



IN THE PRIVATE SECTOR LABOUR RELATIONS
DIVISION

Inquiry into Wage Theft in Western
Australia

DATE: 27 March 2019
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PREAMBLE

- [1] National Retail Association (**NRA**) is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has been advocating on behalf of its members since as early as 1922.
- [2] Presently, NRA has over 6,000 members across Australia in the retail, fast food, hairdressing and beauty, and associated industries, representing over 24,000 shop fronts and their attendant employees.
- [3] This membership encompasses some of the largest retail enterprises in Australia, as well as a plethora of small and medium businesses, including franchisees and licensees.
- [4] Over the last 97 years NRA has grown and evolved with the retail industry, and has overseen much change in the way retailers do business. At all times, NRA has advocated for the lawful operation of business to ensure competitive fairness and, in broader terms, a fair go all round.

TERMS OF REFERENCE

- [5] NRA makes these submissions to this inquiry on behalf of its members, in particular those operating in Western Australia, all of whom as employers have a vested interest in the matters contained within the terms of reference to this inquiry.
- [6] On 23 January 2019 the Hon. Bill Johnston MLA, Minister for Industrial Relations, announced that an inquiry into the systematic and deliberate underpayment of wages or entitlements of workers in Western Australia would commence in February 2019.
- [7] On 18 February 2019, the Minister instructed the inquiry to consider and make recommendations to Government on the following terms of reference:
 - [a] whether there is evidence of wage theft occurring in Western Australia, and the various forms wage theft may take;
 - [b] what are the reasons wage theft is occurring, including whether it has become the business model for some organisations;
 - [c] what is the impact of wage theft on workers, businesses which are compliant with employment laws, and the Western Australian community and economy;
 - [d] Whether wage theft is more prevalent in particular industries, occupations, forms of employment/engagement or parts of the State;
 - [e] whether the current State and federal regulatory framework for dealing with wage theft is effective in combating wage theft and supporting affected workers;
 - [f] whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence;
 - [g] whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft;
 - [h] whether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the federal jurisdiction; and
 - [i] other matters incidental or relevant to the Inquirer's consideration of the preceding terms of reference.

Comment on the expression 'wage theft'

- [8] NRA notes that the expression 'wage theft' is primarily a rhetorical device. This has the potential to create a degree of ambiguity when it comes to what exactly is captured by the expression.
- [9] We note, for example, that in many fields the expression 'wage' means 'hourly wage'. This is distinct from 'salary', 'leave entitlements', and 'superannuation', each of which technically is not a 'wage'.
- [10] For the purposes of this inquiry, NRA takes the expression 'wage theft' to mean 'the non-payment of legislative and/or contractual entitlements', and it is through this lens that NRA has approached these submissions. However, in the interests of brevity, we shall continue to use the expression 'wage non-compliance' in these submissions.

EVIDENCE OF WAGE THEFT IN WESTERN AUSTRALIA AND THE FORMS IT MAY TAKE– term of reference (a)

Evidence of wage theft in Western Australia

- [11] Data on the incidence and extent of wage non-compliance is limited purely because, at current levels of funding, it is impossible for government agencies to inspect the wage records of all businesses.
- [12] Similarly, it is all but impossible for a survey to coax a business operator to voluntarily disclose that they have engaged in activity contrary to the provisions of industrial relations legislation.
- [13] Consequently, such data that exists would relate only to incidents of wage theft reported, litigated, or otherwise brought into the realm of public knowledge.
- [14] There does however exist data in the form of audit reports from the Office of the Fair Work Ombudsman which, although only audits of samples rather than a comprehensive census, sheds some light on the incidence of wage theft around the nation.
- [15] For the purposes of this term of reference, we will focus on audits performed by the Fair Work Ombudsman which did not target specific industries; industrial distinctions, and any associated geographic delineations, will be discussed further below.

National data

- [16] In the early days of the *Fair Work Act 2009* (Cth) the Fair Work Ombudsman conducted the National Follow Up Campaign, in which Fair Work investigators 'followed up' on 465 businesses nation-wide, of which only 3% had no prior history of dealings with the Fair Work Ombudsman or its predecessor, the Workplace Ombudsman.
- [17] Occurring during a period of transition, a degree of non-compliance was to be expected, and Western Australia performed reasonably well with the third best compliance rate nationwide at 62%¹ behind South Australia and Queensland (both at 68%). Western Australia had the third-best rate of wages non-compliance, at 24%.²
- [18] A subsequent campaign was carried out by the Ombudsman in 2015. In this campaign, the national rate of wages non-compliance was 17%.³ In Western Australia, the rate for general

¹ Office of the Fair Work Ombudsman (2010) *National Follow Up Campaign Final Report – August 2010* at page 6, Table 2

² Ibid at page 7, Chart 6

³ Office of the Fair Work Ombudsman (2017) *Compliance Monitoring – Outcomes from the Fair Work Ombudsman's National Compliance Monitoring Campaign 2015*, page 5

non-compliance was fourth at 31%,⁴ with 20% of identified issues attributed to a failure to pay the correct monetary entitlements.

