of enforcement, but larger and harsher penalties do not necessarily deliver greater doses of deterrence in the way that one might expect. Deterrence is about much more than the size of a court ordered sanction. It depends on the risk of detection as well as the swiftness between the time of the contravention and when the punishment is felt. This suggests to me that increasing the perceived risk of detection is more powerful in changing compliance behaviour.102

Ability to make additional orders

5.53 The committee heard that provision should be made for additional orders under the Fair Work Act—including those relating to director disqualification, enforcement,103 banning migrant employment, adverse publicity104, and the possibility for additional orders to be made by the FWC—such as Minimum Entitlements Orders and Independent Contractor Status Orders—to provide further flexibility.105

5.54 For example, the latter could ensure that certain classes of employees are treated as employees and entitled to protections under the national employment framework, or treated as genuine contractors. The committee was told that this would help provide certainty for workers about their

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100 Ai Group, Submission 62, pp. 6–8.
102 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 19.
103 Young Liberals Movement of Australia, Submission 16, p. 6.
104 Mr Glenn Hutchinson, Submission 26, p. 9; Unions NSW, Submission 31, pp. 5 and 27–28; Dr Tess Hardy, Submission 85, p. [9].
105 CFMEU, Submission 106, p. 23; WEstjustice, Submission 47, p. 45; Ms Melissa Kennedy, Submission 3, p. 9; ACTU, Submission 38, pp. 55–56.
employment status and entitlements, while still providing the FWC with the flexibility to include new and emerging forms of work.\textsuperscript{106}

**Measures aimed at companies**

5.55 A smaller number of submitters suggested that compliance by companies and directors could be improved through increased enforcement action, director disqualification and company deregistration via the Australian Securities and Investments Commission (ASIC).\textsuperscript{107} This could occur, for example, where companies use Superannuation Guarantee (SG) payments or wages owed to trade while otherwise insolvent, in relation to the recovery of payments under the FEG and non-payment of debts (including to employees or superannuation funds), or in other instances relating to inadequate financial reporting, or auditing.\textsuperscript{108}

5.56 Moreover, the penalty measures could be extended to cover significant instances where companies, directors and/or officers have underpaid employees—particularly if underpayment is criminalised.\textsuperscript{109} The UNSW Law Society suggested that, as wage theft is perceived as a competitive strategy by some, underpayment could be included within the scope of anti-competitive conduct under consumer law. They submitted that such measures would drive cultural change and provide access to alternative penalties.\textsuperscript{110}

5.57 However, the Australian Institute of Company Directors (AICD) does not favour these approaches, instead it argued for more rigorous enforcement of existing laws.\textsuperscript{111}

5.58 The committee heard that improved employment education and scrutiny of applications at the time companies apply for an Australian Business Number

\textsuperscript{106} Westjustice, *Submission 47*, p. 45.


\textsuperscript{108} See, for example, Senator Paul Scarr, Deputy Chair, Senate Economics References Committee, and Ms Melinda Bolton, Industrial Officer, UWU, *Proof Committee Hansard*, 22 February 2022, p. 9.

\textsuperscript{109} Mr Phillip Sweeney, *Submission 35*, pp. 2–3.

\textsuperscript{110} UNSW Law Society, *Submission 36*, pp. 8–9.

\textsuperscript{111} Australian Institute of Company Directors (AICD), *Submission 52*, p. 2.
(ABN), including a face-to-face interview, a director identification number, and compulsory insurance could be used to limit phoenix activities.

### Extending accessorial liability and supply chain measures

5.59 A range of submitters reaffirmed the Migrant Workers’ Taskforce recommendation to extend accessorial liability, additionally suggesting that a positive obligation be placed on franchisors to ensure their franchisees comply with workplace laws, that franchisors bear underpayments costs if franchisees cannot, and that accessorial accountability be extended to ‘anyone’ who causes wage theft to occur or assists in the commitment of wage theft across supply chains. Maurice Blackburn Lawyers submitted:

> … there needs to be a more streamlined and direct accountability structure between the company that wants the work done (in this case the hotel) and those who do the work. This accountability structure needs to include responsibility for the health and wellbeing of the workers, and responsibility for ensuring that workers are receiving their full entitlements.

5.60 In contrast, other witnesses, including the Ai Group, the ACCI and HIA, rejected the extension of accessorial liability, arguing that the existing provisions are ‘working effectively and as intended’, and that existing requirements for knowledge are appropriate. They further asserted that the number of cases successfully brought by the FWO illustrates the effectiveness of the current arrangements, and that any extension would impede productivity and competitiveness, and negatively impact investment in Australia.

5.61 The ACCI also explained that it is too soon to gauge the effects of legislative changes made in 2017, making it clear that:

> … [it is] therefore strongly of the view that any further extension of liability without seeing the full effect of previous changes will only further act as a drag on our economy and international competitiveness by tying

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112 WEstjustice, Submission 47, pp. 23–24; Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 20.

113 WEstjustice, Submission 47, p. 48; Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 20.


116 Maurice Blackburn Lawyers, Submission 48, p. 6.


118 Ai Group, Submission 62, pp. 8–9; ACCI, Submission 81, pp. 21–27; HIA, Submission 66, p. 14–16.
up resources in administrative oversight, reducing productivity and efficiency instead of achieving compliance objectives.\textsuperscript{119}

5.62 Additionally, it advised that the introduction of measures to make lead businesses liable for underpayments in their supply chains ‘risks paralysing every contract or every attempt to contract’, further observing that businesses are unable to compel honest answers from others, and that businesses do not have the expertise to know the employment obligations of others in their supply chain. The ACCI warned that changes to accessorial liability provisions would result in serious negative implications and costs on business, particularly small companies, forcing them out of business.\textsuperscript{120}

5.63 HIA added that ‘the complexity of the residential building industry makes any further expansion of liability across the supply change impractical and unworkable’.\textsuperscript{121}

\textbf{Criminalising underpayment of wages}

5.64 Some inquiry participants expressed the view that wage theft should be criminalised at the federal level.\textsuperscript{122} For example, Per Capita spoke in favour of this approach, saying:

It is about a lack of meaningful penalties for activities like phoenixing but also for endemic wage theft. No-one’s arguing that someone who’s made a mistake with their payroll and it’s a one-off thing—a small business that perhaps genuinely made a misclassification of award mistake—should be held to a criminal standard. But there is a great deal of evidence that this is not a mistaken practice but actually a deliberate practice by significant sectors of employers in industries that already employ very low-paid and insecure workers. So a lack of meaningful penalty imposed by the Fair Work Commission and through legislation means that often employers, particularly larger employers, will weigh up the cost of the relatively small penalty they may pay against the benefits to their profit line of continuing this practice. And that’s completely out of whack. The problem is that, if you think, ‘I can get away with this. I might get hit with a with a fine that’s going to be 10 per cent of my revenue for a month, but I’m saving 20 per cent by underpaying my staff’, then people will continue to do it.\textsuperscript{123}

\textsuperscript{119} ACCI, Submission 81, p. 24.
\textsuperscript{120} ACCI, Submission 81, pp. 24–26.
\textsuperscript{121} HIA, Submission 66, p. 14–16.
\textsuperscript{122} See, for example, Dr Carina Garland, Assistant Secretary, Victorian Trade Hall Council, Committee Hansard, 11 March 2021, p. 10; Ms Zoe Ranganathan, President, and Ms Arabella Wauchope, Welfare Officer, NUS, Committee Hansard, 10 March 2021, p. 24; Ms Julien Gibson, Member, Hospo Voice/UWU, Committee Hansard, 11 March 2021, p. 2; Ms Emma Dawson, Executive Director, Per Capita, Committee Hansard, 11 March 2021, p. 28; Mr Josh Bornstein, Principal lawyer, Maurice Blackburn Lawyers, Committee Hansard, 11 March 2021, p. 20.
\textsuperscript{123} Ms Emma Dawson, Executive Director, Per Capita, Committee Hansard, 11 March 2021, p. 28.
Underpayment of wages became a criminal offence in Victoria and Queensland in 2020, with a maximum penalty of ten years in prison. When passing the legislation, both jurisdictions signalled the federal regime did not protect workers, nor sufficiently deter underpayment by employers.124

Dr Carina Garland from the Victorian Trades Hall Council spoke to this change:

The need for new laws was due to a failure in our current IR system federally which allowed bosses to build businesses on wage theft. This is a source of national shame.125

Ms Julien Gibson had a more visceral and personal response:

When Victoria introduced legislation criminalising wage theft, I cried. Finally, workers were going to have something solid and strong that couldn't be manipulated or be met with wilful ignorance and poor excuses. Finally, there was hope for my friends and my colleagues.126

The Australian Government indicated its intention to criminalise wage theft in 2019, and commenced consultations which were interrupted by the pandemic.127 On 9 December 2020, the Australian Government introduced the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 to Parliament. Amongst other things, the bill would have created a new criminal offence for an employer who dishonestly engaged in a systematic pattern of underpaying one or more employees and overridden similar state and territory laws.128 However, the proposed amendments relating to criminalisation were removed prior to the bill’s passing.129


125 Dr Carina Garland, Assistant Secretary, Victorian Trade Hall Council, Committee Hansard, 11 March 2021, p. 10.

126 Ms Julien Gibson, Member, Hospo Voice/UWU, Committee Hansard, 11 March 2021, p. 2;


The MWC, the United Workers Union (UWU), NSW Young Labor, the NUS, Domino’s Pizza Enterprises and others supported the introduction of criminal offences at the national level.130

However, other submitters were more cautiously supportive, with the Young Liberals Movement of Australia agreeing that the criminalisation of wage theft could be a greater deterrent against wage theft, but also warning that the laws would only be as effective as their enforcement. It also stressed that criminalisation would potentially add costs and delays, and result in less avenues for dispute resolution for workers.131

The Law Council of Australia (LCA),132 Dr Clibborn and Dr Hardy133 advised that criminalising wage theft would, on its own, not improve compliance. Dr Clibborn remarked:

A couple of points to note on criminalising wage theft in particular are that we’re not adequately enforcing our existing laws in the civil realm, so I don’t expect merely increasing the penalty to do anything, or anything substantive. Added to that, criminal prosecutions are more resource intensive than civil prosecutions, so, if we have the same prosecution and investigation regime in place to support criminal prosecution, then we should not see an increase in compliance as a result.134

Dr Hardy maintained that it is the perception of being caught that is critical, concluding that:

… ultimately our research confirms that the frequency of inspection, combined with strategic use of media and publicity, may be more powerful in fuelling a firm’s perception of risk and foster a greater willingness to commit to compliance in the longer term.135

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129 Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 as passed by both Houses; Tom Earls and David Putland, ‘Update—Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2021’, Fair Work Lawyers (accessed 15 February 2022); Kate Plowman, ‘Federal Government’s ‘watered down’ IR reform package now law, but there are still likely to be further developments’, Minter Ellison, 23 March 2021 (accessed 15 February 2022).

