

Wage Theft: The exploitation of workers is widespread and has become a business model

ACTU Submission Inquiry into wage theft in Queensland

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Wage Theft: The exploitation of workers has become a business model

The ACTU is concerned that the exploitation of workers has become systemic in many sectors of the economy and noncompliance with workplace laws has become commonplace. Many low paid workers are presently in industries with poor levels of compliance; agriculture, meat processing, hospitality, retail and accommodation all of which have a particularly high incidence of wage theft and exploitation.

When low-wage workers are cheated out of even a small percentage of their income, it can cause major hardships like being unable to pay for rent, child care, or put food on the table. Wage theft from low paid workers is also detrimental to society, as it contributes to widening income inequality, wage stagnation, and low living standards—interrelated problems that drive inequality in our society.

Businesses like 7 Eleven, Caltex, Pizza Hut, Dominos, Red Rooster and others must take responsibility for their flawed business models which allow wage theft and other exploitative practices to flourish. What is clear from these recent wage scandals is that business size is not a guarantee against widespread breaches of workplace laws, neither is commercial success, nor is being a common household name or a brand that is present on many high streets. Furthermore employers that do the right thing and pay their employees the proper level of pay and entitlements should not be placed at a competitive disadvantage relative to firms who regularly partake in these practices.

The normalisation and prevalence of wage theft

In some sections of the workforce underpayment of wages has become routine. Employers are unashamedly advertising below Award rates for vacant positions. This seedy underbelly of exploitation and wage theft has been exposed through high profile public exposés of worker exploitation. Workers have been threatened against making complaints, with employers taking advantage of workers who are in vulnerable positions.

A recent audit of job advertisements with particular language criteria found 78% of businesses advertised rates of pay below the minimum Award wage¹. The current approach to redressing worker underpayment and Fair Work Act protections are not working. The system relies heavily on individuals reporting underpayments. There is no recognition of how difficult and dangerous it is to take this first step. Many workers are scared to come forward with a complaint.

Some industry and legal structures normalise and perpetuate underpayment. The FWO website points to a convoluted and intimidating process including mediation and “self help” as the typical response to a report on underpayment. Compare this to ATO practices where tax avoidance is reported. There is a flourishing culture of underpayments in some sections of the workforce where businesses ignore workplace law.

¹ Unions NSW ‘Lighting up the Black Market: enforcing minimum wages’

Awards instead defer to unregulated 'local wage markets' to determine the rates of pay for their staff (employers pay what they think is the going rate). Unions have been restricted from accessing these workplaces to investigate and rectify underpayments. A new approach to uncovering and investigating underpayment is required. Unions need proper access to workplaces suspected of underpayments in order to investigate contraventions and represent and organise workers to collectively enforce their rights. Penalties for employers found to have knowingly or intentionally underpaid their staff should be significantly increased

There are many different forms of wage theft including unpaid super and sham contracting

Wage theft goes beyond paying under-award wages and also includes the following;

- Failing to pay superannuation;
- Failing to pay for breaks;
- Failing to pay overtime;
- The compulsory use of employer-provided staff accommodation to claw back wages;
- Withholding of wages on the basis that it will put visa status at risk;
- Not paying for trial or training periods;
- Misclassifying workers as independent contractors;
- Deliberate employee misclassification;
- Not paying personal, annual or paid leave;
- Not paying appropriately for higher duties;
- Failing to meet basic worker entitlements in family run businesses;
- Phoenixing-type activity, where a firm goes into administration or liquidation to avoid having to pay employee entitlements, then re-emerges under a different legal structure but with the same or related individuals in control;
- Inappropriate deductions from workers' wages such as inflated rent and transport costs;
- Charging employees for PPE;
- Paying 'all-inclusive' flat hourly or daily rates of pay without regard to specific entitlements
- Non-payment of shift allowances, ;
- Failing to deduct or remit taxation amounts;
- Requiring the employee to pay an 'employment bond';
- Compulsory medicals and drug testing at nominated medical centres with inflated medical fees; and
- Failing to pay for 'on call' periods.

This is not an exhaustive list but much of this deliberate behaviour from employers has become commonplace.

