



Law Council
OF AUSTRALIA

Unlawful underpayment of employees' remuneration

Senate Economics References Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the Queensland Law Society, the Industrial Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section and the Law Council's Business and Human Rights Committee in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide a submission to the Senate Economics References Committee (**Committee**) regarding its inquiry into the causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration by employers and measures that can be taken to address the issue (**the Inquiry**).
2. The Law Council notes that the Attorney-General's Department (**Department**) is simultaneously conducting a number of consultations relevant to industrial relations issues, including potential improvements to protections of employees' wages and entitlements. The Law Council provided a submission to the Department on 28 October 2019 in response to the Consultation Paper titled *Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework* (**Department's Consultation Paper**).¹ The Law Council's submission to the Committee draws from this earlier submission to the Department.
3. The Law Council responds only to the following terms of reference:
 - a. the forms of and reasons for wage theft and whether it is regarded by some businesses as 'a cost of doing business';
 - b. the cost of wage and superannuation theft to the national economy;
 - c. the best means of identifying and uncovering wage and superannuation theft, including ensuring that those exposing wage/superannuation theft are adequately protected from adverse treatment;
 - e. whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws; and
 - f. the most effective means of recovering unpaid entitlements and deterring wage and superannuation theft, including changes to the existing legal framework that would assist with recovery and deterrence.

Term of Reference (a)

4. The word 'theft' is normally only used as a shorthand means of describing a type of deliberate and knowing criminal conduct. However, the phrase 'wage theft', has been used more generally as an umbrella term to describe many varying forms of underpayment from genuine and unintentional mistakes to deliberate, systemic and exploitative behaviour by employers.
5. 'Wage theft' was also defined broadly by the Queensland Parliament's Education, Employment and Small Business Committee in its Report, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland*, as 'the

¹ Law Council of Australia, Submission to Attorney-General's Department (Cth), *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance* (28 October 2019) <<https://www.lawcouncil.asn.au/resources/submissions/improving-protections-of-employees-wages-and-entitlements-strengthening-penalties-for-non-compliance>>. The Law Council is currently in the process of preparing its response to a subsequent Consultation Paper released by the Attorney-General's Department in February 2020 titled *Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework*.

underpayment or non-payment of wages or entitlements to a worker by an employer, encapsulating a range of activities that deny workers their legal entitlements'.²

6. Whatever the terminology used, the conduct that is in issue occurs when an employer fails to provide minimum wages or entitlements, and more commonly looks like:
 - unpaid hours or underpayment of hours;
 - unpaid penalty rates;
 - unreasonable deductions;
 - unpaid superannuation;
 - withholding of other entitlements; and
 - sham contracting and the misuse of Australian Business Numbers.
7. The Law Council recognises that this type of conduct is occurring. It occurs for a variety of reasons of increasing seriousness, ranging from: genuine mistake; inattention; negligence; reckless refusal to check what is required; and deliberate and knowing breach. For some businesses, it appears as though it has become their normal mode of operation (i.e. 'cost of doing business') to reduce labour costs in contravention of workplace laws in order to increase their profitability and that of their supply chain partners.
8. The Law Council is generally supportive of new measures to address underpayment of wages and entitlements by employers, including increased pecuniary penalties, particularly where employers recklessly or deliberately and knowingly underpay employees. However, any consideration of increased or alternative penalties, including the potential to introduce criminal sanctions, ought to be carefully calibrated to appropriately reflect the different levels of seriousness of the conduct.

Term of Reference (b)

9. While the Law Council does not wish to comment generally on the 'cost of wage and superannuation theft to the national economy', the Law Council does note that business and employer groups, employees and their representatives as well as the community at large all have a shared interest in maintaining labour standards. Businesses and employers who comply with their obligation to pay wages and entitlements should not be placed in the disadvantaged position of having to compete against businesses which undercut prices due to employee underpayment practices for some competitive advantage or financial gain.

Term of Reference (c)

10. The Law Council considers it critically important in identifying underpayment issues that workers, particularly vulnerable workers such as migrant workers and people with disability, are able to access services, including properly funded legal assistance services, for information and assistance in raising complaints. The Law Council in the Justice Project Final Report,³ and the Productivity Commission in its

² Education, Employment and Small Business Committee, Parliament of Queensland, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* (Report No 9, 56th Parliament, November 2018) 22.

