



# Submission

## Consultation, reform or review details

**Title:** SUBMISSION FROM THE MIGRANT WORKERS CENTRE ON  
WAGE THEFT CRIMINALISATION

**Date of submission:** 25/10/2019

## Your details

**Organisation:** Migrant Workers Centre

*If you are providing a submission on behalf of an organisation, please provide the name of a contact person.*

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## Your submission

SUBMISSION TO THE HON. ATTORNEY-GENERAL FOR AUSTRALIA AND MINISTER FOR INDUSTRIAL RELATIONS  
ON WAGE THEFT CRIMINALISATION

25 October 2019

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### 1. Introduction

1.1. The Migrant Workers Centre ('MWC') makes this submission in response to the Hon. Attorney-General for Australia's invitation for public input about "improving protections of employees' wages and entitlements".

1.2. The MWC is a non-profit organization located in Carlton, Victoria, helping migrant workers understand their rights and get empowered to enforce the rights. Its goal is to fix the system of labour exploitation.

1.3. As one of the members of the community that witness firsthand the prevalence of wage theft against migrant workers and its impact on migrant communities as well as the broader Australian society, the MWC welcomes the call for input. The failure to adequately redress wage theft and protect migrant workers' wages and entitlements remains a significant industrial issue in Australia and a matter of great concern to the MWC.

1.4. The MWC supports the submissions made by the Victorian Trades Hall Council and the Australian Council of Trade Unions, including their recommendations for a new model to create justice for workers and the legislative improvements required for the model's implementation.

1.5. This submission highlights the following issues that the MWC urges the Attorney-General to take into account:

- Generating deterrence of wage theft through increasing monetary penalties and introducing criminal sanctions
- Protecting groups of workers including migrant workers who experience wage theft at a higher rate
- Assisting migrant workers with access to redress without increasing risks of negative implications on their life in Australia

### 2. Definitions and principles

2.1. It is our view that a 'worker' should be comprehensively defined to include any person who works under instructions for income in Australia's rapidly changing economy such as labour hire workers, so-called 'gig economy' workers, and pseudo-contract workers. The term 'migrant worker' in this submission refers to such a worker who was born in a country other than Australia. We also acknowledge that many migrant workers are engaged in small businesses or areas of industries that are structurally weakly organised or historically yet to be clearly defined.

2.2. Most workers and their families rely on wages for living. Wages should be paid in full and on time in order not to disrupt or challenge their right to living. Any underpayment, withholding, or misappropriation of the wages and entitlements prescribed by the Fair Work Act 2009 or the Superannuation Act 1976 constitutes wage theft.

2.3. Laws and regulations should serve the purpose of bringing justice for victims and generating deterrence of contraventions. It is in this context that the MWC upholds the principle that sanctions against wage theft should be imposed in proportion to the magnitude of contraventions. Whether there was a deliberate intention to steal wages and entitlements should not determine whether contraventions constitute wage theft or what sanctions should be imposed.

3. Case studies: migrant workers as targeted victims of wage theft

3.1. Below are two case studies that highlight how wage theft affects migrant workers in Australia. They reveal how employers fail to comply with wage instruments and how visa status becomes a barrier to wage justice.

3.2. Case study 1: Trapped between visa fraud and exploitation

John (pseudonym) is a cook with years of experience from Southeast Asia. His migration agent advised him to enter the country on a tourist visa and apply for permanent residency onshore. Once he arrived, the agent arranged him to work for a business partner of hers, who might nominate John for permanent residency under Victoria's regional sponsored migration scheme.

John worked hard because he didn't want his employer to change his mind on nominating him. He underpaid to \$20 per hour in cash, although he was entitled to \$26.14 according to the hospitality industry award. In the meantime, John's migration agent kept charging him for various fees to process his visa application.

Months past, and John's employer suddenly dismissed him without any reason provided. The employer made him break the conditions of his tourist visa, took advantage of John's skills at a rate below the award rate, and did not keep his word of nominating him for permanent residency. On the other hand, the migration agent promised John things she could never fulfil under the current migration schemes, charged him money for undelivered services, and put John's prospects for permanent residency at risk by advising him to come to Australia on a tourist visa.

Regrettably, the hardship John experienced is not unique to him. Many migrant workers, not familiar with Australia's migration schemes or workplace rights, endure exploitative work conditions with a false hope of getting permanent residency and out of exploitation one day.

3.3. Case study 2: Exposed to higher chances of wage theft and health and safety risks

Bradbury Industrial Services was a waste management factory in North Melbourne, providing storage and disposal services for hazardous and industrial waste. The business accepted chemical waste for a fee and stockpiled it in warehouses until it went into liquidation after a big fire burnt down the factory.

An investigation of the accident revealed that the business had not followed the Environment Protection Authority's safety regulations. There were three times more hazardous materials on the premises than the business was licensed to hold. The fire almost killed a worker and took four days before it was extinguished.