Recent cases of wage theft in Australia

We can see below the extent of wage theft in Australia is not restricted to one industry or small business but in fact is widespread and has become normalised. Recent examples of wage theft include:

- **7-Eleven:** Caught systematically underpaying thousands of workers and then, once caught, pretending to pay workers full wages but committing wage theft through requiring employees to pay back a portion of their wages in cash. 7-Eleven brought large scale non-compliance to national attention with a Fair Work Ombudsman investigation that started in 2014. Not only was there evidence of underpayments but fraudulent records were kept by the franchisees. A franchise system meant that individual stores were the employers and liable for any sanctions for breaching workplace laws. The corporate brand as a franchisor was immune from prosecution as 7-Eleven was not the employer. The conciliatory approach that was adopted by the Fair Work Ombudsman in this case failed due to 7-Eleven failing to cooperate with any program intended to bring about a culture of compliance. A large number of employees on working visas also hampered the investigation as employees were too scared to speak for fear of deportation (FWO 2016; Healy 2016:319; Patty 2016). In June 2017 the amount of stolen wages in 7-Eleven was estimated at over \$110 million
- **Pizza Hut and Dominos:** Recently the Fair Work Ombudsman activity in relation to Pizza Hut has been made public. Widespread non-compliance, including sham contracting, was attributed to the franchisees of this national brand. The Fair Work Ombudsman has issued compliance notices to recover wages for underpayments, infringement notices and formal letters of caution to Pizza Hut franchisees, ninety-two percent of whom were said to be non-compliant (Workplace Express 2016a).
- **Red Rooster:** Another national brand operating under a franchise system is Red Rooster. Migrant workers in Brisbane are being paid as little as \$8 per hour. Channel 7 reporters have been following this case which demonstrates how franchisees are quite often willing to exploit workers in order to increase their profit margin while the owner of the brand they are selling turns a blind eye (Love 2017).
- **MaDE Establishment Group** - was recently caught underpaying staff \$2.6 million in overtime. The restaurant group were putting employees on low salaries and then pressuring them to work long hours with no overtime. The restaurant group also failed to pay superannuation to workers.
- **Guara Nitai Pty Ltd:** operated a Coffee Club café in Brisbane and used the workers' fear of deportation to undertake what was described as "gross exploitation" by Judge Jarrett of the Federal Circuit Court. The guest worker, a cook, was paid an amount owing for underpayment of wages and then required to withdraw the same amount and pay it back to the company director. Judge Jarrett imposed \$180,000 in fines against Guara Nitai Pty Ltd and its director (Workplace Express 2017b).

- **Caltex:** In 2018, an audit of Caltex outlets found that 76 per cent of them were not compliant with providing employees with their proper entitlements. The audit found evidence of underpayment, failure to pay overtime and penalty rates and poor record keeping, with even some examples of falsification of records. Typically, it was young workers and workers from non-English speaking backgrounds who were most likely to be underpaid by the Caltex franchisees (FWO 2018a; Workplace Express 2018a). As a result of this audit Caltex have reportedly taken the decision to bring all of its service stations under direct control rather than use a franchise system. Franchising appears to be synonymous with wage theft for major brands in Australia. By using a franchise system, it appears that major brands have distanced themselves from actual payment of workers and therefore any level of responsibility for compliance.
- **Baiada** owns the Steggles brand and had previously publicised supplying its product to KFC, Red Rooster, Woolworths and Coles. Baiada, therefore has certainly been associated with some high-profile national brands. Baiada had a practice of engaging labour hire companies that were far from reputable. FWO reports state that Baiada and its suppliers of labour were uncooperative with investigations. Exploitation was rife amongst a workforce that included overseas workers on working holiday visas. Record keeping was described by FWO as “inadequate, inaccurate and fabricated”. Baiada’s use of sham contractors was prolific amongst a production workforce where an objective assessment of the work performed would rule out any suggestion of such workers being independent contractors (Workplace Express 2015).
- **Touchpoint Media Pty Ltd** is the subject of legal action by the Fair Work Ombudsman. It is claimed that Touchpoint Media Pty Ltd and its company director, Laurence Bernard Ward, are responsible for underpaying 23 young journalists by more than \$300,000. The highest amount owed to one journalist was almost \$50,000 (Mitchell-Whittington 2017).
- **Uber:** A recent study found² that, after taking into account all costs, but before paying income tax and superannuation contributions, the average Australian Uber driver is paid \$14.62 an hour, with many drivers receiving less. This is over \$4 an hour below Australia’s statutory minimum wage of \$18.93 per hour. That’s a loss of \$163.78 a week for a driver working 38 hours a week (it is clear that many Uber drivers work well in excess of that figure to make ends meet). It is also \$6 an hour below the base rate payable to drivers under the Passenger Vehicle Transportation Award 2010, and potentially equates to less than half the payments due to drivers under that Award once casual loading and penalty rates are taken into account. In defending against these claims Uber has pointed to the existence of surge charging. However, as Economist and Director of the Centre for Future Work Dr Jim Stanford points out:

