The Senate

Education and Employment References Committee

Corporate avoidance of the *Fair Work Act 2009*

September 2017

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5.59 The committee recommends that federal and state governments work together to establish labour hire licensing authorities in each state and territory, and that licensed labour hire operators be required to provide data on the numbers of workers engaged.

Recommendation 3

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a) be a licenced labour hire operator; and

b) only engage in such activity through a registered business.

Recommendation 4

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Recommendation 13

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Recommendation 17

6.79 The committee recommends that the *Fair Work Act* and *Migration Act* be amended to:

- **state that a visa breach does not necessarily void a contract of employment;**
- **provide that the protections of the *Fair Work Act* can be enforced even when a person has breached their visa conditions or has performed work in the absence of a visa consistent with any other visa requirements.**

Recommendation 18

6.80 The committee recommends that there be an onus of proof placed on employers that they have genuinely tested the domestic labour market for available workers before being able to engage temporary visa workers.

Recommendation 19

6.81 The committee recommends that employers pay a training levy for any and all temporary visa workers that are engaged. The proceeds from the training levy should be directly invested to close the skills gaps identified in the domestic labour market.

Recommendation 20

7.37 The committee recommends that the *Fair Work Act* be amended to ensure that all workers have the protections of the Act and access to the labour standards, minimum wages and conditions established under the Act.

Recommendation 21

7.38 The committee recommends that the government review taxation law, including 'alienation of personal services income' provisions, with a view to addressing unintended incentives for sham contracting.

Recommendation 22

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Recommendation 23

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Recommendation 25

8.76 The committee recommends that the *Fair Work Act* be amended to ensure that all workers have the protections of the Act and access to the labour standards, minimum wages and conditions established under the Act, so that these rights accrue to dependent and on demand contracting, preventing those arrangements from being disguised as independent contracting. These amendments should capture the dependant contractor who is dependent upon a labour hire company, a company using a work allocation platform or a major corporation using a relationship power imbalance to exercise control over the worker.

Recommendation 26

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regulatory mechanisms to minimise the avoidance of legitimate Commonwealth tax arrangements.

Recommendation 27

8.78 8.1 The committee recommends that the government, as a matter of priority, bolster the employment conditions of workers engaged in the gig economy by requiring platform providers to verify all platform users comply with minimum standards.

Recommendation 28

8.79 The committee recommends that the government legislate to ensure that workers in the gig economy are protected by a minimum wage by requiring platform providers to provide clear minimum labour price guidelines aligned to the relevant award for different categories of work, along with information about the relevant union for the category of work (where multiple unions would have coverage the ACTU should be provided as a point of referral).

Recommendation 29

8.80 The committee recommends that the federal government work with state and territory safety regulators to review health and safety and workers' compensation legislation to ensure that companies operating in the gig economy are responsible for the safety of workers engaged in the gig economy.

Chapter 1

1.1 On 13 October 2016, the Senate referred the following terms of reference to the Education and Employment References Committee for inquiry and report by 7 August 2017:

> The incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009* with particular reference to:
>
> i. the use of labour hire and/or contracting arrangements that affect workers' pay and conditions;
>
> ii. voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions;
>
> iii. the use of agreement termination that affect workers' pay and conditions;
>
> iv. the effectiveness of transfer of business provisions in protecting workers' pay and conditions;
>
> v. the avoidance of redundancy entitlements by labour hire companies;
>
> vi. the effectiveness of any protections afforded to labour hire employees from unfair dismissal;
>
> vii. the approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions;
>
> viii. the extent to which companies avoid their obligations under the *Fair Work Act 2009* by engaging workers on visas;
>
> ix. whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations;
>
> x. legacy issues relating to Work Choices and Australian Workplace Agreements;
>
> xi. the economic and fiscal impact of reducing wages and conditions across the economy; and
>
> xii. any other related matters.[1]

1.2 Subsequently the Senate extended the committee's reporting date until 4 September and then 6 September 2017.[2]

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1 *Journals of the Senate*, 13 October 2016, pp. 330–331.

2 *Journals of the Senate*, 19 June 2017, p. 1472; and 4 September 2017, p. 1816.

Conduct of the inquiry

1.3 Notice of the inquiry was posted on the committee's website. The committee also wrote to key stakeholders to invite submissions. On several occasions the committee advertised the inquiry in regional newspapers prior to holding public hearings in those areas.

1.4 The committee received 212 submissions, as detailed in Appendix 1, and held nine public hearings:

- 3 February 2017 in Collie;
- 6 February 2017 in Canberra;
- 14 March 2017 in Ballarat;
- 15 March 2017 in Melbourne;
- 18 April 2017 in Sydney;
- 19 April 2017 in Newcastle;
- 20 April 2017 in Brisbane;
- 18 May 2017 in Melbourne; and
- 9 June 2017 in Canberra.

1.5 A list of witnesses who gave evidence at the committee's public hearings is contained in Appendix 2.

Structure of the report

1.6 This inquiry came about as a result of growing indications that some corporate employers are seeking to find ways around the rights and protections the Fair Work Act (the Act, FWA) is intended to provide for workers in Australia.

1.7 The committee received a large volume of evidence describing ways in which some employers circumvent the letter and/or spirit of the FWA. It very quickly became clear over the course of this inquiry that avoidance of the legal obligations set out in the FWA occurs in two distinct ways:

1. Overt avoidance, often entailing breaches of the FWA such as underpayment.
2. Exploitation of legislative loopholes and shortcomings which serve to inadvertently limit the protections offered by the FWA.

1.8 The purpose of the FWA, and comparable legislation around the world, is to protect workers in an economic and social environment where there is an intrinsic

power imbalance between the worker and the employer. Having regard to these avoidance strategies the committee finds that the underlying and substantive problem is that the Act as a whole is not working as expected by the Parliament or the Australian community and it needs a thorough root and branch reform.

1.9 The corporate avoidance of obligations to workers has become a business model taking many forms, from blatant non-compliance to sophisticated commercial arrangements that contract out work in order to avoid statutory and collective bargaining agreement obligations. These iterations of the corporate strategy demonstrate that in the typical twenty-first century corporation is very flexible and capable of reorganizing its workforce in new ways aimed at avoiding the statutory obligations of the FWA. It follows that effective laws in this area need to be capable of providing workers and employers with the means to deal with new business models as well as those that are familiar to us today. This approach requires that long-term and effective solutions must facilitate a similarly agile capacity to keep pace and therefore avoid the risk of repeatedly overlaying statutory amendments that close down specific schemes but add complexity and convoluted processes to compliance enforcement efforts.

1.10 The Act was introduced in order to end the WorkChoices legislation that had stripped workers of so many of the rights and protections that had made Australia fair in the first century of federation. It is the committee's view that the economy has reached a level of sophistication and rapid change, especially in the post-GFC era, that the FWA is no longer fit for purpose and is in need of a thoroughly new approach that is based on a new more vibrant and flexible system for creating workplace rights and ensuring compliance with those rights in a modern and dynamic twenty-first century Australian and world economy. Recognising that a new framework is necessarily some way off, the committee also makes a series of specific recommendations in this report. These recommendations are aimed at interim solutions that the Parliament should adopt without delay in order to address specific problems experienced now. They are not an alternative to the more fundamental changes required.

1.11 For reasons of clarity, this report sets out the key issues raised by witnesses and submitters individually. Chapters are therefore divided thematically as follows:

- Chapter 1 (this chapter) sets out the committee's administrative processes.
- Chapter 2 outlines the background and objectives of the Fair Work system.
- Chapter 3 looks at examples where employers have sought to secure approval of new enterprise agreements through existing employees, or voting cohorts, who are not covered by the new agreements.
- Chapter 4 examines a growing trend which sees employers applying to the Fair Work Commission to have enterprise agreements terminated during negotiations for new agreements, thereby reverting staff to award wages and lowering the bargaining floor.
- Chapter 5 addresses the growing use of labour hire arrangements across numerous industries and the deleterious effect this has on workers' wages and

conditions. While the use of labour hire is legal, the committee encountered examples of employees being laid off only to be encouraged to re-apply for the same job through a labour hire company.

- Chapter 6 looks at the illegal practice of sham contracting, whereby employees are treated as independent contractors for legal purposes in order to avoid the payment of entitlements.
- Chapter 7 explores the complex issue of underpayment. Evidence before the committee indicates that underpayment is rife and practically the norm in many industries which employ vulnerable workers. The chapter looks at why the Fair Work system has failed to curb rampant underpayment.
- Chapter 8 focuses on the gig economy, a term which describes a growing trend in workers paid to complete tasks found through an online for-profit portal, often without the protections prescribed in the FWA.
- Chapter 9 looks at wage growth in Australia and the economic implications of wage stagnation and corporate avoidance of industrial obligations.

Note on references

1.12 References to the committee Hansard are to the proof Hansard. Page numbers may vary between the proof and official Hansard transcripts.

Acknowledgement

1.13 The committee thanks submitters and witnesses who contributed to this inquiry, in particular individual Australian workers who brought forward their personal stories and circumstances.

Chapter 2

Fair work

Australia's Fair Work system

2.1 The Fair Work system is Australia's national framework of workplace laws which sets out enforceable minimum terms and conditions of employment, industrial relations rights and responsibilities. The system was created by the Labor Government with the enactment of the *Fair Work Act 2009* (FWA), which took effect on 1 July 2009.

