

## Chapter 6

### Wage theft

On Saturday morning when I go to a café to buy a coffee, I do not want to ask that person what they are getting paid because I am almost certain the response will be something unlawful.<sup>1</sup>

#### A freefall to the bottom

6.1 The Australian community has an entirely reasonable expectation that workers in this developed, affluent country will not be exploited. This is one of the fundamental objectives of the *Fair Work Act 2009* (FWA, the Act), that it will protect workers by setting out basic rights and entitlements in the National Employment Standards (NES) and modern awards.

6.2 Fittingly, one of the committee's terms of reference is whether the NES and modern awards provide an effective floor for workers' wages and conditions. Evidence presented to the committee, however, shows that employers in some industries are underpaying workers with such impunity that the question of an effective floor is almost redundant. In situations where a significant proportion are not complying with the law, that is the NES or modern awards, there is no floor—as put by one witness, there is 'just a freefall to the bottom.'<sup>2</sup>

6.3 This chapter looks at alarming evidence presented to the committee on the underpayment of vulnerable workers, what many submitters deemed to be outright wage theft.

6.4 It is more common than many would imagine, and penalties provided by the FWA are proving powerless to curb it.

#### The prevalence of underpayment

6.5 Underpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm. Figures cited below are alarming. In Victoria alone, it is estimated that 79 per cent of hospitality employers did not comply with the national award wage system from 2013 to 2016.<sup>3</sup> The national average for noncompliance is brought lower by findings from other states, but is still hardly a figure engendering pride. Nationwide, it is estimated that one in two

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1 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 5.

2 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 5.

3 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 2.

hospitality works are being illegally paid, with similar figures available for the retail, beauty and fast food sectors.<sup>4</sup>

### ***FWO hospitality industry audit***

6.6 A March 2016 report from the Fair Work Ombudsman (FWO) looks at the hospitality industry, breaking finding down into three categories:

- Wave 1: Accommodation/taverns and bars;
- Wave 2: Restaurants, cafes and catering; and
- Wave 3: Takeaway foods.<sup>5</sup>

6.7 The hospitality industry employs mostly vulnerable, low-skilled workers, with 60.7 per cent having no post school qualification.<sup>6</sup>

#### *Accommodation/taverns and bars*

6.8 Businesses operating the accommodation, tavern or bar sector were found to have the highest rates of compliance, with 69 per cent found to be compliant. Of the remaining 31 per cent, most contraventions were monetary in nature.

6.9 A total of 750 audits were conducted, recovering over \$367 000 in lost wages for 629 employees.<sup>7</sup>

#### *Restaurants, cafes and catering*

6.10 According to the ABR, there were approximately 41 000 businesses in the accommodation and food services industry in May 2011. The FWO audit looked at 1066 of these businesses, or approximately 2.6 per cent of the total number, checking for compliance with wage and record-keeping obligations.

6.11 Only 42 per cent were found to be compliant with all requirements, with most errors relating to wage entitlements, and \$1.2 million in lost wages was recovered on behalf of 2752 employees.<sup>8</sup>

#### *Takeaway foods*

6.12 The ABR states that there were over 24 000 businesses in the takeaway services industry in May 2011. The FWO audit looked at 565 of these businesses, or almost 2.4 per cent of the registered number, checking for compliance with wage and record-keeping obligations.

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4 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 2.

5 Fair Work Ombudsman, *National Hospitality Industry Campaign 2012–15*, available at: [www.fairwork.gov.au/how-we-will-help/helping-thecommunity/campaigns/campaign-reports](http://www.fairwork.gov.au/how-we-will-help/helping-thecommunity/campaigns/campaign-reports) (accessed 25 July 2017).

6 Fair Work Ombudsman, *National Hospitality Industry Campaign 2012–15*.

7 Fair Work Ombudsman, *National Hospitality Industry Campaign 2012–15*.

8 Fair Work Ombudsman, *National Hospitality Industry Campaign 2012–15*.

6.13 Nationally, only 33 per cent were found to be compliant with all of their workplace obligations, with the majority of errors relating to underpayment of wages, incorrect payslips and incorrect or non-payment of weekend penalty rates. Only 53 per cent of employers were paying their employees correctly. In total, \$582 410 in lost wages was recovered on behalf of 929 employees, while only six formal cautions and one compliance notice were issued.<sup>9</sup>

6.14 Noting that a little under 2.4 per cent of businesses were audited, these figures suggest that workers are likely losing millions to underpayment. The next section looks at case studies from this and other sectors.

