

Submission to

 Industrial Relations Consultation

*Inquiry into the Criminalisation of Wage Theft*

Prepared by:

John O’Hagan, Lawyer

Monica Bradford, volunteer

Job Watch Inc.

Level 10, 21 Victoria Street

Melbourne 3000

Ph (03) 9662 9458
TIS: 1800 331 617 (Country Vic, Qld, Tas)

Fax (03) 9663 2024

[www.jobwatch.org.au](http://www.job-watch.org.au)

Email: admin@jobwatch.org.au

© Job Watch Inc. October 2019

**Contents**

[**I.** **About JobWatch** 3](#_Toc23325951)

[**II.** **Summary of JobWatch’s recommendations** 4](#_Toc23325952)

[**III.** **The problem** 5](#_Toc23325953)

[A. Pervasiveness 5](#_Toc23325954)

[B. Under-reporting 7](#_Toc23325955)

[C. Difficulty of enforcement 8](#_Toc23325956)

[D. What can the Commonwealth Government do? 10](#_Toc23325957)

[**IV.** **Submissions on proposed changes** 11](#_Toc23325958)

[A. Civil remedy provisions in the *Fair Work Act 2009* 11](#_Toc23325959)

[B. *Fair Work (Protecting Vulnerable Workers) Act 2017* 13](#_Toc23325960)

[C. Extending liability 13](#_Toc23325961)

[D. Sham contracting 16](#_Toc23325962)

[E. Criminal sanctions 17](#_Toc23325963)

1. **About JobWatch**

JobWatch Inc (JobWatch) is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria which also aids Victorian, Queensland and Tasmanian workers about their rights at work. It is funded by the Victorian and Federal Governments, Office of the Fair Work Ombudsman and Victoria Legal Aid to do the following:

1. provide information and referrals to Victorian, Tasmanian and Queensland workers via a free and confidential Telephone Information Service (TIS);
2. engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
3. represent and advise vulnerable and disadvantaged workers; and
4. conduct law reform work with a view to promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our Telephone Information Service. To date we have collected over 200,000 callers’ records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers’ experiences, including the workplace problems they face, and what remedies, if any, they may have available at any given time. JobWatch currently responds to over 12,000 calls per year.

The contents of this submission are based on the experiences of callers to, and clients of, JobWatch and the knowledge and experience of JobWatch’s legal practice. Case studies have been utilised to highlight particular issues where it has been deemed appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch’s TIS.

JobWatch welcomes this opportunity to make a submission to the Attorney-General for Australia, Minister for Industrial Relations, The Hon Christian Porter MP in relation to the Inquiry into the Criminalisation of Wage Theft.

1. **Summary of JobWatch’s recommendations**
2. Changes to the *Fair Work Act 2009* so that the Federal Circuit Court small claims procedure allows for penalties for underpayments.
3. Expansion of the Fair Work Ombudsman’s enforcement resources and activities to maximise deterrence against wage theft.
4. Specific funding for ongoing educational and awareness programs, with particular focus on the internet, including technology such as online applications to help disseminate information and streamline timeframes, and designed to capture vulnerable and disadvantaged groups in their primary languages.
5. Changes to the *Fair Work Act 2009* in order to group penalties to capture multiple breaches as a deterrent to systematic wage theft.
6. Changes to the *Fair Work Act 2009* in order to make penalties consistent with other legislative tools such as the proportionality considerations seen in the *Tax Administration Act 1953*.
7. Changes to the *Fair Work Act 2009* to extend accessorial liability to expressly include a broader range of entities that benefit from work done by employees. This should include a recklessness provision and allow for underpayment claims to be met in situations where insolvency or artificial corporate arrangements currently make recovery difficult.
8. The accessorial liability provisions of the *Fair Work Act 2009* should be strengthened and expanded to ensure that businesses are liable where appropriate for employment law non-compliance by contractors in their supply chain.
9. Changes to the *Fair Work Act 2009* to create a new contravention of serious or systemic sham contracting.
10. Changes to the *Fair Work Act 2009* and other appropriate legislative vehicles to include criminal sanctions for the most serious forms of wage theft.
11. Specific funding to assist the Fair Work Ombudsman and the community sector to leverage any new enforcement mechanisms.
12. Any criminal sanctions should cover theft of all types of workers’ provisions, such as superannuation, overtime, penalty rates, leave, compensation etc.
13. Separate criminal offences should be created in relation to the employment aspect of conduct that already attracts other criminal sanctions.
14. **The problem**
15. Pervasiveness

JobWatch acknowledges that ‘wage theft’[[1]](#footnote-1) is a common issue, which is currently receiving a justifiable increase in media and legislative attention. The Commonwealth Government’s *Report of the Migrant Workers’ Taskforce* (the Report), published in March 2019, highlighted the significant underpayment of wages affecting a certain vulnerable group of workers. Other reports have also demonstrated the correlation of wage theft with the underpayment of superannuation and other benefits and entitlements.[[2]](#footnote-2) This compounds the harm to the employee and, by extension, to society. These issues have also been extensively researched by other reports as seen in *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia,[[3]](#footnote-3)* and *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*.[[4]](#footnote-4)

