

# Unlawful underpayment of employees' remuneration (Wage Theft)

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*Submission to the  
Senate Economics References Committee*

March 2020

***“I am a single mother, and my wages were stolen from me by my employer for almost 3 years. I received less than 50% of the wages I was entitled to, and the taxpayer filled that gap, as I was living in poverty.***

***I received a health care card, and other tax and assistance from Centrelink, in the form of a higher childcare subsidy, and family tax benefit, to fill the wage gap created by my employer, who had record profits.***

***Luckily for me, (and the Australian taxpayers who unwittingly funded the shortfall in my wages), my union came to my rescue, and I received a back payment of all the wages I was owed, but not before my child and I endured years of financial hardship, where I could not pay for excursions, shoes and other essentials.***

***I have a postgraduate degree, and 20 years of experience, and this exploitation brought me to the lowest point of my life.***

***I cannot get my son’s childhood back, but I can fight for other workers who have been exploited and stolen from by their employers.”***

**NTEU member employed in private higher education**

## EXECUTIVE SUMMARY

1. Employees in tertiary education are subject to large scale wage theft, at both private 'for-profit' providers and at public institutions such as universities.
2. NTEU has recently recovered significant back-pay for members, including over \$2,000,000 from one employer.
3. International student exploitation is widespread and of great concern to NTEU members.
4. The high rates of casualisation in tertiary education drive wage theft. Casually employed workers in this sector are more vulnerable to wage theft than those who have secure employment. Recent data reveals that at some Victorian universities over 70% of employees are insecurely employed.
5. In the higher education sector one initiative that would allow both the assessment of risk to quality and the risk of wage theft would be to require universities to report accurate levels of casual employment, especially in key functions such as teaching and research.
6. The two most significant impediments to uncovering and remedying wage theft in higher education are the failure of the adverse action provisions to protect workers who pursue wage justice, and restrictions on the ability of unions to inspect time and wages records.
7. The Federal Government must have a responsibility to ensure that employers which it funds (both public and private providers) pay their employees at the rates prescribed in industrial instruments.
8. NTEU supports the recommendations made in the ACTU submission, particularly those to
  - make right of entry less restrictive;
  - improve trade union rights of entry (especially the capacity to inspect all records);
  - ensure employers have the burden of disproving allegations where they fail to provide records;
  - review the taxation treatment of re-paid wages;
  - increase penalties for wage theft; and
  - give unions greater powers to inspect superannuation records.
9. The NTEU also proposes the additional Recommendations specific to tertiary education:
  - Require all higher education providers who receive funding from the Federal Government (including FEE-HELP income) to demonstrate historical and ongoing compliance with core labour standards including rates of pay.
  - Require universities to report accurate figures for insecure (contract and casual) employment including by function and gender such as is currently collected for other staff.

## INTRODUCTION

This submission is made in response to the invitation by the Senate Economics References Committee for submissions on Unlawful Underpayment of Employees' Remuneration.

NTEU welcomes the opportunity to make this submission.

NTEU represents the industrial and professional interests of some 28,000 people working in tertiary education and research, including at universities, in vocational education and training, adult education, at private providers of higher education and at research institutions. NTEU members also have an interest in the welfare of students of tertiary education institutions who undertake paid work.

As a general introductory comment, NTEU notes that the offence of larceny in the State of NSW carries a maximum prison term of up to five years, but the offence of larceny as a servant carries a prison term of up to ten years. Whatever one thinks of that distinction, it indicates that the law considers that the employment relationship involves special obligations.

Yet the conscious and permanent denial of the property of employees – larceny as a master - is considered a relatively minor civil offence.

NTEU strongly believes that this imbalance must be addressed through significant increases in penalties for employers who breach the special trust of the employment relationship.

### Endorsement of ACTU submission

NTEU supports the recommendations made in the submission made by the Australian Council of Trade Unions (ACTU) and believe they are well argued and supported by the evidence in the submission.

As a result, this submission is not comprehensive and will address only terms a, c, f, and g with specific reference to the characteristics of employment in tertiary education .

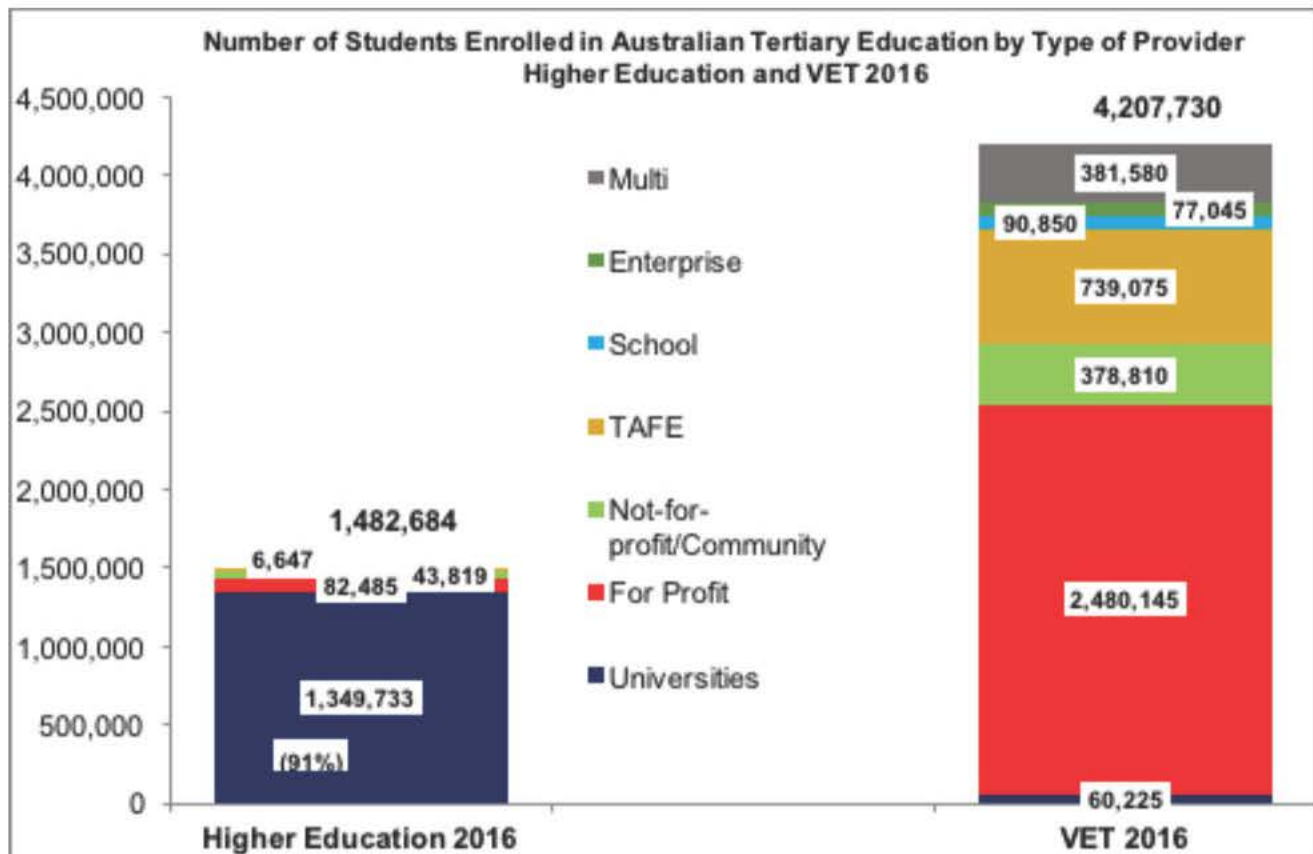
*"I was told by my manager in writing that I should expect to do unpaid work and I should do it for the love of the job."*

