



United Voice WA

Submission

Inquiry into Wage Theft in Western Australia

2019

Introduction

United Voice WA (**United Voice**) welcomes the opportunity to make a submission on behalf of members about Wage Theft in Western Australia. United Voice supports the Western Australian Government in its quest to ensure that workers are treated fairly.

This submission addresses a number of the inquiry's terms of reference relating to the incidence of wage theft in Western Australia, the various forms that wage theft can take and the industries and occupations that, in our experience, are susceptible to a risk of wage theft.

Supporting our submission and recommendations for reform are case examples of our members. These examples show employers exhibiting a spectrum of behaviours ranging from compliant with the legislation, to questionable, adverse or unlawful. The aim is generally to avoid or reduce costs associated with employment of workers.

The impact on affected workers and the broader community is overwhelmingly one of unfairness – of a system stacked against them. It feeds into a lack of trust in our government and legal systems that ultimately damages our democracy.

United Voice has made 23 recommendations for reform. We believe these reforms would have the effect of strengthening protections against unfair and exploitative practices. These reforms are based on the following principles:

- the right of workers to be properly informed about pay and conditions;
- the right of unions to organise and represent workers;
- equal treatment of all workers doing the same or similar work irrespective of the legal basis of their engagement;
- an industrial framework that cannot be gamed to reduce or avoid lawful entitlements; and
- equity in access to justice.

United Voice believes reform needs to start with education. Many workers don't even realise the extent to which they are being exploited. If they do learn, fear of the consequences of raising it impedes action. Unions have been effectively marginalised and stigmatised in the community to the point that most workers are not union members. Most young people, visa workers and new immigrants have no understanding of what an Australian union does or can do.

The Commonwealth Government has failed to address the exploitation associated with labour hire, sham contracting and similar deregulated employment arrangements. Corporate avoidance¹ of our industrial legislation and endemic wage theft is a reality.

Government initiatives are needed urgently to address a systemic problem that is leading to growing inequality and a sense of injustice in our community.

Overview of United Voice, WA

United Voice represents approximately 18,000 workers in Western Australia across a range of public and private sector employers who are engaged in a diverse range of industries and occupations, across both the state and federal industrial relations jurisdictions.

Our membership includes aged care and disability carers, ambulance officers, childcare workers, cleaners, education assistants, gardeners, health workers, hospitality workers, manufacturing workers, personal trainers and security officers.

Risk profile of workers vulnerable to wage theft

Many United Voice members work in industries that are characterised by insecure and low paid work, and are frequently employed within corporate structures that engage in wage theft. In our experience, our members are disproportionately impacted by a pronounced power and status imbalance between the worker and the employer. This exploitation is particularly evident when:

- the job market is competitive;
- the employer operates within a highly competitive industry, where the employer feels that the only means to save costs is by cutting corners on staff wages and benefits; and
- the workers feel powerless to anything about it due to fear of losing their jobs, hours or residential status.

The risks and consequences are more serious for workers engaged in the industries we cover if they are not members of our union.

While many exploitative practices occur within the federal jurisdiction, our members in the state jurisdiction also suffer wage theft. Carers working in private homes in Western Australia are still not

¹ Senate Education and Employment Committee's 2016-17 Inquiry concerning Corporate Avoidance of the Fair Work Act. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report

considered employees and, as a consequence, are not subject to minimum employment standards. We also submit that the State Government has a poor track record in procurement – awarding contracts without consideration of the business’s wage practices or treatment of workers.

The prevalence of underpayment and wage theft

Underpayment is so prevalent in some sectors that it can no longer be considered an aberration; the underpayment of workers is becoming the norm. In its simplest form, wage theft occurs when an employer fails to provide an employee with the full wage or salary to which they are legally entitled. This has become a business model.

It is also important to note that wage theft generally takes place in the context of poor working conditions and insecure employment. Wage theft may be episodic or systematic and prolonged, with some workers experiencing underpayment of wages, some workers being underpaid at varying but recurring intervals, and some workers experiencing extended periods of underpayment.

Although already identified as an issue for many years, public awareness of wage theft has recently increased following investigations by media and the Fair Work Ombudsman (**FWO**) of high-profile franchise operations in Australia’s largest cities. The rise of the gig economy and the exploitative practices of many companies, which rely on hiring workers as ‘independent contractors’, has also started to be better understood.

In our experience, employees’ experiences of wage theft can include the following forms:

1. Labour hire and out sourcing

The *Fair Work Act 2009* (**FW Act**) does not differentiate between labour hire and direct employment. The FW Act maintains the paradigm that construes the employment relationship as one defined by a closed bilateral relationship between the employee and the employer and does not acknowledge practical differences between labour hire-type employment relationships and the more conventional direct engagement of an employee by an employer.

The FW Act’s failure to acknowledge that labour hire represents a departure from the traditional employer/employee relationship permits a user of labour hire to effectively insulate themselves from many of the responsibilities that normally attach to running a workplace.

For example, a large retail building may be cleaned regularly by cleaners, engaged by a labour hire firm, who are being underpaid or exploited, but ultimately the retailer bears no responsibility for those employees – or that exploitation. In the pursuit of profits, and with little to no accountability

under the legislation, the retailer can continue to contract low cost firms that engage in dubious behaviour – as there are limited or no consequences to the decision to contract with a labour hire provider that will almost certainly be contravening industrial law. This is common in the security and cleaning industries.

