

SUBMISSION

SDA Submission to Senate Inquiry into Unlawful Underpayment of Employee's Remuneration

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INTRODUCTION

The Shop Distributive and Allied Employees Association (SDA) represents over 200,000 workers in the retail, fast food and distribution sectors in Australia. The SDA welcomes the Senate's establishment of the Inquiry into the *Unlawful Underpayment of Employee's Remuneration*.

While the growing issue of wage theft has become a policy priority of some state governments, there has been an insufficient lack of policy progress at the federal level. While this submission notes and welcomes certain initiatives by the Federal Government in combatting underpayment, it argues that more can and should be done.

Wage theft is a growing scourge that costs not only its direct victims, but Australia's economy, significantly. While the SDA's first and foremost concern remains with the direct victims of wage theft – workers across all industries that find their personal economic wellbeing jeopardized by underpayment – the SDA's concerns extend to the broader economic impact of continuing underpayment.

Many SDA members work in industries vulnerable to wage theft and impacted by wage theft's macroeconomic impacts. Retail and fast food jobs are heavily dependent on the broader Australian community being able to freely participate in consumption. The challenges facing retailers across Australia are many, including the stubbornly low rate of wage growth that has impacted gross demand across the Australian economy for over a decade. Wage theft is an avoidable and unnecessary addition to the challenges facing Australia's retailers. The less money workers' have in their back pockets, the less money they are likely to spend in their local economies. This dynamic place downward pressure on the wages and conditions of the retail workforce the SDA represents.

Of course, not every incident of underpayment is nefarious by nature – the SDA understands the nuanced nature of the issue. There are cases where employers make mistakes, and at times voluntarily redeem themselves after those mistakes occur. At the other end of the spectrum, as the (2015) 7-Eleven case shows, deliberate and systematic underpayment can be significant. Regardless of the level of intent, as this submission notes, wage theft remains too prevalent. Further, many of the arguments used to justify regular underpayments across various industry groups are made on spurious grounds. The SDA rejects the notion, for example, that award complexity is to blame for underpayment. These arguments are red herrings and serve as a distraction from the meaningful policy levers the Commonwealth can pull to ensure wage theft is eradicated.

While not every incident of underpayment is driven by nefarious intent, every incident of underpayment does carry economic consequences – for its direct victim, and for every Australian, in the form of diminished economic activity. This submission puts forward SDA’s estimates of this economic impact, finding that unchecked wage theft costs workers billions of dollars every year, constrains GDP growth, and is a direct contributor to poor retail spending seen in recent years.

Further, the widespread nature of superannuation theft ensures a delayed economic impact: for every dollar of superannuation a worker isn’t paid, that deficit accrues over time. Today’s super underpayment hurts Australia’s future economy – effectively, it is a form of ‘intergenerational theft’, as Australia’s future economy will be impacted by diminished superannuation holdings, increasing pension costs and potentially constraining consumption.

Ultimately, while wage theft represents a significant economic cost, it is fundamentally unfair. Australians at work should never be exploited, never be underpaid, and never feel powerless in resolving issues that affect their quality of life. The current framework for addressing wage theft at a federal level is inadequate. This submission puts forward key recommendations that the Commonwealth should explore in order to eliminate wage theft from Australian workplaces: aligning superannuation with wages; restoring trade unions’ enforcement and inspection powers; responsibly implementing criminal penalties for worst-case offenders; increasing financial penalties for wage theft offenders; and the establishment of a new small-claims jurisdiction that eliminates access-to-justice challenges for many wage theft victims.

Wage theft can be eliminated, and the Federal Government, working collaboratively with industry, workers and their representatives, and state governments, has the levers at its disposal to ensure that aim is achieved.

The SDA thanks the Committee for the opportunity to submit to this important inquiry.

KEY FINDINGS

Finding 1:

Wage theft is occurring across the economy, not just amongst vulnerable groups.

Finding 2:

Wage theft likely impacts at least 1 in 10 Australian workers, or over 1 million Australians.

Finding 3:

Under the most conservative estimates, regular wage theft costs workers at least \$1 billion in direct wages every year, before considering superannuation.

Finding 4:

The underpayment of superannuation is around \$5 billion per year. Over 10 years, this compounds to a \$30 billion loss in retirement savings.

Finding 5:

High-profile cases of wage underpayment in the retail and fast food sectors alone have cost workers at least \$565 million.

Finding 6:

Under the most conservative estimates in this submission, it is expected that wage theft is constraining GDP growth by 0.12 per cent per year. This would rise to over 1 per cent under less conservative wage theft scenarios.

Finding 7:

The Commonwealth has numerous policy levers at its disposal to end wage theft in Australia. A nationally consistent approach is vital to bringing an end to the scourge.

Finding 8:

Existing policy settings do not adequately deter wage theft. Criminalisation may be introduced for worst-case examples of wage theft, but criminalisation cannot come at the expense of complementary measures aimed at expediting repayments for wage theft victims, and alleviating access to justice issues.

KEY RECOMMENDATIONS

Recommendation 1:

Align the payment of superannuation with wages.

Recommendation 2:

Increase workplace audits by restoring trade unions' inspection and enforcement powers, and adequately resourcing the FWO.

Recommendation 3:

Consider a criminal penalty for severe cases of deliberate and systematic wage theft.

Recommendation 4:

Increase financial penalties for wage theft.

Recommendation 5:

Establish an affordable, easily accessible small-claims jurisdiction in which wage theft victims can seek justice.

Recommendation 6:

Ensure whistle blowers' visa status isn't threatened when blowing the whistle.

PART 1: DEFINING WAGE THEFT

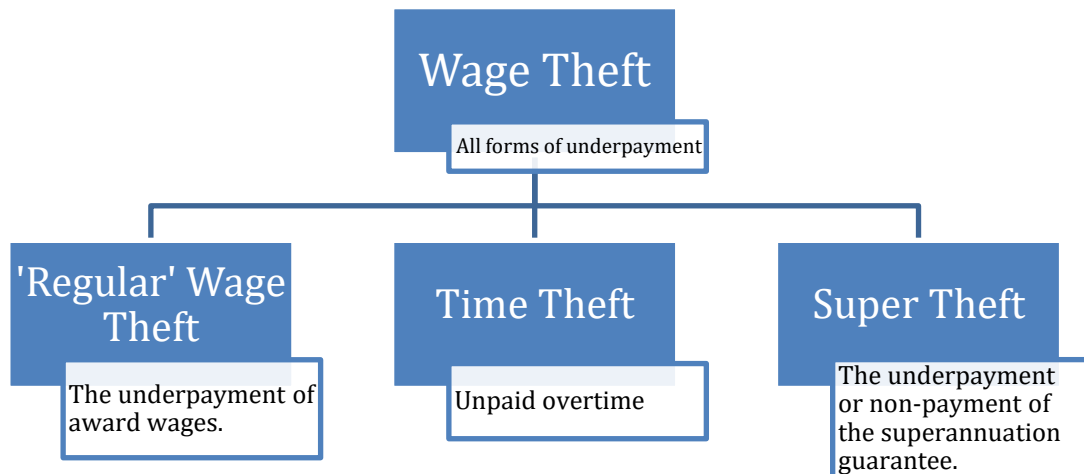


Figure 1: The Categories of Wage Theft

'Wage theft' is an issue affecting hundreds of thousands of Australian workers and the economy. While its impacts have been directly felt by Australian workers for too many years, the term 'wage theft' has entered the Australian lexicon in recent years following regular news stories exposing some of the worst cases of worker exploitation in memory. In 2015, 'wage theft' became a household term after the 7-Eleven scandal, which saw workers at 7-Eleven franchises underpaid by thousands of dollars, often in highly coordinated 'cash-back' schemes designed to skirt federal wage laws¹. But while the 7-Eleven scandal captured the public's attention, underpayment has been growing as a serious problem for some time across Australia and continues to be so.

The term 'wage theft' is often interpreted in different ways. The SDA is conscious of the fact that not every single case of underpayment constitutes deliberate and systematic theft. At times, process errors by employers who don't take the trouble to check to see workers not paid their entitled wages or superannuation. There is a clear distinction between cases of wage theft as scandalous as the 7-Eleven incidents, and accounting errors by business owners. But in either case, there is a direct cost to those being underpaid, and a broader economic impact. In defining 'wage theft', the

SDA looks at the growing literature on the issue. Typically, the term 'theft' is applied to cases of gross negligence, or deliberate underpayment.

In *Wage Theft, Economic Distress: The Impact of Wage Theft on Queensland's Workers and Economy*², The McKell Institute found that:

"Wage theft can take a number of different forms but generally relates to employers deliberately not paying employees their full entitlements including superannuation, award and penalty rates, leave and other employee entitlements. Wage theft should be distinguished from accidental errors, where an employer makes a genuine one-off mistake in the provision of entitlements. Wage theft occurs when the employer knows, or should be expected to know, of the employees' rightful entitlements and yet does not afford the employee these full entitlements."

Additionally, the report identified ways in which wage theft occurs, including:

1. Employees needing to "pay an upfront deposit" for a job
2. Employees needing to pay money back in cash to employers after receiving wages
3. Denying approval for paid professional development leave (an award entitlement)
4. Pressuring workers not to record overtime
5. Not paying overtime when it is claimed
6. Not paying or underpaying superannuation
7. Non-provision of meal breaks
8. Incorrectly classifying workers
9. Unpaid redundancies
10. Working for "free" whilst training
11. Not paying staff to attend mandatory staff meetings
12. Payment in the form of food and beverages, not wages".

Regular Wage Theft: Unpaid Award Wages

There are myriad ways in which workers are not paid their entitlements, but broadly, wage theft comes in three distinct forms: regular wage theft, time theft, and super theft. For many workers in Australia – particularly vulnerable workers, like younger employees and migrant workers – wage theft manifests in the simple form of a payment less than what is mandated by law. Too often, employers exploit workers and simply pay them considerably less than the award wage. Often, this occurs through paying staff cash in hand, or simply under-recording the hours worked by staff members. In many ways, this form of wage theft is most explicit and most brazen.

It should be noted that, while businesses usually inform themselves of their obligations under tax laws, many business's do not put in the same due diligence when it comes to informing themselves of their obligations under employment law.

Time Theft: Unpaid Overtime

While wage theft is often considered simply a problem of failing to meet basic award obligations, it also includes underpayment. Unpaid overtime is simply understood as 'overtime that is not directly remunerated'³. It is a growing and significant problem in the Australian labour market that has been documented for decades, and 'appears to be as common as paid overtime'⁴.

In 2018, the Australia Institute published its 2018 update to *Excessive Hours and Unpaid Overtime*⁵. Researchers surveyed 1459 respondents, 60 per cent of whom were employed when surveyed. While many of the workers were eager to work more hours, reflecting the challenge of *underemployment* in the Australian economy, many reported already working many hours of unpaid overtime in their current job. The Australia Institute's survey revealed that, on average, workers were working 312 hours of unpaid overtime each year: the equivalent of 8 weeks work.

Full time workers reported the most unpaid overtime, at over 7 hours per week. The Australia Institute estimated that, economy-wide, the value of unpaid overtime was **\$106 billion in unpaid overtime**. Such a significant underpayment represents a lost economic opportunity, and directly impacts employment opportunities, including for the workers' represented by the SDA. In tackling underpayment and unpaid overtime, the government would be ensuring more money is delivered to workers' back pockets, ultimately boosting retail spending and economic activity.