³ Law Council of Australia, *The Justice Project: Final Report* (August 2018) rec 2.1 <<https://www.lawcouncil.asn.au/justice-project/final-report>>.

Access to Justice Arrangements Report,⁴ have highlighted the significant funding shortfall for the legal assistance sector to respond to civil legal issues, including employment issues. This funding shortfall must be addressed as a priority.

Term of Reference (e)

Adequacy of existing arrangements

11. Franchisors and holding companies are already subject to liability for breaches of workplace laws in their franchisee/subsidiary networks if it can be shown that they knew or could reasonably be expected to have known that the contravention by the franchisee or subsidiary would or was likely to occur, unless they can show they took reasonable steps to prevent the contraventions.⁵
12. One option to alter existing arrangements which the Law Council does not favour at this time would be to remove the requirement to prove any level of knowledge by the franchisor/holding company, whilst retaining the current defence. In other words, to remove the requirement to prove that the franchisor or subsidiary knew that the contravention would or was likely to occur. This would make their liability akin to that of an employer, imposing strict liability, although still subject to a defence of having taken 'reasonable steps'. Those in favour of such a change argue that it would give franchisors and holding companies a greater incentive to ensure that the conduct of their franchisees/subsidiaries was lawful, and avoid a current difficulty that arises in trying to prove that they 'knew' what was being done.
13. The question of imposing liability on a franchisor or holding company for the transgressions of their franchisees and subsidiaries (subject to the defence) is a policy issue about which minds will differ. It is not an option supported by the Law Council at this time. Section 558B of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) was introduced relatively recently and the changes it was intended to bring about to increase compliance by franchisees and subsidiaries have not yet been shown to be ineffective.
14. Another option, also not favoured by the Law Council at this time, would be to extend liability under the Fair Work Act for operators in a supply chain by imposing liability on head contractors in a supply chain in respect of the conduct of companies or persons unrelated to that entity but engaged by that entity. Those who support such an extension identify that head contractors in a supply chain often have a large degree of control over prices and the method of work of those that contract to them (particularly where the contractors are small businesses) and that such head contractors would be less likely to impose unreasonable terms or accept tenders for work at prices below that which could generate enough income to pay minimum rates if they were legal liable for any resulting underpayments. This too is a policy question about which minds may differ. The Law Council does not support this option at this time and notes in this regard that section 550 of the Fair Work Act already extends liability for contraventions of the Fair Work Act to those persons that have:
 - aided, abetted, counselled or procured the contravention;
 - induced the contravention, whether by threats or promises or otherwise;

⁴ Productivity Commission, *Access to Justice Arrangements* (Report No 72, 2014) rec 21.4 <<https://www.pc.gov.au/inquiries/completed/access-justice/report>>.

⁵ *Fair Work Act 2009* (Cth) s 558B.

- been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - conspired with others to give effect to the contravention.
15. Pursuant to that provision any person, including a head contractor, can be found to be liable for a contravention if it can be shown that they knew of the contravention and were involved in it in some manner. That could include a situation where a head contractor enters into a contract with a supplier at a rate that the head contractor knows will be insufficient to pay minimum rates to those who will be employed to do that work.
16. It is relatively common for the Fair Work Ombudsman to prosecute ‘accessories’ in relation to breaches of the Fair Work Act, with more than 90 per cent of Fair Work Ombudsman prosecutions against companies in 2015 also involving prosecutions against a named individual.⁶ Whilst the vast majority of these accessorial liability prosecutions have related to individuals working within a business that has breached the Fair Work Act, the Fair Work Ombudsman has successfully relied upon accessorial liability provisions to achieve successful outcomes in supply chains. Two prominent examples relate to trolley collection services conducted by small trolley collection businesses, where the Fair Work Ombudsman relied upon accessorial liability provisions to secure:
- an Enforceable Undertaking with Coles Supermarkets Australia Pty Ltd with respect to trolley collectors in 2014;⁷ and
 - Woolworths Group Ltd’s entry into a Compliance Partnership in 2017.⁸
17. These examples demonstrate that the existing provisions have been utilised in some circumstances to hold broader supply chains to account. In the Law Council’s view, the current provisions have not been shown to be inadequate and are being utilised effectively.
18. The Law Council considers, however, that there is scope to expand the Fair Work Act’s accessorial liability provisions in a small way to better capture those who have reason to suspect underpayment but continue to be involved without taking an obvious step to discover if there is in fact underpayment. As noted, the law currently requires that an accessory have actual knowledge of underpayment. Persons who suspect underpayment and make a conscious decision to not make enquiries because they know the answer they will get are considered ‘wilfully blind’ and are inferred to have the required actual knowledge. However those who have good reason to suspect underpayment but are uninterested in finding out whether that is the case are said not to have the requisite knowledge.⁹ In other words, under the current law an accessory involved in the underpayment is not liable even where

