



25 October 2019

Christian Porter, MP  
Attorney General  
Robert Garran Offices  
3-5 National Circuit  
BARTON ACT 2600

Dear Minister Porter,

**RE: CALL FOR PUBLIC COMMENT ON IMPROVING PROTECTIONS OF EMPLOYEES' WAGES AND ENTITLEMENTS: STRENGTHENING PENALTIES FOR NON-COMPLIANCE DISCUSSION PAPER**

Victorian Trades Hall Council (VTHC) welcomes the opportunity to make a submission into the Discussion Paper on Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance.

VTHC is the peak body for unions in Victoria, and represents over 40 unions and more than 430,000 workers in the state. VTHC, along with its affiliates and their members have been campaigning on the issue of wage theft; seeking to bring justice to workers who have had their wages stolen by their employers. We have seen workers from a range of backgrounds, in almost every industry suffer wage theft.

While we welcome the indication from the government that they will take action to address wage theft, it is imperative that the right model is adopted. Wage theft is occurring at epidemic levels. The response must adequately deter this behaviour and be easy to access for workers.

For this reason, VTHC calls on the government to make wage theft a crime. This submission addresses our suggested model for criminalising wage theft, and discusses suggested penalties and redress mechanisms.

If you have any questions or would like more information, please do not hesitate to contact Ted Sussex, Politics and Research Leader on [REDACTED].

Thank you for your consideration.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Luke Hilakari", written over a light blue horizontal line.

Luke Hilakari  
Secretary, VTHC

Ref: LH:TC 92.32

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**VTHC Submission in response to the  
Improving Protections of Employees'  
Wages and Entitlements: Strengthening  
Penalties for Non-Compliance discussion  
paper**



## **Introduction**

The Victorian Trades Hall Council (VTHC) welcomes the opportunity to make a submission in response to the industrial relations consultation discussion paper, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (hereafter referred to as the discussion paper).

VTHC was founded in 1856 and is the peak body for unions in Victoria. VTHC represents over 40 unions and more than 430,000 workers in Victoria. These workers are members of unions that reach into every industry in the state, both in the public and private sectors.

Since gaining the Eight Hour Day in April 1856, VTHC has had a long history of fighting for and defending the rights of workers in Victoria. VTHC will continue to campaign tirelessly for the rights, entitlements and protections of workers in Victoria, no matter their employment status, employer or workplace.

Today, VTHC places a particular emphasis on fighting for the rights and entitlements of vulnerable workers who are more likely to be exploited. This includes young, migrant, and women workers. Increasingly, workers in union are fighting simply to be paid their basic entitlements.

In this submission, VTHC will be using the term wage theft to refer to non-compliance of wage instruments. Every worker has the right to be paid in line with their legal entitlements and to work under proper working conditions. An employer who deviates from complying with these rights is guilty of theft.

Any approach from government in resolving this issue must clearly articulate the problem. The focus should be on creating justice for workers who have suffered wage theft. VTHC calls on the government to criminalise employers' theft of wages so as to disincentivise the rampant exploitation of workers.

VTHC understands that the Young Worker's Centre, the Migrant Worker's Centre, the Australian Council of Trades Union (ACTU) and a number of other unions are making submissions to this discussion paper. The VTHC submission should be read in conjunction with those submissions.

## **Context of this Consultation**

For years, unions and their members have been dealing with rampant wage theft. Sharan Burrow, General Secretary of the International Trade Union Confederation has said that the wage theft that occurs in Australia is amongst the worst in the world, and it leads to a form of "wage slavery" that is "akin to the kind of conditions we see in countries like Gulf states where the kafala system [of migrant workers] exist..."<sup>1</sup>

In recent years a number of prominent businesses have been exposed. From 7-Eleven, to Domino's, George Calombaris's Made Group, Chatime, Caltex and Michel's Patisserie – cases of well-established businesses disregarding minimum wage entitlements are constantly making headlines.

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<sup>1</sup> McCauley, D "Australia's Wage Theft Amongst Work in the World, Top Union Leader Says", *The Age*, September 12 2019, accessed < <https://www.theage.com.au/politics/federal/australia-s-wage-theft-among-worst-in-the-world-top-union-leader-says-20190912-p52qmz.html> >

Moreover, VTHC is alarmed about the epidemic levels of wage theft occurring in smaller, less well-known businesses, and the impact this has on workers. This is particularly rife in the hospitality industry and workers engaged through labour hire.

