

**The Australian Manufacturing Workers' Union –
WA Branch**



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

4 April 2019

Australian Manufacturing Workers' Union
(Registered as AFMEPKIU)

Mr Tony Beech
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

4 April 2019

Dear Mr Beech

Inquiry into Wage Theft in Western Australia

The AMWU welcomes the opportunity to provide submissions on the Inquiry into Wage Theft in Western Australia.

The AMWU represents over 6,000 members in Western Australia working across major sectors of the Australian economy, in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacturing. Our members are engaged in maintenance services work across all industries. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations in engineering and across diverse industries including food technology and construction.

Our union has long experience in representing members in wage theft matters through a variety of avenues. Each year we have more and more members reaching out to us to assist them with their wage theft claims and it is obvious to us that it is a growing problem that requires a strong government response.

Should you wish to discuss anything outlined in this submission, please contact Pearl Lim at pearl.lim@amwu.org.au or on (08) 9223 0800.

Yours sincerely,

Steve McCartney
State Secretary
Australian Manufacturing Workers' Union, West Australian Branch

WA State Office
121 Royal Street
East Perth WA 6004
PO Box J667
GPO Perth WA 6842
Telephone (08) 9223 0800
Facsimile (08) 9225 4744
amwuwa@amwu.asn.au

1. The Wage Theft Experience for AMWU Members¹

In Australia there is currently a heightened awareness of wage theft and its prevalence, which has been defined in the Wage Theft Inquiry's terms of reference as the "systematic and deliberate underpayment of wages". This awareness was largely brought about by the Sydney Morning Herald's 2015 investigation into 7-Eleven's widespread and methodical underpayment and exploitation of its workers.² Since then, there have been numerous media exposes into wage theft in Australia that highlight the endemic-nature of the problem.

It is the AMWU's experience that underpayment of wages can come in many forms, including (but not limited to):

- Failure to pay the correct wages, allowances or penalties in the applicable industrial instrument or contract;
- Requiring the performance of excessive overtime;
- Unlawful deductions;
- Forced piece rate arrangements; and
- Incorrect classification of employees.

Though wage theft can occur in any industry and to any worker, there are patterns that the AMWU has observed in tackling wage theft for our membership.

1.1 The importance of being in a union

It is our experience that high-density union sites will have very different wage theft issues compared to non-union workplaces. Wage theft that affects employees or a group of employees in high-density union sites will tend to be more 'technical' breaches to do with the interpretation of Award or enterprise agreement provisions.

Case Study 1: AMWU and Company T³

Company T is a contractor in the power generation industry. They have a presence in Australia, and the AMWU is a party to several of their enterprise agreements.

In early 2018 our membership at a Company T site informed us that the company had changed the way they were paying casuals who performed overtime. Previously, Company T had paid casual workers their ordinary rate, plus the casual loading, plus the overtime rate. Company T unilaterally decided to change this so that casual workers performing overtime were paid their ordinary rate, plus only the overtime rate.

This change affected over one hundred casual workers. These workers predominantly performed shut-down work, which meant that their shifts were long, but intermittently rostered. As a result, they were highly dependent on how the casual and overtime allowances interacted. Company T's decision had the effect of reducing their weekly take-home pay by several hundred dollars.

¹ This section addresses Terms of Reference 1-4.

² "Revealed: How 7-Eleven is Ripping Off Its Workers", Adele Ferguson and Sarah Danckert, <<https://www.smh.com.au/interactive/2015/7-eleven-revealed/>>

³ In this submission names have been redacted for case studies used, except where the case went to a hearing.

The AMWU brought a dispute under the dispute resolution clause in the enterprise agreement. Despite attempts over several months, the parties were unable to resolve the matter, and it was brought to the Fair Work Commission. It was resolved through the assistance of the Fair Work Commission, and Company T back paid all the affected workers. Our members received over \$500,000 in unpaid allowances.

Case Study 2: AMWU and Company R

Company R is an engineering and maintenance contractor in the defence industry. There is high-density membership on their WA sites, and the AMWU is party to their maintenance enterprise agreement.

Company R hires private full-time firefighters as a part of their workforce. To assist with workplace demands, employees engaged under non-firefighter classifications who undertake firefighting training and perform firefighting duties are classed as auxiliary firefighters. Both the full-time and auxiliary firefighters receive a firefighters' allowance under the enterprise agreement.

An annual increase to the firefighters' allowance came into effect, but Company R only passed the increase onto the full-time firefighters.

