MASTER ELECTRICIANS AUSTRALIA

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WAGE THEFT INQUIRY

Master Electricians Australia

J O'Dwyer / July 2018

INTRODUCTION

Master Electricians Australia (MEA) is a trade association representing electrical contractors, recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. MEA currently has a membership base of approximately 3000 electrical contractors in Australia. MEA understands the current and potential issues facing electrical contractors today.

Master Electricians Australia has a dedicated team that provides comprehensive workplace relations advice to electrical contractors who are also employers to ensure that they are compliant with their industrial obligations.

As an organisation that promotes and assists employers to be compliant with the obligations of the relevant industrial instrument(s) 'wage theft' is not a common occurrence in the electrical industry. However, underpayment of wages claims are not uncommon and there are many important elements to be drawn from these cases that MEA submits must be considered by the Legislative Assembly when analysing 'wage theft'.

The "Simplified" Modern Award System

The introduction of the modern award system has seen thousands of awards across the country reduced to 122 awards. To achieve the "simplified" modern awards they were accompanied by 3000 pages of legislation including the Fair Work Act and the Fair Work (Transitional and Consequential Amendments Act) 2009. This replaced the old award system which included three awards for brush and broom making, two for glue manufacturing and a stand-alone award for potato crisp makers. The AIRC due to time constraints placed on it by the Federal Government built the 122 awards around the traditional award clauses to satisfy industrial parties such as employer and employee associations.

Justice Ross, President of the Fair Work Commission was candid in a recent ABC interview acknowledging the difficulties for employees and employers alike trying to be compliant. "Awards shouldn't need history lesson to interpret." Need date and reference here

In Australia, historically, awards have been the product of industrial disputes. They were the settlement of a dispute, usually between the union and a group of employers. Those parties understood what the words meant.

President Ross reflected on the importance of making awards easier to understand for small business; the largest group of employers in Australia. A challenge for Commission's decision to overhaul the awards as part of the 'plain language' review.

In the ABC interview, Justice Ross said there should be significant improvements to the award system and how they are they are communicated to the parties, replacing the "tortuous language" used in the past.

"The primary responsibility for explaining minimum terms and conditions lies with the Fair Work Ombudsman but, nevertheless, the Commission sets those awards," he said. The expression of existing awards in plain language is critical as awards have historically been legal documents written by lawyers.

The objective of this FWC review, which is only in a pilot stage, is make an award succinct for an employer or an employee at the workplace without needing a history lesson or a paid advocate to interpret it.

The Fair Work Commission took the step to conduct a research project to gain practical insights and a greater understanding of the attitudes of the small business community in relation to their use and perceptions of modern award documents. The Commission contracted Sweeney Research to conduct citizen co-design focus groups and in-depth interviews with 47 small business owners across Victoria and New South Wales in the context of the 4-yearly review of modern awards.

The Sweeney Research results showed small business operators issues included:

- practical information, possibly using examples of how key clauses worked in practice
- limiting erroneous information for as a barista gets 107% of the C14 classification
- clear information about the hourly rate they have to pay them at particular times, and they wanted a schedule for that purpose
- awards to be logically structured, with termination at the end not the beginning, and to group similar provisions together

Justice Ross acknowledges that layers of complexity were being removed, but there was "still a way to go in making it simpler and easier to understand for employees and employers".

Justice Ross said that most small business operators wanted to meet their legal obligation, although there was only a "small minority that deliberately avoid" them. For the balance, I think that they just want to know what it is they have to pay their employees and what their legal obligations are.

The Queensland Government must acknowledge that the vast majority of employers are working hard to pay employees their legal entitlements but are struggling with complex award terms and that underpayment of wages will result from a complex system.

Further, it would be tempting to consider that the larger the wages underpayment the more likely a ‘smoking gun’ for wage theft. However, significant underpayment of wages claims, estimated to be in the hundreds of millions dollars, currently affects the entire Group Training Organisation (GTO) sector as a result of complicated transitional arrangements and unique Queensland provisions and erroneous information received from the Fair Work Commission and the Fair Work Ombudsman.

Compliance Complications Examples:

Fair Work Ombudsman Queensland “One Big Order” wrong advice

An agreement dispute heard by a single Commissioner, a Full Bench of the Fair Work Commission and a Full Federal Court to address incorrect advice issued by the Fair Work Ombudsman for an eighteen-month period which caused one the largest underpayment of wages matters in Queensland if not Australia’s history.

The Courts rulings all confirmed the original ruling on Queensland Preserved Award Apprentices and the resultant wages, for some employers, should have been from the modern award from 1 January 2014.

This decision only affected a limited number of Queensland employers and their apprentices (both existing and new) as they needed to be Constitutional Corporations (e.g. Pty Ltd Companies) who:

1. were constituted prior to 27 March 2006; and
2. directly engaged an apprentice prior to 27 March 2006; and
3. directly engaged an apprentice at 31 December 2009.

(see appendix 1 – constitutional corporations; appendix 2 – division 2B employers)

These apprentices were entitled to be paid wages from the old State Award and Queensland Orders until 1 January 2014; at which time the Modern Award system took over.

However, this limited number of employers includes some of the largest employers of young people undertaking training and apprenticeships. A group of people who would commonly be described as having characteristics that may lead to their exploitation by unscrupulous employers.

The resultant underpayment, as described being hundreds of millions dollars, was systemic for these employers. Further, the underpayment has been touted by some organisations as being the 'largest example of wage theft' without at all acknowledging the incorrect information being provided by the Fair Work Ombudsman; nor that this employee organisation attempted to address the incorrect advice with the Fair Work Ombudsman who refused to change their stance.

MEA took a number of steps to head off this issue as it was foreseen that problems would arise if this disparity was allowed to continue. We considered that regardless of the ambiguity of the sunsetting provisions that the complexity of the arrangements made compliance extremely problematic for contractors.

It was also identified that prior to 2012 MEA had not brought to member's attention the issue of persevered award conditions. WR took steps to address which industrial instrument the member should be under as members as each member contacted for wages advice.

MEA made representations to various agencies including:

1. **ETU** (2012) – various discussions; it was the ETU's position then that as the Qld preserved conditions were better off for the worker than the modern award at the time they should be left alone. Further, they considered that the issues would be addressed by the modern award apprentice review case.

2. **Apprentice Review** (2012 to 2013) – During the modern award '2-year review' which focused on apprentice matters the FWC took the position that they had no ability to disturb the Orders as these sat within the Queensland state jurisdiction rather than their Federal jurisdiction.

3. **Submissions to JAG** (2013) – MEA wrote to the department presenting the issue and options to address the matter. No response.