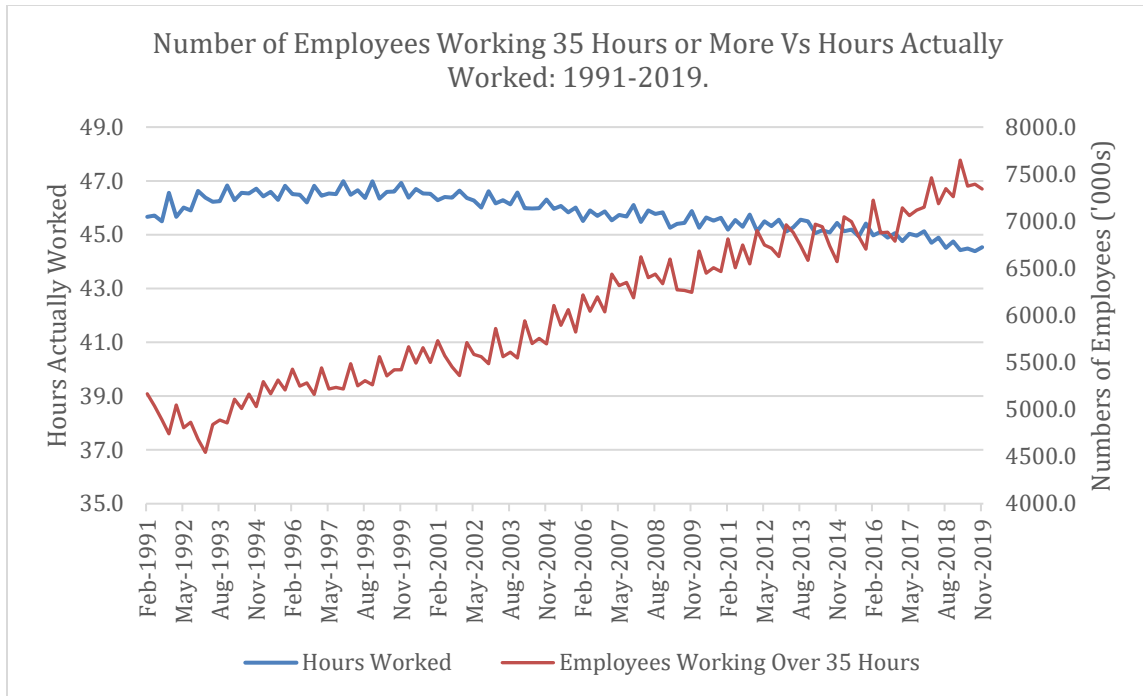


Figure 1: Number of Employees Working 35 Hours of More vs Hours Actually Worked on Average. Source: ABS Cat 6291.0.55.003⁶

Super Theft: Unpaid Superannuation

Action 1: Aligning the payment of superannuation with wages

The Commonwealth should explore legislation requiring employers to align superannuation payments with regular wage payments.

The underpayment of superannuation is among the most widespread forms of underpayment. In its submission to the Senate inquiry into the superannuation guarantee, Industry Super Australia estimated that:

- Unpaid superannuation totaled around \$3.6 billion annually
- Around 30 per cent of Australian workers entitled to superannuation weren't paid their due superannuation
- That, on average, workers who weren't their due superannuation missed out on around \$1500 annually.
- That by 2024, the cumulative unpaid superannuation figure would reach \$66 billion.

Today, employers seeking to lower their overall labour costs are regularly contravening the superannuation guarantee, exploiting the nature of superannuation payments and, at times, employees' lack of certainty over their rights.

This is an easier form of wage theft, is arguably costing workers more than other forms of wage theft but is treated largely as a modest and redeemable infringement by employers. The quarterly nature of superannuation payments provides an increased likelihood of both deliberate and unintentional superannuation underpayments. While the mathematics behind superannuation payments is simple, workers themselves often don't monitor with precision the quarterly contributions to superannuation as they may their weekly, fortnightly, or monthly income. While superannuation payments are included in many pay slips, the lack of alignment between superannuation payments and regular wage payments makes room for mistakes and bad behaviour to occur.

'Super theft' disproves arguments about complex awards driving wage theft

As this submission has noted, the complexity of awards is often cited by employer groups to excuse incidents of underpayment. The argument is that, because the Award system has a modest degree of detail, employers should be forgiven for failing to comply with those details. Employers seem to have no difficulty finding and applying the junior rates in Awards such as those in the General Retail Industry Award which are:

- Under 16 years = 45 per cent (of the adult rate)
- 17 years = 60 per cent
- 18 years = 70 per cent
- 19 years = 80 per cent
- 20 years < 6 months = 90 per cent
- 20 years > 6 months = 100 per cent.

The SDA has always had questions about this 'complexity' argument, particularly as higher rates of wage theft are seen when exploring the underpayment of superannuation. Complying with the superannuation guarantee is simple for employers: the super guarantee of 9.5 per cent of wages of casual, part-time and full-time staff, as well as some eligible contractors, is well understood. The mathematics of identifying the sum of superannuation for each employee is straightforward, too. Nevertheless, superannuation is underpaid at a rate much higher than regular award wages.

As this submission has noted, the cost of *regular wage theft*, that is, the underpayment of award wages before superannuation is considered, is costing Australian workers, even in the most conservative estimates, over \$1 billion annually. From available data, however, it is clear that superannuation underpayment is costing workers much more than that.

The widespread nature of superannuation underpayment suggests that the solutions to the overall underpayment challenges facing Australian workers is not an oversimplification of the existing awards system: the superannuation underpayment evidence suggests that, even under the most simplistic awards framework, employers would still underpay. Instead, the Government's responsibility should be in disincentivizing employers from nefarious activity in the first place, through a combination of stronger oversight, aligning superannuation payments with regular wage payments, empowering and educating the workforce, and stronger penalties for repeat offenders.

Part 2: Wage theft in SDA-covered industries

The SDA regularly responds to member cases. Recent case studies of wage theft in the retail sector demonstrate the varying nature of wage theft, and its capacity to occur even in large franchises with well-resourced, sophisticated human-resources systems in place. The SDA has observed incidences of wage theft for every category of worker – whether they're contractors, casuals, or part time and salaried staff – across both frontline positions and corporate roles across the sector. In recent years, stories of major underpayment scandals have emerged within SDA covered sectors. Accumulatively, these high-profile cases have cost workers in the retail and fast food sectors at least \$565 million.

The following highly publicised case studies demonstrate the extent of underpayments in the retail and fast food sectors.

Franchise/Business	Nature of Underpayment	Amount Underpaid
Super Retail Group	In February 2019, Super Retail Group, which owns brands such as BCF, Macpac, Rebel, and Supercheap Auto, announced it had underpaid workers the tune of \$43 over a period of six years. Super Retail Group identified the widespread underpayment after a 'comprehensive review of employment arrangements across the business'. This figure was revised upwards to \$61 million in February 2020 ⁸ .	\$61,000,000
Wesfarmers	Wesfarmers, the country's 'largest retail conglomerate', revealed in 2019 it had collectively underpaid workers by \$15 million over a period of 9 years. While the incident was self-reported, the Fair Work Ombudsman admonished Wesfarmers due to the extent of the underpayment.	\$15,000,000
Bunnings	Bunnings were found to have underpaid superannuation entitlements to a large cohort of part-time workers. ⁹	\$6,000,000
Sunglasses Hut/Luxottica	The retailer identified the underpayment of 620 staff between 2010 and 2016, totally \$2.3 million. ¹⁰	\$2,300,000

7 Eleven	7Eleven has been found to have underpaid significant number of workers since it was first exposed in a major wage theft scandal in 2015. Despite the national attention 7Eleven has faced, the FWO continues to report on individual franchises underpaying their staff ¹¹ .	\$150,000,000
Michael Hill Jewellers	The jewellery chain identified a \$25 million under payment over a 6-year period. The company's CEO was forced to address the ASX to alleviate investor fears after the underpayment was exposed, demonstrating the broader impact on shareholder confidence that underpayments can have ¹² .	\$25,000,000
Woolworths ¹³	Woolworths identified the underpayment of nearly 6000 salaried staff over a 9-year period. Woolworths have put in place a comprehensive remediation process including effected employees and the union. The figure, first reported at around \$300 million, was adjusted upwards to near \$400 million in February 2020.	\$395,000,000
Lush	Lush Cosmetics underpaid thousands of workers a total of \$2 million. Some incidents were small, but others were underpaid between \$5000-\$10,000	\$2,000,000
MOS Burgers ¹⁴	An investigation by the Fair Work Ombudsman found MOS Burgers had misclassified workers, leading to over \$1 million in underpayments. 285 workers were impacted, one having been underpaid almost \$32,000.	\$1,100,000
Subway	Various Subway franchises have regularly been identified to be underpaying their staff. The FWO cites numerous cases across the country of individual franchises 'failed to pay minimum wages, failed to pay entitlements like casual loadings and holiday and overtime rates, failed to issue proper payslips and did not keep proper employment records' ¹⁵ .	>\$200,000
Coles ¹⁶	In February 2020. Coles announced approximately \$20 million in underpayments of managers in its supermarket and liquor divisions over a period of 6 years.	\$20,000,000
Target	In February 2020, Target announce a \$9million provision for underpayments	\$9,000,000
Total		\$686,600,000

SDA members wage theft case studies

JACK'S STORY

Jack* (name changed) is a trolley collector, employed through a subcontractor that distributes labour to a major supermarket chain in regional New South Wales.

Jack's story of underpayment typifies the types of nefarious behaviour that can occur in the sectors in which SDA members work.

When Jack commenced his job collecting trolleys, the subcontractor – his direct employer – refused to provide him with payslips. For two months, he was paid \$10 an hour cash in hand, which soon became \$14 cash in hand per hour. Jack has never received a payslip, has never had tax paid on his behalf, and has never received superannuation contributions from his direct employer.

After repeated attempts to rectify the situation with his direct employer, Jack was unsuccessful. He then contacted the supermarket chain at which he was working for the subcontractor. The supermarket chain then conducted an audit. Once becoming aware of the audit, Jack's direct employer coerced him to sign payslips that disproved his claims to being incorrectly paid. He was also coerced to validate his employers' claim that he had only been employed for one month, not the actual period of time he had been working for the employer.

It became evident to Jack that his employer was engaging in similarly behaviour with other trolley collectors.

Jack's hourly award rate should be \$23.50.

Jack feared raising the case because he feared losing his job. He engaged the SDA, which assisted Jack in receiving \$18,000 in back pay.

Tony and Annabelle's Story

Tony & Annabelle* (names changed) were working for a small supermarket in the Northern Territory.

A husband and wife, Tony and Annabelle have just relocated from another country and were not fluent in English.

While working at the small supermarket, Tony and Annabelle were paid a flat rate, irrespective of the number of hours they worked, and the overtime they were asked to work.

Despite regularly working during periods which would attract penalty rates, such as weekends, after 6pm on weeknights, and public holidays, Tony and Annabelle would continue to be paid the same hourly rate.