**Casual Academic, Health Sciences**

## WAGE THEFT IN TERTIARY EDUCATION

Tertiary Education encompasses both Higher Education and the Vocational Education Training (VET) sectors. While the majority of higher education providers are public universities, the VET sector has a high level of for-profit private providers – and in fact, there are more students enrolled in for-profit VET than universities. The figure below of student enrolments shows the level of diversity in tertiary education.

Figure 1



Despite their public purpose and principally public funding, universities are by no means immune from commercial pressures to pay employees other than in accordance with their entitlements under enterprise agreements. The graphs below show that decades of declining public funding per student in universities (shown in Figure 2) has led to two principle responses; increasing income by boosting student numbers through fee-paying international students (see Figure 3), and decreasing costs by casualising the teaching workforce (see Figure 4). Both of these responses have implications for wage theft.

Figure 2

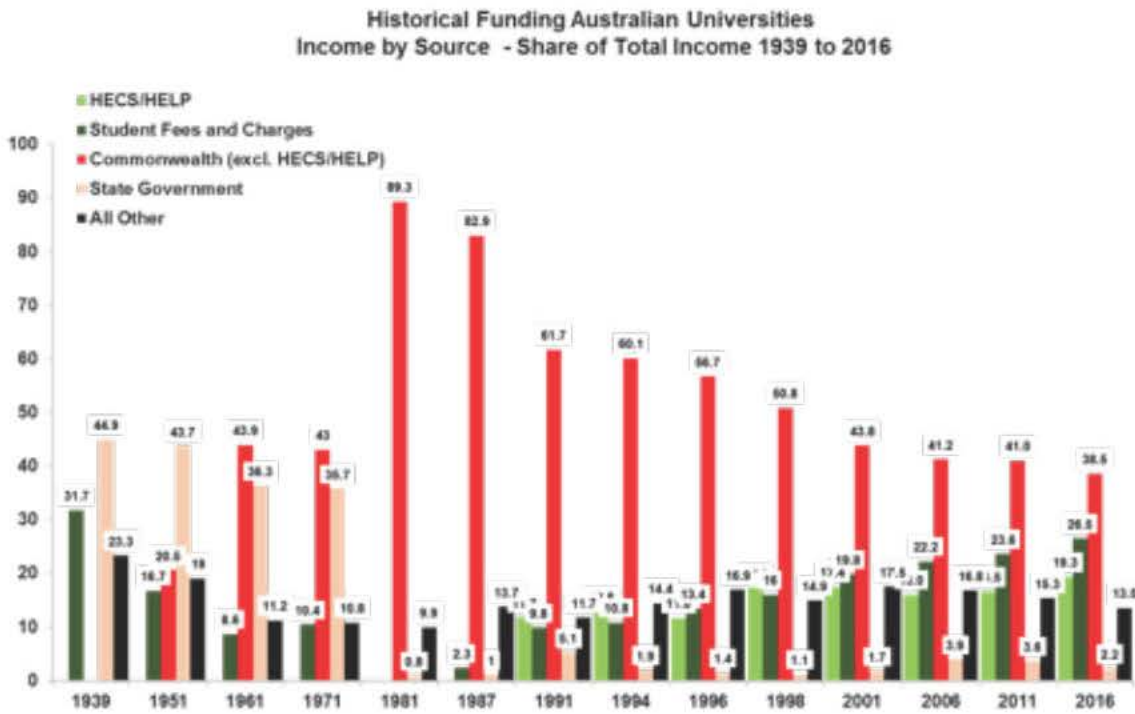