⁶ Natalie James and Janine Webster, ‘Regulation of Work and Workplaces: The Fair Work Ombudsman’s Role in the Development of Workplace Law’ (Speech, Australian Labour Law Association National Conference, Friday 4 November 2016).

⁷ Fair Work Ombudsman, ‘Coles’ trolley collectors report’ (Media Release, 9 January 2019) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20180109-coles-eu-4th-annual-report-media-release>>.

⁸ Fair Work Ombudsman, ‘Fair Work Ombudsman compliance partnership with Woolworths a new benchmark in supply chain governance’ (Media Release, 11 October 2017) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/october-2017/20171011-woolworths-pcd-trolley-collectors-release>>.

⁹ See for example *FWO v Hu (No 2)* [2018] FCA 1034; which was upheld on appeal in *FWO v Hu* [2019] FCAFC 133 (special leave refused). In that case the FWO established that the alleged accessories had reason to suspect that the rates being paid were not sufficient, but failed to prove they had actual knowledge. The ‘wilful blindness’ test was not met, since the FWO failed to prove that the failure to find out if the employees were casuals, and so entitled to a higher rate, was *deliberate*.

there are circumstances from which they should have known there was underpayments and they failed to make obvious enquiries. This would require a change from the current position. One way of doing that would be to expand liability to situations where a person who is involved in the underpayment is *reckless* as to whether their involvement contributes to a contravention. The imposition of liability for reckless contributions to contraventions would be additional to the existing regulatory regime but supports the objects of the Fair Work Act, which, amongst other things, seeks to guarantee a safety net of enforceable minimum terms and conditions of employment.¹⁰

19. What amounts to 'reckless' conduct is something that Courts interpret differently depending on the context and purpose of the legislation. In some contexts it may be proven where a person is aware of the *possibility* of a contravention and there is an indifference as to the consequences, combined with conduct which makes the person involved in the contravention.¹¹ In other contexts it is held to mean where a person is aware of the *probable consequences* of their actions and is indifferent as to the consequences.¹² In the view of the Law Council, if the provision was to be expanded to include reckless conduct it would be useful to be clear as to which of those two will be sufficient to prove a contravention. Noting the serious penalties that are attached to a contravention, the more conservative second approach would be the Law Council's preferred approach, namely that it would need to be proved that the purported accessory was aware of the *probable consequences* of the conduct and was nevertheless involved in that conduct.

Modern Slavery Implications

20. The Law Council notes that acute cases of underpayment of workers may well constitute 'modern slavery' and therefore require disclosure by large reporting entities in their annual modern slavery statements under the *Modern Slavery Act 2018* (Cth).¹³ Those entities undertaking due diligence of their supply chains must be attentive to instances and risks of significant and chronic underpayment of workers beyond the first tier of contracts they are reviewing for the purposes of their annual statement.
21. In its recent submission to the Australian Border Force in relation to the *National Action Plan to Combat Modern Slavery 2020-24 Consultation Paper (Action Plan submission)*, the Law Council considered a number of issues related to labour exploitation – particularly exploitation of migrant workers.¹⁴
22. While these underpayment and exploitation issues are not exclusive to the temporary migrant workforce, it appears to be so prevalent to that section of the labour market that it would seem to be an important starting point. The Report of the Migrant Workers' Taskforce and the findings of the Migrant Worker Justice Initiative's *National Temporary Migrant Worker Survey* provide empirical evidence that migrant

¹⁰ *Fair Work Act 2009* (Cth) s 3.

¹¹ *Aubrey v R* [2017] HCA 18, [49].

¹² *R v Nuri* [1990] VicRp 55; see too the discussion in *Maritime Authority of NSW v Rofe* [2012] NSWSC 5, [24]-[25].