“This ‘surge’ income cannot be relied on, since drivers have no control or knowledge when (or even if) this system will be activated. Moreover, as Uber drivers increasingly organise their work schedules around peak periods, and as the general population of drivers

² https://www.futurework.org.au/innovation_or_exploitation_simulating_net_hourly_incomes_of_uberx_drivers

increases, then the likelihood that demand for drivers will exceed supply (hence triggering surge pricing) is further reduced... supplemental income from surge pricing is shrinking as a result of the growing supply of Uber drivers – many of whom concentrate their working hours in peak periods in often-unfulfilled hope of attracting surge price revenue.³

- **25% of all international students earned \$12 per hour or less;** There is significant empirical evidence that particular cohorts of the labour force routinely face wage theft and exploitation: In a recent study UNSW study a quarter (25%) of all international students earned \$12 per hour or less and 43% earned \$15 or less in their lowest paid job. We expand on this in the ‘Vulnerable workers’ section below.
- **79 per cent of hospitality employers in Victoria did not comply with the national award wage system from 2013 to 2016;** The Report into Corporate Avoidance of the Fair Work Act (Parliament of Australia 2017:59/60) made the following observations:

“Underpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm. Figures cited below are alarming. In Victoria alone, it is estimated that 79 per cent of hospitality employers did not comply with the national award wage system from 2013 to 2016.³ The national average for noncompliance is brought lower by findings from other states, but is still hardly a figure engendering pride. Nationwide, it is estimated that one in two hospitality workers are being illegally paid, with similar figures available for the retail, beauty and fast food sectors”

- **A FWO audit that was undertaken in 2017 restaurants, bars and cafes in Fortitude Valley found non-compliance at 60 per cent⁴.** If one was to extrapolate the 60 per cent non-compliance rate that was found in one audit in 2017 to the number of employees employed in the Accommodation and Food Services industry, in the order of 94,000 employees within that industry alone would not be in receipt of their proper entitlements.
- **Exploitation of Housekeepers by Four and Five-Star Hotel Groups;** In 2016 the Fair Work Ombudsman completed an inquiry into the procurement and working arrangements of housekeepers at the following four and five-star hotel groups; (Hotel Groups), Starwood Hotels and Resorts Worldwide Inc, The Accor Group and Oaks Hotels & Resorts Limited. The Inquiry revealed numerous alleged contraventions of the Fair Work Act in various labour supply chains involving housekeepers, including the failure of employers to:
 - classify workers correctly as employees
 - pay applicable penalty rates
 - reimburse employees the cost of specialist clothing

³ Subsidising Billionaires: Simulating the Net Incomes of UberX Drivers in Australia by Jim Stanford, Ph.D. Centre for Future Work at the Australia Institute. March 2018

⁴ It is accepted that caution would need to be used for a sample of this size and that it was at one geographic location being extrapolated to the entire state.

- provide a regular pattern of work for part-time employees
 - apply accrual of leave entitlements
- **Cleaners in Victoria** – United Voice Victoria has found that 81% of cleaners/in Victorian government schools are underpaid, many by half the legal minimum. Sham contracting in Victorian school cleaning is rife, resulting in effective rates of as little as \$6.07 an hour, with one extreme case being uncovered⁵.
 - **NDIS workers**⁶ a new academic article by researchers at RMIT investigated the paid and unpaid work time of disability support workers under Australia’s new National Disability Insurance Scheme. The research takes a novel approach combining analysis of working day diaries and qualitative interviews with employees to expose how jobs are being fragmented and work is being organised into periods of paid and unpaid time, leaving employees paid below their minimum entitlement. They have found some NDIS workers were losing between 12% and 21% of total work time. The estimated cost in unpaid wages for three days was between \$25 and \$182. These are significant amounts for workers whose earnings for the three days ranged from around \$150 to \$600. Similarly underpayment for travel and overtime was experienced by employees of nine of the ten different employers in this study.

