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27 March 2019

Inquiry into Wage Theft
Private Sector Labour Relations Division
Department of Mines, Industry Regulation and Safety
Locked Bag 14
Cloisters Square WA 6850

By email: wagetheftinquiry@dmirs.wa.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Inquiry into Wage Theft in Western Australia.

Please do not hesitate to contact me and my colleagues on 03 9605 2823 or at KFarouque@mauriceblackburn.com.au if we can further assist with the Department's important work.

Yours faithfully,



Kamal Farouque
Principal Lawyer
MAURICE BLACKBURN





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**Submission in Response
to the Inquiry into Wage
Theft in Western Australia**

March 2019

TABLE OF CONTENTS

	PAGE
INTRODUCTION.....	2
OUR SUBMISSION.....	2
RESPONSES TO THE TERMS OF REFERENCE	3
1. WHETHER THERE IS EVIDENCE OF WAGE THEFT OCCURRING IN WESTERN AUSTRALIA, AND THE VARIOUS FORMS WAGE THEFT MAY TAKE.	3
2. WHAT ARE THE REASONS WAGE THEFT IS OCCURRING, INCLUDING WHETHER IT HAS BECOME THE BUSINESS MODEL FOR SOME ORGANISATIONS.	4
3. WHAT IS THE IMPACT OF WAGE THEFT ON WORKERS, BUSINESSES WHICH ARE COMPLIANT WITH EMPLOYMENT LAWS, AND THE WESTERN AUSTRALIAN COMMUNITY AND ECONOMY	6
4. WHETHER WAGE THEFT IS MORE PREVALENT IN PARTICULAR INDUSTRIES, OCCUPATIONS, FORMS OF EMPLOYMENT/ENGAGEMENT OR PARTS OF THE STATE.	7
5. WHETHER THE CURRENT STATE AND FEDERAL REGULATORY FRAMEWORK FOR DEALING WITH WAGE THEFT IS EFFECTIVE IN COMBATING WAGE THEFT AND SUPPORTING AFFECTED WORKERS... ..	12
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.....	12
7. WHETHER THERE ARE OTHER STRATEGIES THAT COULD BE IMPLEMENTED BY THE WESTERN AUSTRALIAN GOVERNMENT, OR INDUSTRY STAKEHOLDERS TO COMBAT WAGE THEFT.....	13
8. WHETHER THERE ARE STRATEGIES AND LEGISLATIVE CHANGES THE WESTERN AUSTRALIAN GOVERNMENT COULD RECOMMEND TO THE FEDERAL GOVERNMENT TO DEAL WITH WAGE THEFT IN THE FEDERAL JURISDICTION.....	14
9. OTHER MATTERS INCIDENTAL OR RELEVANT TO THE INQUIRER'S CONSIDERATION OF THE PRECEDING TERMS OF REFERENCE.	20
RECOMMENDATIONS	21

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 31 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Since 2011, the Maurice Blackburn Perth office has been providing expert legal advice services in workplace injuries, motor vehicle accidents, medical negligence, will disputes, superannuation, employment and insurance, and other types of compensation and personal injury claims. Our Perth lawyers combine local knowledge with the expertise and resources of a national law firm.

Our Submission

Maurice Blackburn believes that wage theft should be criminalised.

We see this inquiry as an important part of a wider current focus on exploitative employer practices and misconduct, of the undermining of employment practices through labour hire arrangements and sham contracting, the loss of life in workplace accidents, and the rampant exploitation of cohorts of vulnerable workers.

Maurice Blackburn believes that in exploring how best to criminalise wage theft, the Government should draw on the experiences of Queensland and Victoria in developing wage theft legislation appropriate to Western Australian circumstances.

The potential provisions of wage theft legislation should articulate strict liability offences, tiered levels of conduct amounting to wage theft and tiered levels of penalties for breaches of the offences.

Further, Maurice Blackburn believes that existing regulatory instruments can be adjusted to work toward the abolition of wage theft in particular industrial relationships, such as franchise, ride share and gig economy arrangements.

We believe that the pursuit of wage recovery must also be made easier.

We also nominate a number of areas within the jurisdiction of the Commonwealth Government, on which we encourage the Western Australian Government to advocate on behalf of the State's workers.

Maurice Blackburn congratulates the Western Australian Government on its ongoing quest to ensure that workers are treated fairly, and that employers accept responsibility for ensuring their safety and wellbeing.

Responses to the Terms of Reference

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

Maurice Blackburn is confident that this inquiry will receive a number of submissions detailing the scale and extent of wage theft in Western Australia.

As a national law firm, we are acutely aware that wage theft is not restricted to Western Australia. We acknowledge that other jurisdictions are exploring ways through which the likelihood and incidence of wage theft can be reduced, or minimised.¹

Wage theft takes many forms. Maurice Blackburn notes the following forms of wage theft:

- Paying under award wage rates;
- Failing to pay superannuation;
- Failing to pay for breaks;
- Failing to pay overtime;
- The compulsory use of employer-provided staff accommodation to claw back wages;
- Withholding of wages on the basis that it will put visa status at risk;
- Not paying for trial or training periods;
- Deliberately misclassifying workers as independent contractors;
- Sham contracting arrangements;
- Not paying personal, annual or other forms of paid leave;
- Not paying appropriately for higher duties;
- Failing to meet basic worker entitlements in family run businesses;
- Illegal phoenix activity, where a firm goes into administration to avoid having to pay employee entitlements, then re-emerges under a different legal structure but with the same individuals in control;
- Inappropriate deductions from workers' wages such as inflated rent and transport costs;
- Charging employees for PPE;
- Paying flat rates of pay, regardless of the shift type;
- Failing to deduct taxation amounts;
- Requiring the employee to pay an 'employment bond';
- Compulsory medicals and drug testing at nominated medical centres with inflated medical fees; and
- Failing to pay for 'on call' periods.

