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THE AUSTRALIAN WORKERS' UNION

STRONGER TOGETHER

ABN 28 853 022 982

Senate Economics References Committee Inquiry into the Unlawful Underpayment of Employees' Remuneration

Submissions of

THE AUSTRALIAN WORKERS' UNION

6 MARCH 2020

About the Australian Workers' Union

The Australian Workers' Union (**AWU**) is the nation's oldest union, and also one of its largest. The AWU has broad constitutional coverage in a wide variety of industries including construction, steel, manufacturing, mining, agriculture, pastoral, horticulture, hair and beauty, aviation, and oil and gas.

Standing to make submissions

The AWU covers employees in a broad range of industries, including a number in which the underpayment of employee entitlements (**wage theft**) is either rife, established, or growing.

Submissions of the Australian Council of Trade Unions

The AWU has had the opportunity to read the Australian Council of Trade Unions' (**ACTU**) submission to this inquiry. The AWU supports those submissions, and the submissions made by the AWU below are made in addition to those of the ACTU.

Submissions of the Retail Supply Chain Alliance

The AWU is a member of the Retail Supply Chain Alliance (**RSCA**) and has had the opportunity to read the RSCA submission to this inquiry. The AWU supports those submissions made by the RSCA.

Summary of AWU position

Australian working men and women are being denied their full entitlements by their employers on an increasingly prevalent, systematic, and persistent basis.

No industry appears to be completely immune to the spread of what appears in the main to be an intentional strategy by employers to increase business profits at the expense of the workforce. However, the lower-paid and less unionised sectors of the Australian workforce generally seem to be the most vulnerable to this behaviour.

Focus of AWU submissions

In recognition of how thorough the ACTU submission to this inquiry is and the additional RSCA submission, these submissions will focus on only a handful of the many examples of how wage theft continues to proliferate in Australia.

These submissions will briefly address the rampant wage theft in the hair and beauty industry as a case study, the persistence of Work Choices-era agreements as a tool of wage theft, the proliferation of sham contracts in the construction industry (and the

abject failure of the ABCC to have any helpful impact on these), and supply chain participants in wage theft.

Each is addressed below.

The Hair and Beauty Industry

The AWU recently established Hair Stylists Australia (**HSA**) **in 2017** as a distinct element of the AWU with the intention of unionising an historically non-unionised sector – the hair and beauty industry.

Since being established, HSA has engaged with thousands of workers in the hair and beauty sector – discussing what issues they face at work and providing hundreds with support and advice about their rights.

HSA recently asked its members to complete a survey about their entitlements at work. Specifically, the survey focused on the non-payment of these entitlements. Of the respondents to the survey, less than half reported that they were always paid penalty rates and only 63% reported that correct superannuation contributions were always made by their employer on their behalf.

The lack of superannuation contributions being made on behalf of workers in this industry is well-documented. This is true for both small[1][2] and large[3] enterprises. It is both common and entrenched.

The survey also found that the vast majority of respondents did not receive a tool allowance despite employees using their own tools being widespread across the industry, and that less than 10% of respondents received their minimum entitlements when required to work on a rostered day off.

Outside of the survey, HSA has found through interactions with members and through enforcing member rights with their employers that the provision of correct and complete pay slips to employees is exceptionally rare in the hair and beauty industry. The same is true for the provision of information about workplace rights and employee entitlements, and this is both from employers and training colleges that members attend during their apprenticeships (particularly so in the private colleges).

It is the experience of HSA that whilst there are many employers in the hair and beauty industry that fail to provide employees with any information about their workplace rights, there are some employers that intentionally provide their

[1] https://thewest.com.au/news/sound-southern-telegraph/day-spa-employees-speak-out-ng-b881067984z
[2] https://hairstylistsaustralia.com.au/2019/10/25/ruby-rose-shares-her-super-story/
[3] https://irclaims.com.au/high-profile-hairdressing-chain-not-paying-super/

employees with incorrect information about their workplace entitlements for the purposes of exploiting them.

There is also a culture amongst a number of enterprises in the hair and beauty industry of retaliation against employees who do question their workplace entitlements.[4] The HSA has found this practice to be common and it obviously has an effect on the willingness of employees to enforce their rights or request that HSA intervenes on their behalf.

In addition to the clear negative impact of widespread wage theft on the workers in the hair and beauty sector, it is very likely that this culture of underpayment is having a negative effect on the industry itself, with the Australian Government Department of Jobs and Small Business reporting that there has been a shortage of hairdressers for decades.[5] After all, it is only logical that people would be averse to working for a trade level qualification to enter an industry that is establishing itself as a forerunner in wage theft and related workplace issues.[6]

Wage theft as a model is absolutely employed in the hair and beauty industry by both design and by neglect. Workers in the hair and beauty industry are generally low-paid, vulnerable and perform work for small enterprises. Each of these features appears to place these workers at a greater disadvantage of being exploited by their employers. Various forms of bullying and the targeting of workers who ask questions about their entitlements by management are common.

