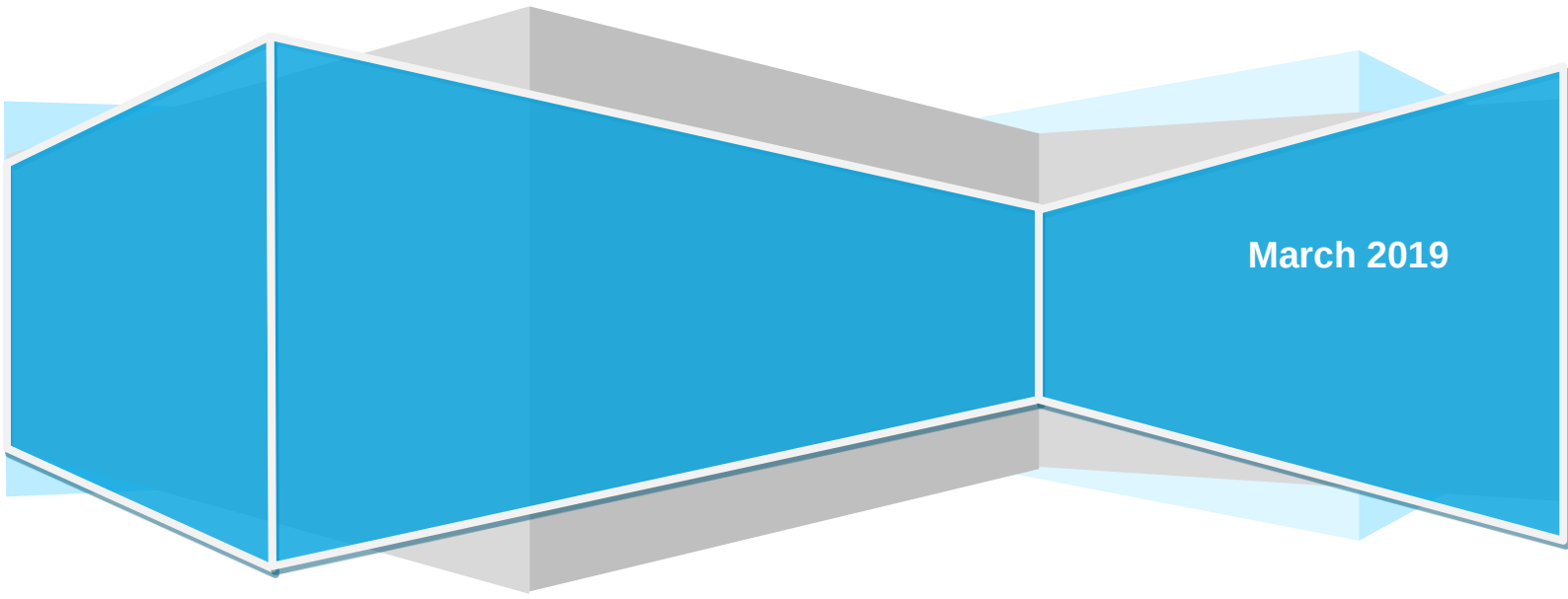
ELC Employment Law Centre of WA (Inc)

Working for WA Workers

ABN 36 365 876 841

Submission

Inquiry into Wage Theft in Western Australia



March 2019

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Inquiry into Wage Theft in Western Australia
Tony Beech
Department of Mines, Industry Regulation and Safety
Level 4, 140 William Street
PERTH WA 6000

Lodged via email: wagetheftinquiry@dmirs.wa.gov.au

27 March 2019

Dear Tony Beech

Inquiry into Wage Theft in Western Australia

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Inquiry into Wage Theft in Western Australia (the **Inquiry**).

ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia offering free - employment law advice, assistance, education and representation. Each year ELC assists thousands of callers through our Advice Line service and provides numerous workers with further assistance from a solicitor.

Please see our submission below. Due to the short time frame to provide submissions to the Inquiry, we have responded at a high level to some of the Terms of Reference and issues raised that appear to be relevant to our client base of vulnerable Western Australian workers.

We would be happy to provide additional information to the Inquiry and participate in further consultation should there be an opportunity to do so, or should the Inquiry want us to expand on any of our submissions and recommendations.

Yours sincerely

Employment Law Centre of WA

Rowan Kelly
Principal Solicitor

Kendra Hagan
Solicitor

Elisha Butt
Solicitor

Contents

Glossary

DMIRS means the Department of Mines, Industry Regulation and Safety.

ELC means the Employment Law Centre of WA (Inc).

FEG means the Fair Entitlements Guarantee.

FW Act means the *Fair Work Act 2009* (Cth).

FW Protecting Vulnerable Workers Act means the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), which amended the FW Act on 15 September 2017.

FWC means the Fair Work Commission.

FWO means the Fair Work Ombudsman.

Harvest Trail Inquiry Report means the Fair Work Ombudsman, *Harvest Trail Inquiry* (2018).[1]

Inquiry means the Inquiry into Wage Theft in Western Australia being conducted by Mr Tony Beech.

IR Act means the *Industrial Relations Act 1979* (WA).

IR Act Interim Report means the *Ministerial Review of the State Industrial Relations System Interim Report* (2018).[2]

MCE Act means the *Minimum Conditions of Employment Act 1993* (WA).

Migrant Workers' Taskforce Report means the *Report of the Migrant Workers' Taskforce* (2019).[3]

NES means the National Employment Standards under the FW Act.

NESB means Non-English Speaking Background.

Phua & Foo Case means *Fair Work Ombudsman v Phua & Foo Pty Ltd* [2018] FCA 137.

PWC means PricewaterhouseCoopers Consulting (Australia) Pty Ltd.

Queensland Parliamentary Inquiry Report means the Queensland Parliamentary Education, Employment and Small Business Committee, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* (2018).[4]

WAIRC means the Western Australian Industrial Relations Commission.

[1] Available at https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports#harvest-trail-inquiry-report.
[2] Available at https://www.commerce.wa.gov.au/sites/default/files/atoms/files/ministerial_review_of_the_state_industrial_relations_system_interim_report.pdf.
[3] Available at https://www.jobs.gov.au/migrant-workers-taskforce.
[4] Available at https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1921.pdf.

Summary of ELC Recommendations

Term of Reference 1: Whether there is evidence of wage theft occurring in Western Australia, and the various forms wage theft may take.

Recommendation 1: The Inquiry recognise wage theft exists within the broader context of significant underpayment of wages and entitlements to Western Australian workers, regardless of employer intent.

Recommendation 2: The Inquiry recognise wage theft and the underpayment of wages and entitlements can take various forms including: non-payment or underpayment; unreasonable deductions; withholding of entitlements; unpaid superannuation or taxation; and sham contracting.

Term of Reference 2: What are the reasons wage theft is occurring, including whether it has become the business model for some organisations.

Recommendation 3: The Inquiry recognise vulnerable workers are those most at risk of wage theft and the underpayment of wages and minimum entitlements.

Term of Reference 3: What is the impact of wage theft on workers, businesses which are compliant with employment laws, and the Western Australian community and economy.

Recommendation 4: The Inquiry recognise the significant impact of wage theft and the underpayment of wages and entitlements on vulnerable workers, compliant businesses, and the Western Australian community and economy.

Term of Reference 4: Whether wage theft is more prevalent in particular industries, occupations, forms of employment/engagement or parts of the State.

Recommendation 5: The Inquiry recognise the greater prevalence of wage theft and underpayment of wages and entitlements for vulnerable workers.

Term of Reference 5: Whether the current State and Federal regulatory framework for dealing with wage theft is effective in combating wage theft and supporting affected workers.

Recommendation 6: The Inquiry recognise that the current State and Federal regulatory framework for dealing with wage theft is ineffective in combating wage theft and supporting affected workers.

Term of Reference 6: Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.

Recommendation 7: The definition of wage theft be amended to:

- more than one intentional instance of underpayment of wages and entitlements, rather than the systematic and deliberate underpayment of wages and entitlements;

- apply it to wages and entitlements as set out under statute, awards and (potentially) industrial agreements (excluding contractual wages and entitlements that sit above statute, awards and industrial agreements); and

- clarify that the intentional act is in respect of the 'underpayment of wages and entitlements', regardless of whether those wages and entitlements are derived from a contract of employment, industrial agreement, award or statute.

Recommendation 8: The number of instances of underpayment of wages and entitlements be a mitigating or aggravating factor in sentencing.

Recommendation 9: That wage theft be a criminal offence, provided that:

- there is a mechanism for a worker to separately pursue their underpayment claim at the same time (without prejudicing any criminal prosecution);

- there is an express mitigating factor in sentencing where the employer has promptly and fully rectified the underpayment at an early stage; and

- the regulator responsible for prosecuting a wage theft criminal claim:

(a) has relevant and specialist expertise in employment matters and is dedicated for that purpose;

(b) is the same regulator for the purpose of pursing any civil underpayment claims (and must take into account and give precedence to the expeditious recovery of the underpayment of wages and entitlements on behalf of the worker); and

(c) has the same powers of investigation for both the civil and criminal claims.

Recommendation 10: The IR Act and MCE Act be amended so that an employer is required to produce to the worker all employment records required to be kept by the employer in relation to the hours worked by the worker, at the time payment of wages is made.

Recommendation 11: The IR Act and MCE Act be amended so that an employer is required to produce to all workers a payslip on payment of wages.

Recommendation 12: The IR Act and MCE Act be amended to provide for a reverse onus of proof where employment records are relevant to an allegation but have failed to be kept by an employer.

Recommendation 13: Employers have a legal obligation to give new workers a factsheet outlining, among other things, the employer's responsibility regarding employment record keeping requirements, wages and permitted deductions. If an employer does not provide this factsheet before or as soon as practical after the start of employment, they should be subject to financial penalty.

Recommendation 14: The employment enforcement framework be reviewed with the specific objective of enabling self-represented individuals to more easily access justice, looking at issues of:

- simplification;

- procedural formality;

- evidentiary requirements; and

- the powers of the court or tribunal to be actively involved in investigating the facts of the case.

Recommendation 15: That:

- there be an expedited process for courts and tribunals to deal with employment law claims relating to underpayment, where there is a prospect the worker may be leaving the jurisdiction to return overseas; and

- where it is not possible for a claim to be dealt with on an expedited basis, the various courts and tribunals processes should be flexible enough to allow claimants to pursue a claim easily, even if they are not in Australia.

Recommendation 16: The Inquiry consider the IR Act Interim Report on the issue of accessorial liability and recommend that accessorial liability provisions be used to combat wage theft.

Recommendation 17: The penalties for underpayment of wages and entitlements be increased from current levels to be at a level that, at a minimum, is aligned with the Federal regulatory framework.

Recommendation 18: The Inquiry consider the merits of an additional mandatory penalty for serious contraventions that is calculated based on a multiplier of the underpayment.

Recommendation 19: That further enforcement options be introduced, such as enforceable undertakings.

Recommendation 20: The Inquiry consider the IR Act Interim Report on the issue of industrial inspectors' powers and tools of enforcement.

Recommendation 21: The Inquiry conduct a comparison of:

- the State regulatory framework (including any recommendations by the Inquiry for improvements to the State regulatory framework);

- the Federal regulatory framework,

to identify the strongest protections and most beneficial entitlements for workers.

Recommendation 22: The identified strongest protections and most beneficial entitlements for workers should form either (as a minimum):

- a recommended change to the State regulatory framework; or

- a recommendation from the State Government to the Federal Government for a change to the Federal regulatory framework,

with the goal of achieving consistency wherever possible between the State and Federal regulatory framework while ensuring no worker is worse off as a result of that consistency.

Recommendation 23: The MCE Act be amended to prescribe additional limitations on when an employer is authorised to make deductions from a worker's pay.

Recommendation 24: The State regulatory framework include general protections provisions which protect a worker from adverse action should they make an inquiry or seek to enforce a workplace right (among other things), in relation to their wages and entitlements.

Recommendation 25: Industrial inspectors have the power to enforce contractual matters relating to statutory minimum entitlements.

Term of Reference 7: Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.

Recommendation 26: Further funding and resources be provided to the community legal sector for the purpose of providing employment law related further assistance and community legal education to vulnerable workers.

Recommendation 27: Further funding and resources be provided to third parties, including the community legal sector, for the specific purpose of subsidising the cost of employment law related enforcement action. For example, funding could be provided for the specific purpose of representation in underpayment disputes.

