



BRIEFING

CRIMINALISING WAGE THEFT



YOUNG WORKERS CENTRE

youngworkers.org.au

**WAGE THEFT IS
AN EPIDEMIC.
OUR WAGE
ENFORCEMENT
LAWS ARE
BROKEN AND
INEFFECTIVE.**

Wage theft is a significant form of theft in Victoria, yet is not considered a crime and does not attract criminal penalties.

It is time that deliberate and dishonest wage theft is included in the *Crimes Act 1958 (Vic)* so that offences are punishable by imprisonment.

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EXECUTIVE SUMMARY

Wage theft is rife

1 in 5 young workers surveyed are working for base pay rates less than minimum wage¹. Less than half young workers surveyed are paid penalty rates when they work nights, weekends, or public holidays².

Our wage enforcement system is broken

Insufficient regulatory enforcement combined with complex and inaccessible legal processes for individuals seeking restitution has resulted in an industrial landscape where wage theft is a low-risk option for 'bad apple' employers.

Employers who do not comply with wage laws are rarely forced to repay outstanding wages and entitlements, and even more rarely do they face penalties for their actions.

No disincentives for bad employer behaviour

If employees steal from their employer, they face criminal penalties. It's time employers face the same consequences when they underpay or deny employees their legal wages or entitlements. Wage theft must be disincentivised as a business model.

We are proposing an amendment to the *Crimes Act 1958 (Vic)* that would mean deliberate and dishonest wage theft would be an offence punishable by imprisonment.

1. Young Workers Snapshot: The Great Wage Rip-Off, Young Workers Centre, May 2017, p7-8

2. Young Workers Snapshot: The Great Wage Rip-Off, Young Workers Centre, May 2017, p11-12

WHAT IS WAGE THEFT?

WHEN EMPLOYERS IGNORE THEIR WAGE AND ENTITLEMENT RELATED OBLIGATIONS UNDER THE NATIONAL EMPLOYMENT STANDARDS, AWARDS, OR AN ENTERPRISE BARGAINING AGREEMENT WE CALL THIS WAGE THEFT.

Wage theft describes the denial or underpayment of wages and entitlements that are rightfully owed to an employee under the Fair Work Act 2009.

Minimum pay rates and entitlements are established by

- The National Employment Standards (NES);
- Modern Awards; and
- Enterprise Bargaining Agreements (EBAs).

These industrial instruments provide minimum standards for Australian workers by establishing

- Base hourly pay rates;
- Penalty rates for hours worked on evenings, weekends or public holidays;
- Overtime rates;
- Other incentive-based payments, bonuses or loadings;
- Paid leave entitlements including personal and annual leave for part and full time staff;
- Superannuation entitlements.

Employers cannot lawfully pay employees lower rates or limit entitlements that are established in Awards or EBAs, even if an employee agrees to such an arrangement.



PAID AS A PART-TIMER, TREATED LIKE A CASUAL

Sally¹ is 22 and worked for a juice bar chain in Melbourne.

Sally's employer ignored the rules under the Fast Food Award, and employed Sally on the cheaper part-time rate but gave her none of the associated part-time benefits. They also failed to pay penalty and overtime rates and superannuation.

When Sally came to the Young Workers Centre her unpaid wages totaled \$6200 for 11 months work. Sally's employment conditions were not the exception. This business employed all of their staff under this arrangement.

¹.Name has been changed for privacy



Tom¹ is 24 and worked in a café in Melbourne.

Tom's employment conditions should be directed by the Restaurant Award, but his employer decided the pay rates were too high and decided to make up their own 'flat' rate of \$18/hour for all hours of work.

Tom's employer charged customers a public holiday surcharge but never paid penalty rates to employees who worked weekends or public holidays.

Tom worked at the cafe for 12 months and had a wage claim of \$8000.

1. Name has been changed for privacy

WAGE THEFT IS ENDEMIC

Australia's industrial legal frameworks provide some of the best minimum standards in the world that ought to prevent worker exploitation.

