

# SUBMISSION TO THE SENATE STANDING COMMITTEE INQUIRY INTO UNLAWFUL UNDERPAYMENT OF EMPLOYEES' REMUNERATION

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## Table of Contents

About Per Capita .....	2
About the author.....	2
Executive summary .....	3
Beyond wage theft: insecure work in context.....	4
The forms of and reasons for wage theft: a 'cost of doing business'?.....	7
Business as usual: wage theft in hospitality.....	7
Young workers in hospitality.....	7
Industrial Hydra: the many forms of wage theft .....	8
Unpaid trials .....	8
Cash-in-hand.....	9
Unpaid overtime .....	10
Misclassification .....	10
Super theft .....	11
The cost of wage and superannuation theft to the national economy .....	12
Identifying and uncovering wage and superannuation theft.....	13
Conclusion .....	14

## About Per Capita

Per Capita is an independent public policy think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia based on fairness, shared prosperity, community and social justice. Our research is rigorous, evidence-based and long-term in its outlook.

We consider the national challenges of the next decade rather than the next election cycle. We ask original questions and offer fresh solutions, drawing on new thinking in social science, economics and public policy.

## About the author

Shirley Jackson is a Research Economist in Per Capita's Progressive Economics program. Shirley spent most of his working life in warehouses, retail shops, restaurants and being unemployed. He has been fortunate enough to have spent the last 10 years working as a union official.

His areas of interest and expertise are young workers, employment, labour market policy, industrial relations, and industry policy. Shirley undertook undergraduate and postgraduate studies in history, economics and political economy, and has an unfinished doctorate on young workers.

## Executive summary

For young people in Australia, the transition from school to work is increasingly defined by insecurity. In some sense, school-to-work transitions have always been characterised by periods of instability, as new entrants to the labour market have always been expected to learn skills, earn respect and prove their value before achieving stability. However, the labour market deregulation policies of the 1980s and 1990s have contributed to young people in the 21st century remaining in precarious positions well into their late twenties and even into their thirties.

While wage theft has only recently become part of the national conversation, it has long been a structural feature of the hospitality industry. Given that young workers overwhelmingly make up the hospitality workforce, the growth of wage theft has increasingly become a key driver of generational inequality in Australia. Young people today are far more likely to work in hospitality than young people from previous generations, and their careers in hospitality are increasingly precarious and marred by wage theft.

For decades Australians have been told that if government stays out of the way, the market will create work for everyone who needs it and will do so in the most efficient way. Yet it is now painfully obvious that the market cannot deliver full employment that can support people to live a good life and ensure the fair distribution of our shared prosperity.

Wage theft is a problem that cannot be solved through market mechanisms – it requires a strong regulatory framework that contains enforcement measures and carries significant penalties for non-compliance. We argue that the government must take wage theft seriously, and that a strong interventionist approach must be taken to ensure the security of work for an entire generation of Australians.

## Beyond wage theft: insecure work in context

The generation of young workers who entered the labour market during and directly after the Global Financial Crisis (GFC) have been locked into patterns of insecure employment that far exceed those of their parents' generation (Goos and Manning 2007; Standing 2011; Wyn 2008).

Recent labour force data from the Australian Bureau of Statistics (ABS) shows a number of dramatic changes to the status of employment amongst recent generations of young workers (ABS 2017a, 2017b, 2018). For those who entered the labour market in 2006, full time employment for 15 to 24-year-olds fell by 6% in 7 years, from 54.5% in 2006 to 48.2% in 2013.<sup>1</sup> Within this same period, youth underutilisation increased from 21.1% to 25.6%. This means that one in every four young workers in Australia is either unemployed or underemployed.

Furthermore, this experience is being compounded by concurrent technological advances, such as robotics, artificial intelligence (AI) and automation. Employment pathways across high-skilled (such as manufacturing and healthcare) and low-skilled (such as retail and hospitality) industries are being 'disrupted', and increasing numbers of young people are starting their working lives in precarious, short-term contracts in the emerging gig and platform economies (ILO 2017: 2-5).