Recommendation 28: Further funding and resources be provided to DMIRS for the purpose of providing education and information, investigating and enforcing the regulatory framework (with priority given to vulnerable workers).

Recommendation 29: ELC supports any submissions by other parties or recommendations by the Committee which provide trade unions greater scope to assist workers in low-wage industries.

Term of Reference 8: Whether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the Federal jurisdiction.

Recommendation 30: The State Government recommend to the Federal Government that the requirements in the FEG Act that an employee be an Australian citizen or the holder of a certain visa type be removed.

Recommendation 31: The State Government recommend to the Federal Government that the accessorial liability provisions be reviewed with the specific objective of applying those provisions to contractual supply chains. As part of this, the Inquiry should consider whether a positive due diligence duty should be placed on a principal or head contractor, such that they will be held liable unless they can demonstrate they have taken proper and reasonable steps to ensure compliance by entities lower down the supply chain with employment laws.

Recommendation 32: The State Government recommend to the Federal Government that the legal definition of 'employee' be modified to provide employment law protections to workers performing services in the gig economy.

Recommendation 33: The State Government recommend to the Federal Government that the recommendations of the Migrant Workers Taskforce be implemented.

Term of Reference 9: Other matters incidental or relevant to the Inquirer's consideration of the preceding terms of reference.

Recommendation 34: The Inquiry make recommendations on the broader issue of underpayment of wage and entitlements, which do not constitute wage theft (see also Recommendation 1).

Recommendation 35: New laws be introduced to regulate the labour hire industry in Western Australia.

Recommendation 36: Courts and Tribunals be granted greater scope to set aside deeds of release which are entered pre-litigation, and which merely relate to payment of lawful entitlements.

1. Introduction

The wage-work bargain fundamentally underpins the employment relationship: an employee agrees to perform work and the employer agrees to pay for the work performed.

The simple and undeniable concept of a worker's right to be paid for the work they perform - promptly and fully - is enshrined in Australian culture, and the State and Federal employment law regulatory framework.[5]

However, it is undeniable workers are frequently underpaid their wages and entitlements. It is also undeniable some employers do this deliberately and systematically. Often the underpaid workers most hurt by this conduct, and who most need to rely on the regulatory framework to protect themselves, are the least able to do so.

The failure to correctly pay wages and entitlements operates on a spectrum where at one end is an innocent, minor, one-off underpayment - easily and readily corrected by the employer when identified - and at the other end of the spectrum is wage theft.

Wage theft is the most egregious breach of a worker's right to be paid on that spectrum, because of its nature and because of who it is directed at. Wage theft is:

- the **systematic** and **deliberate** underpayment of wages and entitlements to a worker;[6] and

- (in ELC's experience) often directed at the most **vulnerable workers**, particularly because they are typically the least able to use the regulatory framework to protect themselves. Accordingly, vulnerable workers are more easily taken advantage of by unscrupulous operators, without fear of repercussion.

In theory, the existing State and Federal regulatory framework should protect vulnerable workers from wage theft. In reality, it is ineffective in doing so.

The principle that underlines ELC's submission and recommendations to this Inquiry, is that the employment law regulatory framework needs to be reviewed and enhanced with the primary objectives of:

- preventing wage theft exploitation from occurring;

- having a regulatory framework where unscrupulous employers do not consider the likely consequences of wage theft "*as simply a cost of doing business whilst continuing to exploit vulnerable employees*";[7]

[5] The entitlement to be paid in money, from which only certain deductions are permitted, are long recognised legal principles dating back to the 15th century in Britain with the Truck Acts. In *Bristow v City Petroleum* [1987] 1 WLR 529, at 523, Lord Ackner in the House of Lords gave a short history of the previous regime of Truck Acts and held [ELC emphasis]:

> *The old Truck enactments were very numerous and date from about the year 1464. The **particular evil** intended to be remedied was the truck system, or payment by masters of their men's wages wholly or in part with goods -- a system open to various abuse -- when workmen were forced to take goods at their master's valuation … They established the obligation, and produced, or at least fortified the custom, of uniformly paying the whole wages of artificers in the current coin of the realm.*

[6] As defined by the Inquiry.
[7] Phua & Foo Case at [63].

- ensuring that where wage theft does occur, vulnerable workers have access to justice as well as a system which allows them (as laypeople) to easily and promptly recover what has been stolen from them.

ELC submits that it is also of critical importance that this Inquiry look more broadly at the issue of underpayment of wages and entitlements beyond wage theft.

2. Term of Reference 1: Whether there is evidence of wage theft occurring in Western Australia, and the various forms wage theft may take.

2.1 Evidence of wage theft

Wage theft is the systematic and deliberate underpayment of wages and entitlements to a worker.[8] In recent years there have been several cases where the employer's failure to pay Western Australian workers their minimum wages and entitlements were found to be the product of deliberate and systemic actions by the employer.[9] For example, in the Phua & Foo Case the employer was found to have "*made the deliberate decision to pay employees of the respondent a flat rate of $25 per hour, in the knowledge that such payment did not comply with the Restaurant Award*".[10]

In these cases, there existed clear evidence as to the systematic and deliberate nature of the employer's actions. Often, however, it can be difficult to ascertain an employer's intent. It is important this difficulty does not obscure the extensive evidence that exists of the many forms of underpayment of wages and entitlements to vulnerable Western Australian workers; as the devastating impact remains the same for workers regardless of intent.[11]

Each year, ELC assists thousands of callers in Western Australia through its Advice Line and provides further assistance to some of these callers. In assisting callers, ELC obtains information as to what the person's employment law problem is. From this information, ELC can determine that it regularly hears from vulnerable workers experiencing underpayment of wages and entitlements.

However, ELC does not specifically seek information as to whether employers are engaging in this behaviour in a systematic and deliberate manner. Consequently, ELC is not able to determine how many of the underpayment and entitlement issues raised by callers would come within the Inquiry definition of 'wage theft'. Given this, the evidence provided by ELC will be on the far-reaching issue of underpayment of wages and entitlements to a worker generally.

2.2 Evidence of underpayment of wages and entitlements

ELC can advise that over the 2017 – 2018 financial year, ELC assisted a total of 4,336 callers. 3,568 of these callers (representing 82.29 per cent) raised issues of underpayment of wages and entitlements occurring in various forms. This is, therefore, a substantial area of non-compliance that is significantly impacting on vulnerable Western Australian workers.

ELC assumes the Inquiry is aware of, and considering as part of the Inquiry, the work FWO and DMIRS has done and reported on relevant to this Inquiry, as ELC's experience is supported by the findings of the FWO and DMIRS. ELC's experience is also supported by the findings in the Migrant Workers' Taskforce Report[12] and the Queensland Parliamentary Inquiry Report into wage theft.

[8] As defined by the Inquiry, being the 'systematic and deliberate underpayment of wages and entitlements to a worker'.
[9] See for example: *Fair Work Ombudsman v Tac Pham Pty Ltd* [2018] FCA 120 at [100]; Phua & Foo Case at [54]; and, *Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors* [2017] FCCA 2838 at [75] – [79].
[10] Justice Siopis at [100].
[11] ELC refers to its submissions at paragraph 8.1.2 in relation to intent.
[12] ELC refers to its submissions at paragraph 12.6 and Recommendation 33.

2.3 Various forms of wage theft and underpayment of wages and entitlements

Wage theft, and the underpayment of wages and entitlements, can take various forms which can be experienced individually or concurrently.

The main forms in ELC's experience are:

- non-payment or underpayment;
- unreasonable deductions;
- withholding of entitlements;
- unpaid superannuation or taxation; and
- sham contracting arrangements.

2.3.1 Non-payment or underpayment

This involves a worker not being paid for all hours worked or being paid less than the legal minimum or award wage. This includes a worker not being paid penalty rates required by the relevant award for working on weekends, public holidays or outside of ordinary hours.

Over the 2017 – 2018 financial year, ELC assisted a total of 4,336 callers. 1415 of these callers (32.6 per cent) raised issues of non-payment and/or underpayment.

Caller characteristics were:

- 52 per cent identified as male.
- 787 callers were aged between 26 – 45; 238 callers were aged between 46 – 55; 192 callers were aged over 55; and 157 callers were aged 25 and under.
- 19 per cent of callers were living in regional Western Australia.
- 31 per cent were of a NESB.
- 12 per cent identified as having a disability.
- 16 per cent identified as having literacy issues.
- 584 callers earned less than $25,000 per year.

Callers experiencing this issue worked across all industries with Hospitality recording the highest number of callers (288), followed by Personal/Other[13] (225), Retail (178), Health/Community (102) and Agriculture (84).

The main occupations worked by callers were:

- Labourer (212).
- Sales/Personnel (157).

[13] This category encompasses those working in nail and beauty salons.

- Administration (115).
- Hospitality Worker (92).
- Cleaner (87).
- Care Worker (83).
- Chef (71).

Example: Case study of Yusuf[14]

Yusuf was a newly arrived migrant from a NESB on a visa performing cleaning services on a permanent full-time basis for a labour hire company in regional Western Australia.

- Yusuf was required to work an average of 85 hours per week across seven days a week.
- He was paid approximately $750 per week, equating to less than $9 per hour, which is significantly below his minimum wage entitlement.
- He was never paid any penalty rates or overtime, which he was entitled to under an award, and did not receive any pay slips.
- Yusuf raised the issues of his wages, hours and pay slips with his employer.
- The employer responded by saying the employer would look to hire another worker if Yusuf was not happy.
- After repeated requests, the employer provided Yusuf with inaccurate pay slips, which stated Yusuf worked just 38 ordinary hours per week.
- Yusuf sought legal advice and, when the employer found out about this, the employer terminated his employment.
- Yusuf is not currently pursuing his claim against the employer, as he is fearful that any action he takes could adversely impact upon his visa status.
- It is estimated Yusuf is owed tens of thousands of dollars in unpaid minimum entitlements including wages, penalty rates, and annual leave.

The experience of ELC's clients has been borne out in numerous campaigns undertaken by FWO including the following audit findings:

- 50 per cent of Western Australian takeaway businesses were found to not be paying employees correctly with underpayment of the hourly rate accounting for 58 per cent;[15]

[14] All case study names have been changed for confidentiality reasons.
[15] Fair Work Ombudsman, *National Hospitality Industry Campaign 2012 – 2015 Takeaway Foods (Wave 3)* (2016), available at https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/march-2016/20160330-hospitality-final-report.

- 43 per cent of Western Australian businesses had errors relating to pay rates;[16] and

- 30 per cent of businesses in the Gascoyne/Mid-West regions were found to be paying employees incorrectly with the most common errors related to penalties, loadings and allowances (39 per cent) and underpayment of hourly rates (26 per cent).[17]

2.3.2 Unreasonable deductions

This involves a worker having part or all of their pay unlawfully withheld or being unlawfully required to pay back an amount said to be due and owing.[18] These amounts are often in relation to accommodation, training, uniforms, food, transport and visa costs.[19]

Over the 2017 – 2018 financial year, ELC assisted a total of 4,336 callers. 246 of these callers (5.7 per cent) raised issues of unreasonable deductions.

Caller characteristics were:

- 58 per cent identified as male.

- 164 callers were aged between 26 – 45; 49 callers were aged between 46 – 55; 25 callers were aged over 55; and 6 callers were aged 25 and under.

- 24 per cent of callers were living in regional Western Australia.

- 30 per cent were of a NESB.

- 8 per cent identified as having a disability.

- 23 per cent identified as having literacy issues.

- 84 callers earned between $51,000 and $60,000; 72 callers earned less than $25,000; and 52 callers earned between $26,000 and $50,000 per year.

- 164 callers were permanent employees; 44 callers were casual employees; and 13 callers were on a fixed term contract.

Callers experiencing this issue worked across all industries with Agriculture recording the highest number of callers (55), followed by Hospitality (39), Personal/Other[20] (31), Manufacturing (28) and Health/Community (23).

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[16] Fair Work Ombudsman, *SA/WA/NT Compliance Campaign* (2016), available at https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/campaign-reports#2016.
[17] Fair Work Ombudsman, *WA – Gascoyne/Mid-West Regional Campaign 2015* (2016), available at https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/campaign-reports#2016.
[18] A well-known occurrence of an unreasonable 'cash back' arrangement occurred where 7-Eleven employees were required by the employer to return some or all of a wage payment back to the employer: see Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (2016), available at https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports#7-11.
[19] Evidence of employers making unlawful deductions from visa holders' wages or unlawfully requiring employees to spend part or all of their wages in an unreasonable manner was noted in the Migrant Workers' Taskforce Report. Specific examples involving Western Australian workers working on the harvest trail included being charged a bond to find work and required to use specific chargeable transport providers between restricted accommodation options to work sites: see Harvest Trail Inquiry Report at p. 41.
[20] This category encompasses those working in nail and beauty salons.