In practice, a lack of effective regulatory enforcement and a decline in union membership, combined with the complexity of legal processes for individuals seeking restitution has resulted in an industrial landscape where wage theft is a low-risk option for 'bad apple' employers.



1 IN 5

Young workers surveyed are working for base pay rates less than minimum wage.¹



LESS THAN HALF

Young workers surveyed are paid penalty rates when they work nights, weekends, or public holidays.²



\$3.12 PER HOUR

Analysis found victims of wage theft are unpaid an average of \$3.12 PER HOUR on their base pay rates alone.³ When underpayments on penalty rates are included those figures sky rocket.

Working 20 hours per week for an employer that underpays could result in a wage theft bill of more than \$3,200 per year.

This cost equates to an employer stealing their employee's iPhone every 3 months.

We know from experience that when wage theft happens to one worker, it's endemic to the workplace.

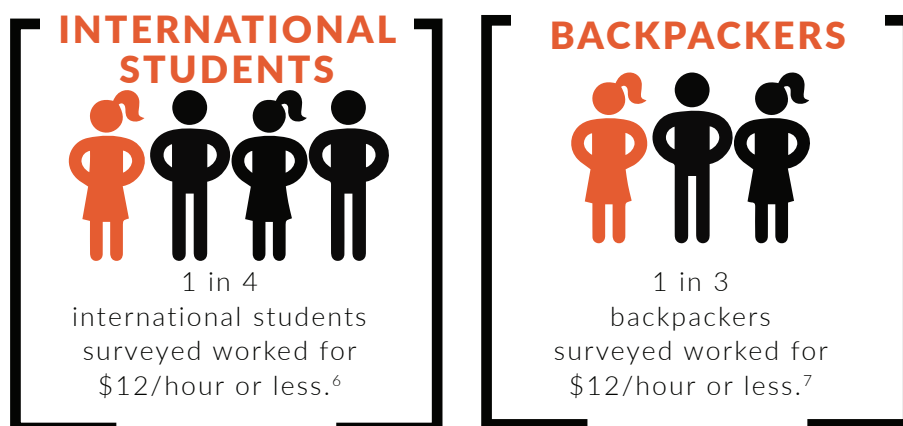
Wage theft comes at a cost to many workers, and generates a windfall for employers who practice wage theft across their business.

1. Young Workers Snapshot: The Great Wage Rip-Off, Young Workers Centre, May 2015, p7-8.
2. Young Workers Snapshot: The Great Wage Rip-Off, Young Workers Centre, May 2015, p11-12.
3. Young Workers Snapshot: The Great Wage Rip-Off, Young Workers Centre, May 2015, p7-8.

INDUSTRIES AT A GLANCE



WAGE THEFT AND MIGRANT WORKERS



1. Young Workers Snapshot: The Great Wage Rip-Off, Young Workers Centre, May 2015, p9-10.

2. National Hospitality Industry Campaign 2012-15, Restaurants, Cafes and Catering (Wave 2), June 2015, p.6

3. National Hospitality Industry Campaign 2012-15 Takeaway Foods (Wave 3) Report March 2016, Fair Work Ombudsman, p. 7

4. National Hospitality Industry Campaign 2012-15 Report Accommodation, pubs, taverns & Bars, November 2013, Fair Work Ombudsman, p.11

5. Fast Food Industry Audit Report, ER Strategies, January 2016, p. 5-6

6. Wage theft in Australia: Findings of the National Temporary Migrant Work Survey, Laurie Berg & Bassina Farbenblum, November 2017, p. 5-7

7. Wage theft in Australia: Findings of the National Temporary Migrant Work Survey, Laurie Berg & Bassina Farbenblum, November 2017, p. 5-7

OUR SYSTEM IS BROKEN

HOW CURRENT LAWS FAVOUR
BAD EMPLOYERS

OUR CURRENT SYSTEM FOR ENFORCING OUR WAGE LAWS - A CIVIL REMEDY REGIME WITH ENFORCEMENT ACTIVITIES CARRIED OUT BY THE FAIR WORK OMBUDSMAN - IS FAILING TO DRIVE COMPLIANCE OR DETERRING EMPLOYERS FROM ENGAGING IN BREACHES OF OUR LAWS.