- [19] The regions with higher rates of monetary non-compliance out of this survey included the Northern Territory (35%) and Victoria (25%).⁵
- [20] A second campaign into monitoring national compliance was carried out in 2018 and discovered that 76% of employers who had been previously audited were now fully compliant with their monetary obligations.⁶
- [21] Out of those businesses identified as being in breach of their workplace obligations, 24% were in contravention of their monetary obligations.⁷ A breakdown of the results by State and Territory was not detailed in the campaign report.
- [22] An education and compliance campaign in regional and remote areas of Australia was carried out and reported in January 2019⁸. The Fair Work Ombudsman found that 76% of businesses were paying their employees correctly and 61% of businesses were compliant with all requirements⁹.

Regional data

- [23] The Fair Work Ombudsman's regional campaigns in each State and Territory, not targeting particular industries, also shed some light on the comparative incidence of wage non-compliance nationwide.
- [24] In Western Australia, audit campaigns uncovered wage non-compliance rates of:
 - [a] 30% in the Gascoyne/Mid-West regions;¹⁰
 - [b] 26% in southern Perth;¹¹
 - [c] 34% in the Albany/Manjimup areas.¹²
- [25] However, by 2019 this had improved to just 17% in Kimberly, Augusta-Margaret River-Busselton and Manjimup with 75% of businesses being compliant with all requirements¹³.
- [26] In contrast, the Western Sydney Campaign in 2017 identified a wage non-compliance rate of 42%.¹⁴ The NSW Mid-North and Mid-Western Regional Campaigns returned wage non-compliance rates of 31% and 34% respectively.¹⁵ This had also slightly improved in the 2019 campaign with a 30% wage non-compliance rate but just 47% of businesses being complaint with all requirements¹⁶.

⁴ Ibid, derived from data presented in Appendix A (page 13)

⁵ Ibid

⁶ Office of the Fair Work Ombudsman (2018) *National Compliance Monitoring Campaign #2*, page 7

⁷ Ibid at page 7

⁸ Office of the Fair Work Ombudsman (2019) *National remote and regional locations campaign January 2019*

⁹ Ibid at page 2

¹⁰ Office of the Fair Work Ombudsman (2016) *WA – Gascoyne/Mid-West Regional Campaign 2015 Report – May 2016* at page 3

¹¹ Office of the Fair Work Ombudsman (2018) *Western Australia – Southern Perth and Albany-Manjimup Regional Campaign Report* at page 3

¹² Ibid

¹³ Ibid at page 12

¹⁴ Office of the Fair Work Ombudsman (2018) *Western Sydney Campaign Report* at page 3

¹⁵ Office of the Fair Work Ombudsman (2018) *New South Wales mid-west and mid-north campaign report* at page 3

¹⁶ Ibid at page 11

[27] In Victoria:

- [a] the state-wide compliance campaign undertaken in 2014 identified a wage non-compliance rate of 40%¹⁷;
- [b] audits of 251 businesses in February 2015 in the Loddon/Elmore and Campaspe region in the north of that State returned a wage non-compliance rate of 31%;¹⁸ and
- [c] similar campaigns in 2017/18 in the Dandenong region and the Warrnambool – Otway Ranges returned wage non-compliance rates of 26% and 28% respectively.¹⁹

[28] Again, this had improved by the 2019 campaign with a 22% wage non-compliance rate and 78% of businesses in the Grampians and Maryborough-Pyrenees compliant with all requirements²⁰.

[29] In Queensland, two regional campaigns and one localised campaign returned a wage non-compliance rate of:

- [a] 31% in Central Queensland²¹,
- [b] 21% in Far North Queensland²², and
- [c] 19.6% in inner Brisbane (9 out of 46 businesses audited).²³

[30] The 2019 campaign showed a 25% wage non-compliance rate with 61% of businesses in Outback South and Darling Downs-Maranoa being compliant with all requirements²⁴.

[31] Campaigns undertaken in Tasmania identified wage non-compliance rates of:

- [a] 24% in the State-wide Tasmanian Compliance Campaign;²⁵
- [b] 14% in the North-West Hobart region;²⁶
- [c] 14% in the Sorell-Dodges Ferry region;²⁷

¹⁷ Office of the Fair Work Ombudsman (2016) *Victorian Compliance Campaign Report – February 2016* at page 3

¹⁸ Office of the Fair Work Ombudsman (2016) *VIC Loddon/Elmore and Campaspe Regional Campaign Report – May 2016* at page 3

¹⁹ Office of the Fair Work Ombudsman (2018) *Auditing Victoria – Dandenong, Warrnambool and Otway Ranges Campaign Report* at page 3

²⁰ Office of the Fair Work Ombudsman (2019) *National remote and regional locations campaign January 2019* at page 12

²¹ Office of the Fair Work Ombudsman (2016) *Central Queensland Regional Campaign, Report – July 2016* at page 5

²² Office of the Fair Work Ombudsman (2016) *Far North Queensland Campaign – Outcomes from the Fair Work Ombudsman’s Far North Queensland Regional Campaign 2015* at page 4

²³ Office of the Fair Work Ombudsman (2017) *FWO – ASIC Joint Audit Campaign – Outcomes from the Fair Work Ombudsman and Australian Securities and Investments Commission’s Joint Audit Campaign – Brisbane 2016* at page 6

