

March 2020

Senate Standing Committees on Economics

By email: economics.sen@aph.gov.au

Dear Secretariat

1. JobWatch Inc (**JobWatch**) welcomes this Senate Committee inquiry into the causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration by employers and measures that can be taken to address the issue.

About JobWatch

2. JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.
3. JobWatch is funded by the Office of the Fair Work Ombudsman, Victoria Legal Aid and the Victorian Government. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).
4. JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:
 - a) Tailored information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (**TIS**);
 - b) Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
 - c) Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
 - d) Law reform work aimed at promoting workplace justice and equity for all workers.

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5. Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 210,000 caller 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.
6. JobWatch currently responds to approximately 12,000 calls per year. The vast majority of our callers are not union members and cannot afford to get assistance from a private lawyer. In order to become clients of the legal practice, workers must have an employment law matter that has legal merit and their cases must comply with the requirements of our funding agreements.

Case studies provided in this submission

7. This submission is based on the experiences of callers to JobWatch's TIS and clients of JobWatch's legal practice. The case studies are already de-identified. Please note that the facts described in the case studies are not findings of a court or tribunal but rather they represent what our callers have told us on the TIS or what our clients have instructed the JobWatch lawyers. Each of the case studies highlights the vulnerabilities endemic to different types of temporary visa holders.

The forms of and reasons for wage theft and whether it is regarded by some businesses as 'a cost of doing business'

8. JobWatch has extensive experience in dealing with queries about wage theft (a term which we use to describe deliberate - not inadvertent or accidental - underpayments of ordinary time wages and of other legal entitlements such as superannuation, annual leave, long-service leave and penalty rates).
9. During the 2018/2019 financial year, we responded to 1,432 callers on the TIS who had a query related to underpayment of wages/other entitlements. This means that 14.6% of our callers during that period talked to us about underpayment of wages. 449 (or 31.35%) of those calls were from migrants (people born outside of Australia). In the same 12-month period, JobWatch's lawyers opened 51 legal practice files that related to underpayment of wages. This means that over 20% of our new clients during that period asked for our

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Employment Rights Information for Workers

assistance in relation to wage theft matters. 78.43% of those files were opened for clients who were born outside of Australia.

10. In JobWatch’s experience, 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. In these employer’s minds, the financial benefits and competitive advantage of illegally reducing employment costs outweighs 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 (**FCCA**).
11. Some of the features of the current law enforcement processes that contribute to this attitude include the following:
 - a. 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 all worked 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, 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 the employer 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 also 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

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Employment Rights Information for Workers

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.

- b. The small claims procedure in the FCCA, which is designed for employees to recover unpaid entitlements of up to \$20,000 through a relatively informal process where legal representation is not necessary, is defective in several ways:
 - i. The current waiting time in Victoria, from when an application is filed to when the hearing is scheduled, seems to have blown out to at least 10 months. This is unsatisfactory.
 - ii. Applicants cannot seek penalties against non-compliant employers.
 - iii. 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 2009 (Cth) (FW Act)*.
 - iv. 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.
 - v. 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 did not 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 FWO, a Compliance Notice was issued to the employer but this was ultimately dropped due to the employer satisfying the

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Employment Rights Information for Workers

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" and they were left with the unenviable option of issuing proceedings against him. Even with JobWatch's offer of assistance, the clients decided not to take their matters to court. Suing him would have required them to personally serve the court documents on him, which was a daunting task. Even if they found him and they managed to get 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.

- c. If the small claims procedure is not used, penalties are available for contraventions of the FW Act, 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 any penalties for non-compliance.
- d. Our law enforcement bodies seem to struggle with inadequate resources and huge work demands. For example, the FWO has the power to impose to prosecute non-compliant employers under the FW Act, but due to its limited resources it chooses to focus on strategic litigation which it considers is in the public interest. 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 work-related scams that affect vulnerable workers (this is probably also the case with the police forces in other states and territories).

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

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Employment Rights Information for Workers

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.