130 Migrant Workers’ Centre, Submission 53, p. 12, UWU, Submission 101, pp. 3, 11–13; NSW Young Labor, Submission 54, p. 10; Victorian Trades Hall Council, Submission 67, pp. 1, 4 and 7; Domino’s Pizza Enterprises Ltd, Submission 82, pp. 3 and 7–8; NUS, Submission 91, p. [2] and Submission 91.1 p. [2].

131 Young Liberals Movement of Australia, Submission 16, p. 7.

132 LCA, Submission 90, pp. 11–12.

133 Dr Tess Hardy, Submission 85, p. [9].

134 Dr Stephen Clibborn, Private capacity, Committee Hansard, 18 September 2020, p. 21.

135 Dr Tess Hardy, Submission 85, pp. [9 and 12].
5.73 Restaurant and Catering Australia agreed with this view, explaining that criminalisation is not a silver bullet, and that alternative approaches—such as improved enforcement of existing laws, more education, and business collaboration with regulators—would be more effective.\textsuperscript{136}

5.74 In contrast, Ai Group, the ACCI and HIA\textsuperscript{137} strongly opposed the criminalisation of wage theft, with Ai Group describing such suggestions as 'extremely harsh and inappropriate'.\textsuperscript{138}

5.75 Ai Group further explained that criminalisation would reduce investment and growth, would stop directors and business managers self-disclosing underpayments, and impede constructive remedial action. It warned that, in any case this measure would not deliver back-pay to workers.\textsuperscript{139} If criminalisation were to be introduced, Ai Group counselled that it apply only to 'dishonest, deliberate, serious and systematic conduct'.\textsuperscript{140} It cautioned:

\begin{quote}
Exposing an employer to imprisonment for non-payment of a debt to an employee constitutes a regressive development in the system of workplace relations reversing more than a century of modernisation since the abolition of debtors’ prisons in the middle of the nineteenth century.\textsuperscript{141}

Criminalising underpayments would represent a major unwarranted change to the workplace relations system that is not in the interests of businesses, employees or the wider community.\textsuperscript{142}
\end{quote}

5.76 The Franchise Council of Australia (FCA) also expressed its disquiet at proposals to criminalise underpayments, advising that new ownership groups would unfairly be held liable for non-compliance issues that were not identified during pre-sale due diligence processes.\textsuperscript{143}

**National labour hire registration scheme**

5.77 Drawing on recommendations from the Migrant Workers’ Taskforce\textsuperscript{144} and the experiences of Queensland, South Australia, Victoria, and the Australian Capital Territory (ACT), several witnesses supported the establishment of a

\textsuperscript{136} Restaurant and Catering Australia, Submission 70, p. [12]. See also SDA, Submission 75, pp. 5, 19–20 and 29–30; Unions Tasmania, Submission 79, p. 12.

\textsuperscript{137} Ai Group, Submission 62, p. 10; HIA, Submission 66, p. 3; ACCI, Submission 81, p. 13.

\textsuperscript{138} Ai Group, Submission 62, p. 10.

\textsuperscript{139} Ai Group, Submission 62, pp. 5 and 9–10.

\textsuperscript{140} Ai Group, Submission 62, p. 10.

\textsuperscript{141} Ai Group, Submission 62, p. 4.

\textsuperscript{142} Ai Group, Submission 62, p. 12.

\textsuperscript{143} Franchise Council of Australia (FCA), Submission 88, p. [2].

\textsuperscript{144} Migrant Workers’ Taskforce, Report of the Migrant Workers’ Taskforce, March 2019, p. 106 (accessed 19 March 2022).
national labour hire licensing scheme to address unscrupulous labour hire practices.\textsuperscript{145}

5.78 In 2019, the Australian Government signalled its intention to establish a labour registration scheme\textsuperscript{146}—as opposed to a licensing scheme—however COVID-19 appears to have impacted its implementation, with little evidence of progress.\textsuperscript{147} That said, as recently as 20 March 2022, it was reported that the Australian Government is moving ahead on its plans to introduce a registration scheme, with Agriculture Minister, the Hon David Littleproud MP saying:

‘There is a small cohort in agriculture, as there is in every industry, that do the wrong thing that cut corners,’ he said.

‘Our job is to weed them out and remove them from the industry. And we’re doing that with increased regulation on labour-hire companies and increasing the penalties to make sure if they do the wrong thing, we will remove them.’\textsuperscript{148}

5.79 Witnesses identified the necessary attributes for such a scheme, including strict licensing standards in relation to workplace and other laws, with compliance or remediation essential to maintaining registration.\textsuperscript{149} The Queensland Government expressed reservations about a federal scheme, noting that:

... the Queensland Government is concerned the federal Government’s intention is to introduce a ‘light touch’ registration scheme with limited coverage, when the experience in Queensland demonstrates the benefits of a rigorous licensing scheme with broad coverage of the entire labour hire sector.\textsuperscript{150}

5.80 ACCR and LUCFR Super suggested that, at minimum, the scheme cover high-risk industries such as horticulture, meat processing, cleaning and security, 


\textsuperscript{146} The Hon Kelly O’Dwyer MP, Minister for Jobs and Industrial Relations, ‘Standing up for vulnerable workers’, Media release, 7 March 2019 (accessed 19 March 2022).

\textsuperscript{147} Attorney-General’s Department, Industrial relations reform (accessed 19 March 2022); Niki Reilly, Mapien, National labour hire scheme—a new reality, 26 February 2020 (accessed 19 March 2022); Attorney-General’s Department, Submission 80, p. 13.


\textsuperscript{149} Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 19; ACCR and LUCFR Super, Submission 86, pp. [6–7].

\textsuperscript{150} Queensland Government, Submission 19, p. 13.
and that host companies in those sectors be required to use registered labour hire operators.\textsuperscript{151}

**Improving recovery of unpaid superannuation guarantee contributions**

**Aligning pay and superannuation payments**

5.81 Overwhelmingly, submitters told the committee that superannuation contributions must be made at the same time as workers are paid. The committee heard that this would not only help employees to see their contributions—and any underpayments—promptly, but it would also help businesses manage their cash flow, and assist the ATO in detecting non- or underpayment of SG contributions.\textsuperscript{152}

5.82 Industry Super Australia (ISA) explained:

> In almost every case study we’ve looked at employees who were underpaid super were shocked to learn that, even though it appeared on their payslip, it wasn’t actually being paid into their accounts. The ATO likewise has lamented the challenges it faces under this framework—the promise to pay verses the actual payment. More frequent payment of super would allow the ATO to act quicker, make it easier for employees to track their payments and harder for employers to fall behind. It would improve cashflow practices and even the playing field for businesses.

> …

> There is a real moral hazard that operates here, where the law permits very lengthy periods before the superannuation entitlements need to be paid. It’s that gap in the law that, in fact, facilitates and enables this sort of conduct to occur.\textsuperscript{153}

5.83 Increasingly, technology facilitates regular payments, and accruing superannuation payments in fact impairs the ability of businesses to get on top of their cash flow situation, merely delaying payments.\textsuperscript{154}

5.84 The ISA further suggests that alignment of superannuation and wage payments be introduced in a staged way, with suitable forewarning, as was successfully done for Single Touch Payrol.\textsuperscript{155}

\textsuperscript{151} ACCR and LUCFR Super, *Submission 86*, pp. [6–7].


\textsuperscript{153} Mr Matthew Linden, Deputy Chief Executive, and Mr James Gunn, Senior Public Affairs Advisor, ISA, *Proof Committee Hansard*, 22 February 2022, p. 2.

\textsuperscript{154} Mr Matthew Linden, Deputy Chief Executive, ISA, *Proof Committee Hansard*, 22 February 2022, pp. 2–5; FCA, *Submission 88*, p. [3].

\textsuperscript{155} Mr Matthew Linden, Deputy Chief Executive, and Mr James Gunn, Senior Public Affairs Advisor, ISA, *Proof Committee Hansard*, 22 February 2022, pp. 4–5.
Extending the National Employment Standards to super

5.85 A number of witnesses called for the National Employment Standards (NES) to be extended to include superannuation. They speculated that this would both improve the future financial security of workers—women in particular—and, at least under current arrangements, enable the FWO and other parties to pursue claims when workers have not received their full SG contributions. This would allow those claims to be pursued concurrently, as with other industrial entitlements.

5.86 The FCA advised:

... make super payment compliance the eleventh [sic] national employment standard. The national cost to both employees and businesses as a consequence of non-compliance is too great a burden for the broader community to bear.

5.87 The Department of the Treasury (Treasury) informed the committee that it had ‘commenced discussions’ on including superannuation in the NES, however these consultations had been disrupted by the pandemic. In its response to a question on notice about any detailed discussions, Treasury advised only that it had not put forward any proposals to the Attorney-General’s Department.

Other parties to aid recovery

5.88 With recovery action for unpaid SG payments the remit of the ATO, ISA and ACTU noted that they are in favour of enabling not only employees, but other parties such as unions and trustees, to act to recover unpaid contributions on behalf of their members.

156 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, pp. 23 and 25; Dr Kristin van Barneveld, Social Policy Committee Member, NFAW, Committee Hansard, 18 September 2020, p. 39; Queensland Government, Submission 19, p. 10; Mr Matthew Linden, Deputy Chief Executive, ISA, Proof Committee Hansard, 22 February 2022, p. 2; ACTU, Submission 38, pp. 8 and 37; WEStjustice, Submission 47, pp. 49–50.

157 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, pp. 23 and 25; Dr Kristin van Barneveld, Social Policy Committee Member, NFAW, Committee Hansard, 18 September 2020, p. 39; Queensland Government, Submission 19, p. 10; ACTU, Submission 38, p. 37.

158 FCA, Submission 88, p. [3].

159 Mr Robert Jeremenko, Division Head, Retirement Income Policy Division, Department of the Treasury, Committee Hansard, 18 September 2020, pp. 1–2.

160 Treasury, Answer to question on notice IQ20-000271, 18 September 2020 (received 19 October 2020).

161 Mr Robb Preston, Principal Advisor, Retirement Income Policy Division, Treasury, Committee Hansard, 18 September 2020, p. 5.

