

# Unlawful Payment of Employees Remuneration.

Senate Standing Committee on Economics.

02 March 2020

- [1] The issue of underpayments to employees is a very complex area, and recent announcements by Attorney - General (AG) of the government's intention to criminalise the most serious forms of underpayments only adds to the complexity and ignores the fundamental reasons why underpayments occur. Suggesting criminalization of offenders is the answer proffers the view that all or any employers underpaying their workers are 'criminals', that underpayment is nothing but deliberate, calculated and deserves severe punishment. This is far from the truth and does nothing to find solutions to avoid workers being underpaid.
- [2] I spent 23 years in the Banking industry, dealing with small to medium size businesses. After leaving the industry my wife and I took on small businesses. Later in my life I took on CEO positions in some Medium sized businesses.
- [3] I found that the underpayments to workers generally occur because of the following factors:
- a. The uneven playing field the Fair Work Act (2009) has created.
  - b. Complexity of the awards.
  - c. Inconsistent decisions by the Fair Work Ombudsman.
  - d. Fraud – perpetuated by some but certainly not all
- [4] On page 1 of the second reading speech for the Fair Work Act (2009), by the Hon. Julia Gillard, it states "The bill being introduced today is based on the enduring *principle of fairness* while meeting the needs of the modern age. It *balances the interests of employers*<sup>1</sup> and *employees* and balances the granting of rights with the imposition of responsibilities." The paragraph continues on: "The Bill delivers:
- i. A fair and comprehensive safety net of minimum employment conditions that cannot be stripped away.

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<sup>1</sup> Fair Work Bill 2008, Second reading 28<sup>th</sup> November 2008, Page 11189

- ii. A system that has at its heart bargaining in good faith at the enterprise level, as this is essential to maximise, workplace cooperation, improve productivity, and create rising national prosperity.
- iii. Protections for unfair dismissals for all employees
- iv. Protection and hope for a better future for the low paid
- v. A balance between work and family life: and
- vi. The right to be represented in the workplace.

## Uneven Playing Field

- [5] However, from the outset the playing field was never level. On the 28<sup>th</sup> of August 2007 and in order to get the Fair Work Act through Parliament the ALP changed its 'Forward with Fairness' policy to allow agreements already in place to continue on.<sup>2</sup> This decision has meant there since has been a two-tiered wage system. Whilst, on a personal level, I find it difficult to believe that anyone could be so stupid to create a situation like this, I suspect that the legislators expected that as agreements met their Nominal expiry date they would be re-negotiated and moved on to the new system, the opposite in many cases has occurred. The recent inquiry by the Queensland State Government highlighted this issue and referred to these agreements as "Zombie agreements".<sup>3</sup>
- [6] This created the problem of one employer, within a single industry, having better employee rates and conditions than another.
- [7] This situation means it is difficult for new players to enter an industry when their competitor has an agreement that doesn't meet the BOOT. They simply cannot compete
- [8] It is impossible for a new entrant to obtain an agreement that is similar to a pre-Fair Work agreement, as the old agreements in most cases do not meet the BOOT.
- [9] I consider it is in the public's interest to resolve the issue of fairness when applying the BOOT to agreements that have carried over from previous industrial relations systems, or even some agreements that FWC have approved since the implementation of the FairWork Act (2009).
- [10] Employee's futures are dependent on the Employer being commercially competitive. It simply goes without saying that if 2 services were offered, both of the same high standard, and one was at a substantially lesser cost than the other, then it is very likely, obvious even, that the entity providing the lesser cost service will be invited to supply the service.
- [11] I believe that the intent of the Fair Work Act – that is that is based on the principle of *fairness* - is not being met in this instance, and that the balancing of the interest of the employer and employee has failed. It could do nothing else but fail when there is such a disparity in the pay rates for the employee.

