



Parliament of  
South Australia

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**FINAL REPORT**

**OF THE**

**SELECT COMMITTEE**

**ON WAGE THEFT IN SOUTH AUSTRALIA**

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# **1. Select Committee on Wage Theft in South Australia**

## **1.1 Appointment**

The Legislative Council established a Select Committee in October 2018 to inquire into and report on wage theft in South Australia. The Interim Report was tabled on 21 July 2020. On 3 June 2020, the Terms of Reference were amended to include:

- (ha) The impact of COVID-19 economic measures on work practices;
- (hb) The intersection of slavery and slavery-like practices with wage theft to establish the depths of human trafficking in South Australia; and

## **1.2 Membership**

Hon Irene Pnevmatikos MLC (Chairperson)  
Hon Connie Bonaros MLC  
Hon Heidi Girolamo MLC (from 24/08/2021)  
Hon Robert Simms MLC (from 11/05/2021)  
Hon Russell Wortley MLC (from 18/06/2019)

*Hon Emily Bourke MLC (23/10/2018 - 18/06/2019)*  
*Hon Tammy Franks MLC (31/10/2018 - 11/05/2021)*  
*Hon Jing Lee MLC (18/02/2020 - 10/09/2020)*  
*Hon David Ridgway (10/09/2020 - 30/06/2021)*  
*Hon Terry Stephens MLC (24/10/2018 - 18/02/2020)*

*Secretary*  
Ms L Guy

*Research officer*  
Dr M Robinson

## **1.3 Meetings**

The Select Committee advertised for interested persons to provide written submissions or to register an interest in appearing before it. Since its last Report, the Committee met on 8 occasions. A list of people who appeared before the Committee is in Appendix 1. The Committee received an additional 5 written submissions, which are listed in Appendix 2.

## 2. Recommendations

### *Federal Legislation*

#### 1. Expansion of the Fair Work Ombudsman.

- a. Dramatically increase funding and resources allocated to ensure the FWO operates to its intended capacity to resolve workplace disputes.
- b. Establish an independent review of the FWO to assess the performance, resourcing, and culture to ensure the FWO responds to wage theft and supports exploited workers.
- c. Require the FWO to undertake several routine and targeted unannounced inspections per year to any workplace and follow up on audits on non-compliant employers.
- d. Employ staff from diverse cultural and linguistic backgrounds within the FWO.
- e. Ensure all material provided by the FWO is *in language* and can be easily accessed by those seeking it.
- f. Restructure the FWO to separate the educative function from the compliance function.
- g. Conduct an ongoing public awareness campaign.

#### 2. Fair Work Act

- a. Amend the *Fair Work Act 2009* (Cth), to criminalise wage theft, making it an offence for an employer to dishonestly, deliberately, and systemically underpaying an employee. Penalties of fines and imprisonment.
- b. Charge interest mandatorily on stolen wages recovered.
- c. Ensure that all employees have access to a right of audit, even without notice, with Registered Organisations acting on their behalf.
- d. Increase the threshold for small claims to \$50,000 indexed annually.
- e. Minimise the vulnerability of temporary migrant workers. Formalise the agreement between the Department of Home Affairs and the Fair Work Ombudsman to ensure workers who are pursuing an industrial claim are not jeopardising their visa status or face deportation, similarly the Migration Act 1958 should be amended.
- f. Broaden s 296 to include all loadings, penalties and allowances to prevent enterprise agreements falling below the conditions of modern awards.
- g. Accommodate emerging forms of non-traditional employment to afford those workers similar rights as available to employees, including;
  - i. Expanding the current definition of a worker to include all workers paid by hourly, piece rates or commission.
  - ii. Broadening access to the benefits of collective bargaining, minimum standards for pay and conditions.

- iii. Access to the FWC.
- h. Give SAET and eligible courts the same broad powers as the Federal and Family Circuit Court. Meaning SAET would be empowered to order a person responsible for phoenixing and sham contracting activity to personally pay the amount owed to a worker and unpaid wages.
- i. Under s 544, increase the time limit on applications to allow for applications after 6 years.

### **3. Amend the *Modern Slavery Act 2018 (Cth)***

- a. Reduce the amount of consolidated revenue for the reporting period to an amount that would capture a greater number of businesses within Australia.
- b. Make annual reporting on the risks of modern slavery in businesses operations and supply chains and actions to address those risks mandatory for businesses.

#### ***Other Federal Measures***

- 4. Victims of wage theft should not be further disadvantaged by unfair tax treatment when their stolen wages are recovered.
- 5. Invite the Australian Law Reform Commission to investigate establishing wage theft as an anti-competitive practice, as well as options for private enforcement of breaches of competition law.
- 6. Establish a national whistle-blowing incentive scheme to encourage reporting of wage theft.
- 7. Department of Home Affairs to provide immunity for refugees on temporary visas and international students if they report unscrupulous employers and businesses, when otherwise they would face sanctions.
- 8. ASIC should act on business act on businesses trading insolvent, be it via an employee report of not being paid. If the employer is uncontactable, assets should be frozen to recoup entitlements.
- 9. Where a court order details employers using wage theft as a business model, they should be disqualified indefinitely from holding the position of company director. Professional licence for directors should be suspended until the debt is paid.
- 10. Instituting a grant scheme with Federal Government funding for both employers, employees, and community organisation to conduct education programs, advice and training on the rights and responsibilities of both employers and workers.
- 11. Review and update the *Fair Entitlements Guarantee Act 2012 (Cth)*, with the intention to extend the time limit and expand the scheme to include redundancy and all underpayments.

#### ***Superannuation***

- 12. Superannuation should be included in as an industrial entitlement in the National Employment Standards.

13. Superannuation legislation to be amended to require employers to pay superannuation fortnightly to coincide with wage payments, or monthly, in line with section 323 of the *Fair Work Act 2009* (Cth).
14. Where possible, give superannuation funds the power to investigate and recoup unpaid entitlements on behalf of their members.
15. The Australian Taxation Office should increase proactive enforcement of unpaid superannuation.
16. An automatic penalty should be applied to employers who do not pay superannuation by the legislated date, with the penalty funding the enforcement of the arrangement.
17. Penalties for company directors who refuse to pay a Superannuation Guarantee liability should be strictly enforced.
18. Unpaid superannuation should be included as a recoverable entitlement under the Fair Entitlements Guarantee scheme.
19. The Fair Entitlements Guarantee scheme should be extended to temporary overseas visa workers who are currently denied access.
20. All ATO payment plans or debt notices about unpaid Superannuation should be publicly searchable by employees of an employer, who would otherwise have no idea their super might not be paid.

### ***State Legislation***

#### **21. Creation of a Wage Theft Act**

- a. Make the dishonest, deliberate, and systemic underpayment or non-payment of wages an offence. Punishment to include fines and jail time.
- b. Establish a Wage Theft Inspectorate as the regulator to have functions and powers of inspectors.
- c. Streamline court services with the Magistrates Court to receive automatic enforcement from decisions and judgements of the SAET.

#### **22. *Fair Work Act 1994* (SA)**

- a. Amend the *Fair Work Act 1994* (SA) to introduce a pecuniary penalty regime for state system employees, reflecting that which is available under the Commonwealth *Fair Work Act 2009*, such as penalties to be a significant deterrent to non-compliance.
- b. Amend the *Fair Work Act 1994* (SA) and the *South Australian Employment Act 2014* to ensure that courts empowered to deal with wage theft have powers consistent with the powers of the Family Court to prevent those responsible for wage theft from hiding assets.
- c. Restore s 182 of the former *Fair Work Act* (SA), to allow the SAET to make payment orders against a person in control of an employer.

- d. Amend the *Fair Work Act (SA)* to give SAET the jurisdiction over phoenixing and sham contracts. As well as the power to order a person involved in underpayments under s 550 to pay the underpayment.

### **23. *Labour Hire Licensing Act 2017 (SA)***

- a. Expanding the *Labour Hire Licensing Act 2017 (SA)* to include all industry sectors.

### **24. *Work Health and Safety Act 2012 (SA)***

- a. Improve the *Work Health and Safety Act 2012 (SA)*.
- b. Dramatically increase funding and recourses allocated to ensure the Safe Work SA operates to its intended capacity and to resolve workplace disputes.
- c. Legislative limitations should be lifted to ensure that Safe Work SA inspectors can fully investigate alleged instances.

### **25. *Long Service Leave Act 1987 (SA)***

- a. Under s 13 (4), increase the time limit on applications to allow for applications after 3 years.

### ***Other Measures***

26. Increase funding for community legal centres that regularly assist workers with wage theft issues without cost to workers.
27. As a unionised workplace offers the most sustainable solution to non-compliance, unions should be empowered to investigate, prevent, and prosecute wage theft.
28. Unions should have right of entry to sites to access time and wage records and educate employees on their entitlements.
29. The State Government should assist non-union employees to access representation for wage theft and provide funding for unions to take on the role.
30. The State Government to lobby the Federal Government for additional FWO inspectors to be located in South Australia.
31. Introduce a Wage Theft Compensation Fund as a 'last resort'/'safeguard' for workers whose employers are phoenixing. By way of State Government Control a levy should be introduced as to ensure workers regain their wages regardless if they file for bankruptcy.
32. SAET should review relevant form and processes to ensure the legal procedure is simple and user-friendly for workers and their representatives.
33. Universities have an obligation to teach students about Australia's industrial relation system and employee rights and responsibilities and should use University funded organisations such as Study Adelaide to fulfil this requirement.