The AMWU brought a dispute under the dispute resolution clause in the enterprise agreement. The parties were unable to resolve the matter during dispute discussions or during a Fair Work conference. The matter was programmed for hearing. Company R conceded and back paid the increase to the auxiliary firefighters.

Contrast the above cases with 7-Eleven, Caltex, Dominos and other similar current high-profile wage theft cases. The latter cases involve serious breaches in failing to pay minimum wages and conditions along with the exploitation of vulnerable workers. A vital component of general deterrence is the knowledge that you will be caught if you break the law. Unions are advocates for employees and their wages and conditions, so a strong union presence makes a difference in an employer's level of compliance with industrial laws.

1.2 Timing

Individual cases of wage theft are generally brought to the union after the worker's employment has come to an end. It is very common for workers who know or suspect that they're being underpaid to not want to rock the boat while they are employed, for fear of losing their job. This can be problematic when the worker has been employed for a long time, as the statute of limitations can kick in, and it can also create evidentiary problems.

A second common scenario is where the worker doesn't know that they've been underpaid until their employment is terminated and they decide to challenge the dismissal. At that point when they contact the union their entire employment is assessed, at which point the underpayment is discovered.

In our experience is not uncommon for union members to wait until their employment has ended before they pursue wage theft claims. However, we find that union members in high-density union sites are more confident pursuing wage theft claims while they are currently employed.

1.3 Vulnerable workers

There are groups of workers who are particularly vulnerable to wage theft. In our membership workers in precarious work and migrant workers experience higher levels of wage theft.

Workers in precarious work arrangements such as labour hire or casual work are by the nature of the employment relationship more vulnerable to exploitation. They do not have the same unfair dismissal protections that full-time or permanent workers have, and do not receive the same wages and entitlements.

The Victorian Inquiry into the Labour Hire Industry and Insecure Work⁴ (**Victorian Labour Hire Inquiry**) heard significant evidence that underpayment of wages is a prevalent problem in the labour hire industry. The Victorian Labour Hire Inquiry noted that:

*The evidence provided to the Inquiry shows that there is a problem with the presence of 'rogue' labour hire operators in Victoria. While it is difficult to be precise about the extent of this problem, rogue operators are particularly evident in the horticultural industry...and the meat and cleaning industries. In many instances, the activities of rogue operators have led to exploitation of vulnerable workers including underpayment or award wages, non-payment of superannuation, provision of sub-standard accommodation and non-observance of statutory health and safety requirements.*⁵

Schedule 1 of the Victorian Labour Hire Inquiry summarises the evidence received from individual labour hire workers. Out of 520 individual worker submissions, 195 (37.5%) reported being underpaid by their employer.

Migrant workers, whether they be temporary migrant workers on a visa or migrants with language barriers are also more vulnerable to wage theft. The residency of temporary migrant workers is contingent on their labour, which opens greater opportunity for exploitation. Workers with language barriers have potentially more difficulty finding proper information on their industrial rights.

We note the Report of the Migrant Taskforce⁶ released in March this year, and the finding that as many as 50 per cent of temporary migrant workers may be being underpaid in their employment.⁷ We refer to the following extract from the overview:

Wage exploitation of temporary migrants offends our national values of fairness. It harms not only the employees involved, but also the businesses which do the right thing...

Wage underpayment is simply non-compliance with existing legal requirements. It is not a problem of having too many temporary migrants. And whilst some might suggest the problem might be reduced if minimum wages were lower, we do not consider this to be the appropriate response. We recognise the importance of our national wage setting mechanisms in determining appropriate living wages.

⁴ Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report, 31 August 2016, <https://economicdevelopment.vic.gov.au/_data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf>.

⁵ Ibid, page 253.

⁶ Report of the Migrant Taskforce, March 2019, <https://docs.jobs.gov.au/system/files/doc/other/mwt_final_report.pdf>.

⁷ 2 L Berg & B Farbenblum, Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey, UNSW Law, Sydney and University of Technology Sydney, 2017.

...

The Taskforce has essentially considered four key elements of compliance. First, there is ensuring market participants are well aware of their entitlements and responsibilities and of how and where to get assistance. Second, there is the role of regulators in taking action to promote compliance. Third, there is the important issue of ensuring that employees obtain redress for underpayment where this has occurred; and fourth, there are questions as to whether existing laws, functions and powers of regulators are appropriate to enforce effective compliance when necessary.