¹³ See *Modern Slavery Act 2018* (Cth) s 5 for the definition of which entities constitute 'reporting entities'.

¹⁴ Law Council of Australia, Submission to Australian Border Force (Cth), *National Action Plan to Combat Modern Slavery 2020-24: Public Consultation Paper* (21 February 2020) <<https://www.lawcouncil.asn.au/resources/submissions/national-action-plan-to-combat-modern-slavery-2020-24-public-consultation-paper>>.

workers are overrepresented in systemic wage underpayment and exploitative practices in a range of industries.¹⁵

23. The scale of the problem is significant both in terms of the number of exploited workers and in monetary terms. The findings of the *National Temporary Migrant Worker Survey* indicated that almost half (46 per cent) of the migrant workers surveyed earned \$15 per hour or less when at the time of the survey, the statutory minimum wage was at least \$17.70.¹⁶
24. The Law Council suggests that there is a need to consider whether the offences under Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) (which include, for example, deceptive recruiting for labour or services and forced labour) apply to cases of labour exploitation or severe cases of underpayment and whether greater enforcement of these provisions is required.
25. In its Action Plan submission, the Law Council noted the concern expressed by the United States Department of State in the 2018 *Trafficking in Persons Report – Australia* that Australia should ‘significantly strengthen efforts to investigate and prosecute trafficking offences, with increased focus on labour trafficking, and convict and stringently sentence ... labour traffickers’.¹⁷ It highlighted its concerns that in 2017, 166 suspected cases of trafficking were investigated but just five traffickers were convicted. Particular concerns were raised that ‘authorities often opted to pursue labour or employment violations in lieu of trafficking charges, resulting in potential labour traffickers receiving only fines and other civil penalties that were inadequate that were inadequate to deter trafficking crimes.’¹⁸
26. In particular, the recognised vulnerabilities of migrant workers need to be addressed through regional as well as urban strategies. For example, specific measures should be considered to improve flexibility of migrant workers to change employers and to reduce their vulnerability to exploitation and modern slavery, including through amending existing visa frameworks.¹⁹
27. Measures are also required to address access to justice issues that particularly affect migrant workers. The Law Council’s Justice Project, which investigated barriers to accessing justice for trafficked and exploited people and recent arrivals (among other groups) identified particular barriers for a migrant workers, including limited understanding of Australian laws and society, poorer levels of English language skills, trauma and fear of authorities, fear of deportation, job loss or other consequences, and financial constraints.²⁰ Many migrant workers, particularly in the

¹⁵ See Australian Government, Report of the Migrant Workers’ Taskforce (March 2019) <https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf>; Bassina Farbenblum and Laurie Berg, Migrant Worker Justice Initiative, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (November 2017). See also, Bassina Farbenblum and Laurie Berg, Migrant Worker Justice Initiative, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia* (October 2018).

¹⁶ Bassina Farbenblum and Laurie Berg, Migrant Worker Justice Initiative, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (November 2017) 5, 35.

¹⁷ Department of State (US), *2018 Trafficking in Persons Report – Australia* (28 June 2018) <<https://www.refworld.org/docid/5b3e0bb2a.html>>.

¹⁸ *Ibid.*

¹⁹ Law Council of Australia, Submission to Australian Border Force (Cth), *National Action Plan to Combat Modern Slavery 2020-24: Public Consultation Paper* (21 February 2020) 21 <<https://www.lawcouncil.asn.au/resources/submissions/national-action-plan-to-combat-modern-slavery-2020-24-public-consultation-paper>>.

²⁰ Law Council of Australia, *The Justice Project: Final Report* (August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>: Trafficked and Exploited People Chapter and Recent Arrivals Chapter.

agricultural sector, are also often located in regional, rural and remote locations where legal assistance can be more difficult to access.²¹

28. Additional funding is required to ensure that migrant workers, have ready access to specialised legal assistance services and professional interpreters, including in regional, rural and remote areas. Community legal services also play an important outreach role in educating communities about their protections and responsibilities under Australian law.