This list, drawn from Maurice Blackburn's involvement in employment law, is not exhaustive. It does indicate, however, the potential scale and extent of wage theft in Western Australia.

¹ See for example <http://www.abc.net.au/news/2018-05-26/victorian-government-vows-to-crack-down-on-wage-theft/9802072>; *Parliamentary inquiry to investigate wage theft in Queensland*, Queensland Parliament, Brisbane.

The high profile of media reports on appalling behaviour by some employers has led to an extraordinary number of eminent forums and committees inquiring into the wage theft in its many forms, and generating reports and recommendations².

We are confident that this current focus across jurisdictions and across industries will produce an impressive bank of evidence from which good decisions will be made.

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

Wage theft is broad in nature, crossing many industries and employment types.

As a recent research paper into wage theft in South Australia³ noted:

Wage theft is often associated with infamous cases, like the 7Eleven incident, or known cases of exploitation in the horticultural sector and hospitality sector. However, the reality is that wage theft, in all of its forms, is evident in effectively every known industry in Australia.

In our response to Term of Reference 4, we address the main industries in which wage theft occurs. In our experience, there is significant similarity in the circumstances through which wage theft is able to occur across industry groups.

We mainly see wage theft in circumstances where:

- There is a pronounced power or status difference between the worker and the employer;
- The company operates within a highly competitive industry, where the employer feels that the only option to save costs is through cutting corners on staff wages and benefits;
- The workers feel powerless to do anything about it, through fear of losing their jobs or residential status; and
- There is competition for the jobs on offer.

Certain business models and processes are, by nature, prone to enabling the exploitation of workers. Large retailers, producers, manufacturers and even ASX200 corporations are able to outsource their manual labour requirements through competitive tender processes. Through this, they are able to dictate pay rates – by selecting the successful tenderer on the basis of cost – without having the direct responsibility to the workers for their employment terms and conditions.

The emergence of this middle party – the employer of the workers – has led to a disconnect between the development of purchasing policies by retailers/corporations and the impacts those policies have on those actually providing services.

² See for example: The Senate Education and Employment References Committee (SEERC) 2016, *A national disgrace: the exploitation of temporary work visa holders*, Commonwealth of Australia, Canberra; The Senate Economics References Committee 2017, *Superbad – wage theft and non-compliance of the Superannuation Guarantee*, Commonwealth of Australia, Canberra; SEERC 2017, *Corporate avoidance of the Fair Work Act 2009*, Commonwealth of Australia, Canberra & Education, Employment & Small Business Committee (EESBC) 2018

³ <https://mckellinstitute.org.au/app/uploads/McKell-Wage-theft-in-South-Australia.pdf>, p.18

These middle parties – the business operators who win the tender to provide services - must figure out how to provide the services and derive their own profit in a highly competitive marketplace where the success of the tender is determined primarily by the lowest bid. One obvious way for them to achieve this is to cut costs in employees' pay rates.

For example, a 2016 audit by the Fair Work Ombudsman (FWO) found that 33% of cleaning businesses were paying their staff incorrectly⁴. The union covering the majority of contract cleaners, United Voice, has found that the likelihood of breaches of the Award increases exponentially once a second tier or more of sub-contracting is introduced.

From the employers' perspective, this is a deliberate business decision. From the employees' perspective, it's a race to the bottom.

Over the past two decades, many business operators have found legal ways to avoid their responsibilities under Fair Work legislation and other legal and regulatory structures.

One approach is requiring that people who work for them become self-employed or independent contractors, and as such the employer avoids having to take responsibility for the provision of safety nets that Australians have come to expect: awards-based wages, superannuation and workers' compensation.

Many business operators adopt 'sham contracting' arrangements between themselves and their contracted staff. This is especially prevalent in low-paid sectors where those doing the work have little market power such as cleaners, construction workers, beauticians, call centre workers, disability workers and drivers.

We are seeing increasing cases of businesses replacing their permanent workforce with contractors or labour hire processes.

In its report on its inquiry into Corporate Avoidance of the Fair Work Act, the Senate Education and Employment References Committee noted that for many workers engaged in such arrangements:

*"There is also no security of income, no insurance for the worker in case of accident, no superannuation, no personal, annual or paid leave of any description."*⁵

These new work arrangements are sometimes positioned in the context of entrepreneurship, self-determination and workplace flexibility, but Maurice Blackburn believes that they are merely another way in which employers are abrogating their responsibilities to their workers. One of those responsibilities is to ensure that wages are in line with agreed minimums.

Precarious work and particularly the prevalence of sham contracting, the abuse of labour hire arrangements, freelance/contingency work and gig economy work outside of regulatory frameworks are increasing year by year.

It is important that industry regulators are appropriately resourced to proactively and reactively respond to issues arising from these non-traditional and multi-level employment arrangements. This involves ensuring that a regime of regular audits of employers sits alongside a capacity to investigate complaints efficiently and in a timely manner.

⁴ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160513-cleaning-compliance-campaign-presser>

⁵ www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report/c08, section 8.2.

Maurice Blackburn is concerned that businesses which engage workers but abrogate their legal responsibilities for proper pay and conditions are being given an unfair commercial advantage over businesses which play by the rules.