2.2 One of the FWA's core objectives is to promote collective bargaining, whereby employers, employees and bargaining representatives, including unions, negotiate enterprise agreements.[1] Bargaining can be straightforward, or it can be complicated and protracted, but it is the process of bargaining which ensures an outcome that serves the interests of employers and employees.

2.3 Any act or process which impinges on the parties' opportunity to bargain can be said to be contrary to the spirit and purpose of the FWA.

Coverage of the system

2.4 The Fair Work system applies to all employees and employers in the Australian Capital Territory and Northern Territory, and most workplaces elsewhere in Australia, with the following exceptions:

> **New South Wales**—State public sector and local government employees are not covered by the national system and remain under the state system. Some state public sector and local government employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system.
>
> **Victoria**—State government employees working in sectors that provide essential services of core government functions aren't covered by the national system… Some state government employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system. All other employees in Victoria are covered by the national system.
>
> **South Australia**—State public sector and local government employees are not covered by the national system and remain under the state system. Some state public sector and local government employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system.

1 *Fair Work Act 2009*, s. 3(f).

Queensland—State public sector and local government employees are not covered by the national system and remain under the state system. Some state public sector and local government employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system.

Western Australia—The following types of businesses are not covered by the national system:

- sole traders
- partnerships
- other unincorporated entities
- non-trading corporations.

These types of businesses and their employees are covered by the state system. State public sector and local government employees are also covered by the state system. Sometimes businesses operating as sole traders, partnerships, other unincorporated entities, non-trading corporations, and state public sector or local government employers have registered agreements in the national system. Employees covered by those agreements are within the national system.

Tasmania—State public sector employees remain under the state system. Local government employees are covered by the national system. Some state public sector employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system.[2]

Key features of the Fair Work system

2.5 There are four key features of the Fair Work system:

- Minimum National Employment Standards;
- Nationally-applicable awards for specific occupations and industries;
- The national minimum wage; and
- Protection from unfair dismissal.[3]

National Employment Standards

2.6 The National Employment Standards (NES) define the minimum entitlements employees in Australia can expect. All employees in the national workplace relations system are covered by the NES. Casual employees have limited access to NES entitlements.[4]

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2 See www.fairwork.gov.au/about-us/legislation/the-fair-work-system (accessed 4 July 2017).

3 See www.fairwork.gov.au/about-us/legislation/the-fair-work-system (accessed 4 July 2017).

4 See www.fairwork.gov.au/employee-entitlements/national-employment-standards (accessed 4 July 2017).

2.7 The 10 minimum entitlements provided by the NES are:

1. Maximum of 38 weekly hours of work, plus reasonable additional hours.
2. In certain circumstances employees can request a change in their working arrangements, for example flexible working arrangements.
3. Parental leave and related entitlements. Up to 12 months' unpaid leave for each employee, plus a right to request an additional 12 months' unpaid leave, plus other forms of maternity, paternity and adoption-related leave.
4. Annual leave
   - four weeks' paid leave per year
   - plus an additional week for certain shift workers.
5. Personal/carer's leave (includes sick leave) and compassionate leave
   - 10 days' paid personal/carer's leave (includes sick leave)
   - two days' unpaid carer's leave as required
   - two days' compassionate leave (unpaid for casuals) as required.
6. Community service leave – unpaid leave for voluntary emergency activities and up to 10 days of paid leave for jury service (after 10 days is unpaid).
7. Long service leave – a transitional entitlement for employees as outlined in an applicable pre-modernised award, pending the development of a uniform national long service leave standard.
8. Public holidays – a paid day off on each public holiday, except where reasonably requested to work.
9. Notice of termination and redundancy pay
   - up to four weeks' notice of termination (plus an extra week for employees over 45 years of age who have been in the job for at least two years)
   - up to 16 weeks' severance pay on redundancy, both based on length of service.
10. The Fair Work Information Statement. This is available from the Fair Work Ombudsman (FWO) and must be given by employers to all new employees. It contains information about:
    - the NES
    - modern awards
    - agreement making
    - freedom of association and workplace rights
    - termination of employment
    - individual flexibility arrangements

- right of entry
- transfer of business
- the role of the [Fair Work Commission (FWC)]
- the role of the FWO.[5]

2.8 Enterprise agreements, any other registered agreements or awards cannot, in any circumstances, set out conditions which are lower than the NES or exclude the NES.[6]

Enterprise agreements

2.9 Enterprise agreements are agreements between employers, employees and employee representative organisations—unions—which set out mutually accepted terms and conditions of employment.

2.10 Most enterprise agreements set out:

- wage rates
- employment conditions (e.g. hours of work, meal breaks, overtime)
- a consultation process
- dispute resolution procedures
- deductions from wages for any purpose authorised by an employee.[7]

2.11 To be approved by the FWC, enterprise agreements must pass the 'better off overall' test (BOOT). An agreement passes the test if each award-covered employee, and each prospective award-covered employee, would be better off overall under the agreement than under the relevant modern award.[8]

Modern awards

2.12 With the NES, awards are intended to provide a guaranteed minimum safety net in terms of conditions of employment. Awards set out pay rates and conditions of employment, for example leave entitlements and overtime. In most cases, workers who are not covered by an enterprise agreement will have their minimum wages and conditions set by a modern award. Modern awards deal with:

- minimum wage rates

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5 See 'National Employment Standards', Fair Work Commission, available at: www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/national-employment-standards (accessed 14 July 2017).

6 See www.fwc.gov.au/awards-and-agreements (accessed 16 July 2017).

7 See www.fwc.gov.au/awards-and-agreements (accessed 16 July 2017).

8 *Fair Work Act 2009*, ss. 193(1).

- annual leave, and annual leave loading
- other types of leave
- hours of work
- penalty rates, overtime and casual rates
- allowances
- consultation, and
- many other minimum conditions.[9]

2.13 The majority of awards pertain to specific industries or occupations, with 122 modern awards currently being in place.[10]

The Fair Work Commission

2.14 The FWC is Australia's national, independent workplace relations tribunal. The commission reports that it performs a range of functions, including:

- providing a safety net of minimum conditions, including minimum wages in awards
- facilitating good faith bargaining and making enterprise agreements
- dealing with applications in relation to unfair dismissal
- regulating how industrial action is taken
- resolving a range of collective and individual workplace disputes through conciliation, mediation and in some cases public tribunal hearings
- functions in connection with workplace determinations, equal remuneration, transfer of business, general workplace protections, right of entry and stand down.[11]

2.15 Most of the above functions are initiated when a person lodges an application with the FWC. Other functions, such as those pertaining to annual wage and modern award reviews, are initiated by the FWC.[12]

2.16 The FWC has a range of options available to it when applications are lodged, including:

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9 See www.fwc.gov.au/awards-and-agreements (accessed 14 July 2017).

10 For a list of modern awards, see the Fair Work Commission website at: www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list (accessed 4 July 2017).

11 See www.fwc.gov.au/disputes-at-work/how-the-commission-works (accessed 14 July 2017).

12 See www.fwc.gov.au/disputes-at-work/how-the-commission-works (accessed 14 July 2017).

- referring an application to a staff conciliator to help resolve the dispute informally
- issuing directions about how an application is to be dealt with
- requiring people involved in an application to appear before the Commission
- inviting submissions (verbal or in writing)
- taking evidence
- conducting conferences
- holding hearings, and
- making decisions and orders.[13]

2.17 When the FWC holds a hearing, all parties are given the opportunity to put forward their case and be heard impartially.[14]

2.18 The FWC's role in settling disputes is limited by the reality that under the Act, the Commission's power to arbitrate intractable disputes is highly constrained and in large part limited to a consensus acceptance of this function by the parties to the dispute. Where a dispute settlement procedure doesn't include arbitration powers for the FWC, reported practice is that a party to a dispute who is in a position of power will seldom, if ever, consent to arbitration. It follows that the party with the most power gets their way in the disputed matter regardless of what might be fair and reasonable in the circumstances. Given the imbalanced nature of the employer/employee relationship under our current laws, the party with the most power is almost always the employer.

The Fair Work Ombudsman

2.19 The Office of the Fair Work Ombudsman (FWO) is an independent statutory agency. The FWA subparagraph 682(1)(a)(i) provides that the FWO's role is to promote harmonious and productive workplace relations. The FWO contributes to this by:

- helping people identify correct pay rates, and helping employers work out what they should be paying employees;
- helping employees find out what their entitlements are for leave, overtime and allowances;
- educating employers and employees about fair work practices, rights and obligations;
- investigating complaints or suspected contraventions of workplace laws, awards and agreements;

13 See www.fwc.gov.au/disputes-at-work/how-the-commission-works (accessed 14 July 2017).

14 See www.fwc.gov.au/disputes-at-work/how-the-commission-works (accessed 14 July 2017).

- acting to enforce workplace laws;
- working with industry, unions and other stakeholders; and
- helping employers manage business transfers, shutdowns and closures.[15]

2.20 The Fair Work Ombudsman also has a significant role under subparagraph 682(1)(a)(ii) to "promote compliance with this Act and fair work instruments".