4. **Submission to DETE** (2013) – MEA wrote and petitioned the department to take steps to limit the Orders' application.

5. **ETU** (2015) – in June it came to light that the ETU took the view that these preserved conditions should have ceased. MEA and the ETU discussed the issue and agreed that the effect of the Fair

Work (Transitional & Consequential Amendments) Act 2009 had a sunsetting provision that would be probably apply but that it was critical for the FWO to agree as they had been continuing to provide the advise that the preserved conditions applied without sunset. The FWO would not change its position; the ETU commenced the aforementioned legal proceedings that gave a definitive answer.

While these kinds of situations are rare this scenario has been branded as wage theft; when the least culpable party is the employer.

EVEN LAWYERS GET IT WRONG

In a recent case in 2018 Maurice Blackburn Lawyer have been found to have underpaid at least 400 staff over the last 6 years to the value of $925,000.

Maurice Blackburn chief executive Jacob Varghese in a statement said the law firm "immediately investigated" when the ASU warned earlier this year that it might have been incorrectly applying its 2016 agreement "regarding the rate of pay for some part time employees working more than their ordinary hours".

The matter was first brought to the attention of Maurice Blackburn in February and reached a restitution deal with the ASU in June. The statement and news articles do not state that whether or not the underpayment restitution agreed to between the ASU and Maurice Blackburn was a fully calculated amount or a best estimate of monies owed.

Maurice Blackburn have undertaken a very similar process to many employers and there is no suggestion this was wage theft from the Union the Employer or the Media. Why because it does not have the features of what is wage theft. It's embarrassing it unintentional and it's been corrected in a reasonable time period given the size of the employer the amount and the industry.

Small Businesses Struggle with Award Complexity

As has been submitted, very few awards express themselves in simple terms. One small error interpreting a term can have ramifications over the life of employment.

A lack of understanding about how the 'normal' rate of pay is constructed under the *Electrical, Electronic and Communications Award 2010* (electrical award), for example, can quickly lead to significant underpayment of wages.

Under the **Electrical Electronic and Communications Contract Award 2010** there are a number of '**all-purpose allowances**' that are applied on top of the base rate of pay. Despite the award referring to 'minimum rates of pay' at clause 16 and employer can easily overlook the further obligations imposed by this clause through oversight or their complexity.

Determining the all-purpose rate

The award provides for these all-purpose allowances at clause 17.2 and they include:

- Industry allowance
- Tool allowance
- Electrician's licence allowance
- Leading hands allowance

- Nominee allowance
- Electrical distribution line maintenance and tree clearing allowance, and
- Where the employee is responsible for ordering materials

The employer must determine the relevant allowances to be included in the all-purpose rate of pay. Often overlooked by employers, and often not adequately contemplated by payroll software is the implications presented by the meaning of 'all-purpose'. As the name suggests these allowances are used for all-purposes of wage calculation including overtime and penalty rates; payment for periods of paid leave including annual leave, sick leave, and public holidays.

Paying these allowances but not including the amounts for these other purposes will quickly lead to an underpayment of wages.

What is wage theft?

MEA submits that careful consideration of the criteria needs to be applied to establishing such a charge. MEA agrees that the conduct of business such as 7-Eleven, Pizza Hut, Domino's and Caltex is unacceptable and damaging; not just to those workers who are exploited as a resulted but the effect it has on businesses who spend considerable time and effort in ensuring they are compliant and paying legally.

Wage theft has been the subject of journalistic and economic investigation since the scandalous practices of certain franchises. Industries that are characterised by strong downward price pressures are highly susceptible to wage theft - industries such as horticulture and hospitality.

This is particularly the case in supply chains that see work outsourced and then further sub-contracted. In order to be able to survive in these low-cost environments, companies often pursue strategies that are exploitative of workers.

However, what is clear from these examples is that 'wage theft' is not defined by one single element. It is not singularly the underpayment of a wage rate, it is the combined efforts of, often, intimidation of vulnerable workers, a system of deceitful practices to hide the practice, the avoidance of regulatory steps and the finding of the overall intent to underpay workers.

Key elements of wage theft that have been variously identified include:

- **being paid under the minimum wage or relevant award** – This would have to be a critical element of any allegation that there has been wage theft. However, MEA submits that in cases where there is a demonstrably complicated industrial/dispute framework; such as, issues arising from the Transitional and Consequential Amendments Act (Qld State Award for Apprentices) and/or bad advice from the FWO that wage theft should not reasonably be a finding.

- **not being paid for work completed, including for time spent training and in work meetings, and unreasonable length trials** – These types of arrangements can be the hallmark of exploitative practices.

- **having part of your pay unlawfully withheld, or being unlawfully required to pay back an amount** – Having wages withheld is unlawful under the Fair Work Act except in the strictest of situations. To this end the statement that this amounts to wage theft has the likely effect of being a threshold too low to be effective. That is, too many cases of withholding pay would result in claims of wage theft. To be a meaningful measure MEA submits that unlawful deductions should be the result of exploitative employment practices such as payments to obtain a job or 'cash back' payments to employers.

  Deductions for breakages, returned meals, order mistakes, etc. typically represent poor employment practice but are not singularly wage theft. This includes misuse of staff tips in the view of MEA.

- **underpayment or non-contribution of superannuation** – To be a meaningful measure MEA submits that underpayment or non-contribution of superannuation should be subject to tests to determine intent, avoidance of obligations and other exploitative employment practices. Not the result of an employer failing to understand the complex interactions of superannuation ruling 2009/2 and the relevant instrument's treatment of an allowance for the purposes of whether it is within the meaning of Ordinary Time Earnings, for example.

- **withholding of entitlements (including breaks, leave, penalty rates)** – general breaches of the award should not automatically be lumped into the definition of wage theft. This will set the threshold for claims too low and result in a burden on assessing these claims. The Fair Work systems should be utilised for these types of disputes. However, occasions where employers have routinely avoided penalty rate payments for overtime and weekend work by paying wages, without any consideration to these types of entitlements, should be criteria of wage theft.

- **not being paid workers' compensation for which you are entitled** – A failure for an employer to hold workers' compensation insurance is already a breach of the Workers' Compensation and Rehabilitation Act 2003 it is not a payment that is made to a worker. It is also a breach of the legislation not to pay the excess entitlements to the worker. MEA submits that a failure to pay an excess for a worker's claim should not singularly be a criterion for a wage theft claim; further, that the mechanisms of the workers' compensation legislation should first be implemented without result.