The AMWU agrees with all 22 recommendations made by the Migrant Taskforce Report and recommends that the Wage Theft Inquiry similarly endorse them to the State and Federal Governments.

The following case study exemplifies many of the patterns discussed in our submission, as well as the legal options and issues a worker faces in pursuing a wage theft claim.

Case Study 3: Farhang Zare v Arc Holdings

Mr Zare was an Iranian welder who applied for permanent residency in Australia through a migration agency in 2010. He was advised by the migration agency that he would improve his chances of permanent residency if he applied for a section 457 temporary visa. Mr Zare followed this advice and was granted a 457 visa in April 2011. He was employed by Arc Holdings (a switchboard manufacturer) that same month as a Sheetmetal Worker.

Mr Zare's employment was covered by an enterprise agreement and his relevant classification was Tradesperson, which was paid \$28 per hour. In early July 2011, Mr Zare's pay was reduced to \$20 per hour, and he was informed that he was being demoted to the role of Trades Assistant. Mr Zare's pay was increased to \$22 per hour a fortnight later.

In November 2011, the Tradesperson's rate of pay increased to \$30 per hour. Mr Zare's increased to \$26 per hour. Throughout his employment, Mr Zare continually asked about his pay rate and requested to be paid the same rate as other tradespersons.

In May 2013, under duress Mr Zare signed a new contract of employment that classified him as a Trades Assistant and was backdated to 27 April 2011.

In April 2015, Mr Zare was instructed to weed the worksite garden, which he did. Mr Zare was then instructed to either wash the window shutters or wash the company cars. Mr Zare refused on the basis that he was a tradesperson, and that such duties were not a part of his role. Arc Holdings terminated Mr Zare's employment on the basis he had refused a lawful instruction, which constituted serious misconduct.

The AMWU first assisted Mr Zare in an unfair dismissal in the Fair Work Commission. The Commission found that the company did not have a valid reason to dismiss Mr Zare, nor was he provided with the necessary level of procedural fairness.⁸

⁸ Mr Farhang Zare v Arc Holdings (WA) Pty Ltd T/A Arc Switchboards [2015] FWC 8322.

The AMWU then assisted Mr Zare in a denial of contractual benefits claim in the WA Industrial Relations Commission to claim the money he had not been correctly paid during his employment (a quantum of \$21,466.93).⁹ The Commission found that the company had:

- Denied Mr Zare his correct wage during the four years he was employed;
- Demoted Mr Zare to Trades Assistant in contravention of the *Migration Act 1958* (Cth); and
- Demoted Mr Zare to Trades Assistant under duress.

The company then refused to comply with the WAIRC's order to backpay Mr Zare or the FWC's order to pay compensation until the threat of enforcement proceedings in the Industrial Magistrates Court was raised.

Recommendation 1: That the State Government invest resources into agencies or bodies that support migrant workers in employment law matters.

Recommendation 2: That the State Government support the recommendations in the Report of the Migrant Taskforce.

Recommendation 3: That the State Government consider greater industrial protections for workers engaged in precarious work.

⁹ *Farhang Zare v Arc Holdings (WA) Pty Ltd* 2016 WAIRC 00041.

2. Pursuing Wage Theft – Where to go?¹⁰

Pursuing wage theft in WA can be a confusing process. There are multiple avenues available, all of them with distinct advantages and disadvantages which are summarised in the below table:

	Jurisdiction	Time¹¹	Cost
Fair Work Commission	National system employees may be able to raise some types of underpayment disputes pursuant to a dispute resolution procedure in Federal industrial instruments.	Conference within 4 weeks Hearing within 6-9 months.	Free.
WA Industrial Relations Commission	National system employees and State system employees can bring denial of contractual benefits claims for underpayments arising from employment contracts.	Conference within 2 weeks. Hearing within 6 months.	Free.
Industrial Magistrates Court	- National system employees can bring underpayment claims pursuant to the Fair Work Act. Claims can arise from Federal industrial instruments, the National Employment Standards, and employment contracts. - State system employees can bring breach of industrial instrument claims to remedy underpayments in relation to State industrial instruments.	Pre-trial conference within 6 weeks. Hearing within 12 months.	\$50 lodgement fee.
Federal Circuit Court	National system employees can bring underpayment claims pursuant to the Fair Work Act. Claims can arise from Federal industrial instruments, the National Employment Standards, and employment contracts. National system employees can hitch a breach of contract claim to a Fair Work Act claim.	Mediation within 2 months. Hearing within 3 years.	\$665 lodgement fee, plus other fees. ¹²
Federal Court	Same as Federal Circuit Court.	Mediation within 2 months. Hearing within 18 months.	\$1390 lodgement fee, plus other fees. ¹³
Magistrates Court of WA	All claims for breach of employment contract which are less than \$75,000	Pre-trial conference within 6 months. Hearing within 12 to 24 months.	