The main occupations worked by callers were:

- Tradesperson (43).
- Labourer (28).
- Truck Driver (26).
- Management (24).

Example: Case study of Gabriela

Gabriela was in Australia on a working holiday maker's visa. She responded to an ad on a backpacker's website to work as a door to door canvasser for $1,000 base pay per month plus commission. All employees were to share live-in accommodation with rent deducted from their wages

During Gabriela's employment, she experienced various forms of exploitation, including unreasonable deductions.

- After working over a month Gabriela had been paid a total of only $400.
- Weekly rental deductions of $150 were made from her pay for accommodation she shared with eight other employees.
- $1 was deducted from Gabriela's pay for every occasion she spoke Spanish instead of English.
- On two occasions her employer deducted $10 from her pay. The employer informed her the money was to pay to make the shared accommodation habitable.

2.3.3 Withholding of entitlements

This involves a worker not being paid leave entitlements, such as annual or sick leave.

Over the 2017 – 2018 financial year, ELC assisted a total of 4,336 callers. 1,395 of these callers (32.2 per cent) raised issues related to minimum entitlements.

Caller characteristics were:

- 55 per cent identified as female.
- 646 callers were aged between 26 – 45; 272 callers were aged between 46 – 55; 235 callers were aged over 55; and 65 callers were aged 25 and under.
- 25 per cent of callers were living in regional Western Australia.
- 23 per cent were of a NESB.
- 10 per cent identified as having a disability.
- 9 per cent identified as having literacy issues.
- 503 callers earned between $26,000 and $50,000; 381 callers earned less than $25,000; and 211 callers earned between $51,000 and $60,000 per year.

- 1,018 callers were permanent employees; 196 callers were casual employees; and 45 callers were on a fixed term contract.

Callers experiencing this issue worked across all industries with Hospitality recording the highest number of callers (197), followed by Retail (155), Personal/Other[21] (150), Health/Community (128), Manufacturing (106) and Agriculture (91).

The main occupations worked by callers were:

- Labourer (179).
- Administration (151).
- Sales/Personnel (125).
- Management (117).
- Tradesperson (100).
- Hospitality Worker (76).

Example - Case study of Aishah

Aishah was working as a permanent full-time chef employee in regional Western Australia.

- Aishah experienced sexual harassment and bullying in the workplace.
- She reported this to her employer who took no steps to prevent this from happening.
- Aishah resigned and the employer refused to pay her nearly 100 hours of accrued annual leave entitlements.

2.3.4 Unpaid superannuation or taxation

This involves an employer not paying the required superannuation or taxation on behalf of the worker. This can often occur in direct cash payment arrangements and will often be linked to a lack of compliant record keeping and pay slip provision.

Over the 2017 – 2018 financial year, ELC assisted a total of 4,336 callers. 475 of these callers (10.95 per cent) raised issues of payslips and/or superannuation and/or taxation. However, ELC generally does not advise on the issues of superannuation and taxation.

Caller characteristics were:

- 52 per cent identified as male.
- 264 callers were aged between 26 – 45; 86 callers were aged over 55; 43 callers were aged between 46 – 55; and 47 callers were aged 25 and under.
- 14 per cent of callers were living in regional Western Australia.

[21] This category encompasses those working in nail and beauty salons.

- 43 per cent were of a NESB.
- 17 per cent identified as having a disability.
- 30 per cent identified as having literacy issues.
- 222 callers earned less than $25,000 per year.
- 183 callers were permanent employees; 155 callers were casual employees; and 23 callers were on a fixed term contract.

Callers experiencing this issue worked across all industries with Hospitality recording the highest number of callers (92), followed by Personal/Other[22] (77), Agriculture (67) and Manufacturing (62).

The main occupations worked by callers were:

- Labourer (116).
- Administration (62).
- Sales/Personnel (56).
- Cleaner (41).

Example - Case study of Amelia

Amelia was a 54 year old sole-income earner earning under $60,000 per annum, with dependants. She had worked on a permanent basis for her employer since 2002.

Over the course of her employment, Amelia experienced ongoing issues with her payslips, non-payment of wages and unpaid superannuation and taxation by her employer.

- Towards the end of 2018, Amelia's employer stopped paying her wages, tax and superannuation completely.
- Amelia continued to work and asked her employer on many occasions about being paid, but she was told various excuses including that the employer was applying for a loan or waiting to receive income or was "*getting it sorted*".
- After two months, Amelia informed her employer she would not come back to work until the pay, tax and superannuation she was owed was paid.
- In response, the employer sent Amelia a one-off payment of $1,100, which did not fully cover the outstanding wages owed.
- Amelia still has unpaid superannuation and taxation.
- This situation caused Amelia difficulties with paying her debts as they became due and she was finding it hard to pay her rent.

[22] This category encompasses those working in nail and beauty salons.

2.3.5 Sham contracting arrangements

This involves a worker being misclassified as an independent contractor instead of an employee.

Over the 2017 – 2018 financial year, ELC assisted a total of 4,336 callers. 37 of these callers (0.85 per cent) raised the issue of sham contracting. This relatively low figure is likely to reflect the fact that in the 2017 – 2018 financial year ELC did not assist contractors. This may have led to potential clients 'self-selecting out' from contacting ELC.

Caller characteristics were:

- 54 per cent identified as female.
- 29 callers were aged between 26 – 45; 6 callers were aged between 55 - 65; and 2 callers were aged 25 and under.
- 3 per cent of callers were living in regional Western Australia.
- 51 per cent were of a NESB.
- 5 per cent identified as having a disability.
- 51 per cent identified as having literacy issues.
- 30 callers earned less than $25,000 per year.

Callers experiencing this issue worked across a number of industries with Personal/Other[23] recording the highest number of callers (20) and Cleaner the main occupation (18).

Example: Case study of Ana

Ana was employed as a cleaner.

During Ana's employment, she experienced various forms of exploitation.

- Her contract said that she was an employee, but her employer then asked her if she had an ABN and said it would be better if she was paid as a contractor.
- Ana's employer deducted several hundred dollars from her pay without her authorisation, supposedly because she had left work early.
- Ana fell sick one day and went to the doctor. She informed her boss that she had a fever and couldn't make it to work that day. The next day she came in, she was told that she would be sacked if she didn't turn up for work again.
- Ana was consistently paid below the minimum wage and was always paid the same rate even when she worked at night. She also didn't receive any annual leave or sick leave, nor did she receive any casual loading.

[23] This category encompasses those working in nail and beauty salons.

- Ana spoke to her boss about how much she was being paid and was dismissed as a result.

Example: FWO proceedings against Foodora Australian Pty Ltd

On 12 June 2018, the FWO commenced legal proceedings in the Federal Court of Australia against Foodora Australia Pty Ltd, alleging it had engaged in sham contracting activity that resulted in the underpayment of workers. Fair Work Ombudsman, Natalie James, was quoted as saying:

"*sham contracting is a priority for her Agency, not just because of the direct impact of these arrangements on individual workers but because those adopting sham contracting as a business model are availing themselves of an unfair competitive advantage by depriving workers of their lawful minimum employment conditions and protections.*"[24]

RECOMMENDATION 1: The Inquiry recognise wage theft exists within the broader context of significant underpayment of wages and entitlements to Western Australian workers, regardless of employer intent.

RECOMMENDATION 2: The Inquiry recognise wage theft and the underpayment of wages and entitlements can take various forms including: non-payment or underpayment; unreasonable deductions; withholding of entitlements; unpaid superannuation or taxation; and sham contracting.

[24] Fair Work Ombudsman, *Fair Work Ombudsman commences legal action against Foodora,* (2018), available at https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180612-foodora-litigation.

3. Term of Reference 2: What are the reasons wage theft is occurring, including whether it has become the business model for some organisations.

3.1 Worker vulnerability

It is difficult for ELC to conclusively assess and determine the likely reasons wage theft is occurring. Nevertheless, ELC sees common themes arising from the clients it assists. ELC is of the view that wage theft, and the underpayment of wages and entitlements generally, may be the result of workers being:

- relatively low paid and heavily reliant on those wages, such that the importance of continuing to be paid is more important than ensuring compliance with employment laws;

- at the end of multiple layers of contractual relationships. This is where the worker is engaged by a contracting company which sits between the principal contractor and the worker, albeit the work done by the worker is for the benefit of the principal contractor atop of the supply chain. Competitive tendering with the associated cost cutting then leads to the last person in the chain (the worker) receiving the least benefit from the contract, despite the worker performing the work;[25]

- the nature of various types of law paid work, such as Hospitality, Agriculture and Cleaning, requires the work to often occur outside of normal business hours (with potentially limited supervision and third-party oversight) or in isolated areas, which can lead to a 'hidden' exploitation;

- lack of access to employment records detailing hours worked creating evidentiary difficulties in proceeding with a claim;[26]

- unable to easily secure alternative employment in a different occupation;

- willing to acquiesce to unlawful conduct, such as unpaid sick leave or no overtime penalty rates being paid, being fearful of the consequences if issues are raised with the prospect of dismissal if they do not accept that unlawful conduct; and

[25] This is supported by findings in Fair Work Ombudsman, *An inquiry into the procurement of cleaners in Tasmanian supermarkets* (2018), p. 24, available at https://www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets.

[26] A number of recent FWO campaigns found high-levels of non-compliant record keeping and pay slips across a number of different Western Australian industries and regions. See for example: Fair Work Ombudsman, *Health Check: Outcomes from the Fair Work Ombudsman's National Health Care and Social Assistance Campaign* (2017), available at *https://www.fairwork.gov.au/reports/national-health-care-and-social-assistance-campaign*. This was a FWO campaign to promote a culture of compliance within the Health Care and Social Assistance industry (which included medical, allied health and residential care services), where 25 per cent of Western Australian employers were found to be non-compliant with pay rates and record keeping requirements. The most common error being non-compliant pay slips at 43 percent; Fair Work Ombudsman, *National Hospitality Industry Campaign 2012 – 2015 Takeaway Foods (Wave 3)* (2016), available at https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/march-2016/20160330-hospitality-final-report. This was a FWO national audit of takeaway businesses, where 29 per cent of Western Australian businesses were found to be non-compliant with pay slip and record keeping requirements; and, Fair Work Ombudsman, *WA – Gascoyne/Mid-West Regional Campaign 2015* (2016), available at https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/campaign-reports#2016. This was a FWO campaign focused on businesses in the Gascoyne/Mid-West regions of Western Australia, where 30 per cent of businesses were paying employees incorrectly with the 26 per cent of the errors related to pay slip errors.

- subject to other vulnerabilities such as speaking English as a second language, having literacy issues, being from overseas and not being familiar with Australian laws and institutions, particularly where Australia's workplace laws and modern award system are generally recognised as being complex and often requiring legal advice.[27]

3.2 Business model

ELC is not best placed to comment on whether wage theft has become a business model for some organisations[28] but again notes the significantly high rates of underpayment of wages and entitlements experienced by ELC clients. ELC further notes and supports the findings of several recent inquiries linking the targeting and exploitation of vulnerable workers by businesses and industries with high levels of non-compliance in the different forms of wage theft.[29]

RECOMMENDATION 3: The Inquiry recognise vulnerable workers are those most at risk of wage theft and the underpayment of wages and minimum entitlements.

[27] Financial Review, Fair Work Ombudsman blasts award complexity (2014), available at https://www.afr.com/news/policy/industrial-relations/fair-work-ombudsman-blasts-award-complexity-20140722-j4245; and generally the decision of Deputy President Sams in *Applicant v Respondent* [2014] FWC 2860.
[28] ELC refers to its submissions at paragraph 4.2 regarding the cost to compliant businesses.
[29] See for example: Queensland Parliamentary Inquiry Report; Migrant Workers' Taskforce Report; Harvest Trail Inquiry Report; and DMIRS, *Compliance campaign results in over $15,000 in unpaid wages returned to workers in nail and beauty industry* (2019), available at https://www.commerce.wa.gov.au/announcements/compliance-campaign-results-over-15000-unpaid-wages-returned-workers-nail-and-beauty.

4. Term of Reference 3: What is the impact of wage theft on workers, businesses which are compliant with employment laws, and the Western Australian community and economy.