### **From the workers' perspective**

6.15 Ballarat Regional Trades and Labour Council (BRTLTC) operates a service called the Young Workers Legal Centre, which assists young workers and relies heavily on legal services and lawyers who offer their services on a *pro bono* basis:

The stories we have received are harrowing and most of them are reporting cash-in-hand payment, but there are also, as our submission states, a significant number of under-award payments and various other breaches—non-payment of entitlements or the lack of applying the award in the proper way.<sup>10</sup>

6.16 Examples are numerous, but have shared features in that young workers are vulnerable to exploitation, are not always familiar with the law, and may be hesitant to report exploitative practices for fear of losing their jobs.

6.17 In one cited example, a young man was working at a Caltex service station when a car drove off without paying for petrol. The worker reported being distressed because his employer would make him pay for the stolen petrol.<sup>11</sup> In another case provided by the BRTLTC, a young worker reported feeling powerless to stand up for her legal rights despite being underpaid for years and knowing that her employer was breaking the law:

Fish and chip shops are particularly bad. I [Brett Edgington, Secretary, BRTLTC] have seen a significant number of young workers from the Rubicon Street fish and chip shop. Mainly, they are paid between eight and nine dollars per hour, and mainly they are young people under 19. I spoke to one girl who had been there for several years, who had started on \$8, and because she had been there for a number of years she went to \$9. As far as I know, there is no WorkCover insurance on those young workers. They are sacked on a whim, and the really distressing story the young girl told me was that she knew that what was happening to her was wrong and knew that the payment was wrong. She looked at me and said, 'Look, if I walked out

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9 Fair Work Ombudsman, *National Hospitality Industry Campaign 2012–15*.

10 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 3.

11 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

tomorrow, there are a line of kids at the door who know what is going on, who will take the job'.<sup>12</sup>

6.18 The pressure on young workers is considerable, as it is on workers in regional Australia more widely. This is in no small part due to high unemployment rates in regional centres, with BRTLTC reporting that a significant portion of people have no choice but to work in the black, cash-in-hand economy without access to workplace rights.<sup>13</sup>

6.19 Often there is no way for workers in these situations to prove that they were underpaid or exploited in any way. Paper trails are scarce, and employers ready to deny any involvement with the workers:

It is very difficult to follow-up on this legally because many times, when you find a worker in this situation, the boss will deny they have ever been there. In fact, if Fair Work were to follow up, it appears they never had. There is no paperwork and there is no mention of their name. Some of these businesses hold cash-in-hand books and some of them do not. It is very difficult.<sup>14</sup>

6.20 This lack of wage records presents a particular problem when workers try to put in WorkCover claims. Mr Orry Pilven, a solicitor appearing in a private capacity, explained that he has difficulty working out earnings owed for the purposes of WorkCover in such situations.<sup>15</sup> He added that employers will often exploit young workers' lack of resources and threaten their future employment prospects:

The first question I get is, 'Won't my employer disparage me to others and I'll never work again in Ballarat?' That is the threat that is often made, particularly within an industry: 'Look, we know everyone in town, and you will never work again. I will put a black mark against your name.' The other problem, particularly with young or disadvantaged workers, is that they often do not have the resources to pursue matters. Obviously, well-resourced employers who are represented by their industry groups know this, and they use this to their advantage—and often there is no office.<sup>16</sup>

6.21 This threat of unemployment is present for workers across sectors and regions:

I imagine you would have a lot of people that are fearful of raising underpayment issues with their employer, especially if they really need a job, and especially if they have seen their employer sack their previous

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12 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

13 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

14 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

15 Mr Orry Pilven, *Proof Committee Hansard*, 14 March 2017, p. 7.

16 Mr Orry Pilven, *Proof Committee Hansard*, 14 March 2017, p. 7.

colleagues when such issues are raised. People have mortgages, they have families, they have bills to pay, and depending where you are at, and what area you are in, it is pretty hard to get a job. Hearing from our members from here all the way up the west Wimmera and all the way down to Warrnambool, it is really hard to get a job.<sup>17</sup>