Emeritus Professor Joe Isaac believes there are widespread breaches of award provisions

There is a growing consensus amongst the academic community on the appearance of widespread breaches of award provisions. Emeritus Professor Joe Isaac in his academic article, ‘*Why Are Australian Wages Lagging and What Can Be Done About It?*’, in the Australian Economic Review commented;

‘There appears to be widespread —and in some cases, organised—breaches of award provisions, involving exploitation of immigrant workers (Li 2015; Fair Work Ombudsman 2016c), for example the underpayment of 7-Eleven employees (Ferguson and Danckert 2015; Fair Work Ombudsman 2016a), underpayment by other franchise companies (Fair Work Ombudsman 2017; Ferguson and Danckert 2017) and the non-payment of applicable penalty rates for hotel housekeepers (Fair Work Ombudsman 2016b). This suggests a serious lack of inspection of pay records. Traditionally, unions have had a major role in this task by virtue of the right of entry provisions in the Act.’

This is an important contribution as Emeritus Professor Joe Isaac is one of the most influential contributors to both scholarship and public policy in Australian industrial relations during the last 60 years.

⁵ <http://www.abc.net.au/news/2017-05-06/victorian-state-schools-cleaners-being-underpaid,-union-says/8500598>

⁶ ‘*Wage theft, underpayment and unpaid work in marketised social care*’ Fiona Macdonald, Eleanor Bentham and Jenny Malone RMIT University, Australia, The Economic and Labour Relations Review 2018, Vol. 29(1) 80– 96

Why wage theft has become normalised

Employers know the chances of being caught are low because unions do not have sufficient powers to check breaches of workplace laws. Additionally many workers are in a weak position to ask for decent wages (i.e, they are casual or temporary visa workers, labour hire or sham contracts) and therefore will 'accept' a wage that is under the legal minimums for their industry.

Furthermore, the protections for workers from adverse action are weak. There are loopholes where employers can avoid liability far too easily (employers just have to show they had some other non-prohibited reason for taking action).

If a worker does complain about a breach of workplace law they face significant costs and risks. Despite popular misconceptions, workers cannot go to the FWC to rectify their underpayments. The only authority that can issue a binding order in this respect is a Court. This means an up-front filing fee in the range of \$615 (Federal Circuit Court) to \$1,290 (Federal Court), plus a setting down and daily hearing fee of \$735 (Federal Circuit Court) to \$2,570 (setting down) or \$1,020 (daily) (Federal Court).

Unpaid superannuation

Superannuation is workers' deferred wages. Each year \$5.9 billion is stolen from 2.98 million workers in superannuation. That's 1 in every 3 workers. Unpaid superannuation compounds over time. After ten years, Australia's stolen super equates to \$102 billion dollars in lost retirement savings. That's an average of \$2,000 per person per year underpaid. Underpayment of super is associated with a 47% loss in super balance at retirement. This means that people aren't just losing occasional payments, they're getting ripped off systemically. The ISA supplementary submission for the Inquiry into Superannuation Guarantee non-payment in March 2017 stated the following;

'Underpayment of employer SG superannuation is associated with a 47 percent difference in superannuation balance for eligible employees aged under 65. The average balance difference between employees underpaid in 2013-14 and those that were not was \$19,700. This large difference suggests that SG underpayment persists for many years for some employees'

When workers' wages are unduly suppressed, then the normal flow of employer contributions into their superannuation accounts is also constrained. They will have smaller superannuation balances when they retire, and will consequently experience a lasting reduction in post-retirement incomes. Moreover, governments will share a significant portion of the resulting damage: they will collect less in taxes on superannuation contributions and investment income, and will pay out more in means-tested Age Pension benefits (since workers' superannuation incomes will be smaller). These significant, lasting consequences from wage-suppression strategies should be documented and considered. They provide a powerful motive for all stakeholders to challenge employers' wage-cutting initiatives. They also should be of direct concern to superannuation trustees and administrators⁷.