162 Mr Matthew Linden, Deputy Chief Executive, ISA, Proof Committee Hansard, 22 February 2022, p. 4; ISA, Submission 11, pp. 5–6; ACTU, Submission 38, p. 37.
Most people would not be aware at the moment that an individual employee actually doesn’t have any legal standing to pursue underpayment of superannuation unless it’s specifically included in their employment contract or individual contract in particular terms. But in most instances they’re powerless; they need to rely on the ATO because of the way the superannuation guarantee charge works.163

5.89 Dr Hardy also supported a broader-ranging approach:

So to the extent that super be introduced into the Fair Work Act as, for example, the National Employment Standards, it would be a really important step forward to make it clear that not only the Fair Work Ombudsman has standing to pursue that claim but unions have. That goes back to the comment I made earlier about trying to be as inclusive as possible, trying to enrol as many actors in the process. I think that is a really important reform.164

Extending the Fair Entitlements Guarantee to super

5.90 Likewise, some submitters called for SG entitlements to be included in the FEG scheme,165 particularly given the high rates of unpaid superannuation, the high proportion of insolvencies involving unpaid superannuation, and the relatively low recovery rate to date.166

5.91 Treasury explained that the SG Cross-Agency Working Group had recommended against expanding the FEG to include superannuation because of administrative complexity, the significant costs to government, and because the FEG had been designed to cover more immediate entitlements such as wages and leave.167

5.92 As explained by Mr Stuart Bonds, schemes such as the FEG are yet another mechanism which enables companies to renege on their obligations to pay

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163 Mr Matthew Linden, Deputy Chief Executive, ISA, Proof Committee Hansard, 22 February 2022, p. 4.
164 Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 25.
165 See, for example, Dr Tess Hardy, Private capacity, Committee Hansard, 18 September 2020, p. 25; Mr Stuart Bonds, Submission 45, p. 14; JobWatch Inc, Submission 92, p. 10; Mr Matthew Linden, Deputy Chief Executive, ISA, Proof Committee Hansard, 22 February 2022, p. 2; ISA, Submission 11, pp. 2 and 5–6; Queensland Government, Submission 19, p. 11.
167 Senator Mehreen Faruqi, Senate Economics References Committee, and Mr Robb Preston, Principal Advisor, Retirement Income Policy Division, Treasury, Committee Hansard, 18 September 2020, pp. 4–5.
employees and place the costs back on taxpayers. By way of example, the CFMEU reported that between 2009 and 2015 taxpayers shelled out over $226 million to workers accessing the FEG because they had not been paid—and that just covered the construction industry.

5.93 The Australian Government’s 2017 consultation paper noted that claims and costs under the FEG have increased dramatically, with some employers deliberately structuring their affairs to avoid paying employees when they become insolvent, relying on the FEG. The consultation paper emphasised that ‘the costs of these behaviours were also found to be significant’.

Need for ATO to improve enforcement and communication

5.94 As discussed in Chapter 3, the ATO’s enforcement is relaxed, its recovery processes are slow, and communication is less than adequate. The ISA highlighted that more could be done by the ATO to improve enforcement:

> At the moment the ATO takes quite a permissive approach to the part 7 penalties. In our opening statement we mentioned that about three-quarters of penalties are fully remitted, and we think there’s more of a role for penalties to be used as a deterrent. At the moment that doesn’t appear to be an approach that the ATO takes. It’s a bit of a perverse outcome where the ATO publishes its part 7 penalty practice guide online, which is a bit of a how-to guide for escaping penalties, but at the same time it doesn’t, for example, publish its enforcement activities or examples of poor practice that might actually act as a deterrent and reduce instances of unpaid super. So there are a few things that are fairly cost free that the ATO could be doing.

5.95 The committee also heard that the ATO needs improve its communications with both employers and employees, including communicating with them directly and keeping them informed of legislative changes, as well as explaining how matters relating to individual complaints are progressing.

Technology assisted compliance

5.96 A number of witnesses, including the ATO and businesses, recognised that technology developments, and improved data collection through measures

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169 CFMEU, Submission 106, p. 9.


171 Mr James Gunn, Senior Public Affairs Advisor, ISA, Proof Committee Hansard, 22 February 2022, p. 4.

172 ATO, Answer to question on notice SQ21-000708, 22 February 2022, p. 2 (received 10 March 2022); HIA, Submission 66, p. 10.
including Single Touch Payroll are improving compliance with employer obligations, such as meeting SG contributions and payroll obligations.\textsuperscript{173}

5.97 However, other witnesses such as Mine Super, suggested that there is more that could be done to leverage technology and data to improve compliance levels.\textsuperscript{174} Pendragon Consultants drew the committee's attention to the challenges faced by digital payroll service providers, admitting that the environment is complex, regulators are not funded to participate in the co-design of systems in order to automate compliance, and 'customers will not pay for compliance: they pay for functionality they require in their business and expect the system to be compliant'.\textsuperscript{175}

5.98 Dr van Barneveld spoke to opportunities for the government to improve cross-agency data sharing,\textsuperscript{176} and Dr Hardy advocated for the payment of workers via electronic funds transfer (rather than cash, for example) in order to make payments more transparent and traceable.\textsuperscript{177}

5.99 The Ai Group argued that improved oversight provided to the ATO by Single Touch Payroll makes further measures aimed at detecting non-compliance unnecessary.\textsuperscript{178}

Other regulatory and structural reforms

5.100 Witnesses recommended a range of other regulatory reforms to help reduce unlawful underpayments and improve payment recovery for victims of wage theft, as explained below.

Reduce industrial relations complexity

5.101 Several witnesses advocated for an overhaul of the industrial relations system, including awards and enterprise agreements, to reduce complexity and ambiguity, making it easier for employers to comply and for employees to

\footnotesize{\textsuperscript{173} See, for example, Mr Robert Jeremenko, Division Head, and Mr Robb Preston, Principal Advisor, Retirement Income Policy Division, and Treasury, \textit{Committee Hansard}, 18 September 2020, pp. 5–6; Institute of Certified Bookkeepers, \textit{Submission} 4, p. 8; Chartered Accountants Australia and NewZealand (CAANZ), \textit{Submission} 14, pp. 3–4; Tanda, \textit{Submission} 46, p. [2]; Monash University, \textit{Submission} 117, p. [3]; ACCI, \textit{Submission} 81, p. 16; Mr Matthew Linden, Deputy Chief Executive, and Mr James Gunn, Senior Public Affairs Advisor, ISA, \textit{Proof Committee Hansard}, 22 February 2022, pp. 4–5.}

\footnotesize{\textsuperscript{174} Mine Super, \textit{Submission} 6, p. 6.}

\footnotesize{\textsuperscript{175} Pendragon Consultants Pty Ltd, \textit{Submission} 24, pp. 5, 10 and 14.}

\footnotesize{\textsuperscript{176} Dr Kristin van Barneveld, Social Policy Committee Member, NFAW, \textit{Committee Hansard}, 18 September 2020, p. 35.}

\footnotesize{\textsuperscript{177} Dr Tess Hardy, Private capacity, \textit{Committee Hansard}, 18 September 2020, p. 25.}

\footnotesize{\textsuperscript{178} Ai Group, \textit{Submission} 62, p. 11.}
understand their entitlements.\textsuperscript{179} By way of example, the Business Council of Australia submitted:

\ldots [underpayment requires] long-term policy solutions to reduce complexity in the industrial relations system. Unless such solutions are implemented, then errors will continue to happen. The extent of non-compliance could be substantially reduced if appropriate reforms are made to awards and the National Employment Standards (NES) to make them simpler and easier to apply by both employers and employees.\textsuperscript{180}

5.102 The Business Council of Australia suggested that complexity be reduced by:

\begin{itemize}
  \item reviewing and simplifying the NES, reducing the number of award pay rates, additional loadings and allowances;
  \item improving job and work descriptions to make it easier to identify which award covers a worker;
  \item addressing conflicts in legislation—especially in relation to superannuation;
  \item redesign of the better off overall test (BOOT) as a global test; and
  \item simplifying the language used.\textsuperscript{181}
\end{itemize}

5.103 The Institute of Certified Bookkeepers went further, recommending a simplified employment relationship, based on a single general class of workers, with standard descriptions and templates, and enhanced by ‘definitive comparison and analysis tools’ in order to reduce complexity and improve compliance.\textsuperscript{182}

5.104 However, not all submitters were convinced of the system’s complexity, nor of the need for regulatory simplification, with the NSW Society of Labor Lawyers recommending a range of alternative measures.\textsuperscript{183} The UNSW Law Society also noted that it was unconvinced, arguing that employers create much of the complexity themselves through torturous employment arrangements, and that ‘… it is important to note that the many businesses that blame the Modern Award’s complexity for their underpayment of employees, such as Woolworths, have the resources to employ professional auditors and interpret the Modern Award correctly’.\textsuperscript{184}

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\textsuperscript{179} See, for example, Business Council of Australia, \textit{Submission 69}, pp. 1–2; ACCI, \textit{Submission 81}, p. 17; The Cheesecake Shop, \textit{Submission 5}, p. 2; Mr Glenn Hutchinson, \textit{Submission 26}, p. 10; NRA, \textit{Submission 49}, pp. 5–8; Australian Retailers’ Association, \textit{Submission 72}, pp. 4–5 and 8–9; Council of Small Business Organisations Australia (COSBOA), \textit{Submission 77}, pp. [ii] and 7; 8.9 FCA, \textit{Submission 88}, pp. [2 and 4].
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\textsuperscript{182} Institute of Certified Bookkeepers, \textit{Submission 4}, pp. 8–10.
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\textsuperscript{183} NSW Society of Labor Lawyers, \textit{Submission 23}, pp. 2.
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\textsuperscript{184} UNSW Law Society, \textit{Submission 36}, p. 11.
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Tax treatment of repayments

5.105 The committee received varying evidence in relation to the tax treatment of wage and superannuation repayments. The ACCI categorically stated that:

Special tax arrangements should not be made for individuals receiving income from the underpayment of wages. It is important that the underlying principles of the tax system - equity, efficiency, certainty, simplicity and neutrality - are maintained.\textsuperscript{185}

5.106 It further explained that existing tax law makes suitable provision for back payments, noting that any increase in tax paid due to a shift to a higher tax bracket 'is likely to be minor'.\textsuperscript{186}

5.107 However, the committee also heard that tax treatments should be reviewed and amended to ensure that workers who are paid stolen wages are treated no less favourably than if their entitlements were paid correctly.\textsuperscript{187}

Ethical Australian Government procurement

5.108 Ethical government procurement was suggested as a further measure to address underpayment. Witnesses to the inquiry, including Associate Professors Berg and Farbenblum, and the MWC, maintain that Australian Government procurement arrangements should require that companies comply with workplace laws—particularly those relating to payments. They submitted that companies which do not comply should not be awarded government business,\textsuperscript{188} arguing that this approach is vital to modelling best practice, and provides leadership and commercial incentives necessary to drive cultural and practical changes, particularly in industries where wage theft is rife,\textsuperscript{189} such as cleaning and security.