2.21 In deciding the approach to take when misconduct is alleged, the FWO considers the seriousness of the alleged conduct and circumstances of each case, including whether the case involves:

- public interest;
- a party facing significant barriers to resolving the matter themselves, for example, low levels of literacy or comprehension;
- a small business owner, who has limited access to a human resources expert;
- a party who has had previous issues with compliance;
- an alleged breach appears to be deliberate;
- sufficient information to support an argument that a breach has occurred;
- confidentiality;
- the parties having made any attempts to resolve the matter;
- breaches of monetary entitlements where the amount is significant;
- minimum entitlements as opposed to above award conditions;
- an employment relationship that has ended, including how long ago the employment ended.[16]

2.22 Given these guidelines it is apparent that the FWO exercises significant discretion in determining which allegations of non-compliance will be the subject of enforcement proceedings. A substantial body of the evidence provided to the committee strongly supports the view that those businesses which choose not to comply with obligations under the Act do so with a high degree of practical immunity. Chapter 6 details disturbing examples that indicate that non-compliance with minimum standards is a business model operating in a significant number of industries. From an economic perspective it seems to be a low risk/high return proposition, especially where the workers involved are in insecure work, are not union members, are young workers, or reflect or a combination of each of these characteristics.

15 See www.fwc.gov.au/about-us/national-workplace-relations-system (accessed 14 July 2017).

16 Fair Work Ombudsman, *Compliance and enforcement policy*, July 2017, p. 10.

2.23 The FWO endeavours to resolve most cases through mediation. Investigations are conducted in the most serious circumstances, where evidence suggests there is:

- exploitation of vulnerable workers (e.g. aged, young, overseas)
- significant public interest or concern (e.g. pregnancy and age discrimination)
- blatant disregard for the law, or a court or commission order
- deliberate distortion of a level playing field to gain a commercial advantage (e.g. large scale non-compliance that distorts the labour market), or
- an opportunity to provide an educative or deterrent effect.[17]

2.24 This gives rise to serious questions about how user friendly the compliance processes of the FWO are for workers who have been denied their rightful entitlements. Compliance proceedings in the court system for a worker who is award reliant are daunting, time consuming and expensive. The high cost of filing and court fees, ranging from $615 upfront filing fees to daily court fees of $2050[18], make alternative dispute resolution options important, but the committee remains concerned that the combination of high cost legal proceedings, drawn out mediation and the very limited prospects of the FWO choosing to investigate a particular worker's complaint because it doesn't rank as serious enough under current policy guidelines makes compliance measures undertaken by the FWO very limited and in fact unlikely.

Is the Fair Work system fit for purpose?

2.25 There is an orthodox view that one of the principal objectives of the industrial relations system is to protect workers.[19] This view is inherently linked to the question at the core of the committee's inquiry: is the Fair Work system fit for purpose?

2.26 The committee has looked at ways in which some employers are able to avoid their obligations under the FWA—by exploiting loopholes in the legislation, engaging in employment practices which undermine the industrial system, and at times breaching the law outright.

2.27 The following chapters examine the evidence.

17 Fair Work Ombudsman, *Compliance and enforcement policy*, July 2017, p. 13.

18 www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/home (accessed 30 August 2017).

19 Australian Council of Trade Unions, *Submission 182*, p. 4.

Chapter 3

Employers undermining collective bargaining

3.1 It is generally recognised that, barring highly specialised and remunerated individuals, who are in the minority, employees are in a stronger bargaining position when they bargain collectively:

> Without access to collective bargaining, employees bargaining alone are unlikely to be able to bargain on an equal footing with their employer (this is obviously not applicable to high net worth individuals).[1]

3.2 Some employers prefer to bargain with individual employees for this very reason, because doing so distorts the power balance between the two parties in favour of the employer. This is evidenced by some employers' support for statutory individual agreements, known as Australian Workplace Agreements (AWAs). Enshrining this imbalance was the cornerstone of the Coalition's WorkChoices legislation.[2]

3.3 With the introduction of the *Fair Work Act 2009* (FWA, the Act), the former Labor Government set in place provisions which instead promote collective bargaining, the fundamental purpose of which is to minimise the power imbalance between employers and employees during negotiations about wages and conditions.[3] This is so that both sides have the incentive to compromise.

3.4 Ten years after the WorkChoices era, the Australian economy has changed substantially. We have weathered the storm of the Global Financial Crisis but we are not immune to the impacts of it. Economic power and wealth has concentrated and inequality has grown to 70 year highs.[4] Wages growth is at historic lows of just 1.9 per cent per annum.[5]

3.5 In the post-GFC era, mergers, use of subsidiaries, outsourcing, offshoring, labour hire, franchising, competitive tendering, contracting out and the use of short term visa workers are all business strategies regularly used by corporations.

3.6 Although AWAs are no longer allowed under the FWA, some employers are exploiting weaknesses in the Act in order to thwart collective bargaining, 'searching

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1 Australian Manufacturing Workers' Union, *Submission 196*, p. 7.

2 Australian Manufacturing Workers' Union, *Submission 196*, p. 7.

3 Australian Manufacturing Workers' Union, *Submission 196*, p. 3.

4 Mr Jim Stanford, *'Labour Share of Australian GDP Hits All-time record low'*, Centre for Future Work Briefing Note, 13 June 2017.

5 Australian Bureau of Statistics, *Wage Price Index, Australia*, ABS 6345.0, June 2017.

for opportunities to bargain with employees in circumstances when they are in the weakest bargaining position.'[6]

3.7 The FWA only provides for collective bargaining in the form of enterprise bargaining. This was done to place enterprise bargaining at the centre of the process of preventing the distortions that flow from a substantial power imbalance between employers and individual employees.

3.8 This chapter looks at evidence of a variety of practices that effectively re-open the debate about how to effectively provide collective bargaining in the context of our twenty-first century economy.

Small cohorts of workers signing agreements

3.9 The FWA requires that the FWC be satisfied that groups of employees negotiating an agreement were fairly chosen, and that agreements are genuinely agreed to by employees.[7] Examples provided to the committee call into question the effectiveness of these provisions.

3.10 In practice, employees can be significantly disadvantaged by employers who secure agreements with selectively chosen groups of employees who are not representative of their wider workforce.

3.11 In some cases the use of strategic voting cohorts is elegant in its simplicity. When a company or project is set up, only a small number of workers are employed. These may in some cases be management workers only. They vote on an agreement, and the agreement is made. If the FWC is satisfied that the agreement was made through a fairly chosen group of employees, the agreement is accepted.

3.12 The process is far from simple in practice, however, and there is little clarity around how voting cohorts are to be selected fairly. Despite the fact that the FWA was designed to promote collective bargaining, recent court decisions have endorsed the view that the commission should not 'withhold approval of an agreement on the basis that it would undermine collective bargaining.'[8]

3.13 A submission from the Construction, Forestry, Mining and Energy Union (CFMEU) describes the case of *CFMEU v. John Holland Pty Ltd*, where the Federal Court rejected an appeal against a decision to approve an agreement made by a voting cohort of just three employees. The agreement had the capacity to cover a wide-ranging workforce—workers under 10 different classifications[9]—to be employed in future:

> The Court…did not exclude the possibility that it may not be fair for an enterprise agreement made with three existing employees to cover a wide

6 Australian Manufacturing Workers' Union, *Submission 196*, p. 7.

7 *Fair Work Act 2009*, s. 186.

8 Construction, Forestry, Mining and Energy Union, *Submission 200*, p. 18.

9 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 4.

> range of other classifications and jobs in which they may have no conceivable interest, or that the group thereby constituted may not be fairly chosen.[10]

3.14 This case paved the way for other employers to avoid bargaining with employees by securing agreements with small cohorts before applying them to a broader workforce, and this loophole is being used with increasing impunity.[11]

> Despite the FW Act requirements in relation to bargaining and agreement approval, there are also examples of employees not receiving notices of employee representation rights or a copy of the proposed agreement, or in some cases, not even being given an opportunity to vote on an agreement, let alone be involved in a negotiation process.[12]

3.15 In doing so, employers are circumventing collective bargaining by excluding unions from the process and are seeking to make unilateral decisions on industrial relations in their workplace. As United Voice submitted:

> The now established practice of making agreements with a very small number of employees is fundamentally about excluding unions from the agreement making process and utilising the fact that for the duration of an agreement no bargaining can take place... In United Voice's view, many of these types of agreements are being made to assist labour hire competitively tender for work. This obviously undermines the basis of collective agreement making envisaged under the Act while also providing labour hire with the ability to represent to potential users of its services that it can provide terms and conditions that cannot be disturbed by any form of collective action.[13]

3.16 Several examples are cited below.

3.17 In *Maritime Union of Australia v Toll Energy Logistics*, Maurice Blackburn Lawyers reports that an enterprise agreement was passed by only seven employees and without the union's knowledge:

> The union challenged the approval on the basis that this was an attempt to manipulate the agreement making process as employees were not fairly chosen and the agreement was not genuinely agreed to. Rejecting the appeal, the Full Bench held that in the absence of a suggestion that employees were not employed for bona fide business reasons, there is nothing improper about the use of a small voting cohort to approve broader enterprise agreements.[14]

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10 CFMEU, *Submission 200*, p. 18.