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[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2011-2012/ChronFWAct](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/ChronFWAct)

<sup>3</sup> Clause 14.1.2 Queensland Parliament Report No 9, 56<sup>th</sup> Parliament. A fair day's pay for a fair day's work. November 2018

## Complexity of the Awards

- [12] On a daily basis I read many of the decisions handed down by the Fair Work Ombudsman. Underpayments are only one of the decisions a Small Medium Enterprise (SME) has to deal with. It is getting to the stage where it is nearly impossible to employ anyone, because the Act itself is so complex, and the risk for SME's is not commensurate with the returns most receive for their businesses.
- [13] In terms of the underpayments specifically, the complexity of the awards, and the interpretation of the awards (and Enterprise Agreements from which are derived from the awards) are a common area of dispute, and are reflected in the literature which I read on a daily basis. These cases are not restricted to large businesses such as Coles, Woolworths, Target, Bunnings, Domino's. (and the list goes on.)
- [14] The AG made the point that these large businesses spend money on Tax Planning etc, marketing, advertising etc., and suggested they should employ more funds in getting advice to pay their employees correctly.
- [15] On the face of it, this comment may seem fair, but in reality, it is unachievable, because the Awards (and EBA's) are open to interpretation. There are two entities making money out of the complexity of the IR system. One is the legal fraternity and the other is the Treasury benefitting from punitive penalties applied to business – large and small – who get it wrong. Far from being simple, the number of decisions being determined by the FWO is itself an indicator of its complexity.
- [16] SME's work under the same system as the biggest companies in Australia. If the biggest companies are required to pay for advice on correct pay rates and all the other terms of individual Modern Awards (aka comment by AG) what chance has a SME business owner got?
- [17] On top of that, the complexity means there is no clear-cut decision, so it can be challenged, which can mean more legal cost for an employer to defend that decision.
- [18] Further to this, if an SME attempts to read the award, they will base their business model and margin around those determined labour costs incurred in running the business.
- [19] If at a later date, an Audit is done on the business, or an employee challenges the pay rate, a back-payment situation can arise, and or fines issued.
- [20] Whether the situation arises from a deliberate action on behalf of the employer or through sheer lack of knowledge he/she has to respond. More legal costs, the likelihood of back-payment and, equally likely, the payment of a fine. It has become not only self-evident but has happened in actual fact, that the upshot of this type of scenario, most certainly for SME's is job losses or business shutdown and business owners lose everything they have worked for and are humiliated in public. Nothing could be more futile, and it acts as a disincentive to expand and grow a business. Small business has traditionally been the major employer in this country, but it is fast becoming too big a risk to provide jobs for others unless you absolutely have to when the system is stacked against you.
- [21] It would be much better to have a system that is clear and unambiguous, so the issue of possible underpayment doesn't manifest itself in the first place. (as opposed to deliberate underpayments)
- [22] I would be confident in challenging all Members of Parliament. I would give them a test, to determine wages rates and payments under different scenarios. If the MP gets the question wrong, then they give the equivalent of the Fair Work Ombudsman's fine imposed on the employer to charity. I will safely say the charity would end up very well off and Parliamentarians would quickly become familiar with

the issues and work to fix them Please let me know if you would like to proceed with this.