¹⁰ This section addresses Terms of Reference 7-9.

¹¹ Based on the AMWU's experience.

¹² <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl>

¹³ <http://www.fedcourt.gov.au/forms-and-fees/court-fees/fees>

District Court of WA	All claims for breach of employment contract which are more than \$75,000 but less than \$750,000	Mediation within 6 months. Hearing within 12 to 24 months.	
Supreme Court of WA	All claims for breach of employment contract which are more than \$750,000.	Mediation within 6 months. Hearing within 18 to 24 months.	

This submission will explore the legal avenues that the AMWU has experience in.

The AMWU believes that when reviewing methods for pursuing wage theft, the State Government should prioritise the following considerations:

- **Access:** Who can access this? How easy is this system to navigate?
- **Affordability:** How much will it cost to run a matter?
- **Effectiveness:** How much time will it take? Will the worker get the money they are owed?
- **Deterrence:** Does this method create general and specific deterrence against wage theft? Given the prevalence of wage theft and worker exploitation, there appears to be a view amongst offending companies that underpaying workers is part of running a business, and the risk of legal action is not serious enough to dissuade them.

2.1 The Fair Work Commission

Jurisdiction

Federal system employees can sometimes seek assistance with underpayments through the Fair Work Commission's (**FWC**) dispute resolution jurisdiction, contained in Division 2 of Part 6-2 of the *Fair Work Act 2009* (Cth) (**FW Act**). Per s 738 of the FW Act, the FWC can deal with a dispute if:

- A modern award, enterprise agreement, a public sector determination, contract of employment or other written agreement includes a dispute resolution procedure, and
- That dispute resolution procedure requires or allows the FWC to deal with a dispute.

If an underpayment claim originates from an instrument covered by s 738 and that instrument has a dispute resolution clause, s 739 can be exercised:

739 Disputes dealt with by the FWC

- 1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.
- 2) The FWC must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:
 - a) The parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter; or
 - b) A determination under the *Public Service Act 1999* authorises the FWC to deal with the matter.
- 3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.

- 4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.
- 5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work-instrument that applies to the parties.
- 6) The FWC may deal with a dispute only on application by a party to the dispute.

Timing

Once an application is made, the matter is initially listed for a conference before a Fair Work Commissioner, who will attempt to assist the parties in reaching a resolution. If a conciliated outcome cannot be reached, the matter is listed for a hearing where the Commissioner arbitrates on how the contested matter within the relevant instrument is to be interpreted.

It is the AMWU's experience that conferences are normally listed within four weeks, and the current wait time for a hearing is 6-9 months. This has varied over the years, depending on FWC resourcing at the time.

Limitations

There are distinct limitations to rectifying underpayments through the FWC. The nature of the FWC's dispute arbitration power is limited not only by the enabling dispute resolution clause, but by the nature of what they are arbitrating. They are only empowered to determine the interpretation of the relevant instrument. They are not able to make orders regarding back payment or enforcement.

It must be noted that the requirement for a dispute resolution term to be included in a Fair Work enterprise agreement under s 186(6)(a)-(b) of the FW Act does not require a term providing for arbitration. A dispute resolution term that only provides for conciliation or mediation is compliant. It is unfortunately common to deal with dispute resolution clauses that either do not provide a path to arbitration or require the consent of both parties to the dispute for the FWC to arbitrate. In practice this effectively kills the dispute, as the employer can simply refuse to consent to arbitration.

Standing

It should also be noted that the FWC's dispute jurisdiction can only be triggered by a party that has standing. Parties have this standing, as do current employees. Ex-employees do not have standing, unless the dispute arose during the relevant employment and continues after termination.¹⁴ Given the earlier discussion regarding the pattern of workers who pursue underpayments once they have ceased working for the employer, this characteristic of the Fair Work jurisdiction limits claims.

Deterrence

The FWC has a less technical and legalistic approach than some of the other avenues available, but the limited jurisdiction and enforcement powers reduces the deterrent force of the FWC on employers willing to steal wages from their employees.