²⁴ Office of the Fair Work Ombudsman (2019) *National remote and regional locations campaign January 2019* at page 11

²⁵ Office of the Fair Work Ombudsman (2016) *Tasmanian Compliance Campaign Report – February 2016* at page 3

²⁶ Office of the Fair Work Ombudsman (2016) *TAS North West Hobart Regional Campaign Report – March 2016* at page 3

²⁷ Office of the Fair Work Ombudsman (2016) *TAS Sorell-Dodges Ferry Regional Campaign Report – June 2016* at page 3

[d] 13% in the South-East Coast Regional Campaign.²⁸

[32] In South Australia, Ombudsman audit campaigns uncovered wage non-compliance rates of:

[a] 23% in the Limestone Coast region in 2014/15;²⁹

[b] 30% in the Barossa, Two Wells and Gawler region;³⁰

[c] 29% in the Adelaide CBD and inner metro area.³¹

[33] This had not improved by 2019 with a 35% wage non-compliance rate and just 52% of businesses in the Mid-North and Outback North and East being compliant with all requirements³².

[34] Wage non-compliance in the Northern Territory was measured at:

[a] 33% in the Alice Springs-Barkly region;³³

[b] 46% in Darwin city and surrounds.³⁴

[35] This had improved to 22% by 2019 with 75% of businesses in Daly-Tiwi-West Arnhem and Katherine compliant with all requirements³⁵.

[36] In the Australian Capital Territory, wage non-compliance rates were measured at:

[a] 25% in northern ACT;³⁶

[b] 17% in southern ACT;³⁷

[c] 26% across the Territory.³⁸

Summary

[37] The data of non-compliance rates available from the Fair Work Ombudsman's audit campaigns indicates that, compared with other States and Territories, Western Australia performed below average until 2019 when it became the best performer.

[38] In the 2019 campaign, the Fair Work Ombudsman identified 61% of businesses audited were compliant with all aspects of their workplace relations obligations.

²⁸ Office of the Fair Work Ombudsman (2018) *Tasmanian South-East Coast Regional Campaign Report* at page 3

²⁹ Office of the Fair Work Ombudsman (2016) *SA Limestone Coast Regional Campaign 2014/15 Report – May 2016* at page 3

³⁰ Office of the Fair Work Ombudsman (2018) *SA Barossa, Two Wells and Gawler Regional Campaign Report* at page 3

³¹ Office of the Fair Work Ombudsman (2018) *Adelaide CBD and Inner Metro Campaign Report* at page 3

³² Office of the Fair Work Ombudsman (2019) *National remote and regional locations campaign January 2019* at page 12

³³ Office of the Fair Work Ombudsman (2016) *Alice Spring – Barkly Campaign – Outcomes from the Fair Work Ombudsman's NT Alice Spring – Barkly Regional Campaign* at page 3

³⁴ Office of the Fair Work Ombudsman (2018) *Darwin City and Surrounds Campaign Report* at page 3

³⁵ Office of the Fair Work Ombudsman (2019) *National remote and regional locations campaign January 2019* at page 11

³⁶ Office of the Fair Work Ombudsman (2016) *Northern ACT Regional Campaign Report – May 2016* at page 3

³⁷ Office of the Fair Work Ombudsman (2017) *Southern ACT Report – Outcomes from the Fair Work Ombudsman's Southern ACT Regional Campaign* at page 3

³⁸ Office of the Fair Work Ombudsman (2017) *ACT Compliance Report – Outcomes from the Fair Work Ombudsman's ACT Compliance Monitoring Campaign* at page 3

[39] Whilst NRA can concede that there are some business operators who, by the material filed in the courts, unrepentantly engage in wage non-compliance, in our experience the overwhelming majority of businesses intend to be, and generally believe themselves to be, compliant.

A note on data of the Fair Work Ombudsman in relation to Western Australia

[40] As Western Australia has not referred its industrial relations powers to the Commonwealth, the *Fair Work Act 2009* (Cth) and the instruments made under it apply only to constitutional corporations in Western Australia.

[41] This also means that the investigatory powers of the Fair Work Ombudsman are limited to constitutional corporations and do not extend to sole traders, partnerships, or any other non-corporate business structure which allows the employment of employees.

[42] As such, the data of the Fair Work Ombudsman in relation to Western Australia pertains only to the compliance or non-compliance of constitutional corporations with their obligations under the *Fair Work Act 2009* (Cth). It does not provide any data in relation to the compliance or non-compliance of non-corporate employers with the State industrial relations laws.

[43] The absence of this data means that only an incomplete picture of the incidence of wage non-compliance in Western Australia is possible.

The various forms wage theft may take

[44] Three forms of wage non-compliance include:

- [a] unpaid superannuation;
- [b] the misuse of ABNs; and
- [c] sham contracting.

[45] Typically, the misuse of ABNs goes hand-in-hand with sham contracting, as unscrupulous entrepreneurs seek to take advantage of the mere fact that an employee has an ABN – regardless of whether that employee is actually operating a bona fide business.