This culture cannot be permitted to continue. Enhanced rights for both workers and their unions, and increased scrutiny by regulators will be positive steps forward in cleaning up this sector and the many others like it.

Persistence of Work Choices agreements in the low-paid workforce

Incredibly, there are still a number of employers that remain able to lawfully undercut their competitors' labour costs by paying wages far below the award safety net through the ongoing operation of collective agreements entered into under the repealed Work Choices framework (**Work Choices agreements**).[7]

Part of the Work Choices reforms was the removal of the requirement in earlier versions of the *Workplace Relations Act 1996* (and, before that, the *Industrial*

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[4] https://hairstylistsaustralia.com.au/2020/01/17/seeking-justice-liz-shares-her-story/
[5] https://www.abc.net.au/news/2019-12-17/hairdresser-shortage-and-what-should-be-done-about-it/11796838
[6] https://www.smh.com.au/business/workplace/fair-work-inspectors-to-audit-1600-hair-and-beauty-salons-20170404-gvd0cz.html
[7] *Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

Relations Act 1988) that employment agreements had to pass the 'no-disadvantage test' against a relevant industrial award. The intention was that industrial parties could not bargain for an employment agreement which left employees worse off than they would be on the applicable award set by the industrial umpire.

At first, new employment agreements under Work Choices were not required to pass any comparative test against applicable award standards—they were simply lodged with the Employment Advocate and thereafter took immediate effect.[8] After 1 July 2007 following the passage of amendments, a new 'fairness test' was added to the legislation, which required the Workplace Authority Director (successor to the Employment Advocate) to consider whether the agreement provided "*fair compensation … in lieu of the exclusion or modification of protected award conditions*".[9]

When the Work Choices framework was replaced by the Fair Work system (on the commencement of the *Fair Work Act 2009* on 1 January 2010), transitional provisions were included which preserved existing Work Choices agreements made under the old law.[10] While these instruments became subject to the new National Employment Standards, they were not required to satisfy the new 'better off overall test' or even the old 'no-disadvantage test'. They simply remained in effect.

Thus, employers who were covered by Work Choices employment agreements, collective or individual, could avoid the need for compliance with the new minimum industry standards set by the Australian Industrial Relations Commission as part of the Award Modernisation Request. An employer could continue to pay wages which were far below the rates set by the modern award up until the Work Choices agreement was terminated or ceased to operate.

The transitional provisions of the Fair Work system provide that the termination of agreement rules which applied to enterprise agreements made under the new law (**Fair Work agreements**) would also apply to Work Choices agreements. In other words, Work Choices agreements would continue to operate after their expiry date until terminated either:

1. with the consent of the employer and a majority of employees (in the case of a collective agreement); or

[8] See Divisions 5 and 6 of Part 8 of the *Workplace Relations Act 1996* (Cth) following the passage of the Work Choices amendments.

[9] See s 346M of the *Workplace Relations Act 1996* (Cth) as amended the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*. There was, additionally, a final 'transitional' phrase under the Rudd Government's *Forward with Fairness* package, under which employment agreements were again required to comply with the old 'no-disadvantage test'. See *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth), which inserted Division 7A—*Application of no-disadvantage test* to Part 11 of the *Workplace Relations Act 1996* (Cth).

[10] See Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

2. on the application of any party to a collective agreement, if the Fair Work Commission considers it "*not contrary to the public interest*" and "*appropriate in all the circumstances*".[11]

Many Work Choices agreements were made without union involvement and, as such, unions generally lack the standing to apply to terminate these agreements (as a non-party).

It appears that the view of the government at the time was that Work Choices agreements would eventually be terminated or replaced by new Fair Work agreements. Unfortunately, experience has proved this assumption incorrect.

The inability of unions to apply to terminate Work Choices agreements combined with the vulnerability of low-paid employees has meant that many of these agreements continued to operate for 5 or more years after the Fair Work system commenced—and some are still operating.

There is clear evidence of the harmful effects of these agreements from decisions of the Fair Work Commission and media reports. The primary beneficiaries of these arrangements are big business, at the expense of both their workers (who receive below award conditions) and their competitors (who are forced to compete on an uneven playing field). Such arrangements are anti-competitive and inconsistent with the guiding principle in Australian industrial relations of '*a fair go all round*'.