Accessing the courts

Wage claims for up to \$20,000 are generally dealt with by the small claims divisions of the Magistrates Court or Federal Circuit Court. Workers are liable for application fees ranging from \$145-\$460. Workers cannot be represented by a lawyer without leave of the court. This would also require them to have access to pro bono legal assistance or afford private representation.

If a worker is successful in their claim, the employer will be required to pay the

outstanding wages and entitlements. The employer will not be penalised, and there is no automatic referral to the regulator to investigate the business's employment practices.

Workers with claims above \$20,000 are heard in jurisdictions that can issue penalties. The high level of legal resources required to make a claim in these jurisdictions renders them inaccessible to most vulnerable workers.

STATE/TERRITORY COURT	FEDERAL CIRCUIT COURT	FEDERAL COURT
<p>Option 1: Small claim in the industrial division of the Magistrates Court</p> <p>Claims up to \$20,000. Cost of application: \$145-460</p> <p>No penalties</p>	<p>Option 1: Small claims</p> <p>Claims up to \$20,000. Cost of application: \$215 (claims < \$10,000) or \$355 (claims \$10,000 - \$20,000)</p> <p>No penalties</p>	<ul style="list-style-type: none"> • Shares jurisdiction with the Federal Circuit Court. • Hears appeals from Federal Circuit Court. • The Full Bench of the Federal Court also hears appeals from a single judge. <p>Costs vary but general application: \$1,290.</p> <p>Penalties can apply</p>
<p>Option 2: Magistrates Court</p> <p>Claims \$20,000 - \$100,000. Cost of application: \$460 - \$691</p> <p>Penalties can apply</p>	<p>Option 2: Federal Circuit Court</p> <p>Any claim amount Cost of application: \$615</p> <p>Penalties can apply</p>	
<p>PENALTIES</p> <ul style="list-style-type: none"> • Maximum is 60 penalty units (\$12,600) or 5x for a corporation (\$63,000) • Maximum for a serious contravention is 600 penalty units (\$126,000) 		

Enforcement activities by the Fair Work Ombudsman

Fair Work Ombudsman (FWO) uses a variety of 'enforcement tools' for 'cases of serious noncompliance' (where dispute resolution or small claims are not appropriate to solve the matter). FWO's enforcement outcomes are reported in its annual report¹ and include:

INFRINGEMENT NOTICES	COMPLIANCE NOTICES	ENFORCEABLE UNDERTAKINGS
<p>May include on the spot fines (maximum of \$ 1260 for individual or \$6300 for a corporation) for failure to keep time and wage records or having the right information on a pay slip or employee record.</p>	<p>Usually used when an employer hasn't or is suspected to not rectify a matter they've been warned about by FWO. If not complied with, FWO can take the action to court to enforce it.</p>	<p>'Legally enforceable arrangements' with employers who agree to address contraventions and prevent future breaches.</p>
<p>In 2016-17 FWO issued 665 infringement notices.</p>	<p>In 2016-17 FWO issued 192 compliance notices that led to the recovery of \$333,000 in unpaid wages.</p>	<p>In 2016-17 FWO entered into 40 enforceable undertakings.</p>

Litigation

The FWO's course of last resort is litigation. It is saved for the 'deliberate exploitation of vulnerable workers', employer refusal to cooperate with FWO, or 'significant history of noncompliance'.

In 2016-17, FWO initiated 55 civil penalty litigations. 75% (or 41 matters) related to wages and conditions. They secured \$4.8 million court-ordered penalties. The Fair Work Ombudsman has also disclosed to Parliament that:

"In 2014-15 the FWO assisted parties involved in ...14,291 separate allegations relating to underpayment of entitlements. ... In 2014-15, there were 42 litigations commenced involving underpayment breaches as part of the alleged contraventions, which represents 84% of all litigations commenced in this period."²

This figure of 42 litigations represents only 0.29% of all allegations of underpayment lodged with the Fair Work Ombudsman in the same reporting period.