5.109 Ms Jo Briskey from UWU explained:

... a potential way to address that is to ensure that, when companies—from those who are tendering for contracts through to the entire supply chain—are tendering for government contracts and seeking to have government investment in the work that they do, they should meet standards. And, if there are any instances of breaches of the Fair Work Act or breaches that clearly demonstrate exploitation of workers, that should be noted and should in effect disqualify them from being able to tender for

\textsuperscript{185} ACCI, \textit{Submission} 81, p. 20.
\textsuperscript{186} ACCI, \textit{Submission} 81, p. 20.
\textsuperscript{187} CFMEU, \textit{Submission} 106, p. 24; ACTU, \textit{Submission} 38, p. 53.
\textsuperscript{188} Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, \textit{Submission} 102, pp. 21–22; MWC, \textit{Submission} 53, p. 12; CFMEU, \textit{Submission} 106, pp. 27–29.
\textsuperscript{189} Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, \textit{Submission} 102, pp. 21–22; Cleaning Accountability Framework, \textit{Submission} 64, pp. 5 and 9.
government contracts. We see that as a positive measure in terms of a carrot and stick approach. If they are looking to get government contracts and be able to secure those, they should be able to demonstrate to the public that they are good employers and they treat their workers properly and by the law. If they can’t demonstrate that, then they shouldn’t be eligible for government contracts.\textsuperscript{190}

5.110 NSW Young Labor and the NUS suggested that such measures go further, submitting that any company found guilty of unlawful underpayment of workers should be prohibited from supplying goods or services to the Australian Government for five years.\textsuperscript{191}

5.111 The Australian Retailers Association (ARA) agreed with the exclusion of businesses from government tendering where underpayments have been 'deliberate, malicious and systemic', but argued that a broad-brush approach would be wrong. The Association argued that blanket measures may not result in better outcomes where, for example, employers had made a genuine mistake, or already making remediation payments, or where such a policy resulted in the loss of jobs or company closure.\textsuperscript{192}

5.112 The ACCI argued for restraint and careful consideration before instituting government procurement provisions, questioning whether there is sufficient evidence to require such a measure, or indeed whether such a measure is justified, as well as how such a measure might be implemented.\textsuperscript{193}

5.113 Similarly, Ai Group cautioned that the Australian Government has already implemented appropriate procurement reforms, particularly in relation to the building and construction industry, and that further reforms should not be made without additional evidence that change is required.\textsuperscript{194}

**Addressing underpayments in the university sector**

5.114 Evidence received by the committee suggested that, in general, universities are unwilling—or at best slow—to take action to reduce underpayments and improve the working conditions of staff, making a mockery of platitudes offered by university management.\textsuperscript{195}

\textsuperscript{190} Ms Jo Briskey, Official, UWU, *Committee Hansard*, 11 March 2021, pp. 3–4.

\textsuperscript{191} NSW Young Labor, *Submission 54*, p. 11; NUS, *Submission 91*, pp. [2 and 5].

\textsuperscript{192} Australian Retailers Association (ARA), *Submission 72*, p. 8.

\textsuperscript{193} ACCI, *Submission 81*, pp. 29–32.

\textsuperscript{194} Ai Group, *Submission 62*, pp. 4 and 11–12.

\textsuperscript{195} Dr Yaegan Doran, University of Sydney Casuals’ Network, *Committee Hansard*, 10 March 2021, pp. 13 and 16; Dr Anastasia Kanjere, *Committee Hansard*, Casualised, Unemployed, and Precarious University Workers (CUPUW), *Committee Hansard*, 10 March 2021, p. 17; Dr Alison Barnes, National President, NTEU, *Proof Committee Hansard*, 22 February 2022, p. 18; Dr Hayley Singer, Member, University of Melbourne Casuals’ Network, *Proof Committee Hansard*, 22 February 2022, pp. 26–27; CUPUW, *Opening Statement*, February 2022, p. 2 (tabled 22 February 2022).
5.115 Universities, the NTEU and other witnesses proposed a number of measures to address wage theft which are specific to the sector, and in addition to those discussed elsewhere in the chapter, including:

• improving access to information about rights—through resourcing on-campus legal support services, especially for international students in relation to workplace rights, as well as employment and taxation law;\(^\text{196}\)

• fundamental changes to academic staff pay models—to ensure all staff are paid for all of their time at the appropriate level, by simplifying and improving enterprise agreement definitions and improving clarity;\(^\text{197}\)

• reducing and limiting the proportion of casual staff—including through publicly reported benchmarks, linked to funding;\(^\text{198}\)

• improving representation of casual workers in university decision-making, and otherwise empowering casual workers to act together;\(^\text{199}\)

• labour laws compliance reporting—that universities receiving federal funding be required to demonstrate historical and ongoing compliance with core labour standards, including rates of pay. Ms Gabrielle Gooding from the NTEU stated ‘we think it’s important that the federal government not support wage theft by funding those who are engaging in it’;\(^\text{200}\)

• improving data collection—in particular requiring that universities report on both FTE and headcount for staff engaged on a casual and fixed term basis, as well as gender, and conversion rates, in order to get a more accurate view of the extent of insecure work in universities and potential impacts on sector sustainability and education quality;\(^\text{201}\) and

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\(^\text{196}\) Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum, Migrant Worker Justice Initiative, Submission 102, p. 17.

\(^\text{197}\) Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 5; Dr Liam Kane, CUPUW, Committee Hansard, 10 March 2021, p. 14; Dr Giles Fielke, Delegate, Monash Casuals’ Network, 22 February 2022, p. 24; Greg, Witness 5, and Andrew, Delegates, Monash Casuals’ Network, Proof Committee Hansard, 22 February 2022, p. 29; CUPUW, Opening Statement, February 2022, p. 2 (tabled 22 February 2022).

\(^\text{198}\) Dr Anastasia Kanjere, Committee Member, CUPUW, Committee Hansard, 10 March 2021, p. 10; Dr Yaegan Doran, University of Sydney Casuals’ Network, Proof Committee Hansard, 22 February 2022, p. 20; CUPUW, Opening Statement, February 2022, p. 2 (tabled 22 February 2022).

\(^\text{199}\) Dr Anastasia Kanjere, Committee Member, CUPUW, Committee Hansard, 10 March 2021, p. 10; Professor Stephen Garton, Vice-Chancellor and Principal, University of Sydney, Committee Hansard, 10 March 2021, p. 30; Dr Giles Fielke, Delegate, Monash Casuals’ Network, Proof Committee Hansard, 22 February 2022, p. 27; Andrew, Delegate, Monash Casuals’ Network, Opening statement, February 2022, pp. 1–2 (tabled 22 February 2022).

\(^\text{200}\) Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 4.

\(^\text{201}\) Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, p. 4; CUPUW, Opening Statement, February 2022, p. 2 (tabled 22 February 2022).
• increasing public funding for universities—to better enable universities to pay staff appropriately, in addition to meeting their other obligations.\(^{202}\)

5.116 The Australian Government could also consider integrating industrial relations reporting and funding into the Higher Education Standards Framework administered by the Tertiary Education Quality and Standards Agency (TEQSA). The Framework documents registration requirements for higher education providers, to enable them to operate in Australia. There is scope for existing standards to be updated to include, for example, standards relating to appropriate payment of staff and related governance mechanisms under the Teaching, Institutional Quality Assurance, and Governance and Accountability domains.\(^{203}\)

5.117 Professor Heywood, Vice-Chancellor of the University of New England, spoke at length about the importance of defining the purpose of casual staff in the academic context, and then defining the work expectation. Professor Heywood agreed that definitions need to be clearer and more explicit.\(^{204}\)

5.118 The committee heard that Professor Heywood is aware of and fully supports the development of permanent employment targets, linked with reporting and funding, to reduce casualisation. The University of New England has already undertaken measures to support the conversion of casual staff.\(^{205}\)

5.119 While Monash University has not set targets, it noted its commitment to taking active steps to reduce casualisation and improve job security, as well as addressing other sources of underpayment.\(^{206}\)

\(^{202}\) Ms Gabrielle Gooding, National Assistant Secretary, NTEU, Committee Hansard, 10 March 2021, pp. 4–5.

\(^{203}\) That is, HESF Domain 3: Teaching, HESF Domain 5: Institutional quality assurance, and HESF Domain 6: Governance and accountability.

TESQA note that: 'Unusually high reliance on casual staff poses risks for the quality of the student experience, and we will investigate where high reliance on casual staff is combined with data indicating lower student outcomes. We do not set a threshold for the ratio of ongoing staff to casual staff, except for the purpose of risk assessment. Findings are made after considering contextual factors including qualifications, experience and depth of scholarship in academic leaders and the nature of the field'.


\(^{204}\) Professor Brigid Heywood, Vice-Chancellor and Chief Executive Officer, University of New England, *Proof Committee Hansard*, 22 February 2022, p. 35.

\(^{205}\) Professor Brigid Heywood, Vice-Chancellor and Chief Executive Officer, University of New England, *Proof Committee Hansard*, 22 February 2022, p. 34.

\(^{206}\) Professor Margaret Gardner, President and Vice-Chancellor, Monash University, *Proof Committee Hansard*, 22 February 2022, p. 50.
5.120 However, the Australian Higher Education Industrial Association (AHEIA) thought that moves to improve reporting in the higher education sector did not have 'proper foundation'.

5.121 Professor Ian Jacobs, Vice-Chancellor of the University of New South Wales, supported the recommendation to improve reporting for federally funded universities and spoke in support of funding increases to universities, through a variety of sources including government, the private sector, philanthropy, and international students.

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207 Australian Higher Education Industrial Association (AHEIA), Submission 113, p. [2].

208 Professor Ian Jacobs, President and Vice-Chancellor, University of New South Wales, Committee Hansard, 10 March 2021, p. 47.
Chapter 6
Committee view

Systemic, sustained and shameful

6.1 Wage theft is a debilitating issue not just for the individuals affected, but in many cases, particularly with superannuation theft, detrimental to the economy. Dr Carina Garland from the Victorian Trade Hall Council, explained to the committee that the need for change and:

‘... the need for new laws was due to a failure in our current IR [industrial relations] system federally which allowed bosses to build businesses on wage theft. This is a source of national shame.’

6.2 As a result of underpayments, future generations of workers will have to foot the bill for ‘missing’ savings through extra taxes to supplement government pensions that should have been covered by employer superannuation guarantee contributions.

6.3 The committee is highly supportive of the findings and recommendations of the Senate Select Committee on Job Security and the Senate Select Committee on Temporary Migration. In addressing some of the outstanding issues of wage theft, the committee is cognisant that the Australian Government attempted to deal with some of the scourge of wage theft through the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020. However, this proved to be a missed opportunity.

6.4 The committee believes that central to providing a fair and equitable workplace is the enshrining of adequate legislative instruments to 'back-up' processes that assist and protect employees and their entitlements at the same time acting as a deterrent to would-be offenders. In addition to appropriate legislative protection and recourse through the Fair Work Act, there is the need for adequate and fully resourced compliance and enforcement of the National Employment Standards, and protection of employees’ entitlements.

Penalties for wage theft

6.5 The committee found that systemic wage theft is often a deliberate decision of businesses that participate in a race to the bottom to bring down wages and increase profit.

6.6 A number of witnesses, including the Australian Council of Trade Unions (ACTU), United Workers Union (UWU) and Shop, Distributive and Allied Employees Association (SDA) have recommended to the committee the need

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1 Emphasis added. Dr Carina Garland, Assistant Secretary, Victorian Trade Hall Council, Committee Hansard, 11 March 2021, p. 10.
for improved penalties and the criminalisation of wage theft. The Young Workers Centre additionally recommended that all remuneration, including superannuation, be included in laws that relate to wage theft.

6.7 The committee frequently heard throughout the inquiry that employers which engage in wage theft derive an unfair competitive advantage over compliant employers. It was also noted that the underpayment of wages and superannuation has been used to by businesses to improve their cashflow, often in cases where they would otherwise be insolvent.

6.8 Evidence was also heard throughout the inquiry that current wage theft laws do not accurately capture parties that participate in or create environments of wage theft. This includes where a contract is awarded at a cost that is not sufficient to pay correct wages.

