



HOW TO STOP WAGE THEFT



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REFORM IS NEEDED TO HELP STAMP OUT SYSTEMIC EXPLOITATION OF VULNERABLE WORKERS.

Wage theft is thriving in Australia and is affecting our most vulnerable workers, causing social and financial disadvantage to the individuals affected as well as negative impacts on the broader Australian economy. A multi-factored approach to regulatory, legal and social reform is urgently needed.

The term wage theft has emerged globally in recent years, and is commonly understood as “the unlawful underpayment of an employee’s remuneration by employers”.¹ It can take a number of forms, such as underpaying wages, penalty rates, superannuation, overtime and commission, or other entitlements such as sick, annual and carers leave. Wage theft is an umbrella term used to describe both deliberate and accidental cases of underpayments.

As evidenced in our Employment Law Justice Program at WEstjustice, wage theft is becoming increasingly common, and occurs on a broad spectrum from deliberate and calculated cases to reckless and accidental cases. Wage theft is particularly common when it comes to temporary migrant workers, young people and women. This is consistent with recent Fair Work Ombudsman campaigns showing that “the trend [of wage theft] on the whole has been worsening over time”.² In 2016 WEstjustice published the *Not Just Work Report* highlighting the widespread exploitation of migrant and refugee workers in Melbourne’s western suburbs, with the highest reported problem being underpayments or non-payments. Since this time, WEstjustice has continued to see high numbers of exploited migrant and refugee clients, as well as young people and women with complaints of wage theft.

Denying workers their proper income can

result in financial difficulties, including difficulties meeting the cost of housing, utilities, groceries and other everyday essentials. It also negatively impacts workers’ future living standards, making it more difficult for them to plan for the future. This is particularly so when it comes to “super theft” which is estimated to cost the economy more than \$5.9 billion, and is affecting millions of Australians. The practice of wage theft negatively affects the economy by undercutting employers who do the right thing.

Currently, governments are talking about criminalising wage theft. However, while this may be a solution to stopping the most serious, egregious cases of wage theft, there are many other reforms that could be adopted to assist to stop wage theft across the spectrum. These reforms include increasing the effective redress of exploited workers, strengthening the functions of workplace regulators, increasing deterrents, empowering workers to enforce their rights and changes to the legal and policy structures that make some workers more vulnerable to wage theft.

One starting point would be amending the *Fair Work Act 2009* to include a statutory definition of employee, with a presumption that all workers are employees unless certain conditions are met. This would help to stamp out sham contracting and assist individuals to come forward with their claims. It is clear from our experience at WEstjustice that sham contracting is rampant, particularly in the cleaning and construction industries. It is an all too common practice adopted by many employers to avoid complying with their legal obligations. Currently, employees engaged in a sham must apply a common law multi-factor test to prove their claims. In the case of vulnerable workers, this presents a significant barrier to pursuing entitlements. It is unrealistic

and unfair to expect vulnerable workers to take the steps required to enforce their rights. As a result many genuine claims do not progress, and wage theft thrives.

Strengthening the functions and resourcing of the Fair Work Ombudsman (FWO), including reforming cost schemes for employers who unreasonably refuse to engage with the FWO or comply with FWO Notices would also assist in curbing wage theft. Evidence from the 2018 FWO National Compliance Monitoring Campaign 2 report, suggests that where intervention by the FWO is unsuccessful many employers continue to engage in wage theft. This is consistent with our experience at WEstjustice, where many employers unreasonably refuse to engage with FWO investigations and processes. Expanding the powers of the FWO to address these issues would encourage employers to engage with the FWO and assist more claimants to bring their matters to court if needed.

Based on our experience, these reforms would go some way in assisting individual claimants but will not stamp out the widespread, complex and systemic practice of wage theft. What is required is multi-factor strategy that combines policy legal and social reform to address the most serious and systemic forms of wage theft, as well as cases of reckless and accidental underpayments. A crucial part of stopping wage theft is to provide sufficient resourcing to community organisations that assist vulnerable workers. However, widespread reform is required at all levels to stamp out the practices, structures and loopholes that allow wage theft to thrive. ■

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1. McKell Institute Victoria, 2019, “Ending Wage theft: Eradicating Underpayment in the Australian Workplace” p14.
2. Note 1 above, p16.