Often, Tony and Annabelle reported not being paid for all the hours they worked – often exceeding 60 hours per week, hours of which were subject to overtime pay.

After approaching the SDA, it was apparent that Tony and Annabelle had, collectively, been underpaid \$72,562.46 since they had begun working at the supermarket.

The SDA, through its negotiations with the employer, ensured the employer would reimburse Tony and Annabelle the full amount in instalments over time. Both Tony and Annabelle have now recovered their entitled backpay.

SOURAV'S STORY

Sourav was a trolley collector working for a sub-contractor at a major supermarket chain in South Australia.

A working visa holder, Sourav's trolley collecting job was his first occupation in Australia. He was employed on a casual basis.

Sourav was working to a roster where he worked 7 days a week for a total of 54 hours per week. He was told to sign in and out of his shifts on an app, but his employer would regularly ask him to sign in as a *different employee* for particular shifts.

Sourav received pay from two different sources. He would be paid part of his wage from his employer, and the remainder directly from his manager's personal bank account. Payslips were rarely provided and were typically inaccurate. It became evident, when Sourav's case was brought to the SDA, that he had been significantly underpaid for an extended period of time.

The SDA raised the matter with the supermarket company which had solicited the services of Sourav's direct employer. It was then calculated that Sourav had been underpaid over \$11,000 since he began working for the contractor.

Once this issue was raised, Sourav no longer received any shifts from his employer.

After some time, the contractor agreed to repay Sourav the full amount he was entitled to, and the supermarket company terminated its contract with the contractor.

There are now concerns that the contractor will 'phoenix' and declare insolvency and void its responsibility to pay any damages or outstanding monies.

Ryan's Zombie Agreement Underpayment

Ryan is a fast food worker from Sydney working part time in a major fast food franchise.

Ryan was working as a casual during university, earning around \$20,000 per year.

Ryan was working under an enterprise agreement which had been in place at his place of employment for over a decade. Accordingly, his hourly rate was significantly less than the rate he would be paid were he working under the Fast Food Industry Award 2010.

It is estimated that, over the course of a year, Ryan is being paid at least \$1,500 less than he would have earned on the appropriate award.

Ryan is one of many workers in the same franchise that has been significantly underpaid over an extended duration. In one case, another worker is estimated to have been underpaid \$11,000 over three years but was unable to recover monies from their past employer because the Franchisee deregistered.

More is needed from Government

In 2016, the Federal Government commissioned the *Migrant Workers Taskforce*, an important examination of the exploitation of migrant workers led by Professor Allan Fels. Its findings, delivered to the Attorney General in 2019, are an invaluable contribution to the evidence base on wage theft. The SDA acknowledges the Federal Government's 'in principle' support for all 22 recommendations made by the taskforce and want to work with the Federal Government to ensure those recommendations are implemented and achieve the desired outcomes.

This submission also notes the passage of the *Protecting Vulnerable Workers* legislation in 2017. The 2017 legislation was an important step forward. It enhanced penalties for 'serious contraventions' and a failure to record-keep, and allowed the FWO to exert more investigative power. These steps, however, failed to implement deterrents sufficient to end wage theft in Australia. The legislation increased fines for systematic contraventions to \$12,600, with a more specific 'serious contravention' clause potentially resulting in a \$126,000 fine. Any increase in fines is welcome, but it is the SDA's perspective that these fines do not go far enough. Increasing fines without increasing the chance of being caught is meaningless. The right of industry unions to conduct spot checks on payments must be restored. At the same time, self-reporting by businesses also needs to be encouraged.

This submission further notes the Federal Government's 2019 proposals to criminalise wage theft at a Federal level, in response to the recommendations handed down by the Fels report¹⁷. The acknowledgement by the Federal Government that 'worker exploitation' is indeed a criminal action is valid. It is vital that any legislation that criminalises wage theft, however, does so in a way that does not make it harder for workers to recover their underpayments.

Any criminalisation bill should be paired with a commitment to:

1. Establish a low-cost small claims jurisdiction with easy access, and a minimum of legalese.
2. Restoration of industry union inspection and enforcement powers.
3. An increase in financial deterrents that dissuade any occurrences of wage theft that might not be severe enough to warrant criminal prosecution in the eventual legislation.

The SDA believes that the pursuit of effective and timely recovery of workers' unpaid wages should be the focus of the system, with criminal proceedings available for the worst cases of deliberate and systematic wage theft.

The SDA looks forward to working with the Federal Government to ensure such legislation is in the best interests of SDA members, retail workers, and the Australian workforce more broadly.

Part 3: Who is impacted by wage theft?

Wage theft directly and indirectly impacts effectively all Australians. Its direct impacts are felt acutely by vulnerable workers, such as migrant workers, young workers, and workers in highly transient industries. But examining the data collected by the Fair Work Ombudsman, it is clear that wage theft occurs to varying degrees in all industries in Australia. Industries such as construction, as well as white-collar industries, often see high rates of underpayment, while the underpayment of superannuation, particularly for salaried workers, remains prevalent economy wide.

The 'Wage Theft in Australia' report¹⁸

"For government, [the extent of wage theft] demands examination of levels of resourcing required to address the scale of non-compliance, and consideration of specialised programs and infrastructure to prevent and remedy wage theft among temporary migrants" – Berg & Farbenlum, 2017.

Berg and Farbenlum's 'Wage Theft in Australia: Findings of the National Temporary Migrant Survey' is a landmark contribution to the wage theft evidence base. Released in 2017, Berg & Farbenlum's research surveyed over 4000 temporary migrant workers across Australia and found that cohort of the Australian workforce acutely impacted by exploitation. The authors surveyed '4,322 temporary migrants across 107 nationalities...working in a range of jobs in all states and territories'¹⁹. The results were shocking to many observers. The authors found that:

- Around 30 per cent of survey participants earned \$12 per hour or less – around half the minimum award rates in the jobs worked.
- The lowest paid jobs tended to be in cafes, restaurants and takeaway shops.
- 'Large scale wage theft was prevalent across a range of industries, but the worst paid jobs were in fruit and vegetable picking and farm work'.
 - o 1 in 7 temporary migrants earned \$5 per hour 'or less'.
- Non-English speaking workers were typically the most exploited.

Against expectation, the authors found that a majority of temporary migrant workers in Australia 'knew they were receiving less' pay than they were entitled to, but felt powerless to intervene. Often, this was because of fears that their visa status could be called into question were they to raise the alarm and inform authorities of their employer's malfeasance. This highlights the need for whistle-blower protections in legislation aiming to address wage theft.

The 'Migrant Workers' Taskforce'²⁰

"Underpayment of migrant workers is certainly not a new problem. It has not recently emerged, but instead it has been a feature of some sectors of the Australian labour market for years" – Migrant Workers Taskforce ²¹

In 2016, the Government commissioned Professor Allan Fels to lead the Migrant Workers Taskforce, a major report that would explore the nature of underpayment amongst Australia's most vulnerable worker cohort. The Taskforce also identified that there are real data challenges associated with tracking cases of exploitation. It found that:

"There is a need for more data to be collected and published on the employment characteristics of unsponsored temporary visa holders, but this is constrained by methodological challenges and by resource constraints."²²

However, despite data challenges, the Migrant Worker Taskforce was steadfast in highlighting the severity of worker exploitation amongst temporary migrant workers, which constitute 11 per cent of the Australian workforce.

Young Workers Center Surveys

A Young Workers' Center analysis tabled the extent of wage theft from Young Workers' Center surveys and a collation of Fair Work audits. The YWC found:

- 1 in 3 'young retail workers surveyed' were working for less than the minimum wage under the Retail Award.

- '46 per cent of restaurants, cafes and catering businesses, 47 per cent of takeaway food businesses, 20 per cent of accommodation and bar businesses were responsible for wage and monetary contraventions'.
- 84 per cent of fast food businesses 'were responsible for some type of underpayment'.
- 1 in 4 international students worked for \$12/hour or less.
- 1 in 3 backpackers surveyed worked for \$12/hour or less²³.

YWC's numbers are an alarming exposition of the extent to which younger workers are being exploited.

"Our current system of enforcing our wage laws...is failing to drive compliance or deterring employers from engaging in breaches of our laws". – Young Workers Center²⁴

PriceWaterhouse Coopers Estimates

PriceWaterhouse Coopers has conducted a major estimate of the extent to which wage theft is impacting the Australian economy²⁵. In its estimates, PwC highlighted that construction workers were most at risk industry-wide, with an estimated \$320 million in workers' wages being underpaid each year in that industry. Overall, PwC estimated that as much as \$1.35 billion wages were underpaid each year throughout the economy.

McKell Institute Estimates

The McKell Institute, in a series of 2019 reports, explored the issue by utilising the FWO's publicly available audit data to identify the extent to which wage theft is likely occurring across the Australian economy. Utilising publicly available data from the FWO's workplace audits, the Institute estimated the occurrences of wage theft in each industry and subsector in two reports focusing on Queensland and South Australia in the lead up to inquiries in those states. It found that approximately 1 in 5 workers in each of those states are likely victims of wage theft to varying degrees. In the McKell Institute's *Ending Wage Theft (2019)*, it further collated the FWO audits to produce the following table, which demonstrates the likely percentage of wage theft

victims in each labour subsector. Concerningly, the data demonstrates that wage theft is not only happening at high levels in industries known to be vulnerable to the practice, like hospitality, but across the whole labour market:

McKell Institute collation of FWO audits shows prevalence of wage theft

<i>Author(s)</i>	<i>Year(s) conducted</i>	<i>Sample size</i>	<i>Wage comparison</i>	<i>Prevalence of wage theft</i>		<i>Survey of...</i>
<i>Nyland et al.</i>	2005	200	15.00	58.1	per cent	International students
<i>Campbell, Boese &</i>	2014-2015	21	21.00 (Award) ²⁶	81.8	per cent	International students
<i>Tham Clibborn</i>	2015	1,433	17.29 (NMW)	60	per cent	International students
<i>Berg & Farbenblum</i>	2016	4,322	15.00	46	per cent	Temporary migrant workers
<i>Young Workers Centre</i>	2016	1,024	17.70 (NMW)	19.7	per cent	Young (15-30) workers
		220	20.79 (Award)	36.8	per cent	Young (15-30) retail workers
<i>Hospo Voice</i>	2017	624	19.53 (Award)	76	per cent	Victorian hospitality workers
<i>UnionsACT</i>	2017	260	n/a	76	per cent	ACT young workers

Data compiled by The McKell Institute, used with permission.

The below table notes a number of large surveys conducted by various research groups since 2005 on the issue of underpayment. Each of the below projects focused on vulnerable, or at-risk groups, such as international students, young workers, and migrant workers.

Wage theft impacts every Australian indirectly

While those directly experiencing wage theft are the worst impacted, the reality is that wage theft affects all Australians in the form of its impact on wage growth, and its impact on economic activity. The more prevalent the occurrence of wage theft, the more downward pressure is placed on wages throughout the economy. And the impact on aggregate demand, as explained in Part 3 of this submission, negatively impacts economic activity. This in turn impacts State and Commonwealth Government revenue. It is in all Australians interests that wage theft, wherever it occurs in the economy, is eradicated.