11 United Voice, *Submission 203*, p. 12.

12 CFMEU, *Submission 200*, p. 19.

13 United Voice, *Submission 203*, p. 13.

14 Maurice Blackburn Lawyers, *Submission 157*, p. 10.

3.18 There is a growing number of such cases before the FWC.[15] These agreements, signed by unrepresentative cohorts of workers, are disproportionately favourable to the employer and come at great cost to affected employees. The Australian Workers' Union summed up the practice:

> [A] handful of people in one state are voting for agreements that apply in other states in which they do not work at all, not in the lead-up to the agreement, not when the agreement is made and not when the agreement is live either. We are seeing a number of those sorts of agreements done, national agreements that are voted on by—and this is my term—three men and a dog out the back of Bourke. They then become national agreements and severely undercut our established market rates of pay and conditions.[16]

3.19 In one example provided by United Voice, Broadspectrum Australia Pty Ltd submitted an enterprise agreement—the JBU Agreement—to the FWC for approval in July 2016. The agreement applied to correctional employees within the company's 'Justice Business Unit…in the Commonwealth of Australia', but did not specify a particular workforce. At the time the agreement was made, Broadspectrum was not engaged in any private correctional work in Australia—the company sought to put an enterprise agreement in place before any prospective workforce began operating.[17]

3.20 Similar practices are rampant in the oil and gas industries, manufacturing, metal construction and civil construction, the AWU reports. Agreements reached with small cohorts, the union explains, are used purely to undercut established rates of pay, whether it be in a particular industry or a specific workplace.[18]

3.21 The AWU cited the example of cleaning and catering workers employed by Sodexo in Bass Strait:

> Sodexo had been Esso's offshore caterer in Bass Strait for about 15 years. These are the people who do the cooking and cleaning and household maintenance, for want of a better term, on Esso's offshore oilrigs and gas rigs in Bass Strait. They had been the contractor for 15 years. They had always bargained with their workforce. They had bargained with the union. They, the old contractor, had come to us last year and said: 'We need to tighten the belt. Esso are looking to cut costs.'[19]

3.22 In August 2016, these workers were told that their contract would not be renewed. Instead, the contract was to be awarded to another company, ESS, which

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15 See for example Australasian Meat Industry Employees' Union, *Submission 158*, p. 6.

16 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 34.

17 United Voice, *Submission 203*, p. 15.

18 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 34.

19 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

would employ a new workforce under an enterprise agreement which had been signed by just six workers, all of whom were based in a different state:

> It was a stunning scenario for the 110 Sodexo workers, many of whom had worked offshore for decades, and virtually all of whom had based their lives in the Gippsland region in order to be close to work. They were given a little over one month's notice of the change and their impending redundancies. They were told they could apply for jobs with ESS, but if successful, would not be working in Bass Strait. To be considered for a job with ESS they would have to relocate their home base to Western Australia at their own expense. This was despite the fact that many of these people had worked for ESS in Bass Strait when the company held the contract for some years before Sodexo took over. They were known as a good workforce; efficient and experienced with a track record of supplying top standard services.[20]

3.23 AWU believes the companies concerned gamed the Fair Work system, because the ESS enterprise agreement, which enabled them to win the contract, was signed earlier, by a small cohort of workers in Western Australia:

> ESS had done an agreement some four months before they won the contract, an agreement with six employees in WA to cover South Australia and Victoria. Those six employees had not worked in South Australia and Victoria either before or when the agreement was made or since then, and yet this agreement, which applies only in South Australia and Victoria, was 'bargained'—which is really, 'Here's a document; we want you to support it'—in Western Australia.[21]

3.24 Reports suggest that only one of the six workers who signed the new, considerably inferior agreement might have started working at the Bass Strait site in subsequent months. Not one of the six had worked in, or made a commitment to work in Bass Strait previously.[22] The agreement nonetheless passed the FWC's 'better off overall' (BOOT) test, even though ESS had undercut established pay and conditions by signing an agreement with workers who would not actually be working in Bass Strait.

3.25 In most contracting situations, the new contractor will 'pick up' the workforce, or a significant portion of the workforce, of the old contractor. ESS managed to avoid any transmission-of-business commitments under the FWA when it won the contract, and achieved this by making clear that existing Sodexo employees—including those who had performed the work for years under various contractors—would not be invited to apply for jobs with ESS:

> So people who had worked in that job for successive contractors—ironically including ESS, before Sodexo—all lost their jobs. They were not

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20 Australian Workers' Union Victorian Branch, *Submission 193*, p. 2.

21 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

22 Australian Workers' Union Victorian Branch, *Submission 193*, p. 2.

> even welcome to apply. They were told that if they wanted a job with ESS they might try to find them something as a lollipop lady in northern Queensland—that is a literal example—or as a canteen attendant in northern Western Australia. That too is a real example. A hundred and 10 people, all of whom lived within an hour of the Longford Heliport, from where they embarked to Bass Strait, all lost their jobs—not on merit. They were told that they could not even bother to apply. And that is because ESS wanted to escape any transmission-of-business commitments on an agreement that quite frankly was shonky, an agreement that was done in Western Australia that does not apply in Western Australia; it only applies in South Australia and Victoria.[23]

3.26 The committee discussed this case with representatives of the ExxonMobil Group of Companies, which includes Esso Australia, who explained that switching contracts from one contractor to another is not unusual. According to these representatives, the practice is geared towards efficiency:[24]

> I think it is very unfortunate if people lost their jobs in this process, but our role is to make sure that we are providing reliable and affordable energy out of Bass Strait. I do know that Sodexo is a very large organisation and I would expect that they have looked at providing jobs elsewhere for those people who were displaced.[25]

3.27 Company representatives further highlighted the need to continually review operations in the interest of providing cost-effective services to Australian customers:

> I would like to reflect back on the business that we are in. Part of that business is maintaining the supply of energy to Australia. We are the largest domestic supplier of gas in Australia. We are running a refinery in Australia. We are providing oil from the Bass Strait operations to our local refinery in Australia. As part of the running of that business, we are very mindful of the needs of all Australians. Part of the process of running those businesses is making sure that they remain profitable. We currently have three platforms in Bass Strait that are shut in because they do not make any money. These are shut in because we have not been able to reduce our operating costs to the extent that we can maintain a profitable business.[26]

3.28 Esso Australia confirmed that the company made an approximate 20 or 30 per cent saving by switching contracts, or around $6 million. Company representatives could not say precisely how many people lost their jobs in the process, suggesting it

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23 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

24 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 2.

25 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 3.

26 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 3.

might have been 50 or 60.[27] The AWU informed the committee that the number of workers who lost their jobs was in fact 110:

> 110 people who had never been complained about, who were model employees, who their employer was happy with, some of whom had worked there for up to 40 years, lost their jobs and their livelihoods because of a change of contractor and because the new contractor wanted to avoid transmission of business and because the client did not take any sort of pastoral care notions around this new contracted workforce. They had dollar signs in mind and went out and achieved them. Esso did as the client, and ESS did as the contractor who came in. That means that 110 people were unemployed. They had been loyal. They had been productive. They had never had any complaints about their work performance for years. A group of 10-, 20-, 30- and 40-year employees, through no fault of their own, lose their jobs and have no ability to get those jobs back.[28]

3.29 Nor were the fly-in-fly-out workers who replaced those who lost their jobs significantly better off.[29] The committee understands that the new contractor pays wages which are some $40 000 lower per annum, on average, for the same cleaning and kitchen work.[30] The company secured the enterprise agreement setting out those significantly lower wages by using a handful of workers—based in Western Australia—instead of the actual workforce performing the work in Bass Strait.[31]

3.30 Noting Esso Australia's estimated $6 million savings on cleaning and kitchen work, the committee sought advice on Esso's executive wage bill for 2016. The executive wage bill for 2016 exceeded $12 million.[32]

3.31 In fact, the committee heard that Esso Australia's executive employees may have enjoyed a wage increase in 2016:

> In the current cycle, that [increase] varied depending on people's careers from zero to probably two per cent.[33]

3.32 Asked whether any of these employees experienced a $40 000-per-year wage cut in that same year, company representatives confirmed that they did not.[34]

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27 Mr Mike Wells, Area Procurement Manager, *Proof Committee Hansard*, 15 March 2017, p. 3.

28 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

29 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 36.

30 Wages are lower by $40 000 on average, but may be up to $65 000 lower. See Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

31 See discussion, *Proof Committee Hansard*, 15 March 2017, pp. 2–5.

32 ExxonMobil Australia Group of Companies, answer to question on notice, received 6 April 2017, p. 1.

33 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 4.

3.33 It would appear that kitchen and cleaning staff bore the brunt of the efficiencies required to save $6 million.

Committee view

3.34 Those cleaners and kitchen workers—whose number the company they were contracted to work for was unsure of—lost their jobs and their livelihoods so that Esso Australia could boost profits. The workers who replaced them performed the same work for on average $40 000 less per year, their salaries set under an agreement signed by a handful of workers in WA—workers not actually working at the site in Bass Strait. The company secured a 20–30 per cent cut in staffing expenditure by using a small cohort of workers based elsewhere to secure an enterprise agreement. And every bit of this was legal.

3.35 In the committee's view, 'legal' does not necessarily translate to 'ethical'. Businesses will always look for efficiencies, but there have to be limits on how these can be found. In this case those efficiencies were paid for by kitchen workers and cleaners while executive wages rose—there is something profoundly unsettling about this. As long as the law allows it, there will always be corporations who look to squeeze every possible dollar out of workers, who view every dollar paid to staff as an assault against their bottom line. The committee urges the Government to take a long, hard look at the FWA, and recognise that the Act is failing in its objective of protecting ordinary workers.