[46] This is not something that NRA sees occur commonly in the retail sector. The key areas in which wage non-compliance arises in the retail sector, in NRA's experience, is by:

- [a] applying the wrong modern award; or
- [b] classifying the employee at too low a level under the modern award; or
- [c] not paying discrete allowances as and when they are applicable; and
- [d] classification creep.

Applying the wrong modern award

[47] Applying the wrong modern award is alarmingly common.

[48] The vast majority of modern awards are 'industrial' awards – that is, they apply if the employing entity is in that particular industry. However, employers have a tendency to classify employees under an award which has a classification which best suits the job performed by the employee.

[49] A key example of this is a business in the retail industry which has, as part of its operations, a warehouse from which it supplies stock to its retail stores. It is alarmingly common for these employees to be engaged under the *Storage Services and Wholesale Award 2010*, because this award contains classifications for 'store workers' i.e. warehouse staff.

- [50] However, the *Storage Services and Wholesale Award 2010* is an industrial award – that is, it applies to businesses that are in the storage services and wholesale industry, i.e. businesses which are in the business of providing warehousing services.
- [51] The business in our scenario described above, being a business in the retail industry, will be covered by the *General Retail Industry Award 2010* – regardless of whether or not particular employees operate in a non-retail environment.
- [52] Another common scenario is clerical employees of a retail business being employed under the *Clerks – Private Sector Award 2010*. It would seem logical that clerical staff should be employed under the clerical award, however clause 4 of that award provides that it does not apply to businesses covered by any of some 22 modern awards, including the *General Retail Industry Award 2010*.
- [53] The issue of coverage is that often, industrial awards do not have an obvious place in the classification structure for the often-diverse variety of employees engaged in such businesses. In this case, businesses will look to another industrial award, not realising that the award cannot apply as they are not in that ‘industry’.
- [54] If an applicable industrial award does not have the necessary classification for an employee, it is possible that they may be covered by an occupational award – that is, an award that applies based on the occupation of the employee, rather than the industry of the employer.
- [55] Occupational awards are in a significant minority, with approximately five currently in existence, including the *Clerks – Private Sector Award 2010*.
- [56] Given this dichotomy, it is easy to see why wage non-compliance occurs – because the award that applies simply doesn’t suit the role the employee occupies, leaving an awful amount of guesswork involved.
- [57] In the context of small businesses, where there are no employees dedicated to human resources or workplace relations, it is especially easy to see how these complexities might be overlooked and give rise to unintentional or accidental wage non-compliance.

Classifying an employee too low and ‘classification creep’

- [58] Another common area of wage non-compliance is where an employee is classified too low for the duties that they perform.
- [59] In NRA’s experience, this is often because the classification structure provided in the modern awards is often intentionally vague, so as to capture as many different types of employee as possible in a particular classification, whilst also providing no real or clear distinction between the levels.
- [60] As an example, the definition of a Retail Employee Level 2 in the *General Retail Industry Award 2010* is simply:
- An employee performing work at a retail establishment at a higher skill level than a Retail Employee Level 1.*³⁹
- [61] In the absence of more detail, the definition is practically meaningless, save that it gives fertile ground for argument as to what level of ‘higher skill’ is needed to attract the higher classification.
- [62] ‘Classification creep’ is something which typically occurs in small businesses when an employee, starting as an entry level employee, slowly gains additional duties and responsibilities as they grow in skill, experience, and their employer’s regard.

³⁹ *General Retail Industry Award 2010* clause B.2.1

- [63] Over time, the teenager who started as a Level 1 employee acquires the duties of a Level 3 employee, with neither the employer nor the employee realising it.
- [64] In this scenario, the mis-classification of the employee only occurs over time and due to a lack of review by the employer, not due to malice.

Failure to pay discrete allowances

- [65] Another reasonably common form of wage non-compliance is the failure to pay allowances, particularly allowances which may not be necessary for the purpose of their employment.
- [66] For example, clause 20.8 of the *General Retail Industry Award 2010* provides for a 'cold work disability allowance', which is an hourly allowance applicable where an employee is 'principally employed on any day to enter cold chambers' or to stock fridges.
- [67] Since this is an hourly allowance, but the clause refers to the employee being 'principally employed on any day', there is a reasonably significant question mark over whether this allowance is payable if an employee spends less than 50% of their working day so engaged.

THE REASONS WHY WAGE THEFT IS OCCURRING, INCLUDING WHETHER IT HAS BECOME A BUSINESS MODEL FOR SOME ORGANISATIONS – term of reference (b)