4.1 Vulnerable workers

It is important to understand that for vulnerable workers, a small underpayment can result in a disproportionately large impact on the worker's financial stability.[30] The WA Council of Social Service reports around 360,000 Western Australians are living in poverty, with an additional 150,000 "*at risk of financial hardship should they face an unforeseen crisis*". [31]

Therefore, any forms of underpayment of wages and entitlements on vulnerable low-income workers can be assumed to have a significant effect. It also has the potential for long-term significant impacts including the amount of superannuation available at retirement for vulnerable workers.[32]

In 2015/2016 ELC conducted research into the social impact of our services on clients and the community by surveying 92 workers who had accessed ELC services. Whilst this research was not limited to issues of underpayment of wages and entitlements, it is reasonable to apply the research findings here.

- A majority of workers surveyed advised their work issue made it hard to very hard to pay groceries, utilities, petrol or transport, rent or mortgage, education expenses, medical expenses, childcare and household essentials.

- Nearly half of the responding workers stated their general health had suffered as a result of their employment issue (for example: depression, anxiety, or other mental health issue).

- 53 workers stated the work issue had affected their family life (for example: stress and marriage issues).

ELC's findings are supported by PWC who, when discussing the impact on workers of potential illegal phoenix activity, which included unpaid wages and entitlements, stated:[33]

> *This is the cost of stress on workers in potential illegal phoenix businesses arising from instability in their work environment or as a direct result of losing their job or outstanding entitlements. These costs are not reliably captured in the direct costs as the data is not readily available as it sits outside of traditional market forces. Similarly, although labour dynamics and productivity are captured in the CGE analysis, this does not capture the private cost to the individual of stress and without reliable direct costs inputs the economy-wide impacts will not capture the cost of employee stress.*

[30] In *Philip Moyle v MSS Security Pty Ltd* [2016] FWCFB 372 at [24], a Full Bench of the FWC comprised of Hatcher VP, Hamberger SDP and Saunders C, commented that "*a $1 per hour reduction in wages for an award-dependent and low-paid worker … may well have been significant in the context of … personal circumstances*".
[31] WA Council of Social Service, *Submission to the Western Australian Industrial Relations Commission* (2018), available at https://wacoss.org.au/wp-content/uploads/2018/05/WACOSS-Submission-State-Wage-Case-2018.pdf.
[32] Industry Super Australia estimates that a $2,000 underpayment can grow to a $24,000 shortfall in investment by retirement which can result in an extra $100 million in age pension costs. See Industry Super Australia, *Unpaid super costs workers $24,000 by retirement – and government foots an extra $100m age pension bill each year* (2017), available at https://www.industrysuper.com/media/unpaid-super-costs-workers-24000-by-retirement-and-government-foots-an-extra-100m-age-pension-bill-each-year/.
[33] PricewaterhouseCoopers Consulting (Australia) Pty Ltd, *The Economic Impacts of Potential Illegal Phoenix Activity,* (June 2018), p. 16 – 17, available at https://www.ato.gov.au/uploadedFiles/Content/ITX/downloads/economic-impact-of-phoenix-activity-update_june-18_56257.pdf.

Stress can have adverse effects on household finances as it has been shown to have adverse health effects, and therefore is seen as an increase personal costs of 'impaired physical and mental functioning, more work days lost, increased impairment at work, and a high use of health care services'.

Stressed workers can also impact the wider economy through lower labour productivity by:

- *adding to the cost of doing business due to absenteeism*
- *errors of judgement and action*
- *conflict and interpersonal problems*
- *violence*
- *customer service problems*
- *resistance to change*
- *feelings of 'no time to do it right'*
- *loss of intellectual capital.*

A similar impact of stress may also be felt by people within the honest businesses that interact with potential illegal phoenix operators. As another kind of creditor, they will also bear stress of not being paid their full entitlements, which can have personal and professional impacts.

4.2 Compliant businesses

The issue of exploitation is not merely an issue for vulnerable workers.

Relevantly, where exploitation permeates through an industry and provides a competitive advantage, it makes it difficult for businesses who comply with the law to equally compete. A level playing field of full compliance with the law then not only benefits underpaid workers, but it also benefits businesses who engage in good business practices.

There is also a broader impact on the Australian economy, including workers, businesses and government, from unlawful business practices. The June 2018 report by PWC, which focused on the issue of potential illegal phoenix activity, found that the direct cost to the Australian economy of potential illegal phoenix activity in 2015-16 was between $2.85 billion and $5.12 billion a year. This included between $31 million to $298 million in unpaid entitlements to employees.

The PWC report also stated that[34] :

> *… that some costs are not currently able to be captured in the direct analysis. These costs include, for example:*
>
> - *employee stress*

[34] PricewaterhouseCoopers Consulting (Australia) Pty Ltd, *The Economic Impacts of Potential Illegal Phoenix Activity,* (June 2018), available at https://www.ato.gov.au/uploadedFiles/Content/ITX/downloads/economic-impact-of-phoenix-activity-update_june-18_56257.pdf.

- *discouragement effect on labour supply*
- *social welfare burden through increased government transfers*
- *competition effects.*

4.3 Western Australian community and economy

ELC is not best placed to comment in detail on the impact of wage theft on the Western Australian community and economy. We do note, however, the financial strain experienced by vulnerable workers when subjected to an underpayment of wages or entitlements is outlined at paragraph 4.1 above.

This financial strain naturally couples with a reliance on government assistance.

The likely conclusion is that if the employment issue is resolved promptly, the reliance on State government services will be minimised and community strain eased.

RECOMMENDATION 4: The Inquiry recognise the significant impact of wage theft and the underpayment of wages and entitlements on vulnerable workers, compliant businesses, and the Western Australian community and economy.

5. Term of Reference 4: Whether wage theft is more prevalent in particular industries, occupations, forms of employment/engagement or parts of the State.

5.1 Worker vulnerability and trends

In ELC's experience, the underpayment of wages and entitlements occurs across all industries, occupations, forms of employment/engagement and parts of the State. The most prevalent characteristic in the exploitation of Western Australian workers in this area is their vulnerability.

Having said that, ELC does note the following trends in industry and occupation groupings of callers to ELC with underpayment of wages and entitlements issues:

- higher number of calls from workers in the industries of Hospitality, Beauty, Retail, Health, Manufacturing and Agriculture; and

- higher number of calls from workers in the occupations of Labourer, Sales, Administration, Hospitality worker, Cleaner, Care worker and Chef.

ELC does not currently have any data that provides any clear trends regarding prevalence in forms of employment/engagement or parts of the State but does highlight a high-level of callers from regional areas.

ELC notes the majority (60% in 2017-18) of callers ELC assisted in this area earned less than $50,000 a year and had higher than the community standard level of literacy issues, disability and NESB characteristics.

5.1.1 Migrant workers

ELC notes the particular vulnerability of migrant workers to wage theft and underpayment of wages and entitlements.

In ELC's experience migrant workers:

- have reported receiving less favourable pay and conditions than Australian workers;

- have been exploited on threat of deportation – e.g. they have been required to pay for vehicle damage for which they were not responsible, or which could have been recovered on insurance;

- have been subjected to assaults, underpayment of entitlements, unreasonable working hours and other forms of mistreatment;

- have been threatened by their employers that they will have to repay visa fees and other associated costs if they leave their employment within a certain period of time; and

- have been selected for redundancy and they consider that they were selected because they were temporary work visa holders.

The above outlined ELC experience aligns with that of FWO, the Migrant Workers' Taskforce Report and the Queensland Parliamentary Inquiry Report.[35]

RECOMMENDATION 5: The Inquiry recognise the greater prevalence of wage theft and underpayment of wages and entitlements for vulnerable workers.

[35] See: Harvest Trail Inquiry Report; Fair Work Ombudsman, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Maker Program* (2016), available at https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports#417-visa; Migrant Worker's Taskforce Report; and Queensland Parliamentary Inquiry Report.

6. Term of Reference 5: Whether the current State and Federal regulatory framework for dealing with wage theft is effective in combating wage theft and supporting affected workers.

6.1 Summary

The outcomes achieved by the current State and Federal regulatory framework in dealing with underpayment of wages and entitlements generally demonstrates that the framework **is not** and **cannot** be effective in combating wage theft more specifically.

- In ELC's experience, underpayment of wages and entitlements is occurring and is a significant issue for vulnerable workers.[36]
- In ELC's experience, the most vulnerable workers are often the most exploited in relation to underpayment of wages and entitlements.[37]
- ELC's experience is reflected by the empirical evidence in other research, studies and inquiries.
- Necessarily, if the framework is ineffective in dealing with underpayment of wages and entitlements, it will be ineffective in dealing with wage theft, being an egregious category of underpayment of wages and entitlements.

6.2 The difference between a strong regulatory framework and an effective regulatory framework

In theory, the existing State and Federal employment law regulatory framework should protect vulnerable workers from harm. This is because the framework provides a regime for:

- minimum conditions of employment that cannot be contracted out of;[38]
- time and wages record keeping requirements to ensure a worker's wage can be correctly calculated;
- measures to ensure employees are paid in cash – regularly and promptly - and limiting the basis on which deductions can be lawfully made;
- protections from unfair and unlawful conduct;
- the establishment of a regulatory framework that enables unpaid wages to be recovered by the employee; and
- regulators who can separately investigate and take enforcement action in relation to contraventions.

However, a **strong** employment law regulatory framework does not in itself mean an **effective** regulatory framework.

[36] ELC refers to its submissions in relation to Terms of Reference 1, 3 and 4.
[37] ELC refers to its submissions in relation to Term of Reference 2.
[38] For example, minimum entitlements prescribed under the MCE Act and the NES under the FW Act, industrial awards, and other entitlements prescribed by employment laws.

Firstly, for a workplace protection to be truly effective it must also be easy to understand and easy to enforce. In contrast, ELC's experience in assisting vulnerable workers is that the State and Federal regulatory framework is complex and difficult for vulnerable workers to:

- understand; and
- seek to enforce their rights under those laws.

This is in an environment where:

- the more vulnerable a worker is, the greater potential there is for the worker to be exploited;
- exploitation of this nature has a more profound impact on low-paid workers;[39]
- there are numerous barriers to vulnerable workers enforcing their rights, for example where they do not speak English as a first language, they do not know where to go for assistance, they are not familiar with Australian workplace laws and institutions, and are concerned about speaking up about their rights for fear of being dismissed, and in some cases, deported (since their employment is tied to their right to remain in the country);
- frequently workers are unable to pay for expert advice, support and representation;
- those workers unable to pay for expert advice, support and representation may have limited opportunities to obtain free third-party assistance from organisations such as community legal centres; and
- agencies such as the Australian Taxation Office, DMIRS and FWO have finite resources and may be limited in the assistance they can provide.

ELC also refers to its submissions at paragraph 3.1 in respect of worker vulnerability.

Second, a strong employment law regulatory framework must necessarily evolve to accommodate changing workplace patterns as employers look for ways to reduce costs and improve productivity, from outsourcing to an increased use of casual employees to the emergence of the gig economy.

Third, for the State and Federal regulatory framework to be effective they need to be aligned. The dual jurisdiction of industrial relations in Western Australia which adds a layer of complexity and source of confusion for many workers.

Some employers and workers do not understand there is a dual jurisdiction of industrial relations. Even where an employer or worker appreciates there is a dual jurisdiction, they can find it difficult to determine whether they operate under the State or Federal regulatory framework.

Where you then have two regulatory frameworks which operate inconsistently, this creates complexity and uncertainty.

[39] Phua & Foo Case, where Siopis J held at [47] that:

> *That sum [the underpayment] must be considered in the context that this represented the underpayment over a nine month period and that the employees were low paid employees and the underpayment would have had a more profound impact upon persons whose base rate of pay was low.*

In ELC's view, the current State and Federal regulatory framework for dealing with wage theft is ineffective in combating wage theft and supporting affected workers.

RECOMMENDATION 6: The Inquiry recognise that the current State and Federal regulatory framework for dealing with wage theft is ineffective in combating wage theft and supporting affected workers.

7. Term of Reference 6: Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.

7.1 Summary

Vulnerable workers' interests are best served in two aspects regarding wage theft.

- (**Prevention**) The regulatory framework must minimise as much as possible instances of wage theft.

- (**Recovery**) Where wage theft has occurred, the regulatory framework must facilitate our clients easily and expeditiously recovering the underpayment of wages and entitlements.

These aspects do not necessarily point in the same direction and strengthening one aspect can detract from the other.

