

Inquiry into Wage Theft in Western Australia

27 March 2019

The Western Australian Council of Social Service Inc. (WACOSS) welcomes the opportunity to make a submission to the inquiry into the systematic and deliberate underpayment of wages or entitlements of workers in Western Australia.

WACOSS is the peak body of community service organisations and individuals in Western Australia. WACOSS stands for an inclusive, just and equitable society. We advocate for social and economic change to improve the wellbeing of Western Australians and to strengthen the community services sector that supports them. WACOSS is part of a national network consisting of ACOSS and the State and Territory Councils of Social Service, who assist people on low incomes and experiencing disadvantage Australia wide.

WACOSS supports the introduction of new laws to address wage theft, including its criminalisation.

Wage Theft in WA

As part of our consultation process in preparation of this submission, WACOSS sought real-life examples of incidents of wage theft from people throughout our networks. We received a number of responses, some of which are summarised below.

We were informed about the situation of an 18-year old working in a casual hospitality job, in which they had been employed since the age of 13. They have been paid an hourly rate of \$11 for that entire period, regardless of whether the shift was during a typical weekday, weekend or public holiday. When they asked management for a pay increase, they were told that if they did not like that pay rate, then they would need to seek employment elsewhere. Based on the annual payment summary that she receives, her family believes that the business owner is lodging payment summaries with the tax department that indicate he is paying her at a higher rate.

We heard the story of another young hospitality worker who was owed more than \$500 in back pay. When they approached management about it, they were informed that the company could not afford to pay it and they have not been assigned any shifts since.

An age pensioner in their seventies, who had held a part-time job for around a year period over 2016 and 2017, also reached out to WACOSS to share their story. They were paid weekly and when they ended their employment there, they were provided with a print-out of the superannuation payments to which they were entitled, amounting to over \$1,230. As of the time of this submission, they have not received any of these superannuation payments. They have complained to the Australian Taxation Office, but this has so far only resulted in the company informing the pensioner that they are entitled to less superannuation than they initially said.

We also received the stories of three Subclass 457 visa holders who had each been significantly underpaid and denied their entitlements. All three workers were employed as tilers.

The first, who was employed between June 2016 and May 2017, was not paid salary entitlements to the value of \$19,027.36. This included unpaid wages and annual leave. During that period, his employer failed to provide him with payslips and failed to make any contributions to the worker's superannuation fund. The employer alleged that the payments were delayed due to cash flow problems. After the worker engaged legal assistance, a settlement was negotiated and the employer paid the entire amount claimed.

The second tiler was the subject of wage theft from approximately May 2014 to April 2016. The employer hired him on the verbal agreement that in exchange for visa sponsorship he would not be paid the full salary stipulated in his contract of employment. Under his contract, his annual salary was \$94,400, but he was instead paid approximately \$60,000 per annum. In addition to unpaid wages and forced 'cash back' payments to his employer, the worker was required to pay for his own insurance. That total value of his claim across his entire period of employment was approximately \$93,000. The matter was settled privately.

The third was the subject of wage theft from December 2016 to February 2019. He was required to pay all costs in relation to his Subclass 457 visa application, including:

- The Standard Business Sponsorship and Nomination application fees payable to the Department of Home Affairs;
- The migration agent's fees for the Standard Business Sponsorship and Nomination applications; and
- Payments towards staff training, as a requirement for the employer obtaining approval as a Standard Business Sponsor.

Under the Migration Act 1958, all of the above costs must be paid by the employer, not the visa applicant. The employer required the worker to pay all of these costs in exchange for visa sponsorship.

The worker was also required to make regular cash payments to his employer and was not paid for a number of hours worked. He was never paid annual leave, sick leave for any days absent from work due to illness, and was not paid all superannuation amounts owed to him. The worker calculated the amount owed to him to total approximately \$50,600. So far, no outcome has been reached.

Wage Theft and Marketised Social Care

The roll-out of NDIS and individualised service payment models, while seeing an increase in consumer choice and control, has been found to have had implications for the conditions of workers. The marketisation of disability support through the NDIS has impacted on the organisational structure of existing service providers as they shift from block-funding contracts to individual units of care, as well as seeing the introduction of for-profit organisations.