- **'sham contracting' – whereby a person is engaged as an independent contractor when they should be engaged as an 'employee', and so do not have the protections afforded to employees by the fair work legislation.** – Sham contracting arrangements versus genuine subcontracting arrangements has been complicated feature of the Australian employment landscape for decades. Various legislative attempts have been made in attempts to discourage their misuse and identify genuine arrangements. However, it is still the case that competing definitions of 'worker' have not served to create a clearer picture of these arrangements had how they may evolve over time.

  Not only can the distinction be unclear it is also a feature of these arrangements that they may evolve over time further complicates the assessment as to whether or not there is wage theft as a result of determination of a finding that the relationship was one of employment. As was the case in Mander v Sunrise Solar Installers Pty Ltd.

In summary, between February 2011 and April 2012 the 'subcontractor' installed solar panels for the business in accordance with a 'subcontracting agreement'. The engagement was subsequently terminated and the 'subcontractor' made an unfair dismissal claim to the Fair Work Commission.

The business was of the view that there should be no such unfair dismissal case to answer as there was no employment; they objected to the claim.

The Commissioner heard from both parties about the arrangement of work. The business relied on the written 'subcontracting' agreement which operated in accordance with the following:

- the 'subcontractor' was not supervised in his work,
- he had discretion as to how the job was undertaken, subject to compliance with regulatory requirements and standards,
- the 'subcontractor' could employ labour to assist with the installation work,
- he provided his own tools, equipment and transport,
- he submitted invoices for payment,
- the 'subcontractor' decided when and if he would work, and
- the 'subcontractor' assumed responsibility for the quality of his workmanship and bore financial responsibility for the panels and fixings in his possession.

It was also the case that the 'subcontractor' was:

- required to wear the business's uniform,
- apart from two short periods and a period of absence due to a shoulder injury, worked solely for the business,
- the applicant was not allowed to advertise his services as an installer to customers,
- other works were prohibited unless the work was of a type not done by the business, and
- he was not able to transfer or assign the work to another person or company.

In considering the matter the Commission pointed out in no uncertain terms that the nature of subcontracting relationships is determined by considering the written terms that they operate under **and** the actual work practices adopted by the parties.

The Commission found:

- the subcontractor was operating solely for benefit of the engaging business, not his own,
- he presented as an employee of the business,
- he could only undertake installation work utilising the products supplied by the business and undertook work as scheduled by the business, and
- labour, technical and training support provided by the respondent integrated the work of the applicant into the respondent's business.

While the Commission did agree that many of the factors, including the written agreement, would tend to point toward a person engaged as a subcontractor they did not overcome the overriding characteristics of the relationship. The applicant was providing his 'subcontracting' services solely for the benefit of the respondent's business rather than his own.

As such, the Commission determined the 'subcontractor' was in fact an employee of the business. Adding to the cost of the defence of this claim there will now be further consideration with regard to employment entitlements, such as unpaid leave and superannuation for the period of employment.

This is an important example that engaging a subcontractor is no clear matter and that even though the parties set out with acceptable terms those changed and should have been classified as employment from that point. However, it should not also be a finding that this employer engaged in wage theft as a result.

MEA submits that sham subcontracting arrangements should be based on a finding that the employer has engaged in conduct including:

- applied duress or threatened the 'employment' in order to establish this type of arrangement,
- the worker has not sought or initiated to work under a subcontracting arrangement,
- whether the contract provides total remuneration that is or is likely to be less than that of an employee performing similar work
- the relative bargaining strengths of the parties to the contract

MEA submits that the definition of "wage theft" should be meaningful so as to not capture, excessively it would suggested, underpayment matters that arise and are able to be dealt with by the available regulators and the parties. Wage theft should be the most serious of cases of underpayment of wages, where there is a system of deceptive and/or threatening conduct designed to result in an avoidance of obligations under the relevant instrument.

The Legislative framework and Enforcement

The submissions from the Qld Department and its representatives provided a summary of the legislation both state and federal. MEA will not repeat those submissions, however legislation is only part of the story.

In all regulatory areas, departments, usually have and publish their own policies on enforcement and litigation. A feature of the FWO is the attached FWO Compliance and Enforcement policy and Litigation policy regarding their enforcement activities and ways in which decisions are made.

The FWO whilst not calling it enforcement for cases of wage theft, has idenitifed many of the same indicators that we and the Department have identified. The FWO use these 2 documents to assist in ensuring that appropriate action is taken to ensure that valuable resources are not wasted on mistakes, wrong interpretations and confusion by both employees and employers. It also assists the FWO maintain consistency across the country which given the nature of the current federal coverage is imperative and anything that disrupts this should be approached with the utmost caution. Workplace relations is already confusing for employers and employees so any additional regulation should not introduce more confusion or uncertainty

MEA would submit that a criminal charge of wage theft, will necessitate an increase in evidence assessment changing from "the balance of probabilities" to one of "beyond reasonable doubt". This will result in higher costs and longer time frames for case resolution compared to civil offences. MEA understands however that in some cases these negatives are outweighed by community expectation and the benefit of a general deterrence for other employers. Cases such as the former MP Craig

Thompson took in excess of 3 years for FWO to investigate and prosecute and it took NSW police another 2 years to criminally convict Mr Thompson.

The FWO policies clarifies that civil penalties and criminal penalties are handled by different organisations. The FWO prosecute civil penalties under the Fair Work Act but it is the Commonwealth Department of Public Prosecutions (CDPP) that takes carriage and responsibility for initiating criminal charges under the FW Act. We see this as appropriate and should be the outcome of any changes made to any legislation.

Information, Advice, Prosecution and Resourcing in the federal system

INFORMATION and ADVICE

The Australian workforce consist of 12.5 million workers**. To give some perspective it is appropriate to look at the instance of employee wage inquiry and related disputes reported through the Fair Work Ombudsman. The 2016-17 Annual report of the FWO details

- 16 328 248 FWO web site visits (or 1.3 visits per Australian worker)
- 9 556 221 FWO unique users (76% of the Australian workforce)
- 567 102 searches of "Find my award" service which determines the correct award for employees and employers
- FWO processed 385,745 phone calls with 74% being from employees
- 25,332 calls were referred to FWO disputes service and most were resolved within 7 days
- 1585 cases were referred for investigation representing 0.41% of total calls received
- 3716 mediation cases referred with an average payment of $1,482.77 awarded as compensation which is less than Australia's average weekly OTE earnings for 2016/17
- 700 claimants pursued through federal courts however only 171 were successful with an average payment being $5,704.67 (a success rate of 25%)
- The Federal Circuit Court finalised 1029 industrial cases in the same year*

**http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0
*http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/annual-reports/2016-17/2016-17-annual-report-part3.