This is echoed in the findings of the McKell Institute, who in their report on Wage Theft⁶ observed:

...wage theft has a much broader negative effect to Australia than the specific negative effect it has on workers subject to it. In particular, wage theft harms businesses who play by the rules and try to do the right thing.

These businesses may lose customers, tenders, and government contracts to businesses that commit wage theft and are able to offer lower prices. Particularly in industries such as hospitality and fruit picking where wages make up a large portion of costs, businesses who pay a legal wage struggle financially against those who commit wage theft. (p.29)

They go on to recommend that:

The Australian Law Reform Commission should be asked to investigate how to establish wage theft as an anticompetitive practice as well as options for private enforcement of breaches of competition law.

We encourage the Committee to give consideration to how ‘the level playing field’ should be retained in Western Australia.

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

Our experience with clients tells us that the impacts of wage theft extend much deeper than merely loss of income – although that in itself is a major concern for families struggling with the day to day cost of living.

Wage theft impacts on the very core of a worker’s sense of self.

Many of our clients report the following feelings associated with, or generated through, their experience of wage theft:

i. Fear. Many victims of wage theft are from the most vulnerable of Australian cohorts. They include immigrant communities and particularly those living under visa conditions, young people, students, women, those with disabilities, older workers, Indigenous Australians, early school leavers and those returning to the workforce.

Inevitably, these people fear that speaking out against wage theft will hamper their capacity to retain work, or find anything better. Migrant workers are often told that they are not receiving their full wage because that would put their citizenship status in jeopardy.

⁶ *Ending Wage Theft: Eradicating Underpayment in the Australian Workplace.* (2019)
<https://mckellinstitute.org.au/app/uploads/McKell-Ending-Wage-Theft.pdf>

There is a feeling of being stuck – unable to see a way forward to a better future. The fear is a natural extension of the power imbalance that exists between unscrupulous employers and vulnerable employees.

ii. Shame or embarrassment. Victims of wage theft often report feeling that they have done something wrong – that they have somehow put themselves and their families in this situation.

iii. Isolation. Many victims of wage theft feel like they are alone. Many are unaware of the supports that are available to them through unions, consumer advocates or the various information and complaints authorities.

iv. Anger and frustration. Negative feelings generated in the workplace are often ventilated in inappropriate ways, having dreadful consequences on families, peer groups and communities.

v. Desperation. Feelings of inadequacy can sometimes lead to tragic consequences.

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

As mentioned above, those who fall victim to wage theft most often work for businesses which attract and employ the most vulnerable workers. These may include workers from culturally and linguistically diverse backgrounds, those returning to the workforce following family responsibilities, early school leavers and students.

This vulnerability often places them at a distinct status disadvantage in negotiating appropriate employment conditions. This is typified by:

- Employee non-engagement with unions or other forms of workforce organisation;
- Employees not questioning inappropriate behaviours of employers through fear of retribution, or not being able to find alternative work; and
- Employees not seeking external information on entitlements.

Migrant populations are often the victims of sham contracting arrangements. Recent research⁷ tells us that:

Temporary migrant workers comprise up to 11% of the Australian labour market. Underpayment within this workforce is both widespread and severe.

There are approximately 650,000 temporary migrants in Australia, a large majority of whom are working.

Business operators claim that contracted employment arrangements offer young migrants an opportunity to join the workforce in a flexible and entrepreneurial way.

In our experience, the conditions of their visas are often used against them to claw back salaries or underpay them. They are led to believe that if they complain about working arrangements, or if they are paid too much, they will be deported.

⁷ <https://www.mwji.org/s/Wage-theft-in-Silence-Report.pdf>, p.5

In its well-researched submission to a recent Senate inquiry into the future of work,⁸ the Centre for Multicultural Youth says, in relation to young immigrants:

'In the future, young people are likely to be navigating a much more flexible and variable workplace, with less support and where there may be increased risks of exploitation. As such, young people will also need to be equipped with knowledge about their rights and responsibilities in the workplace, as well as with supports to exercise those rights.'

Research has indicated that nearly 60% of international students in Australia are paid less than the minimum award rate and some are paid below the minimum wage⁹.

One particularly worrying trend is the rise of poor treatment of employees in the disability sector. Chronic underfunding of the sector has led service providers to cut corners in order to stay in business. This, combined with a workforce largely drawn from marginalised cohorts has led to widespread cases of underpayment and exploitation.

A recent inquiry into Market Readiness¹⁰ by the Joint Standing Committee on the National Disability Insurance Scheme found that:

The committee is concerned that there are currently virtually no incentives to choose a career in the disability support sector. Submitters who have worked for a very long time in the sector described how working conditions have dramatically deteriorated under the NDIS. In short, they reported a rise in underemployment and insecure work arrangements, inadequate wages and no prospect of professional development opportunities. Under these conditions, it is hard to imagine how to retain highly experienced and qualified workers and attract new workers, including young people entering the workforce.¹¹

Ethical employers in the sector are drawing on their own resources in order to continue service provision and look after their staff. Less ethical employers are exploiting a marginalised workforce, through the provision of lesser wages and conditions.

Nowhere in the information provided to potential NDIS service providers¹² does it mention any requirement that the organisation must have a good track record in satisfying employment and industrial relations requirements.

Of increasing concern is the 'Uberisation' of the disability workforce. The direct connection between NDIS participants and independent workers means that there is even less chance of workers receiving minimum entitlements. This style of work is discussed more in the following section.

In short, the most marginalised workers are over-represented in poor working arrangements that leave them vulnerable to wage theft.