In addition to Prevention and Recovery of wage theft, there is the third aspect where the offender is penalised for their offending conduct (**Punishment**). Punishment is intrinsically tied with Prevention, as an effective Punishment (or threat of Punishment) can enhance Prevention.

However, in ELC's experience, our clients' primary objective is typically Recovery - to recover as much as possible of the wages and other entitlements they have been underpaid as soon as possible. While our clients may want to separately punish the employer for their conduct, this is only a secondary objective.

Accordingly, in reviewing this Term of Reference, ELC has broken it up into two separate components, and modified the order, to:

(a) (Prevention) Should wage theft be a criminal offence?

(b) (Prevention and Recovery) Whether new laws should be introduced in Western Australia to address wage theft?

This is because the issue of whether wage theft should be a criminal offence is intrinsically tied to the deterrent impact of criminalising wage theft – the Prevention of wage theft from occurring. Whether new laws should be introduced in Western Australia to address wage theft is then associated with the Recovery of underpayments if wage theft should occur.

7.1.2 (Prevention) Should wage theft be a criminal offence?

The issue of whether wage theft should then be a criminal offence is complex.

On balance, ELC considers wage theft should be a criminal offence subject to one important qualification. That is in making wage theft a criminal offence, this does not detract from a workers' ability to recover the underpayment of wages and entitlements in a timely and easy manner.

7.1.3 (Prevention and Recovery) Should new laws be introduced to address wage theft?

New laws should be introduced in Western Australia to address wage theft and more broadly underpayment of wages and entitlements. There should be:

Process

- a requirement that employment records associated with hours of work be provided to workers;
- a requirement that payslips be provided to all State system workers;
- a reverse onus of proof in circumstances where the employer has failed to comply with their time and wages record keeping requirements;
- a requirement on employers to provide an information statement to workers;
- a fast track process for making claims that is flexible and informal;

Penalty

- enhanced accessorial liability provisions;
- increased penalties for contravention, with consideration been given to whether there should be a requirement to impose additional penalties which are a multiplier of the quantum of the underpayment of wages and entitlements;
- other enforcement options; and

Regulatory enforcement

- increased regulatory powers of inspection and enforcement.

7.1.4 Alignment with the national system

A comparison should be done between the State and Federal regulatory system to identify any entitlements and protections for workers in the Federal system which are stronger than the State system, and for the State system to be modified to adopt or strengthen those entitlements and protections.

8. (Prevention) Should wage theft be a criminal offence?

8.1 The definition of wage theft

The Inquiry's definition of wage theft is the "*systematic and deliberate underpayment of wages and entitlements to a worker.*"

8.1.1 Education and information cannot minimise wage theft

Inherent in the definition of wage theft is that the underpayment is not occurring due a lack of understanding of employment laws or an innocent mistake. Rather, it is an intentional act to circumvent the law. The nature of wage theft means it is typically directed at vulnerable workers, who are most at risk of exploitation, and least able to challenge the exploitation.

Because wage theft is an intentional act, some tools (such as education and information) will not have any, or only minimal, impact on an employer's behaviour in minimising instances of wage theft. The focus instead needs to be on deterring an

employer from this conduct subject to one important qualification – that any deterrence means does not overly detract from workers' ability to recover the underpayment of wages and entitlements in a timely and easy manner.

8.1.2 Should the definition of wage theft include the element that it must be 'systematic'

A deliberate act is an act "*characterised by or resulting from careful and thorough consideration*"[40] – it is an intentional decision. An intentional act is broad enough to include "*wilful blindness*", but not necessarily "*recklessness, negligence or foresight of the probable consequences of conduct"*.[41]

In a case dealing with accessorial liability, the Federal Circuit Court of Australia examined the interplay between 'wilful blindness' and 'actual knowledge'.[42] Judge Driver held:

> *actual knowledge can be inferred from the combination of a respondent's knowledge of suspicious circumstances and the decision by the respondent not to make enquiries to remove those suspicions, but not every deliberate failure to make enquiries will support the inference of actual knowledge. Where a person does not know because he does not want to know, where "the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests", he has that knowledge, but deliberately refrains from asking questions or seeking further information in order to maintain a state of apparent ignorance. That is wilful blindness.*

Judge Driver then held:[43]

> *This principle has been applied in the context of the Fair Work Act by the Federal Court, finding that where an alleged accessory is aware of a system producing certain outcomes, and those outcomes constitute contraventions of the Fair Work Act, it is unnecessary to show that the alleged accessory knew the details of each particular instance of those outcomes in order to prove the requisite knowledge.*
>
> *The situation here was not so much a system as a fait accompli. The Corporate Respondents ran out of money to pay their staff but they permitted those staff who remained to stay on in the hope that the Directors would ultimately be able to pay the staff their entitlements. That proved not to be possible within the contravention periods. Mr Silverbrook and Ms Lee*

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[40] Merriam-Webster online dictionary.

[41] *Fair Work Ombudsman v Priority Matters Pty Ltd & Anor and Fair Work Ombudsman v Superlattice Solar Pty Ltd & Anor and Fair Work Ombudsman v Geneasys Pty Ltd (in liq) & Anor and Fair Work Ombudsman v Silverbrook & Anor and Fair Work Ombudsman v Mpowa Pty Ltd & Anor (No 4)* [2019] FCCA 56 (22 February 2019) at [31] where it was held:

> *with regard to wilful blindness, intention may be proved by showing an intention by some act or conduct which contributes to the commission of the offence, or by proving "wilful blindness" or a "deliberate shutting of one's eyes to what is going on", which includes "deliberately abstain[ing] from asking questions or making enquiries." It does not include recklessness, negligence or foresight of the probable consequences of conduct*.

[42] *Fair Work Ombudsman v Priority Matters Pty Ltd & Anor and Fair Work Ombudsman v Superlattice Solar Pty Ltd & Anor and Fair Work Ombudsman v Geneasys Pty Ltd (in liq) & Anor and Fair Work Ombudsman v Silverbrook & Anor and Fair Work Ombudsman v Mpowa Pty Ltd & Anor (No 4)* [2019] FCCA 56 (22 February 2019) at [31] and [32].

[43] Ibid at [112] – [114].

undoubtedly knew that the staff were not being paid and it necessarily followed that the staff were not receiving whatever their employment entitlements were. To the extent that Mr Silverbrook and Ms Lee did not know the detail of the entitlements of individual employees, that was because they chose not to enquire and were wilfully blind to those details.

The circumstances of the plight the Directors found themselves in tend to evoke some sympathy. These were hardworking and apparently honest people caught up in adverse events beyond their control. However, they made conscious choices which led to the contraventions by the Corporate Respondents and they were knowingly concerned in those contraventions.

A 'systematic' act is then an act "*relating to or consisting of a system*" or being "*methodical in procedure or plan*".[44] Section 557A of the FW Act also refers to a "*systematic pattern of conduct relating to one or more other persons*" and includes a number of factors a court may have regard to in determining whether a person's conduct was part of a systematic pattern of conduct.

If the Inquiry definition of wage theft is used for a criminal offence, this then creates two elements which will need to be proved being:

(i) a systematic underpayment of wages and entitlements; and

(ii) a deliberate underpayment of wages and entitlements.

It may be that the primary intended difference between 'systematic' and 'deliberate', is 'systematic' involves multiple incidents or a pattern of behaviour relating to one or more other persons, whereas 'deliberate' can involve just one act relating to one person.

Having two different elements, both of which include the concept of intent and which need to be proved, obviously increases the evidentiary and legal burden on the prosecution.

This raises the issue of whether the phrase "*systematic and deliberate*" should be modified to include one simplified mental element.

In these circumstances, it is necessary to balance the added burden imposed on a prosecution regarding proving both a 'systematic' and 'deliberate' underpayment of wages and entitlements against the need to limit wage theft to the most serious contraventions.

In ELC's experience, where a deliberate underpayment of wages and entitlements has occurred it is usually not limited to one instance. Given the ongoing nature of the employment relationship it is typically repeated over multiple pay periods.

In ELC's view then, rather than having a qualitative definition of 'systematic', it should be defined 'quantitatively' as being more than one (either in relation to the number of people or the number of pay periods) instance of intentional underpayment of wages and entitlements.

The extent of that pattern of behaviour of underpayment can then be a mitigating or aggravating factor in sentencing, rather than a defence to the charge.

[44] Merriam-Webster online dictionary.

8.1.3 Where are the wages and entitlements derived from?

It is not clear whether wage theft is associated with the deliberate and systematic underpayment of 'wages and entitlements' set by:

(i) statute (such as the MCE Act);

(ii) awards;

(iii) industrial agreements;

(iv) common law contracts of employment; or

(v) a combination of (i) to (iv) above.

If, for example, an employer underpays a contractual entitlement but still meets the minimum entitlements set by the relevant award, would this be a criminal offence?

If this is the case, then this may impact on employer's willingness to enter into contractual arrangements which sit above award and industrial agreement wages and entitlements.

ELC is of the view that the definition of wage theft should be limited to the underpayment of wages and entitlements as set out under statute, awards and (potentially) industrial agreements.

To avoid doubt, ELC's view is if an employer intentionally underpays wages and entitlements under a contractual arrangement which also has the effect of underpaying wages and entitlements as set out under a statute, award or industrial agreement; this would still constitute wage theft (even if the employer is not aware of the underlying statute, award or industrial agreement).

RECOMMENDATION 7: The definition of wage theft be amended to:

- **more than one intentional instance of underpayment of wages and entitlements, rather than the systematic and deliberate underpayment of wages and entitlements;**
- **apply it to wages and entitlements as set out under statute, awards and (potentially) industrial agreements (excluding contractual wages and entitlements that sit above statute, awards and industrial agreements); and**
- **clarify that the intentional act is in respect of the 'underpayment of wages and entitlements', regardless of whether those wages and entitlements are derived from a contract of employment, industrial agreement, award or statute.**

RECOMMENDATION 8: The number of instances of underpayment of wages and entitlements be a mitigating or aggravating factor in sentencing.

8.2 Criminalisation of wage theft

8.2.1 Penalising wage theft: importance of deterrence

The primary sentencing principle in Western Australia is that "*a sentence imposed on an offender must be commensurate with the seriousness of the offence*".[45]

A Court is then required to consider the following objectives in achieving that principle:[46]

- punishment of the offender;
- denunciation of the offending conduct;
- vindication of the victim;
- specific deterrence of the offender;
- general deterrence of other prospective offenders;
- prevention (incapacitation); and
- rehabilitation of the offender (thereby protecting the community).

The theory associated with deterrence is that as a penalty increases, it has a greater deterrent effect both on the offender (specific deterrence) and the broader community (general deterrence). For a penalty to act effectively as a deterrent it should not be seen merely as the cost of doing business.[47]

In considering this Term of Reference then, ELC has assumed that a criminal offence (with the threat of imprisonment) will then have a greater deterrent effect than merely a higher civil monetary penalty.

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[45] Section 6(1) of the *Sentencing Act 1995* (WA).

[46] The Honourable Wayne Martin AC, *The Art of Sentencing – an appellate court perspective* (2014) available at https://www.supremecourt.wa.gov.au/_files/The%20Art%20of%20Sentencing%20-%20an%20Appellate%20Court%20Perspective%20Martin%20CJ%2014%20Oct%202014.pdf.

[47] Phua & Foo Case, where Siopis J held at [61], [62] and [63] that:

> *As I have said, the primary purpose of the imposition of a civil penalty is deterrence.*
>
> *In this case, in my view, notwithstanding Mr Phua's evidence that he will ensure that the respondent does not breach the law again, and the training course he has undertaken, it is, nevertheless, necessary that the penalty reflect an element of specific deterrence. This is because of the deliberate disregard which the respondent has previously shown to compliance with the Restaurant Award conditions in an environment where the affected employees are casual and vulnerable employees. This is to remind the respondent of the continuing need to comply with its statutory obligations.*
>
> *Further, the penalty should also act as a deterrent to others in the restaurant/café industry who may be minded to flout the law with a view to increasing profit at the expense of vulnerable employees. As mentioned, there is in evidence a FWO report which shows that the failure to meet minimum employment obligations is widespread within the restaurant/café industry which employs a large number of vulnerable employees. The penalty should be at a level such that the payment of a penalty is not regarded as simply a cost of doing business whilst continuing to exploit vulnerable employees.*

8.2.2 Interplay between separate civil and criminal claims arising out of the same facts: the appropriate regulator

There may be potentially different regulators responsible and empowered to bring a criminal claim versus a civil penalty claim. Where there are different regulators responsible for different claims which arise out of the same set of facts, this introduces complexity in relation to investigating and enforcing those claims.