PROSECUTION

The FWO also detailed the utilisation of the different enforcement tools at their disposal

Enforcement tool	2016-17	2015-16
Infringement notices issued	665	573
Compliance notices issued	192	186
Enforceable undertakings executed	40	43
Litigations commenced	55	50
Total	**952**	**852**

FWO litigation actions are typically applied to cases where the FWO alleges that there is deliberate exploitation of vulnerable workers, refusal of an employer to cooperate with the FWO or a significant history of non-compliance may result in court action.

In 2016–17, the FWO initiated 55 civil penalty litigations. Fifty matters were decided and these actions resulted in more than $4.8 million court-ordered penalties or an average fine of $87,272 per employer.

If these litigation matters were all to be defined as 'wage theft' this would mean that nationally the proportion of total number of wage disputes raised with the FWO that resulted in litigation was 0.22%. This shows that instances of wage theft, nationally, is very low.

A broadly applied system for dealing with wage theft would not target the offenders and create a further regulatory burden for those businesses that are actively resolving compliance matters; whether they be discovering those matters for themselves (Lush beauty retailer) or as a result of FWO actions.

MEA would submit that to protect and clarify what wage theft is a clear definition and the circumstances in which the offence is created. The Fair Work Ombudsman's Compliance and Enforcement Policy https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.docx.aspx and Litigation Policy https://www.fairwork.gov.au/ArticleDocuments/725/GN-1-FWO-Litigation-Policy.pdf.aspx?Embed=Y are clear and set a good example of what is required. (see attached FWO copies).

MEA would submit that if a criminal charge of wage theft was created similar documents must accompany the legislative change. These supporting documents should be produced and understood when a new criminal charge is established. MEA would submit that these documents should be subject of consultation and scrutiny, by Employer, Employee, Government and Legal profession peak bodies.

MEA did seek to examine the State OIR current policies however were unable to obtain a copy of them before submissions were due to close.

RESOURCING

The Queensland Departmental Officers in their submission make the point that in 2012 there were 55 inspectors, who were previously undertaking duties in the state system when it ceased and that FWO budget has been reduced.

MEA would ask the question; What action and or funding arrangement were put in place after 2012 when the Queensland memorandum of understanding came to a conclusion? It is our understanding that no further memorandum was entered into.

We ask this question because:

- Queensland employers pay approximately $4.1 billion each year in payroll tax which previously funded the inspectorate
- Queensland Department highlighted in their submission that inspectors in Queensland reduced from 70 to 15.
- Queensland Departmental officers stated that only 10% of Queensland's workforce remains covered by the state system

MEA would ask why does the Queensland State Government not contribute to the Federal Governments costs?

The Departmental Officers also make point of the FWO budget has been reduced. Examining the FWO annual reports for the last 5 years shows that in Queensland and Nationally that their staffing levels have remained relatively consistent and have increased since the federal election in 2013. The Department also fails to clarify of the 495 inspectors they referred to includes the 55 inspectors that Queensland were providing via the memorandum of understanding and which it has not continued to provide. We would also seek clarification if other states have also ceased memorandums of understanding that contributed to this reduction.

FWO Staffing levels 2011 – 2017:

	Qld	National
2011/12	99	827
2012/13	102	809
2013/14	99	819
2014/15	94	790
2015/16	100	805
2016/17	103	833

https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports

We make the observation that whilst a State Government may refer power for industrial relations to the federal system it is our view community expectation would mean that the state continues to contribute to the enforcement to protect Queenslanders. This could be achieved either through a direct funding model or an allocation in the reduction of GST funds equivalent of the costs previously incurred by the state. MEA understands that neither of these options have been exercised since 2012 by any Queensland State Government.

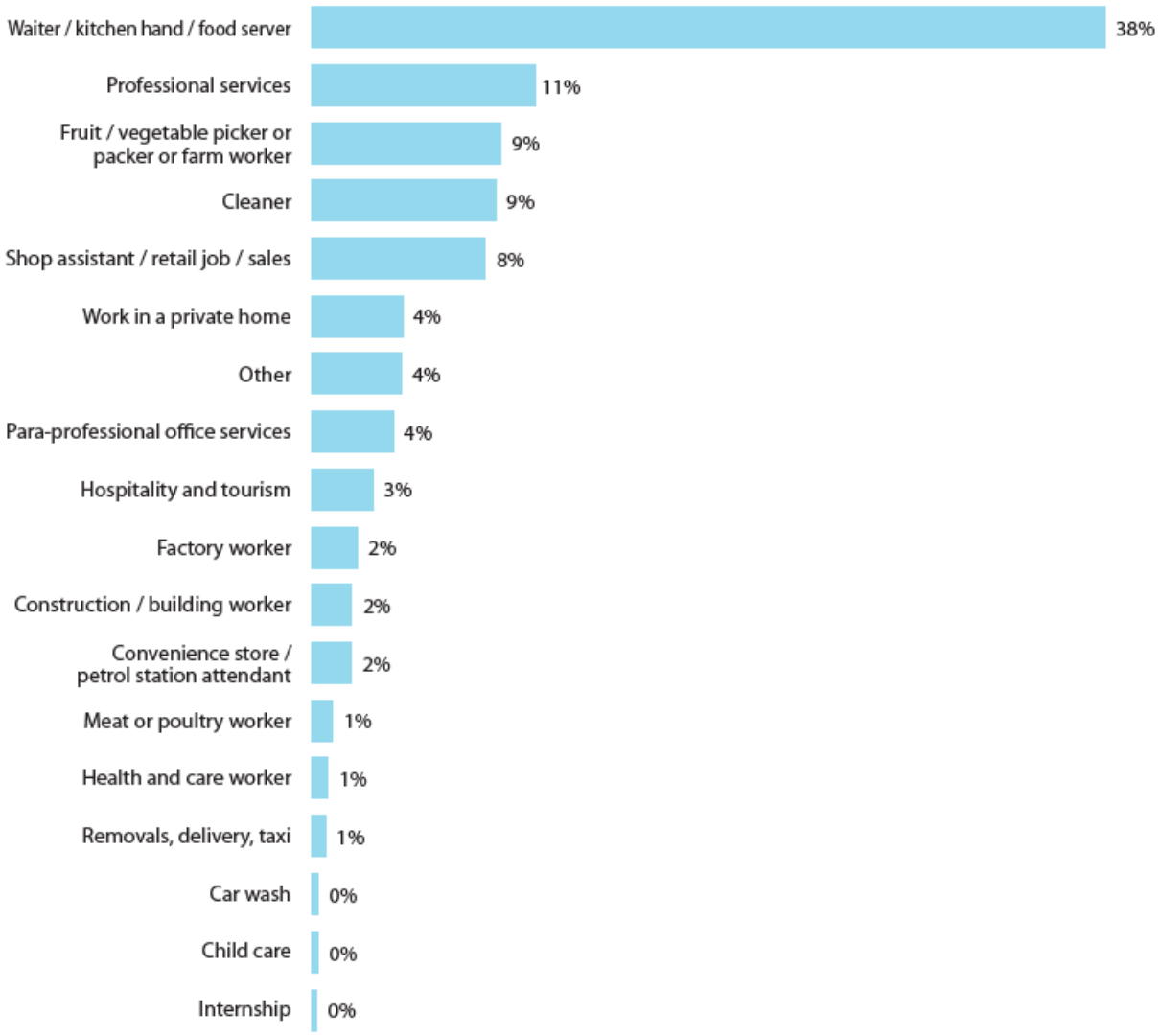
Where is wage theft occurring?