Examples of big businesses which have benefitted from legacy Work Choices agreements are common and include:

1. Merivale, a large New South Wales hospitality operator:

   Merivale staff seek to kill off WorkChoices-era pay agreement over weekend penalty rates (ABC News, 12 November 2018)[12]
   2007 Work Choices agreement remained in operation until 4 March 2019.[13]

2. Subway, a national franchised fast-food chain:

   The 'zombie agreement' loophole leaving Subway workers trapped (9 News, 30 January 2020)[14]

[11] See cll 15 and 16 of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).
[12] Link: https://www.abc.net.au/news/2018-11-12/merivale-staff-move-to-kill-off-pay-agreement/10467566.
[13] *Re Waugh* [2019] FWCA 293.
[14] Link: https://www.9news.com.au/national/subway-australia-staff-speak-out-about-loophole-creating-unfair-wages/b5235084-1c3d-48b1-b076-ec4b5230261b.

It appears that this Work Choices agreement may still be in operation.

3. On The Run/Peregrine Corporation, the largest operator of service stations in South Australia:

   Wage scandals becoming the dark underbelly of the labour market (The Sydney Morning Herald, 14 December 2019)[15]

   2007 Work Choices agreements remained in operation until 30 June 2018.[16]

4. Grill'd, a national franchised fast-food chain:

   Ruling forces Grill'd store to increase wages (The Age, 30 July 2015)[17]

   2007 Work Choices agreement remained in operation until 29 September 2015.[18]

Many of these cases received widespread coverage in the media as wage theft. However, it is important to note that the arrangements in each of these cases was considered lawful.

There is no justification for permitting legacy arrangements made over 10 years ago under legislation emphatically rejected by the Australian community in the 2006 election to remain in effect indefinitely. This is especially so where it gives a few employers (largely big business) lawful permission to pay employees wages at rates far lower than the minimum rates set by the industrial umpire.

Whilst it is not possible to 'unscramble the egg' and identify the broader effects ongoing Work Choices agreements have had on competition in these sectors over the past 10 years, it is clear that certain operators who were able to retain Work Choices arrangements appeared to succeed, at the expense of their employees, during that period. Merivale and On The Run saw increases in market share in, respectively, the NSW hospitality and SA convenience retail sectors during that time. The 'but for' question is whether those gains would have been possible without these businesses being able to legally retain these inferior agreements that are essentially a free pass to engage in wage theft.

Those matters cannot be undone, but it is open to the Parliament to finally address this loophole in the legislation. Amendments should be made to the *Fair Work Act*

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[15] Link: https://www.smh.com.au/business/companies/wage-scandals-becoming-the-dark-underbelly-of-the-labour-market-20191213-p53ju4.html.

[16] *Re Shahin Enterprises Pty Ltd* [2018] FWCA 833

[17] Link: https://www.theage.com.au/national/victoria/ruling-forces-grilld-store-to-increase-wages-20150730-ginn8q.html.

[18] *Re Pyrah* [2015] FWCA 5236.

2009 to automatically terminate any continuing Work Choices agreements at the earliest possible date. From that date, any employees performing work under such an agreement would move onto the applicable modern award.

Such a legislative reform would be straightforward and enjoy support from unions and industry. It would ensure all participants in the industrial relations system are governed by the same rules and that legacy arrangements rejected by the community are not permitted to stay in place indefinitely.

Exploitation in the construction sector

The AWU is the principal union in the civil construction sector of the broader construction industry. The AWU regularly deals with the head contractors for major infrastructure projects and represents members working on projects such as Sydney Metro and Brisbane's Cross River Rail.

Underpayment of wages and sham contracting arrangements are rife in the construction industry.

The regulator in the sector, the Australian Building and Construction Commission (**ABCC**), disproportionately and zealously targets alleged union misconduct at the expense of any focus on employee exploitation by unscrupulous business operators or workplace health and safety. Under international labour standards, including the *Labour Inspection Convention 1947* (ILO C081) to which Australia is a party, the principal role of the inspectorate is the protection of workers' rights.

Article 3 of the Convention states:

> 1. *The functions of the system of labour inspection shall be:*
>
> > *(a) to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors;*
> >
> > *(b) to supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions;*
> >
> > *(c) to bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions.*

> *2. Any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers.*

Instead, it is clear from the ABCC's own reporting data that its focus is the prosecution of unions and union officials. A clear focus on investigating and prosecuting alleged union misconduct is explicitly inconsistent with the requirement in Art 3(2) that any "*further duties*" not prejudice the authority and impartiality of the inspectors in their relations with employers and workers.