It also has the potential to increase delay in resolution of the wage theft claim, as each regulator investigates the matter and determines whether there is a prima facie case to pursue.

- For example, a regulator responsible for pursuing a non-criminal claim may hold off in investigating and enforcing that claim because the charges and penalties available in respect of the criminal claim may be stronger and more appropriate.

  It is reasonable to suspect that you will get situations where the regulator responsible for prosecuting a criminal charge may determine there **is not** a prima facie case at which point the regulator responsible for pursuing a civil claim may investigate the matter and determine there **is** a prima facie case.

  The different decisions are because of the different burdens of proof for each claim, and potentially the different matters which need to be proven (intent being one of the elements to the criminal charge).

In ELC's view, a regulator prosecuting a wage theft criminal claim should:

(i) have relevant and specialist expertise in employment matters and be dedicated for that purpose;

(ii) be the same regulator for the purpose of pursing any civil underpayment claims; and

(iii) have the same powers of investigation for both the civil and criminal claims.

8.2.3 Potential delay of the civil claim while criminal offence is prosecuted

Presumably, if wage theft is a criminal offence it will mean that there are two potential claims that can be made from the same set of facts – the wage theft criminal prosecution and the underpayment claim.

The higher standard of proof for a criminal offence (beyond reasonable doubt) necessarily makes it a more difficult claim to prove than a civil claim (the balance of probabilities). Where both a criminal and civil claim can be made, typically the civil claim also needs to wait until resolution of the criminal offence.

If this is the case for wage theft, this means the underpayment claim could be delayed until the criminal offence is determined.

In ELC's view, a wage theft criminal prosecution should not delay a civil claim for underpayment of wages and entitlements.

8.3 ELC's position on criminalising wage theft (given the likely greater deterrent effect of a criminal offence and the higher burden of proof)

The question of whether wage theft should be a criminal offence is a complex question to answer. ELC is not a criminal law firm and does not have specific criminal expertise. More particularly, as mentioned above, ELC's clients are primarily focussed on recovery of underpayments, and punitive action is secondary to this.

ELC is strongly of the view that the penalties for underpayment need to be increased, and the laws need to be strengthened to hold accessories accountable for the actions of the employer (ELC refers to its submissions at paragraph 9.6 and Recommendation 16).

While increased penalties **could** include the criminalisation of wage theft, it is important that this not have unintended and counter-productive consequences.

To that end, in ELC's view there are various questions the Inquiry should consider when examining this issue.

(a) The issues raised in paragraphs 8.2.2 and 8.2.3 above.

(b) What additional resources and funding need to be provided to support prosecuting wage theft claims?

(c) Should there be an express mitigating factor in sentencing, being the **prompt and full** rectification of the underpayment? This may then encourage employers to remedy any underpayment claim, even if pleading not guilty, to reduce the size of any potential penalty should they subsequently be found guilty of the charge.

On balance, ELC would support criminalisation of wage theft in circumstances where:

- the definition of wage theft is simplified and does not include contractual entitlements that sit above the safety net of statute, awards and industrial agreements (ELC refers to its submissions at paragraph 8.1.2 and 8.1.3 and Recommendation 7);
- a vulnerable worker can still effectively and expeditiously pursue an underpayment claim at the same time or prior to any criminal prosecution (ELC refers to its submission at paragraph 8.2.3);
- a criminal prosecution facilitates rectification of the underpayment (ELC refers to its submission at paragraph (c) above);
- the regulator for both a criminal and civil wage theft claim is appropriately empowered and resourced, and has as an objective supporting workers in expeditiously pursuing underpayment claims (ELC refers to its submissions at paragraphs 8.2.2, 9.7 and 11.2.2 and Recommendations 20 and Recommendation 28); and
- the civil penalties and enforcement options are also strengthened and increased, providing the option to either bring a criminal prosecution or a civil penalty claim (ELC refers to its submissions at paragraphs 8.2.3 and 9.6 and Recommendation 17).

RECOMMENDATION 9: That wage theft be a criminal offence, provided that:

- there is a mechanism for a worker to separately pursue their underpayment claim at the same time (without prejudicing any criminal prosecution);

- there is an express mitigating factor in sentencing where the employer has promptly and fully rectified the underpayment at an early stage; and

- the regulator responsible for prosecuting a wage theft criminal claim:

(a) has relevant and specialist expertise in employment matters and is dedicated for that purpose;

(b) is the same regulator for the purpose of pursing any civil underpayment claims (and must take into account and give precedence to the expeditious recovery of the underpayment of wages and entitlements on behalf of the worker); and

(c) has the same powers of investigation for both the civil and criminal claims.

9. (Prevention and Recovery) Should new laws be introduced to address wage theft?

9.1 Introduction

As set out above, on balance ELC is of the view that wage theft should be a criminal offence.

Separately, there are new laws that could be introduced to strengthen the State regulatory framework to address wage theft, which will have the additional benefit of also strengthening the regulatory framework to address underpayments of wages and entitlements more broadly.

9.2 Process: Employment Records

9.2.1 Provision of various employment records

The IR Act[48] and the MCE Act[49] establish a regime for:

(i) various employment records to be kept by an employer; and

(ii) a worker to have access to those employment records on request.

These employment records (if accurate) are typically critical in establishing a claim where the wages and entitlements due and payable is calculated based on hours

[48] Division 2F, applying to an employee during any period when an industrial instrument applies to his or her employment.
[49] Part 6, applying to an employee during any period when the employee's contract of employment is not governed by an employer-employee agreement or an award.

worked. In ELC's experience though, it can be difficult for a worker to gain access to records relating to the hours worked.

It is often **only** when a dispute arises that a worker becomes aware of the employment record keeping requirements and identifies that appropriate records have not been kept by their employer.

This then creates practical and evidentiary difficulties in easily establishing the quantum of a claim. This is particularly so where the worker has been with their employer for several years, given the complexity of many awards with the calculation of overtime, penalty rates and loadings.

As an employer is already required to keep a record of the hours worked, there would be no substantial additional burden on an employer providing a copy of those records shortly after the time the payment of wages is made. This would assist a worker in identifying during their employment whether their wages and entitlements have been correctly calculated and paid.

RECOMMENDATION 10: The IR Act and MCE Act be amended so that an employer is required to produce to the worker all employment records required to be kept by the employer in relation to the hours worked by the worker, at the time payment of wages is made.

9.2.2 Provision of a payslip be made compulsory

An employer is not required to provide a payslip to State based workers who are award free, although the employer is required to keep various time and wages records which are accessible on request by the employer.

RECOMMENDATION 11: The IR Act and MCE Act be amended so that an employer is required to produce to all workers a payslip on payment of wages.

9.2.3 Reverse onus

One of the changes made by the FW Protecting Vulnerable Workers Act was to create a reverse onus of proof in certain civil remedy proceedings.[50]

Where a worker makes an allegation in such civil remedy proceedings, and:

(i) the employer was required to make, keep, make available or give certain employment records; and

(ii) the employer has failed to comply with that requirement,

the employer has the burden of disproving the allegation.[51] This is subject to an exception where the employer has a reasonable excuse for non-compliance.[52]

[50] Sections 557C(1) and (3) of the FW Act.
[51] Section 557C(1) of the FW Act.
[52] Section 557C(2) of the FW Act.

In ELC's views, this reverse onus together with ELC's recommendations regarding enhancing the employment records keeping requirements, will:

(i) strengthen the State regulatory framework;

(ii) make it easier for vulnerable workers to identify if they have been underpaid their wages and entitlements; and

(iii) make it easier for the worker to then recover those underpaid wages and entitlements.

RECOMMENDATION 12: The IR Act and MCE Act be amended to provide for a reverse onus of proof where employment records are relevant to an allegation but have failed to be kept by an employer.

9.3 Process: Information Statement

In ELC's experience in dealing with vulnerable workers; there is a lack of basic knowledge of employment laws, minimum entitlements and enforcement mechanisms. A significant portion of ELC's work is then to provide clients with at least a minimal understanding of these matters to empower them going forward with their matter. Workers do not know what they do not know.

It would enhance workers' knowledge if they were provided a standard factsheet before or as soon as practical after they start employment, like the Fair Work Information Statement.

This standard factsheet should then, among other things, inform workers of their rights and entitlements regarding employment record keeping requirements, wages and permitted deductions.

RECOMMENDATION 13: Employers have a legal obligation to give new workers a factsheet outlining, among other things, the employer's responsibility regarding employment record keeping requirements, wages and permitted deductions. If an employer does not provide this factsheet before or as soon as practical after the start of employment, they should be subject to financial penalty.

9.4 Process: Flexible and informal enforcement process

For laypersons who are unable to secure support and representation, it is vital that enforcement processes be clearly set out in the legislation and appropriate for them to rely upon. They should be flexible and as informal as possible. Procedural and evidentiary formality prevents vulnerable workers from accessing justice.

In drafting a suitable enforcement process, a balancing act needs to be performed.

On one side, there is a simple concept that a worker is entitled to their wages and entitlements and where there is an underpayment this should not be a matter of negotiation – it should simply be paid. On the other side, the early resolution of a disputed claim through

a conciliated outcome is beneficial to workers, although this may necessitate a worker compromising their claim.

In ELC's experience, as part of this, it is also not unusual where the quantum is disputed for an employer to withhold the entirety of the claimed underpayment (even the amount they may acknowledge is their position on what is payable) until settlement of their claim. One of the disappointing realities of the regulatory framework is that workers then often compromise their claim and their lawful entitlements to achieve a quick result.

As ELC has submitted, the majority of its clients are focused primarily on ensuring they are paid their correct entitlements (Recovery) in circumstances where underpayment has allegedly occurred, rather than Punishment. The tools available to them to do so involve:

(a) seeking to negotiate a resolution;

(b) referring the matter to an industrial inspector to investigate and enforce on their behalf; or

(c) bringing a claim.

In ELC's view, the tribunal or court (and the members of that tribunal or court) presiding over such matters should:

- have relevant and specialist expertise in employment matters;
- have low filing fees (for example, no more than $50), with a means of waiving fees for low income earners;
- have forms which are able to be easily completed by a layperson, with questions guiding the layperson as to what information is required;
- have a process for early compulsory conciliation;
- where early compulsory conciliation is unsuccessful, have a hearing process which is flexible and informal;
- empower the court or tribunal hearing the matter to take a more active role in investigating the facts of the case and drawing out the relevant evidence (akin to an inquisitorial system as opposed to an adversarial system); and
- attract no other fees for procedural and enforcement processes.

For example, one forum, which facilitates the ease of making a claim and early conciliation of the claim is what is commonly called a denied contractual benefit claim (or a DCB claim).[53] This is a claim which is easy to bring without undue formality, and is often quickly resolved at the conciliation phase.[54] It is a forum which ELC recommends to its clients at an early stage due in part to it being an easier system in which to self-represent.

[53] This is a claim by an employee that she or he has not been allowed by her or his employer a benefit, not being a benefit under an award or order, to which she or he is entitled under her or his contract of employment.
[54] This is a matter the WAIRC reports on in its annual reports.

RECOMMENDATION 14: The employment enforcement framework be reviewed with the specific objective of enabling self-represented individuals to more easily access justice, looking at issues of:

- **simplification;**
- **procedural formality;**
- **evidentiary requirements; and**
- **the powers of the court or tribunal to be actively involved in investigating the facts of the case.**

9.5 Process: Migrant workers

One of the factors which can make a worker vulnerable to exploitation is whether they are a migrant worker (ELC refers to its submissions at paragraphs 5.1.1 and 12.6 and Recommendation 33).

The process for dealing with claims by migrants for underpayment of wages and entitlements needs to take into account the prospect that the worker may be leaving the jurisdiction to return overseas. An employer should not be able to use the threat of deportation or take advantage of a worker potentially having to leave the jurisdiction, to engage in wage threat.

RECOMMENDATION 15: That:

- **there be an expedited process for courts and tribunals to deal with employment law claims relating to underpayment, where there is a prospect the worker may be leaving the jurisdiction to return overseas; and**
- **where it is not possible for a claim to be dealt with on an expedited basis, the various courts and tribunals processes should be flexible enough to allow claimants to pursue a claim easily, even if they are not in Australia.**

9.6 Penalty

ELC supports that wage theft should be a criminal offence. Consideration also needs to be given to the range of penalty options available for a separate civil claim for underpayment.