Recommendation 4: That the State Government recommend to the Federal Government a review of the FWC's powers when dealing with disputes.

¹⁴ *Fairall v St George & Sutherland Community College Inc* (2012) 226 IR 402; *Shields v Alfred Health* [2012] FWA 162.

Recommendation 5: That the State Government recommend to the Federal Government a review of the minimum standards in dispute resolution clauses when approving enterprise agreements.

2.2 The Western Australian Industrial Relations Commission

Jurisdiction

Both state and federal system employees can seek remedy for wage theft through the Western Australian Industrial Relations Commission (**WAIRC**) if there is a contractual claim. Under s 29(b)(ii) of the *Industrial Relations Act 1979* (**IR Act**) the WAIRC has the power to hear a denial of contractual benefit claim:¹⁵

An industrial matter may be referred to the Commission—in the case of a claim by an employee—that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment.

Timing

Applications made pursuant to s 29(b)(ii) are generally first listed for a conference before a WAIRC Commissioner, who will attempt to resolve the matter between the worker and employer. If a resolution cannot be reached, the matter is then listed for a hearing where the Commissioner arbitrates the matter.

There are many benefits to pursuing a denial of contractual benefits claim to recover lost wages, the main being the well-resourced nature of the WAIRC. This results in applications being heard very quickly, which increases the chance of matters being resolved quickly.

This is reflected in the WAIRC's statistics on denial of contractual benefits claims:¹⁶

	2014/15	2015/16	2016/17	2017/18
Applications made	121	110	103	75
Applications finalised	110	121	89	73

It is the AMWU's experience that conferences under s 29(b)(ii) are routinely scheduled within two weeks of the application being lodged, often sooner.

Access

The WAIRC is a specialist, but accessible court. The AMWU notes s 26 of the IR Act, which requires the WAIRC to act according to "equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms" when exercising its jurisdiction. This increases accessibility not just for unrepresented workers, but for representative bodies or agencies with limited resources.

¹⁵ Subject to the conditions in s 29AA(4) of the IR Act.

¹⁶ Report of the Chief Commissioner of the Western Australian Industrial Relations Commission 2017-18, <http://www.wairc.wa.gov.au/images/Annual%20Reports/Chief%20Commissioner_%20WAIRC_%20Annual%20report%202017-18.pdf>.

Penalties

Given its emphasis on accessibility and timeliness, the AMWU recommends the WAIRC as an effective way for workers to recover stolen wages. However, the effectiveness of the WAIRC would be enhanced if the WAIRC had the power to penalise employers who break the law. Penalties, particularly penalties for serious or recidivist wage theft offenders, would break the idea that legal proceedings are a cheap risk.

Reverse onus

The second is that the IR Act does not have provisions analogous to section 557C of the FW Act:

Presumption where records not provided

- (1) If:
- (a) In proceedings relating to a contravention by an employer of a civil remedy provision referred to in subsection (3), an applicant makes an allegation in relation to a matter; and
 - (b) The employer was required:
 - (i) By subsection 535(1) or (2) to make and keep a record; or
 - (ii) By regulations made for the purposes of subsection 535(3) to make available for inspection a records; or
 - (iii) By subsection 536(1) or (2) to give a pay slip;
In relation to the matter; and
 - (c) The employer failed to comply with the requirement;
- The employer has the burden of disproving the allegation.

Vulnerable workers would especially benefit from reverse onus provisions for payslips. The AMWU has dealt with state system members who have been underpaid wages, annual leave and long service leave, but because no payslips were issued or kept by the employer, there has been a very hard evidentiary burden to surmount.

We note that the introduction of a section 557C equivalent was Recommendation 62 in the Interim Ritter Report.¹⁷ The introduction of such a section should be available for both the WAIRC and the IMC.

Enforcement

Like the FWC, the WAIRC does not have the ability to order enforcement. If there is an order to rectify a breach of a contractual benefit and the employer does not comply, the worker must go to a different jurisdiction.

Recommendation 6: That the State Government give the WAIRC the power to award penalties in denial of contractual benefits matters.

Recommendation 7: Introduce reverse onus provisions analogous to section 557C of the FW Act into the IR Act.