We draw the inquiries' attention to three types of working arrangement in which workers are particularly vulnerable to wage theft. They are those who work in:

⁸ <https://www.aph.gov.au/DocumentStore.ashx?id=3cd33a44-816c-46dc-87ae-5d4709cb98bb&subId=563289>.

⁹ https://www.theguardian.com/money/2016/feb/17/more-than-60-of-international-students-in-sydney-underpaid-survey?CMP=soc_568

¹⁰ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MarketReadiness/Report

¹¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MarketReadiness/~/_media/Committees/ndis_ctte/MarketReadiness/report.pdf, p.45

¹² <https://providertoolkit.ndis.gov.au/26-key-registration-requirements>

- i. The gig economy;
- ii. Transport; and
- iii. Franchising arrangements

We argue that by using sham contracting arrangements, some companies engaged in these work arrangements purposefully develop business models aimed at ensuring that workers do not enjoy the minimum employment standards (including pay) that Australians have come to expect.

i. The gig economy

The advent of the 'gig economy' and resulting irregular and insecure employment has drastically changed Australia's industrial relations landscape.

Gig-economy platforms have leveraged new technology and exploited out-of-date legislative frameworks to circumvent industrial laws and have sought to engage workers as independent contractors in the delivery of services previously performed by employees.

The most prominent and obvious examples of gig economy work that have sought to evade conventional employment arrangements, and have thereby derived an unfair advantage are the food delivery services such as UberEats and Deliveroo.

Maurice Blackburn submits that workers performing work for gig economy food delivery services should properly be considered employees.

This position is supported by the Fair Work Ombudsman's decision to commence proceedings in the Federal Court of Australia alleging contraventions of sham contracting and minimum payment provisions by Foodora, in an important test case.¹³ As the Committee will be aware, Foodora has opted to withdraw its business model from Australia.

The deprivation of minimum conditions, such as minimum pay rates is, we would argue, a deliberate form of wage theft. If these workers were employed under genuine employment arrangements, as envisaged by the Fair Work Ombudsman, these platforms would be required to adhere to minimum standards.

ii. Transport:

Despite the fact that Uber has complete control over the rates of pay drivers receive for their services and jobs they perform, Uber denies its drivers are employees, instead referring to them as "driver partners".

Uber also denies playing a significant role in the service it provides, describing its role as merely providing a digital platform through which drivers and customers can enter into contractual arrangements.¹⁴

¹³ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180612-foodora-litigation>

¹⁴ See for example <https://www.nytimes.com/2016/11/27/technology/uber-europe-court-ecj.html>

Uber's 'arm's length' position is hard to reconcile with the fact that it allocates jobs to drivers, sets the rates charged, dictates and imposes terms of service on both drivers and passengers and has the power to unilaterally terminate drivers' services.

Uber drivers are responsible for all petrol, insurance, operating and capital costs, as well as net GST payments. They are responsible for their own income tax, and for their own superannuation contributions. They are not paid for the time and expense of driving to their fare, or for time spent waiting between fares.

A recent study¹⁵ found that, after taking into account all costs, but before paying income tax and superannuation contributions, the average Australian Uber driver is paid \$14.62 an hour, with many drivers receiving less.

This is over \$4 an hour below Australia's statutory minimum wage. That's a loss of \$163.78 a week for a driver working 38 hours a week (it is clear that many Uber drivers work well in excess of that figure to make ends meet).

It is also \$6 an hour below the base rate payable to drivers under the Passenger Vehicle Transportation Award 2010, and potentially equates to less than half the payments due to drivers under that Award once casual loading and penalty rates are taken into account.

Uber points to their 'surge pricing' as a way that their "driver partners" can make a living wage.

General Manager for Uber in Australia and New Zealand, David Rohrsheim, was recently quoted as saying, in response to the publicisation of the above income findings, that:

*"When surge pricing automatically kicks in ... the fare might be one-and-a-half, two times the normal rates. Drivers know this and the smart ones log on at the right times and the right areas and earn the big bucks."*¹⁶

However, as Economist and Director of the Centre for Future Work Dr Jim Stanford points out:

*"This 'surge' income cannot be relied on, since drivers have no control or knowledge when (or even if) this system will be activated. Moreover, as Uber drivers increasingly organise their work schedules around peak periods, and as the general population of drivers increases, then the likelihood that demand for drivers will exceed supply (hence triggering surge pricing) is further reduced... supplemental income from surge pricing is shrinking as a result of the growing supply of Uber drivers – many of whom concentrate their working hours in peak periods in often-unfulfilled hope of attracting surge price revenue."*¹⁷

Uber has also indicated that its goal is to limit instances of surge pricing: *"For us, it's better not to surge. If we don't surge, we can produce more rides."*¹⁸

If Uber were required to pay their 'partner drivers', it would actually encourage healthy competition in the market, in which traditional providers such as taxis would not be disadvantaged by paying its drivers living wages.

¹⁵ https://www.futurework.org.au/innovation_or_exploitation_simulating_net_hourly_incomes_of_uberx_drivers

¹⁶ <http://www.abc.net.au/news/2018-03-06/uber-x-drivers-working-for-half-the-minimum-wage/9513250>

¹⁷ *Subsidising Billionaires: Simulating the Net Incomes of UberX Drivers in Australia* by Jim Stanford, Ph.D. Centre for Future Work at the Australia Institute. March 2018

¹⁸ https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html?_r=0

iii. Franchising

In our experience, one of the most common industrial arrangements in which wage theft occurs in Australia is within franchising arrangements.

