



National Retail Association

IN THE PARLIAMENT OF QUEENSLAND  
EDUCATION, EMPLOYMENT AND SMALL BUSINESS  
COMMITTEE

Inquiry into wage theft in  
Queensland

**DATE:** 30 July 2018  
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**PREAMBLE**

- [1] National Retail Association (**NRA**) is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and under Chapter 12 of the *Industrial Relations Act 2016* (Qld).
- [2] The NRA was first registered as a non-corporatised association on employers as the Brisbane Retailers' Association in 1931 under the *Industrial Conciliation and Arbitration Act*.
- [3] The association subsequently corporatised and re-registered as an industrial organisation in Queensland as the United Retailers' Institute (Queensland) in 1944.
- [4] Under one name or another, NRA has been representing employers in the retail, fast food, quick service and hair and beauty sectors in Queensland, and more recently throughout Australia, for almost 90 years.
- [5] At present, NRA has over 5,500 members across Australia in the retail, fast food, hairdressing and beauty, and hardware industries, representing 19,000 shop fronts and their attendant employees.
- [6] 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.
- [7] 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**

- [8] NRA makes these submissions to this inquiry on behalf of its members, all of whom as employers have a vested interest in the matters contained within the terms of reference to this inquiry.
- [9] On 17 May 2018, the Premier referred the following matters to this committee:
  - [a] the incidence of wage theft in Queensland, with reference also to evidence of wage theft from other parts of Australia;
  - [b] the impact of wage theft on workers, families, law-abiding businesses, the economy and community;
  - [c] the various forms that wage theft can take, including through unpaid super, the misuse of ABNs and sham contracting arrangements;
  - [d] the reasons why wage theft is occurring, including whether it has become part of the business model for some organisations;
  - [e] whether wage theft is more likely to occur in particular industries, occupations or parts of the state or among particular cohorts of workers;
  - [f] the effectiveness of the current regulatory framework at state and federal level in dealing with wage theft and supporting affected workers; and
  - [g] options for ensuring wage theft is eradicated, including consideration of regulatory and other measures either implemented or proposed in other jurisdictions interstate, nationally or internationally and the role of industrial organisations, including unions and employer registered bodies in addressing and preventing wage theft.

**Comment on the expression 'wage theft'**

- [10] 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.
- [11] 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'.
- [12] 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.

**THE INCIDENCE OF WAGE THEFT IN QUEENSLAND – term of reference (a)**

- [13] The Office of Industrial Relations departmental briefing paper provided to this inquiry acknowledges that there is no conclusive data with respect to the prevalence of wage theft either in Australia as a whole or in Queensland specifically.
- [14] Naturally, such data that exists relates only to incidents of wage theft reported, litigated, or otherwise brought into the realm of public knowledge.
- [15] 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.
- [16] 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**

- [17] 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.
- [18] Occurring during a period of transition, a degree of non-compliance was to be expected, and Queensland performed admirably with the equal-best compliance rate nationwide at 68%.<sup>1</sup> Queensland also had the second-best rate of wages non-compliance, at only 15.2%.<sup>2</sup>
- [19] This trend continued in 2015, with the Ombudsman's National Compliance Monitoring Campaign 2015 identifying Queensland as a leading performer.
- [20] In this campaign, the national rate of wages non-compliance was 17%.<sup>3</sup> In Queensland, this rate was only 12%, the second-best in the nation behind New South Wales and the ACT jointly (11%).<sup>4</sup>

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

<sup>2</sup> Ibid at page 7, Chart 6

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

<sup>4</sup> Ibid, derived from data presented in Appendix A (page 13)

[21] The highest rate of non-compliance out of this survey was identified as being in the Northern Territory, with a 35% rate of non-compliance.<sup>5</sup>

### Regional data

[22] 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.

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

- [a] 31% in Central Queensland<sup>6</sup>,
- [b] 21% in Far North Queensland<sup>7</sup>, and
- [c] 19.6% in inner Brisbane (9 out of 46 businesses audited).<sup>8</sup>

[24] In contrast, the Western Sydney Campaign in 2017 identified a wage non-compliance rate of 42%.<sup>9</sup> The NSW Mid-North and Mid-Western Regional Campaigns returned wage non-compliance rates of 31% and 34% respectively.<sup>10</sup>

[25] In Victoria:

- [a] the state-wide compliance campaign undertaken in 2014 identified a wage non-compliance rate of 40%<sup>11</sup>;
- [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%;<sup>12</sup> 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.<sup>13</sup>

