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Dear Colleagues,

Wage Theft in the NT

Thank you for the opportunity to provide input to the Committee's current inquiry into wage theft in the NT and whether responses can be improved.

This letter follows on from submissions made in the consultation meeting on 28 November 2022 with Committee President Emeritus Professor Leslie McCrimmon and Committee Member Mr Peter Shoyer, NT Ombudsman, by DCLS staff:

- Matt Gardiner, DCLS Tenants' Advice Service Team Leader,
- Solomon Berhane, General Legal Service Community Solicitor, and
- Judy Harrison, Acting Principal Solicitor

We note that the Attorney-General's Terms of Reference to the Committee are:

"... to investigate, examine and report [to the NT Attorney-General] on possible law reform in relation to wage theft in the Northern Territory.

Matters for the Committee to Consider

Having regard to the scope and application of the *Fair Work Act 2009* (Cth) and sections 109 and 122 of the Constitution of the Commonwealth of Australia in relation to industrial law matters in the Territory:

1. whether the *Fair Work Act 2009* (Cth) adequately covers the possibility of or undertaking of the practice commonly referred to as wage theft;
2. if the answer to 1. is no, whether the Territory has legislative capacity to intervene in the practice, including, but not limited to, criminal or civil sanctions, and if so, what might such legislative intervention consist of; and
3. if the answer to 2. is no, whether there are any other Territory based initiatives that are recommended to deal with the practice of wage theft in the Territory.

In undertaking this reference, the Committee should consult with relevant professionals and agencies in both the Territory and in other jurisdictions. The Committee should consider the



legislative and policy approaches taken in other jurisdictions but have regard to the unique Territory context in making recommendations. The Committee should also have general regard to the cost implications of recommendations.”

We note that wage theft is a national problem as highlighted by the March 2022 report of the Senate Economic References Committee report Systemic, sustained and shameful: Unlawful underpayment of employees’ remuneration¹ (‘the Senate Committee’) which made 19 recommendations, the first two (copy below) recommended that the federal government criminalise wage theft and amend the Fair Work Act to introduce civil penalties and other measures.

Recommendations 1 and 2 in the March 2022 Senate Committee Report:

Recommendation 1: The committee recommends that the Australian Government prioritise amendments to the Fair Work Act 2009 to criminalise wage theft in Australia, and that such legislation:

- apply to the theft of all employee remuneration (including loadings, penalty rates, overtime, leave, allowances and superannuation guarantee);
- include penalties for the falsification of records; and
- is drafted in consultation with the states to ensure Commonwealth wage theft laws do not weaken existing state legislation.

Recommendation 2: The committee recommends that the Australian Government amend the Fair Work Act 2009 to:

- increase civil penalties for wage theft;
- make it an offence for employers to advertise employment with a rate of pay less than the national minimum wage; and
- capture all parties and individuals that directly participate in wage theft, including those who knowingly or recklessly create an environment of wage theft (including franchisors, advisors, head contractors and other third-party participants in supply chains).

DCLS supports these recommendations and in summary submits that:

- The Fair Work Act 2009 (Cth) does not adequately cover or address wage theft and this is highly problematic in the NT where wage theft by employers and by contractors of vulnerable workers is prevalent.
- The NT should support federal action to criminalise wage theft, establish civil penalties, upgrade the Fair Work Act and the federal response generally.
- The NT should proceed with measures which are available under NT legislative and regulatory mechanisms.
- The NT Government and other stakeholders should collaborate to ensure the effectiveness of Territory based initiatives to address theft in the Territory.

¹https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024434/toc_pdf/Systemic,sustainedandshameful.pdf;fileType=application%2Fpdf

1. Background	3
2. Case studies	5
3. Grossly deficient federal protection for vulnerable workers.....	6
3.1 Fair Work Act (Cth).....	6
3.2 Missing powers of search and seizure	6
3.3 FWO insufficient resources	6
3.4 International student visas and hours of work.....	6
4. NT Government measures	7
4.1 NT Government as model employer.....	7
4.2 Labour Hire.....	7
4.3 Government contracts	8
4.4 Legislate for PCBU liability	8
4.5. Educating employers.....	11
4.5 Access to legal help.....	11
5. Conclusion.....	12

1. Background

[Darwin Community Legal Service](#) is a community based collaborative effort which provides free legal help and advocacy and integrates community education, empowerment and reform.

Areas of focus include social security, discrimination, credit and debt, consumer, employment, residential tenancy, disability and seniors rights. Some DCLS programs are NT wide, and others relate to regions.

The DCLS General Legal Service, Tenants’ Advice Service and Seniors and Disability Rights Service have substantial contact with people who have experienced wage theft across a range of sectors. As a result, we are aware of some of the patterns and dynamics of wage theft in the NT.