6.22 Furthermore, some employers are suspected of being repeat offenders, engaging in deliberate underpayment in a 'systemic, highly organised and externally advised process.' Despite complaints being raised repeatedly, Mr Brett Edgington, the Secretary of the BRTLC claims that the FWO continues to assume that underpayments are made in error, and not deliberately.<sup>18</sup>

6.23 BRTLC cites examples of cash in hand payments at several Ballarat-based businesses:

The Bryant Family Trust at Gill's Boatshed collects their till takings every night and saves them up until Thursday. On Thursday, the money goes into little envelopes, normally of \$10 or \$15 cash in hand, and the employees then come and pick them up. I can only assume that the till takings are then fabricated and the PAYG statements that go off to the ATO are also incorrect. There is a cash-in-hand book that meticulously records the cash in hand of that business, so it is not an oversight. This is a systematic, deliberate act to underpay the workforce both at Gill's Boatshed and at the Golf House restaurant.<sup>19</sup>

6.24 Mr Edgington recounted the experience of a young worker who came through the Young Workers Legal Centre. The case spent many months in mediation through the Fair Work system. During this process the employer made an offer to the young worker which was considerably below the \$26 000 she was allegedly owed in unpaid wages, made on the proviso that the worker would sign a confidentiality agreement preventing her from discussing the case in future. This, BRTLC alleged, was not an isolated case.<sup>20</sup>

6.25 The committee also discussed the issue with business groups. Representatives of Commerce Ballarat, for example, suggested that the high reported rates of non-

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17 Mr Kamal Bekhazi, Research and Project Officer, Health Workers Union, *Proof Committee Hansard*, 14 March 2017, p. 36.

18 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

19 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 7.

20 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 7. It should be noted that the committee offered all employers who were the subject of adverse comment an opportunity to respond to any allegations made during the course of this inquiry.

compliance might be due to a lack of understanding of the law or confusion around appropriate rates of pay.<sup>21</sup>

### **Underpayment of temporary migrant workers**

6.26 The committee tabled a comprehensive report on the plight of temporary work visa holders in the previous Parliament, in March 2016: *A national disgrace: the exploitation of temporary work visa holders*.<sup>22</sup> This committee refers readers to that detailed report and the conclusions and recommendations therein.

6.27 In the context of this inquiry, the committee received evidence suggesting that migrant workers are being targeted specifically because they are vulnerable and unlikely to report exploitative practices. In the health sector, the committee heard, the practice affects Australian workers as well. The Australian Nursing Federation reports that Australia's assisted visa program, which exists to help fill temporary skills shortages which cannot be met by employing or training Australian workers, is being misused:

The health industry provides a good example where nurses are employed on assisted visas whilst Australian nursing students who have recently graduated are unable to find employment in a health service in Victoria. Unfortunately, many of the people who are employed on assisted visas do not fully understand their rights in relation to receiving the same wages and entitlements of Australians employed in the same job, or are unable to raise their concerns due to their vulnerabilities.<sup>23</sup>

6.28 Not only are these workers often unfamiliar with their rights and entitlements, but the employers who hire them, and particularly those in the private sector, appear to exhibit limited understanding of their obligations:

In the private sector it is much more difficult for us to gain a full understanding of exactly how those people are treated. But we have examples, again, where there are people coming here on visas that do not necessarily understand their entitlements either. For example, some of those visas allow for people to get assistance to go home every 12 months and that type of thing. When I have raised those sorts of things with employers, they have no knowledge or understanding of that, and neither have the people themselves.<sup>24</sup>

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21 See discussion with Commerce Ballarat, *Proof Committee Hansard*, 14 March 2017, pp. 45–49.

22 *A national disgrace: the exploitation of temporary work visa holders*, Senate Education and Employment References Committee, available at: [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/Completed\\_inquiries/2013-16](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Completed_inquiries/2013-16) (accessed 25 July 2017).

23 Mr Allan Townsend, Industrial Relations Organiser, Australian Nursing and Midwifery Federation, *Proof Committee Hansard*, 14 March 2017, p. 4.