### ***Multi-Lateral Action***

34. Establish a fund in South Australia, with oversight by the Industrial Relations Consultative Council, to facilitate visits to schools, TAFE and VET providers, and universities.
35. Migrants arriving in Australia should receive an information pack explaining their worker rights and entitlements on arrival.
36. Federal, state/territory and local governments should promote compliance by excluding businesses culpable of wage theft from their procurement and grant payments.
37. Breaches of the Fair Work Act should be noted on a public register and result in disqualification from government contracts.



### 3. Overview of Evidence

The Committee's Interim Report in 2020 revealed widespread exploitation of workers who had been deprived of wages, superannuation and other entitlements, those who were subject to intimidation, loss of employment and, for some, their visa status, leading to deportation. Wage theft was found to be pervasive across South Australia among vulnerable cohorts of workers, especially those in non-union, casualised, insecure work. Effectively wage theft has become the basis of a business model. With restrictions related to COVID-19 in place, the Committee determined to consider the impact of these economic measures on work conditions in the community and to appraise the intersection of slavery and slavery-like practices and wage theft.

Much of the current evidence before the Committee reinforced the findings around wage theft and exploitation set out in the Interim Report. The effect of COVID-19 restrictions and economic measures put in place to counterbalance the impact were shown to result in further abuse of some workers. The recurring theme was that with reduced job opportunities and the difficulty of getting a job, it was essential to keep that job, even when workers knew they were being underpaid and exploited. In such a vulnerable environment, there were fewer reports of wage theft or mistreatment for fear of repercussions in the workplace, of being removed from rosters, allocated more difficult work, or even being dismissed.

Although providing businesses and workers with support, evidence revealed instances of the JobKeeper program being manipulated to employers' advantage. With JobKeeper's three-way structure of the Australian Taxation Office, the Federal Government and business, workers lacked information and were subject to employers' directives and misuse of the scheme. The plight of international students stranded in the State without support due to COVID-19 border closures prompted comment on the role and responsibility of the higher education sector, as students were ill-equipped in an abusive job market to identify and assert their work rights. The Committee heard from the SA Labour Info Hub, set up by volunteers to organise migrant workers and international students to fight against their exploitation.

The International Labour Organization's Indicators of Forced Labour underpinned the consideration of slavery and slavery-like practices. Current research into commercial labour exploitation in South Australia provided evidence that modern slavery is a multidimensional problem that includes wage theft but also threats and violence, racism, sexual and gender abuse, silencing and isolation. Temporary migratory status, lack of a reliable network and knowledge of the Australian system, a fear of repercussions and an inability to leave exploitative conditions were common in cases of slavery-like practices in the State. The violent assault of two workers in the Fun Tea Shop incident in Adelaide was considered within these parameters.

## 4. Background

On 3 June 2020, the Hon Irene Pnevmatikos moved that the terms of reference of the Select Committee on Wage Theft in South Australia be amended by inserting:

- (ha) The impact of COVID-19 economic measures on work practices;
- (hb) The intersection of slavery and slavery-like practices with wage theft to establish the depths of human trafficking in South Australia.

The amendments were in response to changes in work practices arising from the pandemic with the aim of uncovering the true human cost of wage theft in the State. Reports of the misuse of the JobKeeper scheme, although a federal program, were also to be considered.

The Hon Tammy Franks supported the motion, recognising the profound impact of COVID-19 in the community and the treatment of those trapped in South Australia by the pandemic. The lack of support for international students and those on a range of visas, now without employment, which has seen them reliant on charity, was to be examined further.

The Hon Connie Bonaros also supported the motion.

The Hon Rob Lucas, Treasurer, opposed the extension of the terms of reference, as he had opposed the original motion, deeming this to be a time for all to be working together – government, employers and employees – in the interests of post COVID-19 recovery. The terms “slavery” and “slavery-like”, he saw as seeking to divide rather than unite.

The motion was carried.

The Interim Report of the Select Committee on Wage Theft in South Australia was tabled on 21 July 2020.

## 5. The Inquiry

### 5.1 Term of reference (ha)

*The impact of COVID-19 economic measures on work practices;*

Evidence before the Committee revealed the effect of COVID-19 restrictions on job opportunities, workplaces and their workers, as well as manipulation and exploitation around the JobKeeper program. The common theme was the difficulty in getting a job, given the reduced number of opportunities, and the extreme need to keep that job, despite workers' awareness that they were being underpaid and exploited.

The United Workers Union (UWU), one of the largest in the country, has some 20,000 members in South Australia. Most of the workers in industries covered by the UWU are either vulnerable, low income or in some other way challenged. Karen Grogan, National Political Coordinator, reported that as a result of COVID-19, the union has seen an increase in "employer abusive behaviours" and a decline in the "willingness and the comfort of workers to stand up for themselves or bring their issues forward". Previously, union members had been "prepared to fight for the common good and for that of fellow workers". Faced with the economic restrictions around COVID-19, however, they are ready to accept many "really challenging behaviours" in order to remain employed in some form. (Evidence, p 381, 382)

From the UWU's perspective, workers who are particularly vulnerable include migrant workers on farms, young workers who are paid in cash, and cleaning industries where the subcontracting conditions introduced due to COVID-19 have made their circumstances even more insecure. Weak laws and regulations around subcontracting, sham contracting and labour hire have seen employers disguising these relationships and concealing subcontracting. UWU members are being paid well below award wages and are working extensive hours, being required to undertake the same level of work in significantly fewer hours. Where previously they worked over a seven-day period, now it is 12-hour shifts over five days, in order to lower the penalty rate component in their wages. Effectively, there is an increased requirement to do more work for the same hours and the same pay, lower wages and cost cutting, all impacting on workers' take-home pay. (Evidence, p 382)

Issues around the "layering of contracts" have caused significant administrative challenges. As an example, one worker had done an additional 12-hour shift at very late notice, following the company's pleading. Subsequently, the shift was not included when the worker was paid. Not being on the original roster system, the employer required the worker to prove that they did, in fact, work the shift. Because of this layering of one company reporting to another company, to another, it falls to the worker to prove they did work, which is causing great stress. This was not an isolated incident; payslips are repeatedly not reflecting accurate hours. (Evidence, p 382; UWU, *Wage Theft in South Australia*, May 2021, p 5, 6)

There were also ongoing concerns in the horticultural industry. Aira Firdaus, Lead Official, Farms, UWU, provided evidence from a migrant worker on a bridging visa who had worked in the Riverland and the South-East. Prior to the pandemic, she was occasionally not paid for several weeks, which she saw as a means of control to prevent her from leaving. Sometimes she was paid in cash at \$14 or \$15 an hour, while being charged \$70 or \$90 a week for accommodation shared with 4 or 5 people. The contractor argued that he could not pay the correct rate because the farmer would not agree. Ironically, with COVID-19, she received \$22

an hour cash, others \$20 an hour. In her view, “they increased the pay because nobody wanted to work because of low pay, and people were scared of COVID”. (Evidence, p 383, 384)

From another perspective, Josh Peak, Secretary, Shop, Distributive and Allied Employees’ Association (SDA) advised that COVID-19’s impact on the retail sector was “very much two speed, occurring at exactly the same time”. Supermarkets experienced a huge surge, whereas the discretionary sector was effectively empty immediately. Accordingly, in retail the impact of COVID-19 restrictions has not been the same as in other sectors. Even so, in the early stage of the pandemic, there were non-compliance issues, mainly with smaller employers, where many workers were not paid their full JobKeeper entitlements. Moreover, there was a significant level of misunderstanding as entitlements and policy changed during the pandemic, with many workers simply accepting their employers’ instructions rather than querying if the directions were correct. It has fallen to the union to ensure that workers received back payment for illicit changes to their contract of employment and notifying employers of non-compliance. (Evidence, p 400)

Abuses of the JobKeeper payment and temporary changes to the Fair Work Act, allowing employers in receipt of the JobKeeper entitlements to issue directives to employees, occurred regularly; not all were “lawful”. While providing employers with options to “juggle people’s work” may have been reasonable, given the COVID-19 constraints, the Committee was advised that the provisions had been misused, contributing to wage theft. Misapplications included:

- Some UWU members in the hospitality industry being tasked with renovating a premises, not cleaning, painting or minor maintenance, but using power tools, undertaking carpentry work, commercial cleaning with commercial chemicals, with no safety training provided; the workers resigned due to the risks.
- A worker required to undertake maintenance and paint a flight of stairs who fell and broke her ankle; the employer refused compensation.
- A childcare company terminating their cleaners and directing educators to carry out the additional cleaning.
- A bar worker required to perform cleaning work but being paid at the lower cleaning rate, even though the employer was claiming the full JobKeeper subsidy.
- Workers being attached to a different award because the employer had changed their job from what they were employed to do.
- Employers forcing employees to take all leave entitlements, while the employer was eligible for, and receiving, JobKeeper.
- Employers introducing leave specific to COVID-19 but requiring that all standard leave entitlements be used before it could be accessed.
- An employer forcing workers to take all leave balances, using JobKeeper to pay them. When the leave balances were exhausted, the workers were made redundant and the employer was exempt from paying out any leave.
- The pandemic being used as an excuse to stand workers down without valid reason, by claiming that it was simply a precaution.
- Workers being required to work additional hours to earn the JobKeeper amount, even if they were unable or unwilling to do so.
- Workers being paid only for the hours they worked, despite the employer claiming the full JobKeeper amount.