Confidence in franchises is at an all-time low, following repeated scandals of wage theft and unsound business practices and relationships. Ongoing, high profile cases such as 7-Eleven, Caltex, Domino's and Retail Food Group show the need for reform in the sector, to ensure that workers are not exploited and compliant franchises can operate with integrity.

The franchise industry employs over 775,000 people¹⁹. The \$180 billion sector was recently the subject of a Senate inquiry, and the focus of an Australian Competition and Consumer Commission ("ACCC") investigation, following 600 franchising related complaints made during 2017. The report from that Senate Inquiry²⁰ made the following observation:

The committee notes that wage theft continues to occur in many franchises: partly due to the business model franchisors operate and partly due to a range of socio-cultural problems. At times, wage theft was occurring as a way for franchisees to extract profits or service payments in order to stay afloat in a financially constrained business model (given wages are one of the greatest costs in the franchisee's control). In some instances wage theft was encouraged by franchisors. Whilst many franchisors cited greed as the primary motivation for wage theft, the committee notes that the issue is far more complex and partly inherent to the business models' structural breakdown of power and the imposition of cost controls.

The franchising model has been described as a 'honey trap', luring inexperienced franchisees with prospects of business success.²¹ When franchisees suffer as a result of these relationships, so do workers engaged by the franchisees.

It is not uncommon for a franchise relationship to be so restricted that the only way a franchisee can make a profit is through the undercutting of their wages bill.

Professor Allan Fels, past chairman of the ACCC is on record as saying:

*"My impression – my strong impression – is that the only way a franchisee can make a go of it in most cases is by underpaying workers, by illegal behaviour"*²²

This goes some way to explaining why the scandals are so wide spread, as it stems from the deliberate business model of franchisors, which hang franchisees and workers out to dry.

The scope extent of wage theft

The McKell Institute recently undertook a review²³ of Fair Work Ombudsman site audits from across the country. They found:

¹⁹ Jenny Buchan, *Franchising: A Honey Pot In A Bear Trap*, Adelaide Law Review (2014) p.34.

²⁰https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising/~media/Committees/corporations_cte/Franchising/report.pdf, p.xiv

²¹ Jenny Buchan, *Franchising: A Honey Pot In A Bear Trap*, Adelaide Law Review (2014) p.34.

²² <https://www.smh.com.au/interactive/2015/7-eleven-revealed/>

²³ McKell Institute Victoria. *Ending Wage Theft: Eradicating Underpayment in the Australian Workplace* (March 2019). p.15

...all campaigns by the FWO have uncovered evidence of wage theft and that the trend on the whole has been worsening over time. It also highlights the fact that wage theft is not confined to any one sector of the economy and is found across the Australian economy.

Research also shows that union members are less likely to experience wage theft²⁴, so it stand to reason that industries with high union membership are less susceptible to wage theft. The reasons for this are self-evident:

- The union is a source of information for workers on their rights, conditions and entitlements;
- The union will involve workers in bargaining processes with the employer; and
- The union will take action if it finds that workers are being exploited and hold the employer accountable.

Conversely, there are several issues prevalent in industries prone to wage theft which make connections with unions difficult. These include:

- A high turnover or availability of staff;
- A highly casualised workforce;
- Antipathy or aggression from some employers about the role of unions; and
- Fear amongst some cultural and minority groups of potential negative consequences of joining a union in the eyes of the employer.

Maurice Blackburn encourages the Committee to recommend that the Western Australian Government work with and through unions as a primary means of information distribution to the workforce, for information pertaining to minimum employee entitlements and recourse available in the event of employer misconduct.

5. Whether the current State and federal regulatory framework for dealing with wage theft is effective in combating wage theft and supporting affected workers.

Please refer to our responses to Terms of Reference 4, 6 and 7

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.

Maurice Blackburn is of the opinion that wage theft should be criminalised. To this end, we submit that:

- a) This inquiry should recommend that a comprehensive legislative scheme be introduced to criminalise wage theft;
- b) The legislative scheme should create strict liability offences, with various penalties dependent on the nature of the wage theft; and
- c) That industrial organisations be given standing to prosecute wage theft.

²⁴ Maconachie, G & Goodwin, M 2006, Recouping wage underpayment: increasingly less likely?, *Australian journal of social issues*, 41(3), p.327-342

Maurice Blackburn submits that the Government should draw on the outcomes of similar inquiries in Queensland and Victoria in developing a legislative scheme which will effectively criminalise wage theft in Western Australia.

In the drafting of any legislative scheme, it is important that its application be broad so as to encapsulate new and emerging methods of engagement, such as the gig economy.

Industrial organisations already provide assistance to their members when it comes to recovering wages. Industrial organisations should be given standing to prosecute wage theft, and to be able to seek costs from an employer on a successful prosecution.

Maurice Blackburn reminds the Committee of the importance of ensuring that appropriate processes for **wage recovery** must be considered as part of any review of wage theft.

We submit that wage recovery rules under WA's industrial relations legislative framework should be reviewed to ensure they are contemporary, and fit for purpose.

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

Aside from the development and adoption of an appropriate legislative framework to criminalise wage theft, Maurice Blackburn offers a number of potential parallel strategies that could be adopted to combat wage theft:

i. Worker Education Programs

Maurice Blackburn believes that, in many cases, companies are able to get away with wage theft because their workforce is unaware of their rights, fearful of making a complaint, or unaware of how to go about making a complaint.