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

- [a] 24% in the State-wide Tasmanian Compliance Campaign;<sup>14</sup>
- [b] 14% in the North-West Hobart region;<sup>15</sup>

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<sup>5</sup> Ibid

<sup>6</sup> Office of the Fair Work Ombudsman (2016) *Central Queensland Regional Campaign, Report – July 2016* at page 5

<sup>7</sup> 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

<sup>8</sup> 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

<sup>9</sup> Office of the Fair Work Ombudsman (2018) *Western Sydney Campaign Report* at page 3

<sup>10</sup> Office of the Fair Work Ombudsman (2018) *New South Wales mid-west and mid-north campaign report* at page 3

<sup>11</sup> Office of the Fair Work Ombudsman (2016) *Victorian Compliance Campaign Report – February 2016* at page 3

<sup>12</sup> Office of the Fair Work Ombudsman (2016) *VIC Loddon/Elmore and Campaspe Regional Campaign Report – May 2016* at page 3

<sup>13</sup> Office of the Fair Work Ombudsman (2018) *Auditing Victoria – Dandenong, Warrnambool and Otway Ranges Campaign Report* at page 3

<sup>14</sup> Office of the Fair Work Ombudsman (2016) *Tasmanian Compliance Campaign Report – February 2016* at page 3

<sup>15</sup> Office of the Fair Work Ombudsman (2016) *TAS North West Hobart Regional Campaign Report – March 2016* at page 3

[c] 14% in the Sorell-Dodges Ferry region;<sup>16</sup>

[d] 13% in the South-East Coast Regional Campaign.<sup>17</sup>

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

[a] 23% in the Limestone Coast region in 2014/15;<sup>18</sup>

[b] 30% in the Barossa, Two Wells and Gawler region;<sup>19</sup>

[c] 29% in the Adelaide CBD and inner metro area.<sup>20</sup>

[28] In Western Australia, audit campaigns uncovered wage non-compliance rates of:

[a] 30% in the Gascoyne/Mid-West regions;<sup>21</sup>

[b] 26% in southern Perth;<sup>22</sup>

[c] 34% in the Albany/Manjimup areas.<sup>23</sup>

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

[a] 33% in the Alice Springs-Barkly region;<sup>24</sup>

[b] 46% in Darwin city and surrounds.<sup>25</sup>

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

[a] 25% in northern ACT;<sup>26</sup>

[b] 17% in southern ACT;<sup>27</sup>

[c] 26% across the Territory.<sup>28</sup>

## Summary

[31] The data of non-compliance rates available from the Fair Work Ombudsman's audit campaigns indicates that, compared with other States and Territories, Queensland performs better than average.

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<sup>16</sup> Office of the Fair Work Ombudsman (2016) *TAS Sorell-Dodges Ferry Regional Campaign Report – June 2016* at page 3

<sup>17</sup> Office of the Fair Work Ombudsman (2018) *Tasmanian South-East Coast Regional Campaign Report* at page 3

<sup>18</sup> Office of the Fair Work Ombudsman (2016) *SA Limestone Coast Regional Campaign 2014/15 Report – May 2016* at page 3

<sup>19</sup> Office of the Fair Work Ombudsman (2018) *SA Barossa, Two Wells and Gawler Regional Campaign Report* at page 3

<sup>20</sup> Office of the Fair Work Ombudsman (2018) *Adelaide CBD and Inner Metro Campaign Report* at page 3

<sup>21</sup> Office of the Fair Work Ombudsman (2016) *WA – Gascoyne/Mid-West Regional Campaign 2015 Report – May 2016* at page 3

<sup>22</sup> Office of the Fair Work Ombudsman (2018) *Western Australia – Southern Perth and Albany-Manjimup Regional Campaign Report* at page 3

<sup>23</sup> *Ibid*

<sup>24</sup> 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

<sup>25</sup> Office of the Fair Work Ombudsman (2018) *Darwin City and Surrounds Campaign Report* at page 3

<sup>26</sup> Office of the Fair Work Ombudsman (2016) *Northern ACT Regional Campaign Report – May 2016* at page 3

<sup>27</sup> Office of the Fair Work Ombudsman (2017) *Southern ACT Report – Outcomes from the Fair Work Ombudsman's Southern ACT Regional Campaign* at page 3

<sup>28</sup> Office of the Fair Work Ombudsman (2017) *ACT Compliance Report – Outcomes from the Fair Work Ombudsman's ACT Compliance Monitoring Campaign* at page 3

- [32] A wage non-compliance rate of 31% was the highest recorded in Queensland, in the Central Queensland region. This is better than all regional audits in New South Wales, and on par with regional audit campaigns in Victoria and the majority of regional audits in South Australia and Western Australia.
- [33] With respect to wage non-compliance in capital cities, Queensland again performs well, outperforming Western Sydney, Adelaide, Perth and Darwin, all of which had higher rates of wage non-compliance.
- [34] Apart from Queensland emerging as one of the better performing areas in terms of wage non-compliance, it is in NRA's view telling that every region audited by the Fair Work Ombudsman returned some level of wage non-compliance.
- [35] 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.

