



Australian Government

Australian Government response to the
Senate Economics References Committee report:

*Systemic, sustained and shameful: unlawful underpayment of
employees' remuneration*

APRIL 2023

Overview of inquiry process

On 13 November 2019, the Senate referred an 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.

The committee was chaired by Senators Alex Gallacher, Kimberley Kitching and Anthony Chisholm throughout the term of the inquiry. Senators Slade Brockman and Paul Scarr each served as deputy chair. The members of the committee were Senators Andrew Bragg, Jenny McAllister, Rex Patrick and Jess Walsh. Other participating members were Senators Mehreen Faruqi, Susan McDonald, Deborah O'Neill, Tony Sheldon and David Van.

The committee accepted 130 submissions from a broad range of stakeholders including unions, peak bodies and associations, academics, state governments, federal bodies, the higher education sector, and legal representatives. As well, the committee held four public hearings.

The evidence received by the committee allowed it to consider the following issues:

- the nature and extent of underpayment;
- vulnerable workers, including women, migrants, young people, international students, and First Nations people;
- the impact of underpayment on workers, their families and wider society;
- the regulatory and enforcement framework;
- the role of unions; and
- underpayment in various sectors, particularly the higher education sector.

The committee was originally due to report to the Senate by the last sitting day in June 2020. The inquiry was extended five times, partly due to the impacts of the COVID-19 pandemic, with the final extension granted on 10 February 2022 requiring the committee to report by 30 March 2022.

The committee tabled its report *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* on 30 March 2022.

Introduction

The Government acknowledges the important work of the committee and welcomes the opportunity to respond to its report, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration*.

The Government stands for the protection of wages and conditions of workers in Australia and against their exploitation. The committee's findings of deliberate and systematic underpayment in many industries clearly demonstrates the need for meaningful reforms to eradicate the pervasive and persistent underpayment of employees. Unlawful underpayment robs workers of their lawful entitlements and puts downward pressure on wages and conditions.

The important work of the committee demonstrates a need to improve the compliance and enforcement system; both with respect to deterring and punishing unlawful underpayment by employers, and by making it easier for employees to seek effective redress.

A number of the committee's recommendations align with the policies that the Government took to the election and that will therefore be delivered. These include:

- criminalising wage theft
- including superannuation in the *Fair Work Act 2009* (Fair Work Act) as a recoverable employment entitlement
- implementing all recommendations of the Migrant Workers' Taskforce
- leading cultural change by committing the Australian Government to being a model employer
- setting targets for the Australian Taxation Office for the recovery of unpaid Superannuation Guarantee amounts.

The Government notes that some of the committee's recommendations align with the reports of the Senate Select Committee on Job Security, which was also tabled on 30 March 2022. The response to this inquiry will be tabled in due course.

The Senate Select Committee on Job Security found that workers engaged in insecure work may be more vulnerable to exploitation, wage theft and underpayment as they are likely to be more reluctant to report issues for fear of dismissal or other adverse treatment. The Government acknowledges these findings and notes the following commitments to tackle the underlying issue of insecure work:

- including job security as an object of the Fair Work Act to ensure job security is central to the Fair Work Commission carrying out its functions
- extending the powers of the Fair Work Commission to include "employee-like" forms of work to equip the tribunal to respond to new and evolving forms of work and workplace arrangements
- reforms to limit the use of consecutive fixed-term contracts as a method to set up insecure work arrangements
- exploring options to develop a portable entitlement scheme for Australians in insecure work.