- [68] In NRA's view, deliberate non-compliance occurs out of a desire to increase profitability. Since labour costs are the most significant cost of doing business for a retail operator, it naturally makes sense to try and decrease this cost. However, the NRA deny that it is common practice for businesses to use wage non-compliance as a business model to address this.
- [69] The threat of significant penalties and a compliance system geared towards employee self-representation generally act as a suitable deterrent against deliberate non-compliance.
- [70] In NRA's view, the substantial driver of non-compliance is the complexity inherent in the system of modern awards, which also has flow-on effects into the space of enterprise agreements.
- [71] The award modernisation process, undertaken in 2008 to 2010, "*generally adopted terms and conditions which have wide application to the existing awards in the relevant industry or occupation.*"⁴⁰ Put another way, the modernisation process did not necessarily regard clarity as its highest priority.
- [72] This is substantially recognised in that the Fair Work Commission, as part of its current review, is undertaking a plain-language re-drafting of most modern awards, in an attempt to standardise such simple matters as making sure all relevant penalties and loadings appear in the clause so titled.
- [73] Perhaps the greatest indictment of the complexity of the industrial relations system, in the context of an enterprise agreement, is the recently-reported case of Maurice Blackburn Lawyers, a firm which counts employment law among its specialties.⁴¹
- [74] In the case of Maurice Blackburn, an ambiguous overtime clause in an enterprise agreement resulted in the firm owing \$1 million in back payments.⁴²
- [75] This begs the question – if a specialist law firm can get it wrong, what hope is there for a small business without access to that level of expertise?

⁴⁰ *Award modernisation – Stage 2 modern awards*, 2 September 2009, [2009] AIRCFB 800

⁴¹ <http://www.mauriceblackburn.com.au/legal-services/employment-law/>

⁴² Ferguson, A (20 July 2018) *Maurice Blackburn's \$1 million pay muck up short changes 400 staff*, Sydney Morning Herald, retrieved from <https://www.smh.com.au/business/workplace/maurice-blackburn-s-1-million-pay-muck-up-short-changes-400-staff-20180720-p4zspi.html>

[76] It has been mooted in various forums that the franchising sector is particularly rife with wage non-compliance, thanks in large part to the case of 7-Eleven, due to the segregation between franchisor and franchisee.

[77] This is not however the case; the Fair Work Ombudsman, in its report into the 7-Eleven case, noted that the 7-Eleven franchise model was unique in the franchise sector for the extremely limited areas in which the franchisee had any direct control over their business, with wages being one of these few areas.⁴³

THE IMPACT OF WAGE THEFT ON WORKERS, BUSINESSES WHICH ARE COMPLIANT WITH EMPLOYMENT LAWS, AND THE WESTERN AUSTRALIAN COMMUNITY AND ECONOMY– term of reference (c)

[78] Wage non-compliance, before it is revealed to a wider audience, has ramifications for competition and business growth.

[79] Post-revelation, wage non-compliance affects not only the value of the business involved in the activity, but also associated businesses. In the case of chains of related businesses, this may result in significant operational restructures. Where formalised action is taken, this generates a cost to the public purse in terms of financing the regulatory bodies and the courts.

[80] For the purposes of this term of reference, we focus on deliberate wage non-compliance, rather than unintentional or accidental wage non-compliance.

Pre-revelation

[81] Deliberate wage non-compliance can have a significant effect on competition in the marketplace, as it allows one business to under-cut its competitors.

[82] In the retail context, labour costs are the single largest component of a retailer's cost of doing business.⁴⁴ Energy and rent are the next highest single cost elements.

[83] As such, if one retailer is engaging in wage non-compliance, it provides that business with a significant cost saving compared to compliant businesses. This in turn allows that non-compliant business to undercut compliant businesses on price.

[84] In this circumstance, wage non-compliance has the potential to generate an illegitimate competitive advantage for the non-compliant business.

[85] In listed companies, or companies that have a relationship with a listed company such as a franchise, this can also result in illegitimately inflated reported profits, which in turn may affect share price and dividends paid to shareholders.

[86] Whether in listed or unlisted companies, wage non-compliance and the subsequent reporting of illegitimate profits can result in increased investment, allowing for greater business growth. This then has the potential to propagate the non-compliant practice, as a practice which may have started out as a short-term process becomes part of the business model.

[87] Eventually, as such businesses grow, the extent of non-compliance can no longer be hidden.

Post-revelation

[88] Once systematic wage non-compliance is identified in a business or business network, significant flow-on effects can be immediately identified.

⁴³ Office of the Fair Work Ombudsman (2016) *Identifying and addressing the drivers of non-compliance in the 7-Eleven franchise network*, at pages 32 and 41

⁴⁴ Australian Productivity Commission (2014) *Relative Costs of Doing Business in Australia: Retail Trade (Productivity Commission Research Report – September 2014)* at page 85

- [89] In the first instance, the value of the business decreases significantly as the value of goodwill declines drastically. Speculation also arises with respect to listed companies as to the accuracy of reported profits, reducing the likelihood of future investment.
- [90] This is particularly drastic in business networks such as franchise networks, in which the actions of a few 'bad apples' can significantly reduce the value of those related businesses who are innocent of any wrongdoing.
- [91] This was seen in the case of 7-Eleven, in which the loss of goodwill in the 7-Eleven brand resulted in losses for franchisees, often 'mum and dad' investors, who were innocent of any wrongdoing and were simply 'guilty by association'.
- [92] Similarly, in the case of Caltex, non-compliance in the network resulted in the decision by the franchisor to withdraw all franchise agreements. Although fair compensation is and will be paid, it is nevertheless reasonable to assume that a number of employees will not be transferred to the new corporate-owned business model.