Where previous generations of young people experienced a transition from student to worker that was relatively smooth and distinct, those born in the 1980s and 1990s have experienced a blurring between these two stages.

Young workers today are more likely to engage in a combination of work and study for most of their young adulthood, often into their late 20s and even early 30s. The number of 15 to 24-year-olds combining work and study has increased from 38.2% in 1998 to 44.8% in 2018 (ABS 2018).

This is compounded by a concurrent disconnection between education and labour market outcomes, which has itself been driven in part by a significant growth in post-compulsory education and an underutilisation of this growing knowledge-based skill set (Furlong 2016; Furlong et. al. 2017; Wyn and Woodman 2006).

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<sup>1</sup> This range of 2006 to 2013 reflects the 15-24 age group for those in who left school in 2006.

Some researchers have argued that young workers in Australia “embrace flexibility as a way of life” (Stokes 2012: 78) and don’t place value and meaning on work as part of their identity (Wierenga 2009). However, Cuervo, Crofts and Wyn (2013:21) have found that the two most recent generations of young Australians (corresponding to popular labels of ‘Gen X’ and ‘Gen Y’) continue to value secure, full time work above flexible working arrangements.

Yet secure, full time work is becoming less available. The world of work that young people are entering is increasingly insecure, and workers are losing long fought for benefits while experiencing a run of wage stagnation that is unprecedented in the modern era.<sup>2</sup>

Insecure or precarious work can manifest in many ways beyond un- or under-employment. A worker can experience precarity as casual or temporary work, as variable or unpredictable hours, as the loss of benefits such as paid leave and overtime pay, high job turnover rates and as variable income. These are all features of the increasing precarity of our workforce. A large part of the reason for the increasing insecurity of work in Australia is the loss of bargaining power for workers, due to declining union coverage, and successive attacks on workplace rights by governments since the 1990s.

Australians could once rely on a system in which workers and employers worked together to increase productivity and growth on the understanding that the spoils would be fairly shared. That system is broken, and the good faith negotiation between workers and their employers that was the hallmark of the Australian “fair go” is under extreme pressure.

Exacerbating the insecurity caused by the casualization of work in Australia in recent years has been a changing industry composition in the economy. Simply put, employment in higher paying industry sectors with more permanent, full time jobs has been falling relative to that in lower paying sectors with more part-time, casualised and limited term contract jobs, including those offered through labour hire.

As noted in our report *Flexible Ongoing Employment: solving a problem that doesn’t exist*,<sup>3</sup> industries with the greatest proportion of casual workers are also the lowest paid industries in Australia (see Table 1).

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<sup>2</sup> For a full account of the factors underpinning the rise of insecure work and the stagnation of wages in Australia, we refer the inquiry to Per Capita’s 2018 report, *The Future of the Fair Go: securing shared prosperity for Australian workers*.

<sup>3</sup> [https://percapita.org.au/our\\_work/flexible-ongoing-employment-solving-a-problem-that-doesnt-exist/](https://percapita.org.au/our_work/flexible-ongoing-employment-solving-a-problem-that-doesnt-exist/)

## PER CAPITA SUBMISSION

Industry composition has changed throughout history, and it is incumbent on policy makers to respond with appropriate regulation and economic settings to support the emergence of new industries.