#### **THE IMPACT OF WAGE THEFT ON WORKERS, FAMILIES, LAW-ABIDING BUSINESSES, THE ECONOMY AND COMMUNITY – term of reference (b)**

- [36] As an employer association, NRA is not ideally placed to comment on the effect of wage non-compliance on workers and their families.
- [37] NRA can, however, comment on the effect that wage non-compliance may have on law-abiding businesses and the wider economy.
- [38] Wage non-compliance, before it is revealed to a wider audience, has ramifications for competition and business growth.
- [39] 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.
- [40] 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**

- [41] Deliberate wage non-compliance can have a significant effect on competition in the marketplace, as it allows one business to under-cut its competitors.
- [42] In the retail context, labour costs are the single largest component of a retailer's cost of doing business.<sup>29</sup> Energy and rent are the next highest single cost elements.
- [43] 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.
- [44] In this circumstance, wage non-compliance has the potential to generate an illegitimate competitive advantage for the non-compliant business.
- [45] 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.

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<sup>29</sup> Australian Productivity Commission (2014) *Relative Costs of Doing Business in Australia: Retail Trade (Productivity Commission Research Report – September 2014)* at page 85

[46] 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.

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

#### **Post-revelation**

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

[49] 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.

[50] 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.

[51] 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'.

[52] 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**

[53] 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.

[54] 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.

[55] 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.

[56] 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.

#### **THE VARIOUS FORMS THAT WAGE THEFT CAN TAKE – term of reference (c)**

[57] The terms of reference identify three particular forms of wage non-compliance:

[a] unpaid superannuation;

[b] the misuse of ABNs; and

[c] sham contracting.

- [58] 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.
- [59] This is not something that NRA sees occur commonly in the retail sector. The key area 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**

- [60] Applying the wrong modern award is alarmingly common.
- [61] 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.
- [62] 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.
- [63] 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.
- [64] 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.
- [65] 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*.
- [66] 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'.
- [67] 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.
- [68] Occupational awards are in a significant minority, with approximately five currently in existence, including the *Clerks – Private Sector Award 2010*.
- [69] 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.

### **Classifying an employee too low and 'classification creep'**



- [70] Another common area of wage non-compliance is where an employee is classified too low for the duties that they perform.
- [71] 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.
- [72] 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.*<sup>30</sup>
- [73] 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.
- [74] '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.
- [75] 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.<sup>31</sup>
- [76] 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**

- [77] 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.
- [78] 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.
- [79] 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 – term of reference (d)**

- [80] 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.
- [81] However, the threat of significant penalties and a compliance system geared towards employee self-representation generally act as a suitable deterrent against deliberate non-compliance.
- [82] 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.
- [83] 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*

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<sup>30</sup> *General Retail Industry Award 2010* clause B.2.1

<sup>31</sup> This reflects a situation encountered by the author when working as an employee advocate.

occupation.”<sup>32</sup> Put another way, the modernisation process did not necessarily regard clarity as its highest priority.

- [84] 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.
- [85] 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.**<sup>33</sup>
- [86] In the case of Maurice Blackburn, an ambiguous overtime clause in an enterprise agreement resulted in the firm owing \$1 million in back payments.<sup>34</sup>
- [87] 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?
- [88] 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.
- [89] 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.<sup>35</sup>

#### **WHETHER WAGE THEFT IS MORE LIKELY TO OCCUR IN PARTICULAR INDUSTRIES – term of reference (e)**

- [90] There is insufficient data to state categorically whether wage non-compliance is more likely to occur in one part of the State than another.
- [91] 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 Queensland of 43% in restaurants, cafes, and catering services<sup>36</sup>, and of 46% in takeaway outlets.<sup>37</sup>
- [92] In comparison, the National Retail Compliance Campaign in 2011 found an 11% rate of wage non-compliance in Queensland.<sup>38</sup>

<sup>32</sup> *Award modernisation – Stage 2 modern awards*, 2 September 2009, [2009] AIRCFB 800

