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25 October 2019

Christian Porter, MP
Attorney General
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Dear Minister Porter,

RE: CALL FOR PUBLIC COMMENT ON IMPROVING PROTECTIONS OF EMPLOYEES' WAGES AND ENTITLEMENTS: STRENGTHENING PENALTIES FOR NON-COMPLIANCE DISCUSSION PAPER

The Young Workers Centre (YWC) welcomes the opportunity to make a submission into the discussion paper on Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance.

The Young Workers Centre, based in the Victorian Trades Hall Council (VTHC), was established in 2016 to break the cycles of exploitation at work for young Victorians. We educate young people on their rights, safety, and wellbeing at work via training programs available to all Victorian high schools, TAFEs and technical colleges. We provide free legal advice to young people to resolve workplace issues. We organise and train young people to develop campaigns to improve their workplaces. We document life at work through our young workers research project.

At YWC, the majority of cases our legal centre deals with are related to wage theft, and we've assisted young workers seeking redress in a range of industries, in particular – hospitality and retail.

This submission sets out the epidemic rates of wage theft, and its impact on young workers. Through detailing a number of case studies, it establishes how the current laws are failing young workers. YWC calls on the government to make wage theft a crime.

If you have any questions or would like more information, please do not hesitate to contact me on (03) 9659 3567.

Thank you for your consideration.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "F Sowerbutts".

Felicity Sowerbutts
Director, Young Workers Centre



YOUNG WORKERS CENTRE SUBMISSION

Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance discussion paper

OCTOBER 2019

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Introduction

The Young Workers Centre (YWC) thanks you for the opportunity to make a submission in response to the discussion paper on Strengthening Penalties for Non-Compliance (hereafter referred to as the discussion paper).

YWC, based at the Victorian Trades Hall Council (VTHC), was established in 2016 to break the cycles of exploitation at work for young Victorians. We educate young people on their rights, safety and wellbeing at work via training programs available to all Victorian high schools, TAFEs and technical colleges.

Our vision is a state in which young people are safe at work, do not suffer harassment or bullying, and are provided their legal entitlements. For this vision to be realised, we must encourage young people to speak up without fear and join with other young workers to make change and improve their workplaces and communities.

We provide free legal advice to young people to resolve workplace issues. We organise and train young people to develop campaigns to improve their workplaces. We document life at work through our young workers research project.

Our research has uncovered the conditions that young workers are subjected to. One such issue is non-compliance with wage obligations. The scale and breadth of wage underpayment requires a radical new regulatory response. YWC have been campaigning for the criminalisation of wage theft since 2016, and it is the most common grievance that young workers seek assistance with through the legal centre.

Young Workers and Wage Theft

Wage theft is rife, and young workers are being subjected to wage theft on an enormous scale. YWC surveyed young workers and found that 1 in 5 were working for base pay less than the minimum wage.¹ Further, less than half young workers surveyed are paid penalty rates when they work nights, weekends or public holidays.²

We see wage theft happening to young Victorian workers frequently. It has become a business model and the current regime does not provide a sufficient deterrent. To many employers, it is worth risking wage theft and non-compliance with industrial agreements, as the chances of being caught are so low, and rarely enforced on a level that deters the behaviour.

For example, the Fair Work Ombudsman (FWO) may issue on the spot infringement notices of a maximum of \$1,260 for individuals, and \$6,300 for corporations. These are often less than the amount of wages that has been stolen. Further in cases where the FWO assists in mediation and dispute resolution, accounting for 18% and 19% of disputes resolved in 2017-18 respectively, around \$1,268 was recovered on behalf of the worker. Here, there is an absence of the FWO's compliance and enforcement powers resulting in workers often not receiving the full amounts they are owed.

This means for employers, it is worth ignoring their obligations in regards to wages, as even when they are caught in many cases, they are rarely compelled to pay what is outstanding, and even more rarely compelled to pay fines to deter the wrong doing.

¹ Young Workers Snapshot: The Great Wage Rip-Off, Young Workers Centre, May 2017, p 7-8

² Ibid, p 11-12

In the same time period, 2017-18, the FWO only instituted 35 court proceedings for civil penalty litigations. This is a mere drop in the ocean in the amount of wage theft cases workers across the country are suffering. There is simply no disincentive to stop employers doing the wrong thing.

We see many cases of workers trying to resolve the matters themselves, or even with the assistance of the Fair Work Ombudsman, and achieving little to no outcome. We find it is when legal action begins, that a claim progresses.

This should not be the case. Workers are entitled to expect that they will receive the wages they are legally entitled to when they earn them. We should not have a situation where they are forced to fight for their minimum standards.

The YWC Legal Centre receives many calls where workers have absolutely no records of hours or pay, or they're paid in cash, and this has resulted in extreme difficulties when making a case for rectification or even applying to small claims.