Figure 3

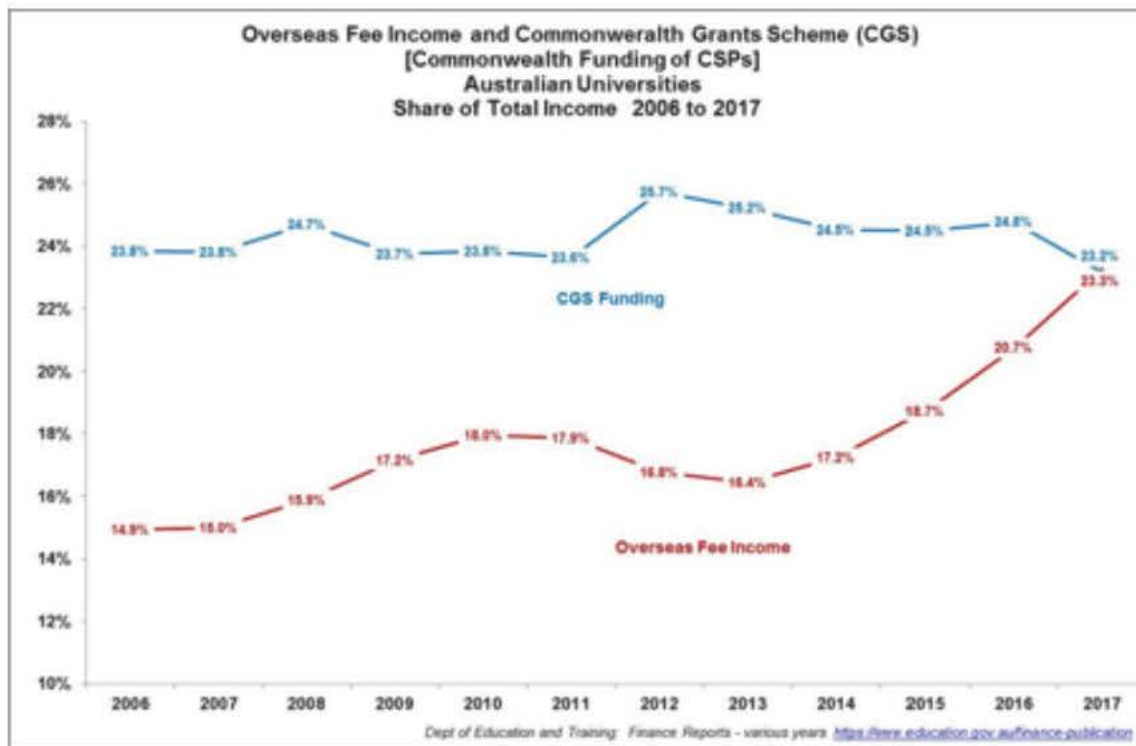
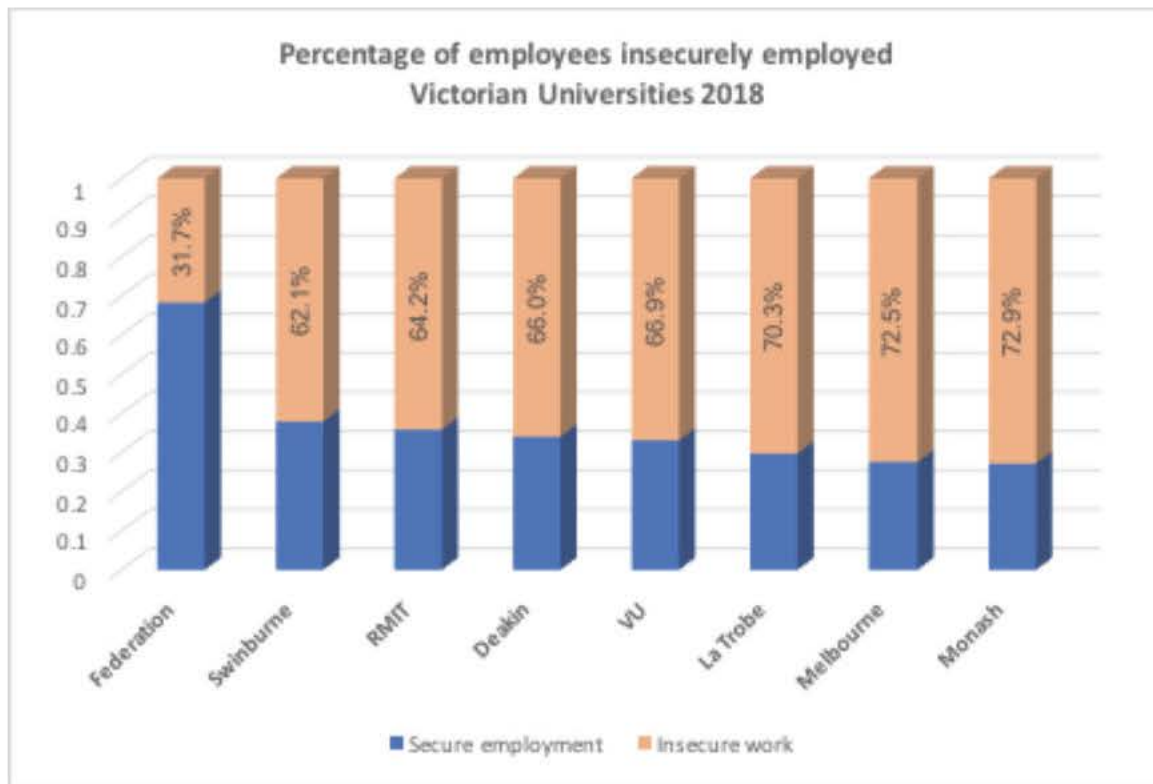


Figure 4 below draws on data from Victorian Universities, as the Victorian Government in 2019 made it a requirement that all universities provide figures for insecurely employed staff as part of their annual reporting obligations. While this is currently the only state to have this requirement, the snapshot of the sector provided through the Victorian figures is telling, and shows that (excluding Federation University), institutions have between 62% - 73% insecure employment.

Figure 4



The experience of the NTEU is that, in the public universities at least, employees in ongoing salaried employment are overwhelmingly paid at the correct salary set out in their enterprise agreements all of which contain detailed salary scales. However, for the reasons described above ongoing employees are outnumbered by casual hourly-paid employees, who are much more vulnerable to wage theft and are often routinely underpaid. The use of contingent labour in this way is now embedded in the business models of Australian universities.