<sup>33</sup> <http://www.mauriceblackburn.com.au/legal-services/employment-law/>

<sup>34</sup> 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>

<sup>35</sup> 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

<sup>36</sup> Office of the Fair Work Ombudsman (2015) *National Hospitality Industry Campaign – Restaurants, Cafes and Catering (Wave 2)*, page 9

<sup>37</sup> Office of the Fair Work Ombudsman (2015) *National Hospitality Industry Campaign 2012-15 Takeaway Foods (Wave 3) Report – March 2016* at page 9

<sup>38</sup> Office of the Fair Work Ombudsman (2011) *National Retail Industry Campaign, Final Report – November 2011*, pages 11 and 12 (Tables 3 and 4)

- [93] The pharmacy industry similarly returned low rates of wage non-compliance (8%)<sup>39</sup>, as did the children's services sector (5%).<sup>40</sup>
- [94] 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.
- [95] 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;<sup>41</sup>
  - [b] 32% of employees in café, restaurant and catering sector aged between 15-19;<sup>42</sup>
  - [c] 60.7% of the industry as a whole having no post-school qualifications, reflecting the generally younger demographic of the workforce therein.<sup>43</sup>
- [96] 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.

#### **EFFECTIVENESS OF THE CURRENT REGULATORY FRAMEWORK – term of reference (f)**

- [97] 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.
- [98] Certainly, the generally high level of compliance is a testament to that office's effectiveness in this respect.
- [99] 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.<sup>44</sup>
- [100] 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.
- [101] 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.<sup>45</sup>
- [102] 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.
- [103] 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.

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<sup>39</sup> Office of the Fair Work Ombudsman (2013) *National Pharmacy Campaign 2012-13 – Final Report*, December 2013 at page 10

<sup>40</sup> Office of the Fair Work Ombudsman (2015) *National Children's Services Campaign 2013/14, Report – May 2015*, page 5

<sup>41</sup> Office of the Fair Work Ombudsman (2013) *National Hospitality Campaign 2012-2015 Accommodation, pubs, taverns and bars* at page 5

<sup>42</sup> *Supra*, note 35 at page 5

<sup>43</sup> *Supra*, note 36 at page 5

<sup>44</sup> 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

<sup>45</sup> *Ibid*

- [104] The Fair Work Ombudsman, according to recent budget figures, has an estimated average staffing level of 745 for the 2018/19 financial year.<sup>46</sup>
- [105] 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.<sup>47</sup>
- [106] This equates to 2,914.8 businesses per FWO employee; bearing in mind that less than half of these employees are likely engaged in enforcement activities, the ratio of businesses to inspectors is likely much, much higher.
- [107] Conversely, the Queensland Police force as of the end of June 2017 had one fully-trained officer for every 414.9 people in the state<sup>48</sup>, and this service remains stretched.
- [108] If one enforcement officer per 415 people is still an under-resourcing, how can any side of Parliament expect the Fair Work Ombudsman to operate effectively when it has less than one enforcement officer for nearly every 3,000 businesses?
- [109] Academics, industry and unions have long lamented the critical under-resourcing of the Fair Work Ombudsman<sup>49</sup>, which is unfortunate as the legislative structure for this agency to achieve its objectives is there, waiting to be used.
- [110] 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).
- [111] 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.

#### **OPTIONS FOR ENSURING WAGE THEFT IS ERADICATED – term of reference (g)**

- [112] 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.
- [113] 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 State parliament's power; and
  - [b] increasing education in workplace rights.
- [114] 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.

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<sup>46</sup> *Budget 2018-19, Agency Resourcing – Budget Paper No. 4* (2018), Commonwealth of Australia, at page 183

<sup>47</sup> 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>

<sup>48</sup> Derived from information published by the Australian Bureau of Statistics 2018, *Australian Demographic Statistics, Dec 2017*, 'Table 4: Estimated Resident Population, States and Territories (Number)', data cube: Excel spreadsheet, cat. no. 3101.0, viewed 6 July 2018, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3101.0Dec%202017?OpenDocument>, and State of Queensland (Queensland Police Service) 2017, *Annual Statistical Review 2016-17*, page 178

<sup>49</sup> 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>

- [115] 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.
- [116] The Fair Work Ombudsman noted, during the National Hospitality Industry Campaign, that although people aged between 15-15 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.<sup>50</sup>
- [117] 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.
- [118] 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.
- [119] 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.
- [120] 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.
- [121] 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.



**Dominique Lamb**  
Chief Executive Officer  
National Retail Association



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<sup>50</sup> Supra, note 35 at page 5