Contracting, sub-contracting, and labour hire operate as significant features of the labour market. The effect of these arrangements is the reduction of standards to the award safety net or, frequently, to a standard effectively below the award. This creates a competitive logic that dictates that anything more than the minimum is excessive and decreased labour costs are a reasonable expectation of a user of labour.

In our experience, an employer may refuse to engage a worker as an employee at all, instead requiring them to register as an independent business and engage them as a contractor. This enables the employer to avoid the statutory requirements in relation to minimum wage rates, overtime, penalty rates, leave entitlements and superannuation.

The main industries for which United Voice has membership coverage and in which labour hire and sham contracting arrangements are prevalent are property maintenance, contract cleaning, security, manufacturing and hospitality related areas. It is also common in the fitness industry.

It is also not uncommon to encounter levels of contracting where the principal contractor is responsible for the work to be performed, but does not directly engage the employees who perform the work. Rather, the principal contractor engages a sub-contractor to ensure the work is performed. In fulfilling its contract, the sub-contractor may also not directly employ the workers, but engage another company to provide the employees or the workers as ‘independent contractors’. This is common in the security industry and contract cleaning.

Commonly, in the industries covered by United Voice, labour hire arrangements or out sourcing result in reduction of employment conditions. There is a ‘race to the bottom’ mentality when bidding for contracts, including government contracts. In order to increase profits in labour intensive areas, a reduction in pay and conditions and then standards seem to be the logical consequence of the process. For example, these have been issues experienced by members at Fiona Stanley Hospital and members working for businesses performing water services, out sourced by the Water Corporation.

The client favours lowest price tenders and is able in most cases to accept the lowest price, without taking any direct responsibility for the pay and conditions paid to workers who actually perform the

EXAMPLE 2

Manufacturing - Labour hire

It has become common practice amongst many industries, especially manufacturing, to hire casual employees through labour hire to avoid paying casual rates under an enterprise agreement.

A large commercial bakery in Western Australia continues to obtain casual employees through a labour hire arrangement. These employees are not paid as per the rates under the enterprise agreement negotiated with the union. They are instead paid under the Manufacturing and Associated Industries and Occupations Award 2010. These employees are paid less than those employed under the enterprise agreement for doing the exact same work. It is common practice for such employers to employ all of their casual employees through labour hire than direct employment under an enterprise agreement due to the difference in pay rates.

The bakery is ultimately owned by global conglomerate.

2. Unpaid hours

Employers may refuse to pay employees for the full number of hours worked. This frequently takes the form of refusing to pay for time spent preparing for work (e.g. handover time or for cleaning up a workplace at the end of a day or shift). Alternatively employees are required by their employer to work, but their working hours are not recorded in full (e.g. where an employee is required to sign off but then continue working).

One group of workers that are particularly exploited are those on an annualised salary in the hospitality industry. In our experience, a worker on an annualised salary arrangement needs to understand the basis of the employment arrangement and keep clear records of the hours performed. While a strong sense of injustice and exploitation may form after a period of time, without their own records a worker will not know how much they have been underpaid or be successful in claiming it.

While recent amendments to the FW Act introduced a reverse onus of proof for the situation where it is claimed that an employer did not keep adequate records, this does not necessarily resolve the actual underpayment. Relevantly, employers in the hospitality industry exploit the concept of an 'industry standard' to justify excessive overtime hours that are not reasonable, as an occupational

requirement. The FW Act criteria to determine what is considered 'reasonable overtime' assists in this exploitation (see s62(3)(g) and the reference to 'the usual patterns of work in the industry').

EXAMPLES 3 & 4

Hospitality

Example 3 Unpaid hours

Chris was employed as a Chef de Partie at a popular bar and grill. After working for his employer for two years, Chris was offered a promotion to Sous-Chef de Cuisine. The promotion involved a change to a salaried position, with a \$50,000 annual salary.

Within this role, our member was required to work a 12 hour broken shift each day - split into two 6 hour lengths, without the opportunity to return home. In these circumstances, Chris regularly worked in excess of 50 hours per week for no additional pay.

Example 4 Unpaid hours and the 'industry standard' myth

Steph was employed as an apprentice Chef. Throughout her apprenticeship, our member was expected to work in excess of her 38 rostered hours each week without meal breaks, overtime payments or recognition of additional time worked.

When Steph raised the issue individually, management responded by suggesting she was not cut out for the restaurant industry and that it was her inexperience that was preventing her from handling the conditions. As a result, Steph was hesitant to make a claim for the additional hours.

After completing her apprenticeship, Steph was moved onto an annualised salary arrangement. Although clause 28 of the Restaurant Industry Award 2010 includes a mechanism to compensate employees on annual salaries who work additional hours, Steph's employer failed to reconcile her salary in accordance with these provisions.

EXAMPLE 5

Education - Unpaid work

Dianne is an Education Assistant at a private school in Perth. Although Dianne is paid an hourly wage, she is required to be at work 15 minutes prior to her official start time. She is also required to complete tasks after her paid work day. This includes supervising students after school if their parents are late to pick them up. Dianne cares about her students and understands that the school has a duty of care. She does not feel as though she has any choice but to keep doing this work, even if she is not paid for it.

United Voice represents many wage earners with similar experiences. Many of our members are utilised by their employer as if they were paid a salary, and therefore regularly undertake hours of unpaid work.