With affiliates and regional trades and labour councils (TLCs), VTHC has been involved in scores of campaigns for workers to reclaim stolen wages from less well-known businesses. These include workers at Barry Café in Northcote, Lalaland in Prahran, UniLodge in Melbourne's CBD, Monga in Boxhill, delivery riders with Deliveroo, Foodora and other gig economy platforms, Drag Queens and entertainers employed at Queer Expo in Melbourne, hairdressers in Geelong, international students in Melbourne's famous Degraeves Street and China Town, as well as public health workers and school cleaners across the state.

The rates of workers suffering wage theft are alarming: 1 in 5 young people are working for base pay less than the minimum wage.<sup>2</sup>

Wage theft is particularly rife in retail, hospitality and fast food. In the retail industry, 1 in 3 young retail workers were working for less than the minimum wage under the Retail Award.<sup>3</sup> An audit undertaken by the Fair Work Ombudsman (FWO), found 46% of restaurants, cafes and catering business,<sup>4</sup> 47% of takeaway food business,<sup>5</sup> and 20% of accommodation, taverns and bar businesses,<sup>6</sup> were responsible for wage contraventions.

An audit of the fast food industry also found 84% of fast food stores were responsible for some form of underpayment, with 39% paying incorrect base pay rates and 44% did not pay penalty rates and loadings.<sup>7</sup>

Worker exploitation, including wage theft, is intersectional and builds on pre-existing vulnerabilities, particularly affecting migrant workers. In a survey of international students 1 in 4 were paid \$12 an hour or less, and 1 in 3 backpackers worked for \$12 an hour or less.<sup>8</sup>

Case studies on the way wage theft pairs exploitation with already vulnerable workers are detailed in the Young Workers' Centre and the Migrant Workers' Centre submissions.

In every corner of the state, in every industry we are seeing some form of wage theft. Employers avoiding their obligations under the *Fair Work Act* has become so endemic it's become the new normal business model.

Slater and Gordon's Industrial and Employment Principal, Carita Kazakoff says that excuses around the complexity of laws setting minimum wages are "not good enough", and the underlying issue is that too often employers don't take their obligations to their workers seriously.<sup>9</sup>

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<sup>2</sup> Young Workers Snapshot: The Great Wage Rip-Off, Young Workers Centre, May 2017, p 7-8

<sup>3</sup> Ibid, p 9-10

<sup>4</sup> National Hospitality Industry Campaign 2012-15, Restaurants, Cafes and Catering (Wave 2), June 2015, p 6

<sup>5</sup> National Hospitality Industry Campaign 2012-15, Takeaway Foods (Wave 3) Report March 2016, Fair Work Ombudsman, p 7

<sup>6</sup> National Hospitality Industry Campaign 2012-15, Report Accommodation, pubs, taverns & bars, November 2013, Fair Work Ombudsman p 11

<sup>7</sup> Fast Food Industry Audit Report, ER Strategies, January 2016, p 5-6

<sup>8</sup> Wage theft in Australia: Findings of the National Temporary Migrant Work Survey, Laurie Berg & Bassina Farbenblum, November 2017, p 5-7

<sup>9</sup> Kazakoff, C "Pay Your Staff Properly", *Slater and Gordon*, October 7, 2019 accessed <  
[https://www.slatergordon.com.au/blog/pay-your-staff-properly?fbclid=IwAR1ISDIDJsax6bBoZk64HPScJv5P-M2vovZowoG3lf\\_ZTi4f8tgMCMRN9ik](https://www.slatergordon.com.au/blog/pay-your-staff-properly?fbclid=IwAR1ISDIDJsax6bBoZk64HPScJv5P-M2vovZowoG3lf_ZTi4f8tgMCMRN9ik) >

VTHC calls on the government to enact laws that criminalise the wide spread practice of wage theft and introduce serious penalties enforced by a well-resourced compliance agency, to break down this business model and protect vulnerable workers.

## **Wage Theft Laws**

### **Recommendation 1: Introduce laws that criminalise wage theft.**

The Victorian Union movement calls for wage theft to be made a crime. Wage theft should be defined as an act performed by employers when their workers do not receive the wages they are legally entitled to under an Award, Enterprise Bargaining Agreement or other industrial agreement.