24 Mr Allan Townsend, Industrial Relations Organiser, Australian Nursing and Midwifery Federation, *Proof Committee Hansard*, 14 March 2017, p. 5.

6.29 In other sectors the exploitation and abuse of workers on temporary visas appears to be so widespread it is becoming the norm.

6.30 The Salvation Army states that employers seeking fruit pickers, for example, target migrant workers for exploitation because these workers are usually very hesitant to pursue their legal entitlements or go to the authorities, due in large part to their reliance on the employer for work. The Salvation Army agrees that it can be difficult to prove intent on employers' part in such cases; however, the evidence is considerable and the examples numerous.<sup>25</sup>

6.31 The Australian Council of Trade Unions (ACTU) reports that the Working Holiday Maker visa has become synonymous with unscrupulous labour hire companies, exploitation and abuse. The ACTU cites evidence, released in 2016, which highlights working holiday-makers' experience in Australia:

- 28 per cent did not receive payment for work undertaken
- 35 per cent stated they were paid less than the minimum wage
- 14 per cent revealed they had to pay in advance to get regional work
- 66 per cent felt employers take advantage of people on Working Holiday Visas by underpaying them.<sup>26</sup>

6.32 Working holiday-makers today comprise around 10.8 per cent of the total Australian labour force aged 15–24, and the program has clearly become 'a fertile ground for unscrupulous labour hire companies that abuse their workers'.<sup>27</sup>

6.33 Mr Giri Sivaraman, Principal at Maurice Blackburn Lawyers, related the experience of one working holiday-maker:

My client is a man named Youngpil Ko. He is about 24 years old, he is Korean, and he was a working holiday-maker. He was living on the Gold Coast and saw a job on a Korean website called SunBrisbane. It did not say much other than the job was for unloading and packing warehouse containers. There was a phone number on the site. He called it. He spoke to a man named Jimmy. Jimmy told Youngpil that he had to get an ABN to do the job, as it was an ABN job. There were flat rates for all of the work, a bit over \$20 an hour. Jimmy told Youngpil that he had to live in specific accommodation with up to eight other people, that he had to take the transport that they would give him to the warehouse where the work was done, that the costs of the accommodation and the transport would be deducted from any pay that he would otherwise receive, and that he had no choice about that at all.

He was picked up at either 4 am or 6 am and taken to the warehouse. The warehouse was a very large warehouse of a multinational company. He received no training. He never met Jimmy. He got onto the site and met

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25 Salvation Army, *Submission 178*, p. 8.

26 Australian Council of Trade Unions, *Submission 182*, p. 22.

27 Australian Council of Trade Unions, *Submission 182*, p. 22.

another fellow named Andy, and was told: 'This is what you have to do. Start working.' So he would work every day, sometimes up until two, three o'clock in the afternoon, six days a week, up to 11 hours a day, without any training, supposedly getting a flat rate. He did not even know what an ABN was. He asked Andy, 'What's an ABN?' Andy said, 'Don't worry about that; I'll take care of it.' He did not get a contract. He did not know what kind of working relationship he had. He did not get pay slips and had no idea that he was caught up in a labyrinth of subcontracting arrangements. After about three weeks of doing the work, he questioned Andy, because he had not been paid fully for the first two weeks and had not been paid at all for the third week, and Andy said; 'Just keep working, we'll sort it out. Don't worry about it.' He did another two weeks of work, he did not get paid anything and so he eventually quit, because he simply was not getting paid at all.

When he was on the site, he was told to wear a vest that said Vixen Workforce, so he put that on. After he stopped, he initially contacted Vixen; they did not respond. He tried to call Andy and Jimmy; they refused to return his calls and did not respond. He noticed on his bank statement that he had received a payment from a company called Call Now Services. He tried to contact them; they refused to respond, and he could not find out what their true corporate status was. The actual warehouse operator knew nothing about him and was unwilling or unable at that stage to assist him. He contacted the Fair Work Ombudsman, and they said to him, 'You need to make a claim against Vixen to the Queensland Civil and Administrative Tribunal.' He tried to do that. Bear in mind, he is trying to do all of this where English is not his first language, where he has no understanding of the laws under which he is operating or the people he is dealing with. He tried to make the claim to QCAT against Vixen, and that claim was thrown out by QCAT on the basis that he could not establish an employment relationship with Vixen. He tried follow-up CNS, Call Now Services, with no response. He tried to call Andy and Jimmy, with no response.<sup>28</sup>