This view was shared by the Senate Standing Committees on Education and Employment. Recommendation 17 of their inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies²⁵ reads as follows:

The committee recommends that the Government work with industry stakeholders and unions to develop and fund targeted education programs aimed at assisting vulnerable workers from migrant and culturally and linguistically diverse backgrounds to navigate the Australian workplace relations system.

The report goes on to add that workers who access union support have greater success in ensuring their wages and entitlements are compliant with the law.

The committee made a further recommendation that the Government ensure that workers have appropriate access to union advice and support²⁶.

²⁵ Ibid, p.x

²⁶ Ibid, p xi, Recommendation 22

ii. Legal Assistance for Workers Making a Complaint.

The system for lodging a claim for underpayment or non-payment of wages is complex and daunting.

Workers often find themselves facing the challenge of coming up against a well funded corporate legal team. It is imperative that any legislative framework that is designed to negate wage theft includes legal assistance for those faced with navigating the claims system.

Maurice Blackburn submits that the Committee should ensure that community legal services are appropriately resourced to ensure that the power balance in the claims process is levelled.

iii. Government Procurement

Recommendation 9 of the Senate Inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies²⁷ reads as follows:

The committee recommends the Department of Finance broaden the Commonwealth Procurement Rules to preclude a tenderer from entering a contract with any corporation or an associated entity that has been penalised on more than one occasion for being non-compliant with any employee entitlement laws.

Maurice Blackburn submits that this inquiry could make a similar recommendation in relation to Western Australian government procurement rules.

This would send an important message to would-be tenderers that the underpayment or non-payment of wages is unacceptable.

8. Whether there are strategies and legislative changes the Western Australian Government could recommend to the Federal Government to deal with wage theft in the federal jurisdiction.

Maurice Blackburn recognises that, in the Western Australian Government's genuine attempts to minimise the occurrence of wage theft, they are limited in the scope of legislative adjustments available to them.

There are a number of legislative and regulatory adjustments that should be made, which are under the jurisdiction of other governments – mainly the Federal Government.

We submit that the Western Australian Government is well placed to advocate on behalf of workers at the federal level, with the outcomes of this inquiry.

To this end, Maurice Blackburn offers a number of potential strategies that could be adopted by other jurisdictions to combat wage theft.

²⁷https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Report, p.viii

i. Wage theft in the gig economy

As discussed in our response to ToR 4, Maurice Blackburn argues that there is a growing prevalence of workers who are suffering wage theft due to the dubious nature of the employment relationship under which they work.

The distinction between employees and independent contractors arose in the 19th century as a means of determining whether one person should be liable for the torts of another.²⁸

Over the years the Courts have developed various common law tests in order to distinguish independent contractors from employees. Presently the common law test applied by the Courts is set out in the High Court decision in *Hollis v Vabu*.

These tests have often been criticised for their complexity, uncertainty in application, and ability to be manipulated in order to achieve a desired outcome.

The ambiguity in the common law test has led to a number of legal disputes over the rights and entitlements of workers that turn on the application of a test, the results of which cannot be predicted with certainty.

Maurice Blackburn submits that some gig economy businesses are attempting to exploit this uncertainty by wrongly classifying workers as independent contractors to avoid industrial obligations they would have if they utilised more traditional employment relationships.

Maurice Blackburn believes that the definition of 'employee' should be extended by federal legislation to be broader than the present definition at common law.

International experience can help inform this process.

In August 2018 the Supreme Court of California handed down a decision adopting the 'ABC test' for determining whether workers were independent contractors or employees. The case follows other jurisdictions in America also adopting the ABC test.

According to the 'ABC test', in order for a worker to be an independent contractor all three of the following criteria must be satisfied:

- a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- b) that the worker performs work that is outside the usual course of the hiring entity's business; and
- c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.²⁹

If the worker does not satisfy all three criteria then he/she is deemed to be an employee.

²⁸ See *ACE Insurance Ltd v Trifunovski* (includes Corrigendum dated 18 November 2011) [2011] FCA 1204 (25 October 2011) Perram J at [25] and *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3 (25 January 2013) Buchanan J at [14].

²⁹ *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*

Maurice Blackburn believes that the above test should be inserted into industrial and other legislation that uses the common law definition of employee as a means of determining whether a worker is an employee or contractor.

Maurice Blackburn further believes that the above test should apply *in addition to* the common law definition so that if a worker meets either test they will be classified as an employee.

There is likely to be significant overlap between the ABC test and the common law definition. However, Maurice Blackburn believes that the ABC test is simpler to apply, is likely to apply to many dependent contractors and would remove some of the ambiguity caused by the common law definition. The ABC test is also likely to cover a larger number of workers than the common law definition which would give a greater number of workers access to the protections and rights in the Fair Work Act including collective bargaining rights.

Maurice Blackburn submits that the Fair Work Commission should be given the power to arbitrate pay and conditions for independent contractors. This would reduce the incentive to classify workers as independent contractors and therefore reduce misclassification in the on-demand economy.³⁰

Maurice Blackburn believes these are worthwhile courses of action, and worthy of promotion at the federal level by the Western Australian Government.

ii. Wage theft within franchise arrangements.

As described in our response to ToR 4, many of the high profile cases of wage theft have occurred under franchising arrangements.

Currently there are two instruments aimed at regulating the franchising industry, both administered federally, namely Australian Consumer Law (“ACL”) and the Franchising Code of Conduct (“the Code”) under the *Competition and Consumer Act 2010* (Cth).

The ACL has jurisdiction to deal with unfair terms in franchise agreements and any misleading, deceptive or unconscionable conduct against franchisees. However, as with other types of litigation, it is often not entered into because of the costly and lengthy nature.