- Workers being directed to forgo full-time or part-time employment to become a casual; using COVID-19 to permanently change a person's status of employment is not a lawful directive.
- In a UWU survey, some 15 per cent of recipients of a JobKeeper claimed their employer had asked them to sign additional documents to those prescribed by the Australian Taxation Office (ATO), effectively entitling the employer to retain some of the JobKeeper payment or make other unlawful changes. In one case, the employer was taking 60 per cent of JobKeeper.
- In the same survey, 68 per cent of hospitality workers did not receive any JobKeeper payments, either because they were ineligible or because their employer chose to terminate their employment rather than apply.
- A worker being asked to sacrifice 10 per cent of their salary to "help keep the business afloat".
- Some workers taking on higher duties but not being paid at that higher level.
- Workers being directed to clean their employer's house to make up the difference between their normal wage and the \$750 JobKeeper payment.

(Evidence, p 340, 342, 343, 383, 400, 410; UWU, *Wage Theft in South Australia*, May 2021, p 6, 7)

Although not a perfect scheme, JobKeeper was important in allowing many firms to continue to operate through the pandemic and ensuring that workers were able to earn a wage. Even so, the UWU deemed the structure of the JobKeeper allowance to be the fundamental cause for much of the manipulation. The arbitrary and often very restrictive eligibility requirements, as well as the mechanism of paying employers directly and not employees, rendered the system "incapable of assisting everyone who required assistance" during the pandemic and enabled opportunities for abuse. As eligibility required the worker to be a citizen or permanent resident, to have been a casual for more than 12 months, there was a group of migrant and casual workers, in particular international students, young workers and young women, who were not entitled. Moreover, enforcement mechanisms surrounding JobKeeper were not clear. The ATO stressed they were unable to hear disputes between employees and employers regarding the payment. Since JobKeeper did not exist as a result of any award or agreement, there was some uncertainty as to whether disputes could be raised through the South Australian Employment Tribunal (SAET) or the Fair Work Commission (FWC). Because the relationship was between the ATO, the government and the employer, employees had no access to information about the contract or the agreement between the parties. Consequently, employees were powerless to do other than as directed by the employer, despite the work being outside their skills and abilities, or causing safety concerns. (Evidence, p 341, 342, 383, 385; UWU, *Wage Theft in South Australia*, May 2021, p 5, 6, 7)

Apart from JobKeeper abuse, some employers, who previously had workplace agreements that generally offered better conditions for their workforce, moved employees to lower award-based wages. Karen Grogan, UWU, cited a recent example of a very large hospitality employer who had changed the licence name in order to employ all new staff on lower award wages and more insecure conditions than their co-workers on enterprise bargaining agreements (EBA). Effectively, wage theft has become hugely problematic in the current economy. In many industries it has become the new normal, an active business decision, a business model utilised simply "because they can get away with it". This has impacted on UWU members' ability to offer resistance to exploitation. As a result, the only reports the UWU received were from members who had moved to another employer, when they were confident that their work would not be negatively impacted. Other workers were not prepared to come forward, since those

expressing concerns about their wages or employment conditions found their shifts had been cut, they were no longer on the rosters, or they were allocated different types of work. (Evidence, p 381, 382)

The Australian Workers Union (AWU), as part of its constitutional coverage, also focused on the extremely vulnerable agricultural sector. Peter Lamps, Secretary, SA Branch, advised of a farm-worker in the South-East being told by his employer that if he brought in the union to rectify his claim of underpayment of wages, “he would be sacked”. Mr Lamps explained that, when faced with an industrial issue, there are some employers who are “still working in the 1950s who make threats”. During the COVID period, the union encountered challenges around their right of entry, “brick walls”, with the virus being actively used to restrain legitimate applications. (Evidence, p 391, 397)

Aira Firdaus, UWU, also reported of workers who joined the union being sacked. As a result, migrant workers or those with insecure visa status are “terrified or having anything to do with the union”. With many workplaces in the horticulture industry being very anti union, abusive and oppressive, workers could only engage with the union at their homes or outside the workplace to report their exploitation. Although workers have been slowly approaching the UWU, the inability to speak out publicly due to visa insecurity is an obstacle. Aira Firdaus maintained that the ongoing labour shortages and the prevalence and depth of exploitation in the industry are interrelated, stemming from “decades of piecemeal, short-term, unregulated, low-road solutions promulgated by industry associations and governments that have failed both workers and growers”. This has been even more apparent during the pandemic in 2019 and 2020. Essentially, members’ primary concern has been retaining work of any kind. Their level of fear and anxiety following the pandemic and the behaviour of some employers has been “appalling to see”. (Evidence, p 383, 384, 385)

Accordingly, the UWU called for a different, long-term approach to address these challenges, implementing solutions to raise standards and foster compliance. Reducing the industry’s reliance on unscrupulous labour hire contractors and enabling workers to continue in the industry long term would create greater stability and certainty for both workers and growers. As noted, most of these workers are migrants and others who do not know their rights in Australia. Unless the issue of visa insecurity is addressed with a reform of the migration system, workers will continue to be deterred from reporting wage theft and slavery-like practices. (Evidence, p 384)

Considering this environment, on 15 December 2020, the AWU applied to the FWC to vary the *Horticulture Award 2020*, which deals with pieceworker rates. The Full Bench of the commission found that work in the horticulture industry is labour intensive and predominantly seasonal, with a high proportion of casual and contract labour; more than half are temporary migrant workers, rendering them vulnerable to exploitation. Moreover, there is widespread non-compliance with clause 15.2 of the Horticulture Award, in that pieceworker rates are set unilaterally by the grower and presented to the employee on a ‘take or leave it’ basis, rather than being the outcome of any genuine negotiation between the employer and employee. The Full Bench expressed the view that the existing pieceworker provisions in the Horticulture Award are not fit for purpose; they do not provide a fair and relevant minimum safety net as required by s.134 of the Act. Accordingly, on 3 November 2021, the Full Bench varied the Horticulture Award to insert a minimum wage floor (the minimum casual rate is currently

\$25.41 an hour), with consequential time recording provisions in clause 15.2.<sup>1</sup> The AWU's National Secretary, Dan Walton, described the ruling as one of the most significant industrial decisions of modern times. He added, if from now on workers were earning less than \$25 an hour fruit picking in Australia, the "boss is breaking the law and stealing from you."<sup>2</sup>

Another challenge exposing the current exploitative conditions has seen Stewart Levitt, of law firm Levitt Robinson, preparing a class action on behalf of Pacific Island workers against labour hire companies that are accused of exploitation and wage theft. As reported on the law firm's website, (originally published in *The Australian* on 4 November 2021), South Sea islanders brought to Australia as farm workers on the promise of wages of \$900 a week are left with less than \$300 a week to pay for food and other basics, after working 12-hour days; this as a result of the excessive deductions by labour hire companies. These include \$200 a week or more for accommodation, often in old shipping containers or squalid, overcrowded dormitories owned by labour hire companies who are "approved employers", \$50 to \$100 a week for transport, often in vans operated by the same firms, and a range of other charges. The stated objectives of the Seasonal Worker Program (SWP) are to provide foreign aid to citizens of participating countries through seasonal work and to meet the needs of Australian industry where there is difficulty obtaining "local" workers. But many of these seasonal workers struggle to save enough to remit any money back to their families overseas. Stewart Levitt stated that farmers in regional areas are reliant on labour hire companies to provide seasonal workers but those who refuse to exploit South Sea workers are left with higher overheads than their competitors. Mr Levitt deemed this to be "literally a race to the bottom", likening the SWP to "blackbirding", the 19<sup>th</sup> century practice of coercing South Sea islanders to work in Queensland's cane fields.<sup>3</sup>

With recognition of the recurrent vulnerability of migrant workers, the UWU advocated for an amnesty for undocumented workers and those on temporary visas who have no pathway to permanent residency. The existing complexity of the migration system makes it "easy to set workers up to fail in terms of living in Australia safely and working in a safe environment where they get paid the proper wage". Indeed, the Victorian Farmers Federation has publicly supported an amnesty since 2017, given the high level of systemic exploitation in horticulture. Yet Josh Peak, SDA, advised that the Fair Work Ombudsman (FWO) and the Department of Home Affairs have created an assurance protocol, providing amnesty from legal action prejudicing their visa for certain workers who seek underpayment through the FWO. Given the level of wage theft international students face and the limited resources of the FWO, he argued that this amnesty should be extended beyond workers who have had their matter progress through the FWO. The AWU, however, had reservations regarding an amnesty, maintaining that they "have a habit of repeating themselves almost on a yearly basis". Once granted, it would potentially lead to an industry where illegal behaviour leads to another amnesty to correct it. Any such change, therefore, requires genuine consideration. Instead, Peter Lamps, Secretary, SA Branch, saw the need for "a strong cop on the beat" and an industrial association able to demonstrate illegal behaviour in a particular workplace. In court, the issue should not only be about that individual case but also any other worker in the same category. (Evidence, p 385, 386, 387, 394, 395, 402)