Deliberate vs accidental non-compliance

- [93] In NRA's experience, the distinction between deliberate and accidental non-compliance is necessary as the mindset attached to each affects how each type of business operates.
- [94] A business that knows it is non-compliant, and is deliberately non-compliant, is more likely to take advantage of the competitive advantage that this provides. This in turn means greater growth, and therefore a greater impact when the non-compliance is revealed to the general public.
- [95] Conversely, a business which does not realise it is non-compliant is:
- [a] less likely to be significantly non-compliant in individual cases; significant amounts of underpayments will only accrue over long periods of time; and therefore
 - [b] less likely to have a significant competitive advantage of which to avail itself, thereby reducing the extent of flow-on effects.
- [96] More importantly, accidentally non-compliant businesses are more likely to take pro-active steps to rectify the situation, thereby not requiring the intervention of the regulator or the courts at the expense of the public purse.

WHETHER WAGE THEFT IS MORE PREVALENT IN PARTICULAR INDUSTRIES, OCCUPATIONS, FORMS OF EMPLOYMENT/ENGAGEMENT OR PARTS OF THE STATE – term of reference (d)

- [97] There is insufficient data to state categorically whether wage non-compliance is more likely to occur in one part of the State than another.
- [98] However, the data available from the Fair Work Ombudsman indicates that the hospitality industry is particularly susceptible to wage non-compliance, with a campaign conducted by the Ombudsman between 2012 and 2015 returning wage non-compliance rates in Western Australia of:
- [a] 42% in restaurants, cafes, and catering services⁴⁵; and
 - [b] 50% in takeaway outlets.⁴⁶

⁴⁵ Office of the Fair Work Ombudsman (2015) *National Hospitality Industry Campaign – Restaurants, Cafes and Catering (Wave 2)*, page 9

⁴⁶ Office of the Fair Work Ombudsman (2015) *National Hospitality Industry Campaign 2012-15 Takeaway Foods (Wave 3) Report – March 2016* at page 10

- [99] This is consistent with the most recent national campaign carried out by the Ombudsman, which identified that the accommodation and food services industry had both the highest recorded rate of non-compliance and sustained non-compliance in the 2016-2017 period.⁴⁷
- [100] In the retail sector, the National Retail Compliance Campaign in 2011 found, from the 12% of Western Australian employers found to be in contravention, 35% were due to rate of wage non-compliance.⁴⁸
- [101] The Ombudsman found it concerning that some directors of corporations still believed they fell under the Western Australian state industrial relations system. Importantly, they did not find any employers to be intentionally not complying.
- [102] On a national level, it was determined by the Ombudsman that continued monitoring of businesses within the retail industry had the effect of reducing wage non-compliance to 45%.⁴⁹
- [103] In comparison, other industry specific campaigns by the Ombudsman have identified the following rates of wage non-compliance in Western Australia:
- [a] 46% in the hair and beauty industry in 2013;⁵⁰
 - [b] 21% in the accommodation, pubs, taverns and bars sector in 2013;⁵¹
 - [c] 67% in the pharmacy industry in 2013;⁵² and
 - [d] 56% in the children's services sector in 2015.⁵³
- [104] Whilst it must be remembered that any data which exists is necessarily sample data rather than a complete census, the hospitality sector tends to remain a poor performer at both the State and Federal levels in terms of wage non-compliance.
- [105] It is noted that the hospitality industry includes a high proportion of young workers, with:
- [a] 45.7% of the workforce in the accommodation, pubs, taverns and bars sector aged between 15-24 years of age;⁵⁴
 - [b] 32% of employees in café, restaurant and catering sector aged between 15-19;⁵⁵
 - [c] 60.7% of the industry as a whole having no post-school qualifications, reflecting the generally younger demographic of the workforce therein.⁵⁶
- [106] In NRA's view, the dominance of young workers in this industry is likely a factor in the high levels of wage non-compliance, as these workers are more likely to be unaware that they are being exploited due to the lack of education provided about their minimum entitlements. They

⁴⁷ Supra, note 6 at page 18

⁴⁸ Office of the Fair Work Ombudsman (2011) *National Retail Industry Campaign, Final Report – November 2011*, pages 11 and 12 (Tables 3 and 4)

⁴⁹ Supra, note 6 at page 18

⁵⁰ Office of the Fair Work Ombudsman (2013) *National Hair and Beauty Campaign 2012-13 Final Report – July 2013* at page 11

⁵¹ Office of the Fair Work Ombudsman (2013) *National Hospitality Campaign 2012-2015 Accommodation, pubs, taverns and bars* at page 12

⁵² Office of the Fair Work Ombudsman (2013) *National Pharmacy Campaign 2012-13 – Final Report, December 2013* at page 10

⁵³ Office of the Fair Work Ombudsman (2015) *National Children's Services Campaign 2013/14, Report – May 2015*, page 8

⁵⁴ Office of the Fair Work Ombudsman (2013) *National Hospitality Campaign 2012-2015 Accommodation, pubs, taverns and bars* at page 5

⁵⁵ Supra, note 46 at page 5

⁵⁶ Supra, note 47 at page 5

are also less likely to complain to appropriate authorities about any underpayments on the perception that doing so will result in the loss of their employment.