JobWatch routinely observes the prevalence and effects of wage theft. Over the 2018-2019 financial Year, JobWatch assisted 10,186 new callers to the Telephone Information Service (TIS). Of these, underpayment of any type (wages, superannuation or other entitlements) was a pervasive issue and was raised 2,628 times, or in 25% of our calls. In contrast, overpayments were raised only 113 times, which equates to 1.1% of our calls.

|  |  |  |
| --- | --- | --- |
| Underpayment of wages and other entitlements | Number of times mentioned | Percentage |
| Overtime - unpaid (6 Years)  | 28 | 1.07% |
| Super - non-payment | 94 | 3.58% |
| Super - under payment  | 28 | 1.07% |
| Underpayment certified agreement (6 Years) | 424 | 16.13% |
| Underpayment common law contract (6 Years) | 205 | 7.80% |
| Underpayment federal award (6 Years)  | 353 | 13.43% |
| Underpayment | 1,425 | 54.22% |
| Wages – non-payment (6 Years)  | 71 | 2.70% |
| Total | **2,628** | **100.00%** |

As noted in the discussion paper, some employers undoubtedly make genuine mistakes leading to miscalculations which are rectified once identified. However, JobWatch’s data demonstrates that incorrect payments affecting our callers are not randomly distributed; they are predominantly underpayments.

The pervasiveness of wage theft is one of its most problematic aspects. Quantitative studies have shown that, in some industries, wage theft is not an aberration but the norm.

JobWatch has identified how common wage theft is and how it interrelates with other issues. The definition of wage theft should not be limited to underpayment of ordinary time wages, but also to underpayment of other legal entitlements such as superannuation, annual leave, long-service leave and penalty rates.

JobWatch also sees another side of wage-theft – the human impact. The failure to pay the correct legal entitlement forces workers to resolve difficult questions: whether having any job or having a good reference is worth being paid less than their legal entitlement. Further, it perpetuates negative cultural norms around work within Australian society.

1. Under-reporting

Despite wage theft being a common issue faced by workers who call JobWatch’s TIS, it is likely our statistics do not represent the full extent of the problem of non-payment or under-payment of wages and entitlements.

In JobWatch’s experience, wage theft is often a secondary or even an unknown issue for many of the vulnerable and disadvantaged workers who call our TIS; the issue is often identified by the TIS worker rather than the actual caller. For example, in the course of a conversation with a caller who has been dismissed and is seeking information about challenging their dismissal, it may become apparent that underpayments are also a potential issue.

There are several factors influencing underreporting of wage theft. Previous assumptions that poor English proficiency or a lack of knowledge of employment rights and/or the Australian legal system were barriers to reporting, have not stood closer examination.[[5]](#footnote-5) As the *Wage Theft in Silence* report found, the main consideration affecting someone making an underpayment claim is a basic cost-benefit analysis: the likelihood of a successful outcome, weighed up against the time, effort, costs and risks to immigration and/or employment status, often does not justify initiating a claim.[[6]](#footnote-6) For migrant workers in particular, it is often easier to continue working, rather than jeopardising their prospects whilst in Australia. At JobWatch, we often hear our callers and clients tell us that they are reluctant to lodge a complaint against their current employer for fear of tarnishing their reputation and not being able to find another job.

Under-reporting may be linked to a societal expectation that underpayment is the reality of the current employment market. This is demonstrated through many individuals being aware that they are being paid below minimum wage,[[7]](#footnote-7) or that all job offers they receive are similar.[[8]](#footnote-8) Vulnerable and disadvantaged employees often feel they have little option but to accept their below-minimum wage rates, as there are few legally compliant employers in their industry or, if they complain and are dismissed, they will be unable to find another job, let alone find another job with a compliant employer. We certainly often hear it said from our callers and clients who are in Australia on temporary visas, working in the hospitality (including fast food), cleaning and retail sectors in particular, that they would complain more readily about underpayments and leave their current jobs if they thought they could find another job with an employer who complied with the *Fair Work Act 2009* (Cth), but they fear that the reality is they will never find a job with an employer who pays minimum wages and entitlements.

Employees in these circumstances are less likely to report underpayments. This is exacerbated in areas where employment prospects are poor, and in particular industries where wage theft is more prevalent due to exploitative hiring practices that target vulnerable individuals, who are often migrant workers.[[9]](#footnote-9)

1. Difficulty of enforcement

Many callers and clients of JobWatch face a conflict between accessing legal entitlements and continuing their employment or finding legally compliant employers.

For those who want to look for another job with a compliant employer, there are the hurdles of requiring a positive reference from the current employer or detailed information about their current employment for their visa requirements. This forces workers to choose between accessing their legal rights to recover their legal entitlements or maintaining a positive employee-employer relationship with the employer who is under-paying them (or, in some cases, not paying them at all).