It has been the finding of the FWO that the exploitation of vulnerable workers is occurring in distinct areas and in distinct types of work. That is, the most serious examples of exploitation often involve vulnerable migrant workers employed by an operator who is part of a much bigger supply chain or network. These workers are typically employed to perform low-skill and labour-intensive work.

This finding has been supported and explored by the report *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey (2017).*

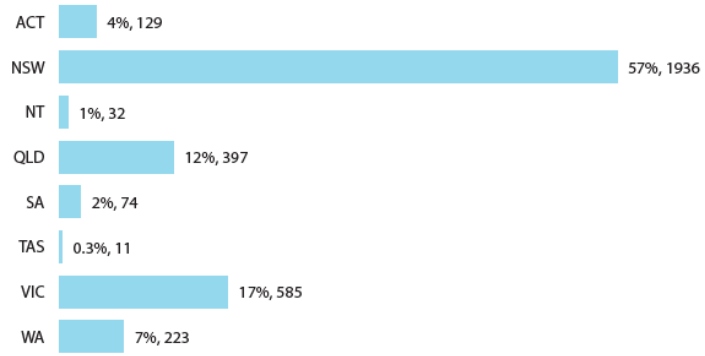
The study confirmed that wage theft is most likely to occur among international students, backpackers and other temporary migrants in Australia.

Characteristics of low paid jobs undertaken by temporary migrants:



(Figure 9: *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey (2017)*)

State/territory in which participants worked in their lowest paid job:



(Figure 10: *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey (2017)*)

Finally, the study dispelled the misconception that temporary migrants are underpaid because they are unaware of minimum wage rates in Australia. Participants in the survey perceived that few people on their visa can expect to receive minimum wages under Australian labour law, with at least 86% of believing that many, most or all other people on their visa are paid less than the basic legal minimum wage.

The report did not explore the reasons that these workers accepted below minimum wages which is surprising given the perception that this non-reporting is the result of 'passport confiscation' or threats of being reported to the immigration department which was only four percent participants.

It is not suggested that given so few participants have been threatened to keep quite that they must somehow be accepting of their exploitation. The impact reaches beyond the individuals as certain businesses profit from wage theft and gain advantage over others that pay workers in compliance with Australian labour law. Rather, given that so many participants understood that they were being underpaid the minimum.

The FWO has increased its compliance education efforts among migrant workers and those groups of workers that have been found to be vulnerable to exploitation. Migrant workers make up 6%[1] of the Australian workforce, however 18% of the workplace disputes assisted with involved a visa holder. This cohort featured in 49% of the court cases commenced during the reporting year.

Given the disproportionately high representation of this cohort of underpayments resulting in court cases it is open to regulators, through the court system, to empower the ordering of harsher penalties against the most grievous or repeat offenders. Recently the Fair Work act was also amended to increase protection of vulnerable workers. Changes included in the act

- liability for franchisors and holding companies
- cashback schemes
- serious contraventions
- reverse onus of proof
- increased penalties
- collecting evidence.

MEA draws attention to the recent Labour Hire Department established in Queensland. There are striking similarities between the cohort of vulnerable employees raised in the Labour Hire issue and the wage theft issue. To the point also that the Departmental Officers again detailed that inspectors from the OIR have been assisting the new Labour Hire section of the OIR. We believe that there is a high probability of overlap and duplication that may occur within these two policy areas and that any regulatory impact statement (RIS) should include an evaluation of this risk and measures to reduce such overlap.

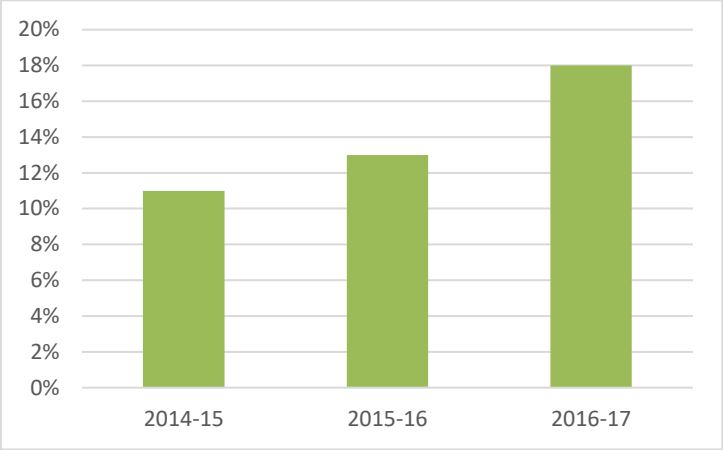
[1] *This percentage has been derived by dividing the number of selected visa types with working entitlements by total persons employed. DIBP, Temporary entrants and New Zealand citizens in Australia, as at 30 June 2016,* Temporary entrants in Australia (stock data) statistics, *p. 3, accessed 27 September 2017. Australian Bureau of Statistics (ABS),* Labour Force Australia, June 2016, cat. no. 6202.0, *Table 1. Labour force status by Sex, Australia - Trend, Seasonally adjusted and Original, accessed 27 September 2017.*

The effectiveness of the current regulatory framework at state and federal level in dealing with wage theft and supporting affected workers.

The Fair Work Ombudsman (FWO) is the appropriate regulatory body to be investigating and brining action against employers who, despite education efforts, fail to comply with workplace laws.

The FWO has invested considerably in the areas of migrant works, the hospitality industry, young workers and the agricultural industry as areas where exploitation has been found most prevalent.

Proportion of disputes the FWO helped to resolve by visa holders, 2014–17



Government and community concern about the exploitation of migrant workers remains high. This is evident in senate inquiry witness statements, media reporting and the 12% of anonymous reports the FWO received during the year which allege workplace exploitation of visa holders.

Migrant workers can be inhibited from exercising their workplace rights or seeking help from government bodies because of a lack of awareness about their options, language and cultural barriers, and concerns about visa status.