Part 4: The determinants of wage theft

Wage theft is ultimately the responsibility of employer indiscretion, or wilful malpractice by an employer. However, in addition to the behaviour of the minority of employers wilfully engaging in wage theft, it is important to look at the determinants of the environment in which wage theft is allowed to occur. It is clear to the SDA that, through a combination of the constrained capacity of trade unions' to inspect workplaces and enforce compliance, the diminished capacity of the Fair Work Ombudsman to intervene in wage theft cases, and insufficient penalties have created an environment in which wage theft is increasing in prevalence and severity.

There is an historic lack of oversight in the workplace

"The number of inspections conducted by the inspectorate has dramatically declined from an average of 25,602 a year during the first Arbitration Inspectorate to just over 5,000 under the Fair Work Ombudsman. While this trend began prior to the establishment of the FWO, the fact is that the risk of getting caught committing wage theft is now lower than it was in the 70s and 80s, despite advances in technology and simplifications to the industrial relations system." – The McKell Institute

One of the primary challenges in combating wage theft is the lack of enforcement, deterrents and oversight in places of employment. While Trade Unions are best placed to ensure both employers and employees are cognisant of their responsibilities and rights, the Fair Work Ombudsman (FWO) is the body responsible with enforcing workplace laws in Australia.

Between 2009-2018, the FWO completed on average 5266 individual workplace inspections or audits per year. The majority of these inspections occurred during audit campaigns focused on industries where underpayment is prevalent. There are approximately 880,000 businesses with at least one employee in Australia²⁷.

<i>Number of businesses with employees</i>	<i>Average number of FWO inspections annually, 2009-2018</i>	<i>Chance of business being inspected in a given year</i>
877,774	5266	0.59 per cent.

Given these numbers, the average business in Australia has only a 0.59 per cent chance of being inspected, unless employees raise an alarm with their union or directly with the FWO. This lack of enforcement breeds an environment in which well-meaning businesses often won't be alerted to continued underpayment, and businesses intentionally engaging in wage theft have a small chance of being identified, let alone prosecuted.

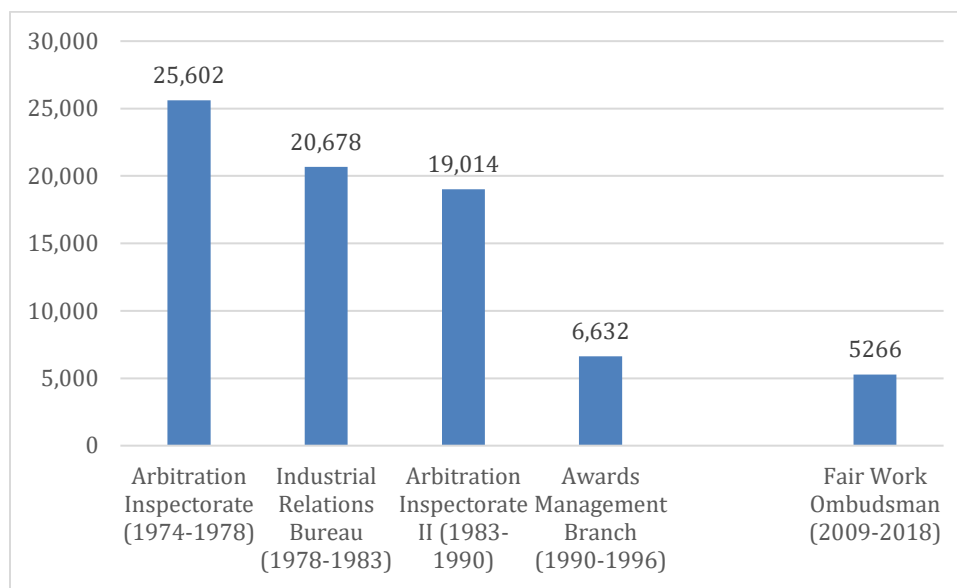


Figure 2: Number of Workplace Inspections under Various Regimes: 1974 to 2018²⁸

Migrant Worker Taskforce called for more FWO resourcing

It is important to note that calls to increase resourcing of the FWO are not unique. The Government's own Migrant Workers Taskforce explicitly highlighted the funding shortfall in its final report to Government in March 2019. Recommendation 10 of the taskforce called on the Government to 'consider whether the Fair Work Ombudsman requires further resourcing, tools and powers to undertake its functions under the *Fair Work Act 2009*'. It then argued that additional funding should be used to explore (emphasis added):

1. "Whether vulnerable workers could be encouraged to approach the Fair Work Ombudsman more than at present for assistance
2. The balance between the use of the Fair Work Ombudsman's enforcement and education functions

3. Whether the name of the Fair Work Ombudsman should be changed to reflect its regulatory role
4. Getting redress for exploited workers, including the use of compliance notices and whether they're fit for purpose
5. Opportunities for wider applications of infringement notices
6. Recent allocations of additional funding".

This submission notes that The Government, in principal, accepted all 22 of the recommendations of the Migrant Worker Taskforce, including Recommendation 10 that calls on an increase in resourcing.

The Reinstatement of Industry Unions' Inspection Powers Is Vital

Trade unions play an essential role in aiding workers' in all industries with challenges in their place of work. Under the current Government, the work of trade unions has become increasingly imposed upon by legislation that appears aimed at constraining unions' capacity. In particular, existing Right of Entry laws impede upon trade unions' responsibility to enter workplaces suspected of underpaying their employees. Given the lack of enforcement capacity of the Fair Work Ombudsman, as articulated in this submission, is its essential that trade unions have their inspection and enforcement powers restored in full.

Currently, trade union employees or elected officials have to first apply for permits to enter workplaces. These permits are granted at the discretion of the Fair Work Commission once applied for by the trade union official. Once receiving a permit, trade union employees are obliged to notify the employer of their visit at least 24 hours in advance. Only in rare circumstances will the Fair Work Commission permit the union representative to enter a workplace after giving less than 24 hours' notice.

Fundamentally, these regulations impede upon trade unions' capacity to inspect workplaces suspected of wage theft and other breaches. Should the Fair Work Commission deny a union official permission to enter a business, the official will risk being disqualified, and the union itself risk being deregistered. The intent of this overreach is clear: it impedes upon unions' core mandate to ensure its members interests, and the interests of all working Australians, is met. The SDA believes the existing regime ultimately disenfranchises workers – and that the increasing prevalence of wage theft demonstrates this. Right of entry laws must be amended to ensure trade unions can continue to represent their members to the best of their ability, without facing the unnecessary risk of deregistration.

Action 2: Increase workplace audits and restore trade unions' inspection and enforcement powers

There are too few audits of workplaces occurring nationally, due to the removal of industry union inspection and enforcement powers, and the diminished capacity of the FWO since 2013. This should be reversed. The Government must also quickly adhere to Recommendation 10 of the Migrant Workers Taskforce and adequately resource the FWO.

Insignificant financial and legal penalties for offenders

Despite the Government's actions in recent years to strengthen penalties for some wage theft offenders, the existing penalties are not sufficient in deterring the behaviour. For many employers, it is worth taking the risk of engaging in wage theft considering on-the-spot fines issued by the Fair Work Ombudsman might often be less than the overall saving from continued wage theft. The *Protecting Vulnerable Workers* legislation in 2017 increased maximum on-the-spot-penalties for individuals from \$6300 to \$12600. The doubling is welcome, but even the issuance of the maximum fine is not enough to deter long-term underpayment.

In addition to modest fines, wage theft is still not being addressed by additional enforcement measures and restoring union inspection rights. Very few cases of wage theft are entering the courts. The Young Workers Centre, for example, noted that the FWO only instituted 35 civil court proceedings in the 2017-2018 financial year²⁹. This is a tiny fraction of the proven cases of wage theft and demonstrates the FWOs lack of resources dedicated to pursuing wage theft in the courts.

In response to the Migrant Worker Taskforce, the Federal Government agreed, in principal, to criminalising 'the most serious forms of deliberate exploitation of workers'³⁰. This is a step in the right direction, but the nature of criminalisation must be such so that it acts as a genuine deterrent for all wage theft, not simply repeat worst-case offending. Criminal sanctions and increased penalties are meaningless if there is only a 0.59 per cent chance of being caught, as this submission establishes. This submission notes the Government's position that, should the nature of its criminalisation of wage theft not act as a sufficient deterrent, 'the Government will also consider options for increasing penalties further'³¹.

Action 3: Implement a criminal penalty for severe cases of deliberate and systematic wage theft.

The SDA believes there should be a mechanism to bring criminal sanctions where there has been deliberate and systematic underpayment. However, criminalisation must be coupled with complementary legislative measures aimed at delivering recompense to wage theft victims, ensuring wage theft victims have access to justice, and a broader deterrence regime that includes an increase in enforcement.

Action 4: Increase financial penalties for wage theft

The current penalty framework should be enhanced to further dissuade offenders. While the Government has enacted reforms increasing certain punishments, too many cases of 'slaps on the wrists' still occur. Financial penalties remain modest and should be further enhanced.

Difficulties and cost barriers for victims accessing justice

Wage theft victims often don't have the incentives, nor the financial means, to access justice independently under the current regime. For those who receive comparably modest underpayments that are not of the scale that might warrant media attention, it is often too onerous and risky to pursue their employer for compensation. The incentive for a worker who is experiencing underpayment to report the malfeasance is low while the risk remains too high.

Action 5: Establish an affordable, easily accessible small-claims jurisdiction in which wage theft victims can seek justice

The Government must establish a new, affordable, and easily accessible small claims jurisdiction in which wage theft victims can seek justice. Such a jurisdiction should allow trade unions to represent their members in proceedings.

A lack of education about entitlements, and where to report malfeasance

Not every worker has an intimate understanding of their rights and obligations as an employee, and the same is true for some employers. The SDA covers industries that disproportionately employ younger workers – a key demographic that is vulnerable to workplace exploitation. There are some concerns that workers in this age bracket are particularly vulnerable to exploitation due to their lack of detailed knowledge of their rights, and their relative lack of experience in the labour market.

But migrant workers, the segment of the labour market most vulnerable to wage theft, are arguably the least informed about their rights, and where to report exploitation. The Migrant Workers Taskforce reported a dramatic percentage of migrant workers were unaware of their rights before arrival in Australia. 90 per cent claimed they 'did not receive or recall receiving information on workplace rights before coming to Australia'³². It also noted that the information migrant workers recalled receiving was typically focused on other necessary information, such as how to receive a tax file number and open a bank account.

Almost 80 per cent of respondents in the survey did not receive or recall receiving information on workplace rights before coming to Australia. – Migrant Worker Task Force³³

Further, the Migrant Worker Taskforce noted that, while many migrant workers do seek further information while in Australia, the numbers remain low, with "32 per cent of survey respondents indicat[ing] that they had sought information about pay after arriving in Australia, compared with 21 per cent who received/remembered receiving workplace information before arrival in Australia."³⁴

Many of these information deficits can be overcome by union activity. The SDA engages in a range of informational and training programs for its members in the

retail sector, as do other trade unions covering other industries. The obstacles facing the trade union movement in recent years has made the task of providing the necessary training and information to the workforce more challenging, ultimately increasing the onus of the Federal Government to provide more resources to achieve a similar outcome.

Action 6: Ensure whistle-blowers' visa status isn't threatened when blowing the whistle.