The Code regulates the conduct of franchising participants towards each other, usually through franchise agreements. The ACCC regulates the Code and investigates alleged breaches.

Maurice Blackburn has previously argued:³¹

- That a positive obligation should be placed on the franchisor to ensure its franchisees are upholding the legislative requirements of workplace law – including the proper payment of wages. This positive obligation should be articulated in the Code of Conduct; and

³⁰ This change may also require an amendment to the Competition and Consumer Act 2010 (CC Act) to exempt independent contractors who engage in collective bargaining in the Fair Work Commission from the anti-competitive conduct provisions of the CCA.

³¹ <https://www.aph.gov.au/DocumentStore.ashx?id=26876526-f184-47fb-a2be-b767b5cfbf55&subId=566187>

- That a Funder of Last Resort process should be embedded and mandated in the Code of Conduct. Under this, the franchisor should bear responsibility for unpaid entitlements if the franchisee cannot do so.

It is clear that any solution should be based on capturing the poor conduct of franchisors, not franchisees or workers who are left largely powerless under the status quo.

A national licensing scheme for franchises could be a reasonable policy consideration. Such a scheme could track whether any individuals have been in breach under the scheme or any other industrial law:

- Whether the franchisor is of good character and judgement;
- Compliance with industrial laws, including work, health and safety laws;
- The number of franchisees engaged by them;
- The number of employees engaged by their franchisees;
- Relevant industrial agreements which govern employees of franchisees; and
- Compliance with ATO requirements.

It is important to ensure that in any changes to regulation regarding franchise arrangements, the onus is on the franchisor to ensure compliance, due to the high degree of control franchisors have in the franchise relationship.

Once again, Maurice Blackburn believes these are worthwhile courses of action, and potentially worthy of further discussion at the federal level by the Western Australian Government.

iii. Wage theft within labour hire arrangements

Many labour hire operators operate outside employment frameworks and routinely exploit workers. They are effectively invisible to legal and regulatory regimes.

While a number of States are now implementing labour hire licensing schemes³², there is still the outstanding issue of how federal laws intersect with these schemes, while other States and Territories continue to be without a framework at all.

We note that the Senate Standing Committees on Education and Employment agrees that the licensing of labour hire arrangements would assist in the reduction of wage theft and other inappropriate employer behaviours.

In the report from their inquiry, they make the following observation³³:

...the committee is persuaded by evidence indicating that fragmented employment arrangements with convoluted labour hire based supply chains work to generate conditions that are demonstrably high risk for illegal behaviour that exploits workers.

³² See, for example, <https://www.worksafe.qld.gov.au/news/2018/regulation-of-the-labour-hire-industry-in-queensland>; <https://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry>; <https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire/labour-hire-licence>

³³https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Report, p.60

Recommendation 13 of their inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies³⁴ reads as follows:

The committee recommends that the Government, in consultation with all states and territories, establish a national labour hire licensing scheme.

Maurice Blackburn believes these are worthwhile courses of action, and worthy of the support of the Western Australian Government.

iv. Wage theft through illegal phoenix activity

The ATO's website³⁵ tells us that:

... illegal phoenix activity is particularly prevalent in major centres in building and construction, labour hire, payroll services, security services, cleaning, computer consulting, cafés and restaurants, and childcare services. We also see it in regional Australia in mining, agriculture, horticulture and transport. There is an emerging trend in intermediaries who promote or facilitate illegal phoenix behaviour.

A recent report³⁶ estimated that illegal phoenix activity has cost individuals between \$31 million and \$298 million in unpaid entitlements, including unpaid wages.

A 2017 paper released by the Federal Government suggested that the incidence of illegal phoenix activity was on the rise with more people terminated because of their employer's insolvency, making them more reliant on the Fair Entitlement Guarantee scheme³⁷

A draft bill³⁸ is currently before the Senate Standing Committees on Economics which will, if passed, increase both criminal and civil consequences for those who engage in wage theft via illegal phoenix activity.

Whilst this is a good start, Maurice Blackburn believes there is more that can be done to improve the situation for workers, through:

- Better screening of corporate directors,
- Better education for directors about the consequences of illegal phoenix activity, and
- Targeting phoenix activity in corporate groups – such that surviving entities become responsible for the debts and worker entitlements of the liquidated entity.

Maurice Blackburn submits that the Western Australian Government, through this inquiry, could make similar recommendations.

³⁴ *Ibid*, p.60

³⁵ <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/The-economic-impact-of-potential-illegal-phoenix-activity/>

³⁶ https://www.ato.gov.au/uploadedFiles/Content/ITX/downloads/The_economic_impacts_of_potential_illegal_Phoenix_activity.pdf

³⁷ Australian Government, Treasury and Department of Employment *Reforms to Address the Corporate Misuse of the Fair Entitlements Guarantee Scheme: Consultation paper* May 2017

³⁸ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLAIllegalPhoenixing

v. Reducing wage theft by making an individual responsible for corporate wrongdoings

Recommendation 10 of the Education and Employment References Committee report³⁹ serves as a useful, broad overview of potential changes to the Fair Work Act, aimed at reducing the occurrence of corporate breaches in worker entitlements, including wage theft. It reads as follows:

Recommendation 10

The committee recommends that for consistency the Fair Work Act 2009 be amended to extend the protections for vulnerable workers from franchise arrangements to other business models such as subcontracting and labour hire arrangements.