3. Underpayment or non-payment of minimum entitlements

An employer may not pay an employee the full amount they are owed for the work performed. This can be affected in a myriad of ways – from clear and direct to subtle, carefully calculated deception.

Historically, some employers have been relatively upfront. This has been a particular issue affecting temporary visa workers in Australia. Going one step further, an employer may simply not pay the employee at all for the work they have performed. Alternatively, prospective employees may be required to work a number of unpaid ‘trial shifts’ prior to being formally hired.

United Voice members experience different kinds of underpayments – often particular to the type of work they do and the award that applies. The following examples demonstrate the variety of ways in which different industries have been found to reduce paying entitlements.

EXAMPLES 6 & 7

Security

Example 6 Unpaid overtime

Employers have interpreted the Security Industry Award 2010 (Award) to allow a rostering arrangement designed to avoid paying Sunday penalty rates to Security Officers. United Voice made

a claim against Wilson Security over its roster pattern allocating overtime hours to Sunday shifts, essentially allocating overtime hours in advance of the worker completing their full complement of 152 ordinary hours in a four-week period.

In United Voice v Wilson Security Pty Ltd [2018] FCA 1215, Justice Tracey found in favour of Wilson Security's practice based on the text and context of the Award, which he found, had no "express" restrictions. The practical effect of the decision is that employers are able to structure the roster to deny paying Award entitlements to workers in the security industry. United Voice is appealing the decision.

Example 7 Redundancy not paid

The ability to access redundancy has become increasingly non-existent for any worker in the security industry. Most employers are committed to the practice of never paying redundancy when their operations change, relying on the exception in s119(1)(a) of the FW Act that redundancy is not payable where it is 'due to the ordinary and customary turnover of labour'. There is a turnover in contracts as clients increasingly force a better price for the labour supplied. However this is in turn exploited by the contractors.

United Voice in Queensland took Berkeley Challenge (owned by Spotless) to court over its failure to pay redundancy relying on this exception (United Voice v Berkeley Challenge Pty Limited [2018] FCA 224). Justice Reeves found in favour of United Voice, finding the exception would only apply in a limited set of circumstances. The decision has been appealed.

Classifying workers lower than their qualification

In the Aged Care and Disability industries (and particularly in home care), employers will engage carers on the basis that they have certain levels of skill, experience and/or qualifications (such as Certificate III in Aged Care), but will not pay wages commensurate with those requisite levels of skill, experience and qualifications.

Typically, employers justify this sort of 'underpayment' by saying that the nature of the work is dictated entirely by client need. For example, if a client only requires basic domestic assistance in the home, and delivery of that assistance does not require that the carer have any particular skills, qualifications or experience, then the carer will be paid the entry-level, unqualified carer rate for all

work performed for that client, irrespective of the skills, qualifications and experience that the carer brings to the job.

Where carers deliver personal care to clients (in the form of showering, toileting, administering medications, wound care etc.), the level of skill, experience and qualification of the carer can significantly affect the overall quality of care received by the client. Yet, any positive effect on quality is not reflected in wage rates if the same work could have been performed by a lesser-skilled/experienced worker, albeit less competently.

Under this model, employers profit (both in a reputational sense as well as financially) from the exploitation of a highly-skilled, yet poorly-remunerated workforce. For carers working under this model, pay rates can vary significantly from week to week depending on the needs of individual clients, which may change quite unpredictably.

Another variation of this model sees employers paying carers a fixed rate based on the category into which the majority of their work falls. This means that, although a carer may perform work for a variety of clients, some of whom are 'high-needs' and require specialised care of the nature that only a qualified carer is able to give, if the majority of the carer's work falls into the category of 'basic domestic assistance', they will receive only the basic-level rate for all of the work that they perform, including the work with 'high-needs' clients.

Potentially, employers are able to distribute work such that few (if any) carers receive the 'high-needs' wage rate, even if they are regularly performing work for 'high-needs' clients.

EXAMPLES 8, 9 & 10

Aged Care – Non-payment of minimum entitlements

Example 8

Jo works as a Care Worker for a large aged care provider, in a residential facility. She is required to complete mandatory training online. Under Jo's enterprise agreement, her employer is required to pay its employees for completing mandatory training. Jo's manager has told Jo that she can use the computer in the staff room to complete her online training modules 'when she has a moment to spare' between taking care of residents.

Jo advises that she rarely has enough time to log onto the computer before she is required back on the floor. Jo completes her training during her lunch breaks, and finishes off her training modules at

home. She is effectively not paid for completing any of her mandatory training.

Example 9

Melissa works at a residential care facility as a Care Worker. Under her enterprise agreement, Care Workers are paid a higher wage if they have a recognised Certificate III qualification. Melissa has a Certificate III in Aged Care.

Melissa's employer refused to pay her at the higher rate under the Agreement for a period of five years. This was despite the fact that she completed the workplace training component of her Certificate III with her employer. The union requested that her employer conduct an audit, and Melissa was back paid \$2,900.

Example 10

Ken works in aged care, providing home care to clients. Ken has a written contract of employment that provides him with a minimum of 24 hours work per fortnight.

Despite being ready, willing and able to work his contracted hours, his employer frequently rosters him for fewer than 24 hours per fortnight. In the last four weeks, Ken has been rostered an average of 14 hours per fortnight.

EXAMPLES 11 & 12

Early Childhood Education and Care (ECEC) – Non-payment of minimum entitlements

In ECEC, most employers operate under the Children's Services Award 2010 (Award). However, employers regularly and systematically avoid paying entitlements owed to their employees under the Award.