3.36 That the impacted workers were never in a position to bargain collectively with ExxonMobil who were the ultimate decision makers underscores the limitations of a collective bargaining model that restricts bargaining to the enterprise level between those directly employed and their employer. The evidence received about the flexibility of companies to organise their workforce to achieve business objectives in relation to efficiency and cost control demonstrates that enterprise bargaining is too limiting as the only form of collective bargaining available to the workers. Without a seat at the table these workers are at a significant and unfair disadvantage. The exclusions of other forms of collective bargaining beyond enterprise bargaining puts workers' wages and conditions in competition for a race to the bottom in the name of efficiency and cost reductions in a range of circumstances not considered when the FWA was introduced.

3.37 It is the committee's view that collective bargaining should be open to workers and corporations at the level which allows the workers to negotiate directly with the point of economic power in the same way that Exxon "bargained" with contractors, playing them off against each other, workers and their representatives should be able to bargain in a real sense with the purchaser of their labour. In commerce a range of labour supply relationships exist beyond traditional direct employment. Outsourcing with competitive contracting gives rise to serious and potentially negative consequences for workers' wages and conditions and the FWA

34 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 4.

should be amended to expand the scope of collective bargaining coverage and corporate responsibility to workers beyond direct employees.

3.38 The committee would like to thank ExxonMobil Australia Group of Companies for readily engaging with this inquiry, and notes that the company appears to have complied with the law throughout. Corporations are not obliged to turn a blind eye to opportunities available to them under the law—it is clearly the law that is lacking.

3.39 It is the committee's view that the FWA must be amended to ensure that workers are protected in situations where a company replaces one provider of contract labour with another. These workers, who will often have worked on the site for many years, are not a supplementary workforce; they have all the features of employees and must be protected under the Act.

Use of subsidiaries for agreement approval

3.40 The committee heard evidence concerning a number of companies which had allegedly set up new subsidiaries with the purpose of using small numbers of employees to secure enterprise agreements.

3.41 Australian Institute of Marine and Power Engineers (AIMPE) recounted its experience with an operator in the offshore oil and gas sector, MMA Offshore Ltd:

> The MMA originally stood for Mermaid Marine Australia. They have two wholly owned subsidiaries: MMA Vessel Operations Pty Ltd and MMA Offshore Logistics Pty Ltd. The case study will identify for you that certain employees in one of the subsidiaries were asked to vote on an enterprise agreement even though they did not realise that their employment had been transferred to another subsidiary of the group. The intention, it appears to us, was that the enterprise agreement that had been approved by a small subset was then to be applied to a larger group by changing contractual arrangements between the various subsidiaries of the larger parent group.[35]

3.42 AIMPE was contacted by MMA employee members who had heard that an agreement was being voted on, but had not been given the opportunity to vote. Employees who were part of the same group had effectively been split into two groups, with a small subset of employees assigned to a new corporate entity established for the purpose of avoiding further enterprise negotiations and instead quickly securing an agreement:[36]

> Mermaid Marine has circumvented the two ballots of its seafarers rejecting its proposed Agreements by corporate malfeasance. By selecting a very small group (five seafarers) employed by a wholly-owned subsidiary, it has defied the views of its broader workforce.[37]

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35 Mr Martin Byrne, Federal Secretary, AIMPE, *Proof Committee Hansard*, 18 April 2017, p. 26.

36 Mr Martin Byrne, Federal Secretary, AIMPE, *Proof Committee Hansard*, 18 April 2017, p. 27.

37 AIMPE, *Submission 204*, p. 13.

3.43 The committee invited the company to address these allegations, but the invitation was declined.

3.44 The Victorian Private Sector Branch of the Australian Services Union (ASU) discussed the case of Dnata Australia, a ground handling company owned by the Emirates Group. The company had reportedly set up a subsidiary company, Airport Handling Services Australia Pty Ltd (AHSA), in order to bid for work using this new entity and have enterprise agreements voted on by only two employees:[38]

> Only 2 people are employed by AHSA and only 2 people voted to approve the AHSA proposed agreement. Evidence gathered by the ASU casts doubt as to whether the 2 employees are genuine employees or have been 'fairly chosen' to vote on the proposed agreement. For example employees have been told by senior management that as there is currently no work associated with AHSA the two employees are not being paid.[39]

3.45 Dnata's intention, the ASU submitted, was through AHSA to use workers to perform the same work for inferior wages secured under the new agreement.[40]

3.46 The committee approached Dnata regarding these allegations. Dnata submitted that AHSA had been established:

> …to provide another entity in the market to successfully retain current client airlines should dAS [Dnata Australia Services Pty Ltd] be unsuccessful in retaining those client airlines, and/or to attract new client airlines that dAS would not otherwise be able to effectively compete for.[41]

3.47 Dnata added that there was nothing unusual about this in industry terms, confirming that the AHSA enterprise agreement had 'been set up as a different operating model to the current dAS employment terms and conditions.[42]

3.48 The committee explored this further with Dnata at a public hearing. The company outlined the reasons for its business strategy:

> This organisation is facing a stark reality: Dnata is unable to match on price as a result of our uncompetitive cost base…something has to happen.[43]

3.49 To address its 'uncompetitive cost base', the company decided to maintain its existing dAS business, along with its workers and their existing pay and conditions. The new subsidiary, AHSA, is intended to as a more cost-competitive alternative.

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38 Ms Ingrid Stitt, Secretary, Victorian Private Sector Branch, Australian Services Union, *Proof Committee Hansard*, 18 May 2017, p. 40.

39 Victorian Private Sector Branch, Australian Services Union, *Submission 205*, p. 3.

40 Victorian Private Sector Branch, ASU, *Submission 205*, p. 3.

41 Dnata Australia Pty Ltd, *Submission 209*, p. 3.

42 Dnata Australia Pty Ltd, *Submission 209*, p. 3.

43 Mr Robert Larizza, Head of Human Resources, Dnata Airport Services Pty Ltd, *Proof Committee Hansard*, 18 May 2017, p. 47.

3.50 The committee asked Dnata to confirm how many are employed by AHSA, and was told that the new company employed two workers as of the date of the hearing, 18 May 2017. Both, Dnata confirmed, are senior employees with many years' experience and are commensurately paid at a very high level.[44]

3.51 These two AHSA employees, the committee put to Dnata, were not representative of those who were yet to be employed, and who would be employed at various classifications—most of them not senior. Dnata did not offer a view on whether this was a fair way to select a cohort of employees to secure an agreement, offering instead that its approach complied with the provisions of the FWA.[45]

3.52 The committee notes that AHSA's application to the FWC had been withdrawn in the days preceding the committee's public hearing, and that Dnata's intention was to re-negotiate the agreement with new employees. Asked whether Dnata would recognise the union as being a negotiating body for the new agreement, company representatives replied:

> If that is a provision under the act, then we would comply with the provisions under the act.[46]

Casual employees

3.53 Submissions also noted that employers are increasingly seeking to negotiate with casual workers, who are in a relatively weaker bargaining position, to secure agreements.

3.54 One such strategy involves using voting cohorts to rubberstamp agreements with wider application. The Australian Manufacturing Workers' Union provided several examples of this. In *McDermott Australia Pty Ltd v AWU, AMWU* [2016], a full bench decision of the FWC allowed casual workers the company had on the books to approve an agreement even though they were not performing any work at the time:

> The FWC Full Bench considered that the words "employees employed at the time" referred to in the Act, include any casuals who were on the payroll and engaged to perform casual work. The Full Bench also reasoned that it would have resulted in disenfranchisement to not allow the casual employees a vote on an agreement that might regulate their terms and conditions of employment. The FWC Full Bench did not consider that there was anything unusual about a business choosing not to engage any permanent employees for the four years the enterprise agreement was to operate.[47]

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44 Mr Robert Larizza, Head of Human Resources, Dnata Airport Services Pty Ltd, *Proof Committee Hansard*, 18 May 2017, pp. 50–51.

45 See discussion with Dnata Australia, Dnata Airport Services Pty Ltd, *Proof Committee Hansard*, 18 May 2017, p. 51.

46 Mr Robert Larizza, Head of Human Resources, Dnata Airport Services Pty Ltd, *Proof Committee Hansard*, 18 May 2017, p. 51.

47 AMWU, *Submission 196*, p. 9.

3.55 This case shows that employers can avoid entering into Greenfields agreements by engaging casual workers without protection from unfair dismissal. What protection from unfair dismissal exists for casuals generally requires enforcement through court. A casual employee is highly unlikely to pursue court action against a former employer whilst looking for a new job.[48]

Equal work for equal pay

3.56 In Queensland's aged care sector, home to arguably the lowest paid health workers in the state, the Queensland Nurses Union (QNU) reports a considerable problem with employers seeking to disadvantage groups of workers by securing enterprise agreements which set out differing rates of pay for similar work:

> Assistants in Nursing (AiNs) and Personal Care Workers (PCWs) are the lowest paid of the direct aged care workforce with AiNs generally receiving marginally more than PCWs. The QNU has consistently argued that any of these workers who perform nursing duties must be classified as such i.e. an AiN and paid accordingly… In our experience, employers will engage PCWs to perform nursing work, often amongst other duties, with the express aim of keeping wages low.[49]

3.57 Essentially, employers push down rates of pay by putting in place separate agreements for groups of workers who perform the same work. In practice this means that two, three or more groups of employees can perform the same work, in the same workplace, for different levels of pay. Gradually, the employer will then recruit new workers into the cohort covered by the most disadvantageous agreement:

> That is what Blue Care/Wesley Mission has done in Queensland. They have two enterprise agreements. One applies to registered nurses, enrolled nurses and assistants in nursing. The assistants in nursing do the same work as a personal carers, but personal carers are under a separate enterprise agreement and get around $1.50 less per hour for the same work. Blue Care/Wesley Mission made a decision some years ago not to recruit any new assistants in nursing who are on the higher wages. So every person who has commenced employment with that organisation in the last few years has been engaged with the label of personal carer and paid the lower rate of pay. The only people who remain on the higher rates of pay are those who commenced employment several years ago.[50]

Workers residing overseas

3.58 The Australian Council of Trade Unions (ACTU), describes another 'species of strategic voting cohort', which involves employers deliberately making agreements with a small, temporary, start-up workforce consisting of visa workers who are asked to 'vote' on collective agreements as part of their sponsorship and employment

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48 AMWU, *Submission 196*, p. 10.