Wage theft refers to the unfair non-payment or underpayment of wages or remuneration for work by employers or by a contracting party under a contract. The Overview in the recent Senate Committee Report (except below), ² refers to contemporary and historical practices, both of which are highly relevant in the NT.

² Ibid, p.5

Overview

- 1.19 There has long been reported instances of unlawful underpayment or non-payment of employee wages and entitlements—sometimes referred to as 'wage theft'—in Australia, even under the formerly centralised workplace relations system.¹³
- 1.20 Historical theft of indigenous wages in Australia goes back to the 1880s, with workers or their families still waiting for appropriate reparation.¹⁴
- 1.21 Wage theft on a broad scale is a relatively new phenomenon and creates significant problems for Australian labour market regulation. The rate of unlawful underpayment complaints and media reporting increased markedly from around 2015, with mounting evidence that wage theft practices have become widespread in the hospitality, retail, horticulture, franchise-heavy and higher education sectors.¹⁵
- 1.22 A 2015 joint ABC-Fairfax exposé of extensive underpayments in 7-Eleven franchises drew attention to the issue, with over 3 600 workers claiming over \$150 million in unpaid wages, many of them vulnerable international students.¹⁶
- 1.23 In many industries, underpayment is deliberate and systematic, and often normalised, especially for migrant workers. Some research suggests that although many workers are aware that they are being underpaid, it is accepted as 'the norm',¹⁷ while for some employers it has become a 'cost of doing business' or a standard business model, impacting individuals and families.¹⁸

While wage theft in the NT is sometimes associated with ignorance or wilful blindness, the more intractable issues relate to wage theft as an intentional and is a systematic business practice.

From our client work we can confirm that wage theft is prevalent for vulnerable workers in the NT especially:

- English as a second language
- Casualised work
- Gig economy
- Cash in hand

Industries in the NT include:

Hospitality	Security	Disability
Retail	Maritime workers	Aged Care
NT Government	NT Government enterprises	Seasonal

2. Case studies

The anonymised case studies below indicate some of the patterns in the NT.

Case study 1: Cleaning industry

Person A is employed for a contract cleaner on a casual basis. Person A's employment involves working unsociable hours and travelling between different clients to perform their role. Person A has not been provided with a copy of their contract of employment.

Person A is paid the applicable hourly award rate, however, does not receive the additional amounts payable associated with working unsociable hours. Person A is also not paid for time travelling between clients.

Person A does not want to pursue underpayments out of fear that her working hours will be reduced due to her casual employment.

Case study 2: Hospitality

Person B is person with an intellectual disability who commenced first time employment working in a kitchen.

Person B working approximately two (2) unpaid hours. Every week Person B regularly forced to withdraw wages in cash and return to employer.

Employer did not provide contract of employment and payslips to Person B. Person B also received Disability Support Pension and cannot accurately report on earnings because of employer's refusal to provide payslips.

Case study 3: Sex industry

Person C works for employer in sex industry. Person C does not have contract of employment. Person C forced to sign payslips overstating hourly pay and understating hours of work per week.

Case study 4: Early Childhood Education and Care

Person D worked in early childhood centre. Employer unpaid Person D by assigning incorrect Award classification based. Person D was entitled to a higher award classification

Case study 5: Labourer

Person E has gone from job to job in the NT, on labour hire contracts often treated very poorly, and struggling to maintain a regular income. Person E feels that labour hire is being used to rob people like Person E of their rights as workers.

Person F believes they have been underpaid, but the record keeping by the small business has always been a problem. Person F wants to achieve a solution but the business owner won't negotiate or be reasonable.

Case study 6: Security industry

Person G works in the security industry, is still learning English and desperately needs their casual job but there are things that shouldn't be happening, including racism. Person F wants to speak up of others because people aren't getting their correct conditions, they are being underpaid.

3. Grossly deficient federal protection for vulnerable workers

As outlined in our verbal submission the federal protections from wage theft are grossly insufficient in the NT.

The federal model should enable resounding penalties for wage theft and make wage theft a criminal offence.

3.1 Fair Work Act (Cth)

- Lacks measures to achieve sufficient deterrence for employers.
- Should be amended to introduce civil penalties and in other ways outlined by the Senate Committee, to achieve a nationally consistent model aimed at protecting workers from wage theft.

3.2 Missing powers of search and seizure

- The federal scheme needs to provide powers to enter and seize employer records in support of workers demonstrating and exposing wage theft.
- This is because liable parties often fail to provide requested records, and there are cases where records are hidden or destroyed to make it harder for a person trying to recover wages to prove their case.

3.3 FWO insufficient resources

- The Fair Work Ombudsman ('FWO') is under resourced for the level of activity and proactivity required in the NT.
- The Commonwealth should be urged to allocate adequate resources for the FWO's operations and intended impacts in the NT.