<sup>1</sup> Fair Work Commission, Application to vary the Horticulture Award 2021, AM2020/104 [2021] FWC 5554, 3 November 2021: <https://www.fwc.gov.au/documents/documents/awardmod/variations/2020/am2020104-2021fwcfb5554summary-fwc-031121.pdf>

<sup>2</sup> <https://www.abc.net.au/news/rural/2021-11-04/fair-work-rules-every-farm-worker-entitled-minimum-rate-of-pay/100592806>

<sup>3</sup> Levitt Robinson: <https://www.levittrobinson.com/post/pacific-island-farm-workers-to-launch-class-action-against-labour-hire-firms-over-wage-theft>

There has also been pressure on employers themselves. In a more “sluggish” economic environment, with less economic activity, there has been greater competition among employers to survive. Faced with some employers paying below award rates, other compliant employers come under greater pressure to follow suit. Peter Lamps, AWU, acknowledged that in the last 15 months, while some employers in the Riverland, the Mallee area and in the South-East have been compliant, others have actively used the pandemic for short-term gain. Although, in his opinion, they will ultimately be brought before the courts, the difficulty has been detecting the underpayment/non-payment of wages and other aspects of exploitation early enough. (Evidence, p 365, 366, 392)

Considering the evidence at hand, in May 2021 Josh Peak, Secretary, SDA was unsure about any direct link between increased levels of wage underpayments and COVID-19, while Karen Grogan deemed it too early to obtain statistics to determine the full impact of the COVID-19 economic measures. In terms of gauging the impact of COVID-19 on wage theft, however, Peter Lamps advised that pre-COVID, in the period 2014-2019, the AWU had recovered \$220,000 for wage matters not being paid. During 2020 until May 2021, the amount recouped was \$280,000, some \$60,000 more than in the previous five-year period. Other data showed that in April 2021, the SDA, in South Australia alone, recovered more than \$360,000 in underpayments and in the past financial year, 2020-2021, the Working Women’s Centre SA (WWC) recovered over half a million dollars in lost wages, penalties and compensation”. Perversely, the UWU has seen a reduction in wage theft cases, with people anxious about retaining whatever form of work they could get and not wanting to pursue any claims. (Evidence, p 339, 382, 384, 385,392, 401, 405)

Since 2019, other jurisdictions have introduced legislation to combat wage theft: Victoria, Queensland and the ACT, with the additional possibility of Western Australia. The Victorian Wage Theft Act criminalised the deliberate underpayment of wages, imposed fines and/or jail on individuals and fined companies that deliberately withheld wages or worker entitlements, and established the Wage Inspectorate Victoria to enforce the legislation. Victoria’s *Wage Theft Act 2020* is considered below. Angus Story, Secretary, SA Unions, recognised the South Australian government’s position that, as this is a commonwealth responsibility, they await the introduction of common wage theft provisions across Australia. In Canberra, however, the omnibus bill for industrial relations legislation that went to the Senate in March 2021, which included provisions around wage theft, was largely amended. Unable to secure support for other measures in the bill, the federal government removed the wage theft component. Even so, the parameters in the bill amounted to a narrower form of wage theft than is available to workers in Queensland and Victoria. Accordingly, SA Unions judged the bar to establish a criminal offence of wage theft to be too high, effectively undermining the regimes in those two states. In light of this, Mr Story called for state legislation around wage theft, as in other states and territories. (Evidence, p, 365, 366, 368; Briefing paper: Victorian Wage Theft Legislation)

Associate Professor Marinella Marmo, Law School, Flinders University, maintained that South Australia is at a “turning point” and there is a need for a “cultural shift”. Like Victoria and Queensland, South Australia cannot wait for federal action but must take the initiative, as legislation against wage theft would foster that shift, allowing agencies, non-government organisations (NGOs), unions and lawyers to use terminology that is not available to them at present. (Evidence, p 298, 300)



## **SA Labour Info Hub**

Such have been the exploitative working conditions, the scale of wage theft in the State, and the effect of COVID-19 restraints, in April 2020, Jackie Chen founded the SA Labour Info Hub. The goal was to organise migrant workers and international students, especially in the Chinatown and Greater Adelaide areas, to fight against their exploitation. By March 2021, more than 500 people, many of them wage theft victims, had joined the Hub, identifying 150 businesses underpaying their staff, mostly less than \$15 an hour, with the lowest rate being \$3 an hour. Zhang Wan is an international student and, since April 2020, has been a volunteer at the Info Hub, which she described as a community group providing support for temporary visa holders and migrant workers facing wage theft and workplace issues. Twelve volunteers offer free information to people, typically from multicultural backgrounds. With no funding and only limited resources, they work with other organisations such as the WWC and the Young Workers Legal Service (YWLS) and are looking to connect with unions and SA Unions as well. In cooperation with these organisations, the Info Hub has assisted 10 people from their community group to retrieve their underpayment of wages, the total exceeding \$30,000. As a result, Mr Chen has been “attacked” by employers, with his details and photo put online. He sees this as a message that the employers want him silenced. It is effective, as some workers are now afraid and “don’t want to stand up”. (Evidence, p 373, 374)

Asked if COVID-19 had resulted in harassment, bullying or racism, Zhang Wan advised that this has been occurring for many years, although COVID has made it worse because it is more difficult to find a job. If a worker is earning only \$10 an hour and quits, any other job is still only going to pay \$10; “what is the point, so just keep this job and keep silent”. Jackie Chen added that there are not many jobs available. “You are lucky if you get a job” even if it only pays \$10 an hour. He told of a worker in Chinatown receiving \$15 an hour who is “very happy about it”. Calling for harsher penalties, even criminalisation, Mr Chen advised that a sushi restaurant, fined previously by the FWO, still has a system where a worker is paid correctly for the first 20 hours, after which it is \$10 an hour, in order for the business to make a profit; this even though they have already been caught. (Evidence, p 375, 378)

Zhang Wan, herself, as a new graduate accountant, had an internship in an accounting firm for five months without any payment, which she said was “very common”. Previously she had worked as a receptionist, initially at \$10 to \$15 an hour but was told that it would be raised and, with expansion, was promised a role as an accountant. The employer “badgered” her to exceed her visa restrictions. After three months she was asked for her ABN, which she provided for fear of losing her job during COVID-19. She did, however, ask for raise; it was refused. In September 2020, Zhan Wan went to the WWC and, with their assistance, reported her employer to the SAET. She was dismissed immediately. (Evidence, 375, 376)

With COVID-19, Jackie Chen advised that migrant workers and international students were “hit hardest”, most losing jobs in hospitality, restaurants, cafés or housekeeping. Being unable to return home due to the reduced number of flights and the cost of tickets and with no family or relatives in Australia, effectively they have been without support except for some charities and churches providing free food. Those with a job are still being exploited but, again, they are afraid to speak up because of visa restrictions. Earning only \$10 an hour, \$200 a week, they must work more than 20 hours a week in order to survive. “You have to pay rent.” (Evidence, 375)

In her research, Associate Professor Marinella Marmo had previously identified that international students were a risk category but, in the current climate, they have become even

more vulnerable. Those students who arrived in February 2020, prior to the COVID-19 restrictions, had no knowledge of the South Australian legal and labour system or other general knowledge. While a number of public universities offered some form of a scholarship during COVID-19, private universities did not provide any assistance at all. With limited English and little to no social connection, they were effectively isolated, holding a “palpable fear” that, if found in breach of their visa conditions, the Department of Home Affairs would take action against them; this despite all efforts to communicate otherwise, including by the FWC. With the frequent call to reopen borders to international students, Associate Professor Marmo reasoned while it may be good for the education sector, “is it good for [the students], for their mental wellbeing”? (Submission 29, p 4; Evidence, p 301, 306)

Recognising that universities are very dependent on international students for their income, Sister Meredith Evans, President, Australian Catholic Religious Against Trafficking in Humans (ACARTH) queried the ethical principles arising from that dependence. She argued that universities are not doing enough. For them to claim that their only concern is academic progress and that individual international students must resolve their own problems is untenable in our society. Sister Evans referred to an encounter with an international student returning from working the Riverland to resume study who could not find work, lacked any support and would likely become homeless. She contended that there are implications around taking in these students and to say “it’s their problem” is an inadequate response in the middle of the pandemic, as they cannot return home. In her view, there must be some ethical imperative to consider the parameters of this predicament. (Evidence, p 302, 304)