The private for-profit sector of higher education is growing rapidly and in contrast to the public universities, employment is usually not regulated by enterprise agreements negotiated by NTEU. There are around 127 non-university higher education providers NUHEPs registered with TEQSA, some of which are owned by universities. However, most (105) are clearly within the private sector. It is notable that while NUHEP numbers have expanded over the last two decades (in 1999, there were 78 private NUHEPs), some providers have multiple trading names, so there are more than 127 'brands' in the education market. Counterbalancing this is that some separately registered providers

are owned by one entity – for example, Navitas Limited in 2018 owned, or partly owned, 12 NUHEPs. Employees working at (NUHEP) are dependent on the safety-net award conditions, and there is a particularly high level of casualisation in this sector of higher education. Indeed, the Tertiary Education Quality and Standards Agency (TEQSA) 2018 Statistics report notes that in higher education, for profit NUHEPs had almost double the number of Full time Equivalent (FTE) casual staff than universities (44% compared to 23%)<sup>1</sup>.

This high level of precarious employment underscores the experience of the NTEU in dealing with numerous wage theft claims, and has led the Union to conclude that there is widespread wage theft, such to the effect that it may be characterised as a business model. In addition, it is apparent that some employers in this sector use sham contracting as a key part of their business model to suppress wage costs and to drive up profits.

NTEU believes that all employers are under an obligation to be capable of paying their employees correctly before entering into an employment relationship and that wilful blindness is not an accident or mistake. The employers we are working with in the tertiary education sector are sophisticated and intellectually resourced employers for whom there can be no excuse for failing to pay their employees correctly.

### **Wage Theft by private providers**

The latest government data indicates that there are 120,000 students enrolled in under-graduate degree programs within the NUHEP sector, a 34% increase over 5 years. The policy settings are such that there is likely to be further expansion in this area.

The vast majority of employees in the NUHEP sector are employed on a casual basis and are not covered by enterprise agreements, in part due to historical factors and also because of the fragmented nature of the workforce. As a result, they are dependent on the underlying award which is less comprehensive but nevertheless sets out salary scales and defines the work involved and minimum hours for some activities.

The NUHEPs have worked very hard to ensure low union density, and it is probable that for every case of large-scale wage theft which is uncovered, there are many other employers which act with impunity.

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<sup>1</sup>Tertiary Education Quality and Standards Agency Statistics report on TEQSA registered higher education providers, 2018. ( see Table 19 Academic staff (FTE) by work contract, 2013 – 2016) <https://www.teqsa.gov.au/sites/default/files/statistics-report-2018-web.pdf?v=1534729727>



Moreover, the scale and systematic character of underpayments uncovered at individual for-profit employers suggests that underpayment is not an occasional oversight, but rather a key part of their business model that drives profits. There are three principal modes of wage theft operating in this sector:

1. underpayment of the required rate of pay (including under-classification of work)
2. excessive unpaid hours
3. sham-contracting

NTEU has uncovered examples of all three.

1. *Underpayment of prescribed rates*

At the Australian Institute of Technology (AIT) casual lecturing staff were being paid less than 50% of the award rate for a lecture. Intervention by the Union resulted in the employees receiving in the order of \$2,000,000 in back pay. The 6 years statute of limitations prevented this figure being higher.

This is a classic example of clear and obvious underpayment of the required rate of pay.

At the same employer, permanent employees were under-classified and paid at a rate lower than the award rate for the type of work that they were performing. This has recently resulted in a back-payment of \$200,000 to nine employees. NTEU believes that this may be a common mechanism for wage theft.

2. *Excessive unpaid hours*

Many of the same permanent employees have been required to undertake excessive face-to-face teaching work for which the award specifies a minimum number of hours. This additional work could involve up to 22 additional hours above a standard 38 hour week. There are no overtime penalty provisions for these employees and the employer is currently refusing to back pay single time for this additional work. NTEU is negotiating with the employer to rectify this situation.

3. *Sham contracting*

A number of employers in this sector are engaging in sham contracting which can be a vehicle for wage theft. In all cases the payment for the services rendered by the supposed 'contractor'; is less than they would be paid as an employee under the award and they are also denied paid leave (sick, annual etc) and superannuation. NTEU asserts this is sham contracting because the indicia point to them being employees. The first of these matters will likely be before the courts soon.

## Wage theft by public providers

In the university sector, casual employment is almost an essential pre-condition for wage theft. As described above the academic workforce in Australia's universities is being systematically casualised. There are no reliable national figures for the level of precarity of employment in universities in terms of actual numbers, but the NTEU's own detailed analysis of university staffing (see NTEU Flood of Insecure Employment) shows that:

- in 2018, less than half of university full-time equivalent (FTE) jobs are secure and ongoing
- more than half of all teaching at our universities is delivered by casual staff;
- eight of ten teaching-only academic FTE are casual positions;
- eight of ten research-only academic FTE are on limited term contracts;

A snapshot of the actual headcount of casual and contract staff numbers in higher education can be seen in the NTEU's analysis of Workplace Gender Equality Agency (WGEA) data, which found that only just over one in three (35.6 %) people employed at universities enjoy secure ongoing work. This is further supported in the reporting of the staffing figures required by the Victorian Government from that state's universities (see Figure 4 above).

This level of casualisation is not only a serious risk to the quality standards of Australian universities, it significantly undermines the capacity of the sector to engage in the sort of workforce planning that such a vital component of the economy requires. The university sector now contains an army of casually employed academics who are vulnerable to being, and are, routinely exploited and underpaid.

The principal modes of wage theft for casual academics in public universities are:

1. Failure to pay for work required (including paying for less hours than the task takes)
2. Unilateral classification of work to lower pay rates

Teaching in universities is complex and requires a deep level of understanding of the material. The teaching tasks can basically be broken down into 4 components; preparation, delivery, student consultation, and assessment marking.

Casual university workers are routinely employed and paid for less hours than is necessary to undertake the elements required to teach a subject, and are frequently required to attend at work for specific activities (e.g. lecture attendance or meetings necessary in order to teach the unit) without being paid. It is important to note that not only does this practice rob the employees of legitimate wages, but the time involved also prevents them from pursuing additional employment to supplement their income.