The most effective means of recovering unpaid entitlements and deterring wage and superannuation theft, including changes to the existing legal framework that would assist with recovery and deterrence

12. JobWatch's recommendations for improving our employment law enforcement mechanisms and deterring wage and superannuation theft include the following:
 - a. The FW Act should be amended so as to extend minimum entitlements to all *workers*, not just employees. At the very least, there should be a statutory definition of *employee*, rather than relying on the common law definition of who is an employee. The statutory definition should include a presumption in favour of the employment relationship. This would alleviate the great uncertainty that often surrounds the status of workers, with people unsure about whether they are employees or contractors or some other class of worker. Many dishonest employers play on this uncertainty by, for example, paying workers cash-in-hand or telling workers that they need to get an ABN and issue invoices before they can be paid. Workers in these situations often do not consider themselves employees and accordingly they do not think they have any of the minimum employment entitlements.
 - b. The FW Act should be amended so as to clarify that all *workers* (or *employees*) as defined are entitled to minimum pay and other conditions, regardless of visa status.

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Employment Rights Information for Workers

Case study 1

Pablo was on an international student visa when he started working in a restaurant on a casual basis. He performed various jobs for the same employer, ranging from food service to general maintenance. He was underpaid and was not given payslips or superannuation contributions. In part because of the severe underpayment of wages, Pablo could not keep paying the fees to his education provider and he subsequently lost his student visa. Pablo went onto a bridging visa with no work rights but he continued to work for the same employer who knew about the change in Pablo's visa status. Pablo became homeless and lived for a period in a tent on the employer's premises. The employer gave Pablo irregular cash payments which fell far short of the minimum payments to which Pablo was entitled under the applicable Award.

Case study 2

Adam and Dalia came to Australia on tourist visas from South East Asia. They intended to apply for visas which would allow them to work and which would eventually lead to permanent residency. Both Adam and Dalia eventually found jobs with the same employer; he was offered a permanent contract as a chef and she was offered casual work as a kitchen hand. They were offered sponsorship through a 457 visa and they were asked to start their employment before the visa had been granted. Adam and Dalia worked for three months without work rights. They were not paid at all during this time and sometimes their shifts were in excess of 10 hours per day. They kept working on the promise that when they had secured visas with work rights and tax file numbers that they would be back-paid for this work. They were both eventually dismissed after the couple wrote a letter to the employer noting a number of concerns about their employment.

- c. Underpayment of wages and other employment entitlements should be a strict liability offence. It should be unnecessary to prove that the employer intended to underpay, knew about the underpayment, was reckless or was negligent. Regardless of whether the employer meant to underpay or not, underpaying employers should be fined and the fines should increase in accordance with the amount of the underpayment. One suggested way in which this could work is as follows:
- FWO does an investigation and determines there is an underpayment;
 - FWO issues an infringement notice to the employer specifying its findings, the amount of compensation owed to the employee (underpayment plus interest), the amount of the fine (to be paid to the FWO and/or the community legal centre and/or union, depending on who notified FWO of the claim), the date by which it must be paid and details about how to pay;

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Employment Rights Information for Workers

- If the FWO issues or has issued multiple infringement notices to the same employer, it may charge the employer with an offence, with much higher fines;
 - If FWO charges the employer with an offence, the employer has to go to court to answer the charge;
 - The prosecution has to prove that the FWO's authorised officer believed on reasonable grounds that the employer committed the offence;
 - The employer may also opt to go to court if it elects to have an infringement dealt with by the court instead of paying the fine, for example if the employer wants to argue that it honestly and reasonably made a mistake which it undertakes to rectify within a reasonable timeframe;
 - The employee may also opt to issue legal proceedings without going through the FWO or if the employee disagrees with the FWO's findings.
- d. In the alternative, if the Government is not prepared to make wage theft a strict liability offence, we consider that the current small claims enforcement mechanism needs to be significantly improved.
- e. The small claims provisions of the FW Act should be amended in the following ways:
- i. The maximum amount of claims should be increased to \$100,000.
 - ii. Community legal centres like JobWatch and others with employment law expertise should be given standing in the FW Act to commence enforcement proceedings.
 - iii. Small claims proceedings should allow for accessorial liability (including improved provisions that recognise the responsibility of franchisors and holding companies) and penalties.
- f. The FW Act should be amended so as to vastly increase the level of penalties for breaches of wage exploitation provisions in the FW Act. Currently, penalties for underpaying employees are only a maximum of \$12,600 for individuals and \$63,000 for bodies corporate (the maximum penalties are increased to \$126,000 per breach for individuals and \$630,000 per breach for bodies corporate in matters involving *serious contraventions* of the FW Act). As noted by the Migrant Workers Taskforce, these are significantly lower than the penalties in consumer laws.
- g. The FWO and other law enforcement bodies (including police forces in each of the states and territories) need considerable additional resources. Community legal centres, like JobWatch, who are assisting the FWO to promote compliance with workplace laws and to educate the public about workplace rights and responsibilities, should also be given a considerable