Committee recommendation	Government response
<p>Recommendation 1</p> <p>The committee recommends that the Australian Government prioritise amendments to the <i>Fair Work Act 2009</i> to criminalise wage theft in Australia, and that such legislation:</p> <ul style="list-style-type: none"> • apply to the theft of all employee remuneration (including loadings, penalty rates, overtime, leave, allowances and superannuation guarantee); • include penalties for the falsification of records; and • is drafted in consultation with the states to ensure Commonwealth wage theft laws do not weaken existing state legislation. 	<p>Accepted.</p> <p>The Government has committed to criminalising wage theft in its <i>Secure Australian Jobs Plan</i>. In that commitment, the Government has indicated it will develop legislation in consultation with key stakeholders, including the states and territories.</p>
<p>Recommendation 2</p> <p>The committee recommends that the Australian Government amend the <i>Fair Work Act 2009</i> to:</p> <ul style="list-style-type: none"> • increase civil penalties for wage theft; • make it an offence for employers to advertise employment with a rate of pay less than the national minimum wage; and • capture all parties and individuals that directly participate in wage theft, including those who knowingly or recklessly create an environment of wage theft (including franchisors, advisors, head contractors and other third-party participants in supply chains). 	<p>Accepted.</p> <p>The Government is committed to ensuring that the compliance and enforcement settings in the Fair Work Act address the serious problem of wage theft.</p> <p><i>The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i> prohibits the advertisement of a job with a pay rate that would breach the Fair Work Act or a fair work instrument. This includes advertising employment below the National Minimum Wage, where that is the applicable rate of pay.</p> <p>In considering how to introduce a criminal penalty for wage theft, the Government will consider how the offence best fits with existing civil penalties to ensure there is an appropriate range of penalties to deal with the spectrum of behaviour that deprives workers of their entitlements, which can include wage theft.</p>

	<p>In addition to its commitment to criminalise wage theft, the Government has committed in its Plan to Build a Stronger Pacific Family to implementing the recommendations of the Migrant Workers' Taskforce. This includes recommendations to increase civil penalties for wage exploitation and extend accessorial liability provisions of the Fair Work Act to also cover situations where businesses contract out services to persons.</p>
<p>Recommendation 3</p> <p>The committee recommends that the Australian Government consider tasking the Australian Competition and Consumer Commission to bring forward a legislative amendment to the <i>Competition and Consumer Act 2010</i> to incorporate wage theft as an anti-competitive practice.</p>	<p>Noted.</p> <p>The Government considers that wage theft is not only unfair to workers who do not receive their lawful entitlements, but also unfair to law-abiding employers who may not be able to compete with employers who do not pay full lawful entitlements to their employees.</p> <p>The Government notes this recommendation because it considers that wage theft can appropriately be covered by the national industrial relations system as set out in the Fair Work Act and as regulated by the Fair Work Ombudsman. The Government is committed to ensuring that the Fair Work Act provides the Fair Work Ombudsman with appropriate statutory enforcement tools to deter wage theft and hold wrong-doers to account.</p>
<p>Recommendation 4</p> <p>The committee recommends that the Australian Securities and Investments Commission improve enforcement action and director disqualifications from managing a company, where companies use Superannuation Guarantee payments or wages owed to trade while otherwise insolvent.</p>	<p>Noted.</p> <p>As the Committee notes, ASIC's enforcement actions are a matter for ASIC as an independent commission.</p> <p>However, the Government is committed to ensuring that strong enforcement tools are available to ASIC so that it can effectively address non-compliance by directors and companies, including in circumstances</p>

	<p>where employment entitlements have not been paid.</p>
<p>Recommendation 5</p> <p>The committee recommends that the Australian Government establish a small claims tribunal, ideally co-located with the Fair Work Commission, to create a simple, affordable, accessible, and efficient process for employees to pursue wage theft, including Superannuation Guarantee non-compliance.</p>	<p>Accepted in-principle.</p> <p>The Government is committed to deterring wage theft, and ensuring that where it does occur, workers should be able to recover their unpaid entitlements quickly and easily.</p> <p>The Government supports a simple and cheap small claims process under the Fair Work Act. In the 2022-23 Budget, the Government provided funding for a review of the effectiveness of the Fair Work Act small claims process, in line with the recommendations of the 2019 Migrant Workers’ Taskforce report. This review will occur over 2023. Establishing a dedicated tribunal would require further consideration. Among other potential reforms, the review will consider the merits of a dedicated small claims tribunal as recommended by the committee.</p> <p>In addition to this review, the Government’s <i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i> makes immediate reforms to the small claims process in the courts, under the Fair Work Act, to address issues cited by the committee. This includes:</p> <ul style="list-style-type: none"> • increasing the cap on small claims recovery from \$20,000 to \$100,000 to enable a greater number of workers to benefit from this mechanism, and • clarifying the courts’ ability to award filing fees as costs to successful small claims applicants to reduce the disincentive that these fees may otherwise have on applicants.