In that context, the Committee heard repeated criticism of StudyAdelaide’s failure to inform newly arrived students of their work rights and warn of potential exploitation, even though one of their own surveys showed that, for 65 per cent of students, employment issues were their primary concern. As a “destination marketing agency”, however, StudyAdelaide highlights the advantages for international students of living and studying in Adelaide. Funded by the State government, there are more than 40 members, including key funding partners: City of Adelaide, Flinders University, The University of Adelaide and University of South Australia (UniSA). Other members include private higher education providers, vocational education providers and Independent and Catholic schools. With international education being valued at \$2.15 billion to the State’s economy in 2019, it is South Australia’s largest export. Normally there would be more than 40,000 international students in South Australia, although in February 2021, while there were 40,000 students enrolled, only 28,500 were onshore due to the Australian border closure in early 2020. The top five markets are China, India, Nepal, Hong Kong and Vietnam. Karen Kent, Chief Executive, saw StudyAdelaide’s role as supporting education providers to “educate and encourage students to seek further information or assistance with work rights”. The agency’s focus has been to highlight assistance from the FWO. (Evidence, p 331, 332, 335 336)

In light of that, criticism of StudyAdelaide came from several parties. The WWC advised that workers, international students, who come to the centre for assistance with wage theft and workplace issues, have had an orientation with StudyAdelaide, with tours and cultural experiences that include hugging a koala and visiting the central market. Very little time is spent – between 10 and 15 minutes – on their working rights in Australia. Abbey Kendal, Director, WWC, maintained that the first experience of education and cultural integration into South Australia might be “at least a one-hour session around what is the minimum wage and what you should expect from your employer”. Jackie Chen, SA Labour Info Hub, too, was critical that StudyAdelaide did not offer essential work related information to international

students in its role promoting South Australia as a study destination. He had asked StudyAdelaide to provide constructive advice on work rights to students or to cooperate with the Labour Info Hub on education sessions. In his words, “they refused” and deleted his contact details, saying, “Remove from the group”. Following the Fun Tea Shop incident in Gouger Street, which will be discussed below, the SDA also contacted StudyAdelaide about their obligations when introducing people to South Australia and their responsibility to explain the minimum entitlements in the workplace. (Evidence, p 322, 376, 401)

Similar censure was levelled at the universities. While StudyAdelaide’s survey showed that 69 per cent of students listed their education institution as the most trusted source of information on employment issues, Associate Professor Marmo advised that, from her research, students report “a sheer lack of support” from their own institution. She suggested that inductions conducted by South Australian universities might include information on exploitation linked to commercial labour and where to seek help. Dr Katherine Christ, Senior Lecturer, UniSA Business, too, called on universities to meet their obligations to protect international students from exploitation around cash in hand payments and exceeding visa restrictions. In her view, vulnerable students who “are scared ... to report” such exploitation in fear of deportation should be assisted with advice on where to “get help” and to realise that they should not feel “trapped” in this way. (Submission 29, p 6; Evidence, p 305, 306, 324, 325)

In March 2021, Angus Story, SA Unions, judged that in the previous two years there has been no change in the prevalence of wage theft, which remains an “industrial-scale breach of the law”, requiring stronger enforcement. At that time, he considered South Australia’s resilience and ability to fight wage theft had deteriorated further, since the State had the lowest level of economic activity in the country, with the highest level of unemployment. As economic conditions have worsened or continued to be challenged by COVID-19 restrictions, both the capacity for, and the prospect of, exploitation and wage theft have only increased. He, too, considered that these circumstances have made workers more fearful for their own job security and less inclined to “stand up and say, ‘I’m being ripped off’”. They are also more disposed to accept employment conditions and wages below the legal requirements without raising complaint. (Evidence p 365)

But Associate Professor Marmo deemed the expectation “that the victim [should speak] up is not a realistic expectation”, referring to many areas of criminal law, including domestic violence. Envisaging that people will come to South Australia and find the right union or NGO, join a union, or that they are aware of Australian laws, or that some information is communicated in all languages, is too much to expect. Applying that principle will only see the same problem recurring repeatedly. She queried, “Why do we expect the victims to take steps? Shouldn’t we expect other people” to do so. Believing that universities are failing society and their students, Associate Professor Marmo identified the need to teach the next generation of South Australian society – police, nurses, lawyers, teachers, social workers – to recognise exploitation and how it is embedded. Currently, while they may encounter exploitation, they don’t “have the tools to recognise it” or to apply the correct terminology against it. (Evidence, p 299, 301)

## 5.2 Term of reference (hb)

*The intersection of slavery and slavery-like practices with wage theft to establish the depths of human trafficking in South Australia;*

Dr Katherine Christ, UniSA Business, provided data that estimated 40 million people are currently enslaved worldwide, many in corporate supply chains, with 20 million in forced labour in the private sector. The economic value of this activity is approximated at \$354 billion of at-risk goods being imported into G20 countries every year. Dr Christ considered that the Australian *Modern Slavery Act 2018* would see the beginnings of more awareness and possibly more cases of modern slavery reported within the community since, in the United Kingdom, although the focus has been on supply chains and developing countries, its own Modern Slavery Act “has brought to light a lot of slavery-related practices” in the country itself. As a result, the Institute of Chartered Accountants in England and Wales has developed “a red flag system” in relation to business accounts and cash transactions to signal a warning around employees. As modern slavery is being recognised in a growing number of jurisdictions in Australia, Dr Christ, with Professor Roger Burritt, Australian National University (ANU), developed the *Modern Slavery Compass: A new tool to point business in the right direction*. Dr Christ’s concern, however, is that the legislation focuses on very large businesses with more than \$100 million in revenue; those that can use their market power to attempt to improve practice. But a lot of slavery-like practices and wage theft occur in small businesses, where effectively they are hidden using accounting records in an attempt at concealment. (Evidence, p 323, 324, 326, 327, 329; *Modern Slavery Compass*, p 4)

Associate Professor Marmo, Law School, Flinders University, cited the International Labour Organisation’s (ILO) Indicators of Forced Labour<sup>4</sup> that highlight there are wider issues than underpayment. They can be used to identify whether a case is more one of wage theft or extreme exploitation akin to slavery. The indicators are:

- Abuse of vulnerability;
- Deception;
- Restriction of movement;
- Isolation;
- Physical and sexual violence;
- Intimidation and threats;
- Retention of identity documents;
- Withholding of wages;
- Debt bondage;
- Abusive working and living conditions;
- Excessive overtime.

(Submission 29, p 2; Evidence, p 296)

Associate Professor Marmo went on to advise that modern slavery is a multidimensional problem that includes wage theft, although her research in South Australia identified other dimensions such as:

- Threats and violence;
- Sexual and gender abuse;

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<sup>4</sup> International Labour Organization: these indicators are intended to help “front-line” criminal law enforcement officials, labour inspectors, trade union officers, NGO workers and others to identify persons who are possibly trapped in a forced labour situation, and who may require urgent assistance. [https://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_203832/lang-en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang-en/index.htm)

- Racism, including severe discriminatory practices where wage is decided according to ethnicity;
- Substandard housing conditions;
- Deduction of wages for transport and accommodation; and
- Overt or covert forms of silencing, such as producing new forms of risks, isolation and/or vulnerability.

These elements were found not only in cases of commercial labour exploitation but also in domestic labour exploitation and in other instances of modern slavery, such as forced marriage. (Evidence, p 296)

A 2019 study by Associate Professor Marmo, with ACARTH, *Slavery and Slavery-like Practices in South Australia*, showed that a combination of the following elements were common to all the cases cited in her report:

- Temporary migratory status;
- Isolation and lack of a reliable network;
- A lack of knowledge of, trust in and/or access to the Australian system;
- A lack of sufficient technical-legal English to keep oneself adequately informed of one's rights;
- A fear of repercussions and an inability to 'walk away' from the exploitative conditions due to threats, blackmail or other reasons akin to honour, shame or financial constraints.

<sup>5</sup>

Such a combination renders people particularly vulnerable, and the more vulnerable they are, the greater their susceptibility to exploitation. In these cases, various forms of threats, deception and/or coercion were present. <sup>6</sup>

Even when workers have "knowledge" of sub-standard conditions and the layers of unfairness, some people so affected have been unable to "walk away" due to a combination of the above factors, exacerbated by the pandemic, thus creating conditions more consistent with slavery than wage theft. Those most affected by the COVID-19 shutdown/lockdown constraints were international students, seasonal workers and backpackers who were here or arrived by February 2020, just before the travel restrictions. While their "value" as workers may have increased, in some cases so has their exploitation, given that they were ineligible for the special COVID-19 support schemes. In Associate Professor Marmo's opinion, in 2020 the pandemic compounded extreme exploitation akin to slavery in South Australia, which, like many other jurisdictions, has "gone backwards". (Submission 29, p 1, 2, 4; Evidence, p 296, 297)

Based on her findings, Associate Professor Marmo's asserted that slavery and slavery-like practices are a reality in South Australia. They are a gross violation of human rights as they reduce a person to a commodity to be exploited; they are also criminalised in the Commonwealth Criminal Code 1995. Accordingly, she called for all situations of extreme exploitation to be recognised and named for what they are: conditions of slavery or slavery-like practice. <sup>7</sup>

<sup>5</sup> Marmo, M, 2019, *Slavery and Slavery-like Practices in South Australia: a report*, Flinders University, Adelaide, p 4.