Example 11

Throughout the course of his employment, Bryce's employer failed to pay him the correct rate of pay for his classification under the Award, any annual leave loading, any overtime entitlements, or the laundry allowance.

The union calculated that this underpayment amounted to over \$3,700. His employer agreed to the wages, overtime and leave loading claims. However, his employer refused to acknowledge the entitlement to a laundry allowance. The employer's position was that Bryce and his colleagues were

free to use the washing machines that are available at the centre to wash children's clothes and other linen.

Example 12

In United Voice's experience, many employers within ECEC have a similar attitude to Bryce's employer and some possess limited knowledge about the law.

Many of our members report that their employers refuse to pay their employees for attending compulsory meetings and training sessions outside work hours, include on their rostered days' off. It is common practice for employers to provide a light meal (such as pizza) as the only compensation for attending these meetings or other compulsory activities.

Non-payment of penalty rates is rife in the hospitality industry. An employee may work at times that would ordinarily entitle to them to penalty rates (e.g. weekends, public holidays or outside of normal work hours) but receive only the base rate for doing so.

EXAMPLES 13 & 14

Hospitality - Non-payment of penalties

Example 13

Jim and Susan both spent several months working for two cafes, owned by the same person, in the Perth CBD. These cafes were popular with the community and both Jim and Susan felt they were an integral part of the business. The second café, which Susan managed for the owners, was opened as a result of the success of the first café.

It was only when Jim approached the union about another issue that his wages were given proper consideration. Once the union's industrial team did a very brief audit of the pay it became obvious that both Jim and Susan had been underpaid the entire time they had worked at the cafes. Neither of them had been paid any additional rates for their early start, late finishes or the weekend and public holiday work they had done. They had been paid a flat rate during their entire employment, that rate being that of the most junior employee under the modern award.

Jim and Susan had been underpaid to the tune of nearly \$30,000 between them. This story is not unique in the hospitality industry and underpayment and wage theft is rife across the board.

Example 14

Peta works as a waitperson for a winery in the Swan Valley, a food and wine region located 25 minutes from Perth. Peta is employed on a casual basis, although she has no written contract of employment, receives no pay slips and is paid in cash.

Contrary to the modern award, Peta is paid a flat rate of \$20 for each hour of work, including work undertaken on the weekends and public holidays. She is not given prior notice when shifts are cancelled, and she is often sent home one or two hours into her shift if her workplace is not busy.

4. Unpaid superannuation

In our experience underpayment of wages has an associated component of underpayment of superannuation. It has been widely reported that superannuation underpayments are costing 2.7 million workers an average of \$2025 a year². According to a December 2016 Industry Super Australia report those workers in 'less secure' employment were at greater risk of superannuation underpayment than those in secure employment³.

Unpaid superannuation is usually realised in our experience after employment has ended – especially when a business has gone into administration or liquidation. Its absence from the FEG scheme means that workers can lose years of unpaid superannuation. The reporting system of employer superannuation payments is not transparent enough for workers.

Minimum threshold

Under current superannuation legislation, employers are only required to pay superannuation to workers who earn more than the minimum threshold of \$450 per month. The increasing casualisation of workers in the Aged Care and Disability Services industries has meant that many workers (and particularly carers engaged in home care) now have to work for a number of employers in order to earn a living wage. Depending on the nature and availability of work from month to month, some may not earn the minimum threshold of \$450 with some or all of their employers. Where this happens, they may receive no superannuation payments, even when their total monthly income (across all employers) exceeds \$450. We know that in Australia women typically retire with 47% less superannuation than men.⁴ Any structural underpayment of

² See www.smh.com.au/business/workplace-relations/about-28m-australians-get-underpaid-56bworth-of-superannuation-inquiry-told-20170322-gv3mxm.html

³ See www.industrysuperaustralia.com/assets/Reports/Final-Unpaid-Super-January-2017.pdf, p.6

⁴ Senate Economics References Committee, (2016). *A husband is not a retirement plan: Achieving economic security for women in retirement*. Canberra: SENATE PRINTING UNIT, p.9

superannuation that affects industries which have a predominantly female workforce is particularly concerning.

5. Underpayment of temporary migrant workers

It is becoming increasingly common for employers to avoid both the spirit and the law of the FW Act by engaging workers on temporary visas. In our experience migrant workers' industrial rights are all too often subordinated by their immigration status.

It is widely recognised that workers on visas are more vulnerable to workplace exploitation than their local counterparts. They also face higher barriers to accessing remedies. The power asymmetry that exists in any employer/employee relationship is exacerbated in the case of temporary migrant workers, because their right to remain in the country is contingent on them not being found to be in breach of the work conditions on their visa. Any legal irregularity in the employee-employer relationship, whether the fault of the employee or not, can trigger a chain of events that leads to a grievous result for the worker (detention and deportation) that is disproportionate to any negative outcome potentially faced by the employer (a fine).

Temporary migrants face strong incentives to stay silent about contraventions of the FW Act. Any complaint about working conditions to a FWO inspector will always be accompanied by the risk that the matter may also be reported to the Department of Immigration and Border Protection.

International students fare badly too. Research⁵ indicates that nearly all international students in Australia are paid less than the minimum award rate, and most are paid below the federally mandated minimum wage.