1. <https://www.fairwork.gov.au/annual-reports/annual-report-2016-17/02-fwo-performance-report/enforcement-outcomes>

2. Senate Standing Committee on Education and Employment, Questions on Notice, Fair Work Ombudsman SQ16 000232, Questions 8 and 9.

TINA'S STORY

\$20,000 in unpaid wages in 10 months

Tina came to Australia from Taiwan on a working holiday visa. Tina worked as a waitress at a popular Melbourne dumpling restaurant for 10 months. She worked long shifts and worked on weekends and public holidays.

Tina's employer did not pay her the minimum wage for ordinary hours, and did not pay her overtime, weekend, or holiday pay rates or the superannuation she was legally entitled to. Tina was paid as little as \$12 per hour 'flat' rate, despite the minimum rate of \$22.76 for level 1 casual employees under the Restaurant Award at the time.

When Tina was sacked for trying to take 10 days leave to visit her family in Taiwan, she decided to pursue her employer for just over \$20,000 in unpaid wages and entitlements.

The long and arduous process to pursue unpaid wages

Tina sought information and assistance from a number of organisations. Taiwanese networks in Melbourne led her to the National Union of Workers for initial advice. Community legal centre Justice Connect guided Tina through the small claims application process. Mediation through the Fair Work Ombudsman led to an offer of a \$3000 – just 15% of her unpaid wages.

Tina was not content with this settlement, and escalated her claim to the small claims division of the Federal Circuit Court. A hearing date was set for the week before Tina was due to return to Taiwan, and she held fears the employer would not turn up to court.

With assistance from the Young Workers Centre, Tina started an online petition and organised rolling protests outside the chain of dumpling stores to exert pressure and build support.

On the hearing date, and with legal representation from the Young Workers Centre, Tina was awarded the full \$20,000 she was owed in unpaid wages.

No justice

Tina's outcome is seen as a 'success story'. However, Tina's employer did not face any penalties. The courts do not automatically require the regulator to investigate the business's employment practices or provide outreach to other potentially affected employees.

Tina benefitted from being granted legal representation in court due to language barriers, where other workers must ordinarily self-represent.

Tina's 'successful' outcome was made possible by pro bono assistance from two community legal centres, one union and multiple community protests.

When it takes resources from three organisations, the broader community and an unsuccessful attempt by the Fair Work Ombudsman to pursue nothing more than the legal earnings for one worker we know the system is broken.



TINA

MAKING WAGE THEFT A CRIME

The Young Workers Centre calls for urgent law reform to address wage theft in Victoria. This reform will:

- insert a crime of Wage theft into the *Crimes Act 1958* (Vic); and
- adequately punish employers for deliberate and dishonest denial or underpayment of wages and monetary entitlements (“wage theft”).

Criminalisation as punishment

Workers and clients or customers who steal money or goods from a business can be referred to police for criminal investigation and prosecution. Businesses who underpay or deny wages or entitlements to workers must face the same investigations and the same consequences.

Criminalisation as a deterrent

The threat of imprisonment generates a deterrent effect, which is vital in preventing wage theft from occurring in the first place. Successful wage laws and enforcement strategies must break the current cycle where wage theft is low-risk business model.

Enforcement

Criminalisation as a successful deterrent is dependent on offending employers’ perceptions of the likelihood the laws may be enforced against them. We call for a specialised investigation and enforcement unit that is sufficiently resourced and trained to understand industrial matters and the barriers that prevent vulnerable segments of the labour force from speaking up about wage theft.

DRAFT LEGISLATION

Part 1—Amendment of the Crimes Act 1958

1 New section 74A inserted

After section 74 of the Crimes Act 1958 insert—

“74A Wage theft

(1) A person who dishonestly withholds an employee’s wages is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

(2) For the purposes of this section, wages are any amounts payable to or for the benefit of an employee in relation to the performance of work, including:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) leave payments; and
- (f) superannuation.

(3) For the purposes of this section, a person withholds an employee’s wages if he is under an obligation to pay the employee’s wages and does not do so at the time the obligation is due to be performed.