¹⁷ Ministerial Review of the State Industrial Relations System: Interim Report (**Interim Ritter Report**), March 2018, <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/ministerial_review_of_the_state_industrial_relations_system_interim_report.pdf>

2.3 The Industrial Magistrates Court

Jurisdiction

Section 81 of the IR Act creates the Industrial Magistrates Court (**IMC**), constituted by an Industrial Magistrate.¹⁸ It has a broad power to deal with underpayments in both the state and federal industrial relations systems.

The IMC's jurisdiction in the state system is conferred by s 81A and s 81AA of the IR Act (and other Western Australian statutes). Relevantly, it has the jurisdiction to enforce awards and industrial agreements in the state system.

The FW Act also invests the IMC with certain powers. The IMC has the jurisdiction to hear applications for orders in relation to:

- Contraventions of the FW Act's civil remedy provisions;¹⁹
- Safety net contractual entitlements;²⁰
- Statutory entitlements derived from contracts;²¹ and
- Pecuniary penalties for breach of a civil remedy provision.²²

Contravention of the national employment standards,²³ a modern award²⁴ or enterprise agreement²⁵ are all civil remedy provisions under the Act, and therefore fall within the jurisdiction of the IMC.

Section 545(3) expressly gives the IMC the power to deal with underpayments:

- (3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:
 - a) The employer was required to pay the amount under this Act or a fair work instrument; and
 - b) The employer has contravened a civil remedy provision by failing to pay the amount.

Unlike the FWC and WAIRC, the IMC has enforcement powers it can exercise where there is non-compliance with an order.

Penalties

The breadth of the IMC's jurisdiction and the power to not only determine underpayment matters, but to also issue penalties for breaches makes the IMC one of the more attractive mechanisms for dealing with wage theft matters. In representing our members with wage theft claims, the potential exposure to penalties makes employers take the claim more seriously, which increases the chances of resolving it. Our experience is that employers are far less willing to go to a hearing in the IMC where there is a chance of penalties, compared to hearings in the FWC or WAIRC.

¹⁸ IR Act, Section 81B(1).

¹⁹ FW Act, s 539.

²⁰ Ibid, s 541.

²¹ Ibid, s 543.

²² Ibid, s 546.

²³ Ibid, s 44.

²⁴ Ibid, s 45.

²⁵ Ibid, s 50.

However, there is a disparity in the fines that the IMC can issue. The maximum penalties in a matter brought pursuant to the IR Act are \$5,000 on an employer, organisation or association, and \$1,000 in any other case.²⁶ Contrast this with the FW Act, where the maximum fine for a body corporate is \$63,000, and \$12,600 for an individual.²⁷

The AMWU notes and agrees with Recommendation 59 of the Interim Ritter Report, which recommends not only that the penalties in the IR Act be lifted to match the FW Act, but that a method of indexation be included so that the penalties adjust over time to take inflation into account.

Under the FW Act the IMC can exercise accessorial liability powers. However, there are no comparable provisions in the IR Act. Accessorial liability provisions would be a valuable tool in combating companies that deliberately 'phoenix' or collapse the company to escape liability, by holding directors and involved persons liable for wage theft. This was also supported by Recommendation 62 of the Interim Ritter Report.

Timing

In the AMWU's experience, the IMC has comparatively quick timeframes for dealing with matters. An application is normally listed for a pre-trial conference within 4-6 weeks, and a hearing normally within 9-12 months.

It is the AMWU's understanding that the Industrial Magistrates only sit to hear industrial matters 2-3 days a week. Expanding this so that there is an Industrial Magistrate sitting every day of the week would reduce the length of time for pre-trial conferences and hearings, increasing accessibility for workers.

Recommendation 8: That the State Government introduce accessorial liability into the IR Act.

Recommendation 9: That the penalties in the IR Act be increased to match the FW Act, with an indexation mechanism included.

Recommendation 10: That the State Government allocate more resources to the IMC to allow for quicker listings of pre-trial conferences and hearings.

2.4 Federal Court (FC) and Federal Circuit Court (FCC)

The AMWU WA Branch rarely deals with wage theft issues through the FC or FCC, for two reasons. The first is that the FC and FCC are prohibitively expensive. Filing an application in the FCC costs \$665 for non-corporations. It costs \$1390 in the FC. Unlike the FWC, WAIRC and IMC, you cannot appear unrepresented in the FCC and FC, and you can only be represented by a legal practitioner. This significantly increases the cost of pursuing wage theft through these courts.

The second reason is that both take a considerable amount of time to hear matters. In particular, the FCC in WA is known for lengthy wait times for hearings. The AMWU is aware of hearings that have been listed more than 2 years from mediation.