Recommendation 1

6.9 The committee recommends that the Australian Government prioritise amendments to the *Fair Work Act 2009* to criminalise wage theft in Australia, and that such legislation:

- apply to the theft of all employee remuneration (including loadings, penalty rates, overtime, leave, allowances and superannuation guarantee);
- include penalties for the falsification of records; and
- is drafted in consultation with the states to ensure Commonwealth wage theft laws do not weaken existing state legislation.

Recommendation 2

6.10 The committee recommends that the Australian Government amend the *Fair Work Act 2009* to:

- increase civil penalties for wage theft;
- make it an offence for employers to advertise employment with a rate of pay less than the national minimum wage; and
- capture all parties and individuals that directly participate in wage theft, including those who knowingly or recklessly create an environment of wage theft (including franchisors, advisors, head contractors and other third-party participants in supply chains).

Recommendation 3

6.11 The committee recommends that the Australian Government consider tasking the Australian Competition and Consumer Commission to bring forward a legislative amendment to the *Competition and Consumer Act 2010* to incorporate wage theft as an anti-competitive practice.
Recommendation 4

6.12 The committee recommends that the Australian Securities and Investments Commission improve enforcement action and director disqualifications from managing a company, where companies use Superannuation Guarantee payments or wages owed to trade while otherwise insolvent.

Pursuit of wage theft claims

6.13 The committee found that the current legislative and regulatory framework is inadequate for pursuing wage and superannuation theft.

6.14 A wide range of witnesses told the committee about the difficulties encountered by witnesses seeking redress for underpayments, with a number of witnesses proposing recommendations to the committee to make processes for pursuing wage claims more affordable and accessible for workers. In particular, the ACTU called for the establishment of an industrial court, co-located with the Fair Work Commission (FWC), that allows for a claim initiated in the FWC to be resolved in the industrial court.

6.15 The process of pursuing wage and super theft is disconnected, inaccessible and daunting for workers. Many witnesses called for a process in which wages and super can be pursued together in an accessible, simple, and affordable way that encourages more workers to seek justice.

6.16 Witnesses also noted that the payment of lump sums when wage theft claims are finalised can financially disadvantage workers due to the taxation treatment of the repayment.

Recommendation 5

6.17 The committee recommends that the Australian Government establish a small claims tribunal, ideally co-located with the Fair Work Commission, to create a simple, affordable, accessible, and efficient process for employees to pursue wage theft, including Superannuation Guarantee non-compliance.

Recommendation 6

6.18 The committee recommends that the Australian Government, through the Australian Taxation Office, review the taxation treatment of wages repaid to employees following incidents of wage theft to ensure they are treated no less favourably than if wages were paid when they were due.

Investigation of wage theft

6.19 The committee believes that workers and unions should be the driving force in ending wage theft. For this to be achieved, workers need to be empowered and protected to speak out against wage theft and unions should be better utilised to investigate potential wage theft.
6.20 The committee heard from a number of witnesses who recommended a need to return the ability of unions, on behalf of employees, to inspect employees’ records, as a tool for monitoring and investigating wage theft.

6.21 Witnesses also noted that since these powers had been removed, incidents of wage theft have increased. Evidence to the committee, including from academics and the National Foundation for Australian Women (NFAW), suggested that investigations would be improved, and wage theft deterred by allowing ‘right of entry’ permit holders to inspect employee records. The committee noted that concerns were also raised regarding the failure of employers to produce accurate and timely records to ‘right of entry’ permit holders, as well as the lack of penalty for providing false and misleading documents.

Recommendation 7

6.22 The committee recommends that the Australian Government review whether employee representatives that hold ‘right of entry’ permits can be better utilised to inspect and investigate potential underpayments across workplaces.

Recommendation 8

6.23 The committee recommends that the Australian Government amend the *Fair Work Act 2009* to include provisions relating to the production of documents to permit holders, to:

- introduce a penalty for individuals or entities that provide false or misleading documents to a permit holder exercising right of entry; and
- expand section 557C to apply to the failure to produce accurate documents to a permit holder exercising right of entry.

Superannuation theft

6.24 The committee believes that superannuation must be treated the same as wages, particularly by employers.

6.25 The committee received evidence that the Australian Taxation Office (ATO) takes a permissive approach to superannuation theft. The ATO, the committee was informed, do not properly penalise non-compliant employers and repeat offenders, furthermore, the ATO does not communicate with employees that have a superannuation theft claim, and it does not have accurate visibility of the extent of unpaid superannuation, despite the introduction of Single Touch Payroll, which theoretically makes it more visible.

6.26 The committee heard evidence from workers, unions, and academics about the difficulty in pursuing unpaid super claims through the ATO, including the
lack of standing for employees, unions and superannuation funds, and the lack of information shared between the ATO and affected employees.

6.27 While it was suggested that pursuing unpaid superannuation would be made easier by shifting the process to the FWC or alternative process, the committee heard other proposals from Industry Super Australia (ISA), unions and workers about ways the ATO could improve its activities.

Recommendation 9

6.28 The committee recommends that the Australian Government consider bringing forward amendments to the *Superannuation Guarantee (Administration) Act 1992* to:

- require Superannuation Guarantee payments to be aligned with the payment of wages;
- require Superannuation Guarantee payments to be made on every dollar earned to achieve simplicity and ease of compliance; and
- consider an incremental implementation strategy, similar to that used for the rollout of Single Touch Payroll, to ensure small businesses are adequately prepared for changes to the timing of Superannuation Guarantee payments.

6.29 The committee acknowledges the assistance that the Fair Entitlements Guarantee (FEG) provides employees who are faced with no entitlements, particularly superannuation when businesses do not pay what they owe and then go into liquidation, with limited likelihood of receiving these outstanding payments.

6.30 Compensation schemes of last resort, such as the FEG provide some assistance to those employees who have had their rightful entitlements stolen. However, ultimately the need is for adequate legislation to ensure that, firstly, payments are made on time and, secondly, that employers that do not pay the correct entitlements face harsher penalties. Reliance on such compensation schemes entrenches the ability for white collar crime to persist because ultimately some else will pay—the taxpayer.

6.31 The committee believes that the absence of superannuation in the FEG is an oversight which needs to be amended.

Recommendation 10

6.32 The committee recommends that the Australian Government include superannuation in the National Employment Standards.

Recommendation 11

6.33 The committee recommends that the Australian government consider including superannuation in the Fair Entitlements Guarantee payments.
Recommendation 12

6.34 The committee recommends that the Australian Taxation Office improve its communication with individuals to keep them promptly and fully informed of the progress and outcomes regarding their Superannuation Guarantee non-compliance cases, including:

- that before entering into a payment plan to recover Superannuation Guarantee payments from a non-compliant employer, the Australian Taxation Office be required to notify the affected employee and gain their consent to the course of action; and
- that in determining a reasonable payment plan to recover Superannuation Guarantee payments from a non-compliant employer, the Australian Taxation Office must give primary consideration to the loss of retirement savings suffered by the employee.

Recommendation 13

6.35 The committee recommends that the Australian Government review all current compliance and recovery activities related to unpaid Superannuation Guarantee contributions, including:

- determining which cases should remain with the Australian Taxation Office, and which ones could be transferred to, or shared with, the Fair Work Ombudsman or an alternative body;
- directing the Fair Work Ombudsman to begin receiving and acting on Superannuation Guarantee non-payment complaints where appropriate, rather than simply referring the affected employees to the Australian Taxation Office;
- reviewing the Superannuation Guarantee contribution regime and its management by the Australian Taxation Office to ascertain whether it is adequately deterring underpayments and recovering unpaid Superannuation Guarantee entitlements; and
- improving proactive Superannuation Guarantee initiatives including strengthening and increasing penalties for deliberate and repeated acts of non-compliance, the inclusion of random audits, and the publication of enforcement activities in relation to Superannuation Guarantee payments.

Recommendation 14

6.36 The committee recommends that the Australian Government consider legislative options to give employees, or other parties acting on their behalf such as unions, superannuation funds, and legal representatives greater standing to assist in the recovery of unpaid superannuation.
Migrant workers

6.37 The committee heard from many witnesses who stressed the impact of wage theft for migrant workers, in line with findings in both the job security and temporary migration committee inquiries.

6.38 The Migrant Workers Centre (MWC) made recommendations to the committee which echoed these inquiries regarding protections for migrant workers that are pursuing exploitation and wage theft complaints.

6.39 The committee notes that the Migrant Workers’ Taskforce report recommended the extension of the Fair Entitlements Guarantee program to temporary migrant workers, which was also reiterated in this inquiry by the MWC.

6.40 Building on the recommendations of the Migrant Workers’ Taskforce report, which the Australian Government has broadly agreed to, the committee makes the following recommendations.

Recommendation 15

6.41 The committee recommends that the Australian Government, as a priority:

- extend the Fair Entitlements Guarantee to all employees, including those on temporary visas, building on recommendation 13 of the Migrant Workers’ Taskforce report; and
- implement a National Labour Hire Licensing Scheme, building on recommendation 14 of the Migrant Workers’ Taskforce report. The National Labour Hire Licensing Scheme should build on existing frameworks, such as those schemes operating in Queensland and Victoria, to provide a nationally consistent framework.

Recommendation 16

6.42 The committee recommends that the Australian Government explore reform to visa laws to allow migrant workers who have been exploited or underpaid to remain in Australia until the relevant legal processes for recovery of lost wages or conditions is finalised.

Recommendation 17

6.43 The committee recommends that a formal, and legally binding firewall be established between the Fair Work Ombudsman and the Department of Home Affairs to protect whistle-blowers and temporary visa holders that report exploitation or wage theft to the Fair Work Ombudsman and extend protection to exploitation and wage theft claims progressed through the courts.
Australian Government procurement

6.44 The committee received recommendations from a number of witnesses about ways in which the Australian Government can set the standard across its own workforce, particularly in government procurement processes, to prevent wage theft and ensure that taxpayer money is not used to tacitly endorse the underpayment of wages.

6.45 The committee believes that the Australian Government should be a model employer by ensuring that wage theft does not occur in its own workforce.

Recommendation 18

6.46 The committee recommends that the Australian Government act as a model procurer by ensuring that:

- government procurement powers are being used to support businesses that engage in fair, equitable, ethical and sustainable practices, including demonstrated compliance with labour laws; and
- wage theft does not occur within its own workforce, including in government funded sectors.

General

6.47 As mentioned at the commencement of this chapter, the Senate Select Committees on Job Security and Temporary Migration have made findings and recommendations relevant to this inquiry, and evidence from those inquiries has been reflected throughout this report, particularly in relation to migrant workers and the interaction between insecure work and wage theft.

6.48 Throughout the inquiry the committee heard that employees are often too scared to come forward and report wage theft due to fear of repercussions, and that increased protections for employees are necessary to address wage theft and exploitation.

6.49 As such, the committee endorses the recommendations made by both the Senate Select Committee on Job Security and the Senate Select Committee on Temporary Migration.