9.6.1 Accessorial liability

In some jurisdictions there is an increased focus on accessorial liability provisions to hold those involved in contraventions accountable.

As part of this, it is important that those accessorial liability provisions are not only used to make individuals within the contravening entity accountable but are also

strong enough to make other entities (and individuals inside those entities) within the contractual supply chain accountable.

This is because in ELC's experience, a common strategy often used to defeat workplace protections is distancing the entity from whom the work is performed from the entity that employs or engages the worker.

The IR Act Interim Report at paragraph 8.5 deals with this issue of accessorial liability.

RECOMMENDATION 16: The Inquiry consider the IR Act Interim Report on the issue of accessorial liability and recommend that accessorial liability provisions be used to combat wage theft.

9.6.2 Increase in penalties

ELC submits that the penalties for a contravention or failure to comply with statutory and industrial obligations are currently too low and should be increased.

Section 83 of the IR Act sets the maximum penalty for a contravention or failure to comply with an industrial instrument (such as an award) as $2,000 for an employer, organisation and association and $500 in any other case.

Section 83E of the IR Act sets the maximum penalty for contravention of a civil penalty provision, as $5,000 for an employer, organisation or association and $1,000 in any other case.

In comparison, under the FW Act the maximum penalty for a civil remedy provision which is not a serious contravention is $63,000 for a corporate entity and $12,600 for an individual.

The FW Protecting Vulnerable Workers Act also introduced penalties for serious contraventions, for which the maximum penalty is increased tenfold to $630,000 for a corporate entity and $126,000 for an individual. Relevantly, in determining whether a serious contravention has occurred a court may have regard to the failure to make or keep certain employment records and a failure to give pay slips.[55]

There is then a significant disparity between the penalties under the State and Federal regulatory frameworks. As mentioned above, for a penalty to be an effective deterrent it must be more than the cost of doing business.

ELC recommends a significant increase in the current penalties, with a significantly higher penalty for serious contraventions, to be at an amount that at least equals the Federal regulatory framework.

Separately, consideration should be given whether for certain serious offences there should be the requirement to award an additional penalty, which is based on a multiplier of the quantum of the underpayment. For example, section 222 of the *Fish*

[55] Section 557A(2)(d) and (e) in relation to whether a person's conduct was part of a systematic pattern of conduct.

Resources Management Act 1994 (WA) provides that if a person is convicted of certain offences, in addition to the penalty imposed under the relevant provision:

> *the court must impose on the person an additional penalty that … is equal to 10 times the prescribed value of any fish the subject of the offence*.

RECOMMENDATION 17: The penalties for underpayment of wages and entitlements be increased from current levels to be at a level that, at a minimum, is aligned with the Federal regulatory framework.

RECOMMENDATION 18: The Inquiry consider the merits of an additional mandatory penalty for serious contraventions that is calculated based on a multiplier of the underpayment.

9.6.3 Other enforcement options

While penalties do have a specific and general deterrent effect, there needs to be a range of available enforcement mechanisms to achieve the outcome.

Another enforcement mechanism is enforceable undertakings.

Enforceable undertakings allow the parties to resolve matters before commencing proceedings and can resolve both the past breaches but set up mechanisms to prevent further breaches.

RECOMMENDATION 19: That further enforcement options be introduced, such as enforceable undertakings.

9.7 Regulatory enforcement

ELC has made submissions and recommendations:

(a) to ensure the regulator responsible for prosecuting wage theft has the necessary specialist expertise, and is DMIRS or aligned with DMIRs (ELC refers to its submissions at paragraph 8.2.2 and Recommendation 9); and

(b) the need for increased funding and resourcing (ELC refers to its submissions at paragraph 11.2.2 and Recommendation 28).

Additionally, in reviewing the statutory compliance and enforcement mechanisms, this Inquiry should look at what other regulatory and administrative tools are available to an inspector to achieve an effective and just result.

The IR Act Interim Report at paragraph 8.7 deals with updating the industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

RECOMMENDATION 20: The Inquiry consider the IR Act Interim Report on the issue of industrial inspectors' powers and tools of enforcement.

10. Alignment with the national system

Term of Reference 6 deals with whether new laws should be introduced into Western Australia and Term of Reference 8 deals with whether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the dual jurisdiction.

ELC has made submissions on both these Terms of Reference.

Fundamentally though, ELC is of the view that a comparison needs to be done between the State and Federal regulatory framework to identify in each framework what are the stronger protections and more beneficial entitlements for workers.

There then needs to be a focus in changing Western Australian laws and making recommendations to the Federal Government to, wherever possible, achieve **consistency** between the two regulatory frameworks in respect of:

(a) protections;

(b) entitlements; and

(c) the process of enforcement.

For example:

(a) section 17D of the MCE Act (regarding authorised deductions from pay) should be amended to introduce additional limitations on when deductions can be made from a worker's pay, including at least the limitations set out in sections 324, 325 and 326 of the FW Act;

(b) introducing general protection provisions similar to the general protections' provisions in Part 3-1 of the FW Act, (which protect employees from having adverse action being taken against them for prohibited reasons, from having undue influence, pressure or coercion applied to them, and from sham contracting, amongst other things). This would provide a separate cause of action if, for example, a worker is dismissed because they have raised a complaint about their wages and entitlements; and

(c) under ss 541 and 542 of the FW Act, FWO may enforce contractual matters relating to the NES, even where the contractual entitlement is more generous than the NES.[56] An equivalent provision should exist in the MCE Act to allow DMIRS to enforce above-minimum contractual entitlements relating to minimum conditions.

[56] See section 12 of the FW Act which defines a "*safety net contractual entitlement*".

RECOMMENDATION 21: The Inquiry conduct a comparison of:

- **the State regulatory framework (including any recommendations by the Inquiry for improvements to the State regulatory framework);**
- **the Federal regulatory framework,**

to identify the strongest protections and most beneficial entitlements for workers.

RECOMMENDATION 22: The identified strongest protections and most beneficial entitlements for workers should form either (as a minimum):

- **a recommended change to the State regulatory framework; or**
- **a recommendation from the State Government to the Federal Government for a change to the Federal regulatory framework,**

with the goal of achieving consistency wherever possible between the State and Federal regulatory framework while ensuring no worker is worse off as a result of that consistency.

RECOMMENDATION 23: The MCE Act be amended to prescribe additional limitations on when an employer is authorised to make deductions from a worker's pay.

RECOMMENDATION 24: The State regulatory framework include general protections provisions which protect a worker from adverse action should they make an inquiry or seek to enforce a workplace right (among other things), in relation to their wages and entitlements.

RECOMMENDATION 25: Industrial inspectors have the power to enforce contractual matters relating to statutory minimum entitlements.

11. Term of Reference 7: Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.

11.1 Summary

It is important that the focus on enforcement (and the general deterrent effect of penalties and accessorial liability provisions) does not draw attention away from measures that can be adopted to prevent underpayment in the first place.

As mentioned previously:

(a) a necessary precursor to enforcing employment rights is having a basic understanding of those rights and the ability to either self-represent or obtain third party assistance; and

(b) vulnerable workers often have a lack of basic knowledge of employment laws, minimum entitlements and enforcement mechanisms.

In ELC's view, insufficient resources are currently devoted to measures designed to ensure workers have adequate representation and knowledge of their rights.

11.2 Level of available third-party resources for workers

11.2.1 Community Legal Centres

ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia dedicated to offering free employment law advice, assistance, education and representation to vulnerable non-unionised workers.

Unfortunately, the demand for ELC's services greatly exceeds ELC's resources.

To provide a State-wide service that is not geographically limited, ELC primarily operates a telephone service through an Advice Line. Currently, ELC is only able to answer approximately a small proportion of calls on our Advice Line. This potentially means that many vulnerable non-unionised workers in WA, who cannot otherwise afford to pay for a lawyer, are missing out on receiving legal or employment advice on their situation.

In addition to providing one-off advices to callers on its Advice Line, ELC provides some particularly vulnerable workers with further legal assistance. In some circumstances, this includes providing some clients with further assistance by way of representation. However, ELC is unable to do this for a large number of callers due to resourcing.

In respect of the balance of callers who are unable to afford representation, if they are not members of a union and DMIRS is not in a position to bring a claim on their behalf, they must then self-represent, often against well-resourced employers.

To try and alleviate this ELC adopts a multi-faceted approach to maximise the benefit of the services it provides. For example, it also:

- conducts community legal education, information and training sessions across the State;

- offers 20 Factsheets and eight Information Kits that cover a range of employment issues and remedies on the ELC website (www.elcwa.org.au);

- provides an online InfoGuide on the ELC website (www.elcwa.org.au) to help users find the relevant referral or information they need, either within the tool itself or via links to appropriate ELC or external information;

- two videos available on the ELC website providing an overview of "Employment Law in WA" and "What to do if you lose your job";

- will refer some of these callers to State and Federal regulators (DMIRS and FWO) to obtain assistance; and

- secures pro bono representation support for a limited number of ELC's callers.

In December 2014, the Productivity Commission released its inquiry report on Access to Justice Arrangements.

In looking at legal assistance funding of community legal centres, the report noted the uncertainty of funding (under the heading of 'Getting off the funding merry-go-round'). This uncertainty of funding is something the ELC has experienced, and previously had led to a significant contraction of its services, before being able to expand its services as further funding was obtained.

The Productivity Commission considered that greater predictability of funding is required. The Productivity Commission also recommended that:

> "*Given the dearth of data, and having regard to the pressing nature of service gaps, the Commission considers that an interim funding injection in the order of $200 million — from the Australian, state and territory governments — is required per year.*"

Interestingly in the inquiry report, the Productivity Commission examined the top five most accepted areas of pro bono practice and the top five most rejected pro bono practice areas. On a percentage basis, employment law was the fourth highest area under both the top five most accepted and most rejected pro bono practice areas. The Productivity Commission noted that the rate of rejection for employment law may "*simply reflect the volume of applications*".[57]

ELC regularly reviews the effectiveness and efficiency of service delivery in relation to the amount of funding received each year. ELC can leverage an average of $700,000 annually in pro bono and volunteer support from the funded services. Further, according to a social return on investment research project conducted in 2016, every dollar invested in ELC provides conservatively $1.53 of value.

RECOMMENDATION 26: Further funding and resources be provided to the community legal sector for the purpose of providing employment law related further assistance and community legal education to vulnerable workers.

[57] At p. 819.

RECOMMENDATION 27: Further funding and resources be provided to third parties, including the community legal sector, for the specific purpose of subsidising the cost of employment law related enforcement action. For example, funding could be provided for the specific purpose of representation in underpayment disputes.

11.2.2 Regulatory agencies such as DMIRS

Agencies such as DMIRS do not have unlimited resources to educate the community and enforce the State regulatory framework.

Like ELC, DMIRS looks to undertake alternative measures to gain maximum benefit from its resources. It must first focus on what it is statutorily 'required' to do before it can devote resources to what it would 'like' to do.

In relation to funding to investigate and enforce claims, this must be at a sufficient level to ensure DMIRS can expeditiously and effectively enforce claims on behalf of vulnerable workers. The exploitation of vulnerable workers should then be a key factor in deciding what issues of non-compliance need to be prioritised for litigation.

DMIRS also has a limited capacity to provide funding to community organisations. ELC is a recipient of a portion of this funding, an amount we are extremely grateful for, and which funding is put to great use in the community we serve. ELC, however, is still unable to meet demand for its services.

RECOMMENDATION 28: Further funding and resources be provided to DMIRS for the purpose of providing education and information, investigating and enforcing the regulatory framework (with priority given to vulnerable workers).

11.2.3 Trade Unions

Trade unions have traditionally played an important role as protectors and enforcers of employment legal rights.

To do so though, trade unions need to have access to workers, records and information. It is trite to say, but unless a trade union has knowledge of employer non-compliance, it is unable to take on the role of the enforcer.

RECOMMENDATION 29: ELC supports any submissions by other parties or recommendations by the Committee which provide trade unions greater scope to assist workers in low-wage industries.

12. Term of Reference 8: Whether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the Federal jurisdiction.

12.1 Legislative changes: Protecting vulnerable workers

Regulatory intervention to protect vulnerable workers is starting to receive greater Federal Government attention and support.

The amendments to the FW Act that were introduced by FW Protecting Vulnerable Workers Act were in response to community concern about the exploitation of vulnerable workers, in particular migrant workers, and many of those who work in the franchise sector.[58]

12.2 Fair Entitlements Guarantee scheme

FEG is a safety net scheme of last resort, providing assistance to eligible employees where their former employer has entered liquidation or insolvency. Necessarily, this means that the employer must be an Australian employer and subject to Australian employment laws.