### **Recommendation 2: Deliberate wage theft should apply to a spectrum of behaviours, including recklessness, negligence and wilful blindness.**

We note that the discussion paper suggests that wage theft occurs in two distinct ways; 'unintentional mistakes', and 'employers that knowingly underpay' their workers.<sup>10</sup> VTHC disagrees with this simple characterisation. The idea that theft of wages can be a mere afterthought or error is repeated throughout the paper. For example, it suggests that penalties should be careful not to be 'crushingly punitive in genuine cases of mistake',<sup>11</sup> and 'any new [criminal] offence would need to be carefully framed to target only the most serious and culpable underpayment cases – rather than unintentional mistakes or miscalculations.'<sup>12</sup> We do not agree with this view.

A worker's wage is their livelihood. Their income is the direct determination of their ability to pay rent, pay bills, look after their families and interact with their communities. Wages associated with Awards are increased yearly in line with cost of living by the Fair Work Commission in recognition of the significance of wages to a worker's capacity to engage in daily life. Because of this, employers have an obligation to ensure payment of wages is correct. Any deviation from paying wages in the correct amount should be treated with the requisite level of seriousness.

VTHC highlights that a policy response that defines two simplistic types of wage theft will not be appropriate or have the flexibility needed for enforcement.

VTHC suggests the laws must be drafted in a way that encapsulates a spectrum of deliberateness for the act of wage theft.

Wage theft is occurring on such an enormous scale that it is clear there should be culpability for wilful recklessness where employers are unfairly ignorant of their obligations, and they do not take reasonable steps to inform themselves of their obligations. Ignorance, recklessness, wilful blindness and negligence must form part of what is considered when enforcing wage theft laws. Whether the wage theft was systematic in nature should also be considered.

Concurrently, there should be space for employers who are genuinely mistaken and quickly rectify and repay lost wages when they are brought by workers.

Wage theft that includes recklessness or wilful blindness should still attract criminal sanctions, as it is important laws are drafted to change behaviour of employers. Few employers guilty of wage

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<sup>10</sup> Discussion paper p 2

<sup>11</sup> Ibid, p 4

<sup>12</sup> Ibid, p 12

theft will be caught if deliberateness is the only determining element, doing little to assist vulnerable workers impacted by wage theft.

**Recommendation 3: Ensure wage theft laws applies to all forms of wages and compensation.**

Wage theft should apply to any underpayment or non-payment of entitlements, including wages, superannuation, over-time, time in lieu, allowances, loadings, penalty rates, leave payments or other entitlements.

Laws that criminalise wage theft should also include a reverse onus of proof where it has occurred, that require the employer to explain how the theft arose and to mount a defence.

The laws should also include a strict liability. There may be a defence of mistake or a due diligence defence for bodies corporate.

Commonwealth laws that criminalise wage theft should not be inconsistent with state laws, particularly those suggested in Victoria. Commonwealth offences should be confined to strict liability, which would likely not encroach on states' wage theft laws under the relevant state criminal codes.

## **Wage Theft Laws Should Protect Workers**

**Recommendation 4: Wage theft laws should apply to all workers, no matter their employment arrangement, and should include gig economy workers, workers engaged in sham contracting and through labour hire.**

Wage theft laws should protect workers from having their wages stolen. Multiple inquiries and reports have highlighted how employers are avoiding their obligations under the *Fair Work Act*, by falsely classifying workers as independent contractors or through labour hire arrangements.<sup>13</sup>

Wage theft laws must be drafted to protect all workers, including gig economy workers, workers engaged in sham contracting and workers employed through labour hire. Workers in these industries often belong to some of the most vulnerable communities, and are employed through these mechanisms to avoid obligations under industrial law.

VTHC notes that the introduction of the *Protecting Vulnerable Workers Act* has done little to change behaviour in this regard. Although this bill attempted to bring wage theft occurring in franchises under the remit of franchisors, it has had little effect in actually providing justice for workers. The recent revelations against Subway demonstrate this.

Wage theft laws must be drafted to protect workers, no matter their employment arrangement.