6.34 One year on, at the time of the committee's hearing in Brisbane, Mr Youngpil Ko had not seen the money owing to him. Not a large sum of money, his lawyer explained, but enough for someone in this young man's situation to be concerned about. Mr Ko, like all workers, is entitled to be paid for work performed, but his plight is far from unique. Due to shortcomings in federal and state laws, cultural and language barriers and unscrupulous employer practices, Mr Ko and other workers like him experience work in Australia as a form of modern day slavery.<sup>29</sup>

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28 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 1.

29 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 2.



## International students

6.35 International students fare badly too. Research indicates that nearly all international students in Australia are paid less than the minimum award rate, and most are paid below the federally mandated minimum wage.<sup>30</sup>

6.36 In some cases, the committee heard, workers are so poorly paid that they hold down more than one grossly underpaid job in an attempt to make ends meet:

Some of those people had two jobs. Some of them were working 60, 80 or more hours a week. The tragedy of it—and there are many tragedies—was they were being forced to work outside of their visa restrictions—because many of them were students and had visa restrictions—simply to make ends meet because their pay was so low. I had one client who, when you averaged out his pay across the hours he worked, was getting 47c an hour. He had to work a whole day to be able to buy a cup of coffee. You cannot live on those wages so, not surprisingly, they would end up getting a second job. They would then drop out of uni because they had no time to go to classes. There is a really personal aspect to all of this—they would feel like failures. I had clients crying who were so distraught about where they had got to. It was not the Australian dream that they imagined it would be; it was a nightmare.<sup>31</sup>

6.37 Many people who work multiple jobs or long hours are hesitant to approach the FWO, in part if a complaint is litigated and the facts reveal that the student works more than 40 hours per fortnight, the Department of Immigration and Border Protection is informed and the student potentially deported.<sup>32</sup>

6.38 In the rare cases that such workers make a claim, the prolonged recovery of wages process holds little promise for them because their visa restrictions mean they have to leave the country long before the claim can be progressed. As put to the committee, 'they come, they get exploited, chewed up, spat out and then they go'.<sup>33</sup>

6.39 Chronic underreporting of exploitation will continue unless steps are taken to reduce migrant workers' overreliance on their employers and fear of deportation.<sup>34</sup>

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30 Survey by the University of Sydney Business School, available at: [http://sydney.edu.au/business/news/2016/foreign\\_student\\_workers](http://sydney.edu.au/business/news/2016/foreign_student_workers) (accessed 25 July 2017).

31 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 5.

32 Taken to the cleaners: international students underpaid, exploited, available at: [www.abc.net.au/radionational/programs/backgroundbriefing/international-studentsexploited/7472384](http://www.abc.net.au/radionational/programs/backgroundbriefing/international-studentsexploited/7472384) (accessed 26 July 2017).

33 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 5.

34 ACTU, *Submission 182*, p. 22; United Voice, *Submission 203*, p. 36.

*Addressing exploitation of migrant workers*

6.40 Migrant workers' industrial rights are all too often 'subordinated by their immigration status.'<sup>35</sup>

6.41 Temporary visas place disproportionate restrictions on the worker, United Voice submitted, ignoring the power balance between the worker and employer and applying penalties to the worker where conditions are breached, irrespective of the reasons for the breach:

The punitive, rather than protective impetus of visa regulation in regard to workers themselves leads to situations in which exploited workers who have been compelled to breach a condition of their visa can lose the right to remain and work in Australia. A common instance of this is when student visa holders work more than 40 hours per fortnight on the orders of their employer, and are afraid to come forward out of fear that their visa will be terminated. Effectively, temporary migrant workers are punished for the illegal acts of their employers.<sup>36</sup>

6.42 The ACTU cited mounting evidence that some employers go so far as to exert pressure on migrant workers in order to trigger a breach of visa conditions, thus gaining additional leverage over workers.<sup>37</sup> Breaching visa conditions gives the employer leverage by putting the worker in a precarious position:

1. The worker is in fear of approaching authorities for fear of visa cancellation and deportation.
2. The FWA does not apply where a person has breached their visa conditions.