However, one of the requirements to be an eligible employee is to be an Australian citizen or the holder of certain visas. The result of this is that even if a migrant employee is lawfully able to work in Australia and is subject to the Australian law framework, they may not be entitled to access the scheme.

In ELC's view, there should be no exclusion in the FEG scheme based on citizenship or visa status.

RECOMMENDATION 30: The State Government recommend to the Federal Government that the requirements in the FEG Act that an employee be an Australian citizen or the holder of a certain visa type be removed.

12.3 Classification of workers as contractors or gig workers

In ELC's experience, another common strategy often used to defeat workplace protections is the:

(a) classification of workers as contractors rather than employees – a clear example of this practice, and the difficulty in determining a worker's actual classification should the matter be in dispute, is the significant increase in the gig economy; and

(b) distancing the entity from whom the work is performed from the entity that employs or engages the worker.

Typically, these matters which fall under the Federal regulatory framework because of the nature of the entities involved in these arrangements (and the operation of both the *Independent Contractors Act 2006* (Cth) and the FW Act).

[58] Explanatory Memorandum to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth), page i.

The two principal mechanisms currently available for overcoming these arrangements are:

(a) the enforcement of the sham contracting provisions;[59] and

(b) accessorial liability provisions[60], which provisions FWO has recently emphasised its commitment to use the accessorial liability provisions to "*ensure that all accessories to that conduct are held to account.*"[61]

12.4 Operation of accessorial liability provisions in the Federal regulatory framework

12.4.1 Accessorial liability of managers and directors

In *Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors* [2017] FCCA 2838, penalties were issued against two managers and directors of the first respondent, Commercial and Residential Cleaning Group Pty Ltd, for (among other things) failing to meet a broad range of minimum entitlements due to be paid to employees of the first respondent and failing to keep and maintain adequate or correct records to issue payslips.

One of the factors the Court considered in assessing a penalty was that in another similar Court action against a different cleaning company, the two managers and directors also operating that company – and compensation and penalties ordered in that action had not been paid.

> *By reason of the fact that the first respondent in these proceedings and ACN 146 435 118 Pty Ltd had common directors, including the second respondent and the third respondent in these proceedings, and that the third respondent in ACN 146 435 118 (No.2) is the second respondent in these proceedings, the Court considers that appropriate weight must be given to the previous contravention by the third respondent and the previous similar conduct by a corporation in which both the second and third respondents were involved.*[62]

12.4.2 Accessorial liability of another entity

In *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810 a declaration was made that and accounting firm, Ezy Accounting 123 Pty Ltd, was accessorily liable for knowingly helping one of its clients exploit a vulnerable worker.

The underpayments occurred despite the FWO having previously put Ezy Accounting 123 on notice of their obligations under workplace laws. It was found that Ezy Accounting 123 had "*deliberately shut its eyes to what was going on in a manner that amounted to connivance in the contraventions by the first respondent*".[63]

In a supply chain environment, while an employer may be directly responsible for the payment of wages, it is important to push liability for non-compliance with employment laws up the contractual supply chain to the ultimate beneficiary. The head entity in these supply chains are typically well-resourced sophisticated companies and it must be made clear to them that there is a business case for having strong governance arrangements in this area and direct consequences to them if non-compliance occurs.

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[59] ELC refers to its submissions and case examples at paragraph 2.3.5.
[60] See for example s. 550 of the *Fair Work Act 2009* (Cth).
[61] Fair Work Ombudsman, *HR Manager among those penalised almost $400,000 for "systematic" exploitation at restaurant,* (2017), available at https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/november-2017/20171117-nsh-north-penalty-mr.
[62] At paragraph [57].
[63] At paragraph [102].

12.4.3 Extended liability for franchisors and holding companies

One of the changes arising from the FW Protecting Vulnerable Workers Act was extended liability for franchisors and holding companies.

In ELC's view, the concepts contained in the extended liability for franchisors and holding companies, together as to what factors a court may have regard when determining whether reasonable steps have been taken to prevent a contravention, could similarly be applied to other contractual supply chains.

However, ELC also recommends the legislation go further and a stronger positive obligation be placed on contractual supply chains to prevent a contravention; rather than a retail chain seeking to abrogate its legal risk of being accessorily liable for non-compliance by limiting its involvement in the conduct of entities further down the contractual supply chain.

RECOMMENDATION 31: The State Government recommend to the Federal Government that the accessorial liability provisions be reviewed with the specific objective of applying those provisions to contractual supply chains. As part of this, the Inquiry should consider whether a positive due diligence duty should be placed on a principal or head contractor, such that they will be held liable unless they can demonstrate they have taken proper and reasonable steps to ensure compliance by entities lower down the supply chain with employment laws.

12.5 Manner of engagement: definition of employee

While greater protection is being given to vulnerable workers, ELC submits that the Federal employment law regulatory framework has failed to keep pace with the way in which workers are being engaged in modern society to perform work.

For example, the gig economy has, arguably, moved from an emerging market to a developing market.

What started with ride share and food delivery, has expanded to the undertaking of a raft of 'tasks' (which can include long-term assignments with large employers and even providing aged care).

Although ELC is not able to identify a business's motivation to establish a gig economy arrangement, it notes that the current status of the law provides a barrier to a worker in such an arrangement from claiming the business has disguised an employment relationship as one of an independent contractor relationship (sham contracting).

An individual can prosecute an employer who engages in sham contracting. To do so, it must first be proved, having regard to the relevant indicia when applying the 'multi-factorial test', that a worker is an employee, and not an independent contractor. Once proven, the court can make orders with declaratory effect and penalise the employer.[64]

[64] See generally *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610 where the FWC, in applying the multi-factorial test, rejected a Victorian Uber driver's argument that he was an 'employee' protected by unfair dismissal laws.

RECOMMENDATION 32: The State Government recommend to the Federal Government that the legal definition of 'employee' be modified to provide employment law protections to workers performing services in the gig economy.

12.6 Report of the Migrant Workers' Taskforce

On 7 March 2019 the Migrant Workers' Taskforce Report was released by the Minister for Jobs and Industrial Relations.

The Final Report made 22 recommendations, which also included recommendations specifically addressing wage exploitation.

The Federal Government has accepted "*in principal all the report's recommendations*".[65]

However, it is highly unlikely there will be any significant changes, if at all, to the Federal regulatory framework given the impending Federal election. Although the date of a Federal election has not been announced, the most likely date for the 2019 Federal election is in May 2019.

RECOMMENDATION 33: The State Government recommend to the Federal Government that the recommendations of the Migrant Workers Taskforce be implemented.

[65] Australian Government Response: Report of the Migrant Workers' Taskforce March 2019 (available at https://docs.jobs.gov.au/documents/government-response-migrant-workers-taskforce-report).

13. Term of Reference 9: Other matters incidental or relevant to the Inquirer's consideration of the preceding terms of reference.

13.1 Non-wage theft underpayments

A number of ELC's submissions and recommendations equally apply to underpayment of wages and entitlements which does not constitute wage theft.

In ELC's view the broader issue of underpayment of wages and entitlements is equally as important to wage theft; and enhancing the regulatory framework in this area will also enhance the regulatory framework in respect of wage theft (and vice versa).

RECOMMENDATION 34: The Inquiry make recommendations on the broader issue of underpayment of wage and entitlements, which do not constitute wage theft (see also Recommendation 1).

13.2 Regulation of labour hire providers

Several States have introduced legislation to regulate the labour hire industry,[66] in recognition of the fact that labour hire agencies have been involved in the exploitation of workers.

Such legislation requires labour hire agencies to obtain a licence in order to operate.[67]

RECOMMENDATION 35: New laws be introduced to regulate the labour hire industry in Western Australia.

13.3 Deeds of release

It is not unusual for an employer to seek a deed of release, as a precondition to paying a worker their lawful entitlements on termination of employment.[68] Conversely, it is not permissible to contract out of award or industrial agreements entitlements.[69]

This then raises an issue – should a deed of release or any other form of agreement act as a release and a bar against proceedings being taken, where it involves the employer merely paying a worker their lawful entitlements?

ELC's usual advice when clients seek advice on this issue is not to sign any deed of release where the settlement sum is merely what the employer will need to pay the worker in any event. Regardless, workers still feel pressured to sign the deed of release in order to obtain that sum of money.

[66] South Australia, Queensland and Victoria have introduced Labour Hire Licensing Acts.
[67] See further A. Stewart, *Stewart's Guide to Employment Law,* Sixth edition, The Federation Press, 2018, pp. 78-79.
[68] Sometimes tied up with this 'settlement sum' is a nominal ex gratia payment together with outstanding salary, relevant leave entitlements and any payment in lieu of notice.
[69] Section 114 of the IR Act.

An example of this is found in the decision of Commissioner Matthews in *Kay Heald -v- Metlabs Australia Pty Ltd* [2019] WAIRC 12 at paragraph 69:

> *The industrial agent told Ms Heald not to sign the deed but Ms Heald told him of her need for the money the deal guaranteed, against the possibility of being terminated without payment, and the industrial agent told Ms Heald that if she did sign the deed she should make it clear that she was doing so under duress.*

In this case, although Commissioner Matthews found on the basis of the law as it currently exists that Ms Heald was stressed at the time she signed the deed[70], "*her stress falls well short of establishing special disadvantage.*"[71]

Commissioner Matthews also found that "*there is ample evidence of exquisite and sustained pressure being brought to bear on Ms Heald.*"[72] However, he found that "*this pressure was not "undue" in a relevant sense*.' :[73]

In particular, ELC notes Commissioner Matthews concluding statements:

> *143. I find that Ms Heald was put in a most unfair position by Ms Beeson and that Ms Beeson prosecuted her purpose in relation to Ms Heald, that was to get her to agree to end her employment on terms favourable to Metlabs Australia Pty Ltd, in a most unfair way but at the end of the day I consider that this matter is resolved in favour of the respondent according to the application of known principles to the facts as found by me.*
>
> *144. Unfairness of the sort I have identified is not in itself enough to cause me to set aside the deed.*
>
> *145. I recognise the difference in the bargaining strength of the parties.*
>
> *146. I recognise that Ms Heald was stressed throughout the relevant period.*
>
> *147. I recognise that Metlabs Australia Pty Ltd, through the agency of Ms Beeson, had little regard for Ms Heald's stress and the awful position she found herself in and prosecuted its purpose unremittingly and forcefully.*
>
> *148. However, Ms Heald was under no special disadvantage and Ms Beeson did not, on behalf of Metlabs Australia Pty Ltd, breach or threaten to breach the contract of employment, if this was a material question to answer.*
>
> *149. I recognise that the Industrial Relations Act 1979 requires me to act according to equity and good conscience and that it is necessary for me, in coming to my decision, to have regard to the public interest.*
>
> *150. I have been guided by equitable principles which helpfully, in my view, flesh out the way in which the imperative under section 26(1)(a) Industrial Relations Act 1979 should operate in this case.*
>
> *151. In terms of the public interest, I find, taking into account all of things considered above, that there is a public interest in the Western Australian Industrial Relations Commission enforcing deals such as that struck in this case. That is, a deal not which*

[70] At paragraph [96].
[71] At paragraph [97].
[72] At paragraph [124].
[73] At paragraph [125].

was not attended by the taking advantage of a special disadvantage or one achieved through actual or threatened unlawful conduct.

152. However, I hasten to add for the benefit of the interested reader that this matter turns very much on its own facts.

153. I would not wish, by my decision, to encourage a belief that entry into deeds by employees to avoid potentially negative action toward them is simply part of the rough and tumble of employment relations in this State and such an outcome may be prosecuted without regard to equity and good conscience. Meetings such as those between Ms Heald and Ms Beeson will no doubt continue to occur but employers should be careful to ensure that what is said by them, or on their behalf, at such meetings is within the law.

ELC is not suggesting any form of settlement agreement or release needs Court approval (similar to other jurisdictions). This would introduce unnecessary complexity and has the potential of causing delays.

Rather, ELC recommends that the Courts and Tribunals be granted greater scope to set aside deeds of release which are entered pre-litigation, and which merely relate to payment of lawful entitlements.

RECOMMENDATION 36: Courts and Tribunals be granted greater scope to set aside deeds of release which are entered pre-litigation, and which merely relate to payment of lawful entitlements.