3.4 International student visas and hours of work

- While the NT wants to attract international students, visa conditions under federal law are resulting in many students being unable to support themselves.
- The hours of work permitted under visa conditions are driving many students into informal, cash in hand employment – that is, into situations where they are highly vulnerable to wage theft.
- During a period of worker shortages across many sectors, this regulatory framework has the perverse effect of incentivising employers towards informal arrangements.

4. NT Government measures

Our submission does not address constitutional issues regarding the distribution of powers between the Commonwealth and the NT, which are being addressed by others but we:

- Agree that the Fair Work Act (Cth) should be amended, and other measures should be taken federally– which are Commonwealth responsibilities, and
- Submit that there are a range of measures the NT can take within Territory powers – which evoke and are NT responsibilities.

That is, we recommend the following measures which are within NT Government powers:

4.1 NT Government as model employer

- The NT Government, it's various entities and statutory bodies, should never engage in wage theft and should always be model employers.
- The NT Government should ensure that there are relevant directives and other regulatory arrangements in place to guard against wage theft in its own operations and those of quasi-government bodies and statutory bodies.
- The NT Government should ensure that model standards are accompanied by:
 - key performance indicators,
 - monitoring and reporting, and
 - Intervention if standards are not met.

4.2 Labour Hire

- Labour hire (also sometimes referred to as 'indirect employment') is a construct in labour law which circumvents many basic protections for workers.³
- Labour hire workers, are typically employed by a labour hire company which does not guarantee them employment, instead feeding them out on 'assignments' to entities which would otherwise be their employer.
- Labour hire workers can typically be terminated from an 'assignment' on 24 hours' notice without cause.
- While labour hire is often promoted as creating an 'agile' or 'flexible' workforce – this often comes at the expense of the worker who is vulnerable to receiving lower wages and grossly inferior conditions. While some workers do well through labour hire engagements, many do not, and labour hire is a construct which in effectively enables theft of wages and conditions from workers.

³ See for example the Productivity Commissions recent Aged Care Employment Study Report, October 2022 <https://www.pc.gov.au/inquiries/completed/aged-care-employment/report/aged-care-employment.pdf>

- The NT is the only jurisdiction in Australia which lacks regulation of labour hire, and this should be addressed. This is outlined in [Not very far from modern slavery? Labour-hire reform in the Northern Territory](#), Scanlon Williams, October 2021, Law Internship Research Paper for Darwin Community Legal Service
- The [Darwin Community Legal Service submission in May 2022 to the Productivity Commissions Aged Care Employment Study](#), also discussed how labour hire operates problematically for workers in the NT and for people receiving aged care and on the waiting list all of which impacts informal carers, families and communities. .

4.3 Government contracts

- NT Government procurement and contracting should protect workers from wage theft by favouring employers:
 - Whose workforce are covered by an Enterprise Bargaining Agreement, and
 - Who have a better track record of providing continuing, rather than casual, employment.
- Procurement should incorporate standards to guard against bidders whose profit comes at the expense of proper conditions for workers.

4.4 Legislate for PCBU liability

- Using the model of health and safety legislation, the NT should legislate to hold the Person Conducting the Business Undertaking ('PCBU') liable for wage theft
- This would mean that the head contractor would be responsible for wage theft - and so on down the chain
- This model applies already in health and safety legislation.

That is:

- The concept of a Person Conducting a Business or Undertaking ("PCBU") has now been widely accepted throughout employment areas due to the introduction of Work Health and Safety National Uniform Legislation.
- A PCBU is defined in section 5 of the **Work Health Safety (National Uniform Legislation) 2011** (NT) as:

- (1) For the purposes of this Act, a person conducts a business or undertaking:
 - (a) whether the person conducts the business or undertaking alone or with others; and

(b) whether or not the business or undertaking is conducted for profit or gain.

(2) A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.

(3) If a business or undertaking is conducted by a partnership (other than an incorporated partnership), a reference in this Act to a person conducting the business or undertaking is to be read as a reference to each partner in the partnership.

(4) A person does not conduct a business or undertaking to the extent that the person is engaged solely as a worker in, or as an officer of, that business or undertaking.

(5) An elected member of a local government council does not in that capacity conduct a business or undertaking.

(6) The Regulations may specify the circumstances in which a person may be taken not to be a person who conducts a business or undertaking for the purposes of this Act or any provision of this Act.

(7) A volunteer association does not conduct a business or undertaking for the purposes of this Act.