The industries where the exploitation of visa holders is most prominent are cleaning, horticulture, retail, meat and poultry processing, hospitality and accommodation services.⁶ These are also the industries in which labour-hire, subcontracting and sham contracting are most common, and where union density is low.

A 2012-13 FWO audit of 578 cleaning businesses found that only one in four were paying wages lawfully. International student workers regularly worked through scheduled breaks and after the completion of shifts in order to complete their allocated tasks, which could not be feasibly or safely

⁵ Survey by the University of Sydney Business School, available at:
http://sydney.edu.au/business/news/2016/foreign_student_workers

⁶ The Senate Education and Employment References Committee (2016) A National Disgrace: The Exploitation of Temporary Work Visa Holders, March 2016

completed within the paid time that was allocated.⁷ In cleaning, employees are often from a non-English speaking background, and it is not unusual for cleaners to be international student visa holders who are susceptible to regularly working through scheduled breaks and after the completion of shifts in order to complete their allocated tasks.

Many people who work multiple jobs or long hours are hesitant to approach the FWO, in part if a complaint is litigated and the facts reveal that the student works more than 40 hours per fortnight, Border Protection is informed and the student potentially deported.⁸

EXAMPLE 15

Laundry – underpayment migrant workers

Lin worked at a medium sized laundry in a semi-industrial area of Perth. Lin was employed on a casual basis, but worked at least full time hours every week. She was dismissed by her employer for taking leave due to an injury sustained at work, contrary to the general protections provisions of the FW Act.

Lin migrated to Australia two years ago. She joined the union at the suggestion of her neighbour and close friend, who is Australian. Lin's neighbour assisted her to gather documents needed for the union to assess her claim.

Along with a general protections claim, Lin had a significant underpayment claim. Because her neighbour had read the relevant award, Lin already knew that she not being paid the correct rate of pay by her employer throughout the course of her employment. Not only was her employer paying her almost three dollars less than the award rate, Lin's employer was not paying any of the penalties owed to her. This included penalties for shift work, for working during her meal break, and for working overtime.

The union discovered that Lin was not paid approximately 25% of wages owed to her.

Lin advised the union that all workers within the laundry are consistently paid below the award rate. The vast majority of workers are employed on a casual basis. They regularly work 14 hour days at a flat rate of pay, without any of the applicable penalties. Most of Lin's former colleagues speak English as a second language, and are not confident with their written English. Many are concerned

⁷ FWO (2015) *National Cleaning Industry Follow-up Campaign 2012-13*, Report - February 2015

⁸ Taken to the cleaners: international students underpaid, exploited, available at: www.abc.net.au/radionational/programs/backgroundbriefing/internationalstudentsexploited/7472384

about their work status, and any problems at work, affecting their visas.

In addition to these issues, Lin reports that there is a cultural dimension preventing workers from enforcing their rights at work: 'In my home country, people do not go against their bosses, nobody speaks out at work. This is why it is hard for us'.

Through Lin, two more employees have come forward and asked the union to assist them with their underpayment issues. However, these employees were only empowered to confront their employer about their lost wages after their employment ceased, and they were no longer worried about losing their jobs.

6. 'Zombie' Agreements

The continuance of long expired 'zombie' agreements allows employers to pay below the modern award safety net minimum standard. A 'zombie' agreement continues in force until an employer or employee covered by the agreement makes formal application to the Fair Work Commission (**FWC**) to terminate it.

A feature of the FW Act and related legislation passed in 2009 was that a variety of transitional instruments consisting mainly of old 'Work Choices' collective agreements and Australian Workplace Agreements continued to have legal effect.

These agreements would not pass the better off overall test (**BOOT**) applied to agreements made today. The continuing operation of these transitional instruments is a significant problem. These old collective agreements are colloquially referred to as 'zombie' agreements and are maintained and used by employers because they provide a means to avoid award penalties, loadings and allowances.

In many cases, there are few substantive provisions in the agreement which have any practical effect other than to lock out award entitlements. The interaction of these transitional instruments with the broader Fair Work system is complex. Where an old collective agreement still applies, the relevant modern award does not apply.

While the focus here is on 'zombie' agreements we also note there is another class of enterprise agreements made in the first five years or so after the FW Act commenced, when the Commissioners adopted different approaches to the BOOT. Following the Coles decision,⁹ the FWC took important steps to apply a stricter and more consistent approach to the BOOT process. While this has created a

⁹ *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd*[2016] FWCFB 2887

new issue around undertakings, the earlier approach means there is a second cohort of expired agreements ('zombie mark 2'?) that did not face sufficient scrutiny or because of loaded rates, within a few years workers dip (depending on their rosters) into wages below the relevant modern award.

The main reason these 'zombie' agreements are maintained is that they provide an employer with the ability to pay reduced or no penalty rates and loadings for work. The base rate of pay for any employee is notionally the base rate in the relevant modern award. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Transitional Act)* provides for a base rate guarantee in relation to employees covered by these transitional instruments in identical terms to section 206 of the FW Act.

In theory, the modern award system sets the base rate of pay for all employees, including those covered by 'zombies'. One of the broader problems with the FW Act is that section 206 only guarantees that an employee covered by any agreement (including a 'zombie') is paid at or above the base rate of pay within the applicable modern award. It does not extend this guarantee to penalties and loadings.

For many low paid workers and United Voice members working unsocial hours in areas such as cleaning, security and hospitality, penalties and loading make up a substantial part of their overall remuneration. These additions to the base rate of pay have also been determined by the FWC as part of the 'fair and relevant minimum safety net of terms and conditions'.