Since the YWC Legal Centre was established, 65% of the matters dealt with relate to wage and condition contraventions. In the year 2018-19, 371 young workers were assisted through YWC, which was 64% of cases, and in 2017-18, 438 cases, which accounted for 73%, were wage and condition contraventions.

The Protecting Vulnerable Workers amendments have not done enough to assist vulnerable workers to obtain recompense. The amendment in section 557C does not go far enough to ensure that employers face the consequences of failing to properly abide by their simple administrative obligations. This creates an almost insurmountable hurdle for workers to prove that their employers knew they were contravening provisions.

Case Studies

Below are a number of case studies that highlight how wage theft has become standard practice in Victoria, particularly across the hospitality and retail industries.

The case studies highlight how reluctant employers are to comply with wage instruments, and how vulnerabilities in the labour market, such as casual employment, exacerbate the difficulties.

James Lea, Ichi Group and Bar Americano

James worked for Ichi Ni Nana in Fitzroy for two years, operated by Ichi Group who also run Ichi Ni in St Kilda. He worked for \$18.50 an hour for seven months, and then requested to be paid in line with Award rates, which would have seen his pay increase by about \$5.

The managers responded by sitting him down in the office and telling him he had been doing a bad job, and his employment was in jeopardy. They weren't able to pay James correctly because, in his words "they were unhappy with my progress."

For the entire period he worked there, James was underpaid. When he left, he organised with a few of his co-workers to sign a letter requesting an investigation into whether they'd been paid correctly. James was later able to claim \$13,000 in stolen wages, even though he had over \$14,500 in wages and superannuation stolen. The other signatories subsequently lost their jobs.

James said he frequently worked up to seventeen hours without a break, and others would sometimes wait at the venue for hours only to find out they weren't needed for that shift. His pay slips did not reflect the hours worked. Sometimes workers at the venue weren't even given payslips.

Hospo Voice, the union representing hospitality workers, highlighted that temporary visas at Ichi Ni Nana were often paid less than \$18 an hour, with no penalty rates, and frequently working 50 to 60 hours a week. James emphasised that few had the confidence to speak up “because [of] the threat to their visa and the threat to their jobs.”

James is also typical of hospitality workers who move from one job with wage theft to another.

He was offered a job at Bar Americano, an exclusive cocktail bar in Melbourne's CBD, after working two unpaid shifts. The offer was over email and included a contract. James responded with a request for a Fair Work Information Statement, and with questions about the roster system, base pay rates, penalty rates and expected hours of work.

The owner, Matt Bax responded by saying it's a “flat rate per hour”, that “There are no penalty rates in Victoria anymore,” and that they “... don't have overtime rates on [their] shifts”, in which workers were expected to work until 1.15am.

Later, Bax emailed James to say he felt they were “getting off on the wrong foot” and requested a coffee meeting to clear things up. James happily obliged, and brought the relevant Award. Bax told him at this meeting he would “never pay Award rates”, and terminated the offer of employment by email 10 minutes after the meeting, saying he “couldn't meet your salary expectation.”

Renee McCarthy, Subway

Renee is one of the almost 150 workers with grievances against Subway we've heard from at the YWC. In the cases we've seen, Subway employees complained of underpayment, the use of expired Work Choice era agreements, a lack of penalty rates, physical and verbal bullying, and other occupational health and safety issues.

Renee worked at the Mitcham Subway store for three years, and had over \$1,300 in wages stolen from her. She had to spend around 15 unpaid hours completing online training called 'Subway University'. She and her co-workers would be watched by their employer from home on security cameras, and the employer would make comments about what they were wearing.

Renee said Subway head office conduct inspections once a month. She said she knew when they were coming as everything in the store was immaculate, but they never checked payslips or checked on the workers. She received no support from head office when reaching out for assistance, saying the only things they “care about is your name badge, your uniform – it is all about the image.”

Renee lodged a complaint with the Fair Work Ombudsman, but received little help, which is when she called YWC. It was only when she spoke about the matter on national television on The Project, that the store reimbursed her stolen wages.

A FWO investigation into Subway recovered nearly \$89,000 in stolen wages for 167 current and previous Subway workers, from an investigation of 22 franchisees. The investigation found 82% of franchisees were non-compliant with workplace laws. Only nine on the spot fine were given, with a total of \$5,880; a fraction of what had been taken from the workers. Subway Australia claimed it is the responsibility of franchisees to ensure workers are being paid correctly. The FWO report signalled there were “systemic issues in the Subway franchise network.”³

³ Fair Work Ombudsman, Subway Compliance Activity Report October, 2019

Hellenic Republic, Made Establishment

Orlaith worked at former MasterChef judge, George Calombaris' Hellenic Republic restaurant in Brunswick. She had multiple thousands of wages stolen over a number of years. She was initially paid \$790.37 and no superannuation, a fraction of what she was owed when stories of wage theft at Made Establishment first broke in 2017. In July this year, her employers told her they had already rectified the underpaid wages, and she wouldn't be getting any more.