Litigation to pursue underpayments is often seen as difficult, cumbersome and expensive, with time and effort better spent pursuing the more pressing economic imperative of finding a new job. Vulnerable and disadvantaged employees therefore often accept their underpayment and do not seek legal advice, in the hope that their silence will be worth it in the long run.

As already mentioned, the weighing up of factors, such as personal security and safety (e.g., immigration and/or employment status, which are often linked), compounded by considerations of time, cost etc., means the process can be lengthy and difficult to navigate individually. Migrant workers, for example, may have moved to another State, or no longer be in Australia by the time their matter is listed for hearing, making it impracticable to prosecute their case.

Without support systems (such as legal advice and/or social support) exploited employees do not have the resources nor the time to put their livelihood at stake.

JobWatch also believes that some employers have essentially undertaken a cost/benefit analysis regarding wage theft and have considered it worthwhile making the practice of underpaying employees and/or engaging in sham contracting part of their business model. That is, the financial benefits and competitive advantage of illegally reducing employment costs outweighs, in their view, the risk of enforcement action being taken as a result of a report to the Fair Work Ombudsman (FWO) or a small claim application being filed in the Federal Circuit Court of Australia.

These are some of the features of the current recovery processes that contribute to this:

1. The FWO processes appear to be heavily weighted in favour of voluntary compliance and/or private mediated settlements rather than court hearings. This allows employers to negotiate a private settlement with no risk of additional penalties being imposed or even any associated adverse publicity. Unfortunately, this often also results in the employee settling their claim for less than their minimum entitlements, because proceeding to court is too complex, costly, risky, stressful, time consuming and protracted.

**Case study**

*JobWatch has in recent years acted for a number of young temporary visa holders who have all been employed by the same employer. Our clients haven’t known about each other. They have all worked as kitchen hands/wait staff in the same restaurant but at different times. Some of them have come to us after being owed relatively small amounts of wages and superannuation, whilst others have come to us after many months of being exploited by the same employer, with substantial amounts of unpaid wages and superannuation. One client worked for this employer 10-12 hours a day, six days a week, for two years, during which she was only paid $400 a month in cash. Another client also worked for him for an extended period of time and was badly underpaid. The employer was their landlord as well as their boss and he unlawfully deducted accommodation costs from their pays. He even acted as education agent for one of our clients, as he managed her studies and deducted further monies from her pay in relation to her education expenses. With the first of our clients who was underpaid by this employer, we took the matter to the FWO. This was before the new reverse onus of proof provisions came into operation in relation to wage claims. The FWO conducted a lengthy investigation but concluded that there was insufficient evidence to substantiate our client’s claims due to the fact that there were no wage and time records other than our client’s hand-written list of hours worked.*

1. The small claims procedure in the Federal Circuit Court, which is designed for employees to recover unpaid entitlements under $20,000 through a relatively informal process where legal representation is not necessary, is defective in several ways. The current waiting time in Victoria, from when an application is filed to when the hearing is scheduled, seems to have blown out to 10 months. This is unsatisfactory. Applicants cannot seek penalties against non-compliant employers. Nor can applications be made against accessories to the contraventions. This means that the worst possible outcome an employer faces under this procedure is simply to pay what the employee is owed in any case, which provides no incentive to comply with the *Fair Work Act*. Moreover, the court’s service requirements are too onerous for employees who wish to take action against an individual (for example, a sole trader, members of a partnership or the individual trustee of a trust which is the holder of a business for whom the employee worked). In these cases, the sealed court documents need to be personally served on an individual respondent. Given that often these people (the respondents in small claim applications) owe money to many people, they are very good at “going underground” and avoiding service. A further problem with the way the small claims process functions currently, is that even if a court order is made in favour of the applicant, there is no automatic system for enforcing that order. The applicant needs to spend considerable money and energy to enforce the order through the sheriff’s office and, in JobWatch’s experience, this is often not worth the effort because there is a good chance that nothing will be recovered.

**Case study**

*JobWatch recently acted for a number of international students who all worked as cleaners for the same sole trader. They were each told they would be paid a flat rate of $20 per hour as contractors (no superannuation). However, in reality they were each treated as employees as they were told where to perform their work, what to do and how to do it. They were often driven to and from the worksite by the employer. They did not use their own equipment and they could not sub-contract their work. They certainly did not genuinely consider they were carrying on their own businesses. They each came to JobWatch only after the employer had stopped paying them all together and each of them had worked for several days without any pay at all.*

*When the allegations of sham contracting and underpayment of wages were investigated by the Fair Work Ombudsman (FWO), a Compliance Notice was issued to the employer but this was ultimately dropped due to the employer satisfying the FWO (but not our clients) that he was impecunious. Our clients were left dejected and disillusioned: they had expected that their employer would not be allowed to get away with underpaying them, not paying them at all for many hours’ work and not paying any of their superannuation contributions. Instead, he seems to have been “let off the hook” by the workplace regulator and they were left with the unenviable option of issuing proceedings against him. Whilst suing him would probably have resulted in court orders against him, there was a good chance that he would not comply with those orders and our clients would then have needed to take enforcement action through the sherriff’s office. This would have meant extra time and money without a guaranteed outcome.*