The main way that these 'zombie' instruments deliver adverse remuneration outcomes is by containing penalties and loadings that are significantly inferior to the modern award standard. In security and cleaning, where much of the work is in the evenings and on weekends, avoiding penalties and loadings provides a competitive advantage to firms and undermines the award safety net. In labour hire industries, employers who have a continuing 'zombie' agreement in place, can use the agreement market their services to businesses, as they can offer cheaper below award labour.

While one might expect the FWC to expedite the termination of long expired agreements which clearly undercut minimum standards, in practice, the proceedings and processes can be time consuming and difficult. The difficulties arise from employer resistance and the manner in which the FWC is required to deal with these applications and the different approaches taken by individual members of the Commission to terminate applications.

The Transitional Act applies the same provisions to ‘zombies’ that applies to expired agreements made under the FW Act in relation to their termination. These transitional instruments continue to have legal effect until an application is made to the Commission, requiring evidence and the Commission to make specific findings and then formally terminate the agreement.

Section 225 of the FW Act allows for employee organisations, employees and employers to apply to terminate expired agreements. Section 226 sets out the criteria to be applied by the FWC when determining whether or not to terminate an agreement that has passed its nominal expiry date. These are the same criteria that an employer will have to satisfy when applying to terminate an agreement during bargaining that pays a significant premium above the relevant award and where the effect of termination will be to reduce the workforces’ remuneration to the award safety net as permitted by the FWC in the “Aurizon” matter.¹⁰

The effect of the termination of a ‘zombie’ is to increase employees’ remuneration to the award safety net. Sections 226(a) and (b) requires that FWC must consider the public interest and concerning ‘all the circumstances’ and the views of the employees, the employer or employers and any industrial organisation covered by the agreement. Section 226 makes no direct reference to whether or not the instrument is providing remuneration that is superior to or manifestly below the relevant modern award safety net.

Only a person covered by the agreement can make an application to terminate the agreement. If a union was covered by the agreement, the union could make an application. Most of these agreements do not cover unions. This adds an additional layer of difficulty as a current employee needs to make the application to terminate the agreement. In United Voice’s experience this is can be a tremendous barrier. In WA it has particularly stopped a number of hospitality industry termination applications from commencing. Potential applicants, often young, decide to change jobs rather than be the named applicant to a formal tribunal against their current employer.

The FWC does not adopt a standard approach in dealing with these applications. Some applications are subject to more complex directions, with the onus placed on an applicant employee to prepare and place material before the tribunal. Some applications are dealt with by requiring the employer to contact employees or provide contact information for employees, and to file material about the effects on employees. This type of approach is more suitable because it acknowledges that the employer holds the information necessary to assist the FWC take into account the views of

¹⁰ *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540

employee concerning the effect of the termination on them. We acknowledge that there has been a recent trend from some Commissioners to deal with these applications much more efficiently.

The net effect of this situation is that many workers are underpaid relative to the modern award. This is even the case with enterprise agreements made under the FW Act. The situation may be technically lawful, but the effect is similar to other forms of wage theft. It is a loophole and a rort.

EXAMPLE 16

Security – Termination of agreement

On 31 March 2014 [redacted] transferred its security operations to [redacted] and in doing so triggered the transfer of business provisions of the FW Act. Under these provisions, employees who were previously employed by [redacted] should have stayed on the old [redacted] (Agreement), whilst workers who were employed after 31 March 2014 should have been employed under the Security Services Industry Award 2010 (Award).

[redacted] kept employing people after 31 March 2014 under the old Agreement instead of the Award.

The Agreement was much worse for workers in many ways, including:

- under the Agreement, Sunday shifts attract only 75% loading instead of 100%;*
- employees who work additional hours or overtime do so for no extra pay;*
- casuals got a 20% loading instead of 25%; and*
- some allowances are lower, such as the first aid allowance and supervisor allowance.*

This situation only became clear in 2016 when some United Voice members applied to the FWC to terminate the Collective Agreement so that all employees would go to the Award. After a hearing the FWC in July 2017 terminated the Agreement. This means that from 7 July onwards, all [redacted] Security Officers were under the Award. Over 2016 and 2017 [redacted] corrected thousands of dollars in back pay to over 200 workers.

[redacted]
[redacted]
[redacted]

EXAMPLE 17

Cleaning

The union was approached by a member working as a cleaner for a large Perth company that contracts in the private sector and for state government entities. The company relied upon an agreement that was approved in the last days of the Howard coalition government in 2009, and prior to the introduction of the FW Act. The workers of this cleaning company had not seen a pay rise in ten years and were being underpaid for not only their base rate but also a host of overtime, weekend and Public Holiday rates.

United Voice found that the pay rates provided for in the enterprise agreement fell well below those found in the Cleaning Services Award 2010 (Award).

United Voice contacted the employer at first instance to work together to terminate the enterprise agreement and rectify the underpayments however the employer maintained that they were confident that the pay rates did now fall under the Award rates.

With the help of the union, two cleaners made an application to the FWC to have the agreement terminated. With the employer not opposing the application, the employees became entitled to the conditions under the relevant Award. This, significantly, meant a pay increase overnight for the entire work force. The union is now working with the same workers to secure back pay for the money that appears to have been stolen from them over the past few years.

Without a technical understanding of the legislation and the ability to make an application to the FWC, these workers would have continued to have been underpaid and have their conditions dictated by a ten year old agreement.