EFFECTIVENESS OF THE CURRENT REGULATORY FRAMEWORK – term of reference (e)

- [107] Although often criticised for its selective approach to prosecution, the Office of the Fair Work Ombudsman has all the legislative tools it needs to be an effective regulator.
- [108] Certainly, the generally high level of compliance is a testament to that office’s effectiveness in this respect.
- [109] A study conducted by the University of Melbourne in 2015 demonstrated that, out of a sample of cafes, restaurants and hairdressing salons, found that 44% of respondents considered it ‘likely’ or ‘highly likely’ that the Fair Work Ombudsman would discover non-compliance, with a further 31% putting the odds of this at 50/50.⁵⁷
- [110] The study observed that this appeared to over-state the intelligence gathering capabilities of the Ombudsman, given the proportion of businesses subjected to audit in any given year.
- [111] This study also found that action by the Ombudsman in the public sphere caused 38% of businesses to take some form of check of their own internal processes. Of the 62% which did not, 88% were assured of their own compliance.⁵⁸
- [112] Although somewhat limited in its scope, this study demonstrates the ‘ripple’ effect of the actions of the Fair Work Ombudsman and its ability to utilise its limited resources to be an effective regulator.
- [113] Notwithstanding this, it is NRA’s submission that the key impediment to the Fair Work Ombudsman being an even more effective regulator is not the current state of the law, but the resources provided to the enforcement agency.
- [114] The Fair Work Ombudsman, according to recent budget figures, has an estimated average staffing level of 745 for the 2018/19 financial year.⁵⁹
- [115] This staff of 745 – of which only a fraction are enforcement staff such as inspectors and lawyers – is expected to regulate the workplace practices of an estimated 2.17 million businesses trading in Australia.⁶⁰
- [116] This equates to 2,914.8 businesses per FWO employee; bearing in mind that less than half of these employees of the Fair Work Ombudsman are likely engaged in enforcement activities, the ratio of businesses to inspectors is likely much, much higher.
- [117] Academics, industry and unions have long lamented the critical under-resourcing of the Fair Work Ombudsman⁶¹, which is unfortunate as the legislative structure for this agency to achieve its objectives is there, waiting to be used.

⁵⁷ Hardy, T and Howe, J *Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman* (2017) 39(4) Sydney Law Review 471

⁵⁸ Ibid

⁵⁹ *Budget 2018-19, Agency Resourcing – Budget Paper No. 4* (2018), Commonwealth of Australia, at page 183

⁶⁰ Australian Bureau of Statistics 2018, *Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017*, ‘Table 1: Businesses by Industry Division: June 2013 – June 2017’, data cube: Excel spreadsheet, cat. no. 8165.0, viewed 6 July 2018, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0Jun%202013%20to%20Jun%202017?OpenDocument>

⁶¹ See, for example, Patty, A. (2018, May 9) “Unions watchdog gets funding boost, but fair wages enforcer misses out”, retrieved from <https://www.smh.com.au/business/workplace/unions-watchdog-gets-funding-boost-but-fair-wages-enforcer-misses-out-20180509-p4zea5.html>

[118] NRA reiterates the position it has consistently taken in the past – that the Fair Work Ombudsman has all the legislative powers it needs to be an effective regulator under the *Fair Work Act 2009* (Cth).

[119] A change to fiscal policy, rather than legislation, needs to happen in order for those powers to be utilised in the manner Australian businesses and the Australian public expect.

SHOULD NEW LAWS BE INTRODUCED IN WESTERN AUSTRALIA TO ADDRESS WAGE THEFT AND IF SO, SHOULD WAGE THEFT BE A CRIMINAL OFFENCE – term of reference (g)

[120] In early November, the Queensland Education, Employment and Small Business Committee tabled its Report No. 9, 56th Parliament – *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland*.

[121] One of the recommendations of the committee was for the Queensland Government to legislate to make wage theft a criminal offence, where the conduct is proven to be deliberate or reckless.

[122] The NRA notes that, at a State level, the criminalisation of wage non-compliance insofar as it relates to non-compliance with requirements under the *Fair Work Act 2009* (Cth) and statutory instruments made under it presents a constitutional issue vis a vis inconsistency with the Commonwealth law in this regard.

[123] The NRA further notes that, whilst it may be open to the Western Australian Government to criminalise wage non-compliance in relation to those businesses still covered by the State industrial relations system, the data of wage non-compliance in this sector is inadequate to allow a considered determination on this point to be made without further investigation.

[124] Leaving the constitutional question to one side, NRA agrees in principle that wage non-compliance should be treated in the same manner as other anti-competitive practices under the *Competition and Consumer Act 2010* (Cth) and similar legislation. The NRA notes that recently the McKell Institute issued a report which included, among other recommendations, a call for the Australian Law Reform Commission to investigate this possibility.⁶²

[125] However, the NRA caveats this in that criminal liability should only attach to circumstances where there is sufficient proof of 'malice aforethought' in relation to non-compliance. Only deliberate and calculated non-compliance ought to attract criminal sanction.