### Inconsistent decisions by the Fair Work Ombudsman

- [23] I touched on the unlevel playing field created during the transition to the Fair Work system. The same situation has also been created by the Fair Work Commission itself, by giving decisions which are inconsistent with previous decisions. In addition to that there is a pre “Bill Shorten” Royal Commission appearance, and a post Royal commission appearance.
- [24] Mr Shorten appeared at the Heydon Royal Commission. The Royal Commission was investigating a deal between the AWU and the Cleanevents company. (that is not something I want to focus on). What seems to go through to the keeper is the fact an agreement was made for workers that did not meet a Fairness Test. The workers who were low paid, were not better off overall than the award.
- [25] Cleanevents were given an unfair advantage, and competitors would have to underpay their workers to compete with Cleanevents. It was revealed during the Royal Commission that Spotless (a services company) purchased Cleanevents, purely on the basis of its unfair agreement. The Senate needs to consider that instances like this occur all the time. If you take a closer look at it, the Fair Work Commission have in effect set the market rate. The market rate that has been set, is (in this instance) not better off overall than the award, so why are these fines and back payments being issued to one party and not the other? Why is one employer being forced into a possible underpayment position by the FWC? To extend this argument further, you could say that the Fair Work Commission is determining who can be in business and who can't, who can offer work to others and who can't and who can make a profit and who can't.
- [26] After the Royal Commission, the Fair Work Commission seem to change the way in which it approved agreements. They introduced a triage system. Were they embarrassed about the Clean Events agreement? Reactive instead of proactive a pattern we see often.
- [27] The change seemed only to take the “Monetary” aspect of an agreement into account, rather than a “Better Off Overall Test” which could mean for instance a worker wants to work weekends or nights, because it suits their lifestyle.
- [28] The change now means we have agreements that have generous interpretations pre “Bill Shorten” and agreements that are uncompetitive because they were made in the post “Bill Shorten” period, and of course for others the more regressive Modern Award.
- [29] The Fair Work Act (2009) allows for Individual Flexibility Agreements to be used. However, they are not popular, because if you make an agreement that doesn't meet the BOOT, then the business owner is again faced with financial ramifications.
- [30] In essence, you are asking the employer and employee to make an agreement, yet if the agreement is deemed not to meet the BOOT, then only the employer is penalised, yet there are two parties to the agreement in the first place.
- [31] In addition to this, history now tells us the FWC cannot get decisions about the BOOT correct, so they are allowing the business owner and employee make the same decision?
- [32] The individual flexibility agreement should be left to the employer and employee with no interference from Fair Work, but with guidelines that protect the worker and the employer.

- [33] Inconsistency is further demonstrated, by a recent decision by the FairWork Commission.
- [34] On the 24<sup>th</sup> of December the FWC approved (in conjunction with the applicant and the UWU) an application to terminate a Collective Agreement made in 2007<sup>4</sup> during the Workchoices era.
- [35] The agreement paid a casual rate of pay, pegged at the Modern Award Casual rate of pay. MA000010. (after the transition period)
- [36] The rate was payable 24/7, 365 days per year. Nothing for Overtime, Penalties, or Public Holidays.
- [37] The nominal expiry date of the agreement was March 2012. (i.e. it continued for a further 8 ½ years after its Nominal Expiry Date).
- [38] The rate payable to workers gave Labourplus, the Collective Agreements owner, an unassailable competitive advantage in the security industry in particular WA where it was based.
- [39] Many other companies, in order to compete with the agreement, had to underpay their workers. They had no choice, or they would have lost their clientele, and their workers would have lost their jobs.
- [40] The likelihood in that scenario, given the competitive nature of the security industry in WA, is that these unemployed workers would inevitably look to work with another security company. If they then subsequently found work with Labourplus, it would be on the terms of its Collective Agreement. The workers would have been NO better off but the competition would be drastically reduced. Further evidence of 'zombie agreements' creating an unlevel playing field.
- [41] The company Labourplus, were acting well within the bounds of the law, and their actions are very similar to many companies that have similar (pre-Fair Work) agreements.
- [42] Under the Transitional Provisions and Consequential Amendments Act (2009), agreements going back to 1991 were given the ability to transition, which means agreements this year can be 29 years old and have an unfair advantage to a business that has to pay the modern award.
- [43] Prior to the last election, a lot was made about getting rid of penalty rates, Labour, Greens and the Unions in particular (rightly or wrongly) defended penalty rates.
- [44] It was with dismay I came across a very recent agreement in Western Australia, made by the WA Government's own Corporate entity The WA Sports Centre Trust Trading as Venues West, and the Media, Entertainment and Arts Alliance, United Voice WA.
- [45] On the 26<sup>th</sup> March 2019, an agreement was approved via the WA Industrial Relations Commission.<sup>5</sup> The agreement is a comprehensive agreement but was made to the exclusion of several "Low Paid" Awards. Venues West is a Government entity, all the awards below are State Awards,
- a. Theatrical Employees Entertainment Sporting and Amusement Facilities (WA Government) Award 1987.
  - b. Miscellaneous Government Conditions and Allowances Award No A 4 of 1992.
  - c. Restaurant, Tearooms and Catering Workers Award; and