Term of Reference (f)

Civil Penalties

29. The compliance regime under the Fair Work Act should take into account the complexity of the Australian workplace relations system, appreciating that many breaches of workplace laws relating to underpayments are not intentional. They are often a result of the complexity of Australia's workplace relations system and the difficulties that employers and payroll systems have in complying with the many provisions in the vast number of awards and enterprise agreements that are in force.
30. The Law Council supports treating cases of clear culpability and knowing breaches more seriously, reflected by proportionately greater penalties.
31. In the Law Council's view, caution should be exercised before automatically adjusting the size of a penalty by reference to the size of a business. While the impact of a fine will vary based on the wealth of the employer,²² the level of penalty imposed should be determined not only with regard to the size of the business, but also with regard to the level of culpability or fault or knowledge of a breach, and the impact of a penalty upon business profitability.
32. The Law Council considers that it is important when considering changes to the Fair Work Act that employers are encouraged to investigate and voluntarily disclose any underpayments and take steps to rectify them in a timely and effective manner. Changes that may act as a disincentive to employers to investigate potential underpayments and report and rectify these, may not ultimately be to the benefit of employees.

Criminal Penalties

33. While there may be a deterrence effect wherever the criminal law may apply, consideration should first be given to the effectiveness of appropriately enforced civil penalties.
34. As noted in the Law Council's submission to the Department's Consultation Paper,²³ the criminalisation of underpayments may give rise to additional general deterrence, given that individuals involved in a contravention may become concerned about breaches affecting their own personal liberties. The criminalisation of underpayments is likely to have a further deterrent effect where companies or persons are not concerned about pecuniary penalties, because they intend to claim

²¹ Ibid: Rural, Regional and Remote (RRR) Australians Chapter.

²² *ABCC v Patinson* [2019] FCA 1654, [97].

²³ Law Council of Australia, Submission to Attorney-General's Department (Cth), *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance* (28 October 2019) <<https://www.lawcouncil.asn.au/resources/submissions/improving-protections-of-employees-wages-and-entitlements-strengthening-penalties-for-non-compliance>>.

insolvency in the event of penalties being enforced against them and because pecuniary penalties have no substantial impact on the profitability of the company. It is important to appreciate that civil penalties arise against an employer on a strict liability basis: there is no need to prove that the employer intended to underpay the workers or did so knowingly or recklessly. Criminal sanctions will not be appropriate for contraventions that were not intentional and knowing. Criminal sanctions may be suitable in very serious cases where the contraventions are repetitive or systematic, and the individual concerned has actual knowledge of the contravention or is reckless as to the contravention.

35. However, the Law Council is of the view that the introduction of criminal sanctions not be seen as the means by which underpayment issues can be addressed. While criminal sanctions could play an important deterrent effect, they alone are not going to assist to alter the vast majority of cases of underpayment of wages. Instead, the Law Council suggests that more resources must firstly be directed to enforcing current laws and this, as reflected in the recommendations of the Migrant Workers' Taskforce report, also includes an educational element to ensure that workers are aware of their rights and further, are able to adequately and easily access legal recourses. The Law Council would be reluctant to see the introduction of new criminal offences while under-resourcing of the agencies with the power to prosecute under existing offences remains an issue.
36. An alternative option, and only once the resourcing issues outlined below have been addressed, the Law Council suggests that consideration could be given to Recommendation 6 of the Report of the Migrant Workers' Taskforce. The Law Council previously recommended in its submission to the Department's Consultation Paper, noting that the *Migration Act 1958* (Cth) (**Migration Act**) already contains a criminal offence regime with respect to the employment of temporary migrant workers, that a 'first step' might be the introduction of additional offence provisions within the offence regime at part 2, division 12, Subdivision C, of the Migration Act (Offences and civil penalties in relation to work by non-citizens). Such provisions would need to be appropriately drafted to address the kinds of deliberate, systemic and exploitative conduct contemplated by Recommendation 6 of the Migrant Workers' Taskforce report. The Law Council, notes, however, that this would only address offences in one section of the labour market.
37. Should the addition of criminal sanctions as part of the enforcement framework be introduced, the Law Council wishes to again highlight several important factors which should be taken into consideration by Government:²⁴
 - (a) Underpayment of wages is an inherently monetary-based malfeasance which is largely rectifiable by monetary compensation payments. Deterrence can also be implemented by way of significant pecuniary penalties, particularly in cases where intentional underpayments arise. In these circumstances, imposing additional criminal penalties of imprisonment, other than perhaps in the most egregious of cases, may be unnecessarily onerous and go beyond what is required to rectify underpayment breaches.
 - (b) Currently, Fair Work Act prosecutions proceed on the basis that a court must be satisfied on the balance of probabilities that an underpayment has occurred. The establishment of a criminal penalty will also require a shift of the burden of proof currently applicable. To satisfy a criminal conviction, the court must be satisfied beyond a reasonable doubt, and *mens rea* would need to apply as is typically the case in most criminal statutory provisions. This may

²⁴ Ibid.

have the unintended consequence of making convictions more difficult to secure and prosecutions less likely to be pursued or reach successful outcomes.