1. Penalties are available if the small claims procedure is not used, but this involves complex, protracted and expensive litigation. Legal representation may not be obligatory but it is strongly arguable that applicants are greatly disadvantaged if they are not legally represented. JobWatch’s callers and clients would rarely elect to proceed under the Fair Work list (non-small claims) if their claim was worth less than $20,000. This means that employers who underpay individual employees by less than $20,000, even if there are many such employees, face little risk of being exposed to these penalties. For this reason, JobWatch recommends that the Act be amended to allow the Federal Circuit Court to order pecuniary penalties under the small claims procedure, with the proviso that the matters in respect of which these penalties may be ordered is limited to matters that may be raised under the procedure (i.e. underpayments), in order to maintain the relative simplicity of the procedure.
2. Our law enforcement bodies seem to struggle with inadequate resources and hige work demands. For example, the FWO has the power to impose penalties and to prosecute non-compliant employers under the Act, but due to finite resources, its enforcement cannot be comprehensive, and must focus on strategic action – for example, cases of extensive, systematic or high-profile contraventions. To many non-compliant employers it must seem worth taking the risk of being contacted by the FWO regarding alleged underpayments. Likewise, Victoria Police appears to be struggling to allocate sufficient resources to adequately investigate wor-related scams that affect vulnerable workers. JobWatch recommends the expansion of all our law enforcement bodies’ resources (including the FWO’s) to the extent necessary to ensure as close as practicably possible to universal deterrence against wage theft.

**Case study**

*JobWatch has acted for several) young international students and working holiday makers who were scammed by a group of young men who advertised flyer distribution jobs on Gumtree. The jobs were advertised with a pay rate of $20 per hour. Our clients each worked for many hours distributing the leaflets that were handed to them by their supposed employers. Location tracking apps were used to demonstrate to their employers how many hours they had worked and what distance they had covered. None of our clients was ever paid for any of the work they performed and it has thus far proved to be impossible for us to track down the scammers. Victoria Police have told our clients that they do not have sufficient resources to investigate every scam of this nature. A number of people have been charged in relation to a similar scam, but apparently those are not the same people that were involved in this particular scam and, accordingly, police have said that, given their limited resources, there is a high chance these scammers will never be caught. This is despite the fact that police have been provided with photos of one of the scammers and the license plates of the cars of some of the scammers. None of these clients have felt that justice has been achieved in their case. They haven’t had their matters comprehensively investigated by the police because of resourcing issues and the civil law enforcement options have proved to be inadequate.*

In cases of employer insolvency, the above enforcement process is unavailable. Currently the Fair Entitlements Guarantee Scheme (FEG) provides some protection for Australian citizens workers. However, a long-standing critique of the FEG from JobWatch’s perspective is that it does not extend to non-citizen workers, does not cover superannuation, and generally only provides protection once a liquidator has been appointed. This leaves many employees’ entitlements unprotected and unlikely to be recoverable.

**Recommendation 1:** **Changes to the *Fair Work Act 2009* so that the Federal Circuit Court small claims procedure allows for penalties for underpayments.**

**Recommendation 2: Expansion of the Fair Work Ombudsman’s enforcement resources and activities to maximise deterrence against wage theft.**

1. What can the Commonwealth Government do?

As noted, there are many issues facing an individual who seeks to recover their unpaid legal entitlements. As stated in the discussion paper, solutions need to focus on the adequacy of the existing penalty framework and the possible introduction of criminal sanctions for the most serious forms of exploitative workplace conduct. The Commonwealth Government has the power to bring about real changes and reforms to the Act’s enforcement mechanisms.

The existing enforcement frameworks set out in the *Fair Work Act 2009* (Cth) (Act) have already been strengthened by the *Fair Work (Protecting Vulnerable Workers) Act 2017* (Cth) (PVW Act). These positive steps have made claims easier for our clients, as is discussed below. However, more funding to community legal centres is needed to advise and represent vulnerable and disadvantaged workers experiencing exploitative employment practices to allow for enforcement of these protections to occur.

JobWatch supports the proposed additional measure by the Commonwealth Government of implementing criminal sanctions, because this would reinforce the tough stance against exploitative practices.

Importantly, any implemented solutions must achieve the best overall balance, having regard to the needs of both employees and employers, whilst including structures to streamline the processes of justice.

Alongside these substantive changes, cultural changes should be encouraged. Awareness campaigns for employees regarding their employment rights may help to empower vulnerable and disadvantaged employees to enforce their minimum entitlements and to report non-complying employers. Such awareness campaigns could be undertaken by a community legal centre providing community legal education to appropriate audiences such as student visa workers and other temporary migrant workers.

**Recommendation 3: Specific funding for ongoing educational and awareness programs, with particular focus on the internet, including technology such as online applications to help disseminate information and streamline timeframes, and designed to capture vulnerable and disadvantaged groups in their primary languages.**

1. **Submissions on proposed changes**
2. Civil remedy provisions in the *Fair Work Act 2009*

The Act prescribes the maximum penalty a court can award for each contravention of a civil remedy provision. When the court is determining which of these penalties to order, it is required to ‘group’ a series of contraventions of the same provision that arise out of a ‘course of conduct’.[[10]](#footnote-10) These ‘grouped’ contraventions only attract a single penalty and the courts can apply this requirement in multiple ways.