Recommendation 19

6.50 The committee recommends that the Australian Government improve protections for employees who engage in lawful activity to prevent wage theft, including joining a union, pursuing underpayments through established processes, publicly speaking out against poor workplace practices, exercising workplace rights, and engaging in industrial activity.
Senator Anthony Chisholm
Chair
Labor Senator for Queensland
Dissenting report by Government Senators

Introduction
1.1 Every employee has a right to be paid the wages and entitlements which they are legally entitled to under Australian law. This goes to the heart of the relationship between the employer and the employee. Throughout its period in office, the Australian Government has introduced a raft of measures to support the rights of employees in this regard. In our view, the Majority Report insufficiently considers the positive impact of these measures and proposes a range of recommendations which are insufficiently supported by evidence.

Australian Building and Construction Commission
1.2 The comments in the Majority Report in relation to the Australian Building and Construction Commission (ABCC) in paragraphs 3.64 to 3.66 are deeply concerning. The discussion leads with evidence criticising the focus of the ABCC. It is noted at paragraph 3.65 that the Construction Forestry Maritime Mining and Energy Union (CFMMEU) calls for the abolition of the ABCC. In our view, the presentation of the evidence fails to provide a balanced overview of the important work of the ABCC, including in relation to the recovery of underpaid wages and entitlements.

1.3 The submission of the Attorney-General’s Department provides evidence of the success of the ABCC in pursuing matters relating to wages and entitlements.\(^1\) In its most recent Annual Report 2020–21, the ABCC provides further information in relation to its actions. The annual report indicates that the highest number of investigations commenced by topic in that year related to wages and entitlements (it was the same in the 2019–20 year).\(^2\) Hence, the evidence does not support the assertion that the ABCC has a lack of focus on its core objectives.

1.4 In relation to the views of the CFMMEU, the Annual Report 2020–21 indicates that the CFMMEU and its representatives were subject to penalties of $3,010,790 out of total penalties imposed during the year of $3,491,890.\(^3\) In this regard, it should be noted that the penalties are assessed by the courts.

1.5 There is no recognition in the Majority Report that it is the repeated infringements of the CFMMEU which require the deployment of resources by the ABCC. The view of the CFMMEU to abolish the ABCC is stated without

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\(^1\) Attorney-General’s Department, Submission 80, p. 9.


the inclusion of any evidence as to context—over 85 per cent of the penalties levied in the 2020–21 year were against the CFMMEU.

1.6 The ABCC is discharging its role to uphold the rule of law on building and construction sites. The presentation of the evidence in the Majority Report is not a reasonable representation of the facts. It is deeply concerning that the true position is so distorted in the Majority Report.

**Measures taken by the Government**

1.7 Through its period in office, the Australian Government has introduced a range of measures to address the issue of underpayment of employee wages and other entitlements. This is across a range of policy areas.

1.8 As detailed in the submission of the Attorney-General’s Department, on 5 September 2017, the Parliament passed the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*. The legislation introduced a higher scale of penalties for serious contraventions of prescribed workplace laws. This included a ten-fold increase of penalties for serious contraventions.

1.9 A range of other reforms were introduced including:

- doubling of penalties for record-keeping and pay slip breaches;
- extending liability to franchisors and holding companies liable for breaches by their networks, where they knew or could reasonably be expended to have known of contraventions, and failed to take reasonable steps to address them;
- additional evidence gathering powers for the Fair Work Ombudsman (FWO);
- outlawing of cashback arrangements; and
- new penalties for hindering an investigation.

1.10 The effectiveness of these amendments is evidenced by the results of cases brought by the FWO. Particular case studies are provided in the submission from the Attorney-General’s Department.

1.11 It should also be noted that over $180 million in new funding to the FWO has been provided since 2016 to prevent wage underpayment and improve compliance.

1.12 The establishment of the Commonwealth-funded Employer Advisory Service provides advice to employers. Through this service, which commenced on 1 July 2021, small businesses can seek free written advice, tailored to their circumstances to help employers meet their workplace obligations to

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4 Attorney-General’s Department, *Submission 80*, p. 5.
employees. The Australian Government is providing $12.9 million in funding over four years from 2020–21 to the FWO for this purpose.⁵

1.13 As part of the Australian Government’s industrial relations reforms legislation that was introduced into the Parliament in late 2020, proposals were included to make the more egregious form of wage underpayment a criminal offence. The Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 would have provided for this criminal offence, amongst a raft of other measures which supported Australia’s recovery from the COVID-19 pandemic. It is noted that the bill was not passed as proposed because of lack of support from the Opposition.⁶

1.14 In relation to migrant workers, the Australian Government has introduced the Migration Amendment (Protecting Migrant Workers) Bill 2021⁷ which addresses two of the recommendations in the report by the Migrant Workers’ Taskforce. This legislation will strengthen protections for migrant workers in Australia. This is important to maintain Australia’s international reputation as a preferred migration destination. Passage of this bill through the Parliament will build on existing compliance mechanisms and sanctions against unscrupulous employers, labour hire intermediaries and others who misuse Australia’s visa programs and immigration status to exploit migrant workers in the workplace.

1.15 The Australian Government’s Superannuation Guarantee Integrity Package, contained in the Treasury Laws Amendment (2018 Measures No. 4) Act 2018,⁸ received Royal Assent on 1 March 2019. The package provided the Australian Taxation Office (ATO) with new powers to detect non-compliance and enforce employers’ superannuation guarantee obligations. This included:

- From 1 July 2018, superannuation funds have been required to report more frequently the contributions they receive, enabling the ATO to identify non-compliance earlier and take prompt action.
- The ATO’s recovery powers have also been improved, through strengthened director penalty notices and the use of security bonds for high-risk employers. These measures enhance the ability of the ATO to act on behalf of employees.

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• The ATO has been empowered to seek court-ordered penalties in the most egregious cases of non-payment, including up to 12 months jail for employers who repeatedly fail to pay superannuation guarantee liabilities.
• The ATO can inform all affected employees the steps taken by the ATO to recover unpaid super.

1.16 The rollout of Single Touch Payroll (STP) is also making it easier for employers to comply with their superannuation obligations. STP has reduced the regulatory burden on business and transforms compliance by aligning payroll functions with regular reporting of taxation and superannuation obligations.

1.17 The Australian Government introduced a one-off amnesty to encourage employers to self-correct historical superannuation guarantee non-compliance. The amnesty period applied to disclosures of historical non-compliance made between 24 May 2018 and 7 September 2020.

1.18 The amnesty encouraged employers to come forward and pay historical superannuation guarantee debts without facing the usual financial penalties from the ATO. Importantly, employers still had to pay the amounts owed in full and with interest. More than 28,300 employers qualified for the amnesty, disclosing nearly $912.5 million in Superannuation Guarantee Charges (SGC) on behalf of more than 690,950 employees. The goal was to seek the payment of the SGC for the benefit of the affected employees.

1.19 Given the initiatives which have been taken by the Government across a range of policy areas, care is required prior to making additional changes. Time is required to assess the impact of Government initiatives. Further, the costs (financial and otherwise) of additional policy measures must be carefully weighed against the benefits.

Comments on Recommendations
1.20 In relation to Recommendation 1, it is noted that the Australian Government’s 2020 industrial relations reforms proposed a new criminal penalty for wage theft, as well as higher civil penalties for other forms of underpayments that did not meet the criminal threshold. The Opposition voted against the legislation.

1.21 Recommendation 2 is vague and imprecise in relation to seeking to: ‘capture all parties and individuals...[that] create an environment of wage theft...’. It is unclear how this would work in practice.

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9 Australian Taxation Office (ATO), Single touch payroll, 10 November 2021 (accessed 30 March 2022).

10 ATO, Superannuation guarantee amnesty, 6 July 2021 (accessed 30 March 2022).
1.22 In relation to Recommendation 3, the policy benefit for making such an amendment has not, in our view, been established.

1.23 In relation to Recommendation 4, under the Corporations Law, directors have a duty to prevent a company trading if it is insolvent.11 The Australian Securities and Investments Commission (ASIC) has successfully prosecuted directors for allowing companies to incur debts when the company is insolvent—and has sought orders making directors personally liable for company debts.

1.24 It should also be noted that the Australian Government has also given the ATO increased recovery powers, including strengthened director penalty notices and the use of security bonds for high-risk employers.12 The ATO can now also seek court-ordered penalties in the most egregious cases of non-payment, including up to 12 months jail for employers.

1.25 In relation to Recommendation 5, it is noted that there is already provision under section 548 of the Fair Work Act 2009 (Fair Work Act) for certain proceedings to be dealt with as small claims. This is referenced in the submission from the Attorney-General’s Department.13

1.26 Further consideration is required in relation to Recommendation 6, including how this recommendation would work in practice and the amendments required to legislation.

1.27 In our view, there is inadequate evidence to justify the measures proposed in Recommendations 7 and 8.

1.28 In relation to Recommendation 9, it is noted that many large businesses already pay their superannuation guarantee obligations either monthly, fortnightly, or weekly. The current payment frequency of superannuation seeks to strike a balance between ensuring the timely payment of superannuation and the burden on business, particularly small businesses. The impact on small business of any such change would need to be carefully considered; especially given the measures which have been taken by the Government to secure compliance of employers with their legal obligations.

1.29 In relation to Recommendation 10, it is noted that most workers and their legal representatives can already pursue unpaid superannuation through the court system due to superannuation clauses in their award or employment agreement. Accordingly, it is difficult to understand how including the

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13 Attorney-General’s Department, *Submission 80*, p. 10.
superannuation guarantee in the National Employment Standards (NES) would have a material or practical impact.

1.30 It also needs to be noted that, unlike the legislation relating to the superannuation guarantee, the Fair Work Act does not have universal coverage of all Australian workers, due to constitutional constraints on the Commonwealth’s industrial relations powers.

1.31 Finally, it is noted that the costs of pursuing unpaid superannuation via the courts is significant for individuals. Including superannuation in the NES would not make it more economically viable for individuals or groups to pursue unpaid superannuation. The ATO provides a more economic route to recovery.

1.32 In relation to Recommendation 11, the Majority Report lacks any analysis of the cost of such an expansion of the scheme. It is important that the Fair Entitlements Guarantee (FEG) is sustainable. Any expansion of the scheme (however well intended) needs to consider the cost.

1.33 In relation to Recommendation 12, as a general proposition, we support the communication of information with the employee. It is noted that since 1 April 2019, the ATO has been able to disclose to employees a greater range of information relating to the superannuation owed to the individual employee, including ATO efforts to recover unpaid superannuation from the employer.

1.34 Where an employer has entered into a payment arrangement to repay super, the ATO can disclose this to an employee and, in addition to this, the high-level terms of the payment arrangement as they relate only to that employee. For example, the ATO can disclose the start and end dates of the payment arrangement, the frequency of payment agreed by the employer, and the amount of superannuation that is being collected for that employee.

1.35 Additional information that the ATO is also able to disclose to an employee includes other actions that the ATO may be taking to recover unpaid superannuation debts from an employer. The ATO may also disclose that they are pursuing related parties against whom they may be able to recover an unpaid superannuation debt (for example, using director penalties or garnishee powers).