<sup>6</sup> Marmo, *Slavery and Slavery-like Practices*, p 4.

<sup>7</sup> Marmo, *Slavery and Slavery-like Practices*, p 3, 4.

Kyla Raby, Lead, Human Trafficking, Forced Labour and Forced Marriage, Australian Red Cross, informed the Committee that since 2009 Red Cross has been assisting people made vulnerable through migration, as they are at a higher risk of modern slavery, via the Support for Trafficked People Program (the program), funded by the Department of Social Services. As at 1 August 2021, the program had provided individualised casework support to 519 people who have experienced sexual exploitation, labour exploitation, forced marriage, exit trafficking and other types of exploitation, all having been referred to the Red Cross by the Australian Federal Police (AFP). Of this number, the AFP assessed that 134 people had experienced labour exploitation in a commercial setting, 55 in a personal setting. In South Australia, 36 people were identified, 30 female and six male, with 17 in or at risk of forced marriage, 12 having experienced either personal or commercial labour exploitation, and seven having been sexually exploited or trafficked out of Australia. To date, the Red Cross has supported people from 54 countries, all exploited in an extensive range of industries. (Evidence, p 434, 435, 436)

Ms Raby explained that this data does not represent all individuals affected by human trafficking and slavery in Australia as it only captures those who have engaged with the AFP and consented to receiving support. Due to the hidden nature of exploitation, quantifying the full extent of victimisation is challenging, although in 2019 the Australian Institute of Criminology estimated that for every person identified as a victim, another four people remain unidentified. Since 2009, the number of people referred to Red Cross each year has increased from 98 in the 2017-2018 financial year, to 149 in 2018-2019, and 188 in 2019-2020, indicating a growing awareness of human trafficking in the Australian community. The 2019-2020 pandemic, however, has reversed the trend. Ms Raby saw this as resulting from the diversion of AFP resources into the national emergency response to contain the spread of the virus, and the over-reliance on the AFP as the sole referrer to the program. In her view, support services for people who have experienced exploitation should be accessible at all times and not diverted during a crisis, as that is when their risk increases. She, therefore, suggested that a new referral pathway to the program might allow people to engage with a humanitarian agency in the first instance, with neutrality from government, due to the fear of deportation and any further negative impact. (Evidence, p 436, 437, 440)

Kyla Raby advised that, globally, forced labour is one of the main reasons why people are trafficked and a common reason why they are trafficked in Australia. She referred to the Australian government's strategic plan, the National Action Plan to Combat Modern Slavery, to consider how responses to wage theft and modern slavery can be more inclusive, to prioritise support for those impacted and to prevent exploitative practices from occurring. Accordingly, it is essential that state and federal strategies to protect workers from wage theft complement those designed to prevent human trafficking and slavery, as there is a gap in both responses around support for those who have experienced exploitation "on the lower end of the continuum, such as wage theft". (Evidence, p 437, 438, 440)

Additional evidence before the Committee revealed elements of slavery-like practices.

Karen Grogan advised that the UWU, United Voice and the National Union of Workers (NUW) had contributed to Associate Professor Marmo's study, *Slavery and Slavery-like Practices in South Australia*, that highlighted temporary migrant workers are often more vulnerable to deceptive recruitment and coercive labour practices, with the key industries for commercial labour exploitation being hospitality, cleaning and horticulture/agriculture. Workers' freedom to leave an exploitative situation is very much limited for a number of reasons, as noted above. International students, after a struggle to find a job are not only underpaid but are also forced

to work in breach of their visa conditions. This increases their vulnerability that, like other temporary visa holders, can increase their being subjected to exploitation and blackmail. (Submission 31, p 8, 9)

In the pyramid scheme in the cleaning industry, in schools, universities, hotels and cinemas, temporary visa holders, especially international students, are heavily underpaid and instructed by employers on what to say if unions contact them. Many suggested that any interactions these workers have with external people are “watched”. If they do not comply with instructions, they are not given work. In the horticultural industry, temporary migrants tend not to communicate with co-workers as the fear of losing one’s job is felt on both sides: by the underpaid temporary worker who is unable to leave and by other workers. There is little interaction because both parties are scared of the consequences: either losing hours or being given more difficult work. Different languages also reduce the ability to communicate and if migrant workers communicate in English with local workers, the employer may become suspicious and “monitor” the conversation. In some cases, different groups of workers are deliberately separated to prevent comparisons of salary and work conditions. Rarely do they receive proper superannuation and there are certainly breaches of safety conditions, with claims for workers’ compensation in case of injury being openly discouraged. Essentially, temporary visa holders have a substantial “lack of voice for fear of repercussions” (Submission 31, p 8, 9)

The Committee heard other instances linked to slavery-like practices. Jackie Chen, SA Labour Info Hub, stated that it was “very common” for workers having to repay their employer for being sponsored into South Australia. He also told of a worker in a grocery shop being underpaid at \$10 an hour. When she reported it to the FWO, her employer went to her house to threaten her and “send a message”. In another instance, an employer raped a farm worker in a field because of her insecure visa status. Aira Firdaus, UWU, informed the Committee of workers’ passports being taken by cash contractors who demand the workers pay as much as \$3,000 for their return. (Evidence, p 375, 384)

By way of comparison, Dr Christ reported that during an audit by Adidas and other shoe companies, seeking evidence of modern slavery in their overseas suppliers, factories were given 30-minutes notice of an inspection. When workers were asked if they had access to their passports, “everyone on the factory floor” produced their passports. When one of the auditors spoke to a Nepalese worker in her own language, the advice was that it was the first time the worker had seen her passport in two years, and only because of the audit. (Evidence, p 328)

Peter Lamps, Secretary of the AWU’s South Australian Branch, reported that during COVID-19 workers of different nationalities on farms and in packing sheds close to the border were effectively “trapped” in South Australia as their residence extended further than the agreed distance either side of the border. Coupled with amendments to several awards, there were changes to hours of work and days in the week, with little or no notice or consultation. Workers were confined to a location, labouring for extremely long hours, in some pack houses for 12 to 14 hours a day. In addition, there were incorrect applications in awards, incorrect classifications, generally on the lower side, and various penalties not being paid, even under changes made by the FWC in line with agreed measures in 2020. Reflecting on the previous 15 months of COVID-19, he would “respectfully argue” as to whether these were slave-like practices. In the circumstances, the AWU assisted not only their members, but also workers who were scared, or who came from a non-English-speaking background, believing that if a part of the workforce is being treated differently, “if the model is broken”, it should be addressed. He also provided anecdotal reports of three women backpackers experiencing

sexual harassment by their employer in a small country town. None were prepared to take the complaint further, however, and left the country. (Evidence, p 391, 392, 395, 396)

Citing Woolworths' modern slavery statement that identified risk of slavery-like practices on berry farms around Australia, Dr Katherine Christ, UniSA Business, then referred to media reports relating to backpackers who must work in rural communities to extend their visa for an extra year. She relayed "absolutely shocking" accounts of "girls [working] out there in bikinis", adding that when a new worker queried this requirement, the employer replied, "Well, you're mine for three months. If I say you're going to work like that, you're going to work like that". Many of the backpackers were being paid well below the minimum wage and were sleeping in sheds. Those who raised concerns were instructed that if they did not comply, the employer would not sign off and their visa would not be extended. The workers tried to draw attention to the fact that they were "being paid next to nothing" but, effectively, were subsidising Australia's agricultural industry. (Evidence, 327, 330)

### **Fun Tea Shop Incident**

On Friday night, 29 January 2021, two workers were violently assaulted at the Fun Tea shop in Gouger Street. The incident was captured on mobile 'phone video and uploaded to the Internet where it went viral. The two women aged 20 and 22 were international students who had worked at Fun Tea for five months and three weeks, respectively. During their employment they earned between \$10 and \$12 an hour as casual employees. They should have been classified under the *Fast Food Industry Award 2010*, which, for a level 1 food and beverage attendant, as a casual employee, sets a rate of \$26.76. (Evidence, p 344; WWC, Twitter, "Funtea, Gouger Street Assault on Workers – Statement from Workers", 3 February 2021")

The assault was in response to a worker asking to be paid her wages for that night and the two weeks prior, as well as a complaint about the underpayment of wages. Some two hours previous to the incident, she had resigned due to mistreatment and wage theft. Earlier in the evening, the owner and manager of Fun Tea, Jiachen Duan (Jason Duan) had instructed the workers that a close friend, Lei Guo (Gavin Guo), his wife and children should receive free drinks and desserts. The video shows Mr Guo hitting the worker in the face during the altercation. Mr Duan, the owner, left the restaurant, not immediately checking on the women's welfare, nor calling the police or an ambulance. On 3 February 2021, the WWC advised that they were representing the two women, stating that they were not only victims of wage theft, but that the employer failed to provide a safe workplace on the night of the assault, in an example of gendered violence. The workers, themselves, called an ambulance and were taken to hospital; they were released that night. SAPOL laid charges against the man who attacked the worker, with the matter going to court and sentencing due in August 2021. (Evidence, p 343, 344, 374, 431; WWC, Twitter, "Funtea, Gouger Street Assault on Workers – Statement from Workers", 3 February 2021")

The committee heard of unusual practices where workers when collecting their pay, in cash, were asked to sign two pieces of paper. The first showed they received their exact wages. The second paper they signed was what their employer thought was the correct wage, an amount that was significantly higher than the rate they were paid. No penalty rates or superannuation were paid. These allegations reveal that some employers had not only "knowingly and wilfully stolen wages from their workers" but had also embarked on a process of legitimising and "protecting themselves from being discovered and/or from being penalised". (Evidence, p 344, 349.)