An explanation of the level of this underpayment for one long term casual worker at the University of Melbourne is provided in Attachment 1.

In recent months, NTEU has uncovered instances of large-scale underpayments in public universities.

### **University of Western Australia**

At the University of Western Australia, 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 rate-of-pay between one-half and two-thirds lower than that applicable at the proper rate of pay.

This case demonstrates the difficulty for Unions in investigating potential wage theft and in enforcing the terms of industrial instruments under current right of entry provisions. The employer agreed with the Union that it should undertake an audit of these practices. However, having agreed on that course of action, it has had the “audit” conducted by the law firm Clayton Utz, and is now asserting legal professional privilege over its contents. The full extent of the underpayments is not yet known, as the Union is still pursuing the matter, but it does seem that the practice has been widespread if not systematic, involving many employees and many thousands of dollars in underpayment.

This case study indicates at least prima facie that the employer is more interested in concealing than remedying the problem. It also tends to support a conclusion that underpayment is deliberate and considered (to save money) rather than an oversight or error.

*“During the semester I ended up so busy that I ate meals in my car while driving to and from work. I love what I do, and I love the people I work with but I am having to face the reality that I cannot keep working in the Higher Education sector and survive financially.”*

**Casual Academic, STEM**

## University of Melbourne

In recent months union casual academic activists at the University of Melbourne, supported by the NTEU, have uncovered two significant areas of underpayments in breach of the relevant enterprise agreement.

The first major area of concern is the redesignation of tutorials as “practice class” – a similar practice to that described above as happening at the University of Western Australia. An email from 2008 acknowledged that this change in payment did not reflect any change in the work performed, merely a cut in pay. The Union’s initial estimate of the underpayments suggests an amount in the order of \$550,000.

The second issue, which is widespread in the university sector, is the use of “piece rates” to pay for marking – such as of examinations, essays and other written work. The relevant enterprise agreements nearly all prescribe that employees are to be paid for this marking on a time-taken basis. 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.

The 2019 NTEU State of the Uni Survey is a large survey of university staff. Of the 2,392 “casual” academics who responded to the survey, 64% of casual academics are paid according to a formula which underestimates the time taken to perform the work.

If this is anything like an accurate reflection of existing practices, unlawful underpayments across the sector will have amounted to many tens of millions of dollars over recent years.

At the University of Melbourne, the management and the NTEU have entered into a so far co-operative process to attempt to acknowledge and identify this problem and provide appropriate redress, in relation to both of the issues identified above.

*“We are allocated 22.5 minutes to mark a 1500 word assignment. 22.5 minutes is entirely unrealistic: I have spent up to 15 hours of unpaid time per subject to complete marking.”*

**Casual Academic, Regional Victorian University**

## Macquarie University

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.

## The impact of wage theft on international students

NTEU also has an interest in preventing the exploitation of international students through wage theft. Over recent years there have been many publicised examples across a number of industries including retail, hospitality and gig work demonstrating that international students are frequently subject to wage theft.

While there has been efforts made (through both Government campaigns and the Fair Work Ombudsman) to "...keep international students well informed of their work rights under Australian law", the reality is that other factors, including work insecurity, financial pressures and the need to keep the employer happy, are leading to the exploitation of international student workers. It is common practice for exploitative employers to also require the international student to work more hours than permitted under their visa conditions (of 40 hours per fortnight during periods of study) and then threaten to report the student worker for violating their visa conditions if they do not continue to work in the exploitative conditions required by the employers.

The pressure to work is further exacerbated by a lack of opportunity for meaningful work. Anecdotal evidence from international students reported to the NTEU and other organisations indicates that many post study visa holders are finding it difficult to compete with domestic graduates, and that employers in many professional areas are reluctant to take on an international graduate. As such, these graduates are ending up in (or continuing to work in) areas outside their fields of expertise, and many are working in low wage/underpaid jobs.

International and domestic students are also exploited in multiple industries through the use of unpaid internships where they are often used as a substitute for paid labour to undertake productive work.

The Union's evidence on the exploitation of international student workers is supported by research into international student employment more broadly. *The report Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* found that wage theft and other forms of exploitation is rife for temporary working migrants in Australia<sup>2</sup>.

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<sup>2</sup> Berg, L. and Farbenblum, B., *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* November 2017, Migrant Worker Justice Initiative <http://apo.org.au/system/files/120406/apo-nid120406-483146.pdf>

Drawing from 4,322 students, backpackers and other temporary migrants, the survey addressed the characteristics of temporary migrants' lowest paid job, rates and method of pay, working conditions, how they found low paid work, their knowledge of Australian minimum wages and perceptions of their labour market. Most participants (55%) were international students, with three quarters (77%) enrolled at a university and 23% were studying at vocational and English-language colleges.

Key outcomes of the survey included the finding that while 43% of international student workers earned \$15 per hour or less, almost a quarter (25%) earned \$12 per hour or less in their lowest paid job. In addition, the research found that students who worked more than 20 hours per week (potentially breaching their visa conditions) earned substantially lower wages than other students. Two thirds (64%) of international students reported that they worked between 9 and 20 hours each week, and a further 13% worked 21 hours or more.

The report found that while underpayment was widespread across numerous industries it was especially prevalent in food services, which has a high density of international student workers. Two in five survey participants (38%) had their lowest paid job in cafes, restaurants and takeaway shops. Furthermore, the study found that it was common for employers to pay temporary migrant workers (including international students) in cash and to not provide pay slips, with 44% of survey participants reporting that they were paid in cash, and 50% reported that they never, or rarely, received pay slips. Not surprisingly, the 'cash in hand' payment practice rose to almost three quarters of those paid \$12 per hour or less (70% paid in cash and 74% rarely or never received pay slips). The worst industry for the practice was in food services where two in three (65%) waiters, kitchen-hands and food servers were paid in cash and with no documentation of wages.