Industry	Casual part-time	Casual full-time	Permanent full-time	Permanent part-time	Median pay (\$/hour)
Accommodation and Food Services (including Hospitality)	57	10	22	11	21.25
Arts and Recreation Services	41	8	39	11	26.32
Retail Trade	35	4	39	22	22.84
Administrative and Support Service	24	9	55	12	25
Agriculture, Forestry and Fishing	21	31	41	6	23.18
Other Services	18	9	64	9	25.00
Education and Training	17	3	58	22	34
Health Care and Social Assistance	14	4	50	32	31.43
Transport, Postal and Warehousing	13	13	65	9	28.74
Information Media and Telecommunications	13	7	68	12	31.41
Manufacturing	9	10	75	6	28.11
Rental, Hiring and Real Estate Services	8	9	70	13	27.14
Construction	8	20	70	3	30.00
Wholesale Trade	8	6	80	6	27.10
Professional, Scientific and Technical	7	5	78	10	33.75
Public Administration and Safety	4	5	80	10	38.97
Financial and Insurance Services	3	3	78	16	36.84
Electricity, Gas, Water and Waste Services	2	9	86	2	38.45
Mining	2	16	79	3	49.76

Table 1. Percentage of workers in each industry by employment category, ranked by percentage of casuals (2017). Shading shows the five industries with the lowest median hourly pay rate. Source: HILDA.

In short, while young workers are still interested in finding secure, full time work, they are being denied the opportunity to obtain it. As a result, young workers are spending longer and longer periods of time in insecure working arrangements in non-career industries like retail, fast food, and hospitality.

## The forms of and reasons for wage theft: a 'cost of doing business'?

This report will concern itself primarily with the hospitality industry, for two reasons. Firstly, the endemic nature of underpayment within the hospitality have made it the industrial face of wage theft, and secondly, the increasing numbers of young workers employed in the industry make it an important factor in shaping the school-to-work transition.

### Business as usual: wage theft in hospitality

While wage theft has recently been uncovered extensively in hospitality, workplace conditions more generally are often in dispute across the industry. The Fair Work Ombudsman (FWO) reports in 2016-17 that despite the industry "...employing around 7% of Australia's workforce, it accounted for the highest number (17%) of disputes...[and] was also the industry with the highest number of anonymous reports received (36%), infringement notices issued (39%) and court actions commenced (27%)" (FWO 2017, pp. 20-21).

Yet the sheer scale of underpayments within the industry point to the intrinsic nature of wage theft within hospitality: these are not individual cases of wrongdoing; rather, underpayment has become the foundation on which the industry has been built. Indeed, due to the sheer number of reported cases, the practice has been acknowledged by the industry association as a widespread problem (Schneiders and Millar, 2018a).

In 2018, restaurant chains run by celebrity chefs including Neil Perry and George Colombaris were found to be underpaying their staff and required to pay back A\$1.6m and A\$2.6m respectively in unpaid wages (Schneiders and Millar, 2018b; Longbottom et al., 2018). Furthermore, the FWO found payment violations in 72% of hospitality businesses audited in 2018 (Davey, 2018a). This followed on from a three-year audit, which concluded in 2015 that 4,520 workers in 800 businesses were being underpaid a total of A\$2.3m by their employers (Owen, 2016).

### Young workers in hospitality

The second reason for our focus on the hospitality sector is the disproportionate representation of young workers in the industry. In Table 2, we have mapped the changes to this landscape, as they relate to 15 to

## PER CAPITA SUBMISSION

24-year-old workers. In 1986, the spread of employment is reasonably equal, with the Manufacturing, Construction and Financial industries employing a significant number of young workers. Retail (and Wholesale) Trade employed over a quarter of young people, and less than 5% worked in Accommodation & Food Services, under which hospitality is grouped.

	Manufacturing	Construction	Finance and Insurance	Retail Trade	Hospitality
1986	14.8%	11.2%	11.0%	26.5% <sup>4</sup>	4.7% <sup>5</sup>
1996	11.6%	5.9%	3.7%	29.0%	8.7%
2006	8.5%	8.1%	2.8%	24.1%	16.3%
2016	4.9%	9.1%	1.8%	21.8%	21.5%

Source: Australian Bureau of Statistics (1986, 1996, 2006, 2016)

Table 2. Industrial Changes to Youth Employment

By 2016, nearly a quarter of all young workers were employed in hospitality. When this figure is broken down into 15 to 19-year-olds, it increases to 34%. Conversely, 45% of the total hospitality workforce is made up of by 15 to 24-year-olds (Department of Employment, 2017).