In particular the committee recommends that the Fair Work Act 2009 be amended so that a person (whether an individual or a corporate entity) should be liable for an employer's contravention of the National Employment Standards, an industrial instrument, the rules concerning the payment of wages or the keeping of records, or the prohibitions on sham contracting, where the person:

- has a significant degree of influence or control over the employer's affairs, or over the wages or employment conditions of the relevant employee(s);*
- knew or could reasonably be expected to have known that the contravention (or a contravention of the same or a similar character) would occur; and*
- cannot show that they have taken reasonable steps to prevent a contravention of the same or a similar character.*

The committee recommends that the amendment specify that whether a person has significant influence or control over wages or employment conditions should be determined by reference to the substance and practical operation of arrangements for the performance of the relevant work.

The committee further recommends that the amendment specify that person should be deemed to have significant influence or control if it sets or accepts a price for goods or services, or for the use of property, at a level that practically constrains the capacity of the relevant employer to comply with its obligations.

Maurice Blackburn submits that the current inquiry could include a recommendation that the Western Australian Government should advocate for the acceptance of this sensible amendment.

vi. Non-payment or under-payment of superannuation as a form of wage theft

Maurice Blackburn believes that the underpayment or non-payment of superannuation should attract the same community abhorrence and derision as the underpayment or non-payment of wages.

Maurice Blackburn suggests that there are three core reasons that companies are able to use the non-payment or under-payment of superannuation as a corporate strategy. They are:

³⁹https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Report, p.51

1. That the law does not make it unlawful to not pay super. There is no legislated obligation on employers to pay super.
2. Current laws do not perceive superannuation to be part of an employee's salary; and
3. Corporate greed.

Whilst it is not possible to legislate against corporate greed, Maurice Blackburn submits that the Western Australian Government could advocate for legislative changes that would assist in negating the other two issues noted above.

Firstly, the Superannuation Guarantee Act (SG Act) should clearly reflect that superannuation is part of an employee's salary. The extensions of this include:

- Employers should be required to pay superannuation at the same time as wages and salary, rather than continuing with the status quo of allowing up to four months for the funds to be lodged.
- Maurice Blackburn sees the continuation of the ability for employers to offset superannuation against salary sacrifice arrangements as counter to the desired outcomes of reducing super theft.
- Defining superannuation as 'deferred wages' would add additional means for recourse, through Fair Work and court processes.
- Maurice Blackburn suggests that the Fair Work Commission (FWC) may potentially be the better forum for resolving these issues than the ATO. Consideration could be given to a separate Division of the FWC being created to deal with these matters given the apparent inability of the ATO to efficiently administer recovery on behalf of employees.

Secondly, that the SG Act should be amended to empower individuals and their union to be able to pursue unpaid superannuation payments directly from the employer, including compensation if loss is sustained because insurance cover is not in place due to the non-payment of super.

Maurice Blackburn submits that the Western Australian Government, though this inquiry, could play an important role in advocating for these important national changes, in order to reduce the incidence of wage theft in Western Australia.

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

No response to this Term of Reference

Recommendations

1. That wage theft be criminalised in Western Australia.
2. That a legislative scheme for criminalising wage theft should set out the following:
 - Strict liability offences;
 - Tiered levels of conduct amounting to wage theft; and
 - Tiered levels of penalty.
3. That industrial organisations be given standing to prosecute wage theft, and to be able to seek costs from an employer on a successful prosecution
4. That the Western Australian Government work with and through unions as a primary means of information distribution to the workforce, for information pertaining to minimum employee entitlements and recourse available in the event of employer misconduct.
5. That community legal services be appropriately resourced to ensure that the power balance in the claims process is levelled.
6. That wage recovery rules under Western Australia's industrial relations legislative framework be reviewed to ensure contemporary best practice.
7. That the Western Australian Government procurement rules preclude a tenderer from entering a contract with any corporation or an associated entity that has been penalised on more than one occasion for being non-compliant with any employee entitlement laws.
8. That the Western Australian Government advocate for the following changes to Commonwealth laws:
 - a. That the ABC test should be inserted into industrial and other legislation that uses the common law definition of employee as a means of determining whether a worker is an employee or contractor
 - b. That the Fair Work Commission should be given the power to arbitrate pay and conditions for independent contractors.
 - c. That a positive obligation should be placed on franchisors to ensure its franchisees are upholding the legislative requirements of workplace law – including the proper payment of wages.
 - d. That a Funder of Last Resort process should be embedded and mandated in the Franchise Code of Conduct. Under this, the franchisor should bear responsibility for unpaid entitlements if the franchisee cannot do so.
 - e. That the Federal Government, in consultation with all states and territories, should establish a national labour hire licensing scheme.
 - f. That the Federal Government should review the rules relating to phoenix activity within corporate groups – such that surviving entities become responsible for the debts and worker entitlements of the liquidated entity.

- g. That the Superannuation Guarantee Act should make it unlawful for an employer to not pay superannuation.
- h. That the Superannuation Guarantee Act should clearly reflect that superannuation is part of an employee's salary.
- i. That NDIS service provider registration rules should preclude any service provider that has been penalised on more than one occasion for being non-compliant with any employee entitlement laws.
- j. That the Federal Government move to accept the recommendations of federal inquiries which will minimise the occurrence of wage theft, including:
 - The Parliamentary Joint Committee on Corporations and Financial Services inquiry into the operation and effectiveness of the Franchising Code of Conduct
 - The Senate Education and Employment Committees inquiry into The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies
 - Treasury consultations on Illegal Phoenix Activity
 - The Senate Select Committee on the Future of Work and Workers
 - The Senate Standing Committees on Economics inquiry into superannuation guarantee non-payment.