1.36 To better inform employees, the ATO can now inform all affected employees about their actions to recover unpaid superannuation and display contribution information on the MyGov website.

1.37 In our view, care needs to be taken prior to imposing additional processes upon the ATO in relation to its pursuit of unpaid superannuation. How much will these additional processes cost? Could they have the unintended consequence of delaying the ATO taking the steps it needs to take in order to secure the best prospects for payment of unpaid superannuation?
1.38 In relation to Recommendation 13, further consideration is required with respect to the current distribution of powers with respect to enforcement. The role of each regulator needs to be recognised and clearly defined. The demarcation of responsibilities should be clear.

1.39 It is noted that the Australian Government legislated the Superannuation Guarantee Integrity Package, contained in the Treasury Laws Amendment (2018 Measures No. 4) Act 2018 in 2019. The package was a result of the findings of the Superannuation Guarantee Cross Agency Working Group which reported on the operation, administration, and extent of non-compliance in the superannuation guarantee system. The package provided the ATO with new powers to detect non-compliance and enforce employers’ superannuation guarantee obligations.

1.40 From 1 July 2018, superannuation funds have been required to report more frequently the contributions they actually receive, enabling the ATO to identify non-compliance earlier and take prompt action.

1.41 The ATO’s recovery powers have also been improved, through strengthened director penalty notices and the use of security bonds for high-risk employers. These measures enhance the ability of the ATO to take action on behalf of employees to ensure that unpaid superannuation is paid to employees’ super accounts.

1.42 It should be noted that the ATO has primary oversight of superannuation regulation. In comparison, the functions of the FWO relate to providing advice about, and enforcing compliance with, modern awards and enterprise agreements requiring employers to make superannuation contributions. The FWO also has functions in relation to record keeping and payslip requirements relating to superannuation contributions.

1.43 The FWO does not have statutory access to payment information from employers or superannuation funds in the same way as the ATO. Hence, as a result, the FWO is not able to proactively monitor the superannuation guarantee and forwards on complaints regarding superannuation contributions to the ATO for action.

1.44 Actions to enforce unpaid superannuation guarantee charges are brought by the ATO. If an employee reports their employer to the ATO for non-payment or underpayment of superannuation contributions, the ATO may investigate the employer on the employee’s behalf.

1.45 In relation to Recommendation 14, it is noted that superannuation legislation is based on the taxation power. Further legal advice is required in relation to whether superannuation trustees could be empowered to bring claims. Such a change would require substantive legislative reform. Given measures which have been introduced relatively recently (described throughout this dissenting report), further time is required to consider the impact of the new measures.
One benefit of the ATO taking action is that the costs are not incurred by the superannuation funds.

1.46 In relation to Recommendation 15, financial analysis would need to be undertaken in relation to any extension of the FEG Scheme. It is also noted that the Australian Government is committed to a nationally consistent approach to labour hire and continues to work with State and Territory governments to achieve this objective. Moreover, labour hire employees have the same rights and protections as all other employees when it comes to, for instance, unfair dismissal rights, award entitlements, general protections and work health and safety protections. Labour hire employees working under enterprise agreements already have rights and entitlements above the award minimum safety net.

1.47 In relation to Recommendation 16, as noted above, the Australian Government has strengthened legislation to better protect migrant workers by enhancing the powers of the FWO. The FWO has made clear that the protection of vulnerable workers, including migrant workers, is a priority area. The Government also established the Migrant Workers’ Taskforce in 2016 and is continuing to progress implementation of the Taskforce’s recommendations.

1.48 It is also noted that: (a) the FWO offers a telephone interpreter service (tel: 13 14 50) and an online reporting tool for workers to report issues anonymously and in languages other than English; and (b) there is no obligation for any migrant worker to disclose their visa status when seeking assistance from the FWO, and (c) under the Assurance Protocol that the FWO has with the Department of Home Affairs, migrant workers will generally not have their visa cancelled, or be detained or removed by the Department of Home Affairs if they are assisting the FWO.14

1.49 In relation to Recommendation 17, it is noted that the Australian Government has provided $18.1 million in new funding for the FWO over four years from 2021–22 to support a doubling of the current scale of the Pacific Labour Scheme and Seasonal Worker Programme, and the establishment of the new Australian Agricultural Visa program. This new Government funding will enable the appointment of 27 additional Fair Work inspectors to ensure compliance with workplace law under the expanded Pacific labour mobility programs and the Australian Agricultural Visa Program.

1.50 Migrant workers are covered by the same basic workplace rights and protections as Australian citizens and permanent residents, and these rights and protections will continue to apply to future workers under the Australian Government’s labour mobility programs.

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1.51 In relation to Recommendation 18, it is noted that the Commonwealth Procurement Rules provide:

… the Australian Government promotes the proper use and management of public resources. Proper means efficient, effective, economical and ethical … Relevant entities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe. This includes not entering into contracts with tenderers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order.\(^\text{15}\)

1.52 In relation to Recommendation 19, it is noted that the employees who expose workplace non-compliance are protected from adverse action taken by their employer. This is under the general protections provisions contained in the Part 3-1 of the Fair Work Act. There is a summary of these provisions in the submission of the Attorney-General’s Department.\(^\text{16}\)

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\(^{16}\) Attorney-General’s Department, *Submission 80*, p. 11.
Appendix 1
Submissions and additional information

1 Mr Stuart Gardner
2 Australian Charities and Not-for-Profits Commission
3 Ms Melissa Kennedy
4 Institute of Certified Bookkeepers
5 The Cheesecake Shop Pty. Ltd.
6 Mine Super
7 Government of Western Australia
8 Mr Mark Tomisich
9 Mr Peter Bates
10 WorkLawyers
11 Industry Super Australia
   • 11.1 Supplementary to submission 11
   • Additional Information 1
12 Cbus Super
13 South Coast Labour Council
   • Attachment 1
14 Chartered Accountants Australia and New Zealand
15 Mr Maxim Zintchenko
   • Attachment 1
   • Attachment 2
   • Attachment 3
   • Attachment 4
   • Attachment 5
   • Attachment 6
   • Attachment 7
   • Attachment 8
16 NSW Young Liberals
17 NT Working Women’s Centre
18 Security Providers Association of Australia
19 Government of Queensland
20 AustralianSuper
21 Government of Victoria
22 ANU Postgraduate and Research Students’ Association
23 NSW Labor Lawyers
24 Pendragon Consultants Pty Ltd
25 Mr Kym Yeoward
26 Mr Glenn Hutchinson
27 NSW Young Lawyers
28 Master Grocers Australia Ltd
29 Confidential
30 Mr Ange Kenos
31 Unions NSW
  • Additional Information 1
  • Attachment 1
  • Attachment 2
  • Attachment 3
  • Attachment 5
32 Australian Building and Construction Commission
33 A/Prof. Angela Knox
34 Centre for Business and Social Innovation
35 Mr Phillip Sweeney
  • 35.1 Supplementary to submission 35
  • 35.2 Supplementary to submission 35
  • 35.3 Supplementary to submission 35
  • 35.4 Supplementary to submission 35
  • Additional Information 1
36 UNSW Law Society
37 National Foundation for Australian Women
38 Australian Council of Trade Unions (ACTU)
39 Fair Work Ombudsman
40 Electrical Trades Union of Australia
41 Chamber of Commerce and Industry of WA
42 UnionsWA
  • Attachment 1
43 Associate Professor Anna Boucher, Ms Umeya Chaudhuri, Mr James Hall
44 Council of Australian Postgraduate Associations
45 Mr Stuart Bonds
46 Tanda
47 WEstjustice, Migrant Employment Legal Service (MELS), Redfern Legal Centre
  International Student Service (RLCISS)
48 Maurice Blackburn
49 National Retail Association
50 Australian Small Business and Family Enterprise Ombudsman
51 Australian Manufacturing Workers’ Union
  • Attachment 1
52 Australian Institute of Company Directors
53 Migrant Workers Centre
54 NSW Young Labor
55 McKell Institute
• Attachment 1

56 Community and Public Sector Union
57 UnionsACT Young Workers Centre
58 Per Capita Australia
59 University of Melbourne Graduate Student Association
60 Registered Organisations Commission
61 Australian Services Union
62 Ai Group
63 Name Withheld
64 Cleaning Accountability Framework
65 Finance Sector Union
66 Housing Industry Association (HIA)
67 Victorian Trades Hall Council
68 7-Eleven Stores Pty Ltd
69 Business Council of Australia
70 Restaurant & Catering Australia
71 Woolworths Group
72 Australian Retailers Association
73 Australian Workers’ Union
74 Retail Supply Chain Alliance
• Attachment 1

75 Shop, Distributive and Allied Employees’ Association (SDA)
76 Industry Fund Services
77 Council of Small Business Organisations Australia (COSBOA)
78 Queensland Nurses and Midwives Union (QNMU)
79 Unions Tasmania
80 Attorney General’s Department
81 Australian Chamber of Commerce and Industry (ACCI)
82 Domino’s Pizza Enterprises
83 Australian Salaried Medical Officers’ Federation (ASMOF)
84 Shoalcoast Community Legal Centre
85 Dr Tess Hardy, Melbourne Law School
• Attachment 1

86 Australasian Centre for Corporate Responsibility (ACCR) and LUCRF Super
87 Financial Services Council
88 Franchise Council of Australia
89 Dr Stephen Clibborn
• Attachment 1
• Attachment 2
• Attachment 3
• Attachment 4
• Attachment 5
• Attachment 6
• Attachment 7

90  Law Council of Australia
91  National Union of Students (NUS)
    • 91.1 Supplementary to submission 91

92  JobWatch
93  Confidential
94  Confidential
95  Confidential
96  Young Workers Centre
97  Queensland Council of Unions
98  Hospo Voice
99  Retail and Fast Food Workers Union (RAFFWU)
    • Attachment 1

100  Confidential
101  United Workers Union
    • 101.1 Supplementary to submission 101
    • Attachment 1
    • Attachment 2

102  Associate Professor Laurie Berg and Associate Professor Bassina Farbenblum
103  CPSU (SPSF)
104  Confidential
105  National Tertiary Education Union (NTEU)
106  CFMEU - Construction & General Division
107  Confidential
108  Australian Licenced Aircraft Engineers Association
109  Wage Theft Australia
    • Attachment 1

110  Australian Taxation Office
111  Treasury
112  University of Technology Sydney
    • 112.1 Supplementary to submission 112

113  Australian Higher Education Industrial Association
114  University of New South Wales
115  Macquarie University
116  University of Sydney
117  Monash University
118  RMIT University
119  University of Western Australia
120  University of Melbourne
121  University of New England
122 Mr Trevor Lock
123 La Trobe Casuals Network
124 The University of Sydney Casuals Network
   • 124.1 Supplementary to submission 124
125 Monash Casuals Network
127 QUT Centre for Decent Work & Industry
128 University of Melbourne Casuals Network
129 Confidential
130 Dr Pooja Sawrikar

Additional Information
1 Workshop paper by Dr Tess Hardy, ‘Compliance Defiance: Reviewing the Role
   of Deterrence in Employment Standards Enforcement’
2 UQ Casuals’ Caucus Report on Wage Theft, September 2021