The Commonwealth should legislate to protect migrant worker whistle-blowers' visa status, to ensure migrant workers are confident in their ability to inform authorities about underpayments. Terminating an employee for alerting authorities to occurrences should be subject to significant penalties.

Arguments surrounding award complexity do not stand up to scrutiny

The SDA is concerned about many of the excuses deployed to abrogate employers of their responsibilities when it comes to ensuring workers are adequately remunerated. In conversations surrounding the prevalence of underpayment, the nature of Australia's awards framework is often cited. Opponents of the current awards framework argue its complexity, and the inability of employers to navigate that complexity, drives higher rates of underpayments. These arguments tend to result in recommendations ultimately aimed at simplifying that system, potentially to the detriment of employees who rely upon the safeguards that system ensures.

The arguments that awards are simply too hard to administer, and that this factor above all else is the key determinant of underpayment, does not stand up to scrutiny for a few key reasons:

Firstly, *super theft* is as prevalent, or more prevalent, than *regular wage theft*. The administration of superannuation guarantee is simple. All employees in Australia are entitled to 9.5 per cent of their award wages to be placed into their nominated superannuation account. Incidents of super theft cannot be credibly argued to arise because of the complexity of the system.: one which has been in place for a generation and for which increases in the superannuation guarantee are

rare. The widespread nature of *super theft* adds credence to the notion that a significant proportion of all wage theft is intentional.

Secondly, cases of regular wage theft occur not only in small businesses, where there may be at times legitimate oversights of award responsibilities due to resource constraints, but in major corporate firms, too. It is not credible for ASX listed organisations, equipped with the resources to ensure compliance, to claim that cases of widespread underpayment were the result of a complicated awards framework.

Thirdly, the General Retail Award has been under constant 'review' before the FWC since 2012. Retail employers saw fit to run two major cases to cut penalty rates in that time but the alleged 'Award complexity' was never addressed. This is not a credible position.

Fourthly, why is it that employers, small and large, are able to deal with the complexity of applying junior rates across all hours of work? The General Retail Award provides the following junior rates scheme, to which employers typically manage to adhere:

- Under 16 years = 45 per cent (of the adult rate)
- 17 years = 60 per cent
- 18 years = 70 per cent
- 19 years = 80 per cent
- 20 years < 6 month = 90 per cent
- 20 years > 6 months = 100 per cent.

Fifthly, there are very few cases, if any, of workers' experience significant overpayment due to a mistake made by their employer. We're paying award wages so extraordinarily complex that mistakes were inevitable, we would expect to see incidents of both underpayment and overpayment. This is not observable in the data, nor in anecdotal evidence from SDA members or other members of the workforce.

The argument that wage theft is the result of a complicated awards system is a red herring. The Committee should ensure that, at the conclusion of this Inquiry, that argument is thoroughly rejected. Instead, the Committee should focus on the tangible, actionable recommendations aimed at addressing wage theft that are put forward in this and other submissions.

ATO crackdown on super underpayment welcome

This submission notes and welcomes 2019 legislation strengthening the ATO's enforcement of the superannuation guarantee. The imposition of criminal penalties for employers who repeatedly abdicate their responsibilities to pay the superannuation guarantee serves as a template for criminalising the underpayment of regular award wages. The SDA welcomes the Government's commitments to criminalising wage theft but notes legislation to that affect has yet to be introduced to parliament. The criminalisation of wage theft should be a priority for the Government in 2020. The SDA believes the Government's focus should be on the creation of a framework that expedites wage theft victims' compensation and recompense. Criminalisation is a vital component of any deterrence regime that must be implemented for worst-cases of wage theft, though criminalisation must be paired with the additional actions as recommended in this submission.

Part 5: Estimating the cost of wage theft

Quantifying wage theft is a challenging exercise that requires the use of scenarios to explore the likely impact of demonstrable levels of wage theft if they were replicated throughout the Australian economy. Indeed, an inherent challenge in quantifying the true extent of wage theft in Australia is the limited nature of relevant data.

To date, reliable datasets that monitor the extent to which workers in Australia are underpaid is insufficient. This is due to a range of factors, perhaps none more obvious than the fact that some underpaid workers do not know that they are being underpaid and therefore have not taken action to report it, with others being uncomfortable in reporting their underpayment. However, inspections of businesses do occur.

Since 2009, the Fair Work Ombudsman (FWO) has audited more than 34,000 businesses across Australia in a wide variety of industries. Some businesses were selected based on anonymous tip-offs and requests for assistance from employees, and some were chosen randomly. The data from these audits provides the most comprehensive overview of the extent of employer compliance with hourly rates of pay and other paid entitlements, record keeping and pay slip obligations. Figure 1 tables the aggregate findings after analysing roughly 150 audit campaigns undertaken by the FWO over the past decade.

Figure 1: Results from data extracted from FWO audit campaigns since 2009

<i>Percentage of non-compliant businesses (monetary and non-monetary breaches)</i>	38.72%
<i>Percentage of non-compliance (monetary breaches)</i>	24.40%
<i>Average reimbursement per wage theft victim</i>	\$719.61
<i>Avg. number of wage theft victims per non-compliant (monetary breaches) business</i>	6.5

Source: FWO audit campaigns data.

It finds that, approximately 38.72 per cent of businesses audited by the FWO were found to be in contravention of the *Fair Work Act 2009 and Fair Work Regulations 2009*, with roughly 24.40 per cent having monetary breaches. Several FWO reports note that employer non-compliance is due to a general lack of awareness or understanding of award provisions rather than a malicious act by the employer.

Examples include:

- Non-payment of the correct minimum wages (e.g., junior employees not receiving a pay increase on their birthday as per their industrial agreement);
- Non-payment of the correct casual loading;
- Non-payment of the correct evening, weekend and public holiday penalties; and
- Non-payment of overtime penalties.

Figure 2: Cost of wage theft in Australia, various scenarios

<i>Number of Total Employers in Australia June 2018 (latest data)</i>	877,744
<i>Estimated number of non-compliant (monetary contraventions) businesses in Australia using FWO audit campaigns data percentage</i>	214,171
<i>Estimated number of wage theft victims across all non-compliant (monetary contraventions) employers in Australia</i>	1,393,067
<i>Estimated amount of identified wage theft victims' wages not paid (Based on FWO audit campaigns data average money recovered per wage theft victim)</i>	-\$1,002,463,861
<i>Total Wages at Average Salary of \$65,000</i>	\$90,549,339,346
<i>If 3 per cent of identified wage theft victims' wages were not paid</i>	-\$2,716,480,180
<i>If 5 per cent of identified wage theft victims' wages were not paid</i>	-\$4,527,466,967
<i>If 10 per cent of identified wage theft victims' wages were not paid</i>	-\$9,054,933,935

Source: ABS data, FWO audit campaigns data, Author's calculations.³⁵

Based on FWO audit campaigns data, it is estimated that more than \$1,002 million in wages are underpaid each year, affecting approximately 1,393,067 workers, or roughly one-tenth of the Australian workforce who are employed (Figure 2).

Foregone government revenue

The table below explores the likely impact on cumulative federal and state revenues from income tax and goods and services tax (GST) as a result of wage theft. Based on FWO audit campaigns data, it is estimated that federal and state governments forgo approximately \$375.9 million in income tax and 33.8 million in lost GST revenue from wage theft annually.

Figure 3: Estimated forgone government revenue, various scenarios

	<i>FWO-based estimate</i>	<i>3 per cent</i>	<i>5 per cent</i>	<i>10 per cent</i>
<i>Forgone income tax revenue</i>	-\$375,923,948	- \$1,018,680,068	- \$1,697,800,113	- \$3,395,600,225
<i>Forgone GST revenue</i>	-\$33,833,155	-\$91,681,206	-\$152,802,010	-\$305,604,020

Source: ATO data, RBA data, FWO audit campaigns data, Author's calculations.³⁶

Macroeconomic impact of wage theft

The economic impact of wage theft in Australia can be estimated using a simple expenditure multiplier. The simple expenditure multiplier refers to how much additional Gross Domestic Product (GDP) results from an initial change in expenditure. An initial increase in expenditure can lead to a larger increase in economic output because spending by one household, business or the government is income for another household, business or the government. The total amount of additional GDP can be calculated using the simple multiplier:

$$\text{Simple multiplier } (k) = \frac{1}{1 - MPC}$$

The Reserve Bank of Australia (RBA) estimates that the marginal propensity to consume (MPC) for Australians is 0.54.³⁷ The marginal propensity to consume is the proportion of an aggregate raise in pay that an individual spends on the consumption of goods and services as opposed to saving it and is calculated by dividing changes in consumption by changes in income.

A marginal propensity to consume of 0.54 would suggest a multiplier effect for Australia of 2.17. This means, in scope of the analysis, that every dollar of income forgone from wage theft would equate to a loss of \$2.17 of extra money into the Australian economy.

Figure 4: Estimated economic impact of wage theft in Australia, various scenarios

	<i>FWO-based estimate</i>	<i>3 per cent</i>	<i>5 per cent</i>	<i>10 per cent</i>
<i>Total economic impact</i>	-\$2,179,269,263	-\$5,905,391,696	- \$9,842,319,494	- \$19,684,638,988
<i>Loss in GDP</i>	0.12 per cent	0.31 per cent	0.52 per cent	1.04 per cent

Source: RBA data, FWO audit campaigns data, Author's calculations.

Based on the simple multiplier, it is estimated that the total impact of wage theft (excluding time theft and super theft) on the Australian economy is more than \$2,179 million annually (Figure 4), which is equivalent to a 0.12 per cent loss in GDP.

The estimated impact of forgone income from wage theft may be understated to the extent that the analysis does not take into account the relatively greater marginal propensity to consume that would exist for low-wage workers compared to the average worker. Since workers who are on the national minimum wage or award reliant are typically liquidity-constrained consumers and more at risk to wage theft, a recovery in income for low-wage workers is more likely to lead to an increase in consumption relative to the average worker.

The cost of underpayment and non-payment of superannuation

Arguably the most common form of wage theft is in the form of superannuation non-payment. Unlike other forms of wage theft, detailed data exists estimating the extent of superannuation non-payment and underpayment. Industry Super Australia (ISA) analysed Australian Taxation Office (ATO) data on individuals and found that approximately 2.85 million Australians were being short-changed \$5.94 billion in superannuation in 2016-17.³⁸

It is tempting for some to see the non-payment of superannuation as a lesser infringement than the underpayment of non-superannuation wages. But the non-payment and under- payment of superannuation is of equal – if not greater – detriment to an employee than the theft of ordinary wages. When employers do not pay superannuation to the extent they are mandated, it is a crime equal to any other form of non-payment.