<p>Recommendation 6</p> <p>The committee recommends that the Australian Government, through the Australian Taxation Office, review the taxation treatment of wages repaid to employees following incidents of wage theft to ensure they are treated no less favourably than if wages were paid when they were due.</p>	<p>Accepted in-principle.</p> <p>The Government is committed to ensuring that individuals who receive wages repayments as lump sums are not penalised through a higher tax liability purely because of the timing of the payment.</p> <p>The tax law treats wages paid as a lump sum and in arrears, such as for the underpayment of wages and salary, as taxable. The repayment of wages and salary following incidents of wage theft can therefore result in a one-off increase to an individual's taxable income in the income year it is received.</p> <p>There are two tax offsets available to individuals that can reduce their tax liability following receipt of lump sum payments: the lump sum payment in arrears tax offset, and the Medicare levy surcharge lump sum payments in arrears tax offset.</p> <p>These offsets generally operate to ensure that most taxpayers are no worse off, relative to their position had they been paid correctly in prior years. However, in certain circumstances taxpayers may face higher tax liabilities, for example taxpayers who would not have otherwise been liable for the Medicare levy.</p>
<p>Recommendation 7</p> <p>The committee recommends that the Australian Government review whether employee representatives that hold 'right of entry' permits can be better utilised to inspect and investigate potential underpayments across workplaces.</p>	<p>Accepted in-principle.</p> <p>The Government appreciates concerns raised by witnesses that the restrictions on permit holders may not always be appropriate in the context of underpayments and exploitation.</p> <p>The Government will continue to monitor the effectiveness of the right of entry framework in deterring underpayments, including the powers of permit holders to investigate suspected contraventions, to</p>

	ensure they are appropriate to enforce the workplace rights of employees.
<p>Recommendation 8</p> <p>The committee recommends that the Australian Government amend the <i>Fair Work Act 2009</i> to include provisions relating to the production of documents to permit holders, to:</p> <ul style="list-style-type: none"> • introduce a penalty for individuals or entities that provide false or misleading documents to a permit holder exercising right of entry; and • expand section 557C to apply to the failure to produce accurate documents to a permit holder exercising right of entry. 	<p>Accepted in-principle.</p> <p>The Government appreciates that in some circumstances, conduct that prevents a permit holder from effectively investigating a suspected contravention is treated differently than if the same had occurred with a Fair Work Inspector. The Government will continue to monitor the effectiveness of the right of entry framework in deterring the provision of false and misleading documents, to ensure that it is appropriate to enforce the workplace rights of employees.</p> <p>The Government notes that the Fair Work Act already provides penalties for individuals who refuse entry, delay, hinder or obstruct a permit holder, including by providing false or misleading documents. The Government also considers that the proposed amendment to section 557C of the Fair Work Act is not required, because section 557C would already apply to the failure to produce accurate documents, including to a permit holder exercising right of entry.</p>
<p>Recommendation 9</p> <p>The committee recommends that the Australian Government consider bringing forward amendments to the <i>Superannuation Guarantee (Administration) Act 1992</i> to:</p> <ul style="list-style-type: none"> • require Superannuation Guarantee payments to be aligned with the payment of wages; • require Superannuation Guarantee payments to be made on every dollar earned to achieve simplicity and ease of compliance; and 	<p>Accepted in-principle.</p> <p>The Government is committed to ensuring that employees receive the entirety of their lawful entitlements, including superannuation.</p> <p>That is why the Government has committed to including superannuation in the Fair Work Act (see response to Recommendation 10); and to set targets for the Australian Taxation Office for the recovery of unpaid Superannuation Guarantee amounts.</p>