(8) In this section:

volunteer association means a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

- This definition has been accepted into other legislation, particularly the Fair Work Act 2009 (Cth) (“FWA”) when amended by the Fair Work Amendment Act 2013. Where to assist in defining who is covered by the bullying and sexual harassment amendments it refers to Work Health and Safety Act 2011 (Cth) at section 789FD.
- NT Worksafe describes a PCBU on its website as:
 - PCBU is a new term in the WHS Act that replaces ‘employer’ in the Northern Territories old health and safety legislation. If you previously had duties as an employer, you are now a PCBU under the WHS laws.
 - In many cases PCBU still refers to an employer but it’s also used to describe others such as contractors, designers, manufacturers, suppliers, importers, persons who install, construct or commission plant or structures, franchisees and self-employed people. It’s a broad concept aimed at capturing all types of working arrangements.
 - A PCBU is the main duty holder. They may be an individual person or legal entity, working for profit or not-for-profit.
- Individuals who are PCBUs include:
 - committee members in unincorporated associations
 - partners in partnerships
 - individual trustees of trusts and sole traders

- self-employed people.
- Legal entities that are PCBUs include:
 - incorporated bodies, including incorporated associations
 - private and public companies
 - trustees or cooperatives that are companies
 - local authorities.
- A person may be an individual or organisation such as a company, voluntary association or partnership. A business is generally an enterprise that is conducted with a view to making a profit which has a degree of organisation, system and continuity. An undertaking is generally not for profit or commercial in nature, although it may have elements of organisation, system and continuity.⁴
- This widens the definition of employer to include entities that were not specified in previous legislation.
- This is also shown in FWA by the explanations given by the Fair Work Commission in its Sexual Harassment Benchbook where it states:
 - “The term **person conducting a business or undertaking** or PCBU refers to the legal entity running the business or undertaking, and includes incorporated entities, sole traders, partners of a partnership and certain senior ‘officers’ of an unincorporated association. It also refers to the Commonwealth including its Departments, local governments and other government businesses and undertakings.”⁵
- Not all PCBUs are covered by the laws to stop bullying and/or sexual harassment in the Fair Work Act.
- Public and private sector employers (including the self-employed) are the largest category of PCBU, but the term is broader and also includes principals that use contractors or subcontractors as well as franchisors and bailors.
- A person (including a corporate entity) may conduct a business or undertaking alone or with others. It is irrelevant whether the business or undertaking is conducted for profit or gain.
- Exclusions
 - The following are examples of persons or bodies that are not a business or undertaking under these laws:
 - a person engaged solely as a worker in, or as an officer of, that business or undertaking
 - an elected member of a local authority (acting in that capacity), or

⁴ <https://worksafe.nt.gov.au/forms-and-resources/bulletins/information-for-a-person-conducting-a-business-or-undertaking>

⁵ <https://www.fwc.gov.au/what-person-conducting-business-or-undertaking-pcbu>

- a wholly ‘volunteer association’ that does not employ anyone (whether incorporated or not).⁶
- This broadening of definitions of who is responsible for actions within occur to workers would be beneficial in the context of accountability in the matter of wage theft.
- The widening that “also includes principals that use contractors or subcontractors as well as franchisors and bailors” would assist in making those who use employment arrangements to undermine responsibilities under the FWA or encouraging the conduct of their sub-contractors, franchisees in underpaying, sham- contracting or avoiding their obligations under the FWA.
- Using this recognised definition of PCBU may make the instigator or user of these arrangements ultimately responsible for any breaches that they are reasonably aware of.

4.5. Educating employers

- In collaboration with the NT Chamber of Commerce, the NT Government, via the Department of Trade and Innovation and/or in other ways - should promote education and awareness of employers about legal requirements and expectations.
- The NT Government should increase positive incentives for good employment practices and increased disincentives for wage theft, including naming and shaming.

4.5 Access to legal help

- The NT should collaborate with the Commonwealth to increase access of employees (including groups of employees) to legal help in cases of wage theft in the NT.
- This should include increasing funding to non-profit legal services which can scale up to proactively assist and respond to vulnerable groups.
 - This requires collaborating with unions, and other groups accessible to vulnerable workers, to extend education and help to workers.

The NT should help ensure that these unmet legal and advocacy needs are reflected in:

- the NT Strategy and Action Plan under the [National Legal Assistance Partnership](#) (‘NLAP’),
- The review of the NLAP prior to it ending in 2025, and
- In the Commonwealth/Territory Agreement which follows on from the current NLAP.

⁶ <https://www.fwc.gov.au/what-person-conducting-business-or-undertaking-pcbu>

5. Conclusion

Wage theft is prevalent in the NT and mainly affects vulnerable workers across a range of sectors.

Even though addressing wage theft must involve increased Commonwealth action there are a range of complementary measures which can and should be undertaken by the NT.

The latter include legislative and regulatory measures as well as education and facilitation.

Please contact us if we can be of further assistance.

Regards,



Rachael Bowker
Chief Executive Officer



Judy Harrison
Principal Solicitor