In this respect, the approach of the ABCC can be contrasted with that of the Fair Work Ombudsman (**Ombudsman**). The Ombudsman has taken a number of high-profile wage and sham-contracting cases to court since the commencement of the *Fair Work Act 2009*. Regrettably, the Ombudsman has also prosecuted unions, but at least there appears to be a recognition by the agency that union misconduct is not the major problem facing Australian workplaces: worker exploitation is.

The construction industry is near the top of the list of industries in which worker exploitation and non-compliance with minimum standards is rife. Yet the ABCC appears almost entirely absent from this domain.

Of course, unions in the construction sector represent members, enforce industry standards, and actively attempt to stop all forms of worker exploitation. But unions' traditional role in enforcing standards is made more difficult by the *Code for the Tendering and Performance of Building Work 2016* (**Building Code**), which places considerable and unjustifiable limits on the ability of head contractors to work cooperatively with unions to ensure compliance through the construction labour supply chain. For instance, cl 11(3)(e) of the Building Code prohibits industrial arrangements whereby head contractors consult with union officials over the use of sub-contracted labour.

The ABCC has completely failed to reduce worker exploitation in the construction industry and as such must be abolished. Similarly, the Building Code must be revoked.

Supply chain participants and wage theft

The problem of wage theft is systematic across many Australian workplaces. The AWU has a particular interest in the exploitation occurring in the agriculture, horticulture and construction industries.

The current regulatory model is not capable of dealing with the forms of labour deployment now common in these industries. As a number of academic and economic studies have observed, the direct-hire employment model is no longer the dominant form of worker engagement.[19] Instead, the sub-contracting of labour by major enterprises or principal contractors is increasingly common. Just as a major contractor in the construction industry will outsource various tasks to a sub-contractor responsible for providing their own workers (or sub-contractors of their own), horticulture employers regularly pay agencies to provide workers via on-hire arrangements.

It is now clear that (a) non-direct-hire employment is increasingly prevalent and normalised across industry and (b) such arrangements have led to increasing job insecurity, worker exploitation and non-compliance with minimum standards.

In agriculture this arrangement is coupled with an increasingly complex and largely unenforced migration and visa scheme. The complexity only serves to favour employers who wish to do the wrong thing in the area of exploitation and wage theft.

The academic work addressing this phenomenon has uncovered facts entirely consistent with common sense: when large businesses are relieved of legal liability for non-compliance with regulations and where there is limited regulation of such regulations in any event, it encourages the outsourcing of that liability to other, smaller entities that are incentivised to not comply with such regulations.[20]

There are known mechanisms to reduce non-compliance in industries in which economically powerful 'principals' control the assignment of work or provision of services to smaller companies. Examples include:

1. the regulation of textile, clothing and footwear (**TCF**) outwork in New South Wales, South Australia and federally;
2. the regulation of owner-driver contracts in the transport industry in New South Wales via Chapter 6 of the *Industrial Relations Act 1996* (NSW); and
3. the regulation of food and grocery contracts between supermarkets and suppliers under the voluntary Food and Grocery Code of Conduct prescribed by the *Competition and Consumer Act 2010* (Cth).

[19] See, e.g., Johnstone, et al., *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012), Lansbury, "The changing world of work and employment relations: a multi-level institutional perspective of the future" (2018) *Labour and Industry*, Vol 28, 5-20 and Howe, "Labour regulation now and in the future: current trends and emerging themes" (2017) *Journal of Industrial Relations*, Vol 59, 209-224.

[20] See, e.g., Howe, et al., "A Critical Examination of the Relationship between Labour Hire Intermediaries and Growers in the Australian Horticulture Industry" (2019) *Australian Journal of Labour Law*, Vol 32, 83-102.

4. The regulation of labour hire in various states of Australia.

As part of the Retail Supply Chain Alliance—a coalition of three unions (AWU, TWU and SDA) committed to improving labour conditions throughout the retail supply chain—the AWU supports a move to impose reporting and compliance obligations on the principal companies that are the economic beneficiaries of the work done by countless workers throughout the agriculture and transport industries.[21] Furthermore our unions seek to reward those businesses that do the right thing and punish those that do the wrong thing. Currently wage theft and exploitation are being used as a comparative advantage and are operating as a business model in many sectors of the economy.

Conclusion

The methods of wage theft engaged in by unscrupulous employers are many, varied, and are sometimes even considered legal (such as in the case of Work Choices agreements).
Government bodies such as the ABCC that ignore employee exploitation that they are tasked to prohibit merely permit these practices to be entrenched further.

Wage theft is an enormous issue in Australia and must be confronted immediately. The price of inaction on wage theft is already incredibly high and it will only increase as time passes.

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[21] The Retail Supply Chain Alliance recently made a submission to the Joint Standing Committee on Migration's *Inquiry into migration in regional Australia* dealing with labour rights issues in the horticulture supply chain.