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<sup>4</sup> Labour Plus Staff Collective 2007 (AG2019/1758)

<sup>5</sup> 2019 WAIRC 00151 AG 6 OF 2019.

d. Cleaners and Caretakers (Government) Award 1975.

[46] Of particular interest to the me was the clause in relation to Casuals.<sup>6</sup>

### 13.7 Casual Agreement

- a. *Casual Employees shall receive a loading of 30% that shall apply in addition to the normal wage rate for all work performed. This loading will be in lieu of all leave, allowances, loadings, public holidays, and overtime rates which may apply to other Employees as specified within this Agreement.*
- b. *Casual Employees shall be employed for a minimum attendance of two hours except that:*
- c. *Employees required to take programs and/or fitness sessions may be paid the agreed rate for all work associated with the program or session and the minimum attendance provisions of this Agreement shall not apply.*
- d. *The contract of employment may be terminated by either party giving one hour's notice or payment in lieu of notice.*
- e. *After six months continuous service and on receipt of a written request from the casual employee, the status of casual employees who regularly work 10 or more hours a week shall be reviewed by the parties.*

[47] To put this into a proper perspective. The WA State Awards have a casual loading of 20%. The base rate in the agreement as of January 2020 is \$797.60<sup>7</sup>. The casual worker would normally receive a weekly hourly rate of \$20.99 plus an additional loading of 20%. This would increase the weekly hourly rate to = \$25.18 P/H. The agreement increases the loading from 20% to 30% = \$27.28 P/H. The worker receives an additional \$2.10 per hour as a tradeoff for all penalties and allowances. An example would be a Saturday Night football match, under this agreement for say 6 hours work, a worker would receive **\$163.68** whereas under an award they would receive **\$226.62** plus allowances.

[48] The agreement was approved in conjunction with Media, Entertainment and Arts Alliance, United Voice WA.

[49] The Casual agreement for all intentional purposes is exactly the same as the Labourplus agreement the Fair Work Commission terminated (see clause [34]) and

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<sup>6</sup> Clause 13.7 page 8, Venueswest General Agreement, 23/03/2019. AG 6 of 2019. Attachment 25

<sup>7</sup> Schedule 2, page 66 Venueswest General Agreement, 23/03/2019.

even though it has been casualised by 30%, the rate being offered is only marginally different. In fact, if the annual CPI is built into the equation, workers would be better off under the agreement being terminated.

- [50] Furthermore, this agreement is done on the exclusion of 4 low paid awards, (see clause [41]).
- [51] These are award's the Unions in particular were trying to protect prior to the election.
- [52] For instance, Hospitality. The Venues West / Union agreement takes away all penalties for Casual workers covered by the Restaurant, Tearooms and Catering Workers Award, and so on for the others.
- [53] The Hospitality Industry was one of the industries pushing for the elimination of penalties.
- [54] This demonstrates the inconsistency employers have to put up with. The Venues West agreement could be classed as "Government sanctioned wage theft". Here we have the best Venues in Western Australia, Optus Stadium, (AFL & Cricket) The Perth Arena (basketball), NIB Stadium (Soccer) and Champion Lakes (Rowing) and others, all run by the State Government saying, "we cannot afford to pay the modern award". (or the State equivalent), so we will work with the Unions to get a pay rate we can afford
- [55] Even the AFL, who play at Optus Stadium announced a profit of \$50m. Are they making this money because Venues West and the Union are underpaying their casual staff and therefore can charge the AFL less? Are the AFL accessories to these underpayments? Where does the responsibility or culpability end?
- [56] The Western Australian Government goes to a great extent in its submission to this inquiry to point out wage theft, when between the Union and themselves have done exactly that, and at the disadvantage of many small businesses in Western Australia.
- [57] They even mention in paragraph 13 (page 3) on their submission that Hospitality and Cleaning are just two industries where underpayments occur. Pot, kettle = black!
- [58] This sends a clear signal to businesses in those areas, that if it is OK for the government to pay such a rate, then it is OK for them. The reality is of course, if Fair Work did an audit, that business would be subject to massive fines, and backpays. The businesses would go under, and workers would lose their jobs.