Answer to Question on Notice
1 Anna Boucher: Answers to questions on notice from the public hearing in
   Canberra on 18 September 2020 (received 1 October 2020)
2 Attorney-General’s Department: Answers to questions on notice from the
   public hearing in Canberra on 18 September 2020 (received 12 October 2020)
3 The Treasury: Answers to questions on notice from the public hearing in
   Canberra on 18 September 2020 (received 14 October 2020)
4 Fair Work Ombudsman (FWO): Answers to questions on notice from the
   public hearing in Canberra on 18 September 2020 (received 15 October 2020)
5 Fair Work Ombudsman (FWO): Answers to questions on notice from the
   public hearing in Canberra on 18 September 2020 (received 16 October 2020)
6 The Treasury: Answers to questions on notice from the public hearing in
   Canberra on 18 September 2020 (received 19 October 2020)
7 ATO: Answers to questions on notice from the public hearing in Canberra on
   18 September 2020 (received 29 October 2020)
8 The Treasury: Answers to questions on notice from the public hearing in
   Canberra on 18 September 2020 (received 4 November 2020)
9 Tess Hardy: Answers to questions on notice from the public hearing in
   Canberra on 18 September 2020 (received 13 November 2020)
10 The Treasury: Answers to questions on notice from the public hearing in
    Canberra on 18 September 2020 (received 24 November 2020)
11 ATO: Answers to questions on notice from the public hearing in Canberra on
    18 September 2020 (received 24 November 2020)
12 ATO: Answers to questions on notice from the public hearing in Canberra on
    18 September 2020 (received 18 February 2021)
13 National Tertiary Education Union (NETU): Answers to questions on notice
   from the public hearing in Sydney 10 March 2021.
14 ATO: Answers to questions on notice from the public hearing in Canberra on 18 September 2020 (received 25 February 2021)
15 ATO: Answers to questions on notice from the public hearing in Canberra on 18 September 2020 (received 25 February 2021)
16 Migrant Workers Centre/Victorian Trades Hall Council: Answers to questions on notice from the public hearing in Melbourne on 11 March 2021 (received 24 March 2021)
17 University of Sydney: Answers to questions on notice from the public hearing in Sydney 10 March 2021 (received 25 March 2021)
18 University of Sydney: Answers to written questions on notice from the committee (received 25 March 2021)
19 Macquarie University: Answers to written questions on notice from the committee (received 25 March 2021)
20 Macquarie University: Answers to questions on notice from the public hearing in Sydney 10 March 2021 (received 25 March 2021)
21 University of NSW: Answers to written questions on notice from the committee (received 31 March 2021)
22 University of New England: Answers to questions on notice from the public hearing in Canberra on 22 February 2022 (received 8 March 2022).
23 RMIT University: Answers to questions on notice from the public hearing in Canberra on 22 February 2022 (received 9 March 2022).
24 Monash University: Answers to questions on notice from public hearing in Canberra on 22 February 2022 (received 9 March 2022).
25 La Trobe University: Answers to questions on notice from public hearing in Canberra on 22 February 2022 (received 9 March 2022).
26 ATO: Answers to questions on notice from public hearing in Canberra on 22 February 2022, ATO investigations relating to unpaid liabilities (received 10 March 2022).
27 ATO: Answers to questions on notice from public hearing in Canberra on 22 February 2022, Legislative restrictions around disclosure of unpaid superannuation status (received 10 March 2022).
28 Industry Super Australia: Answers to questions on notice from public hearing in Canberra on 22 February 2022, ISA’s analysis of increases in Age pension expenditure (received 22 March 2022).

Tabled Documents
1 Opening statement tabled by the FWO at a public hearing on 18 September 2020.
2 Opening statement tabled by the CUPUW at a public hearing in Sydney on 10 March 2021.
3 Opening statement tabled by Dr Liam Kane (CUPUW) at a public hearing in Sydney on 10 March 2021.
4 Opening statement tabled by USyd Casuals Network (CUPUW) at a public hearing in Sydney on 10 March 2021.
5 Opening statement by the University of Sydney at a public hearing in Sydney on 10 March 2021.
6 Opening statement tabled by the Australian Higher Education Industrial Association (AHEIA) at a public hearing in Sydney on 10 March 2021.
7 Opening statement and additional documents tabled by the Council of Australian Postgraduate Associations (CAPA) at a public hearing in Sydney on 10 March 2021.
8 Opening statement tabled by the National Tertiary Education Union (NETU) at a public hearing in Sydney on 10 March 2021.
9 Opening Statement tabled by the Casualised, Unemployed and Precarious University Workers (CUPUW) at a public hearing on 22 February 2022.
10 Opening statement tabled by the Industry Super Australia at a public hearing on 22 February 2022.
11 Opening statement tabled by La Trobe Casuals’ Network at a public hearing on 22 February 2022.
12 Opening statement tabled by the United Workers Union at a public hearing on 22 February 2022.
14 Opening statement tabled by University of Melbourne Casuals’ Network at a public hearing on 22 February 2022.
15 Opening statement tabled by Andrew X from University of Melbourne Casuals’ Network at a public hearing on 22 February 2022.
16 Opening Statement tabled by the La Trobe University at a public hearing on 22 February 2022.
17 Opening statement tabled by National Tertiary Education Union (NTEU) at a public hearing on 22 February 2022.
Appendix 2
Public hearings

Friday, 18 September 2020
Committee Room 2S1
Canberra

Treasury
• Mr Robert Jeremenko, Division Head—Retirement Income Policy
• Mr Robb Preston, Principal Advisor—Division Head, Retirement Income Policy
• Ms Shanyn Sparreboom, Manager—Individuals Tax Unit

Australian Taxation Office
• Mr John Ford, A/g Deputy Commissioner—Superannuation & Employer Obligations
• Ms Kasey MacFarlane, Assistant Commissioner—Risk & Strategy Employer Obligations

Australian Council of Trade Unions
• Mr Liam O’Brien, Assistant Secretary
• Mr Sunil Kemppi, Legal & Industrial Officer

Dr Tess Hardy, Private capacity

Dr Stephen Clibborn, Private capacity

Associate Professor Anna Boucher, Private capacity

Associate Professor Laurie Berg, Private capacity

National Foundation for Australian Women
• Dr Kristin van Barneveld, Social Policy Committee Member

Fair Work Ombudsman
• Ms Sandra Parker PSM, Fair Work Ombudsman
• Mr Mark Scully, Deputy Fair Work Ombudsman—Compliance & Enforcement
• Ms Kristen Hannah, Deputy Fair Work Ombudsman—Policy & Communication
• Mr Jeremy O’Sullivan, Chief Counsel
• Mr Steven Ronson, Executive Director—Enforcement
• Mr Michael Clark, Executive Director—Customer Services
• Mr Anthony Fogarty, Executive Director—Policy
**Attorney General’s Department**
- Mr Martin Hehir, Deputy Secretary—Industrial Relations Group
- Mr Greg Manning, First Assistant Secretary—Industrial Relations Group
- Ms Ashleigh Saint, Assistant Secretary—Industrial Relations Group

**Wednesday, 10 March 2021**
The Grace Hotel
Sydney

**National Tertiary Education Union (NTEU)**
- Ms Gabrielle Gooding, National Assistant Secretary

**Casualised, Unemployed and Precarious University Workers**
- Dr Giles Fielke, Member Organiser
- Dr Anastasia Kanjere, Committee Member
- Dr Ellyse Fenton, Member
- Dr Yaegan Doran
- Dr Siobhan Irving
- Dr Liam Kane

**National Union of Students (NUS)**
- Ms Zoe Ranganathan, President
- Ms Arabella Wauchope, Welfare Officer

**Council of Australian Postgraduate Associations**
- Mr Errol Phuah, National President

**Australian Higher Education Industrial Association**
- Mr Stuart Andrews, Executive Director

**University of Sydney**
- Professor Stephen Garton AM, Vice-Chancellor and Principal

**Macquarie University**
- Professor Bruce S. Dowton, Vice-Chancellor and President
- Ms Nicole Gower, Vice-President—People and Services

**University of New South Wales**
- Professor Anne Simmons, Provost
- Ms Deena Amorelli, Chief HR Office—Division of Operations
Thursday, 11 March 2021
Mantra on Russell
Melbourne

Hospo Voice & United Workers Union
  • Ms Jo Brisky, Official
  • Ms Julien Gibson, Member
  • Mr Mohammad Abdillahi, Member
  • Mr Trent Whitehand-Willick, Member

Victorian Trades Hall Council
  • Dr Carina Garland, Assistant Secretary
  • Dr Hyeseon Jeong, Research and Policy Officer

Migrant Workers Centre
  • Mr Mathew Knunkle, Director

Young Workers Centre
  • Ms Felicity Sowerbutts
  • Ms Annie Wong

Maurice Blackburn
  • Mr Josh Bornstein

Per Capita Australia
  • Ms Emma Dawson, Executive Director
  • Mr Shirley Jackson

Tuesday, 22 February 2022
Committee Room 2S3
Canberra

Industry Super Australia
  • Mr Matthew Linden
  • Mr James Gunn, Senior Public Affairs Advisor

United Workers Union
  • Ms Melinda Bolton, Industrial Officer
  • Witness 1, Member
  • Witness 3, Member

Australian Taxation Office
  • Ms Emma Rosenzweig, Deputy Commissioner—Superannuation and Employer Obligations
• Ms Michelle Allen, A/g Assistant Commissioner—Risk and Strategy
Employer Obligations

National Tertiary Education Union (NTEU)
• Dr Alison Barnes, National President
• Ms Kelly Thomas, Director—Industrial and Legal
• Mr David X, Sessional Academic
• Witness 2, Sessional Academic at Swinburne University of Technology

Casualised, Unemployed and Precarious University Workers (CUPUW)
• Ms Lisa (Siobhan) Irving, Representative
• Mr Ben Nunquam, Representative
• Mr Yaegan Doran, Representative

La Trobe Casuals’ Network
• Dr Anastasia Kanjere, Spokesperson

Monash Casuals’ Network
• Dr Giles Fielke, Delegate
• Mr Andrew XX, Delegate
• Mr Greg XX, Delegate
• Witness 5, Former Sessional Academic, Monash University—Faculty of
Science
• Dr Heine Heinrich

University of Melbourne Casuals’ Network
• Dr Hayley Singer, Member

University of New England
• Professor Brigid Heywood, Vice-Chancellor, and CEO

University of Melbourne
• Dr Julie Wells, Vice-President—Strategy and Culture

RMIT University
• Professor Sherman Young, Deputy Vice-Chancellor—Education
• Ms Dionne Higgins, Senior Vice-President—Strategy and Operations

La Trobe University
• Professor John Dewar, Vice-Chancellor
• Ms Regan Sterry, Executive Director—Human Resources

Monash University
• Professor Margaret Gardner AC, President and Vice-Chancellor
• Mr Peter Marshall AM, Chief Operating Officer and Senior Vice-President
• Mr Phillip Vaughan, Chief Human Resources Officer