Thus, for example, if a company contravenes a single term of a modern award in respect of ten employees, or contravenes the same civil remedy provision ten times in respect of one employee, both instances will result in the same grouping of ten and the maximum penalty would be 300 penalty units (currently $63,000), rather than the 3000 penalty units ($630,000).

JobWatch believes that grouping penalties in this way reinforces to employers that contraventions of the Act can, in some instances, be more beneficial to them than complying with workplace laws. Changes should be made to make penalties referenced by the number of affected employees (especially in situations of large, systematic underpayments schemes), period of underpayment, or something more akin to other legislative requirements and penalties.

**Recommendation 4: Changes to the *Fair Work Act 2009* in order to group penalties to capture multiple breaches as a deterrent to systematic wage theft.**

The Report’s fifth recommendation[[11]](#footnote-11) regards increasing penalties to be more in line with those applicable in other business laws, especially consumer laws. JobWatch believes there is a need for increased maximum penalties, but as the *Australian Consumer Law Review* noted,[[12]](#footnote-12) current breaches of the Australian Consumer Law are insufficient to deter highly profitable non-compliant conduct. Further, unlike breaches of the ACL, contraventions of industrial law do not have immediate self-enforcing feedback through falls in share prices; nor are these good indicators of systemic changes in underpayment norms.

However, a system along the lines of the levies applied under the *Taxation Administration Act 1953* (Cth) can operate to balance proportionality against effective deterrence. The levies are calculated by reference to the degree of fault in each case, and to the resources of the party to be penalised, and so can be increased or reduced if there are aggravating or mitigating circumstances. Coupled with a reframing of how the penalties are referenced, this would allow for proportionate penalties.

This would also be beneficial to cases where underpayments are more extreme. One example of this is the highly published case of the chef George Calombaris. The Fair Work Ombudsman, Sandra Parker, has conceded that the $200,000 fine against him ‘was not high enough and that higher fines for similar underpayment cases would be issued in future’.[[13]](#footnote-13) Although the $200,000 "contrition payment" against Mr Calombaris ‘had not taken into account the $7.83 million in wages he admitted to underpaying more than 500 current and former employees’, this may not be the case.[[14]](#footnote-14) Ms Parker indicated that evaluations of these payments may consider the amount staff had been underpaid, thus allowing for more extreme, systematic offenders to have harsher penalties.

When considering these changes, it is important to maintain the courts’ discretion to determine penalties that are proportionate to the offence. Factors which allow for this consideration include the nature and extent of the wrongdoing, remorse by the contravening party, and the impact that penalties may have on the viability of the business. A levy system addresses this while retaining strong deterrence against calculated contraventions.

**Recommendation 5: Changes to the *Fair Work Act 2009* in order to make penalties consistent with other legislative tools such as the proportionality considerations seen in the *Tax Administration Act 1953* (Cth).**

1. *Fair Work (Protecting Vulnerable Workers) Act 2017*

Given the PVW Act only came into effect in 2017, it is too early for JobWatch to have clear statistical evidence on whether the amendments it effected have influenced employers’ behaviour. However, these changes, coupled with the FWO’s education, compliance and enforcement activities, may have had some influence over employer behaviour.

Anecdotally, the changes have led to a positive shift of power towards employees in wage disputes. For example, the reverse onus of proof in regard to record-keeping has made negotiating settlements easier, as employers who would previously have been able to use their own failure to keep records to frustrate a claim can no longer do so. The higher civil remedies have had a similar effect. This has allowed more of JobWatch’s clients greater access to justice and easier recovery of the wages they are owed.

1. Extending liability

As outlined in the Report’s eleventh recommendation,[[15]](#footnote-15) the Government should consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws.

JobWatch believes that current legislative arrangements do not adequately regulate the behaviour of lead companies or head contractors in relation to employees in their supply chains. When pursuing underpayment claims, JobWatch often sees examples of employers who have outsourced work originally performed by employees to independent contractors, resulting in underpayments to the employees of the contractor. Even though the original employers are well aware of how much the contract should be costing them, they are not being held responsible for underpayments by the contractor. JobWatch recommends that the accessorial liability provisions of the Act should be extended to also cover situations where businesses contract out services, building on existing provisions relating to franchisors and holding companies.

Where such provisions require actual knowledge of, or knowing involvement in, a contravention of a workplace law, a heavy onus of proof is imposed on the complainant. Anecdotally, JobWatch deals with many employers who were not aware of obligations where they ought to have been, for example, because they made no effort to check legal minimums or were not proactively checking their supply chains for underpayments where these should have been apparent. In JobWatch’s view, drafting such provisions to include an element of recklessness (which may include presumptive knowledge or “wilful blindness”) would make those at the head of, or within, supply chains responsible for their actions, promote fairness and safety for workers, and ultimately change the culture within workplaces.