Therefore, any structural inequalities within the hospitality industry will disproportionately affect the lives of young workers in Australia.

### Industrial Hydra: the many forms of wage theft

Wage theft has become so prolific in the hospitality industry partly as a result of the many forms that it can take. This report will discuss the five forms of wage theft that are most common in the hospitality industry: unpaid trials, cash-in-hand, unpaid overtime, misclassification, and super theft.

#### *Unpaid trials*

Unpaid trials occur when a hospitality business requires prospective employees to do unpaid trial shifts within the business as a precondition for securing paid employment. It is worth noting that there are

<sup>4</sup> 1986 figures are Wholesale and Retail Trade combined

<sup>5</sup> 1986 figures group Cafes & Restaurants under Recreation, Personal and Other Services



certain circumstances when unpaid trials are lawful: when it involves nothing more than a demonstration of the person's skills; when it is only for as long as needed to demonstrate the skills required for the job; and when the worker is under direct supervision of the potential employer (or other appropriate individual) for the entire trial.<sup>6</sup>

However, the practice of asking prospective employees to do unpaid trials that cover entire shifts or multiple shifts, involve productive work that creates profit for the business owner, and that involve working independently, have a long history, and are increasingly common.<sup>7</sup>

While this form of unpaid trial is prevalent throughout the industry, another related practice is common amongst high end restaurants. "Culinary tourism" occurs when up and coming chefs will seek out experiences in famous restaurants, in order to build their résumé and obtain new skills.<sup>8</sup> Both practices are predatory behaviours that take advantage of the desire for experience among young workers.

### *Cash-in-hand*

"Cash-in-hand" is a familiar phrase in our economy. Like most shady dealings, it goes by many names: unreported employment, the informal economy, or the grey labour market. Whatever we call it, it is used to circumvent Australian workplace and taxation laws.

This should not be confused with being paid in cash.<sup>9</sup> For example, an employer who wanted to reduce their expenditure on transaction fees could add up an employee's hours, calculate wages for the week minus tax, superannuation and other deductions. The adjusted wages could then be paid straight from the till, accompanied by a payslip.

The tell-tale signs of a "cash-in-hand" job are a lack of formal employment paperwork, such as signed contracts, weekly payslips or a group certificate at tax time. There are obvious downsides: these jobs are unlikely to pay the correct minimum wage, penalty rates,<sup>10</sup> or super contributions.<sup>11</sup> A greater concern is

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<sup>6</sup> [https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/unpaid-work/unpaid-work-hospitality-industry#unpaid\\_trials](https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/unpaid-work/unpaid-work-hospitality-industry#unpaid_trials)

<sup>7</sup> <https://theconversation.com/all-these-celebrity-restaurant-wage-theft-scandals-point-to-an-industry-norm-131286>

<sup>8</sup> <https://www.sciencedirect.com/science/article/pii/S1878450X18300155>

<sup>9</sup> <https://www.ato.gov.au/Individuals/Working/Working-as-an-employee/Receiving-cash-for-work-you-do/>

<sup>10</sup> <https://theconversation.com/penalty-rates-and-their-role-in-australias-cash-economy-30420>

<sup>11</sup> <https://www.ato.gov.au/Individuals/Super/Growing-your-super/Unpaid-super-from-your-employer/>

these jobs aren't covered by workers' compensation. The most concerning aspect is that so little data is being collected about such jobs. The most recent estimate comes from a 2012 survey, and found that one in four young workers had recently done cash-in-hand work.<sup>12</sup>

The risks of this informal economy extend well beyond young workers. Professor Christopher Bajada estimates that cash-in-hand jobs make up an informal economy equivalent to 15% of Australia's GDP.<sup>13</sup> Similarly, in 2004 the government estimated the informal economy between 3-15%.<sup>14</sup>

Even if we take the lowest estimate of 3% of GDP, that's approximately AUD\$48.6 billion which is circulating, untaxed, outside our economy. A 2012 report on the cash in hand economy estimates a staggering \$3.3 billion of public revenue is being lost to cash-in-hand working arrangements each year.<sup>15</sup> This is a significant amount of forgone revenue to the federal budget. It is, for example, roughly equivalent to the annual cost of increasing the rate of *Newstart* by \$75 per week.