Figure 5: Compound loss of underpayment and non-payment of superannuation, (\$ billion, 2016-17 dollars)

2016-17	10 Year	20 Year	30 Year
\$5.94	\$6.40	\$8.33	\$10.84

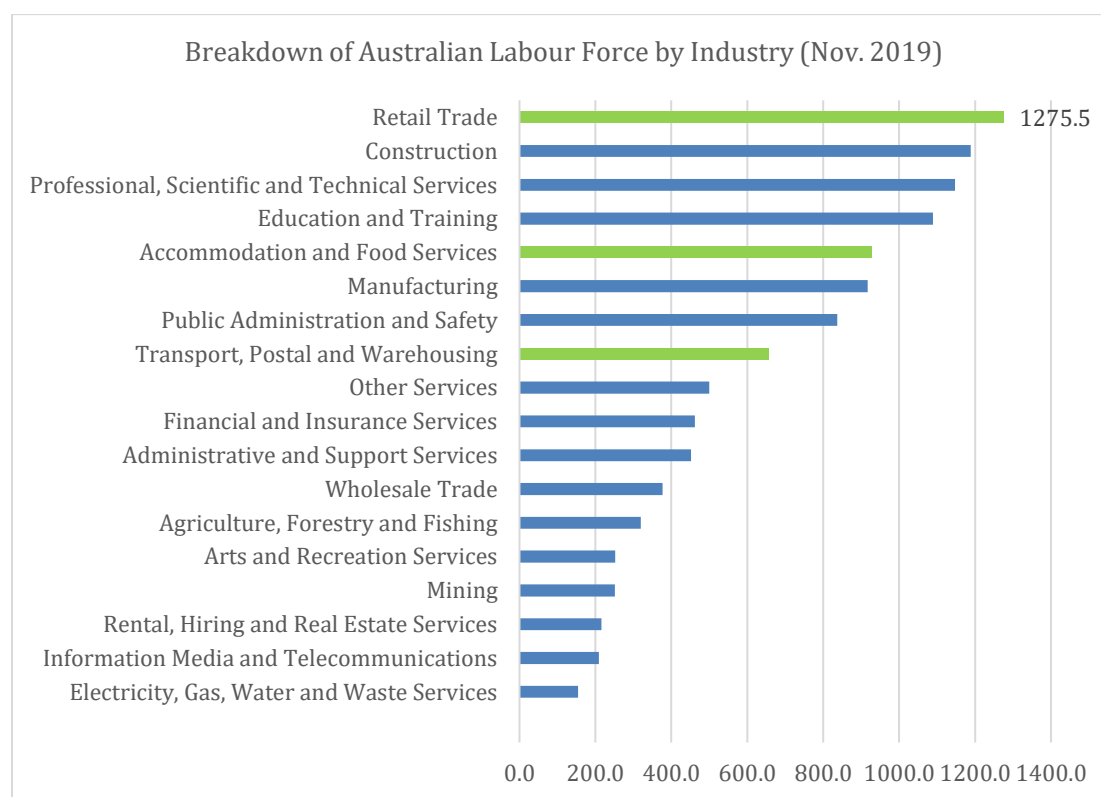
Source: ISA data, Author's calculations.

The most insidious aspect of superannuation non-payment is its compounding effect over time, and how this long-term nature of the crime costs not only its individual victims, but the broader society and economy in every state in Australia. It is estimated that employees who had superannuation contributions unpaid or underpaid by their employer in 2016-17 would lose close to \$10.84 billion over a 30-year accumulation period (Figure 5).

Part 6: The Broader Impact of Wage Theft on SDA-covered Sectors

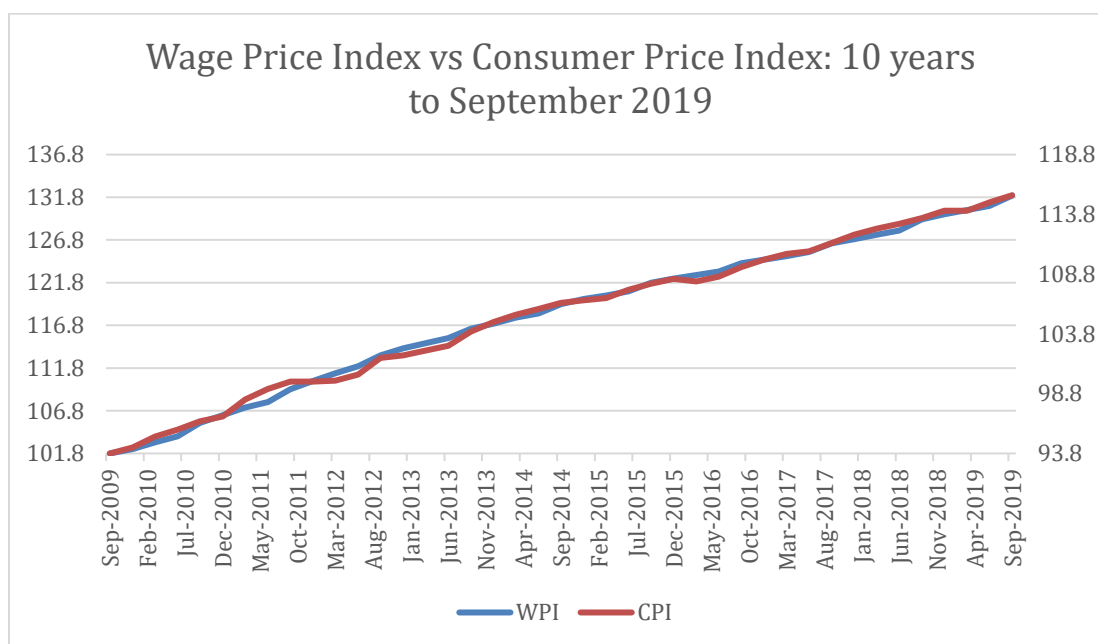
The SDA represents over 200,000 workers throughout Australia's retail, fast food and warehousing sectors. Each of these sectors is heavily reliant on continued, growing aggregate demand, which is directly constrained by unchecked wage theft.

This is particularly acute in the retail sector – the industry which employs more Australians than any other. As of November 2019, the sector employed 1.275 million Australians. Wage theft, and its corresponding impact on consumer spending, presents a direct challenge to each and every retail worker across Australia. A decline in aggregate demand constrains the growth of the sector overall, limiting future opportunities for the existing workforce as well as potential entrants into the sector.



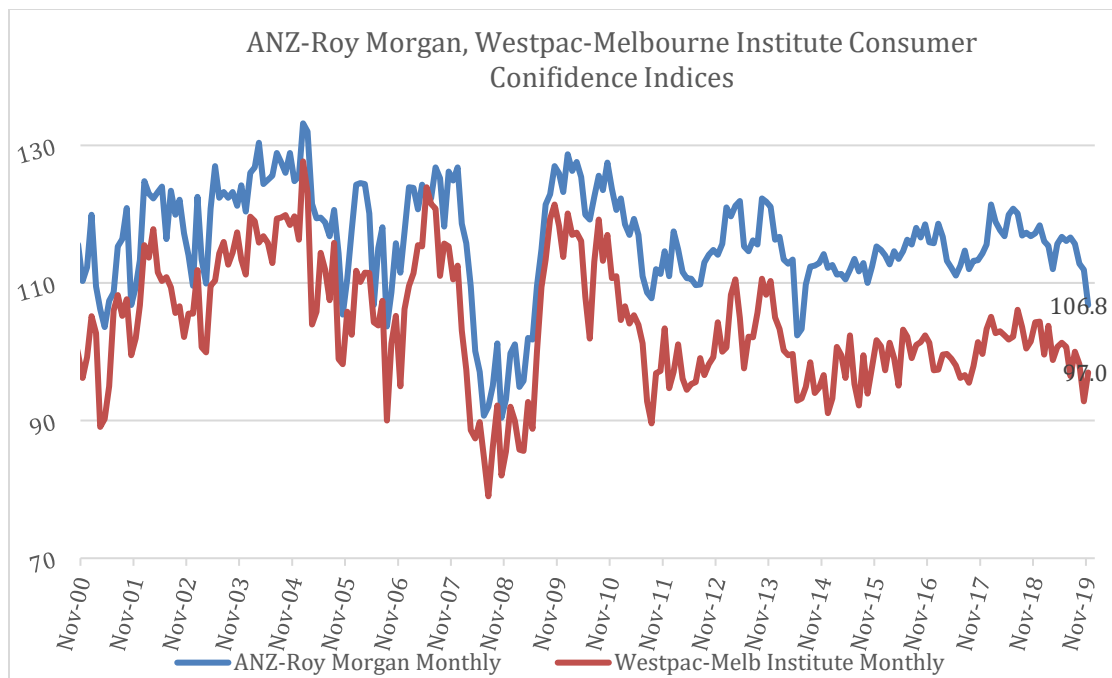
For those already employed in the sector, lower demand can result in fewer hours and a lower overall income – itself then resulting in less demand nationally. It should be noted that, in addition to the demand impacts of wage theft, workers in the retail trade sector have already been faced with direct impacts to their income. Since 2017, hundreds of thousands of retail workers have been subjected to reduced penalty rates, directly costing individual workers hundreds of dollars every year. The imposition of penalty rate reductions also occurred during the middle of an extended

period of wage-stagnation. The flat lining of Australian wages over the past decade is undeniable. While wages are nominally increasing, the pace of that increase is not outstripping the price of goods and services in the economy. The Wage Price Index, which measures wage growth, has grown in parallel with the Consumer Price Index, which measures the price of goods and services in the economy. Translated into the experience of a typical Australian household, it simply means most consumers feel like they aren't 'getting ahead', with many seeing no real increase in standards of living. This fundamentally limits the willingness of the Australian public to consume, directly impacting the opportunities and livelihoods of SDA members, and retail trade sector workers more broadly.



Consumer Confidence at the same level as the Global Financial Crisis

This dynamic has led to the lowest levels of consumer confidence since the Global Financial Crisis of 2008/9. The ANZ/Roy Morgan and Westpac-Melbourne Institute Consumer Confidence indices both find a marked decline in consumer confidence. In 2009, consumer confidence reached a peak, before continuing to fall over the same period as wages have stagnated. There is a clear correlation between wage stagnation, and consumer confidence – again impacted the opportunities for those employed in sector's like retail trade, which are dependent on growth in aggregate demand. Per capita retail spending too has grown poorly over the past five years.