As part of its commitment to tackle worker exploitation, the FWO developed the FWO Multicultural Access and Equity Plan 2016–19 (*link supplied for reference*). The plan outlines how the FWO are working to ensure multicultural employers and employees are aware of and educated about workplace rights and responsibilities. It also sets out how the FWO are working to remove barriers of access to FWO advice and services for multicultural communities. The activities of the FWO in this area as reported 2016–17 are considerable and include:

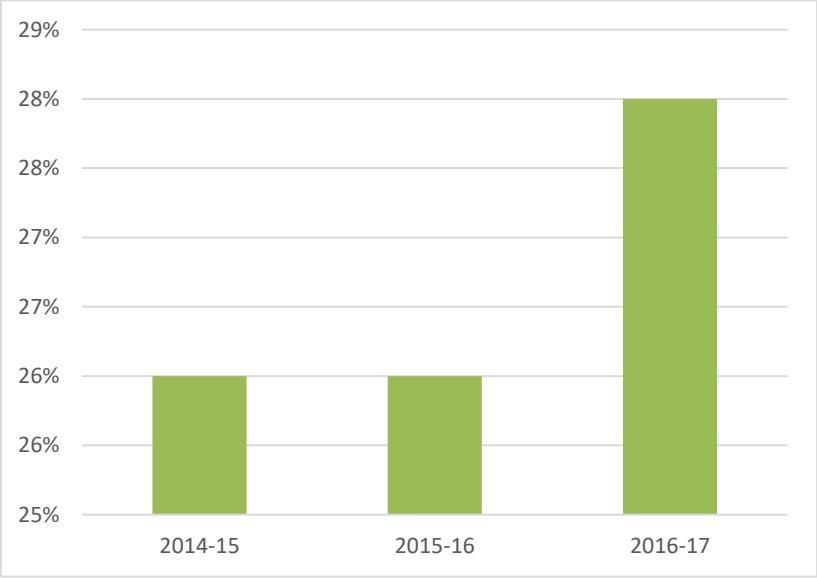
- Setting up and promoting an arrangement with the Department of Immigration and Border Protection (DIBP) to support migrant workers to come forward about exploitation. Under the assurance protocol, a breached temporary visa with work rights will not be cancelled where workers request the FWO's assistance. Facebook posts publicising the assurance protocol to working holiday visa holders and international students were seen over 1.1 million times.
- Introducing a dedicated 'visa' option for callers to the Fair Work Infoline that directs callers to translated website resources and prompts advisers to ensure the caller understands advice given. The FWO also maintained a referral process for community legal centres which enables intermediaries to contact the FWO on behalf of migrant workers.

- Expanding the in-language content on the FWO website to 30 languages and improving content on popular topics (such as pay, leave and ending employment) for the top 16 language groups. New resources include animated in-language storyboards and videos designed to aid understanding of basic workplace rights and obligations. The storyboards and videos were developed in consultation with migrant workers, community organisations and cultural advisers.
- Engaging with the Korean community, including Korean business leaders, media and the Consular General, to develop a tailored strategy to educate this community about workplace rights and responsibilities. This follows a significant number of enforcement outcomes involving employers and employees of Korean background. In 2017, targeted Facebook posts and ads on Korean websites and apps were seen over one million times, and contributed to more than 11 200 visits to Korean language content on the FWO website.
- Continuing to build its relationship with the Chinese business community. The FWO worked together to deliver information on workplace laws as part of its Chinese Engagement Strategy. In 2016, the FWO met with local councils in areas with high Chinese populations across Victoria and NSW. During these meetings the FWO distributed resources for Chinese business operators, demonstrated the FWO website, including its Simplified and Traditional Chinese content, and explored opportunities to increase awareness of workplace laws in their community. The FWO also promoted its Chinese resources via Facebook, Weibo and WeChat (Chinese social media channels) and display advertising on Chinese language websites. Content was seen over 1.7 million times and generated over 12 000 visits to its Chinese language page. Media coverage was also generated through various Chinese language media outlets.
- Administering the Community Engagement Grants Program, which funds community organisations to deliver services, projects and programs of work that supplement its functions under the Fair Work Act, and which are targeted at assisting vulnerable workers. Services facilitated by the program include:
    - JobWatch—general advice and assistance to the most vulnerable workers in Victoria (Vic.), Tasmania (Tas.) and Queensland (Qld), and legal casework services and community legal education for Victorian workers.
    - Growcom—education on compliance with workplace laws, including training, for Queensland horticultural employers to improve the employment experiences of vulnerable workers in the sector.
    - Redfern Legal Centre—free and independent employment law advice and assistance to international students through the NSW International Student Employment Law Service, and development of the employment section of an education app.
    - Employment Law Centre Western Australia (WA)—specialist employment law legal advice service for vulnerable and disadvantaged workers.
    - Northern Territory (NT) Working Women's Centre and Working Women's Centre South Australia (SA)—workplace information, advice and advocacy services for vulnerable female workers as well as outreach and community engagement activities targeted at other vulnerable groups
- Participating in forums and networks that bring together government bodies and key stakeholders to collaborate on best practice solutions including the:
    - Interdepartmental Committee on Human Trafficking and Slavery
    - National Roundtable on Human Trafficking and Slavery
    - Labour Exploitation Working Group
    - Melbourne Law School's Migrant Worker Campaign Steering Group
    - Council of International Students Australia National Conference.

- Assessing whether 457 temporary skilled work visa holders were receiving their nominated salary and/or not performing work in the nominated position in their visa. Five hundred and nineteen entities that employed 741 temporary skilled work visa holders were assessed. One hundred and thirty entities were referred to the DIBP over concerns regarding 160 workers.
- Completing an inquiry into wages and conditions of those working under the 417 Working Holiday Visa Program, which found an environment of unreasonable and unlawful requirements imposed on visa holders by unscrupulous businesses. As a result of the inquiry the FWO recommended a number of measures, including:
    - establishing a federal–state inter-agency working group that examines current and future regulations to develop a holistic compliance and enforcement model
    - exploring opportunities to work with a broader range of stakeholders and extend the channels through which information and support is delivered
    - supporting the establishment of an employer register for employers of 417 visa holders partnering with academics and migration experts.
- Working with the Department of Employment to administer compliance with the Seasonal Worker Programme. In 2016–17, the FWO delivered 53 on-arrival briefings, providing new workers and their employers with information about workplace rights and obligations in Australia. The FWO also finalised a litigation involving one programme employer, and entered into an enforceable undertaking with another to address serious non-compliance.

Further, the FWO reports on the increase of young workers raising disputes and the investments the agency is committing to the promotion of compliance among these workers.