⁷ The Consequences of Wage Suppression for Australia's Superannuation system' Stanford Jim, Center for Future Work

Sham contracting

Data from the ABS would suggest there are over 1 million “independent contractors” in Australia. Nearly one third of them are engaged in the construction industry. In fact, the CFMEU have suggested that between 26% and 46% of so-called independent contractors in their industry are engaged on sham contracts.

In recent decades the use of so-called independent contractors has increased significantly in other sectors of the economy including the public and private sectors. One example of this trend is the professional, scientific and technical services industry which is now the second largest employer of “independent contractors” with roughly 16% of all contractors operating in this sector.

However a large proportion of the workers that fall into this category are not really “independent”. Many of them are economically dependent on a single employer and have limited discretion over when or how they work. In many cases these bogus contractors work alongside regular employees doing the same or similar tasks and even using tools, equipment and other inputs supplied by the same employer. One key difference between a genuine independent contractor and a regular employee is the level of control or independent authority the person has over the performance of their work⁸.

The classic example of a genuine independent contractor would be the tradesperson who has established their own micro enterprise, who undertakes work for different and multiple clients from one week to the next, supplies their own tools and materials and can make decisions about the work schedule and work methods without instructions from a supervisor. It is evident from data compiled by the ABS that a majority of workers currently classified as “independent contractors” would not meet the above mentioned criteria. In fact a massive 64% of people who are classified as “independent contractors” indicated they do not have authority over their own work.

If an independent contractor does not have authority over their work, (and are actually economically dependent on one employer), then they should be employees and entitled to all the benefits and rights that accrue to other permanent employees they work alongside. A similar test of whether a contractor is truly independent or bogus is the ability to sub-contract out work they are engaged upon. As can be seen in Figure 5 roughly 40% of so-called independent contractors report that they are not allowed to sub-contract out work.

⁸ The draft resolution for the 20th Conference of Labour Statisticians defines independent workers in the following way:

“Independent workers own the economic unit in which they work and control its activities. They make the most important decisions about the activities of the economic unit and the organization of their work. They may work on their own account or in partnership with other independent workers and may or may not provide work for other”

The problem of using sham or bogus contactors to disguise what should be a regular employment relationship has expanded considerably in recent years. In 2011 ABS data indicated there were 406,200 people classified as “independent contractors” who claimed they had no authority over their own work. This represented about 40% of all so-called independent contractors. By 2016 this ratio had increased to 64%. That is a very rapid increase in just 5 years. This casts serious doubt over the “independence” of almost two-thirds of all workers now classified as “independent contractors”.

Sham contracting arrangements are an attempt to deny workers the protection provided by labour laws and institutions like the Fair Work Commission and trade unions. They also seek to place workers beyond the reach of basic industrial standards such as the minimum wage and annual leave, sick pay, superannuation, or other benefits that are considered standard provisions in a country as wealthy as Australia. Instead these people must try and extract a fair deal for themselves from their much more powerful employers on the basis of commercial law.

They are unable to collectively bargain and attempting to do so can lead to them falling foul of laws designed to prohibit price fixing among companies. Needless to say most of them end up failing to get a fair deal and are exploited. In fact government authorities have recognized that bogus or sham contracting strategies are widespread. For example, in the past the Fair Work Ombudsman has called particular attention to such practices in cleaning services and call centres. Nevertheless little action has been taken to reverse these trends. The ACTU fears that this trend towards bogus or sham contracting will continue in the coming decades unless the Federal Government reforms our workplace laws.

Labour hire companies have been associated with wage theft

The terms labour hire or private employment agency work are used to describe a triangular employment relationship that includes the worker, the employment agency who is nominally the employer and the end-user enterprise where the work is undertaken. The end user enterprise is often a large company and in many cases this company will use both its own regular employees alongside workers engaged through the private employment agency or labour hire company. Historically the use of triangular employment relationships of this nature was confined to very specific tasks outside the core business of the end user enterprise, or to fill genuine short-term labour shortages. Over time, the ACTU has observed the use of this form of employment expand to a range of occupations and industries and has increased substantially as it is being used a means to reduce wage costs and transfer risk to workers.