An example of an innovative approach to extending liability in this way is the proposed Fair Work Amendment (Making Australia More Equal) Bill 2018 (Bill). Section 789FBB of the Bill effectively widens the range of relationships that can be regulated by the Act. The Bill proposes that the Fair Work Commission (FWC) would be able to make “minimum entitlement orders”[[16]](#footnote-16) in favour of workers who do work for the benefit of a business, regardless of the nature of the legal relationship between the workers and the business.[[17]](#footnote-17) Such orders would have the effect of applying particular provisions of the Act, a modern award or enterprise agreement to the workers as if they were employees of the business.

As outlined in the Second Reading Speech, the Bill would “introduce a presumption that all workers, however classified, are entitled to at least the same minimum standards as employees”.[[18]](#footnote-18) This means that situations where companies are purportedly reclassifying workers as contractors, outsourcing work, or using labour hire, those workers would be entitled to minimum pay and conditions[[19]](#footnote-19) if the FWC considered it appropriate.

Therefore, regardless of each company’s legal arrangements, where work is ultimately benefiting the lead company/head contractor, they would be responsible for their supply chains. This would act as a deterrent against the use of legal devices such as independent contracting arrangements as way of avoiding minimum pay and conditions obligations.[[20]](#footnote-20)

JobWatch accepts that there are many legitimate uses for contracting and labour hire arrangements, and the approach taken in the Bill would still allow employers to utilise any legal arrangement they prefer. However, it would not allow them to artificially undercut the legal minimums that would apply to employees doing the same work.[[21]](#footnote-21) In JobWatch’s view, this would render many current arrangements otiose and their use would decline markedly.

An advantage of the approach adopted in the Bill is that it circumvents a wide range of other artificial arrangements designed to avoid liability for employee entitlements, including those as yet unforeseen, because it looks only at whether work is being done for the benefit of the business. It is also not limited to the type of wage theft considered in this inquiry, potentially protecting against the avoidance of length-of-service-based entitlements such as redundancy pay and even long service leave through such arrangements.

If the Act were amended to cover relationships such as that proposed by the Bill, it would give the FWC more powers to regulate a broader range of “work-related relationships existing in Australia”.[[22]](#footnote-22) This would enable underpayment claims to be pursued in situations where this is currently difficult or impossible, for example, insolvency or deregistration of corporate entities where the business is still operating. This would improve access to justice for workers and send a strong message to employers that artificial legal arrangements will not relieve them of employment obligations.

**Recommendation 6: Changes to the *Fair Work Act 2009* to extend accessorial liability to include a broader range of entities that benefit from work done by employees. This should include a recklessness element and allow for underpayment claims to be met in situations where insolvency or artificial corporate arrangements currently make recovery difficult.**

These extensions would also capture many more workers, especially migrant workers who work in industries where independent contracting arrangements (some legitimate, some sham) are widespread.

JobWatch recognises that the degree of control that contracting businesses have over each other in terms of employment practices varies and is inherently limited. However, JobWatch believes there should be a minimum level of obligation on businesses to check the employment law compliance of contracting businesses in their supply chain.

In response to problems with wage theft in supply chains, the governments of Queensland[[23]](#footnote-23), Victoria, and South Australia[[24]](#footnote-24) have implemented licensing regimes for labour-hire companies. This is aimed at addressing a common issue causing wage theft: the abuse of a company’s separate legal personality to push down wages and working conditions while reducing direct liability. Licensing reform to this area, while beneficial in providing some oversight, is responding to a limited sphere of wage theft and is dependent upon truthful reporting from the licensee[[25]](#footnote-25) and effective oversight. However, in JobWatch’s view, the fundamental issue with labour hire arrangements is where they are used inappropriately by businesses that use labour as part of their normal operations but wish to avoid obligations to employees.

**Recommendation 7: The accessorial liability provisions of the Act should be strengthened and expanded to ensure that businesses are liable where appropriate for employment law non-compliance by contractors in their supply chain.**

The benefits of this approach are that employers and contactors are held responsible for their actions, and are motivated to proactively undertake their responsibilities; and that in situations involving insolvency or other use of corporate structures to avoid liability, underpaid workers are still able to receive their entitlements.

Some risks of this approach include pushing these practices underground, making it harder to detect and prevent, as well as imposing administrative burdens on businesses which may affect their viability. However, in JobWatch’s view, the imposition and enforcement of this type of liability would mean that many businesses currently using such arrangements to avoid liability would no longer have an incentive to do so, and would revert to direct employment, while business with legitimate reasons to use such arrangements would be largely unaffected.

1. Sham contracting

Sham contracting is the mischaracterisation of an employment relationship as a contracting arrangement to avoid legal obligations to employees. This is already prohibited under the Act. However, JobWatch recommends that there be a separate contravention for more serious or systemic cases of sham contracting that attracts higher penalties; the focus being on the ability to enforce the legal entitlements.