6.43 On the second point, the ACTU adds that the FWA does not apply 'when a person has breached their visa conditions or has performed work in the absence of a visa consistent with any other visa requirements.'<sup>38</sup>

6.44 Given the element of employer coercion, the ACTU concluded, current penalties faced by migrant workers are 'disproportionate and draconian.'<sup>39</sup>

6.45 Exploitation should not, United Voice concluded, result in deportation. The union explained how this could be addressed:

Uphold temporary migrant workers' right to seek justice without fear of deportation by instituting one-way reporting requirements between the Department of Immigration and Border Protection and the Fair Work Ombudsman. A worker on a temporary visa should feel confident that coming forward to report a claim of underpayment or other breach of the

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35 United Voice, *Submission 203*, p. 36.

36 United Voice, *Submission 203*, p. 36.

37 ACTU, *Submission 182*, p. 21.

38 ACTU, *Submission 182*, p. 21.

39 ACTU, *Submission 182*, p. 21.

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Fair Work Act will not result in their having to leave the country or be deported. That workers from overseas are granted the right to remain in the community until civil and/or criminal claims are resolved is especially important when indicators of modern slavery are found.<sup>40</sup>

6.46 Submitters such as United Voice pointed to the critical role unions play in monitoring and enforcing migrant workers' rights:

Unions are embedded in Australian industries, they have a deep understanding of the problems faced by migrant workers, and they are working productively with other stakeholders to ensure that all workers, regardless of their citizenship, are treated lawfully and fairly in our industries.<sup>41</sup>

6.47 The committee notes that the Turnbull Government believes it delivered a key election commitment by establishing its Migrant Workers Taskforce.<sup>42</sup> The Taskforce, however, excludes workers and unions, making it unlikely that meaningful progress will be made while ever affected workers and their representatives are ignored.

### **Committee view**

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

6.49 Furthermore, in the committee's view the FWO's estimates of the levels of non-compliance are likely to be a very conservative reflection of the bigger picture. Given that employers are contacted well in advance of FWO audits, they have every opportunity to examine their practices and make necessary changes before an audit takes place. This being the case, the committee concludes that the actual rate of non-compliance is likely to be even higher.

6.50 Given this evidence, it is the committee's view that a lack of union representation on site, the relative youth of the workforce and a lack of permanent right to reside in Australia are each individual risk factors for workers being in a position of vulnerability and when taken together exponentially add to the likelihood that the worker will be subjected to some form of wage theft or underpayment.

6.51 Underpayment of wages has an associated component of underpayment of superannuation. While the committee did not hear direct evidence on this issue it has

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40 United Voice, *Submission 203*, p. 36.

41 United Voice, *Submission 203*, p. 35.

42 See Senator the Hon Michaelia Cash, *Coalition delivers on election commitment to protect migrant workers*, media release, 4 October 2016, available at: <https://ministers.employment.gov.au/cash/coalition-delivers-election-commitment-protect-migrant-workers> (accessed 25 July 2017).

been widely reported that superannuation underpayments are costing 2.7 million workers an average of \$2025 a year.<sup>43</sup>

6.52 According to a December 2016 Industry Super Australia report those workers in 'less secure' employment were at greater risk of superannuation underpayment than those in secure employment.<sup>44</sup>

6.53 With underpayment of superannuation costing \$5.6 billion in the 2013-14 year alone, the knock-on costs to the Commonwealth in the form of long term increases in aged pension liabilities make this a major Treasury as well as workplace issue.<sup>45</sup>

6.54 The next section looks at the penalties for non-compliance.

### **Penalties for non-compliance**

6.55 There are few tangible disincentives in place for employers considering underpaying their staff. Penalties are low in comparison to the money wrongly retained by underpaying staff, and there appears to be a propensity to attribute underpayment to oversight, rather than deliberate theft.