A four-year investigation found that Calombaris' hospitality business, Made Establishment was found to have stolen approximately \$8 million from his workers. Calombaris announced he had back-paid \$7.83 million to 524 current and former workers. He was only fined \$200,000, 2.5% of the profit he stood to make.

Orlaith constantly worked overtime without pay, and when she raised the issue, was told that it's just how it is. She was told to "suck it up and work the job or leave."

Calombaris said he had been co-operating the FWO investigation but Orlaith disagrees. She said workers had repeatedly requested records so they could recover the stolen wages, but they were refused. She said the process for recovering wages had been held up and unfairly stretched out. She had sent emails, made phone calls and sought advice from YWC, but the company refused to pay her for her work.

Further, the company announced in 2017 when the investigation originally began, only 162 workers were affected by \$2.6 million, due to "historical poor processes."

Calombaris continued his television appearances, including an interview on 7.30, where he explained how "difficult" the investigation had been on him. Orlaith found this offensive, considering how much she was still owed, how many workers have been affected, and how there are few mechanisms to for compliance. She said "this should be about the principles, and the laws, and the fact that he broke them."

She said "A three percent fine is not enough. Wage theft is a business model and George Calombaris has built his career on it. And he continues to be heralded as the "nice guy" celebrity chef and a MasterChef judge."

In October this year, Orlaith finally received a payment much closer to what she believed she was owed, \$8,136.

Anonymous, Pressed Juices

A worker contacted YWC about wage theft at Pressed Juice. They are still owed \$2,000 in stolen wages and another \$2,000 in superannuation from Pressed Juices.

They say they've been robbed of three months rent, and the prospect of being paid is diminishing as almost all stores across the country have shut. YWC have been working with former employees of Pressed Juices for over a year. These workers have suffered wage theft of thousands of dollars, that includes unpaid leave and superannuation.

Leo Pegoli, former director, declared bankrupt but continued to manager the Pressed Juices, even though Amanda Pegoli was listed as the current director. He initially established Pressed Juice Holdings, which wound up when Pegoli was made bankrupt. He later opened Pressed Juices Retail, and then Pressed Juices Production and Manufacturing. This allowed him to continue with the pattern of wage theft, without repercussions. None of the former Pressed Juices workers who the YWC has assisted have been able to recover their stolen superannuation.

Daniel, on-demand food delivery driver by car

Daniel* is 25 years old and works as an on-demand food delivery rider and bike courier. His story highlights why wage theft laws should apply to gig economy workers. He cannot be deemed an independent contractor due to the level of control over his working conditions his employers have, yet makes well below the minimum wage.

Most of the companies Daniel works for assign him jobs through an app, and some by phone call.

He has no ability to negotiate a pay rise. Daniel takes on jobs with three companies so he can pay for food, rent and bills. He's been deemed an "independent contractor", so he doesn't receive superannuation, and he can't get a pay rise to meet increasing costs of living.

"I don't believe I can negotiate a pay rise. It is not possible in the structure of the gig economy."

There are adverse consequences for refusing unreasonable work. Daniel says although he can choose if and when to work for these companies, his choices can negatively impact his chances of being assigned future jobs.

"There was one situation where the office called and asked me to do an unreasonable delivery, I declined and they hung up on me mid-sentence. For the next week I received substantially less delivery requests. I suspect I was in some way blacklisted and punished."

Daniel has suffered negative impacts to his physical and mental health, and has described the impact of working on the road as a bike rider. Riding in traffic can be dangerous at the best of times, and when workers are under pressure to make quick deliveries or feel compelled to work in rain or extreme heat, the risks to their health skyrocket.

"I have suffered injuries and sickness due to working in dangerous weather conditions. I have also been injured in altercations with other road users. I also receive regular verbal abuse from car drivers and even pedestrians, which is emotionally taxing."

Daniel doesn't have access to paid sick leave. If he gets sick or injured and needs time off work, he doesn't get paid and needs to use his savings as make-up pay. As a result, taking time off for recreation, holidays, or to recharge is rare.

"Due to my financial situation, which is exacerbated by my employer's terms and conditions, holidays and breaks are not a viable option for me."

"I would like to either be made an employee with all rights and benefits under the law, or be paid a reasonable amount to compensate for the expenses and needs I have as an independent contractor. I make \$25 an hour on average. Once I remove my sick pay, leave, super and tax and expenses for the maintenance of my bike, I make well under the minimum wage."

Mina, Café Worker

Mina* is a recent migrant who first came to Australia on a student visa. In December 2015, she began working at a café waiting tables, preparing food, cleaning, and balancing the till. Mina worked five days per week and was paid a flat rate of \$15.45, even on weekends and public holidays.