As much alarming as the accident itself was the fact that most of the workers at Bradbury Industrial Services were asylum seekers who had been underpaid for years. With not enough documents to prove their skills or experiences from their homelands, asylum seekers have difficulty finding jobs in Australia. When they find one, they are often exposed to poor working conditions and underpayment. Bradbury Industrial Services was one such place. Workers there worked for extended hours but were paid no overtime payment or penalty rates. The unlawful practices had continued even after the MWC had confronted the employer and requested immediate rectifications. After the business went into liquidation, many workers were not able to recover their unpaid wages due to the deficiency of the Fair Entitlement Guarantee in addition to the underpayment that had occurred prior to the accident.

Migrant workers are at increased risks of wage theft and poor health outcomes compared to other workers because their workplaces disregard their workplace rights and expose them to extensive occupational health and safety risks that go unnoticed by authorities.

#### 4. Generating deterrence of wage theft through increasing monetary penalties and introducing criminal sanctions

4.1. The MWC witnesses every day that wage theft is prevalent in Australia and the enforcement of the Fair Work Act 2009 is inadequate. As the Australian Consumer Law Review pointed out, non-compliant business owners perceive existing penalties as “a cost of doing business”. This suggests that stronger sanctions against wage theft would have the effect of increasing the perceived cost of non-compliance and potentially deter business owners from making contraventions.

4.2. Following the recommendation of the Migrant Workers’ Taskforce Report, criminal sanctions should be introduced against serious forms of wage theft. Civil recovery should come first, so as not to create delays, and criminal proceedings can occur at a later stage.

4.3. Penalties should be proportionally applied in reference to the number of instances of each contravention made, number of workers affected, length of period over which contraventions are made. In accordance with the increased maximum penalties in the Competition and Consumer Act 2010 as suggested in the Treasury Laws Amendment Bill 2018 and as discussed in the Terms of Reference of the invitation to which this submission responds, monetary penalties should be calculated as three times the value of the benefit obtained from contraventions when the value can be determined or 10 per cent of annual turnover when it cannot be determined.

4.4. The onus of proof should be reversed when business owners have breached payslip and record-keeping obligations in all circumstances.

4.5. Contraventions caused by recklessness, negligence, or omission as well as those deliberately made should be taken into account in order to rectify the wrongful benefits business owners gain from contraventions and to encourage better business practices and diligent compliance.

4.6. Accessorial accountability should be extended to anyone who commits wage theft or causes wage theft to occur across supply chains. Penalties should be applied to corporate decisions or recklessness that facilitate the occurrence of wage theft, such as not ensuring that labour hire workers or contractors are paid correctly.

4.7. Given the prevalence of wage theft and inadequate enforcement of the Fair Work Act 2009, there is an urgent need to establish a wage theft inspectorate that holds the authority to (a) inspect businesses’ employment and payment records, (b) investigate any potential wage theft, and (c) press charges.

#### 5. Protecting groups of workers including migrant workers who experience wage theft at a higher rate

5.1. Certain groups of workers experience wage theft at a higher rate than others. Studies and investigations reveal that migrant workers are more likely to fall victim to wage theft. One of the reasons for the disproportional impact of wage theft on migrant workers is the increasing number of business owners who

adopt it as a business model to profit from migrant workers' unfamiliarity with Australian workplace rights, industrial relations systems and law enforcement as well as their temporary residency and visa conditions.

5.2. The MWC's experience suggests that some business owners maximise their chances of profiting from wage theft by employing only migrant workers. A survey of farm workers conducted by the National Union of Workers early this year confirms the MWC's observation: all the participants who disclosed how much they earned (79 per cent) were underpaid; only 2 per cent of the participants were Australian citizens or permanent residents.

5.3. It is the MWC's view that there should be additional penalties for contraventions made disproportionately against migrant workers. Although the Protecting Vulnerable Workers Act 2017 created some measures of protection for them, they are inadequate and beyond the reach of many migrant workers. Many migrant workers are engaged in small businesses or areas of industries where it is hard to prove contraventions without profound familiarity with the Act.

5.4. Processes of reporting wage theft and seeking wage recovery should be made easy for all workers including migrant workers and non-English-speaking workers.

5.5. The wage theft inspectorate, whose creation is suggested earlier in this submission, should be assisted by a statutory institution on the matters of (a) assisting workers to report contraventions and (b) calculating stolen wages and entitlements and restoring the underpayment to workers. It should provide legal assistance to workers and resolve claims in 30 days. It should allow workers to be represented by unions and to file representative proceedings.

5.6. The institution should provide appropriate services to migrant workers and non-English-speaking workers among other groups of workers who experience wage theft at a higher rate.

5.7. The Fair Entitlement Guarantee should be extended to migrant workers on temporary visas. The instrument protects employees when their companies file for bankruptcy by paying them up to 13 weeks of unpaid wages and entitlements as well as redundancy payments, but the protection is currently provided only to Australian citizens and permanent residents. In its first year of operation, the MWC has met dozens of migrant workers who struggled to pay for their weekly rents after their employers suddenly filed for bankruptcy, leaving them unemployed and unpaid tens of thousands of dollars in wages, superannuation, and redundancy entitlements. Many of them express their loss of hope over the Australian justice systems when they find their employers continue to have thriving businesses through illegal phoenix activities.