6.56 The evidence certainly suggests that some employers might be underpaying workers in the knowledge that penalties are small.<sup>46</sup>

### ***Access to the system***

6.57 Employees can contact the FWO if they believe they have been underpaid. The FWO helped resolve a relatively low 29 000 workplace relations matters in 2016, with most resolved through early intervention. It is axiomatic that FWO is quite selective in deciding which cases to pursue to litigation. FWO says that:

We use a range of methods to resolve these matters. In many cases we assist the parties to understand their rights and obligations and encourage them to resolve the matter with our support and advice. We often find this to be the quickest and most effective way to resolve many matters, particularly where the parties are still in an employment relationship. That is why most of the disputes that come to us are resolved through early intervention strategies or alternative dispute resolution methods such as mediation. Last year, three-quarters of all the matters that we dealt with were settled using these sorts of techniques, without the need for a formal investigation or the use of our formal enforcement powers. If matters are

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43 See [www.smh.com.au/business/workplace-relations/about-28m-australians-get-underpaid-56b-worth-of-superannuation-inquiry-told-20170322-gv3mxm.html](http://www.smh.com.au/business/workplace-relations/about-28m-australians-get-underpaid-56b-worth-of-superannuation-inquiry-told-20170322-gv3mxm.html) (accessed 6 September 2017).

44 See [www.industrysuperaustralia.com/assets/Reports/Final-Unpaid-Super-January-2017.pdf](http://www.industrysuperaustralia.com/assets/Reports/Final-Unpaid-Super-January-2017.pdf) , p.6, (accessed 6 September 2017).

45 See [www.theguardian.com/australia-news/2017/apr/12/one-third-of-australians-are-being-underpaid-superannuation](http://www.theguardian.com/australia-news/2017/apr/12/one-third-of-australians-are-being-underpaid-superannuation) (accessed 6 September 2017).

46 Mr Glen Ludbrook, Principal Solicitor, Central Highlands Community Legal Centre, *Proof Committee Hansard*, 14 March 2017, p. 51.

dealt with in this way, they take, on average, less than one month to resolve.<sup>47</sup>

6.58 Matters which require an investigation take an average of 131 days to resolve. Where a matter goes to court, resolution can take years.<sup>48</sup>

6.59 Recouping unpaid wages through the courts is a lengthy and potentially expensive (fees ranging from \$215 up to \$2570 upfront with a daily hearing cost of \$1020)<sup>49</sup> and intimidating process many employees are unlikely to pursue.

6.60 To enforce payment the matter must be taken to either:

- the small claims tribunal, if owed under \$20 000; or
- the Federal Circuit Court, if owed more than \$20 000.<sup>50</sup>

6.61 The process is costly for the FWO, forcing FWO to prioritise vulnerable workers, and it is also costly for unions. The Health Services Union, for example, reported spending in the vicinity of \$100 000 to pursue around half of that amount in unpaid wages for one particular health worker.<sup>51</sup>

6.62 For businesses, however, the cost of enforcement may provide an incentive to take the risk of underpaying staff, relying on the unlikelihood of employees pursuing unpaid wages through the system.<sup>52</sup>

### **Committee view**

6.63 As mentioned above underpayment of wages has an associated component of underpayment of superannuation. The committee believes that it would be more efficient and effective if the recovery processes for underpaid wages and underpaid superannuation were simplified and combined and made directly available to workers and their unions rather than separated between workers/unions/FWO and the ATO.

6.64 Evidence presented to the committee suggests that employers who deliberately underpay workers do so in part because of a crude risk assessment: Because unions have reduced power to inspect wages records, the union and the FWO is unlikely to deploy its limited resources to undertake a prosecution where penalties

47 Ms Natalie James, Fair Work Ombudsman, Fair Work Ombudsman, *Proof Committee Hansard*, 9 June 2017, p. 20.

48 Ms Natalie James, Fair Work Ombudsman, Fair Work Ombudsman, *Proof Committee Hansard*, 9 June 2017, p. 25.

49 <http://www.federalcircuitcourt.gov.au/> , <http://www.federalcourt.gov.au> (accessed 6 September 2017).