<ul style="list-style-type: none"> consider an incremental implementation strategy, similar to that used for the rollout of Single Touch Payroll, to ensure small businesses are adequately prepared for changes to the timing of Superannuation Guarantee payments. 	<p>The Government will consider the desirability of these proposed amendments to the Superannuation Guarantee (Administration) Act.</p>
<p>Recommendation 10</p> <p>The committee recommends that the Australian Government include superannuation in the National Employment Standards.</p>	<p>Accepted.</p> <p>Consistent with its commitment in the <i>Secure Australian Jobs Plan</i>, the Government will introduce legislation in due course to include superannuation in the Fair Work Act to ensure that more people can directly pursue their employer for unpaid superannuation debts.</p>
<p>Recommendation 11</p> <p>The committee recommends that the Australian government consider including superannuation in the Fair Entitlements Guarantee payments.</p>	<p>Noted.</p> <p>The Government will consider the desirability of guaranteeing unpaid superannuation entitlements in insolvency. Further consideration of this recommendation will include examination of costs and benefits, including moral hazard aspects, as well as interactions with other measures to address superannuation non-compliance.</p> <p>The Government notes that improved compliance by employers in meeting their obligations is preferable to reliance on a government guarantee to ensure that workers receive their superannuation entitlements.</p>
<p>Recommendation 12</p> <p>The committee recommends that the Australian Taxation Office improve its communication with individuals to keep them promptly and fully informed of the progress and outcomes regarding their Superannuation Guarantee non-compliance cases, including:</p>	<p>Accepted in-principle.</p> <p>The Government is supportive of keeping individuals fully informed about their unpaid superannuation cases and will consider the proposals specified in this recommendation.</p> <p>The Government notes that the Australian Taxation Office is currently reviewing how it</p>

<ul style="list-style-type: none"> • that before entering into a payment plan to recover Superannuation Guarantee payments from a non-compliant employer, the Australian Taxation Office be required to notify the affected employee and gain their consent to the course of action; and • that in determining a reasonable payment plan to recover Superannuation Guarantee payments from a non-compliant employer, the Australian Taxation Office must give primary consideration to the loss of retirement savings suffered by the employee. 	<p>can better keep individuals informed about the collection of their amounts of superannuation guarantee owing to them within the scope of current legislation.</p>
<p>Recommendation 13</p> <p>The committee recommends that the Australian Government review all current compliance and recovery activities related to unpaid Superannuation Guarantee contributions, including:</p> <ul style="list-style-type: none"> • determining which cases should remain with the Australian Taxation Office, and which ones could be transferred to, or shared with, the Fair Work Ombudsman or an alternative body; • directing the Fair Work Ombudsman to begin receiving and acting on Superannuation Guarantee non-payment complaints where appropriate, rather than simply referring the affected employees to the Australian Taxation Office; • reviewing the Superannuation Guarantee contribution regime and its management by the Australian Taxation Office to ascertain whether it is adequately deterring underpayments and recovering unpaid Superannuation Guarantee entitlements; and • improving proactive Superannuation Guarantee initiatives including strengthening and increasing penalties for deliberate and repeated acts of non- 	<p>Noted.</p> <p>The Government is committed to ensuring that the Australian Taxation Office and the Fair Work Ombudsman are able to continue to work together to ensure that employees receive all of their lawful entitlements in their respective jurisdictions. The Government notes that the Australian Taxation Office and the Fair Work Ombudsman collaborate closely in their compliance and recovery activities and have a memorandum of understanding for the sharing of superannuation-related information.</p> <p>As in response to recommendation 9, the Government is committed to setting targets for the Australian Taxation Office for the recovery of unpaid Superannuation Guarantee amounts. The targets would be made public and reported annually. The Government will undertake further work to determine the specific targets and will announce these in due course.</p>

<p>compliance, the inclusion of random audits, and the publication of enforcement activities in relation to Superannuation Guarantee payments.</p>	
<p>Recommendation 14</p> <p>The committee recommends that the Australian Government consider legislative options to give employees, or other parties acting on their behalf such as unions, superannuation funds, and legal representatives greater standing to assist in the recovery of unpaid superannuation.</p>	<p>Accepted.</p> <p>The Government’s commitment to include superannuation in the Fair Work Act will provide certain employees, and other parties acting on their behalf, an avenue to pursue unpaid superannuation through the courts, where they are not currently able to do so because their awards or enterprise agreements do not have clauses to allow this.</p>
<p>Recommendation 15</p> <p>The committee recommends that the Australian Government, as a priority:</p> <ul style="list-style-type: none"> • extend the Fair Entitlements Guarantee to all employees, including those on temporary visas, building on recommendation 13 of the Migrant Workers' Taskforce report; and • implement a National Labour Hire Licensing Scheme, building on recommendation 14 of the Migrant Workers' Taskforce report. The National Labour Hire Licensing Scheme should build on existing frameworks, such as those schemes operating in Queensland and Victoria, to provide a nationally consistent framework. 	<p>Accepted in-principle.</p> <p>The Government has committed to implementing the recommendations of the Migrant Workers’ Taskforce, which include extending eligibility for FEG to migrant workers with work rights following consultation regarding the benefits, costs and risks, but excluding people who have deliberately avoided their taxation obligations. The Government is considering this Recommendation 15 further in the context of delivering this election commitment.</p> <p>As part of the Government’s commitment to implement the recommendations of the Migrant Workers’ Taskforce, the Government has committed to establishing national labour hire regulation to help protect workers by promoting greater compliance with workplace and other relevant laws.</p>
<p>Recommendation 16</p> <p>The committee recommends that the Australian Government explore reform to visa laws to allow migrant workers who</p>	<p>Accepted.</p> <p>The Government is committed to ensuring all workers, including migrant workers, are able to recover their unpaid wages.</p>