### *Unpaid overtime*

Unpaid overtime occurs when working outside of normal rostered hours becomes an expected part of working life. This practice ranges from minor time theft (for example, where workers are expected to be at work 15 mins before a shift to count the till before their shift starts) through to major time theft, like the practices uncovered within the Rockpool dining empire that paid workers for a 38 hour week and demanded an additional 20-30 hours be worked.<sup>16</sup> This form of wage theft is prevalent throughout the hospitality industry and represents a significant normative approach to work within the industry.

### *Misclassification*

Classification underpayments are often overlooked within the wage theft debate. This form of wage theft occurs when workers are employed on a wage rate that corresponds to one level within the relevant

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<sup>12</sup> <https://www.abc.net.au/news/2012-09-26/one-in-four-young-people-working-illegally/4282040>

<sup>13</sup> <http://onlinelibrary.wiley.com/doi/10.1111/j.1475-4932.1999.tb02573.x/abstract;jsessionid=66A72F1F0047789A0C739DD10EF98F8C.f03t03>

<sup>14</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Completed\\_inquiries/2002-04/tax\\_effects/report/c04](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2002-04/tax_effects/report/c04)

<sup>15</sup> [https://www.tai.org.au/sites/default/files/TB%2017%20Cash%20in%20hand%20means%20less%20cash%20for%20states\\_4.pdf](https://www.tai.org.au/sites/default/files/TB%2017%20Cash%20in%20hand%20means%20less%20cash%20for%20states_4.pdf)

<sup>16</sup> <https://www.smh.com.au/business/workplace/rockpool-to-pay-back-1-6m-to-staff-20181012-p509c7.html>

award, yet are expected to perform duties that are covered by a different level of the award that would be attract a higher rate of pay.

Often within the hospitality industry, casual workers will be asked to manage a shift or supervise a section of the business (the counter, the kitchen, etc), yet will receive the same rate of pay as others on shift. Similarly, someone who is employed as a barista might be asked to work in the kitchen on different shifts, but their rate of pay will remain the same regardless of the change in their duties.

### *Super theft*

This form of wage theft occurs when employers avoid their legal obligations and refuse to pay mandatory superannuation. Recent research conducted by Industry Super Australia (ISA) has shown the breadth and depth of this problem. Through an analysis of Australian Tax Office (ATO) data, ISA estimates that 2.85m workers are having their super stolen by employers, with a staggering \$5.94bn being taken from workers' wages.<sup>17</sup> Young workers are most likely to experience this form of wage theft, with almost half of all workers aged 20 to 29 earning less than \$30,000 not receiving their mandated superannuation payments from their employers.

The theft of super represents a large threat to the eventual retirement of young workers, as the compound interest that is generated over time is crucial to ensuring an adequate super balance at the time of retirement. Super theft is particularly dangerous for young women, as research shows that women are more likely to earn less, work shorter hours and spend longer periods of time outside the paid labour market.<sup>18</sup> By engaging in super theft, employers are actively contributing to the future likelihood of poverty, insecurity and homelessness of older women.

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<sup>17</sup> <https://www.industrysuper.com/assets/FileDownloadCTA/d62c256bec/Super-Scandal-Unpaid-super-guarantee-in-2016-17-formatted-versio-for-final-compliance-tick-V5.pdf>

<sup>18</sup> [https://percapita.org.au/wp-content/uploads/2018/05/Not-So-Super\\_FINAL-v2-2.pdf](https://percapita.org.au/wp-content/uploads/2018/05/Not-So-Super_FINAL-v2-2.pdf)

### The cost of wage and superannuation theft to the national economy

The cost to the economy of wage and super theft is substantial. As indicated above, an estimated \$5.94bn is being taken from workers superannuation balances annually. As superfunds achieved an average return of 8.32% per year between 1993 and 2019,<sup>19</sup> over 40 years that \$5.94bn in stolen super would accumulate to \$134.1bn less in overall super balances.