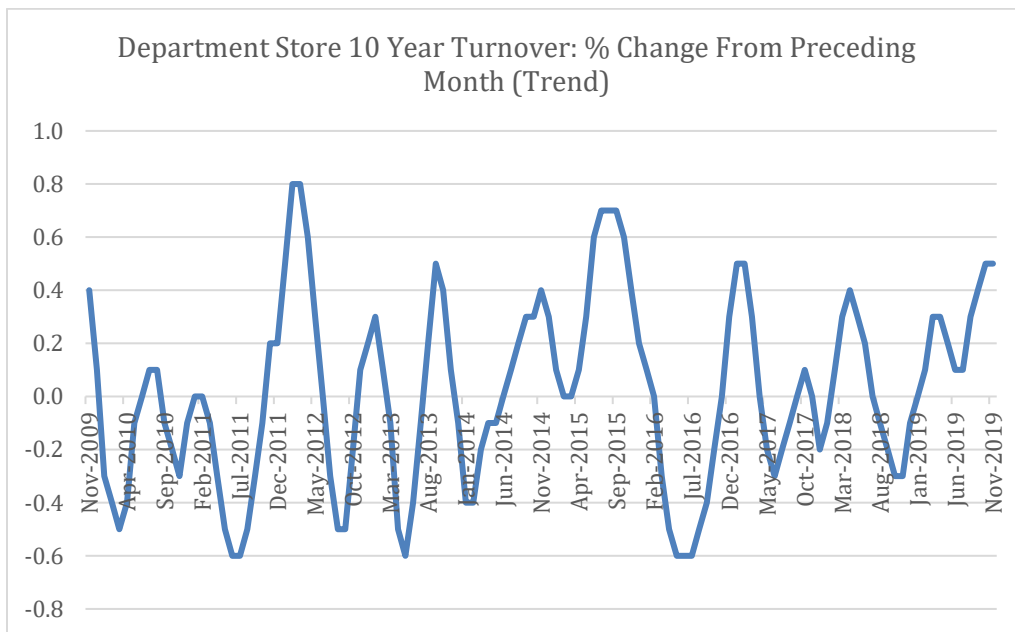


The decline in spending has damaged the sector

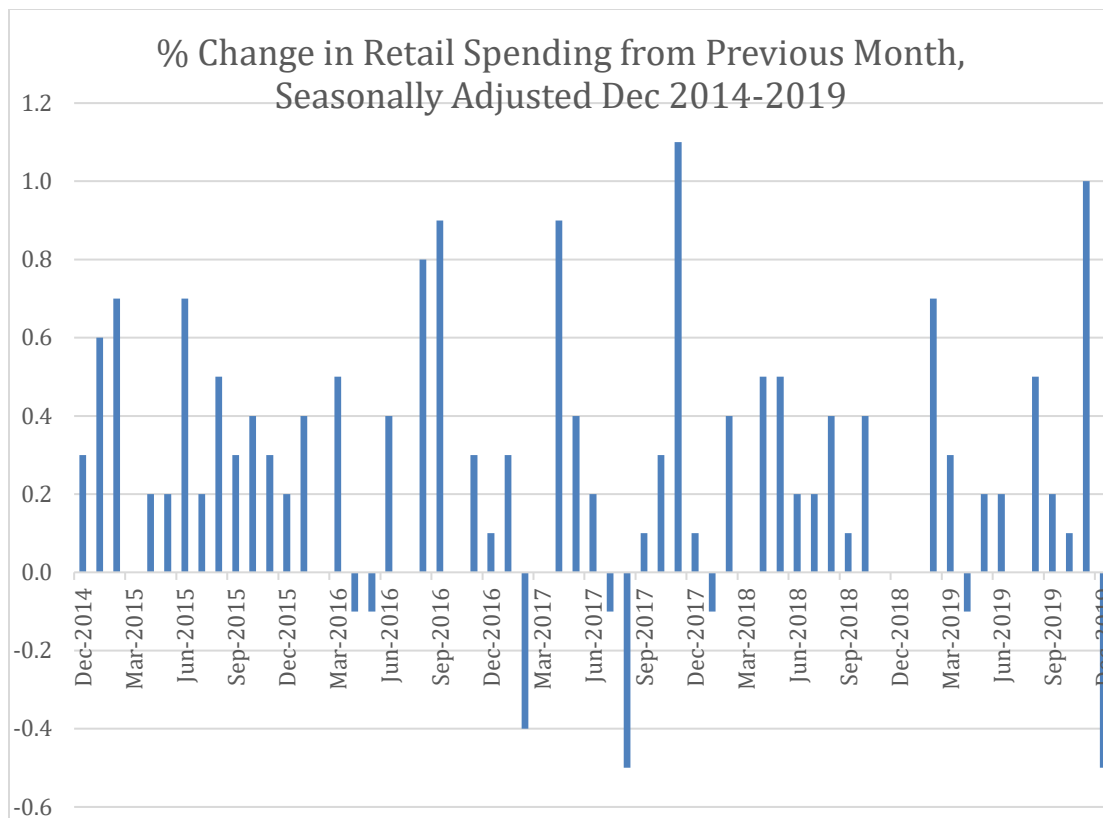
These macro trends have damaged the sector. Constrained consumer confidence and spending has led to the collapse of existing retail outlets and discouraged prospective investors in Australia's retail sector from establishing operations. In just the first weeks of 2020, news has already emerged of major retailer Harris Scarf closing some 21 outlets across Australia⁴⁰, and international retailer Kaufland – which had already commenced construction at premises in Adelaide – withdrawing from the Australian market with 'no warning'⁴¹. This reflects the reality of a stagnant retail economy, driven by low wage growth, shallow consumer confidence, and exacerbated by the billions of dollars withdrawn from consumers' back-pockets as a result of unchecked wage theft.



Source: ABS Cat. 8501019⁴².



Source: ABS Cat. 8501.0⁴³



Source: ABS Cat. 8501.0. In the five years to December 2019, there have been too many quarters of negative growth in the retail sector.

Addressing wage theft would help boost spending

In this climate, it is beholden upon policymakers to explore every option to drive spending higher. Quick fixes, such as the 2019 income tax cuts, have failed to deliver confidence to the sector. Unfortunately, the tax cuts did not result in a significant increase in retail spending. The Government must now explore alternate policies to ensure workers have more money in their back pocket. Ensuring workers are actually paid correctly in the first place would be a logical place to start. The SDA calls on the Commonwealth Government to implement a wage theft action plan, aimed at bringing an end to the scourge of wage theft. Not only will this deliver economic justice to those who have fallen victim to wage theft – it will also help lift Australia's consumer economy out of its years-long malaise, increasing consumer spending and improving the welfare of SDA members and others in the retail trade sector.

Part 7: Measures to end wage theft

There are many policy levers at the disposal of the Federal Government to create an economy free of wage theft. The SDA notes the Government's recent proposals to criminalise worst-case wage theft, as well as other ideas including the banning of directors of companies intentionally stealing wages, the imposition of adverse publicity orders, and the imposition of banning orders. However, the following five recommendations represent the SDA's priority policies that it believes will restore some balance in the workplace, and ensure more workers are protected.

Recommendation 1: Align the payment of superannuation with wages.

As has been established in this submission, one of the most insidious forms of wage theft is the underpayment of superannuation, due to its compounding impact on both individual victims and the Australian economy. One of the reasons super theft is so prevalent is due to the way superannuation is paid in Australia. While regular wages are paid weekly, fortnightly or monthly, employers are obliged to make a superannuation contribution quarterly. For some workers, an underpayment of their superannuation may not be able to be discerned, as it requires them personally collating their earnings over that quarter and ensuring that their employer has indeed contributed the superannuation guarantee as mandated. The pay cycle for wages and for superannuation should be brought into line over time to give workers more oversight over their pay.

Recommendation 2: Increase workplace audits by restoring trade unions' inspection and enforcement powers

As noted earlier in this submission, the Fair Work Ombudsman has only a finite capacity to provide oversight of workplaces. Trade unions, in contrast, maintain deep relationships and visibility over workplaces across Australia, and have the capacity, resources and knowledge that can aid workers in understanding their own rights, as well as enable businesses to understand their obligations. The SDA believes the Government's current reform agenda, which aims to dilute the capacity of trade unions to represent their members, is unfortunate – especially at a time when worker exploitation is so evidently rife. Both trade unions and other registered organisations, like peak bodies and other employer-representative groups, have an important role to play in ensuring workplaces are fair and compliant. A less adversarial approach from the Federal Government would enable the trade union movement to further assist their members in cases of exploitation.

Recommendation 3: Establish an affordable, easily accessing small-claims jurisdiction in which wage theft victims can seek justice

The SDA believes the best means of addressing the access to justice challenge for wage theft victims is the establishment of a new small claims' jurisdiction. Such a jurisdiction should be well-resourced, affordable, and permit workers' to be represented by their trade union's personnel. Such a jurisdiction would eliminate the access to justice challenge for wage theft victims, itself serving as a further deterrent for prospective wage thieves.

Recommendation 4: Implement a criminal penalty for severe cases of deliberate and systematic wage theft.

The SDA supports the criminalisation of worst-case wage theft offenders. While it is vital that deliberate and repeated wage theft is criminalized, it is important that criminalisation is legislated alongside complementary measures, such as those articulated in this submission.

Recommendation 5: Increase financial penalties for wage theft.

Despite the Government's increases in financial penalties in 2019, the existing deterrence regime simple does not include sufficient financial penalties for wage theft offenders. There will always be incidences of wage theft that fall below the level which the SDA believes should warrant criminal prosecution but remains particularly impactful for SDA members and others. Accordingly, a significant increase in financial penalties should be explored. Such measures must be complimented by others leading to greater enforcement, and greater access to justice for wage theft victims.

Recommendation 6: Ensure whistleblowers' visa status is protected when they blow the whistle on wage theft

Migrant workers remain among the most vulnerable cohorts exposed to wage theft and underpayment. Many migrant workers do not feel they have the agency to blow the whistle on their employers' malfeasance. This can be addressed by ensuring any migrant worker who brings loses their employment after bringing their employers' underpayment to the attention of authorities should not have their visa status threatened. By guaranteeing whistle blowers' visa won't be threatened once they

raise the alarm, a larger number of vulnerable workers will be able to report cases of underpayment.

Conclusion

This submission has highlighted the SDA's concerns about the growing epidemic of wage theft in the Australian economy. The underpayment of workers – be it in the form of intentional or grossly negligent wage theft, or less nefarious underpayments – poses a major threat to the fair go in Australia. As has become increasingly clear in recent years, it is a problem that is widespread, economy-wide, directly impacting hundreds of thousands of Australians, and placing negative pressure on economic growth and wage growth.

This submission has conservatively estimated the cost of regular wage theft at over \$1 billion per year – a comparable figure to estimates from other organisations, including PriceWaterhouse Coopers, and the McKell Institute. When looking at superannuation underpayment, the costs are even higher. High-profile underpayment scandals in SDA-covered industries alone have cost workers more than \$565 million in recent years.

While it is important to highlight the alarming economic costs of wage theft and underpayment, it is equally important to highlight the personal stories of those who have been underpaid. For all workers, but particularly for those with modest and irregular incomes, wage theft is an abhorrent act, robbing its victims not only of their entitlements, but their agency in the workplace, and capacity to full participate in Australian society. This submission has shared four such case studies that highlight the work the SDA does every day to ensure its members are treated with dignity.

While the scale of wage theft is cause for alarm, we can find hope in the fact that there are policy levers which the Government can pull that will help eradicate such widespread underpayment. One lever the restoration of payroll spot check rights to unions. However, there is more that is needed. This submission has highlighted five further recommendations, including: criminalising cases of deliberate and systematic wage theft, aligning superannuation payments with wages, increasing audits by allowing trade unions to inspect workplaces, further increasing financial penalties for wage theft, and establish a new small-claims jurisdiction in which wage theft victims can quickly settle their claims.

These ideas will go a long way to ensure wage theft is eradicated from the Australian economy.

References

Berg, L & Farbenblum, B, 2017. 'Wage theft in Australia: findings of the National Temporary Migrant Worker Survey', Migrant Worker Justice Initiative, Sydney.