The survey found that, contrary to popular assumptions, underpaid international students knew they were receiving less than the Australian minimum wage. Among those earning \$15 per hour or less:

- 73% knew that the minimum wage was higher than what they were earning;
- 86% of students at vocational and English-language colleges knew the minimum wage was higher than what they were earning, a higher proportion than among students at universities (69%);
- underpaid survey participants believed underpayment is endemic among people on their visa.
- 86% of students at vocational and English-language colleges knew the minimum wage was higher than what they were earning, a higher proportion than among students at universities (69%);
- underpaid survey participants believed underpayment is endemic among people on their visa. At least 86% of temporary migrants who earned \$15 per hour or less believed that many, most, or all other people on their visa are paid less than the basic national minimum wage.

Finally, the survey reported that International students, backpackers and other temporary migrants also experienced other indicators of exploitation and criminal forced labour:

- 91 participants had their passport confiscated by their employer (3%) and 77 by their accommodation provider (2%). Most were in food services (28%) or horticulture (18%);
- 173 participants (5%) paid an upfront 'deposit' for a job in Australia;
- 112 participants (4%) indicated that their employer required them to pay money back in cash after receiving their wages.

The findings of the National Temporary Migrant Work Survey were also supported by a survey of international students conducted by the Council of International Students Australia (CISA) in 2018. The survey was presented at the CISA National Conference (2018) and noted that:

- the majority of students surveyed reported exploitation, with around 70% reporting wage theft and approximately 15% claiming 'ill treatment';
- the majority of students, when asked why they were working even though they were aware of being exploited, said they were in need of money, and/or could not find other job opportunities.

When asked in the survey why international students might be susceptible to exploitation in the workplace, respondents cited:

- lack of support from the education provider;
- the need for money;
- perceived compliance of international students, particularly in cultures where respect for authority is ingrained;
- social cohesion, which sees new students integrated into their communities but also potentially exploited by employers from those communities.

Respondents to the CISA survey who reported exploitation were also asked if they contacted any authority regarding their treatment (eg Fairwork Ombudsman or a union) but only a small number stated that they had. This supports the low reporting rates cited by authorities, in comparison to the overall numbers of vulnerable international student workers .

In September 2017, the Fair Work Ombudsman, Natalie James, called for international students to seek help when dealing with workplace exploitation, stating that “*The number of international students reporting issues to the Fair Work Ombudsman is disproportionately low compared to other categories of visa holders, despite the fact that international students represent a significant proportion of overseas visitors with work rights.*”<sup>3</sup> The Fair Work Ombudsman further noted that the cases reported were often serious and highly exploitative, and that a large percentage of the cases litigated by the Ombudsman’s office involved one, or more, international students<sup>4</sup>.

The vulnerability of international student workers appears to be seen as a workforce advantage by government. In 2015, the Federal Government’s discussion paper “Draft National Strategy for International Education”<sup>5</sup> openly canvasses the idea that international students may be willing to work in areas or in jobs that are “not necessarily in demand from domestic students” and that institutions are well positioned to provide “local work experience opportunities” for international students.

There seems to be little concern, if any, as to whether Government policy initiatives such as the Post study visa stream<sup>6</sup> are being abused by employers, with no interest in investigation or review of these policies by the Government Departments who are tasked with carrying out the policy agenda<sup>7</sup>. Indeed, it appears that the onus is clearly upon the international student (and graduate) workers to be their own advocates in the workplace – despite their lack of power. It is no wonder then that international student workers are one of the most vulnerable, and exploited, groups of workers in the Australian economy.

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<sup>3</sup> New strategy to raise international students’ awareness of workplace rights, 25 September, 2017. Fair Work Ombudsman Office <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/september-2017/20170925-international-students-release>

<sup>4</sup> In the financial year 2016-2017, 49 per cent of litigations the Fair Work Ombudsman filed in court involved a visa holder, and over a third of these involved an international student.

<sup>5</sup> Commonwealth Government, Draft National Strategy for International Education (for consultation) April 2015. Canberra, pg 40.

<sup>6</sup> The Post study work stream is part of the Temporary Graduate Visa (subclass 485) scheme and is an integral part of the international education strategy used by the government and tertiary education sector to attract international students to Australia. The stream allows successful applicants to be granted a visa of two, three or four years duration, depending on the highest educational qualification they have obtained. It is notable in that, once granted, there are no requirements or restrictions on the visa holder – that is, they may work in any industry, in any job, they may leave the country and return, and they are not required to work in order to maintain the visa.

<sup>7</sup> The Department of Home Affairs (formerly Immigration and Border Protection), which assesses and grants the 485 visa, has stated that the visa is not intended to fill skills gaps, but to enable students to have “work experience” in Australia. However, there is no tracking of the visa holders so it is not possible to determine if the visa is fulfilling the intended role of providing practical “work experience”. In addition, the fact that employment under the visa does not have to be in the area of the graduate’s expertise leads to questions as to how this visa is limited to “work experience” only.



## IMPEDIMENTS TO THE DISCOVERY AND REMEDYING OF WAGE THEFT IN TERTIARY EDUCATION

The combination of weak adverse action protections and the removal of the threat of an inspection of time and wages records being undertaken by a union at any time means employers who steal wages have a level of comfort that they will not be detected. In addition, time and wages inspections by unions that are now limited to union members places the member at risk of being victimised by their employers. These are the two most substantial impediments to the discovery and remedying of wage theft in our sector.

### Inadequate protection from adverse action

Vulnerable employees (such as those employed casually and by the semester) are often unwilling to have the NTEU raise the issue of their underpayments by lodging any type of complaint, for fear of losing their employment or not being engaged for further work. The current situation whereby the employer can make an assertion as to the reason for the adverse action and the effective onus of proof is on the employee to prove what was in the mind of the decision maker, now means that the NTEU, in many circumstances, cannot in good conscience advise members in precarious employment to pursue underpayments, given the incapacity of the law to protect them from victimisation. This is compounded by the fact that most of these workers hold casual jobs across multiple employers, and, while it is arguable that the employer subject to a complaint of underpayment could be held to account for subsequently refusing to employ that person, word travels fast and other employers are not prevented from discriminating against those who have sought wage justice at another institution.