Two years later, the café closed down. Mina has been trying to recover her underpaid wages of approximately \$20,000, including superannuation, ever since.

In March 2017, Mina attempted to schedule a mediation with her employer through the FWO. Her employer refused to attend the mediation, and told the Ombudsman that it would discuss Mina's claims directly with her. Mina's claim was left unsettled.

Mina approached the Young Workers Centre shortly afterwards. This year, Mina and her employer negotiated a settlement agreement, which is still in place.

Gabrielle, Farm Worker

Gabrielle* began working on a farm when she was fourteen years old. After graduating from high school, she began working full-time. Throughout her employment, the farm manager became increasingly verbally and physically abusive towards her and other staff. Gabrielle was passionate about her job, but eventually resigned for her own safety. She worked there for almost ten years.

Gabrielle knew she had been dramatically underpaid throughout her employment, but was too frightened to pursue her claim while she was still working there.

Gabrielle's employer did not keep consistent records of her payments, and were not responsive to her attempts to pursue her underpaid wages.

With YWC's assistance, Gabrielle was finally able to negotiate a settlement agreement this year for her underpaid wages totalling approximately \$15,000.

By this time, almost five years' worth of her underpayment claim had expired.

Melissa, Industrial Cleaner

Melissa* began her first job, working part-time for an industrial cleaning business in July 2015. Melissa cleaned the same building every weekday, and was the only cleaner working there. She never met anyone else employed by her employer, and only had contact with Mr Smith*, who she understood to be the sole owner of the business.

Melissa was consistently underpaid throughout her employment. As time went on, Mr Smith began paying her late, then only partially paying her, and then not at all.

In June 2017, Melissa sent a letter to Mr Smith asking about her correct rates of pay. She did not receive a response. Undeterred, she sent another letter in November 2017, outlining her award rates and entitlement to superannuation.

In November 2017, Mr Smith stopped paying Melissa and did not return phone calls or emails. She sent three further letters, but received no response.

The company employing Melissa entered liquidation in August 2018, nine months after Mr Smith cut off contact with her.

Melissa began preparing a Fair Entitlements Guarantee claim. As she reviewed her payslips, she realised that the name of her employing entity had changed multiple times throughout her employment.

The first two companies which employed Melissa are both deregistered. Mr Smith currently operates a third company, which is still active. Melissa's Fair Entitlements Guarantee claim is pending.

Rachel, Graphic Designer

Rachel* worked as a graphic designer at an office supplies company. She had worked there since 2010, when in August 2017, her employer went into liquidation.

Rachel and all of her co-workers were immediately re-hired by the same employer using a different corporate entity but the same trading name.

In November 2018, Rachel's employer told her and her co-workers that the company was "going bankrupt" and they were all fired. The company was heavily in debt, but did not formally enter liquidation.

In March 2019, one of Rachel's co-workers, Bethany*, contacted ASIC and applied to have the company wound up. Bethany was initially rejected, as her individual entitlements were under the statutory threshold. Rachel, Bethany, and her other co-workers contacted ASIC. They were told ASIC would investigate, but have not heard anything since.

The company has still not entered liquidation. Rachel is still owed in excess of \$15,000 in unpaid entitlements. She has made an unpaid superannuation complaint to the Australian Taxation Office in an attempt to recover some of what she is owed.

In August 2019, Rachel received an email from her employer celebrating the opening of their new company, which provides the same services.

* Names changed.

Suggested Model: Wage Theft as a Crime

YWC calls on the government to make wage theft a crime.

We endorse the Victorian Trades Hall Council (VTHC) and the Australian Council of Trade Unions (ACTU) submissions that thoroughly consider the best model to create justice for workers, and the laws that should be implemented for this to occur.

For YWC, we want to see all workers protected by wage theft laws, including gig economy workers, workers engaged through sham contracting and workers employed through labour hire.

Laws must apply to the theft of any remuneration to an employee in relation to the performance of work. This should include loadings, penalty rates, overtime, leave, allowances and superannuation.

Wage theft laws should be drafted in such a way as to address the business model attitude. Wage theft should not just apply to deliberate exploitation, but where employers are reckless, negligent and where they were wilfully blind and ought to have taken reasonable steps to inform themselves of their obligations. They should be drafted to apply to managers where they have had influence over decisions that have led to wage theft.

Unions should be able to investigate and institute proceedings under wage theft laws, and the FWO should be given proper funding and resourcing to conduct investigations and compel compliances.

Redress models must prioritise workers reclaiming the wages they're entitled to. Currently, the system is too complex, and onerous on workers proving a contravention has occurred. Wage theft laws should create a reverse onus on employers, where a worker can demonstrate that the employer has failed to pay correct wages it falls on the employer to demonstrate how it is not a serious contravention.