49 Queensland Nurses' Union, *Submission 192*, p. 12.

50 Mr Kevin Crank, Industrial Officer, Queensland Nurses and Midwives' Union, *Proof Committee Hansard*, 20 April 2017, p. 9.

requirements. These agreements are signed before the visa workers begin working in Australia, and are then used to lock in conditions in the company's entire workplace, or even a number of workplaces, and 'are exploitative by reason of information asymmetry and the economic dependence of the worker on the offer of work.'[51]

3.59 Multiple submitters voiced concerns about operators in the Australian maritime industry, such as Inco Ships Pty Ltd.[52] Inco is alleged to have secured an enterprise agreement which covers both Australian seafarers and foreign seafarers working on 457 visas by using only a particular cohort—foreign workers—to approve the agreement:

> We understand that no bargaining happened in Australia. The bargaining happened overseas, and approval for the agreement was made overseas… The agreement Inco is seeking to put in place is one that our members have had no input into and, as far as we know, certainly has not been negotiated in Australia.[53]

3.60 This was borne out by evidence from AIMPE. AIMPE submits that Inco's enterprise agreement was signed by an employee representative residing in Odessa, Ukraine, while the signing was witnessed by a person residing in the Philippines.[54] The Australian Maritime Officers Union (AMOU) described this particular company as having 'a record of employing foreign seafarers on 457 visas in place of Australian seafarers.'[55]

When negotiations reach impasse

3.61 Part 2-4 of the FWA regulates the actions of the parties to facilitate enterprise bargaining negotiations. There are times when these negotiations do not end in an agreement. With a decline in the number of workers covered by enterprise agreements[56] and historically low wage growth,[57] the options available to the parties to bring the collective bargaining process to a successful end must be considered.

3.62 In the long running bargaining dispute between AMWU and Cochlear (*AMWU v Cochlear Limited*) Commissioner Cargill analysed the evidence in detail and concluded:

> Cochlear, and the other bargaining representatives, cannot be required to make concessions during bargaining or reach agreement on terms which are

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51 ACTU, *Submission 182*, p. 20.

52 Australian Institute of Marine and Power Engineers, *Submission 204*, p. 16; Australian Maritime Officers Union, *Proof Committee Hansard*, 18 April 2017, p. 42.

53 Mr Jarrod Moran, Industrial Officer, Australian Maritime Officers Union, *Proof Committee Hansard*, 18 April 2017, p. 42.

54 AIMPE, *Submission 204*, p. 16.

55 Mr Jarrod Moran, Industrial Officer, Australian Maritime Officers Union, *Proof Committee Hansard*, 18 April 2017, p. 42.

56 'Fall in collective agreements blamed on union coverage', *The Australian*, 1 June 2017.

57 Australian Bureau of Statistics, *Wage Price Index, Australia*, ABS 6345.0, June 2017.

> to be included in an agreement… I accept that Cochlear has taken its stance in relation to this issue as part of its bargaining strategy. However frustrating this may be it is not unfair or capricious conduct.[58]

3.63 Despite having achieved majority support to commence bargaining, won good faith bargaining orders against the employer and taking protected industrial action in support of claims for a new Enterprise Agreement, Cochlear workers to this day, some five years after the FWC made bargaining orders, do not have an enterprise agreement.

3.64 Part 2-5 of the FWA allows for limited scope for workplace determinations through arbitrated decisions but this Part of the Act does not address the need for arbitral powers to resolve intractable bargaining disputes beyond the limits of the underutilised low paid bargaining stream.

3.65 It is the recommendation of the Committee that the Fair Work Commission be given the power to resolve intractable collective bargaining disputes through arbitration.

58 *AMWU v Cochlear Limited* [2012] FWA 5374.

Chapter 4

Saving the silver: termination of enterprise agreements

4.1 A spate of cases was brought to the committee's attention over the course of this inquiry where employers have seemingly sought to unilaterally terminate enterprise agreements that have passed their nominal expiry date. It is apparent that this is done by employers in order to significantly reduce employee wages and conditions, often for the purpose of obtaining an advantage in negotiations for a replacement agreement.

4.2 Terminated agreements take with them all conditions secured in previous bargaining rounds and have the effect of placing employees back on the relevant industry award—that is, the legal minimum. Once on the award, employees have little ability to negotiate, and are instead manoeuvred into accepting terms and conditions vastly inferior to those they worked under previously: from the bottom of the bargaining floor, anything looks like an improvement.

4.3 This chapter looks at the questionable practice of agreement termination and outlines a number of illustrative case studies.

Agreement termination under the FWA

4.4 Under the *Fair Work Act 2009* (FWA, the Act) enterprise agreements contain a nominal expiry date of up to four years. Existing agreements continue to operate beyond the expiry date until new agreements are negotiated and approved, or they are terminated by the Fair Work Commission (FWC).

4.5 The Act provides two ways in which enterprise agreements may be terminated:

- Under section 219, where agreements are in term and where employees and employers jointly agree to a termination;
- Under section 225, where agreements have passed their nominal expiry date.[1]

4.6 In the latter case, where the nominal expiry date has passed and agreements have rolled over, an application can be made to the FWC for the agreement to be terminated. Applications can be made unilaterally by an employer, employee or employee organisation covered by the agreement. The decision to terminate an agreement, however, rests with the FWC.[2]

4.1 If an application for termination is made, section 226 of the Act states that the FWC must approve the application if:

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1 Australian Manufacturing Workers' Union (Western Australian branch), *Submission 154*, p. 2.

2 Department of Employment, *Submission 149*, p. 5.

(a) the FWC is satisfied that it is not contrary to the public interest to do so; and

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

(i) The views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

(ii) The circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.[3]

4.7 Until recently, applications for termination were uncommon, and the authorities on agreement termination were *Tahmoor Coal*[4] in 2010 and *Aurizon*[5] in 2015. In each of these two cases the FWC took a very different view.

Tahmoor Coal

4.8 The FWC set a relatively high bar in *Tahmoor Coal*, rejecting the company's application for termination on the basis that bargaining for a new agreement was still ongoing, finding that:

> …[I]t will generally be inappropriate for the [Commission] to interfere in the bargaining process so as to substantially alter the status quo in relation to the balance of bargaining between the parties so as to deliver to one of the bargaining parties effectively all that it seeks from bargaining.[6]

4.9 In other words, the FWC was reluctant to terminate nominally expired agreements while negotiations were ongoing for new agreements. This was in recognition of the profound effect terminating an agreement could have on the bargaining process.

4.10 The approach taken in *Tahmoor* was generally adhered to, until *Aurizon.*

Aurizon

4.11 The *Aurizon* case unfolded in 2015. The company had been privatised but ongoing employees were protected by the provisions of their enterprise agreement during negotiations for a new agreement. Rather than negotiate, the company applied to have its agreements terminated.[7]

4.12 To the surprise of many, the FWC decided to uphold the application, terminating all 12 nominally-expired enterprise agreements at *Aurizon* and its related companies.

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3 Section 226, *Fair Work Act 2009*.

4 See *Tahmoor Coal Pty Ltd* [2010] FWA 646.

5 See *Aurizon Operations Limited: Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540.

6 Cited in Australian Council of Trade Unions, *Submission182*, p. 14.

7 Queensland Council of Unions, *Submission 205*, p. 14. "Aurizon" refers to Aurizon Operations Limited, Aurizon Network Pty Ltd and Australia Eastern Railroad Pty Ltd.

> In its reasons, it [FWC] departed from the view expressed in Re *Tahmoor* and found that there was no indication in the Fair Work Act that there should be a predisposition against the termination of enterprise agreement that had passed its nominal expiry date.[8]

4.13 The *Aurizon* decision set a new precedent, the FWC 'finding that it will not always be inappropriate to terminate an expired enterprise agreement while bargaining is ongoing.'[9] This, the ACTU submitted, reset the rules by which employers had to abide:

> The legal orthodoxy therefore is effectively that employers now have a new species of protected industrial action available to them in bargaining, which is to threaten to reduce workers terms and agreements to the award minimum, in order to economically coerce those workers to accept the offers it has made in bargaining.[10]

4.14 The *Aurizon* decision was pivotal. As put by the Queensland Council of Unions (QCU):

> Unions had a belief that the public interest arguments required to bring about the termination of an agreement may have protected these employees. The interpretation placed on section 226 of the Fair Work Act 2009 in this case now places doubt over the protection offered by existing agreements.[11]

Agreement termination as economic coercion

4.15 All enterprise agreements negotiated in good faith between employers and employees provide for pay and other conditions which both parties are bound by and agree to when entering an employer-employee relationship. When these agreements expire, and it comes time to negotiate new ones, the existing conditions form the starting point for negotiations—employers may wish to remove some conditions in order to make financial savings, and employees may seek a further improvement on the status quo, or, at the very least, may wish to minimise any erosion of existing conditions. What follows is the process of bargaining until a compromise serving both parties' interests is reached.