50 Mr David Eden, Assistant Secretary, Health Workers Union, *Proof Committee Hansard*, 14 March 2017, p. 34.

51 Mr David Eden, Assistant Secretary, Health Workers Union, *Proof Committee Hansard*, 14 March 2017, pp. 35–36.

52 Mr David Eden, Assistant Secretary, Health Workers Union, *Proof Committee Hansard*, 14 March 2017, p. 36.

might be imposed and the ATO is unlikely to discover underpaid superannuation contributions then the most likely consequence for being found out is that they have to repay the wages—it follows that the potential rewards are significant and the risk is low.

6.65 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'.

6.66 Although there may well be employers who do not take the time to acquaint themselves with the relevant awards, ignorance of the law should not be an acceptable defence. Put simply, if you want people to work for you, you have a legal and ethical responsibility to work out what they should be paid, and then pay them correctly.

6.67 The committee concludes that many employers will only begin to take their obligations towards employees seriously when the financial incentive to underpay workers is removed. The committee is therefore strongly of the view that penalties should be increased so that the consequences of underpayment are serious enough for most employers to decide against taking the risk, and makes a number of recommendations to that end.

6.68 The committee also believes that the incidence of deliberate underpayment revealed by this and earlier inquiries, along with numerous media investigations, does not align with community expectations of our system's capacity to protect vulnerable workers. In the committee's view it is in the public interest to bring underpayment out of the shadows. To this end, the committee supports the introduction of penalty notices for businesses found to be underpaying workers, allowing customers to decide whether they wish to patronise these establishments.

6.69 Furthermore, there is a need for increased monitoring and random checks to ensure compliance. The FWO has neither the resources nor the interest in regular engagement with these workplaces specifically on behalf of the workers. The fact is that unions perform a public good in undertaking regular wage and superannuation compliance checks.

## **Recommendation 8**

**6.70 The committee recommends that the *Fair Work Act* be amended to allow unions greater access to workplaces and workers in order to address the need for increased monitoring and random checks to ensure compliance.**

## **Recommendation 9**

**6.71 The committee recommends that the penalties for wage and superannuation theft be substantially increased in order to provide a more**

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effective deterrence. A combination of more likely discovery and higher penalties for offending companies would be beneficial to the community as it would create a level playing field and remove the current competitive disadvantage that complying employers suffer in industries where wage theft is widespread.

#### **Recommendation 10**

6.72 The committee recommends that the *Fair Work Act* be amended to provide a reverse onus of proof so that, where employers are alleged to have underpaid staff, the employer is required to disprove the allegation.

#### **Recommendation 11**

6.73 The committee recommends that employers' obligations regarding record-keeping be reviewed.

#### **Recommendation 12**

6.74 The committee recommends that the *Fair Work Act* be amended to require employers to provide a written statement to every employee, before any work is performed, setting out the wages and conditions they are being employed under.

#### **Recommendation 13**

6.75 The committee recommends that the *Fair Work Act* be amended to empower the Fair Work Ombudsman to display infringement notices on the premises of businesses found to be underpaying staff, and that display of such notices be mandatory where an employer has twice been found to be in breach of relevant laws.

#### **Recommendation 14**

6.76 The committee recommends that the government introduce a program in Australian secondary schools educating young people on their workplace rights and responsibilities.

#### **Recommendation 15**

6.77 The committee recommends that the government work with unions, migrant and community organisations, employer groups and employers to address growing exploitation of migrant workers in Australia.

#### **Recommendation 16**

6.78 The committee recommends that freedom of association provisions within the *Fair Work Act* be strengthened to recognise the role of unions in providing protection and advice to workers and ensure that all workers are informed of their industrial rights on commencement of their employment.

#### **Recommendation 17**

6.79 The committee recommends that the *Fair Work Act* and *Migration Act* be amended to:

- **state that a visa breach does not necessarily void a contract of employment;**
- **provide that the protections of the *Fair Work Act* can be enforced even when a person has breached their visa conditions or has performed work in the absence of a visa consistent with any other visa requirements.**

#### **Recommendation 18**

**6.80 The committee recommends that there be an onus of proof placed on employers that they have genuinely tested the domestic labour market for available workers before being able to engage temporary visa workers.**

#### **Recommendation 19**

**6.81 The committee recommends that employers pay a training levy for any and all temporary visa workers that are engaged. The proceeds from the training levy should be directly invested to close the skills gaps identified in the domestic labour market.**