Unfortunately reliable data on the extent of triangular employment arrangements is out dated and patchy. Back in 2008 the ABS estimated that 576,700 workers, or 5% of employed people, had found their current job through a labour hire agency. Some 97% of these workers were engaged as employees and 3% were estimated to be independent contractors. Regularly updated statistics are urgently required to monitor these trends.

It has been estimated that there are between 2,000 and 3,500 private employment agencies operating in Australia. The top ten agencies have a combined market share of less than 20% of the total market and fewer than 2% of agencies employ more than 100 workers. While the industry is largely directed by big firms such as Skilled, Manpower, Spotless, Programmed Maintenance Services and Chandler Macleod, there are a large number of small players and considerable scope for unethical practices.

The dominant private employment agencies also utilise workers engaged through labour-hire subcontractors and a multitude of the smaller players. Hence, an employee engaged in this manner may be involved in complex layers of inter-corporate subcontracting arrangements, as well as the commercial arrangements between the private employment agency and the end user enterprise. Rather than a triangular employment relationship the worker may find themselves in a multi-dimensional relationship with no idea about who is ultimately responsible for their wages and employment conditions.

In most advanced economies there are strict licensing arrangements and regulations governing the operations of private employment agencies. In some countries the laws make the employment agency and the end user enterprise jointly responsible for ensuring that the worker receives the pay and benefits to which they are entitled. Thus if the employment agency does not meet its obligations, the worker can take steps to secure compensation from the enterprise in which they perform their work. These provisions have helped reduce worker exploitation and wage theft. Even in the U.S., joint employment is a longstanding feature of labour laws regulating agency work. Australian lawmakers have yet to give effective recognition to the notion of joint employment.

Unfortunately in Australia an enterprise that chooses to engage some, or all of their workers through a private employment agency, has very few obligations to those workers. Previous research has suggested that this gives rise to some very critical shortcomings in the Australian labour market. For example:

- The common law does not generally see an employment relationship between the end user enterprise that directs the work and the worker;
- Workers engaged in this manner cannot bargain for a collective agreement with the end user enterprise, or in the absence of specific provisions, benefit from collective agreements that enterprise may have with its regular workers who are performing similar or even identical work duties. Whilst the workers can conclude a collective agreement with the private employment agency, the agency is not the organization that controls the work and the conditions under which the work is performed;
- Labour hire workers cannot make an unfair dismissal claim against the end user enterprise, even where this enterprise makes the decision as to whether the worker will have a continuing job at the workplace or not;
- Workers in triangular arrangements are less inclined to defend their rights because they realise the end user enterprise can terminate their employment without any adverse consequences.

Vulnerable workers are experiencing particularly high levels of wage theft

In a recent empirical study by UNSW they found a quarter (25%) of all international students earned \$12 per hour or less and 43% earned \$15 or less in their lowest paid job. The National Temporary Migrant Work Survey was the most comprehensive study of wage theft and working conditions among international students, backpackers and other temporary migrants in Australia⁹. The survey drew on responses from 4,322 temporary migrants across 107 nationalities of every region in the world, working in a range of jobs in all states and territories. Its unprecedented scope indicates the breadth, depth and complexity of non-compliance with Australian labour law.

Interestingly, university students did not earn substantially higher wages than students at vocational and English language colleges. Students who worked more than 20 hours per week (potentially breaching their visa conditions) earned substantially lower wages than other students.

The key points from the survey were the following;

- A quarter of all international students earn \$12 per hour or less and 43 per cent earn \$15 or less in their lowest paid job;
- A third of backpackers earn \$12 per hour or less and almost half earn \$15 or less in their lowest paid job;
- Workers from Asian countries including China, Taiwan and Vietnam receive lower wage rates than those from North America, Ireland and the UK. Chinese workers are also more likely to be paid in cash.