4.16 Terminating an existing agreement disrupts that process, as the ACTU pointed out:

> It is our strong view that such a bargaining strategy is illegitimate, as it is effectively penalising workers for their stance in bargaining.[12]

4.17 Terminating an agreement while the parties are negotiating, or preparing to negotiate its replacement can produce a seismic shift in the bargaining outcome by

8 Australian Council of Trade Unions, *Submission 182*, p. 15.

9 AMWU (WA branch), *Submission 154*, p. 3.

10 ACTU, *Submission 182*, p. 15.

11 Queensland Council of Unions, *Submission 205*, p. 14.

12 ACTU, *Submission 182*, p. 15.

taking away any leverage employees might have had and allowing employers to maximise this advantage.

4.18 The years since the *Aurizon* decision have seen a marked increase in the number of applications for agreement termination.[13] When these cases are analysed it becomes clear that employers are indeed taking advantage of the opportunity to use the threat of termination as a coercive bargaining strategy to secure agreements which employees would otherwise reject.

4.19 This is best illustrated through real-life examples of agreement terminations brought to the committee's attention over the course of this inquiry. For the purposes of this report, the committee will focus primarily on the Griffin Coal Mining Company case, the Parmalat dispute and the Esso controversy.

Griffin Coal, Collie

4.20 Collie is a coal-mining town in Western Australia with a 120-year history in the industry; a blue-collar town whose coalfields once boasted a record 24 years without a strike or day off.[14]

4.21 Today the town is host to two operators: Premier Coal and Griffin Coal. The latter is a subsidiary of India-based Lanco Infratech Ltd and as at December 2016 employed approximately 270 blue-collar employees—production and maintenance workers—who were covered by two separate enterprise agreements and represented by two different unions: the CFMEU (production) and the AMWU (maintenance).

4.22 From 27 April 2012 Griffin's maintenance employees were covered by the *Griffin Coal Mining Company (Maintenance) Collective Agreement 2012*, with a nominal expiry date 26 April 2015. Negotiations for a replacement enterprise agreement were protracted—the parties could not come to an acceptable compromise despite months of bargaining.

4.23 On 15 January 2016 Griffin Coal successfully made an application under section 225 of the Fair Work Act to terminate the 2012 agreement on the basis that termination would:

- remove restraints and inefficiencies in the 2012 agreement;
- improve productivity;
- enable more efficient use of the workforce;
- reduce operational costs and losses;
- promote efficiency; and
- not preclude implementation of a new EA.[15]

13 Queensland Council of Unions, *Submission 205*, p. 14.

14 Mr Michael Murray, Member for Collie-Preston, Western Australian Parliament, *Proof Committee Hansard*, 3 February 2017, p. 5.

15 AMWU (WA branch), *Submission 154*, p. 3.

4.24 The AMWU, representing Griffin Coal's maintenance employees, opposed the application on the following grounds:

- If the 2012 Agreement were to be terminated, the maintenance workers would fall back to the *Black Coal Mining Industry Award 2010* (the Black Coal Award), which would significantly reduce the wages and entitlements of the employees.
- It would create inequality on site, in that the majority of the blue collar workers – the production employees – would continue to be covered by an enterprise agreement with substantially higher terms and conditions of employment.
- The termination would erode the industrial standards not just for the Griffin Coal maintenance workers, but also for all other workers in the coal industry in Western Australia.
- Negotiations for a replacement agreement were ongoing, and terminating the 2012 Agreement would fundamentally alter the employees' bargaining position in the negotiations.[16]

4.25 The FWC heard the application over two days on 6 and 8 April 2016. On 9 June 2016 Commissioner Cloghan found in favour of Griffin Coal. A subsequent AMWU appeal was not successful.[17]

The effect of termination on wages and conditions

4.26 By terminating the 2012 agreement, the FWC decision effectively put Griffin Coal's maintenance employees back on the Black Coal Mining Industry Award, resulting in a significant reduction in pay and conditions:

- A reduction in the base rate of pay of over 40 per cent.[18]
- A move from a 42-hour to a 49-hour working week.
- A move from a four-panel "even time" roster based on 12-hour shifts to a three-panel roster based on 10.5 hour shifts, equating to fewer days off and fewer weekends at home.
- Considerable erosion of superannuation entitlements.
- Considerable erosion of the accrued value of annual and long service leave and redundancy benefits.[19]

4.27 To the employer, these may simply be figures contributing to the bottom line. For employees, their families and households, the impact of such sizable reductions

16 AMWU (WA branch), *Submission 154*, p. 3.

17 AMWU (WA branch), *Submission 154*, p. 3.

18 It must be noted that Griffin Coal offered to continue to pay workers at 40 per cent above the award until March 2017; see Griffin Coal, *Submission 118*, p. 3. Negotiations however continued with the threat of being returned to the award hanging over workers.

19 AMWU (WA branch), *Submission 154*, p. 3.

can be devastating. This is particularly pronounced in cases where employees and their families have borrowed money to buy a home on the basis of what they thought were set, legally enforceable incomes, and where the prospects of alternative employment are poor, as they are in Collie. And the effects do not stop there:

> It must also be remembered that a pay cut impacts not only on immediate incomes but also the value of accrued entitlements such as long service leave. Further, there are flow-on effects to communities as a result of reduced disposable incomes.[20]

4.28 Not only did terminating the agreement place Griffin Coal's maintenance employees onto the industry award—the minimum pay and conditions allowed under law—it also lowered the bargaining floor and exacerbated the power imbalance between the employer and the employed.

In their own words

I have lost 43% of my income and now work 49 hours per week up from 42 hours. Sporting clubs and volunteer groups are also seeing a big drop in support where the wives now are running the clubs and volunteer groups because their partners are at work. We need help.

Mr Rodney Latham, Griffin Coal maintenance worker, Collie

We've had a massive cut in our annual income, and the funny thing is, my husband has to work 60 extra shifts a year to get that pay cut, and it will be nearly 50% come February 2017.

Ms Jane Beauglehole, wife of Griffin Coal maintenance worker, Collie

I am aware that things change, and myself and my fellow employees have tried to be flexible. We have tried to work with the company. For months we went back and forth giving concessions, and each time the company simply refused. The lack of negotiation and contempt that the company displayed was staggering. They have spent millions on expensive lawyers who advise them in exactly how to refuse to engage in any agreement.

Mr Brett Pernich, Griffin Coal maintenance worker, Collie

The maintenance workforce had been aware of Griffins' plight to turn around its loss making business and so offered approximately a 15% pay cut along with a four year wage freeze. This offer was clearly not enough for Griffin Coal as it set its bargaining position at a point so low that a new agreement was unattainable to reach… Commissioner Danny Cloughan had stated in his decision that [the agreement was terminated] to help assist both parties in reaching a new agreement. This far his decision has failed to accomplish its desired outcome and has placed employees and their families under enormous pressure both financially and mentally.

Mr Paul Beauglehole, Griffin Coal maintenance worker, Collie

20 ACTU, *Submission 182*, p. 16.

The award is 35 hours per week but I am being forced to work a 2 and 1 roster and 46.66 hours. I class this as excessive hours and having to work 2 out of 3 weekends is unreasonable. It has caused great stress to myself and my family and my quality of life has been greatly affected. I am being forced to work excessive overtime for greatly reduced income. When I bring this up with my HR department they continually ignore my objections and tell me to seek counselling.

Mr Greg Avins, Griffin Coal maintenance worker, Collie

The Griffin Maintenance Enterprise Bargaining Agreement was cancelled by the Fair Work Commission and they have taken a 43% pay cut along with a FIFO style roster of increased hours that is not family friendly. This means the men work 7 days straight, 3 days off, 7 days on, 4 off. Griffin are getting the best out of my man, while at home he is exhausted recovering from his long hours. The cancellation of the maintenance workers EBA has affected our life as well as our Collie community.

Ms Leonie Scoffern, wife of Griffin Coal maintenance worker, Collie

Reasons for the application

4.29 Submissions provided to the committee discussed the reasons for the termination at length, going into Griffin Coal's motivations for applying to the FWC, as well as the wisdom of the FWC's decision.

4.30 Unsurprisingly, Griffin Coal's perspective differed markedly from that of its employees and their union, the employer describing agreement termination as a necessary, if unfortunate, consequence of financial hardship. Neither Griffin Coal's employees nor their union were persuaded by the company's narrative, instead painting a very different picture of the breakdown in negotiations.

4.31 The committee reviewed evidence provided by the AMWU, Griffin Coal and a considerable number of individual employees. While it is not the committee's place or intention to arbitrate individual industrial disputes or comment on the content of specific agreements, the respective positions are briefly outlined below.