7. Junior Rates

The junior rates provided under the state and federal awards across different industries differ. They generally cover those between those who are 16 to 21 years of age.

This age group are often undertaking the same work as an adult employee except on a reduced rate of pay, all as a result of a business notion that this group are less experienced and are starting out in the workforce. This has led to a common trend where employers are engaging this age group to save costs whilst maintaining the same expectations that they would undertake the same duties as those paid at an adult rate of pay.

Additionally, junior rates do not take into account the financial issues that this age group faces at present. Most of those in this age group are studying whilst working to support themselves, and in some cases they are working to pay rent and living expenses.

Junior rates should reflect the work that these employees undertake and take into account the prevalent financial issues that exist at present.

Hospitality industry

In the hospitality industry, there are food and beverage supervisors who are on junior rates but undertake the same duties as an adult food and beverage supervisor. If their level of experience was in question then the employer would not have considered them capable in fulfilling a supervisory role, but their rate of pay is limited due to their age.

In the *Hospitality Industry (General) Award 2010*, the junior rates apply to employees between 16 to 20 years of age. At 20 years of age employees are entitled to receive 100% of the adult rate of pay. A permanent 18 year old is entitled to 70% of the adult rate of pay, which means a level 5 food and beverage supervisor would receive \$16.39 per hour instead of \$23.42 per hour, which is less than an entry level position (\$19.47 per hour) for an adult food and beverage attendant.

The Fair Work system

The Australian community has an entirely reasonable expectation that workers in this developed, affluent country will not be exploited. This is a one of the fundamental objectives of the FW Act, that it will protect workers by setting out basic rights and entitlements in the NES and modern awards.

The FWO investigates and prosecutes incidents of wage theft for national system employees. It should be noted, however, that the FWO's own performance measures stipulate that no more than 10% of complaints should be dealt with through compliance and enforcement tools.¹¹ The remainder are dealt with through informal education and mediation processes. Coupled with the fact that many workers do not report wage theft except in egregious cases due to fear of sanctions available to employers¹² this means that only the most serious offences are likely to attract enforcement action.

In our experience, often there is no way for workers in these situations to prove that they were underpaid or exploited in any way. Documentation is scarce, and employers deny any involvement with the workers. This lack of wage records presents a particular problem when workers try to

¹¹ Department of Jobs and Small Business, 2018

¹² Senate Education and Employment References Committee, 2017

calculate underpayment claims. The difficulties encountered with delays gathering initial evidence of underpayments and entering a workplace before prosecuting an application in these circumstances hinders effective deterrence.

Compliance proceedings in the court system for a worker who is award reliant are daunting, time consuming and expensive. The high cost of filing and court fees, ranging from \$615 upfront filing fees to daily court fees of \$2050¹³, make wage theft claims cost prohibitive for many workers in these circumstances.

In our experience, the combination of high cost legal proceedings in the Federal Circuit Court (including the Small Claims jurisdiction), the often drawn out mediation process and the very limited resources available to most workers renders legal costs an insurmountable obstacle to wage theft recovery.

Growing exploitation associated with labour hire, sham contracting and similar deregulated employment arrangements

Rising inequality is a clear consequence of the Commonwealth Government's failure to address growing exploitation associated with labour hire, sham contracting and similar deregulated employment arrangements.

The Government must address the longstanding issue of sham contracting – the wrongful classification of employees as independent contractors in order for employers to avoid paying the legal minimum wage and entitlements. Over one million workers in Australia are employed as independent contractors, but approximately 40% of these admit that, in reality, they are dependent on their employers, with no real authority or control over their own work. Although the FW Act makes it unlawful for employers to knowingly misrepresent an employment relationship as a contracting relationship, the existing provisions are not adequate to stop the practice.

There are a number of measures that would significantly reduce the incidence of sham contracting including greater scrutiny on the use of Australian Business Numbers (ABNs) in industries where high levels of sham contracting occur, such as the contract cleaning and security industries. In particular, holders of international student and holiday-making visas should be ineligible for ABNs. The purpose of these visas, to facilitate education and extended holiday-making, is not compatible with the establishment of an Australian business, and there should be no legitimate reason why holders of these visas should need to obtain an ABN. Removing ABNs as a possibility for international students

¹³ www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/home

and Working Holiday Makers is a simple measure that will make it far more difficult for employers to coerce migrant workers into sham contracting arrangements.

Government contracts or funding

Government must play a far greater and more pro-active role in educating workers and ensuring compliance with legal obligations when it is paying for services or providing funding. There should be a robust framework applied in both circumstances that means workers are given information on their rights and have access to independent advice and support. Rather than being a model for the private sector, government has, on occasion, participated in a race to the bottom when awarding supplier contracts, particularly those that are labour intensive.

United Voice believes the following principles should be adopted:

- Wages and conditions must be in line with legislation and best contemporary practice.
- Employment contracts should offer surety and minimise the use of casual employees or part-time employee without guaranteed weekly hours.
- Recognition and promotion of employee rights to independent advice and support.
- Regular workforce and management communication pathways to jointly understand and address matters.

These principles could be enacted with practical requirements such as compulsory information sessions in employee rights on induction, and clear guidelines on how to access to independent advice.

The need for education

United Voice understands that Australians enter the workforce as teenagers or young adults on a part-time or casual basis. Our experience is that, until they are involved in a conflict or have an issue at work, the large majority of our members have limited or no knowledge about:

- the industrial relations system;
- how their pay and conditions at work are set; or
- their basic workplace rights.