Other studies have also found that particular visa types are associated with wage theft and exploitation. The Working Holiday Maker (WHM) visa has unfortunately become a fertile ground for unscrupulous labour hire companies that abuse their workers. There is now a growing consensus of this problem. The March 2016 Senate Standing Committee on Education and Employment “A National Disgrace: The Exploitation of Temporary Work Visa Holders” stated;

“The WHM visa program is a poorly-regulated program, and the bulk of the evidence to the inquiry showed that the WHM visa program has been abused by unscrupulous labour hire companies in Australia with close links to labour hire agencies in certain south-east Asian countries (labour hire companies)are in fact not only using the program to fill potential shortfalls in labour, but also to gain access to cheaper labour¹⁰”

⁹ The authors were Laurie Berg and Bassina Farbenblum. Laurie Berg is Senior Lecturer in the Faculty of Law, University of Technology Sydney. Bassina Farbenblum is Senior Lecturer in the Faculty of Law, UNSW Sydney, and Director of the Australian Human Rights Centre’s Migrant and Refugee Rights Project. She is the founding director of UNSW Law’s Human Rights Clinic

¹⁰ Senate Enquiry “A National Disgrace: The Exploitation of Temporary Work Visa Holders ” Education and Employment References Committee, March 2016

Unions need to be empowered to inspect pay records and enforce laws

The Fair Work Act now places unnecessary restrictions on unions from conducting workplace checks on businesses suspected of underpaying and exploiting workers. Union investigation powers were, until 1996, governed by the provisions of the Industrial Relations Act and supplemented by Federal Awards. These provisions recognised and expressed the policy merit of providing such rights on the basis of “ensuring the observance of an award or order of the Commission”.

From 1996, changes to relevant statutory provisions as well as the requirements of “award simplification” resulted in a far reduced capacity for Unions to perform this valuable role. Instead, the emphasis of the system has shifted toward union officials needing to have a prima facie case of non-compliance before exercising such rights, and needing to prove their own character as pre-condition of being able to access those rights at all.

Moreover, unions are placed in the ridiculous position of being required to give advance notice to enter a premises where they know the relevant records are not stored, and then physically enter that premises, before they can legally require that the records they know to be held off site be made available for inspection. It is not possible for all of those requirements to be satisfied and the records provided even inside of two working weeks. Even if all relevant requirements are satisfied, it is not possible to require production of records that relate to former employees. In practice, this means that the worker who is the subject of the prima facie case can be dismissed in order to defeat the Union’s legal right to investigate.

Recent scandals have demonstrated rampant underpayments in the many businesses. Despite this, unions are now only able to check the pay records of union members. The FWO undertakes audits of businesses to ensure compliance with workplace laws. These audits have recovered underpaid wages for workers, and have uncovered a number of repeat offenders, who despite being caught and fined, continue to underpay workers.

Empowering unions is an efficient and cost effective way of achieving better compliance. If employers know they could be caught as unions are empowered to inspect records and recover stolen wages, this becomes a deterrent itself. At the moment employers know the chances of being caught are low so it is worth the risk

ACTU Key Recommendations

Our industrial laws are in need of a serious overhaul. Some elements of that overhaul should include the following points below but this is by no means an exhaustive list:

- It needs to be much easier for workers and their representatives to enforce laws and recover stolen wages. The Fair Work Act currently requires a lengthy and expensive process just to enforce your rights via court proceedings.
- Unions need stronger investigation and compliance rights. There are 12 million workers across Australia. Australian unions have thousands of trained officers and staff, yet the Fair Work Act now restricts unions from conducting workplace checks on businesses

suspected of underpaying and exploiting workers. The rules need to change so that it is easier for Unions to conduct workplace checks.

- The ACTU would like to see improvements to and the penalties increased for serious contraventions of prescribed workplace rights and worker protections, including for acts of anti-union discrimination and to protect workers from adverse action if they question or enforce a workplace right on behalf of themselves or other employees. Combined with a more easily accessible enforcement mechanism, these measures will act as a greater deterrence for these breaches of workplace laws.
- Stop sham contracting. The ACTU fears that the trend towards bogus or sham contracting will continue in the coming decades unless the Federal Government reforms our workplace laws. Legislation against sham contracting should be tightened
- There needs to be greater accountability for domestic supply chains by establishing a national licensing and regulation scheme for the labour hire industry. Especially given that compared to other employers, labour hire businesses carry a higher risk of being involved in wage theft, particularly via activities that breach the Fair Work Act. There must be changes to the laws to prevent employers from outsourcing their labour requirements to labour hire companies or contractors in order to cut the wages of employees and side step the enterprise agreements for the pay and conditions of those employees. This open practice of corporate avoidance of established agreements, by outsourcing to third parties, is driving down wages by locking out employees from being able to negotiate for their fair share of the value they create for the business.

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