- (c) The Fair Work Ombudsman currently only takes legal action in cases of strategic value and whilst it offers a limited mediation service between aggrieved employees and employers, most employees are left to take action themselves. Therefore, in addition to increased funding for the regulator, there is a need for tools to assist aggrieved employees to take legal action quickly and simply, simplification of the legal processes for such action and for greater resourcing to be provided to the courts to facilitate these outcomes in a timely manner.
- (d) The resourcing issues related to the Courts, agencies (including the Fair Work Ombudsman) and legal assistance services (primarily Legal Aid Commissions and specialist Community Legal Centre) outlined below must be addressed.

Addressing current resourcing issues

- 38. The Law Council is of the view that the introduction of criminal sanctions should not be seen as the primary means by which underpayment issues can be addressed. While criminal sanctions have the potential to play a deterrent effect, they alone are not going to assist to alter the vast majority of cases of underpayment of wages.
- 39. Instead, the Law Council suggests that a greater priority is to put more resources towards enforcing current laws and this, as reflected in the recommendations of the Report of the Migrant Workers' Taskforce, also includes an educational element to ensure that workers are aware of their rights and further, are able to adequately and easily access legal recourses. Educating workers to identify underpayment issues and ensuring that they have access to appropriate services, including properly funded legal assistance services, to assist in raising complaints is critical to ensuring that these issues are uncovered.
- 40. The Law Council would also be reluctant to see the introduction of new criminal offences while under-resourcing of the relevant agencies and courts remains an issue. The Federal Circuit Court of Australia (**Federal Circuit Court**) is currently largely reliant on the services of volunteer mediators in assisting to resolve minor wage claims in the court. Further, anecdotal reports suggest that employees often have difficulty in accessing court forms. There is often considerable delay in the Federal Circuit Court's ability to deal with matters – it is not uncommon for underpayment actions to take more than two years to resolve. In the context of these issues and the conduct which is sought to be addressed, there is a case to be made for a new method to enforce small claims involving underpayment.
- 41. One such method would be to create a dedicated industrial panel in the Federal Circuit Court along with the appointment of additional judges adopting a streamlined procedure. The Queensland Law Society has identified a particular shortfall of Federal Circuit Court Judges in Queensland with industrial law experience,²⁵ and the position is no different in the other States.
- 42. An alternative method to enforce small claims involving underpayment would be to create a new tribunal which could enforce claims that are not able to be conciliated

²⁵ Queensland Law Society, Submission No 40 to Education, Employment and Small Business Committee, Parliament of Queensland, *Inquiry into wage theft in Queensland* (30 July 2018) 2
<<https://www.parliament.qld.gov.au/documents/committees/EESBC/2018/Wagetheft/submissions/040.pdf>>

by the Fair Work Commission. It could perhaps sit in the same premises as the Fair Work Commission and be constituted by some of the legally qualified current members of the Fair Work Commission dual appointed as Commonwealth judicial officers.

43. The Law Council also strongly supports the appointment of additional judges to the Federal Court of Australia with expertise in industrial and employment law, noting that questions arising in this area are at times complex and, if not commenced in that Court, are not uncommonly are appealed to that Court.

Recommendations

- **Increased resources are urgently required, including for:**
 - **the legal assistance sector to assist workers in identifying and recovering unpaid wages;**
 - **the Fair Work Ombudsman; and**
 - **additional appointments to the Federal Circuit Court of Australia and Federal Court of Australia with knowledge and experience in industrial and employment law to ensure matters progressing to the Courts are resolved expeditiously.**
- **Once these resourcing issues have been addressed, a review of Part 2, Division 12, Subdivision C of the *Migration Act 1958* (Cth) to give effect to Recommendation 6 of the Report of the Migrant Workers' Taskforce could be considered as a first step towards the introduction of criminal sanctions.**