## Fraud

- [59] It would be naïve to say no fraud occurs in the employment of workers. Employers seem to be dragged before the media and made an example of. Yet from my experience as many employees defraud the system also.
- [60] Since 2010 I have been trying to expose the blatant fraud in the security industry, as my clients were being undercut on contracts at prices to the client which were less than what the employee is supposed to be paid.
- [61] There has been a direct correlation between the amount of fraud and the number of international students in the country.
- [62] The education industry is now worth approximately \$40b dollars, they bring in many students from countries that are not as advanced as Australia. Wages rates in Australia in most cases are much higher than the source country. Even at \$15 and hour wages are still high.
- [63] Organised crime (usually from countries where students come from, such as India or Pakistan) are aware of this and use it to their advantage. Plus, there is a never-ending source of workers to take advantage of.

- [64] In the Migrant Workers Taskforce Report, Professor Fels identified international students as being underpaid and vulnerable.<sup>8</sup>
- [65] The question arises though, that if one employer is exploiting their workers and gaining market traction, how would you expect a “Genuine” employer to respond? Does he just sit there and see his business go down the drain?
- [66] Put yourself in the Employers position. Your business is your livelihood. Your wife and family depend on its success. You have no choice to compete on price, and inevitably it will affect what you pay a worker. Sadly, that employer will get nailed by the FWO, and the international students and organisers will be ignored, and the problem will go on.
- [67] I was talking to an employee (working visa) of a friend’s company last week. I asked how a particular company in Perth was tracking, as they are known to exploit workers, and win many Government contracts. His reply was they have more business than ever. It really is quite simple, by the time the authorities catch up with the “workers” they are long gone, and a new group would have arrived, and the whole process starts over again. The industry I am talking about is the security industry. However, it occurs in the same way in many other industries, such as the construction industry. Groups of workers are brought in from the Philippines in 6-week turnarounds.
- [68] It is well known to everyone except the Government. Of course, the only reaction that can occur from established businesses, is to pay their workers less to be able to compete. Many older businesses owners have just closed their doors and retired, so they do not have to run the gauntlet with Fair Work.
- [69] The FWO takes the easy road as it doesn’t have the resources to fix the real problem.
- [70] The increase in the number of students entering the country has made it impossible to keep track of them, or the hours they are allowed to work. Operators know this and exploit the situation.
- [71] The simplest and most cost-effective way of fixing this problem is to take the right of overseas students to work away from them. Students are required to demonstrate they have the financial wherewithal to pay for their courses, and to demonstrate that they and or their family have the capacity to keep themselves in Australia. It seems that the reason the Education sector has grown as quick as it has, is because the requirements appear to have been waived or not tested properly. Ramifications have come at the cost to the students, via the exploitation, and that exploitation has created a flow on effect for small businesses, as they are trying to compete using a higher wage rate.
- [72] Governments of all persuasion and at all levels assist this further by accepting contracts that are well below market rate, and even what the worker should be getting paid. Another example of “Government Sanctioned Wage Theft”.