Coughlan, M. 2019. 'Bunnings super error 'wage theft': Labor'. 7News. Accessed online: <https://7news.com.au/politics/bunnings-super-error-wage-theft-labor-c-475194>

Fair Work Ombudsman, 2019. 'National Compliance Monitoring Campaign Report'. Accessed online: <https://www.fairwork.gov.au/reports/national-compliance-monitoring-campaign-report/about-the-campaign>

Fair Work Ombudsman, 2019. 'Trolley collectors protected under new agreement'. Accessed online: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/may-2019/20190517-united-trolley-collectors-pcd-media-release>

Fair Work Ombudsman, 2019. 'Melbourne toy retailer faces increased penalties'. Accessed online: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/may-2019/20190529-uncle-toys-litigation-media-release>

Fair Work Ombudsman, 2019. 'NSW service station chain faces court'. Accessed online: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/march-2019/20190325-westside-petroleum-litigation-media-release>

Fair Work Ombudsman, 2019. 'Fashion start-up penalised over unpaid internship'. Accessed online: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/march-2019/20190301-her-fashion-box-penalty-media-release>

Fair Work Ombudsman, 2019. 'Coles trolley collectors report'. Accessed online: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20180109-coles-eu-4th-annual-report-media-release>

Fair Word Ombudsman, 2019. 'Regional workers back-paid \$190,000'. Accessed online: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20190125-remote-and-regional-campaign-report-media-release>

Henderson, T & Swann, T, 2018. *Excessive Hours and Unpaid Overtime: 2018 Update*, The Australia Institute. Accessed online: <https://www.tai.org.au/sites/default/files/GHOTD%202018%20Excessive%20Hours%20and%20Unpaid%20Overtime.pdf>

Nyland, C, Forbes-Mewett, H, Marginson, S, Ramia, G, Sawir, E & Smith, S 2009, International student-workers in Australia: a new vulnerable workforce, *Journal of education and work*, 22(1), 1-14.

Toscano, N. 2019. '7-Eleven operator fined \$335,000 in wage scandals'. Sydney Morning Herald. Accessed online: <https://www.smh.com.au/business/workplace/7-eleven-operator-fined-335-000-in-wage-scandals-20190118-p50s81.html>

Young Workers Centre, 2017. 'Young workers snapshot: the great wage rip-off'. Accessed online: https://d3n8a8pro7vhm.cloudfront.net/victorianunions/pages/1411/attachments/original/1493954358/Young_Workers_Snapshot_The_Great_Wage_Ripoff_final.pdf?1493954358

Young Workers Center, 2018. 'Briefing: Criminalising Wage Theft'. Accessed online: www.d3n8a8pro7vhm.cloudfront.net/victorianunions/pages/1411/attachments/original/1526522932/YWC_Criminalising_Wage_Theft_Briefing.pdf?1526522932

End Notes

¹ Toscano, N. 2019. '7-Eleven operator fined \$335,000 in wage scandals'. *Sydney Morning Herald*, Accessed online: <https://www.smh.com.au/business/workplace/7-eleven-operator-fined-335-000-in-wage-scandals-20190118-p50s81.html>

² Cavanough, E., & Rajadurai, E. 2018. *Wage Theft Economic Distress: The Impact of Wage Theft on Queensland's Workers and Economy*. The McKell Institute. Accessed online: <https://mckellinstitute.org.au/app/uploads/McKell-QLD-Impact-of-Wage-theft-on-QLD-Workers-and-Economy-FINAL-.pdf>

³ Campbell, Iain. 2002. *Snatching at the Wind?: Unpaid Overtime and Trade Unions in Australia*. *International Journal of Employment Studies*, 10:2, 109-156.

⁴ Ibid.

⁵ Henderson, T & Swann, T, 2018. *Excessive Hours and Unpaid Overtime: 2018 Update*, The Australia Institute. Accessed online: <https://www.tai.org.au/sites/default/files/GHOTO202018%20Excessive%20Hours%20and%20Unpaid%20Overtime.pdf>

⁶ Australian Bureau of Statistics, 2019. '6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, Nov 2019'. Accessed online: <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.003Nov%202019?OpenDocument>

⁸ Druce, A. 'Rebel Sport, BCF Owner Super Retail will cop a \$43 million pre-tax hit to first half earnings'. *News*. Accessed online: <https://www.news.com.au/finance/business/retail/rebel-sport-bcf-owner-super-retail-will-cop-a-43-million-pretax-hit-to-firsthalf-earnings/news-story/2f04ed67baa7c44a69e73e1b04caeba5>

⁹ Powell, D. 2019. 'Bunnings reveals underpayments of \$6.1 million'. *Sydney Morning Herald*. Accessed online: <https://www.smh.com.au/business/companies/bunnings-reveals-underpayment-bill-of-6-1-million-20191129-p53fa4.html>

¹⁰ Fair Work Ombudsman, 2019. 'Sunglass Hut to back-pay 620 workers'. Accessed online: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/september-2019/20190924-sunglass-hut-eu-media-release>

¹¹ Fair Work Ombudsman, 2019. '\$335,664 in penalties for underpaying workers at 7-Eleven outlet and restaurant.' Accessed online: <https://www.fairwork.gov.au/about->

[us/news-and-media-releases/2019-media-releases/january-2019/20190118-xia-jing-qi-penalties-media-release](https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20190118-xia-jing-qi-penalties-media-release)

¹² Ranosa, R. 2019. 'Michael Hill to pay \$25m in underpaid wages'. Accessed online: <https://www.hcamag.com/au/news/general/michael-hill-to-pay-25m-in-underpaid-wages/172829>

¹³ Hall, J. 2019. 'Woolworths staff underpaid ^\$620 million, class action estimate claims'. *News*. Accessed online: <https://www.news.com.au/finance/business/retail/woolworths-staff-underpaid-620-million-class-action-estimate-claims/news-story/fb6c55ad33fb8f1b53f1aa40b6281456>

¹⁴ Chung, F. 2019. 'Japanese burger chain Mos Burger underpaid workers' \$1.1 million. *News*. Accessed online: <https://www.news.com.au/finance/work/at-work/japanese-burger-chain-mos-burger-underpaid-workers-11-million/news-story/6e6950e3d204ba853395bf2249b81393>

¹⁵ Fair Work Ombudsman, 2019. 'Underpaid wages recovered for Subway employees'. Accessed online: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/october-2019/20191001-subway-sica-media-release>

¹⁶ The Guardian, 2019. 'Coles underpaid workers by \$20m over six years'. Accessed online: <https://www.theguardian.com/business/2020/feb/18/coles-underpaid-workers-by-20m-over-six-years>

¹⁷ Karp, P. 2019. 'Coalition set to criminalise wage theft as it pushes on with union integrity bill'. *The Guardian*. Accessed online: <https://www.theguardian.com/australia-news/2019/jul/24/coalition-set-to-criminalise-wage-theft-as-it-pushes-on-with-union-integrity-bill>

¹⁸ 1 L Berg & B Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, UNSW Law, Sydney and University of Technology Sydney, 2017

¹⁹ L Berg & B Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, UNSW Law, Sydney and University of Technology Sydney, 2017

²⁰ Australian Government, 2019. 'Report of the Migrant Workers' Taskforce'. Accessed online: https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf

²¹ Ibid.

²² Ibid, page 33

²³ Young Workers Center, 2018. 'Briefing: Criminalising Wage Theft'. Accessed online:
www.d3n8a8pro7vhmx.cloudfront.net/victorianunions/pages/1411/attachments/original/1526522932/YWC_Criminalising_Wage_Theft_Briefing.pdf?1526522932

²⁴ Young Workers Center, 2018. 'Briefing: Criminalising Wage Theft'. Accessed online:
www.d3n8a8pro7vhmx.cloudfront.net/victorianunions/pages/1411/attachments/original/1526522932/YWC_Criminalising_Wage_Theft_Briefing.pdf?1526522932

²⁵ White, A., 2019. 'Unpaid wages bill hits \$1.4 billion annually'. *The Australian*. Accessed online: <https://www.theaustralian.com.au/business/unpaid-wages-bill-hits-14bn-annually/news-story/a68a141ee6567fc2290c827fda27ad8c>

²⁶ The Award rate at the time of this survey was slightly higher at \$21.09 under the *Restaurant Industry Award*.

²⁷ Australian Bureau of Statistics, 2018. '8165.0 - Counts of Australian Businesses, including Entries and Exits, June 2014 to June 2018'. Accessed online: <https://www.abs.gov.au/ausstats/abs@.nsf/mf/8165.0>

²⁸ McKell Institute, 2019. 'Ending Wage Theft'. Accessed online: <https://mckellinstitute.org.au/research/reports/ending-wage-theft/>

²⁹ Young Workers Center, 2018. 'Briefing: Criminalising Wage Theft'. Accessed online:
www.d3n8a8pro7vhmx.cloudfront.net/victorianunions/pages/1411/attachments/original/1526522932/YWC_Criminalising_Wage_Theft_Briefing.pdf?1526522932

³⁰ Australian Government, 2019. 'Australian Government response: Report of the Migrant Workers' Taskforce'. Accessed online: https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/government_response_to_the_migrant_workers_taskforce_report.pdf

³¹ Ibid.

³² Australian Government, 2019. 'Report of the Migrant Workers' Taskforce'. Accessed online: https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf

³³ Australian Government, 2019. 'Report of the Migrant Workers' Taskforce'. Accessed online: https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf

³⁴ Australian Government, 2019. 'Report of the Migrant Workers' Taskforce'. Accessed online: https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf

³⁵ Note: Around 24.4 per cent of Australian businesses audited since 2009 have been found to have monetary contraventions. This would equate to approximately 214,171 businesses if extrapolated across Australia. There were also approximately 6.5 wage victims per non-compliant business. If extrapolated across the Australian economy, this would equate to approximately 1,393,067 workers. Additionally, the average reimbursement per wage theft victim where the FWO was able to recover money from the employer was \$719.61. If extrapolated across the Australian economy, this would equate to approximately \$1,002 million in forgone wages.

³⁶ Note: We have assumed marginal propensity to consume for Australian disposable incomes of 0.54. We have assumed GST rate of 10 per cent. Based on ATO data for the 2016-17 income year (latest available data), we have assumed an income tax rate of 37.5 per cent, based on the weighted average of 2016-17 taxpayers' marginal tax rates by percentile. The weight factor is the proportion of net tax by income percentile divided by the sum net tax

³⁷ May, D., Nodari, G., & Rees, D., 2019. 'Wealth and Consumption RBA Bulletin– March Quarter 2019'. Accessed online: <https://www.rba.gov.au/publications/bulletin/2019/mar/wealth-and-consumption.html>

³⁸ ISA, 2019. 'Super Scandal: Unpaid Super Guarantee in 2016-17'. Accessed online: <https://www.industrysuper.com/assets/FileDownloadCTA/d62c256bec/Super-Scandal-Unpaid-super-guarantee-in-2016-17-formatted-versio-for-final-compliance-tick-V5.pdf>.

⁴⁰ Blake, D. 2020. 'Harris Scarfe closing 21 stores'. *Inside Retail*. Accessed online: <https://insideretail.com.au/news/harris-scarfe-closing-21-stores-202001>

⁴¹ Mitchell, S. 'Warning' as Kaufland pulls plug on Australia'. Accessed online: <https://www.afr.com/companies/retail/kaufland-pulls-plug-on-australia-without-firing-a-shot-20200122-p53tga>

⁴² Australian Bureau of Statistics, 2019. '8501.0 - Retail Trade, Australia, Nov 2019. Accessed online: 'https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8501.0Nov%202019?OpenDocument

⁴³ Australian Bureau of Statistics, 2019. '8501.0 - Retail Trade, Australia, Nov 2019. Accessed online: 'https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8501.0Nov%202019?OpenDocument