*“You can’t speak up about these issues because subject co-ordinators won’t re-hire you next time.”*

**Casual Academic, Victoria**

### Inadequate Right of Entry Laws

The current regime of right-of-entry laws prevents the NTEU from uncovering much of the unlawful behaviour involved in the sector.

The current laws might as well have been designed with the intention of ensuring that in most circumstances wage-theft cannot be uncovered by union investigation. Union access to time

and wages records is vital to the discovery and remedying of wage theft. Unions have specialist knowledge of the industries within which their members work which is not available to government inspectors and bodies such as the Fair Work Ombudsman.

Understanding and enforcing the particularity of wage and remuneration structures in tertiary education requires a degree of specialist knowledge about what questions need to be asked. For example, in higher education, determining whether wage theft is occurring may require assessment of work against classification standards specific to the sector or determining whether an academic employee is required to exercise various levels of academic judgement.

As stated above, there can, and should, be an expectation that higher education employers understand their industry sufficiently to be able to apply the enterprise agreements that they have negotiated. There cannot, however, be an expectation that an inspector for the Fair Work Ombudsman could do so. This problem underlines the critical importance of union officials having proper access to employee records as a matter of course. If the Parliament were serious about addressing wage theft, this, more than any other single measure, would address the problems in tertiary education.

Examples of previous or current legislative and award provisions that if inserted into the Fair Work Act would significantly reduce Wage Theft are provided at Attachment 2.

## **FEDERAL GOVERNMENT PRACTICES**

All of the higher education sector receives Federal Government funding in some form. NTEU supports the ACTU recommendation that would require the Government to contribute to reducing wage theft by ensuring its suppliers meet core labour and superannuation standards. In the case of tertiary education NTEU recommends the following actions by Government that would assist the fight against wage theft:

1. Require all higher education providers who receive funding from the Federal Government (including FEE-HELP income) to demonstrate historical and ongoing compliance with core labour standards including rates of pay.
2. Require universities to report accurate figures for insecure (contract and casual) employment, including by function and gender such is currently collected for fixed term and ongoing staff. Point 1 of these recommendations could be enabled through a proposal made by the NTEU for an alternative funding policy framework for higher education, outlined in the NTEU's 2015 Federal Budget Submission [Towards a sustainable policy framework for Australian higher education](#).

In short, the NTEU is proposing a flexible but coordinated model for the allocation of public funding in universities, primarily through changes to the framework for Commonwealth Supported Places (CSPs). In the proposed framework, excessive red tape associated with the funding and regulation of universities would be reduced by replacing a number of existing planning and funding agreements with revised versions of the current University compacts.

Under the NTEU proposal, these compacts would be known as Public Accountability Agreements (PAAs) and be negotiated and administered by an independent agency or council with statutory planning and funding responsibilities. Within such a framework universities would exercise control over how many students they enrol (and are thus funded for) while the Commonwealth would be assured that all students enrolling in a public university receive a high quality education and the opportunity to succeed.

Importantly, the PAAs would be a mechanism where the university would need to provide evidence to prove they have meet a set of agreed of performance criteria (which could include public reporting of data) as well as demonstrate that they have the capacity to accomodate any proposed increase in enrolments in a sustainable way.

The criteria would be negotiated and may well differ between institutions based on their specific circumstances goals and objectives. However, there would be common areas for all institutions, which may incorporate workforce planning. As an example, for a proposed increase in enrolments, an institution might include evidence that involves a number of factors including:

- physical resources to teach
- staff to student ratios,
- having enough appropriately qualified staff, and
- the proportion of teaching undertaken by casually employed academic staff.

Thus, the PAAs could be used as a mechanism to help achieve sector based goals and objectives that a universities or the government may determine as being critical, such as addressing important equity issues, especially amongst under represented student groups, or dealing with workforce issues, (noting that the increasing levels of casual employment is a recognised risk to quality under Higher Education Standards Framework (Threshold Standards) 2015, monitored by Tertiary Education Quality and Standards Agency (TEQSA)).

*“The contracts assigned to us at the beginning of the semester have “anticipated hours” in them rather than the actual hours that will be worked.”*

**Casual Academic, Design**

*“In 2018 I was sent an email detailing how much my time was worth in a consultation, and that I was required to have 12 a semester. The same email also made clear that I was not going to be paid for any student consultations. “*

*“In the 2018-2019 financial year I made \$24,000 at Monash from a position I regularly spend full time hours in. I must have another low-skilled job on the side in order to provide sufficiently for my family.”*

**Casual Academic, Humanities**

*“As a full-time PhD candidate, sessional teaching is not only expected work experience as an academic but a financial necessity. My full-time scholarship amount falls below the Australian minimum wage at \$30,000 net per annum.*

*This amount puts me in housing stress. Despite the much-needed additional income sessional teaching provides, tutoring work creates an added financial burden due to implicit an overt underpayment.”*

**PhD candidate and Casual Academic, Architecture**

## CONCLUSION AND RECOMMENDATIONS

Wage theft is a serious concern within both the public and private components of the higher education sector and is dependent on the high level of casualisation of the workforce. There is widespread exploitation of casual academics and international students.

NTEU supports all of the ACTU recommendations with the following being of particular importance in eliminating wage theft in our sector:

1. **Amend the FW Act to make the notice requirements for right of entry less restrictive**, in particular by enabling permit holders to enter a site without being required to provide 24 hours' notice.

2. **Provide trade unions with improved rights of entry**, including access to records by:

- Providing trade unions with the right to inspect the records of former employees;
- Removing the restrictions on trade unions accessing "non-member records" directly (i.e. without an FWC application) through right of entry;
- Requiring employers to have all employment records at a place of work or head office, both of which are accessible by a union official, including electronically.

5. **Expand the presumption brought about by the FW Act s 557C to apply to trade union right of entry**, such that an employer who fails to provide records, or otherwise comply with right of entry provisions will have the burden of disproving allegations of wage theft.