**Recommendation 8: Changes to the *Fair Work Act 2009* to create a new contravention of serious or systemic sham contracting.**

1. Criminal sanctions

As suggested in the Report’s sixth recommendation,[[26]](#footnote-26) the Government should consider criminal sanctions for the most serious forms of exploitative conduct, using the most appropriate legislative vehicles. JobWatch supports this view, bearing in mind that these criminal sanctions should not reduce opportunities for claimants to receive their owed wages and entitlements.

JobWatch’s view is that the FWO does an excellent job as regulator with the resources at its disposal. While the steps for pursuing underpayments are relatively clear, the FWO’s ability to fully investigate and prosecute on behalf of individuals is limited by its resources. For example, the 250 inspectors the FWO employs (93 of whom investigate for compliance with the Act)[[27]](#footnote-27) are responsible for 11.6 million workers who work in over 2.1 million workplaces.[[28]](#footnote-28) While this situation is far from ideal, criminal sanctions would at least allow another avenue for courts to deal with contraventions of industrial laws.

A form of criminalisation is demonstrated in proposed Victorian legislation, which aims to dis-incentivise wage theft by attaching criminal sanctions to ‘deliberate’ underpayment.[[29]](#footnote-29) Under the proposed new laws, criminal sanctions would apply to employers who deliberately withhold wages, superannuation or other employee entitlements, falsify employment records, or fail to keep employment records.[[30]](#footnote-30) The offence will carry with it fines of up to $190,284 for individuals, $951,420 for companies and up to 10 years jail.[[31]](#footnote-31) These measures aim to decrease wage theft by increasing the cost of non-compliance to an employer and making wage theft less attractive.

**Recommendation 9: Changes to the *Fair Work Act 2009* and other appropriate legislative vehicles to include criminal sanctions for the most serious forms of wage theft.**

Admittedly, there are operational concerns with such proposals. For the law to be effective and not merely window dressing, it will require adequate funding and a willingness and capacity to prosecute. The amount of funding needed may be relatively high, given the increased burden of proof on the prosecution in criminal trials and the ongoing difficulties that the FWO already faces in gathering evidence. Further, the type of evidence that would need to be gathered to establish criminal culpability would be peripheral to the FWO’s work, raising questions of funding priorities – particularly whether the deterrent to employers created by the new law would actually be greater than the current civil penalties, were these more adequately and commonly enforced. In short, the Commonwealth Government may want to consider ways to further fund other agencies, such as an employment rights community legal centre, that could support and supplement the work of the FWO and to make sure these provisions are enforced.

**Recommendation 10: Specific funding to assist the FWO and the community sector to leverage any new enforcement mechanisms.**

The issue of wage theft is greater than unwitting underpayment – as an employer who acts without awareness can rectify the situation easily by repaying the employee. The major issue that faces workers are unscrupulous employers who seek to profit from the low risk of prosecution.

For example, JobWatch is aware of one company that traded into insolvency, and knowing the company’s precarious economic position, failed to pay the correct superannuation entitlements for employees 16 months preceding the company’s winding-up. The intentional nature of this breach is clear – the employer knew of the obligation to pay superannuation, but realised money could be ‘saved’ by illegally withholding it.

Similarly, unscrupulous employers may also take advantage of unintended underpayments; becoming un-cooperative when back pay is requested. This type of opportunistic underpayment also needs to be captured by any new provisions.

Therefore, any proposed criminal sanctions around wage theft must encompass all types workers’ entitlements (e.g., superannuation, leave, workers’ compensation payments, etc.). If the elements establishing the offence require that it be “clear, deliberate and systemic”, this may not capture employers who are recklessly or opportunistically avoiding responsibilities to their employees.

**Recommendation 11: Any criminal sanctions need to cover theft of all types of workers’ provisions, such as superannuation, overtime, penalty rates, leave, compensation etc.**

There are some potential unintended consequences of introducing criminal sanctions for wage underpayments. As already mentioned, social utility factors weighed up against the outcome of a dispute is the main factor when considering pursuing an underpayment claim. Therefore, the effect of facing a criminal case may negatively affect workers’ decisions whether to proceed, particularly where vulnerabilities exist, such as migrant workers not wanting to jeopardise their position in Australia. The introduction of criminal sanctions must not take away opportunities or discourage workers from pursuing their owed wages and entitlements.

Additionally, sometimes these situations occur with the ‘consent’ of the employee. That is, the client is so desperate to get a job that they consent to be underpaid. This is a concern if sanctions are enshrined in the criminal law, and must be considered when contemplating defences an employer may argue.

Noting these concerns, there are other serious types of exploitation that should also attract criminal penalties. When serious claims of underpayments are seen at JobWatch, they are usually coupled with other serious types of exploitation. These scenarios are sometimes analogous to slavery and/or fraudulent situations which are systematically undertaken by employers.

JobWatch is aware of some such scenarios where an employee is paid ‘on the books’, that is, there is a record of payment, but they are then are forced to pay back the money, usually in cash. In some cases, the employee has been forced not only to pay back all their wages, effectively working for free, but also to make increasingly large payments to the employer, amounting to tens or even hundreds of thousands of dollars over several years, often borrowed from family overseas. This may be tied to a promise of a service, such as a visa sponsorship, which is never performed.