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<sup>13</sup> For example, the Senate Education and Employment References Committee, *Inquiry into Corporate Avoidance of the Fair Work Act*, published September 2017

## **Enforcement**

### **Recommendation 5: Give unions the power to institute proceedings for wage theft offences.**

Workers in unionised workplaces are much less likely to have their wages stolen. Unions make workplaces safer for union members. A study of 31 industrialised countries published in September 2013 found that union density was the most important external factor in workplace safety climate and health. The report concluded that “eroding unionism may not be good for worker health or the economy either”.<sup>14</sup> Further, a 2007 study of manual workers in the United Kingdom found that unionised workplaces were less likely to have a fatal injury.<sup>15</sup>

The OECD Employment Outlook for 2018 reported that there is a strong association between collective bargaining and lower wage inequality, and that wage inequality is highest among workers who are not covered by any form of collective bargaining.<sup>16</sup> The ability of unions to effectively bargain on behalf of workers, and be involved in the ongoing defence of rights and entitlements fought for by workers in union is vital.

### **Recommendation 6: Re-instate unions right of entry powers for inspection.**

As such, unions must be involved in investigating instances of wage theft. Restrictions on union organisers’ right of entry to workplaces must be removed, and unions should be given the entry powers to inspect employer’s records in relation to wages. Where wage theft is occurring, unions should be able to bring proceedings.

### **Recommendation 7: Increase funding and powers to the Fair Work Ombudsman to investigate and bring proceedings for wage theft.**

Funding to the Fair Work Ombudsman (FWO) also needs to be drastically increased. The discussion paper highlights, that in 2017-18, the FWO only instituted 35 court proceedings for wage contraventions.<sup>17</sup> This is wildly out of step with the actual rates of wage theft occurring across the country.

For example, in 2018, the FWO undertook an audit of food precincts, and found that of businesses on Victoria Street in Melbourne’s Richmond alone, 81% of businesses were non-compliant with workplace laws, including 41% whose breaches were underpayment of hourly rates.<sup>18</sup>

In 2015, the FWO undertook a general wages audit and found, 46% of restaurants, cafes and catering business had at least one wages contravention,<sup>19</sup> 47% of takeaway food business were paying their employees incorrectly,<sup>20</sup> and 31% of accommodation/taverns and bar business were found to be in contravention; 53% of which were monetary.<sup>21</sup> While the discussion paper highlights

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<sup>14</sup> Dollard and Naser, *Social Science and Medicine*, Volume 92, September 2013, Pages 114–123

<sup>15</sup> S Grazier, *Compensating Wage Differentials for Risk of Death in Great Britain: An Examination of the Trade Union and Health and Safety Committee Impact* (2007) Working Paper 2007/02, Welsh Economy Labour Market Evaluation and Research Centre, Swansea University.

<sup>16</sup> OECD Employment Outlook Chapter three ‘The Role of Collective Bargaining for Good Labour Market Performance’, 2018

<sup>17</sup> Discussion Paper, p 3

<sup>18</sup> Food Precincts Activities – Compliance Report, Fair Work Ombudsman, July 2018, p20

<sup>19</sup> National Hospitality Industry Campaign 2012-15, Restaurants, Cafes and Catering (Wave 2), June 15, p 6

<sup>20</sup> National Hospitality Industry Campaign 2012-15, Takeaway Foods (Wave 3), Report March 2016, Fair Work Ombudsman, p 7

<sup>21</sup> National Hospitality Industry Campaign 2012-15, Report *Accommodation, pubs, taverns & bars*, November 2013, Fair Work Ombudsman, p 11



the FWO recovered \$29.6 million for 13,367 workers in this period, VTHC contends these figures do not remotely quantify the scale of the contraventions.

Workers often tell their unions that, despite the best efforts of the FWO, investigations into workplaces result in little to no repercussions. Other than bringing legal proceedings, the FWO may issue infringement notices, compliance notices and enforceable undertakings. In 2016-17, the FWO issued 665 infringement notices, 192 compliance notices, and 40 enforceable undertakings.<sup>22</sup>

Despite this, a 2018 report detailing the FWO's re-auditing of previously non-compliant workplaces, which found that 38% were still non-compliant when the FWO returned.<sup>23</sup> Clearly, this isn't good enough. Alongside unions, the FWO must be given more powers and resources to be an effective investigative and regulatory body.