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Employment Rights Information for Workers

funding boost to enable them to properly carry out their services and achieve their objectives. In particular:

- i. The FWO should have an advertising campaign similar to successful campaigns that Australians have seen in recent years, like the one against drink driving and the one against wasting water (eg the ‘Don’t be a Wally with Water’ campaign in Victoria). WorkSafe Victoria also appears to have a successful advertising campaign about ‘More Inspectors, More Inspections’. The FWO urgently needs to launch an advertising blitz, warning employers of the actions they face if they don’t comply with the FW Act.
- ii. The FWO should hire more inspectors and more lawyers.
- iii. Community legal centres with employment law expertise like JobWatch should also be given additional funding to hire more staff. It is absolutely unsatisfactory that workers who try accessing JobWatch’s TIS are often unable to get the assistance they require because JobWatch – which assists workers across three Australian States (Victoria, Tasmania and Qld) and whose callers are often referred by the FWO and other statutory agencies – only receives approximately \$450,000 per annum of Commonwealth Government funding. If the Government is serious about tackling the nation-wide problem of wage theft, it must:
 - Recognize the important role played by community legal centres in this space; and
 - Adequately fund our organizations so that we may work in partnership in the areas of education and enforcement.

Case study 1

Carlos is a working holiday maker from South America. He has been working as a permanent part-time cashier in a supermarket for the last seven months and throughout this time he has been on 462 working holiday visa. Last week, Carlos’ supervisor took him aside and informed him that he needed to be dismissed because his particular visa precludes him from working for the same employer for longer than six months. Carlos explained to his supervisor that he had received his second working holiday visa two months previously, as a result of having completed his 88 days of specified regional work. Being granted this second working holiday visa effectively ‘re-sets’ the six-month limit, meaning that Carlos could have continued to work with his employer for a further six months without being in breach of his visa conditions. Carlos showed his employer the information on the Department of Home Affairs website that

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Employment Rights Information for Workers

explained this, but his supervisor was adamant that he needed to abide by the employer's policy not to employ a working holiday maker for longer than six months and accordingly he dismissed Carlos with immediate effect and without any pay in lieu of notice. JobWatch is currently assisting Carlos with an unfair dismissal claim.

Case study 2

Maria arrived in Australia on a student visa to study hospitality. As part of her course she was required to complete 400 hours of work per semester in the hospitality industry. She found a job as a casual sandwich maker/waitress at a café. She agreed to work for \$18 per hour on a cash-in-hand basis initially but after one week she asked to be put 'on the books' as she needed to show pay slips to her course provider to prove her hours. During her employment Maria only received one pay slip and it contained incorrect information. After Maria resigned, the owner withheld her wages, claiming that she had not given enough notice. JobWatch advised Maria that she had been underpaid during her employment, that her employer had failed to make the requisite superannuation contributions and that the employer had failed to provide her with accurate pay slips. JobWatch filed an application in the Small Claims division of the Federal Circuit Court of Australia on Maria's behalf. The employer paid the outstanding wages and superannuation before the hearing date.

Case study 3

Alan is a young man who came to study in Victoria on a student visa. After finishing his three-year Bachelor's degree, he tried hard to find a job in his chosen profession but he was repeatedly told that employers wanted previous work experience or, at least, employees who were permanent residents. He eventually met a man from his same ethnic background who promised him a job in his chosen field and a permanent visa after two years' work. This man seemed to operate a labour hire business and he directed Alan to work both for him and for an external company who subsequently employed Alan on a 457 visa. Alan paid both this man and the company a substantial sum of money over a period of about two years. His wages and superannuation were paid to him out of the money he paid to them. JobWatch is assisting Alan with claims that his employer and a number of accessories contravened the FW Act. Legal proceedings in this matter will be very resource-intensive.

- f. In cases of employer insolvency, the Fair Entitlements Guarantee Scheme (FEG) should be extended to non-citizen workers and it should cover superannuation entitlements.

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We thank the Committee for considering JobWatch's submission on this important issue and we would welcome the opportunity to answer any questions or provide more details on any aspect of our recommendations. Please do not hesitate to contact Gabrielle Marchetti by email on gabriellem@jobwatch.org.au or by phone on 03 9662 9458.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "G Marchetti".

Gabrielle Marchetti
Principal Lawyer
JobWatch Inc

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