5.8. The MWC also hears from many migrant workers (including the one represented in Case study 1) who are tricked into fraudulent employment arrangements and exploitative work conditions by their migration agents. It is the MWC's strong view that migration agents should be penalised if they directly or indirectly profit from exploiting migrant workers.

6. Assisting migrant workers with access to redress without increasing risks of negative implications on their life in Australia

6.1. There are many barriers to migrant workers seeking remedies to wage theft. One of the primary barriers pointed out to the MWC by migrant workers on temporary visas is the fear of harming their chances to continue living in Australia by reporting wage theft. Migrant workers often do not have clear information about their entitlements or Australian migration schemes and worry that any records of legal procedures might ruin their prospects of acquiring permanent residency.

6.2. In addition, employers often threaten migrant workers by saying that they will have them sent to the police or deported out of Australia even for things the workers have not committed. One of the migrant workers we met was told by their employer "Do you think you are a citizen? You're just a backpacker" when he asked for his unpaid entitlements. Some business owners encourage migrant workers to breach their visa-

specific work conditions and then tell them they are ready to have them deported anytime. These are only a few of many ways unscrupulous business owners use to intimidate migrant workers and profit from underpaying them.

6.3. There is an urgent need to regulate and sanction businesses knowingly unduly influencing, pressuring, or coercing temporary migrant workers in breach of their visa conditions.

6.4. The police should not be the body to undertake investigations or prosecutions of wage theft against migrant workers. Police presence is likely to be intimidating and could defeat the purpose of obtaining justice for migrant workers.

6.5. A clear and strong firewall between the Fair Work Ombudsman and the Department of Home Affairs should be created by making comprehensive improvements to the existing Assurance Protocol to protect wage theft victims and whistle-blowers.

6.6. When a migrant worker files claims for wage theft, any breaches of visa-specific work conditions suspected or identified should not provide a ground for cancelling the worker's current visa or denying a subsequent visa.

6.7. In addition, a bridging visa should be established to regularise stay of migrant workers who have workplace claims pending. This is particularly necessary for migrant workers on employer-sponsored visas. The current system requires them to leave the country within 60 days after their employment ends, which does not allow enough time to achieve justice in the existing workplace law enforcement systems.

6.8. Unions should be given entry powers for inspection over their industrial coverage and be allowed to institute proceedings for wage recovery on behalf of migrant workers.

6.9. Civil society organisations including migrant community organisations, community legal centres and unions should be assisted with adequate funding to be able to extend their services to migrant workers. Many migrant workers are afraid of government authorities and fear potentially negative visa impacts, and a community-based response is likely to be more effective in identifying cases of workplace rights infringement.

## 7. Conclusion

7.1. The issue of underpayment of wages and entitlements to migrant workers is one that is yet to be resolved satisfactorily. Its prevalence is now at the extent of distorting Australia's job market and harming its reputation internationally.

7.2. The MWC supports the Government's view that there is a special need to improve protections for migrant workers. The MWC urges the Attorney-General to recognise the importance of this issue with a view to achieving just outcomes for the victims of wage theft.

7.3. The MWC has sought to focus this submission on a particular issue of wage theft criminalisation as requested and summarized its recommendations as presented in the box below. It would, however, be pleased to provide the Attorney-General with further assistance in relation to protecting migrant workers.

### Summary of recommendations:

1. Wage theft should be defined to include any underpayment, withholding, or misappropriation of the wages and entitlements.

2. Penalties should be proportionally applied in reference to the number of instances of each contravention made, number of workers affected, length of period over which contraventions are made. Criminal sanctions should be introduced against serious forms of wage theft conducted in systemic manners.

3. Additional penalties should be applied for contraventions made disproportionately against migrant workers and for practices of knowingly unduly influencing, pressuring, or coercing temporary migrant workers in breach of their visa conditions.
4. Migration agents should be penalised if they directly or indirectly profit from exploiting migrant workers.
5. A wage theft inspectorate should be established that holds the authority to (a) inspect businesses' employment and payment records, (b) investigate any potential wage theft, and (c) press charges.
6. The wage theft inspectorate should be assisted by a statutory institution on the matters of assisting migrant workers to report contraventions and recover stolen wages and entitlements.
7. The Fair Entitlement Guarantee should be extended to migrant workers on temporary visas.
8. A clear and strong firewall between the Fair Work Ombudsman and the Department of Home Affairs should be created by making comprehensive improvements to the existing Assurance Protocol.
9. Any breaches of visa-specific work conditions by a migrant worker filing claims for wage theft should not provide a ground for cancelling the worker's current visa or denying a subsequent visa.
10. A bridging visa should be established to regularise stay of migrant workers who have workplace claims pending.
11. Unions should be given entry powers for inspection over their industrial coverage and be allowed to institute proceedings for wage recovery on behalf of migrant workers. They should be assisted with adequate funding to be able to extend their services to migrant workers.