In some circumstance, where they may have previously been employed by an agency, workers may now find that they are employed directly by the person they are providing services for, which could push them outside of the current definition of employee. This disruptive strategy and business model functions to both by-pass much existing regulation concerned with occupational health and safety and quality assurance, and effectively transfer the risks and costs of accidents, errors and

poor outcomes onto either the worker or the service recipient. This by-passing of the costs of administrative compliance and insurance can significantly reduce the cost of the service, potentially making services more attractive and affordable for consumers, who may not be aware of their additional risks, responsibilities or obligations. The invisibility of work conducted in the home, as well as the complexity of contracting arrangements, increases the difficulty of ensuring workers are not being coerced into independent contractor arrangements that undercut the award or, potentially, illegal sham contracts.¹

A 2018 study of wage theft and underpayment for disability support workers employed under NDIS arrangements found that some of the ways in which disability support work is being organised under NDIS implementation, is leaving employees underpaid for significant amounts of their working time. In particular, it identified the non-payment or underpayment of travel, overtime and administrative tasks of disability support workers.²

The study argues that in fact the funding and regulatory environment of the NDIS institutionalises and facilitates the systemic non-payment of working time for homecare workers. A stark example of this was that the only employees in the study who were paid for travel time lost work as their employer's disability services provision was deemed not viable under the new funding arrangements.

The study's authors suggest that the gendered legacy of care work as women's work, often regarded as being performed for altruistic reasons or as unskilled work, contributes to an attitude towards the non-payment of social care work. This in turn can be compounded by the long traditions and strong norms within not-for-profit agencies of volunteering and a preparedness of workers due to both factors of undertaking unpaid work.³

We note that this also highlights a particular regulatory gap in the protection of community service workers, in that activities that could be considered wage theft for workers under a different award (for example not being paid for time travelling between different work assignments) are not necessarily covered in the terms of the *Social, Community, Home Care and Disability Services (SCHADS) Award*. This means that while this lack of payment is unfair and fails to recognise the true costs of service delivery, it may not technically constitute wage theft. This is why governments, as procurers of services and regulators of service quality, need to play a more active role in ensuring the programs and services they design and contract are safe and fair.

Government and the Social Care Supply Chain

As part of addressing wage theft and to prevent it occurring in the community services sector, the State Government needs to take seriously its position in the 'supply chain' and the fundamental role it has in shaping the activities of the sector. In particular, it needs to consider how through policy and contracting decisions, it may be creating an environment where the potential for the exploitation of workers is high, as organisations struggle to meet contractual service level obligations they are unable to renegotiate.

¹ Fiona Macdonald and Sara Charlesworth (2016) 'Cash for care under the NDIS: Shaping care workers' working conditions?' *Journal of Industrial Relations*, Vol 58(5) 627-646

² Fiona Macdonald, Eleanor Bentham and Jenny Malone (2018) 'Wage theft, underpayment and unpaid work in marketised social care', *The Economic and Labour Relations Review*, Vol. 29(1) 80-96

³ Ibid.

As a sector with a strongly female workforce, gender equity is of great importance for community service organisations. As such, they were proud to advocate alongside their workers and their unions to achieve the *2012 Equal Remuneration Order* by the Fair Work Commission for social and community service workers, crisis accommodation workers and disability home care workers under the *Social, Community, Home Care and Disability Services Award*.

The ERO provides for 'above Award' pay increases for social and community service workers of between 23% and 45% over an eight-year period from December 2012 to December 2020. In 2012, the Fair Work Commission issued an Equal Remuneration Order (ERO) requiring human services agencies to pay annual increases of between 23 per cent and 45 per cent over 8 years (to 2020).

In Western Australia, this was followed by a 2013 decision of the Industrial Relations Commission to amend the *Crisis Assistance, Supported Housing Industry – Western Australia Interim Award 2011* and the *Social and Community Services (Western Australia) Interim Award 2011* in line with the national system to increase rates of pay.⁴

WA has seen, however, the advances achieved through the ERO and WAIRC decisions undermined by successive State Governments' refusal to accept their continued role in fully funding historically undervalued sectors. In the 2011-12 State Budget, \$600 million over four years was provided in order to meet the historical funding shortfall for the sector. It was not to address the ERO-based salary increases awarded after the fact, as has since been claimed, and comprising around 15 per cent for most eligible organisations (with some regional and remote organisations receiving an extra 10 per cent), it was at any rate never sufficient to meet those increases.

The failure to provide funding to fully cover those increases was compounded by changes to the indexation policy for community service contracts. In 2004, the Non-Government Human Services Sector Indexation Policy was introduced, which used a methodology set at 80 per cent Wage Price Index and 20 per cent CPI. In 2015, however, this was changed to 100 per cent CPI, with no allowance for wage growth.