7. **Review the taxation treatment of wages repaid to workers** following incidences of wage theft, to ensure that they are treated no less favourably than if the wages owing were paid initially as due.

11 and 12. **Increased penalties for wage theft including creation of criminal provisions.**

S1. **Unions should be given improved powers to inspect employers' records of superannuation payments.**

NTEU also proposes the additional Recommendations specific to tertiary education:

1. Require all higher education providers who receive funding from the Federal Government (including FEE-HELP income) to demonstrate historical and ongoing compliance with core labour standards including rates of pay.

2. Require universities to report accurate figures for insecure (contract and casual) employment, including by function and gender such is currently collected for fixed term and ongoing staff.

## **Further information**

The NTEU is available to provide further information or advice if that is required. In the first instance, the Department should contact Dr. Terri MacDonald in our National Office [tmacdonald@nteu.org.au](mailto:tmacdonald@nteu.org.au)

## **ATTACHMENT 1**

### **Testimonial of a long-term casual academic from University of Melbourne.**

For 3+ years, I have tutored, lectured, and coordinated undergraduate courses at the University of Melbourne. My experience indicates that academic wage theft is rampant, facilitated by an opaque workplace culture, perpetuated by exploiting teachers' dedication, and sustained by precarious employment.

For example, the University allocates 3 hours of working time to each 1 hour tutorial: 1 hour preparation, 1 hour delivery, 1 hour administration. For my first few semesters, I thought the reason it took me 5+ hours to prepare tutorials each week (attending 90-minute lectures, reading 50+ pages of assigned texts, and developing class plans) was that I was not as clever or skilled as other tutors. It was only through talking to others in the Union that I realised that I was not inadequate, that the careful development of high-quality classes would always take time, and that the timeframes indicated in my contract were utterly unreasonable.

**(Average of 4 unpaid hours/tutorials, 11 tutorials/semester, 3 semesters: 132 unpaid hours)**

Even once we came to recognise this exploitation, casual teaching staff do not have the option of simply "working less". The pressure to perform well is magnified in a knowledge industry, but I challenge anyone, from any industry, to walk into a packed room and talk for 60 minutes - with confidence and authority, usually on a topic only marginally related to their area of expertise - with only 2 hours to prepare. In one course I taught last year, I spent over 150 hours researching, writing, and delivering lectures. I was paid for just 54 hours; I lost 98 hours of wages. The only way I could have kept to the university's expected timeframe would be to wing every lecture - and lose credibility in front of my students who, quite reasonably, expect their teachers to be informed on the subject matter.

**(Average of 7 unpaid hours/lecture, 12 lectures/subject, 2 subjects = 168 unpaid hours).**

People who teach at universities love what they teach. They love learning more about subjects in their field, and they love helping students build new skills and develop new knowledge. Universities exploit our passion and dedication, putting pressure on us to provide free labour for the benefit of students, who generally have no idea that we are not paid for our time.

For example, my first few semesters teaching, I dedicated multiple days a week to student consultations during assessment periods, adding up to 30+ unpaid hours a semester. I can no longer afford to provide students with this support. I try to plan ahead and offer students 10-minute slots in my office hour during assessment periods, but there are always more students than time-slots, and it feels wrong to turn down students who genuinely want to improve. I usually end up working double consultation hours.

**(Average of 20 unpaid hours/semester, 6 semesters = 120 unpaid hours).**

Turning students away can also end up costing teachers more in unpaid marking. Students who want to discuss assignments and clarify feedback generally do much better on their next assignment, and there is an inverse correlation between the quality of a student's work and the time it takes to mark it. Many students are surprised to learn that their teachers are allocated 1 hour total to mark all of their assessments for the semester. A wage-theft campaign at my university found that most staff are working at least 50% over the 1 hour 'performance expectation.'

**(310 students = 155 unpaid hours).**

Precarious employment is the underlying thread that sustains wage theft. Even among staff who know that they are being exploited, who recognise that expectations are unrealistic, who try to withstand the pressure to perform and the discomfort of turning students away - the risk of unemployment forces us to work for free. I have taught my classes for 3 years, have a PhD in my field, and receive glowing student feedback. But I have no idea if I'll be employed next semester. I can't control the job market in my field, or the funding in my department, or student enrolments.

**The only thing I can do is work harder, and hope.**



## ATTACHMENT 2

**Examples of previous or current legislative and award provisions that if inserted into the Fair Work Act would help significantly with the detection and prevention of wage theft.**

*South Australian Government Services Award (current)*

7.4.1 An official of an association of employees may enter an employer's premises at which one or more members of the association work and:

7.4.1.1 Inspect time books and wages records;

*Commonwealth Conciliation and Arbitration Act 1904-1987 and Industrial Relations Act 1988-1996.  
(provisions in substantially the following terms)*

42A. (1) An officer of an organization authorized in writing by the secretary of the organization or of a branch of the organization to act under this sub-section may, at any time during working hours, but subject to any conditions provided by the relevant award, enter any premises in which work to which an award binding on the organization is applicable is being carried on, being premises specified in the authority, or premises occupied by an employer who is bound by the award and is specified in the authority, for the purpose of ensuring observance of the award, and may for that purpose inspect any work, books or documents and interview any employee, being a member or a person eligible to be a member of his organization, on those premises, but an officer so authorized shall not hinder or obstruct an employee in the performance of his work during working time.

(2) If an officer of an organization proposing to enter, or being in or on, premises in pursuance of this section is required by the occupier or person in charge of the premises to produce evidence of his authority to that occupier or person, the officer is not entitled to enter or remain on the premises unless he produces to that occupier or other person the authority in writing referred to in sub-section (1).

(3) A person shall not hinder or obstruct an officer of an organization in the exercise of a power conferred by this section.

Penalty: \$100.

(4) In this section -

“officer”, in relation to an organization, means a person holding an office in, or employed by, the organization or a branch of the organization;

“premises” includes any building, structure, mine, mine working, ship, vessel or place.