## **Prosecution should extend to managers**

**Recommendation 8: Wage theft laws must be drafted to capture managers who are in control of decisions that cause wage theft to occur.**

It is important that wage theft laws apply where managers and senior managers are responsible for creating wage theft. Accessorial and corporate liability could be determined based on sections 550, and 793 of the *Fair Work Act*. This should merge with Clause 12.3 of the Criminal Code to establish corporate criminal responsibility, enabling liability for individuals acting within the scope of their authority. This would be useful given the range of businesses that wage theft laws should apply to, as it would not be necessary to prove the person was a "high managerial agent" of the body corporate.

Laws must also ensure that companies that outsource their labour requirements to third parties who commit wage theft, are made culpable. For example, a manager should be subject to wage theft laws where they decide to use a labour hire firm's services, where that labour hire firm steals wages from its workers.

## **Penalties and Redress**

Current penalties are inadequate as a serious deterrent for wage theft. In the period of 2014-15, there were only 42 litigations commenced in relation to wage contraventions, representing 0.29% of allegations of underpayments lodged with the FWO for the reporting period.<sup>24</sup>

As the discussion paper highlights, penalties under the Act can currently be grouped, so that employers guilty of multiple cases of wage theft only have to pay a small fraction of what they gain off the back of their workers.

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<sup>22</sup> Fair Work Ombudsman and Registered Organisations Commission Entity, 2016-17 Annual Report, p 23

<sup>23</sup> National Compliance Monitoring Campaign #2, 2018, p 7

<sup>24</sup> Senate Standing Committee on Education and Employment, Questions on Notice, Fair Work Ombudsman SQ16 000232, Questions 8 and 9

There is very little disincentive to prevent employers from committing wage theft. This is due to the few investigations and subsequent prosecutions of wage theft resulting in the small likelihood of employers facing redress, and when they do, the minimal fines they are made to pay.

Penalties need to be completely overhauled. As a starting point, penalties for wage theft should not be grouped as civil contraventions, but rather instituted as fines, with each case of wage theft being prosecuted.

Currently workers are forced through an expensive system that can be traumatic and overly complicated or legalistic. It is essential that workers who have suffered wage theft can access a system that allows them easy redress to gain their stolen wages back promptly, without delays. VTHC suggests that civil recovery be made simple and timely, to allow workers to recover their money quickly, and then criminal proceedings can occur at a different stage.

**Recommendation 9: Funding to the Small Claims Court should be increased, with the aim to make the process more accessible for workers.**

Although the Small Claims Court in the Federal Circuit Court is designed to make it easy for workers to access redress, in effect it is overly complicated and takes too long. Funding should be increased to this arm, to process wage theft claims quickly.

**Recommendation 10: Wage theft proceedings and evidentiary burdens should be simplified so workers can easily access the system.**

Evidentiary burdens should be clear and easy so workers can represent themselves. The key considerations should be whether money is owed, the quantity owed, and the reason it is owed. Special Discovery could be a procedure in this court, whereby an employer must open their wage records. Fines should be imposed if employers do not keep records or allow inspection of their accounts.

## **Conclusions**

Wage theft is an endemic issue facing vulnerable workers across the country. It has become so common; it is now a business model. Stealing workers' wages is a serious issue that warrants the same response as other forms of theft.

VTHC calls on the government to make wage theft a crime. Wage theft should be associated with serious penalties that can be enforced through unions and a well-resourced enforcement agency. Those responsible for wage theft including managers, and workplace practices that normalise wage theft, should be made culpable. Workers who are victims of wage theft must be able to access simple redress. The government owes a duty to vulnerable workers who have had their wages stolen. They must break this business model and ensure that no more cases of wage theft occur.

## **Recommendations:**

**Recommendation 1: Introduce laws that criminalise wage theft.**

**Recommendation 2: Deliberate wage theft should apply to a spectrum of behaviours, including recklessness, negligence and wilful blindness.**

**Recommendation 3: Ensure wage theft laws apply to wages, loadings, over-time, penalty rates, allowances, leave and superannuation.**

**Recommendation 4: Wage theft laws should apply to all workers, no matter their employment arrangement, and should include gig economy workers, workers engaged in shame contracting and through labour hire.**

**Recommendation 5: Give unions the power to institute proceedings for wage theft offences.**

**Recommendation 6: Re-instate unions right of entry powers for inspection.**

**Recommendation 7: Increase funding and powers to the Fair Work Ombudsman to investigate and bring proceedings for wage theft.**

**Recommendation 8: Wage theft laws must be drafted to capture managers who are in control of decisions that cause wage theft to occur.**

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