[126] Incompetence or misapprehension of workplace laws ought not to attract criminal sanction, at least at the first instance. However, once a business operator has been made aware that their practices are not compliant, the continuation of those practices thereafter may be considered deliberate and calculated.

OTHER STRATEGIES TO COMBAT WAGE THEFT – term of reference (h)

[127] In NRA's respectful submission, wage non-compliance will never be eradicated. There will always be a business operator with insufficient understanding, or insufficient scruples, for this to occur.

[128] However, wage non-compliance can be minimised, in NRA's submission, by two actions:

[a] increasing the resources available to the Fair Work Ombudsman, although we note that this is outside the scope of the power of State governments; and

[b] increasing education in workplace rights.

⁶² Cavanaugh E. and Blain L. (2019) *Ending Wage Theft: Eradicating Underpayment in the Australian Workforce*, Melbourne: The McKell Institute Victoria, pp. 29 - 30

[129] In NRA's view the exploitation of workers in any industry is not a failure of the legislation, but a failure of the wider system to educate workers in their rights under the legislation.

[130] To be clear, this is not meant as an excuse for non-compliant behaviour by employers. Rather, enforcement agencies such as the Fair Work Ombudsman can only take action if non-compliance is brought to their attention. If employees are unable to recognise non-compliant behaviour, then that avenue of intelligence gathering is lost to the enforcement agency.

[131] The Fair Work Ombudsman noted, during the National Hospitality Industry Campaign, that although people aged between 15-19 in the café and restaurants sector were the largest single group of employees, they were the least likely to make a complaint or inquiry about their rights at work.⁶³

[132] In NRA's view, this is due to a lack of awareness of this group of workers about their rights and entitlements in the workplace.

[133] Further, the *Fair Work Act 2009* (Cth) and the processes under it are designed to allow workers to more readily take matters into their own hands. Workers cannot do this if they are not aware that those systems exist, or indeed that there is any reason to activate them.

[134] We are aware that many schools provide a basic education with respect to the necessity of having a tax file number, and some schools go so far as provide some education in workplace skills. However, we know of no formalised attempt to educate young people about their rights under the Fair Work system, even in formal traineeships and apprenticeships.

[135] In NRA's respectful submission, investment in formalising education in workplace rights for:

[a] young people – through co-operation between the Fair Work Ombudsman, industrial organisations and the Departments of Education at the state and federal levels; and

[b] new arrivals to Australia – through co-operation between the Fair Work Ombudsman, industrial organisations and the Department of Immigration;

will have a significant effect in improving the effectiveness of the current legislative provisions.

ARE THERE STRATEGIES AND LEGISLATIVE CHANGE THE WESTERN AUSTRALIAN GOVERNMENT COULD RECOMMEND TO THE FEDERAL GOVERNMENT TO DEAL WITH WAGE THEFT IN THE FEDERAL JURISDICTION – Term of reference (h)

[136] In response to previous inquiries and recommendations, certain amendments to Commonwealth legislation have been implemented.

[137] The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) sought to foster greater compliance by exposing franchisors to liability for the non-compliance of their franchisees, and also introduced higher penalties for serious contraventions.

[138] In NRA's experience the introduction of this legislation has borne significant fruit, as franchisors are increasingly taking a greater interest in the activities of their franchisees to ensure compliance, including introducing proactive compliance measures such as auditing the workplace relations practices of their franchisees.

[139] The NRA notes, however, that franchisors are limited by the *Franchising Code of Conduct* insofar as that whilst breach notices under that Code can be issued for breaches of workplace relations laws, regular resort to this course of action may be contrary to the good faith requirements of the Code.

[140] Where franchisees refuse to rectify identified contraventions of workplace relations laws, whether in whole or in part, the NRA has also observed a reluctance by franchisors to rely on

⁶³ Supra, note 46 at page 5

this to terminate the franchise agreement for fear of contravening those same good faith obligations.

- [141] The Western Australian Government may wish to recommend to the Federal Government that the *Franchising Code of Conduct* be amended in such a fashion to allow franchisors to terminate franchise agreements following a fair process in circumstances where contraventions of workplace relations laws have been identified but declined to be rectified, without fear of the franchisor contravening their obligations under that Code.
- [142] The Western Australian Government may also wish to recommend to the Federal Government that the prospect of wage non-compliance being made an anti-competitive behaviour be referred to the Australian Law Reform Commission for consideration.
- [143] In relation to the specific terms of the *Fair Work Act 2009* (Cth) and its enforcement mechanisms, it is the view of the NRA, as discussed above at term of reference (e), that the Office of the Fair Work Ombudsman has all the legislative tools needed to be an effective regulator. It is the limited resources provided to the enforcement agency which is the key hindrance to that agency being even more effective, not the current state of the law.
- [144] The Fair Work Ombudsman cannot operate effectively with less than one enforcement officer for every 3,000 businesses.
- [145] The Western Australian Government may wish to recommend to the Federal Government a change to budgetary policy is needed to permit the Fair Work Ombudsman to more effectively police the workplace relations practices of Australian employers.
- [146] The NRA is grateful for the opportunity to represent its members in this inquiry. If NRA can be of any further assistance, please do not hesitate to contact NRA Chief Executive Officer, Ms Dominique Lamb.



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