Proportion of disputes the FWO helped to resolve by young workers, 2014–17



Young people in their early working life often need extra support navigating the workplace relations system. To assist young workers, the FWO:

- Launched the Record My Hours smartphone app. Available in multiple languages the app enables employees, in particular young and migrant workers, to quickly and easily record the hours they work on their mobile device. The app serves as a backup record should any concerns regarding pay arise. These records can be especially useful in the many industries, such as

hospitality, where shifts can be irregular and employees finish up when the customer flow begins to reduce, rather than at a set time.

- Released the findings of its National Apprenticeship Campaign that checked the pay and employment records of 2266 apprentices. Businesses were selected based on FWO dispute data and data from the Department of Education and Training. Seventy-eight per cent of the 822 businesses audited met record-keeping and pay slip requirements and 68% paid their apprentices correctly. The activity recovered $339 433 in underpayments for 323 apprentices, with an average recovery of $1051 per apprentice. Fifty-four formal cautions, seven compliance notices and five infringement notices were also issued.
- Entered into memorandums of understanding with the Government of South Australia, Department of State Development and the Victorian Registration and Qualifications Authority to share information that will assist in the effective regulation of apprenticeships and traineeships.
- Ran a National Apprenticeship Initiative in which the FWO emailed and text messaged 2352 first-year hairdressing apprentices and 1794 of their employers a link to information on common workplace issues in the industry including pay rates, pay slips, hours of work, breaks and unpaid work. The initiative is ongoing and as new apprentices sign up they are sent these communications.
- Conducted compliance activities to gather data and address non-compliant workplace practices in Wollongong. Retail and hospitality businesses in the region were targeted following media reports of an alleged culture of underpaying students. In addition to audits of businesses and engagement with students, the FWO engaged with the Illawarra Business Chamber to provide education on workplace rights and obligations.
- Addressed common workplace misconceptions, identified as prevalent among young workers and their employers, by publishing a series of common myths and tips for young workers on the FWO website, issuing a media release and posting on its social media channels. The combination of these activities resulted in 6502 views of the myths and tips webpage, over 780 000 views of the social media content and received associated radio coverage.

It is clear that as this group is the target of education and compliance efforts by the FWO that these groups of workers are taking action against underpayment matters. However, as the above measures of the FWO are detailed by their annual report; these successes in increased action by these groups is hard won. They take considerable resources and time to filter down.

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.

MEA submits that to eradicate an unlawful behaviour there is no one single action that will reduce its occurrence and as such a suite of actions must be implemented. MEA submits that the suite of actions must include the following:

1. A clear law with clear accountabilities
2. Education
3. Investigation and enforcement

1) The first is a clear legal deterrence. In our view the Fair Work Act is the best place for this legal deterrence of both civil and criminal charges.

MEA, submission is, if the Qld Legislature was to try and create a wage theft law there are 3 possibilities that we can identify, each with significant problems. Those avenues would be

A. Criminal code amendment
B. Queensland Industrial Relations Act amendment
C. Fair Work Act amendment

A.) Qld Criminal Code amendment would certainly assist in the prosecution of employers; however, this would then require referral of employers after a complaint and investigation to the Queensland DPP. The question remain does this require a new investigative arms of the Government to assist the DPP? We do not envisage the Queensland Police investigating wage theft like other wage theft.

B.) The second avenue, amend the Queensland Industrial Relations Act. The Queensland IR Act only covers around 10% of employees. The Queensland Government cannot achieve the protection of all Qld Employees because of the Fair Work Act. However, to protect the 25% of business who were referred to the federal system this would require rescinding or necessitating the amendment of the Queensland Fair Work (Commonwealth Powers) and Other Provisions Act 2009. This in our view is not practicable and creates a confusing two-tiered system.

A State regulatory agency for dealing with wage theft issues will be considerably hamstrung by the State's referral of powers resulting in all private employers in Queensland are subject to the national employment system under the Fair Work Act.

Further, a state based agency will overlap with the work of the FWO, potentially resulting in jurisdictional court proceedings to determine who is the appropriate cop on the beat. Perhaps the Queensland government ought to consider providing resources to the FWO to support their compliance efforts in the region – rather than add another regulator, licence or report with which a business must comply.

It is noted that there have been memorandums of understanding entered into with between the FWO and relevant departments in South Australia and Victoria for the purposes of improving the effective regulation of apprenticeships and traineeships.

To support this the state government could join the compliance campaign of the FWO by looking at industries that are characterised by strong downward price pressures are highly susceptible to wage theft - industries such as horticulture and hospitality.

C.) MEA submits that if in the view of the Committee that a crime of "wage Theft" is required in a statute then the Fair Work Act is the appropriate place for this crime. In MEA view we believe that this would pass as a bi-partisan amendment to the Fair Work Act with support from Employer, Employee, Government and Legal representatives.

Education

2) Employees and Employers need to understand what wage theft is. MEA submits that to appropriately address the issues of wage theft it must first determine what it considers this to be. The net must not be cast so wide as to include all underpayments by employers because as has been demonstrated compliance with industrial instruments can be difficult.

Investigation and Enforcement

3) Further, by and large the instance of wage disputes that require 'enforcement action' by the FWO is a very small group. Many suggest due to a lack of reporting and resources. Every regulator around the country realises that resources are limited and as such targeted campaigns need to be undertaken as employee reporting is unreliable. Most regulators have supplementary audit activities in high risk industries based on some form of data collection.

   In the coming years all employers are required to use single touch payroll systems to record wages, PAYG and superannuation payments from employers from the 1 July 2019. MEA would submit with this advancement there is an opportunity to better target compliance activities by employers recording not only wages and super but also number of hours worked. This data collected on behalf of the FWO and data sharing advancement between departments will be able to ensure that based at least on the Modern Awards that employees are receiving no less than the award base rate. This process then assists in identifying people who are below the modern award or the adult minimum wage. We do not believe that this change is onerous and is well within the possibilities for Departments to better target non-compliance

   The Federal Government is also introducing legislation from 1 July 2019, businesses will no longer be able to claim deductions for payments to:

   - employees if the business has not withheld any amount of PAYG (where they were required to do so); and
   - contractors if the contractor does not provide an ABN and the business has not withheld any amount of PAYG (where they were required to do so).

   Accordingly, the response to instances of wage theft should be appropriately targeted once there has been a finding and penalty for a breach of Australian workplace laws. Enforcement needs resourcing and both levels of Government, State and Federal, both have responsibilities and community expectation to deliver.

   Much in the same way the Federal government has used its purchasing power to influence the behaviours of building industry participants and where government lack resources to tackle wage theft and exploitation, **certification programs** can create commercial reasons for companies to do the right thing.