Having seen the video online, on 2 February 2021, Jackie Chen, SA Labour Info Hub, arranged a meeting with the workers through the WWC. The Labour Info Hub continued to offer support due to the “huge pressure” on these workers, “not only safety but also non-violence – too much personal detail has been exposed, too much pressure”. His goal was for the workers to “get their stolen wages back”, along with penalties being imposed on the employer. (Evidence, p 374)

Josh Peak, SDA, believed the video of the extreme nature of the assault has prompted a large-scale community response and recognition of “a widely known secret”, that of widespread underpayment and mistreatment of workers in the Chinatown precinct, as well as the vulnerability of international students in insecure work and the risk they face. Indeed, the Select Committee’s Interim Report on Wage Theft, July 2020, had noted the scale of non-compliance in the precinct and that it would be “more likely to find restaurants engaged in wage theft in Gouger Street than ... an honest broker”. Mr Peak added that anonymous individuals have incited online slander against the workers who have also been blacklisted. While recognising the support provided by the WWC, he also advised that the SDA is working with the “victims of this employer”. (Evidence, p 191, 401)

SafeWork SA began an investigation of the incident, attempting to contact the workers through the WWC on multiple occasions to arrange a meeting and interview the two women. They did not receive any direct complaints from those involved and the WWC was reluctant to provide contact details due to confidentiality provisions. By August 2021, SafeWork SA was still waiting to interview the workers, as well as four witnesses to the incident, as they had not yet agreed to talk. Earlier attempts had failed as the WWC advised that these six people were not ready to meet. Until the regulator could speak to the complainants, however, the investigation could not be progressed.

With regard to the business, SafeWork SA inspectors telephoned, emailed and visited the premises on multiple occasions but they were empty and closed up. Subsequently, a new business, Super Chicken, was trading at the site. Statutory notices were sent to the directors of Fun Tea and Fun Tea Australia Pty Ltd, as Martyn Campbell, Executive Director, SafeWork SA, explained that the regulator can pursue the business as a business entity, and the directors or owners of a business as individuals. If, however, that business entity deregisters and ceases to exist, there is no avenue to continue investigations, as it does not exist at law. They can pursue the owner with allegations via section 155 notices but require evidence. It was therefore crucial for the workers and witnesses to provide details of the incident to SafeWork SA in order to compile that evidence. Under the legislation, the regulator has two years to lay charges. In August 2021, Mr Campbell told the Committee that the FWO had interviewed those involved and that an investigation had commenced under the Fair Work Act. (Evidence, p 425, 426, 427, 428, 429, 430)

In April 2021, the FWO began a surprise audit of restaurants, cafés and fast food outlets in Adelaide’s Chinatown, including the Adelaide Central Market. Fair Work Inspectors visited at least 60 businesses, speaking with business owners, managers and employees to check that workers were being paid correctly. Audits included a focus on employers who had sponsored visa holders, as Adelaide’s Chinatown precinct employs many workers on visas who may have limited English skills, which can lead to vulnerability and exploitation. The FWO stated that protecting vulnerable employees, such as visa holders and young workers, and improving compliance in the fast food, restaurant and café sector were ongoing priorities.<sup>8</sup>

<sup>8</sup> Fair Work Ombudsman, “Adelaide Chinatown eateries face workplace audits”, 15 April 2021:

It was alleged that Fair Work inspectors found 20 workers in three Fun Tea shops had been paid flat rates of \$10 to \$18 per hour, which were insufficient to meet their entitlements under the Fast Food Award. Several of the allegedly underpaid workers were visa holders, including international students. Four were juniors, aged under 21. On 15 September, the Fair Work Ombudsman commenced legal action against the Yuxuan Group Pty Ltd, operator of the three Fun Tea outlets in the Adelaide CBD, on Gouger Street, York Street and in Rundle Mall. The FWO alleged the Yuxuan Group underpaid 20 fast food employees who worked across the three outlets a total of \$186,895 and breached record-keeping and pay slip laws. The FWO also took legal action against former Yuxuan Group director, Yang Su, alleging she was involved in the record-keeping and pay slip breaches.<sup>9</sup>

In considering the incident, Associate Professor Marmo employed the ILO Indicators of Forced Labour to assess whether the Fun Tea case was one of wage theft or a more serious form of exploitation akin to slavery. She identified at least six that were applicable:

- Abuse of vulnerability;
- Deception;
- Intimidation and threats;
- Withholding of wages;
- Abusive working conditions; and
- Physical violence.

Two other indicators she believed that might apply, depending on finer details yet to emerge, could be isolation, which can be a form of silencing, and excessive overtime; some eight indicators out of 11. Those she omitted in this case were restriction of movement, retention of identity documents and debt bondage, the classical criteria for modern-day slavery. The Federal Police and the Attorney-General, however, have recognised that the retention of identity documents is not a practice in use anymore; there are new ways to impose restrictions. Associate Professor Marmo added that the benchmark to prove slavery in the courts and at the Australian Federal Police level is “far too high”. Moreover, asking victims to cooperate with any criminal justice agency is “a big turnoff” and therefore also too high a criminal law benchmark”. (Evidence p 296)

During the audit, the FWO stated:

We are finding really high levels of non-compliance. We are finding flat rates of pay, not being paid, failure to provide award provisions, and weekend penalty rates not being paid, not findings of a regular audit – an audit of the regulator, triggered only by the vicious assault of a worker. Worse than that, if it wasn’t captured and shared, if it didn’t give a platform for people to speak up, would have this audit even happened? (Evidence, p 401)

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<https://www.fairwork.gov.au/about-us/news-and-media-releases/2021-media-releases/april-2021/20210415-adelaide-chinatown-frac-audits-media-release>

<sup>9</sup> Fair Work Ombudsman: “Adelaide bubble tea operator faces court”:

<https://www.fairwork.gov.au/about-us/news-and-media-releases/2021-media-releases/september-2021/20210915-fun-tea-litigation-media-release>

### **Victoria's wage theft legislation: *Wage Theft Act 2020***

On 16 June 2020, both houses of the Victorian Parliament passed the *Wage Theft Act 2020*, the first Australian jurisdiction to do so. The laws came into effect on 1 July 2021, when it became a crime for an employer in Victoria to deliberately underpay or dishonestly withhold wages or other employee entitlements, and to falsify or avoid keeping employee entitlements records to gain a financial advantage. These crimes are punishable by a fine of up to \$198,264 or up to 10 years' jail for individuals, and a fine of up to \$991,320 for companies. Honest mistakes made by employers who exercise due diligence in paying wages and entitlements are not considered wage theft.<sup>10</sup>

The Wage Theft Act 2020 also established the Wage Inspectorate Victoria as an independent statutory body under the Wage Theft Act 2020. The Inspectorate will promote and enforce Victoria's wage theft laws, child employment laws, long service leave entitlements, and owner driver, forestry contractor, hirer and freight broker obligations. Its role under the wage theft laws is to inform, educate and assist businesses and workers, and to investigate wage theft offences.

Inspectors have the ability to enter premises to obtain information and documents without the consent of the occupier, subject to giving prior notice of entry of five business days, or where they believe that a delay may result in the concealment, loss or destruction of evidence. Inspectors can require a person to answer questions under oath or affirmation and apply for and execute search warrants. Many of these powers are coercive.<sup>11</sup>

The Inspectorate will assess a worker's report of wage theft and aim to respond within 21 days. There must, however, be enough evidence for a court to be satisfied beyond a reasonable doubt that an offence has been committed. Victoria's wage theft laws do not include recovering money. Workers need to contact the FWO or their union, lodge a small claim in the Magistrates' Court or Circuit Court, or take other civil court action. To recover superannuation, they should contact the Australian Taxation Office.<sup>12</sup>

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<sup>10</sup> Wage Theft Fact Sheet: <https://www.vic.gov.au/wage-theft-fact-sheet>

<sup>11</sup> Wage Theft Fact Sheet: <https://www.vic.gov.au/wage-theft-fact-sheet>

<sup>12</sup> Wage theft – worker information: <https://www.vic.gov.au/wage-theft-worker-information>

## 6. Acknowledgements

The Select Committee extends its thanks to those who provided information and evidence to its inquiry.

A handwritten signature in blue ink, appearing to read 'I Pnevmatikos', written in a cursive style.

Hon Irene Pnevmatikos

**Chairperson**

17 November 2021

## Select Committee on Wage Theft in South Australia

### Dissenting Report

As a member of the Legislative Council's Select Committee on Wage Theft in South Australia, I would first like to thank the witnesses who appeared before the Committee and gave evidence. I also thank our Chairperson the Honourable Irene Pnevmatikos MLC, the other Honourable members of the Committee, our Secretary Ms Leslie Guy, and our Research Officer Dr M Robinson.