United Voice believes that this lack of basic knowledge could be ameliorated by providing teenagers and young adults with education through schools and other training institutions. This is especially relevant for students undertaking vocational courses at technical colleges (TAFEs) and other registered training organisations. Education about workplace rights should be a mandatory component in vocational courses.

A range of changes

United Voice advocates for cultural and structural changes led by better understanding of the rights and responsibilities of businesses and workers – with greater and more accessible sanctions for deliberate breaches. Whilst operating in a more complex regulatory environment, workers have been denied, through the systemic disempowerment of unions, the information and resources to navigate it effectively.

United Voice – Recommendations

Education

1. United Voice recommends that information about our industrial relations system and the sources of workers' rights be included as content in the Australian Curriculum set by the Commonwealth Department of Education and Training. A review of the Australian Curriculum is expected to be undertaken in 2020.
2. United Voice recommends that information about our industrial relations system and the sources of workers' rights be included in the Australian Quality Training Framework, which is administered by the Commonwealth Department of Industry. This information should be included as core content in the qualification for Cert III courses.
3. United Voice recommends that, at the point of attaining licencing and meeting regulatory requirements for particular industries, information about our industrial relations system and the sources of workers' rights be demonstrated. For example - Responsible Service of Alcohol, Security Licence, to be a Nominated Supervisor in ECEC.

A considered scheme to combat wage theft

4. United Voice recommends considering introducing measures to criminalise wage theft, including for unpermitted deductions and falsifying or failing to keep employee records. These measures would include the imposition of significant fines for individuals and companies and the potential for custodial sentences.

5. United Voice recommends that a reporting system be established which supports a register of wage theft breaches which is available to the general public. The register could also be used in future prosecutions which should attract greater penalties. There should be an obligation to disclose to any prospective employee any prior incidence of wage theft.
6. United Voice recommends that union officials be provided with greater powers to access and inspect time and wages records.
7. United Voice recommends legislative change to bolster the obligations on employers to provide clear, thorough and understandable time and wages records.
8. United Voice recommends streamlining and simplifying the existing wage recovery rules and procedures. United Voice recommends installing a dedicated, low cost, user-friendly underpayment and wage recovery mechanism with sitting judicial members who are skilled in dealing with contemporary industrial matters.

Government

9. United Voice recommends the state government should develop a whole of government procurement policy that incorporates the closer scrutiny of organisations that have any history of wage theft or worker exploitation.
10. United Voice recommends that any government contract offered should require a robust framework of education and oversight around workers' rights. This should include compulsory information sessions for all employees and access to independent advice and support. Such items should be considered standard KPI benchmarks in contracts.
11. United Voice recommends that any organisation in receipt of either federal or state funding should demonstrate compliance with a robust framework of education and oversight around workers' rights. This should include compulsory information sessions for all employees and access to independent advice and support.
12. United Voice recommends that when government deliver funding for particular industries such as Disabilities (NDIS) and Aged Care, there is sufficient oversight of the use of that funding to ensure that workers receive wages that a commensurate with their skills and qualifications.

Superannuation

13. United Voice recommends that superannuation legislation be amended to remove the minimum threshold earning level of \$450 per month. This will enable workers who do piecemeal work for a number of employers, to earn superannuation on all their earnings.
14. United Voice recommends superannuation should be included in the FEG scheme and workers should be notified when superannuation has been paid/not paid directly by the supersaturation fund.

A range of changes that together would help address this complex problem

15. United Voice strongly recommends that carers employed in the state jurisdiction in private residences be considered employees as a matter of urgency.
16. United Voice recommends that outsourcing and labour hire cannot be used to undercut existing pay and conditions at a worksite.
17. United Voice recommends that the inquiry investigate state and federal options for ensuring that workers performing work for the 'gig economy' - including cleaners and hospitality workers - are properly considered employees.
18. United Voice recommends that the process associated with applying for and working under an ABN should be subject to closer scrutiny.
19. United Voice recommends that junior rates be reviewed, updated and unified across Australia. That the junior rate percentage of the adult rate should be increased to reflect the prevalent financial issues that younger people experience today, and that the adult rate of pay should be applied at 18 rather than 21 years of age (which is the case in some industries).
20. United Voice recommends changes in relation to the termination of enterprise agreements, allowing applications to be made by a union not covered by the agreement. The main criterion should be whether it would pass the BOOT.
21. United Voice recommends the introduction of industry-wide bargaining to stop the 'race to the bottom' in key industries.

22. United Voice recommends a complete overhaul of how the current practices in sham contracting, labour hire and outsourcing interact with the objectives of industrial legislation. This should be considerably more than a labour hire licencing scheme, but we strongly recommend the introduction of a robust scheme in Western Australia, taking the best elements from the new schemes operating in other states.
23. United Voice recommends that the inquiry consider ways to level the playing field such that employers who are doing the right thing by their workers are not put at a commercial disadvantage to those who are not.

Conclusion

United Voice members support the inquiry into the problem of wage theft in Western Australia and the delivery of any measures that combat wage theft and provide more effective deterrence.

We urge the State Labor Government to consider the recommendations contained in this submission and to make the changes needed on behalf of working people.

For more information on this submission, please contact Carolyn Smith, United Voice WA Secretary, via carolyn.smith@unitedvoice.org.au or on (08) 9388 5400.