The cost of wage theft is more difficult to estimate. Recent estimates conducted by the McKell Institute show that for every 1% of wages that are stolen, the government loses \$46.4m in income tax revenue in Queensland alone.<sup>20</sup>

Conservative calculations using the ATO's tax gap data reveal that approximately 20% of all Queensland's wages are being stolen through the various forms of wage theft practices, resulting in \$928m in foregone revenue every year.

Given that Queensland employs approximately 10.19% of Australia's workforce,<sup>21</sup> it is reasonable to estimate that the national revenue loss due to forgone income tax on stolen wages is approximately \$9.46bn a year.

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<sup>19</sup> <https://www.superguide.com.au/boost-your-superannuation/super-funds-return-calendar-year>

<sup>20</sup> <https://mckellinstitute.org.au/app/uploads/McKell-Ending-Wage-Theft.pdf>

<sup>21</sup> <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6202.0Jan%202020?OpenDocument>

## Identifying and uncovering wage and superannuation theft

Given the epidemic of wage theft being engaged in by Australia's employers, it is clear that current arrangements to regulate wage payments are not working. While the current push for the criminalisation of wage theft is an admirable one, the pursuit of the Ensuring Integrity Bill and its assault on the rights of working people will make the criminalisation of wage theft less effective. Restrictions on the ability of unions to access workplaces, represent workers, monitor wage payments and engage in legal industrial action not only diminish the power of ordinary workers, but reduce the likelihood of wage theft cases being made public.

Internationally, evidence has been mounting to show the integral role that trade unions play in ensuring stronger wage growth, greater social cohesion and reduced inequality. Notably, a comprehensive paper by the International Monetary Fund (IMF) reported that high union density strongly predicts low income inequality.<sup>22</sup> They found that a reduction in union density weakens earnings for middle- and low-income workers and increases the income share of corporate managers and shareholders.

Similarly, recent research from Princeton found that union density had a strong equalizing effect on income distribution, ensuring that low skilled workers wages at the low end of income distribution were lifted at times of high union density.<sup>23</sup>

Trade unions and industrial lawyers at union friendly law firms have been integral to uncovering cases of wage theft. The best way to ensure that incidences of wage theft are identified, prosecuted and brought to justice is to increase the rights of working people and extend the industrial powers of the trade union movement, including by reinstating the right of unions to enter the workplace and inspect the accounts of employers to check that wages and superannuation are being paid at award rates.

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<sup>22</sup> <https://www-imf-org.eu1.proxy.openathens.net/external/pubs/ft/sdn/2015/sdn1514.pdf>

<sup>23</sup> <https://dataspace.princeton.edu/jspui/bitstream/88435/dsp01gx41mm54w/3/620.pdf>

## Conclusion

Wage theft is an epidemic. Throughout our economy, employers are engaging in unscrupulous practices that are taking money from the pockets of workers and reducing the revenue of governments.

Overwhelmingly, it is younger workers who are bearing the greatest costs of wage theft, particularly those employed within the hospitality industry. This contributes to entrenched inequalities within our society, most notably generational and gendered inequality.

By allowing these practices to continue, and providing amnesty to the guilty parties who have engaged in these criminal acts, the government is sending a message that it is soft on crime – provided you run a business. These actions are teaching an entire generation of workers that their government does not value their work, their safety or their security. Young workers deserve so much better.

We have argued that not only has wage theft become a crisis in Australia, but that it is a crisis we can avoid. By restoring the rights of working people and their unions, and bringing our industrial instruments into alignment with international standards, we can eradicate the curse of wage theft from our economy and reduce income inequality.

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