I have prepared this Dissenting Report as I do not agree with all aspects of the Final Report of the Legislative Council's Select Committee on Wage Theft in South Australia. This Dissenting Report outlines my reasons.

Firstly, I wish to advise that I and the South Australian Government strongly condemn any employer who does not comply with the law by refusing to pay employees in accordance with their industrial entitlements for wages and conditions or threatens an employee who speak up about alleged underpayment. It is un-Australian, unfair and, more importantly, it is unlawful and, therefore, the full extent of the law should be brought down upon those employers.

The term "wage theft" is frequently used as a blanket term to describe the underpayment or non-payment of wages and entitlement that are due to employees, in accordance with provisions in legislation, awards, enterprise agreement or contracts. It is highly emotive, loaded, and misleading term which can mischaracterise hardworking small business owners who make genuine, accidental errors or miscalculations, which can unintentionally result in an underpayment of wages and entitlements. Such miscalculations or errors are often due to the complexity of the national system, which comprises the National Employment Standards and some 155 modern awards. Therefore, the South Australian Government prefers to use the term, "the deliberate underpayment of wages and entitlement", as this does not capture those businesses who have no intention of underpaying employees.

The Government is opposed to creating a criminal offence for the underpayment of wages as a result of a completely unintentional mistake or reasonable differences in interpretations of complex awards and enterprise agreements.

The South Australian Government considers that law reform in respect of underpayment of wages and entitlements would be most appropriately led by the Commonwealth Parliament. By virtue of the *Fair Work (Commonwealth Powers) Act 2009* (SA) which commenced on 27 November 2009 and the *Statutes Amendment (National Industrial Relations System) Act 2009* (SA) which commenced on 1 January 2010, the South Australian Government referred certain matters relating to industrial relations to the Commonwealth. As a result, all South Australian employers and employees in the private sector are covered by the national system under the *Fair Work Act 2009* (Cth) with State and Local government employers and employees remaining under the State system.

Under the Federal industrial relations system, disputes between employees and employers that relate to underpayment of wages and entitlements are governed by the *Fair Work Act 2009* (Cth). An employee can seek assistance from the Fair Work Ombudsman in relation to an underpayment of wages and entitlements. For unpaid superannuation, an employee can make a report to the Australian Taxation Office who will investigate the matter. I consider that further public awareness campaigns about the role of these organisations and options for people, will assist to provide information to people who may be vulnerable to exploitation.

The reality is that as a consequence, the capacity for the State in terms of its industrial relations jurisdictions, to make new laws which impact upon employer and employee relationships is significantly restricted, and in some cases has disappeared completely.

In respect of law reform in this area, the South Australian Government strongly supported the Federal Government's attempt in late 2020, as part of a package of proposed industrial relations reforms to criminalise the dishonest and systemic underpayment of wages by amendments to the *Fair Work Act 2009* (Cth).

In March 2021 the Federal Government enacted some of the proposed industrial relations reform package; however, disappointingly the full package of reforms including the proposed criminal offence for dishonest and systematic wage underpayments, was not enacted due to opposition from the Labor Party and some crossbench Senators. The proposed penalties for breaching the law would have been, for an individual, up to 4 years' imprisonment or a \$1.11 million fine or both; and, for a body corporate, a fine of up to \$5.55 million.

I do not support the creation of a Wage Theft Act for South Australia. It is appropriate that changes that will affect the Federal industrial relations system be made by the Commonwealth Parliament.

A handwritten signature in blue ink, appearing to read 'H.M. Girolamo', written in a cursive style.

**Hon H.M Girolamo MLC**

## APPENDIX 1: INDEX TO WITNESSES

Public evidence was received from the following persons and organisations:

### 27 March 2019

1. Edward Cavanough, Manager of Policy, The McKell Institute
2. Sally Neville, Deputy Chief Executive Officer, Restaurant and Catering Industry Association

### 17 April 2019

1. Abbey Kendall, Director Working Women's Centre SA Inc. and Rachael Seaforth, Coordinator, Young Workers Legal Service
2. Multicultural Communities Council of SA
  - Helena Kyriazopoulous, Chief Executive
  - Nasir Hussain, Board Member

### 8 May 2019 - Regional Visit to Mount Gambier

1. The Hon. Clare Scriven
2. Trish Stringer, Organiser, Australian Workers' Union
3. Robert Aldersey
4. Ron McBride
5. Sylvia Jones and Brenton Jones
6. Fei Su, Solicitor, Limestone Coast Community Justice Centre

### 29 May 2019

1. Fabian Moore, Industrial Officer, Shop Distributive and Allied Employees Association
2. Lindsay Carroll, Deputy Chief Executive Officer and Legal Director, National Retail Association

### 26 June 2019

1. Attorney-General's Department
  - Dini Soulio, Commissioner for Consumer Affairs, Consumer and Business Services
  - Cara Knight, Manager Reform, Consumer and Business Services
2. Angas Oehme, Solicitor, Lieschke and Weatherill Lawyers and Rajesh Salaria

### 21 August 2019

1. Daren Hincks, Adam Jaworski, Laci Katsaparas, Brendan Lines

### 28 August 2019

1. Housing Industry Association
  - Stephen Knight, Executive Director (SA)
  - Huan Do, Workplace Adviser

### 18 September 2019

1. Business SA
  - Anthony Penney, Executive Director, Industry and Government Engagement
  - Estha van der Linden, Senior Policy Adviser
2. Angus Story, Secretary, SA Unions



## **APPENDIX 1: INDEX TO WITNESSES - CONT.**

### **2 October 2019**

1. Greyhound Racing SA
  - Grantley Stevens, Chairman
  - Matthew Corby, Chief Executive Officer
  - Gavin Bosch, Chief Financial Officer
2. Associate Professor Marinella Marmo, Flinders University and Umes Acharya, Youth Officer, Young Christian Workers
3. Scott Cowen, Assistant Secretary, Australian Services Union

### **26 February 2020**

1. Shop Distributive and Allied Employees Association
  - Tom Carrick-Smith, Director of Policy and Strategy
  - Edward Satchell, Lawyer
2. Woolworths
  - Hayley Baxendale, General Manager, Workplace and Employee Relations
  - Scott Joseph, Group Counsel, People and Culture
  - Rachel Elliot, Senior Manager, Government Relations
3. Michael Taliangis

### **11 March 2020**

1. Henry Honner
2. United Workers Union
  - Karen Grogan, Acting Secretary
  - Mary McCarthy, Industrial Officer
3. Ralph Clarke

### **10 February 2021**

1. Flinders University and ACRATH
  - Associate Professor Marinella Marmo,
  - Meredith Evans, President of ACRATH, SA branch
  - Anne Tormey, Secretary of ACRATH SA branch and former national president of ACRATH.
2. Justin Daley, Digital Content Creator  
Shannon Cross, Digital Content Creator

### **10 March 2021**

1. Working Women's Centre
  - Abbey Kendall, Director
  - Maddie Sarre, Youth Project Officer
2. Dr Katherine Christ lecturer in Accounting, UniSA Business
3. Study Adelaide
  - Karyn Kent, Chief Executive
  - Sarah Parrington, Student Engagement Manager

## **APPENDIX 1: INDEX TO WITNESSES - CONT.**

### **24 March 2021**

1. SafeWork SA
  - Martyn Campbell, Executive Director
  - Glenn Farrell, Director, Compliance and Enforcement
2. SA Unions
  - Angas Story, Secretary
3. SA Labour Info Hub
  - Jackie Chen
  - Wan Zhang

### **19 May 2021**

1. United Workers Union
  - Aira Firdaus, Lead Official, Farms
  - Karen Grogan, National Political Coordinator
2. Australian Workers Union
  - Peter Lamps, Secretary
3. SDA
  - Josh Peak, Secretary
  - Tom Carrick-Smith, Director Policy & Strategy

### **4 August 2021**

1. SafeWork SA
  - Martyn Campbell, Executive Director
  - Glenn Farrell, Director, Compliance and Enforcement
2. Red Cross
  - Kyla Raby, National Program Coordinator - Lead - Trafficking, Forced Labour and Forced Marriage

### **18 August 2021**

1. Simon Hou, Councillor, City of Adelaide

## APPENDIX 2: LIST OF SUBMISSIONS

The following persons and organisations made written submissions to the Committee which were resolved to be published by the Committee:

01. National Retail Association
02. [Redacted]
03. Multicultural Youth SA
04. WK Lawyers
05. Restaurant and Catering Industry Association
06. Australian Services Union
07. The McKell Institute
08. AMIEU
09. Multicultural Communities Council of SA
10. Ron McBride
11. Young Workers Legal Service
12. Working Women's Centre Inc.
13. CEPU
14. SDA
15. CFMEU
16. National Union of Workers
17. Health Services Union
18. Greyhound Racing SA Employees
19. Housing Industry Association
20. Ai Group
21. Andrew Moore
22. Henry Honner
23. Business SA
24. M Taliangis
25. Citrus Australia
26. Pamela Clark
27. SA Unions
28. Various submitters
29. Flinders University and ACRATH
30. Anonymous
31. United Worker Union