²⁶ IR Act, s 83E.

²⁷ <https://www.fwc.gov.au/industrial-action-benchbook/enforcement>

The advantage of dealing with the FC or FCC is that they have greater powers to deal with matters than the IMC. Specifically, the FC or FCC can issue injunctive or declarative relief in the Fair Work jurisdiction, which is not open to the IMC.

Recommendation 11: That the State Government communicate to the Federal Government the need to appoint more Federal Circuit Court judges.

Recommendation 11: That the State Government recommend to the Federal Government a review of Federal Court and Federal Circuit court fees with a view to increasing affordability and accessibility for workers.

3. Pursuing Wage Theft – Who can help?²⁸

A savvy worker may be able to pursue a straightforward wage theft matter unrepresented in the WAIRC or FWC if their employer does not have legal expertise. However, if the employer has legally trained personnel or engages legal representation the imbalance between the parties increases. Complex matters, or matters in the IMC, FC or FCC would be outside the ability of an unrepresented worker to pursue.

3.1 Representation through a lawyer

Engaging a lawyer can be a costly exercise, which a worker must weigh up against the quantum of the claim they are pursuing. Some law firms run pro bono services, but it is not something that can be relied upon.

3.2 Employment Law Centre (ELC)

The ELC is a community legal centre that provides a valuable service in providing free legal advice and representation to vulnerable workers. However, the demand for ELC's services outstrips their current resourcing.

Recommendation 12: That additional government funding and resources be directed towards community legal centres that provide free or subsidised services in employment law representation.

3.3 Trade Unions

As explored earlier in this submission, unions play an important role in deterring wage theft at the workplace and play an important role in representing workers who are pursuing wage theft.

Both functions can only happen where there is union membership. Deterrents to joining a union, and restrictions on unions investigating matters for their members decrease the power of the union in tackling wage theft.

We note that under the State system there are no general protections provisions analogous to Part 3-1 of the FW Act, which afford greater protection to workers who wish to join their trade union or exercise workplace rights. We have unfortunately represented many members who have had their employment terminated after engaging in union activity, or after pursuing entitlements.

The Interim Ritter Report found that consideration of a State system general protections scheme was outside of the review's terms of reference.²⁹ Introducing such protections would give workers greater comfort that their employer cannot take adverse action against them for joining their union, which would give unions greater opportunities to represent members in wage theft matters. Such protections would also add an extra action to pursue if an employer acts adversely against a worker for pursuing wage theft and related employment matters.

²⁸ This section addresses Term of Reference 5.

²⁹ Interim Ritter Report, page 78.

Recommendation 13: That the State Government introduce provisions into the IR Act analogous to Part 3-1 of the FW Act.

3.4 State Department Inspectors

The Department of Mines, Industry Regulation and Safety (DMIRS) is the State regulatory body and can investigate underpayment matters. The AMWU has not had any recent interaction with State Inspectors on a wage theft matter, and we are unaware of how well-resourced DMIRS is to perform this function.

3.5 Fair Work Ombudsman (FWO)

The FWO is the Federal Regulatory body. We note the following extract from the FWO's 2017-2018 Annual Report:³⁰

In 2017-18, we initiated 35 litigations and achieved over \$7.2 million court-ordered penalties (\$5.8 million against companies and \$1.4 million against individuals). This is the highest amount of penalties we have ever secured in a financial year (a 46% increase from the previous highest amount of \$4 864 925 in 2016-17). This rise in court-ordered penalties reflects the increasing complexity and significance of matters we are filing, as well as the court's growing intolerance for exploitative conduct against vulnerable workers. As at 30 June 2018, the FWO had 85 matters before the courts.

This supports our submission that wage theft is a growing problem for the Australian community. It is our experience that despite the increase in the FWO's enforcement activity, the demand still far outstrips their resources. There is an understandable triaging that occurs in the FWO where resources are directed to priority areas. However, this results in other legitimate wage theft claims falling through the cracks.

We have had members who have taken wage theft matters to the FWO, only to be told at the end of the FWO mediation process that they would have to engage third-party assistance to progress their claim. This highlights that a large part of the wage theft problem is not the adequacy of our laws, but in the resourcing of compliance and enforcement mechanisms.

Recommendation 14: That the State Government communicate to the Federal Government the need to invest more funding and resources into the FWO's enforcement activities.

³⁰ The Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 17-18, page 21.