   In the context of supply chains, they harness economically dominant businesses. A big supermarket or food chain can use their market power to encourage those who contract to them to comply with minimum labour standards.

   A version of this, called the Cleaning Accountability Framework, has been created by stakeholders in the cleaning industry.

   In the cleaning industry 21.5% of businesses were engaging in sham contracting by misclassifying employees as contractors. The industry is also characterised by high-rates of underpayment and denial of entitlements.

   The new program has building owners, key tenants, facility managers and cleaning contractors verify standards concerning wages and entitlements, workplace health and safety, and working conditions are being met. This process actively involves the onsite cleaning workforce, and is

ensured by an independent auditor. After the required standard is verified, certification is awarded for that particular building.

Over time, as this certification becomes established, being socially responsible will become a competitive feature in the cleaning industry. Not complying with the standards will result in potential reputational risk for building owners and investors. Cleaning companies that don't comply won't be competitive when bidding for contracts.

Conclusion

In the experience of MEA, as an organisation that promotes and assists employers to be compliant with the obligations of the relevant industrial instrument(s) 'wage theft', is not a common occurrence in the electrical industry. However, underpayment of wages claims are common due to the complexity of the underlying award and there are many important elements to be drawn from these cases that MEA submits must be considered when analysing 'wage theft'.

The vast majority of employers are working hard to pay employees their legal entitlements but are struggling with complex award terms and that underpayment of wages will result from a complex system.

MEA submits that careful consideration of the criteria needs to be applied to establishing such a charge. MEA agrees that the conduct of business such as 7-Eleven, Pizza Hut, Domino's and Caltex is unacceptable and damaging; not just to those workers who are exploited as a result but the effect it has on businesses who spend considerable time and effort in ensuring they are compliant and paying legally.

It has been the finding of the FWO that the exploitation of vulnerable workers is occurring in distinct areas and in distinct types of work. That is, the most serious examples of exploitation often involve vulnerable migrant workers employed by an operator who is part of a much bigger supply chain or network. These workers are typically employed to perform low-skill and labour-intensive work.

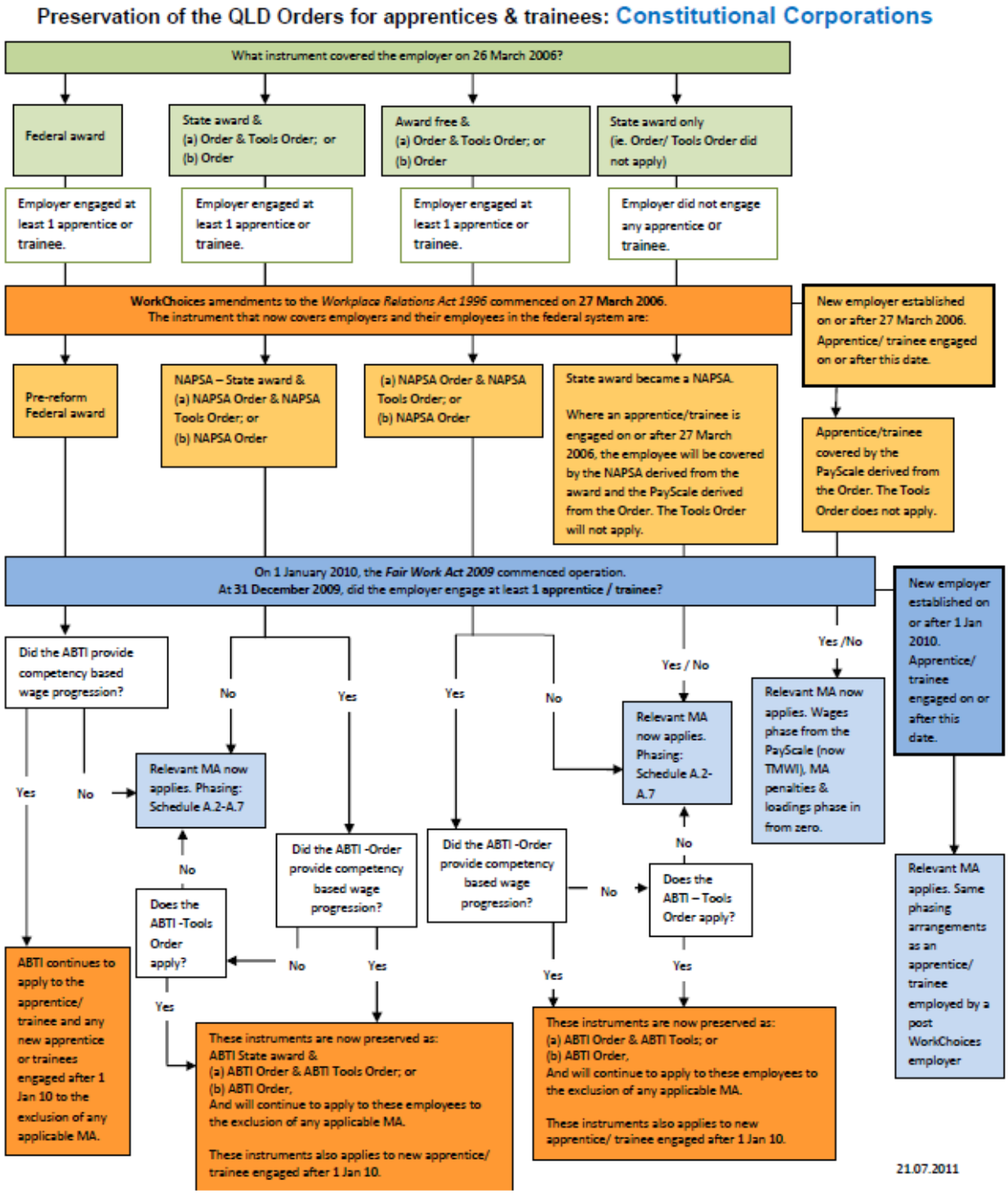
A State regulatory agency for dealing with wage theft issues will be considerably hamstrung by the State's referral of powers resulting in all private employers in Queensland are subject to the national employment system under the Fair Work Act.

MEA submits that the Queensland government should consider supporting the efforts of the FWO in its extensive efforts focus on these industries/groups at greater risk of wage theft; rather than simply impose a new licence or regulatory process.

Further, much in the same way the Federal government has used its purchasing power to influence the behaviours of building industry participants and where government lack resources to tackle wage theft and exploitation, **certification programs** can create commercial reasons for companies to do the right thing.

Jason O'Dwyer

Appendix 1 – Constitutional Corporations OBO Coverage Flowchart



Appendix 2 – Division 2B Employers OBO Coverage Flowchart