(4) For the purposes of this section, a person’s withholding of an employee’s wages is not to be regarded as dishonest if he reasonably believes that he has discharged his obligation to pay the employee’s wages.

(5) For the purposes of subsection (4):

(a) whether or not a person reasonably believes that he has discharged his obligation

to pay an employee’s wages depends on the circumstances;

(b) without limiting paragraph (a), the circumstances include any steps that the person has taken to find out—

- (i) what is his obligation; and
- (ii) whether he has discharged it.

(6) In a proceeding for an offence against subsection (1) it is a defence to the charge for the accused to prove that it was not reasonably possible for the accused to discharge his obligation to pay the employee’s wages.

(7) Section 80A applies as if the reference in that section to sections 81–87 (both inclusive) were a reference to this section.

(8) Section 84 applies as if the reference in that section to sections 81–83 (both inclusive) were a reference to this section.”

PENALTIES

SENTENCING

	MAGISTRATE'S COURT	COUNTY COURT
Imprisonment	Up to 2 years	Up to 10 years
Community Corrections Order (CCO)	Up to 2 years (1 offence) Up to 4 years (2 offences) Up to 5 years (3+ offences)	Up to 5 years (1 or more offences)
Fine	Up to 500 penalty units (\$79,285)	Up to 1200 penalty units (\$190,284)

or:

- Adjourned undertaking
- Conviction and discharge without further penalty
- Dismissal of charges without conviction or penalty

ADDITIONAL ORDERS

- Restitution
- Compensation
- VOCAT
- Confiscation

AUTOMATIC DISQUALIFICATION

In addition to sentence, conviction carries automatic disqualification from managing corporations for 5 years under s206b of the Corporations Act 2001.

APPENDIX

AWARD WAGE TABLES

Basic pay rates for Awards common to young worker industries are included below for reference. Note these are not exhaustive and full classification levels and additional rates can be accessed via the Fair Work Commission listings of modern Awards and associated pay guides.

RESTAURANT INDUSTRY AWARD 2017/18

	Classification	Hourly	Saturday	Sunday	Public holiday
Full time Part time	Level 1 - food & beverage attendant	\$18.81	\$23.51	\$28.22	\$42.32
	Level 2 - food & beverage attendant	\$19.53	\$24.41	\$29.30	\$43.94
Casual	Level 1 - food & beverage attendant	\$23.51	\$28.22	\$28.22	\$47.03
	Level 2 - food & beverage attendant	\$24.41	\$29.30	\$29.30	\$48.83

HOSPITALITY INDUSTRY AWARD 2017/18

	Classification	Hourly	Saturday	Sunday	Public holiday
Full time Part time	Level 1 - food & beverage attendant	\$18.81	\$23.51	\$31.98	\$42.32
	Level 2 - food & beverage attendant	\$19.53	\$24.41	\$33.20	\$43.94
Casual	Level 1 - food & beverage attendant	\$23.51	\$28.22	\$32.92	\$47.03
	Level 2 - food & beverage attendant	\$24.41	\$29.30	\$34.18	\$48.83

FAST FOOD INDUSTRY AWARD 2017/18

	Classification	Hourly	Saturday	Sunday	Public holiday
Full time Part time	Level 1	\$20.08	\$25.10	\$29.12	\$45.18
	Level 2	\$21.29	\$26.61	\$31.94	\$47.90
Casual	Level 1	\$25.10	\$30.12	\$34.14	\$50.20
	Level 2	\$26.61	\$31.94	\$37.26	\$53.23

RETAIL AWARD 2017/18

	Classification	Hourly	Saturday	Sunday	Public holiday
Full time Part time	Retail employee level 1	\$20.08	\$25.10	\$39.16	\$45.18
	Retail employee level 2	\$20.56	\$25.70	\$40.09	\$46.26
Casual	Retail employee level 1	\$25.10	\$27.11	\$39.16	\$50.20
	Retail employee level 2	\$25.70	\$27.76	\$40.09	\$51.40