In even more extreme cases of which JobWatch is aware, migrant workers are brought to Australia on tourist visas and put to work illegally for a fraction of minimum wages, sometimes living at the workplace in slave-like conditions, often picking fruit, with no way to return home and nowhere to go. While conduct of this type is already attracts criminal sanctions for other reasons, for example, under migration law, JobWatch believes separate criminal offences should also be created in relation to the employment aspect of the conduct.

**Recommendation 12: Separate criminal offences should be created in relation to the employment aspect of conduct that already attracts other criminal sanction.**

JobWatch thanks the Attorney-General for considering our submission.

Please contact Zana Bytheway or John O’Hagan on **[Redacted personal information]** if you have any queries.

Yours sincerely,



**Job Watch Inc**

Per: John O’Hagan

1. Wage theft is used in this submission as an umbrella term to describe all types of employment underpayments. [↑](#footnote-ref-1)
2. Education and Employment References Committee, the Senate, ‘Corporate avoidances of *the Fair Work Act 2009*’ September 2017, [6.52]. [↑](#footnote-ref-2)
3. Bassina Farbenblum and Laurie Berg, October 2018 (*Wage Theft in Silence*). [↑](#footnote-ref-3)
4. Laurie Berg and Bassina Farbenblum, November 2017(*Wage Theft in Australia*). [↑](#footnote-ref-4)
5. *Wage Theft in Silence*, 5. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. *Wage Theft in Australia,* 34-37. [↑](#footnote-ref-7)
8. Sam Langford and Marty Smiley, 'They told me that they could pay me $12': Chinese student speaks out about wage theft’, The Feed (online), 16 October 2018, < https://www.sbs.com.au/news/the-feed/they-told-me-that-they-could-pay-me-12-chinese-student-speaks-out-about-wage-theft> [↑](#footnote-ref-8)
9. Education and Employment References Committee, the Senate, ‘Corporate avoidances of the *Fair Work Act 2009*’ September 2017, [6.27]. [↑](#footnote-ref-9)
10. The Act, s. 557(1). [↑](#footnote-ref-10)
11. Australian Government, *Report of the Migrant Workers’ Taskforce*, March 2019. [↑](#footnote-ref-11)
12. Australian Government, *Australian Consumer Law Review Final Report*, April 2017. [↑](#footnote-ref-12)
13. Anna Patty, ‘Ombudsman admits Calombaris 'contrition payment' may not have been enough’, *Sydney Morning Herald* (online), 23 October 2019 <https://www.smh.com.au/business/workplace/ombudsman-admits-calombaris-contrition-payment-may-not-have-been-enough-20191023-p533mj.html>. [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. Australian Government, *Report of the Migrant Workers’ Taskforce*, March 2019. [↑](#footnote-ref-15)
16. FWA Bill, s789FBA. [↑](#footnote-ref-16)
17. Ibid s. 789FBB. [↑](#footnote-ref-17)
18. Commonwealth, *Parliamentary Debates*, House of Representatives, 21 May 2018, 3858 (Adam Bandt). [↑](#footnote-ref-18)
19. Ibid. [↑](#footnote-ref-19)
20. Ibid. [↑](#footnote-ref-20)
21. Ibid. [↑](#footnote-ref-21)
22. Explanatory Memorandum, *Fair Work Amendment (Making Australia More Equal) Bill 2018*. [↑](#footnote-ref-22)
23. Labour Hire Licensing Act 2017 (Qld). [↑](#footnote-ref-23)
24. Stephen Clibborn and Chris F Wright, ‘Employer theft of temporary migrant workers’ wages in Australia: Why has the State failed to Act?’ (2018) 29(2) *The Economic and Labour Relations Review* 207, 218. [↑](#footnote-ref-24)
25. Labour Hire Licensing Act 2017 (Qld) s 31. [↑](#footnote-ref-25)
26. Australian Government, *Report of the Migrant Workers’ Taskforce*, March 2019. [↑](#footnote-ref-26)
27. Stephen Clibborn, ‘Why Undocumented Immigrant Workers Should have Workplace Rights’ 26(3) (2015) *The Economic and Labour Relations Review* 465, 469. [↑](#footnote-ref-27)
28. Stephen Clibborn, ‘Why Undocumented Immigrant Workers Should have Workplace Rights’ 26(3) (2015) *The Economic and Labour Relations Review* 465, 470. [↑](#footnote-ref-28)
29. Daniel Andrews, *Dodgy Employers to Face Jail for Wage Theft* 26 May 2018 <https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>. [↑](#footnote-ref-29)
30. Daniel Andrews, *Dodgy Employers to Face Jail for Wage Theft* 26 May 2018 <https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>. [↑](#footnote-ref-30)
31. Daniel Andrews, *Dodgy Employers to Face Jail for Wage Theft* 26 May 2018 <https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>. [↑](#footnote-ref-31)