<p>have been exploited or underpaid to remain in Australia until the relevant legal processes for recovery of lost wages or conditions is finalised.</p>	<p>Consultation is ongoing with key stakeholders to explore measures that could be employed to support migrant workers remain lawfully in Australia while they seek to recover lost wages or conditions.</p>
<p>Recommendation 17</p> <p>The committee recommends that a formal, and legally binding firewall be established between the Fair Work Ombudsman and the Department of Home Affairs to protect whistle-blowers and temporary visa holders that report exploitation or wage theft to the Fair Work Ombudsman and extend protection to exploitation and wage theft claims progressed through the courts.</p>	<p>Accepted in-principle.</p> <p>The current Assurance Protocol between the Fair Work Ombudsman and the Department of Home Affairs includes a range of safeguards and protections, and operates on the basis of informed consent from the visa holder worker.</p> <p>The Government is examining the implications of establishing a firewall between the Fair Work Ombudsman and the Department of Home Affairs to support migrant workers to report exploitation without fear of adverse consequences. Any changes to existing arrangements will seek to extend protections for migrant workers.</p>
<p>Recommendation 18</p> <p>The committee recommends that the Australian Government act as a model procurer by ensuring that:</p> <ul style="list-style-type: none"> • government procurement powers are being used to support businesses that engage in fair, equitable, ethical and sustainable practices, including demonstrated compliance with labour laws; and • wage theft does not occur within its own workforce, including in government funded sectors. 	<p>Accepted.</p> <p>The Government will act as a model procurer by exercising its procurement powers in line with the Commonwealth Procurement Framework and Rules. These Rules seek to ensure that the Commonwealth does not enter into a contract with tenderers that do not comply with workplace obligations.</p> <p>The Government has committed to act as a model employer in its <i>Secure Australian Jobs Plan</i> and its <i>Plan to improve the Public Service</i>. The Government will work constructively with the public service and unions to ensure fair and equitable conditions of employment and job security in the public sector. This includes</p>

	addressing and preventing wage theft within the public service.
<p>Recommendation 19</p> <p>The committee recommends that the Australian Government improve protections for employees who engage in lawful activity to prevent wage theft, including joining a union, pursuing underpayments through established processes, publicly speaking out against poor workplace practices, exercising workplace rights, and engaging in industrial activity.</p>	<p>Accepted in-principle.</p> <p>The Government is committed to ensuring that the general protections provisions of the Fair Work Act continue to operate to provide protections for employees who engage in lawful activity to prevent wage theft.</p> <p>The Government has committed to implementing a number of measures under its <i>Secure Australian Jobs Plan</i> and <i>Plan to Build a Stronger Pacific Family</i>, that would increase protections for employees and induce greater compliance with relevant provisions. This includes legislating to make wage theft a criminal offence (see Recommendation 1) and incorporating a right to superannuation within the Fair Work Act (see Recommendation 10). Any action available to employees under these measures would be covered by the existing general protections provisions.</p> <p>As an outcome of the Jobs and Skills Summit, the Government has also announced that it will amend the Fair Work Act to provide stronger protections for workers against discrimination, harassment and adverse action. The Government will consider how these protections can be strengthened and may consult further on the issue in due course.</p>