The *Delivering Community Services in Partnership* (DCSP) Policy, in place over the past six years, was intended to see the transition over time to fairer and more accountable funding models, where contracts would be based on outcomes, and service providers would be able to negotiate the true cost of service delivery. However, a significant proportion of service contracts currently operating in WA are not DCSP compliant, including many that predate proper implementation of the policy and have been rolled-over as well as a significant proportion put in place after the adoption of the policy that have not complied with it fully, particularly in relation to meeting the true cost of care.

There are numerous services with contracts established before 2012 that have been extended and rolled-over multiple times, with inadequate indexation and no opportunity to renegotiate funding levels or service outputs. Many of these contracts specify staffing levels and operating hours, and were agreed under an indexation policy designed to match funding increases to wage rises.

These impacts are most apparent in after-hours and outreach services, particularly in regional areas, as well as those requiring sustained wrap-around support for clients facing multiple inter-related areas of need. Uncertainty of policy direction, complications and delays caused by the machinery of government changes have led to high numbers of service contract roll-overs in recent years.

⁴ *Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Aboriginal Alcohol and Drug Service (AADS) (Inc) & Others* [2013] WAIRC 00795; (2013) 93 WAIG 1380

The continued roll-over of contracts by the State Government, with inadequate indexation and no allowance for the ERO wage increases, means that organisations are being placed in the position where they must provide services with ever dwindling resources.

Two independent studies over the last 3 years have evidenced the extent of the impact of the ERO on services, and a third study was recently commissioned by the Department of Communities to examine the impact of the ERO on homelessness services funded under the National Affordable Housing Agreement. Although the Department of Communities has so far been unwilling to release the findings of study, a number of the twenty-three organisations who participated have informed WACOSS that their individual funding levels do not cover the full cost of their service contract. Organisations have been forced to restructure, cut costs where possible and, in some cases, have stopped providing or have reduced services where they are no longer financially viable.

Successive State Governments and their departments are either wilfully blind to the impact of these policy decisions or are tacitly relying on the idea that organisations will engage in activities like wage theft in order to meet their service obligations. Organisations may be forced into the position where they are restricting service provision to deliver lower service quality as part of a downward reclassification of their workforce, while attempting to provide essentially the same service under an extension of the same contract. Where community services have arguably gone above and beyond the minimum requirements of service provision they may find they are no longer able to do so. Ultimately, this reflects a hollowing out of service provision and service quality where government practices are short-changing WA communities on the essential services they have a right to expect will continue to be adequately delivered. The State Government must set an example of good practice, both through its treatment of its employees in the public sector, but also through its purchasing of services and policy decisions around service contracts.

No organisation should deliberately underpay or exploit their workers. Likewise, the State Government should not create a service environment where there is a real risk that it could occur. Arguably, in this situation, the State Government is acting no better than large corporations outsourcing cleaning services at below cost to distance themselves from direct responsibility for the employment terms and conditions of those workers.⁵ It could be suggested that the State Government's actions are even worse, considering organisations are trapped in contracts that have been rolled-over for seven or more years, with no ability for them to renegotiate funding or service delivery levels.

To this end, WACOSS recommends a whole-of-government audit of DCSP Policy compliance in the contracting of community services since 2012.⁶

Wage Theft and Temporary Migrant Workers

Research has demonstrated that temporary migrant workers are at significant risk of underpayment, especially in food services, and the fruit and vegetable picking industries. The 2017 National Temporary Migrant Survey, drawn from the responses of 4,322 temporary migrants across 107 nationalities, found that almost a third of survey participants earned \$12 per hour or less. At the time of the survey, that was approximately half the minimum wage for a casual employee in those

⁵ Senate Standing Committee on Education and Employment (2018) *Wage theft? What wage theft?!* www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Report

⁶ [Vision 2020](#) WACOSS State Budget Submission 2019-2020.

jobs.⁷ A quarter (25%) of all international students earned \$12 per hour or less and 43% earned \$15 or less in their lowest paid job. Students who worked more than 20 hours per week (potentially breaching their visa conditions) earned substantially lower wages than other students.