## Responsibility.

The Attorney General, in his press release on the 18/02/2020 asks whether the courts should be given greater powers to:

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<sup>8</sup> Migrant Workers Taskforce, March 2019 Page 33.

- disqualify directors of companies where significant underpayments occur.
- issue banning orders to prevent companies doing certain things such as employing workers on certain visa types; and
- issue adverse publicity orders that force companies to disclose or publish their offences.

I would suggest many Directors of SME's would not know of their responsibilities. SME companies in most cases are set up by accountants to protect the interest of a director's assets. They are simply following the directions of their accountant.

It has created an industry in its own right to protect the accountants on- going fee generation.

My suggestion is: Before anyone can become a Director, they have to complete a Directors course with someone like the Australian Institute of Company Directors. It would then be clear what the responsibilities of a Director are. It would then be fair to disqualify them.

However, I caution setting the bar too high with gaol sentences. The IR system is complex. No one can get it right, and the proof is in the pudding, when you see the number of decisions the FWO has to make each day. The proof is there when you see Unions and Employers make agreements that fail the Boot when challenged, agreements such as the one raised in the Cole / Vickers case.

## Summary

The proposed legislation by the Attorney General is very heavy handed. For SME's the proposed legislation is not considering the complexity of the IR system, and the inability of the Fair Work Ombudsman to deal with rogue operators. SME's in many cases are simply reacting in such a way to save their businesses.

The proposed legislation should only be enacted, when it can be demonstrated that the underlying issues of the industrial system have been fixed.

[73] These issues are:

- a. The carryover agreements from the old workplace systems. These agreements can go back to 1991 and create a two-tier IR system.
- b. The current system of nominal expiry dates needs to be addressed, so that within 6 months of the expiry date, an extension of the current agreement, or a new agreement have to be approved by the FWC. If not, the modern award applies.
- c. Individual Flexibility Agreements need to be truly Flexible, with the ability to exclude all penalties if that is what the parties want. The only thing that should be maintained are the National Employment Standards, and the minimum wage for a particular award. Everything else is open for negotiation.
- d. International students should not be allowed to work, unless it can be proven that there is a system in place that can unequivocally track the hours a student works, and that their rates of pay are what they are legally entitled to. In the meantime, they should not be issued a Tax File number, and ABN, or any licence that is required for a specific type of employment such as a Security Licence, or a Working with Children licence.

- [74] Finally, I would like to say to the committee, that Australia's future will be built on SME's being able to grow into businesses that produce and earn an export dollar and employ fellow Australians along the way. Trade is our most important lever for future prosperity. You do not make money by doing business with yourself. To do that, the IR system has to be made simpler, not more punitive and certainly acknowledgement of its counter-productive nature would help.
- [75] As an elected Representative, you earn a very good salary, and you probably work the same long hours that many SME's work. The difference between you and the SME is the SME takes on a huge risk when they employ somebody. What starts off as a person's business quickly becomes 'someone else's workplace' when he/she decides to employ even just one worker. With some exceptions, that small business owner is held accountable to the same set of employment laws as BHP yet without the massive resources of such a big company. All of a sudden, these business owners can be gaoled for industrial manslaughter, harassed by the tax office to pay tax before they have made any money. They have to pay workers compensation and live with the fact that they are at fault even if the worker caused the issue. Now, we will gaol them, or fine them if a worker is underpaid, yet recent history is littered with cases where no one can determine the correct rate of pay, not the Unions, Not the Employer, and not the Fair Work Ombudsman.
- [76] The AG makes a point that it will be only for "serious" offenders. In order to do that, you have to determine what serious is? What is the test. The point is of course, if the SME disagrees with the determination, they will then have to pay for legal representation to argue their case. On that basis, the SME will without doubt have legal fees that will send them broke. Even if they are innocent the legal fees would have killed them. Because the threat of gaol is so serious, they will in many cases have to sell everything simply to fund a case, and or go Bankrupt.
- [77] The answer is not more legislation, the answer is a simpler system.