Importantly, the findings of the survey make clear that temporary migrants are aware of the minimum wage rate and know that they are being underpaid, meaning that a lack of knowledge about their entitlements is not the cause of their underpayment. It is likely instead that the precarious nature of that employment and the significant power imbalance in the favour of the employer means that the employer considers that they are able to underpay those workers with impunity. The survey results outlined a number of other exploitative practices by employers of temporary migrant workers, including confiscating their passports, requiring them to pay money to obtain the job, threatening to report them to Immigration Department, and requiring workers to return part of their payment to the employer in cash.⁸

Stolen Wages Reparations

In the context of wage theft, WACOSS considers that it is important to also raise the issue of reparations for historical stolen wages. Until 1972, the WA Government was able to hold up to 75 per cent of an Aboriginal person's wages, and these monies were often not returned to them and used instead to subsidise departmental activities. Earlier Government policies also saw many Aboriginal people pushed off their land and forced to work on stations for food and clothing rations.

The 2012 response to this gross injustice in the form of the *Stolen Wages Reparation Scheme* was totally inadequate. Based on actuarial advice, the WA Department of Indigenous Affairs had recommended an ex-gratia Common Experience payment of \$10,000, with the potential increase of an extra \$5,000 as additional monetary compensation to acknowledge the personal and family impacts beyond the actuarial calculation.⁹ Despite this, the Government's scheme only ended up offering a limited number of people a maximum of \$2,000 each.

As stated by Dennis Eggington, CEO of the Aboriginal Legal Service of Western Australia, "The significant legacy these people left this state was paid for in blood, sweat and tears and to have this measured so meagrely is heart breaking to those who have survived and insulting to the families of those who didn't."¹⁰

In this context, the State Government should review the Stolen Wages Reparation Scheme, and seek to co-design a more comprehensive response with Aboriginal people to ensure it is just and adequate, and provides opportunities for their stories to be collected and recognised.

Where it is no longer possible to return wages to the primary victims, the wrongly withheld money should be traced and returned to the families and communities from which it was taken.

⁷ Laurie Berg and Bassina Farbenblum (2017) *Wage Theft in Australia: Findings of the Temporary Migrant Work Survey*, <https://apo.org.au/sites/default/files/resource-files/2017/11/apo-nid120406-1162971.pdf>

⁸ Ibid.

⁹ Department of Indigenous Affairs, Western Australia (2012) '[Briefing note the Minister for Indigenous Affairs on the actuarial advice of the Stolen Wages Taskforce](#)'

¹⁰ Aboriginal Legal Service of Western Australia (2012) '[Stolen Wages offer a 'slap in the face' says ALSWA](#)'

Addressing Wage Theft

Deliberately withholding or not paying wages to which a worker is entitled should be considered a form of theft and thus a criminal action. If a worker should steal money from their employer, it would be treated as a criminal offence. When an employer deliberately underpays the wages or entitlements of a worker, they have likewise effectively stolen from that worker and their position in the employment relationship does not in any way reduce the severity of that action.

The fundamental power imbalance between workers and employers means that it is necessary for serious penalties to be in place in order to prevent the exploitation of workers. That power imbalance means that criminalisation alone may not be sufficient to prevent wage theft, as some employers may consider the likelihood of their workers pursuing claims to be low, particularly workers who are young, elderly or whose first language is not English. As a result, it is important that the criminalisation of wage theft be accompanied by an appropriately funded agency that can receive complaints, undertake investigations and take legal action where necessary.

WACOSS supports the Victorian Government's proposed model to tackle wage theft. Under this proposal, employers who deliberately withhold wages, superannuation or other employee entitlements, falsify employment records, or fail to keep employment records will face fines of up to \$190,284 for individuals, \$951,420 for companies and up to 10-years jail. A conviction under these laws will also result in the automatic disqualification from managing corporations for five years.

These laws are accompanied by the establishment of a *Victorian Wage Inspectorate*, which investigates complaints, and carries out a range of compliance and enforcement functions to ensure compliance with state legislation.

To prevent wage theft, there is also a clear need for unions to be able to freely organise in workplaces and take industrial action when needed. As the frontline against injustice in the workplace, through delegates, shop stewards and the broader membership, unions provide a direct means for observing, documenting and raising issues of wage theft. The State Government should ensure that Western Australian laws do not prevent unions carrying out their role in the workplace and explore means by which they can assist the growth of union capacity.

If you would like to discuss this submission further, please contact the WACOSS Research and Policy Development Leader Chris Twomey at chris@wacoss.org.au or 9420 7222.

Yours sincerely,



Louise Giolitto
Chief Executive Officer
WACOSS