The employer's view

4.32 Griffin Coal stressed that its decision to apply for a termination of the 2012 agreement was not taken lightly, and was pursued as a measure of last resort only when it became necessary. The decision was made necessary, Griffin Coal submitted, for a number of reasons:

> Not least of these reasons were the dire financial circumstances faced by Griffin and the need to make operational changes which were not possible under the Agreement.[21]

4.33 The financial circumstances described meant that Griffin Coal was only operating with financial support from its parent company and banks, with ongoing

21 Griffin Coal, *Submission 118*, p. 2.

losses unsustainably funded by debt. Retaining the pay and conditions offered by the 2012 agreement, Griffin Coal submitted, was an untenable option:

> A new enterprise agreement that locks in losses for the period of another agreement would jeopardise further funding and likely cause Griffin to cease operation with the loss of over 300 jobs. Griffin Coal is a vital member of the South West community in Western Australia with a number of key local industries dependent on the viability of the mine. There would be a significant detrimental knock-on effect if Griffin cannot continue operating.[22]

4.34 Pay and conditions at Griffin Coal had been 'unrealistically generous for a long period', the company asserted, and were set 'at a time when commodities (and particularly coal) market opportunities and relevant revenues were greatly optimistic.'[23]

4.35 Reducing staffing costs was necessary for survival:

> Griffin's goal is to survive by initially reaching a self-sustaining position. That is, a break-even operating position (unrelated to borrowing costs). This will assist to underpin further funding to continue operating. Given that income from domestic contracts is effectively fixed, this has to come from a reduction in costs. We have been working hard at operational improvements. However, labour costs are by far the largest operating cost and at about 50% they are out of all proportion as a percentage of total operating costs.[24]

4.36 In essence, Griffin Coal's argument was that failing to cut staffing costs would ultimately force the company to cease operating in Collie, which would be to the wider community's detriment:

> If they [workers' pay and conditions] are not re-balanced the business cannot continue. We understand that it is not easy to accept a reduction in terms and conditions of employment but we are seeking the changes that are necessary for survival of the business. There is no joy in this task. It is not easy. Members of management have been put under significant personal pressure. However, if sustainable employment terms and conditions are not achieved we will fail all of our stakeholders, including our employees.[25]

4.37 In the company's view, what employees were asking for was unreasonable:

> While it would be nice for the economy and the business to perform on an upward trend at all times, that is not the current reality for many businesses, particularly in our sector. A business must be able to adjust. The Agreement was very generous to employees and completely uneconomic for Griffin.[26]

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22 Griffin Coal, *Submission 118*, p. 2.

23 Griffin Coal, *Submission 118*, p. 2.

24 Griffin Coal, *Submission 118*, p. 2.

25 Griffin Coal Mining Company, *Submission 118*, p. 2.

26 Griffin Coal, *Submission 118*, p. 3.

4.38 Far from agreeing with Griffin Coal's assessment, the AMWU explained that negotiations for a new agreement were in fact stymied from the start due to Griffin Coal's unbending determination to substantially increase the hours worked and reduce the rates that are paid to its maintenance workers.[27]

4.39 Griffin Coal, the AMWU submitted, did not waver from this position during or after the agreement termination:

> Last month, the AMWU took the enormous step of presenting a possible three-panel roster to Griffin Coal. Even this was rebuffed on the basis that it did not provide enough cuts.[28]

4.40 The union also drew the committee's attention to the singular nature of Griffin Coal's position towards its maintenance workers, who the company appears to expect will shoulder the lion's share of its cost-cutting:

> Despite Griffin Coal's constant protestations that they need to reduce labour costs and the 2012 Agreement was a significant barrier to a productive workforce, Griffin Coal have not attempted to move the production workforce or the managerial/administrative staff onto the same arrangements as maintenance workforce.
>
> The 230 production workers are still working an even time roster, and continue to earn wages under their agreement. This is despite their agreement expiring earlier this year in July. The managers and supervisors continue to work an even time roster, with no loss of earnings.[29]

4.41 When asked by the committee, Griffin Coal's Chief Operating Officer, Mr Terry Gray, confirmed that only maintenance workers had had their agreement terminated and pay and conditions cut. At the time of the public hearing, no application had been made to terminate Griffin Coal production workers' enterprise agreement, which had nominally expired, and white-collar administrative staff had not had wages reduced.[30]

Employee views

4.42 Employees rejected Griffin Coal's assertion that they had enjoyed unrealistically high wages and conditions for too long. Mr Brett Pernich, an electrician with Griffin Coal, stated:

> All this stuff about being high-paid and all of that? We were actually below industry standard, if you like.[31]

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27 AMWU (WA branch), *Submission 154*, p. 2.

28 AMWU (WA branch), *Submission 154*, p. 4.

29 AMWU (WA branch), *Submission 154*, p. 4.

30 See discussion with Mr Terry Gray, Chief Operating Officer, Griffin Coal Mining Company Pty Ltd, *Proof Committee Hansard*, 6 February 2017, p. 12.

31 Mr Brett Pernich, *Proof Committee Hansard*, 3 February 2017, p. 9.

4.43 Others called on the company to take responsibility for its financial management. Their evidence was diametrically opposed to Griffin Coal's narrative, and questioned the company's determination to address its financial problems by slashing staffing expenditure:

> [T]hough the company promotes its excessive financial losses, it still somehow maintains a team of top-notch lawyers to break its employees down to wages and conditions from several decades ago, yet fails to find the same amount of money to execute its main duty and reason for existence: to mine coal.[32]

> The numbers do not add up. Even if we worked for nothing, which they would be quite happy to agree to, it would still not be enough to save this company.[33]

> My employer the Griffin Coal Mining Company has set many new precedents in Corporate Australia since coming under the ownership of Indian giant Lanco Infratech. Over the past 6 years Griffin Coal has managed its business into a state of decay and has focused the blame on everyone else but themselves.[34]

4.44 It is beyond the scope of this inquiry to delve into Griffin Coal's financial circumstances, however the committee notes that parent company Lanco Infratech went into receivership in April 2017.[35]

4.45 The committee also notes reports that accrued entitlements earned by Griffin Coal's workers at $62 an hour are to be paid out at only $30 an hour.[36]

Parmalat

4.46 Parmalat Australia is one of the major dairy manufacturers operating in Australia and is part of a European multinational—Lactalis Group of Companies. Parmalat took over the ownership and operation of the former Fonterra Echuca dairy product manufacturing site in February 2016, transferring existing Fonterra employees into its employment in the process.

4.47 Under transmission-of-business provisions within the FWA, Parmalat recognised all employment service and entitlements of the transferred employees. Parmalat was bound by the provisions of the existing enterprise agreement, negotiated by employees prior to Parmalat taking over. Many of those provisions had featured in enterprise agreements covering the site for over 15 years.[37]

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32 Mr Brett Pernich, *Submission 172*, p. 1.

33 Mr Brett Pernich, *Submission 172*, p. 1.

34 Mr Paul Beauglehole, *Submission 169*, p. 1.

35 See www.watoday.com.au/wa-news/parent-company-of-collie-miner-griffin-coal-put-into-administration-20170505-gvz31b.html (accessed 11 July 2017).

36 See www.sbs.com.au/news/article/2017/05/05/collie-wa-mine-owners-receivership (accessed 11 July 2017).

37 Parmalat Echuca AMWU and ETU members, *Submission 201*, pp. 1–2.

4.48 The agreement Parmalat inherited had a nominal expiry date of 31 August 2016—negotiations for a new agreement began between Parmalat, the AMWU and ETU (unions representing the workers) in July 2016.

4.49 A submission from workers (and members of the AMWU or ETU) described Parmalat's opening position:

> At the start of enterprise agreement negotiations, Parmalat presented a very aggressive log of claims attacking Echuca site employment conditions. The following were part of the company log of claims:
>
> - A four year wage freeze;
> - A reduction of employer superannuation contributions;
> - The company to have total freedom to engage contractors and labour hire personnel to do the work on the Echuca site. No minimum wage rates and employment conditions were to apply to such labour. (This would results in a 40% to 50% reduction in wage rates paid on the site);
> - A significant reduction to employee rights in relation to union representation.[38]

4.50 Parmalat, in turn, submitted that workers had made the following log of claims:

- Wage and allowance increases of 5.0 per cent per annum.
- Any time worked by an employee on a rostered day off would be paid at double time for the whole day, with the employee to be provided with an additional day's leave.
- A right for all categories of permanent employees to be offered overtime work before any casual employee is allocated work (under the 2015 Enterprise Agreement this 'right of first refusal' was granted only to particular categories of employees).
- A requirement that changes to manning levels were only able to be implemented if agreed by the majority of employees covered by the new enterprise agreement.
- An increase of paid union meetings from 4 hours per year to 70 hours per year.
- An increase of two pay levels (to a majority of employee) from level 6 to level 8.[39]

4.51 As with the Griffin Coal case, considering the parties' respective bargaining positions is beyond the scope of this inquiry.

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38 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 2.

39 Parmalat Australia Pty Ltd, *Submission 211*, p. 3.

4.52 The company did not wait long to seek to terminate the existing agreement once employees rejected the above proposal, applying to the FWC in early October 2016—five weeks after the agreement's nominal expiry date.[40]

4.53 The impact of a termination would have been considerable:

> If the Fair Work Commission approved Parmalat's application to terminate the existing Echuca site Enterprise Agreement, the wage rates of all employees would be reduced by at least 40%. Such an agreement termination would result in further reductions in wages with lower overtime and shift penalty loadings applying. The combined effect of the application of award rates and penalty loadings would be an approximate 50% reduction in the wage entitlements paid to Echuca site employees. This would mean that the annual wage bill paid to the current 70 Echuca site employees would be millions of dollars less than was paid to these employees in the calendar year 2016.[41]

4.54 The unions responded by announcing protected industrial action. Within the first hour of the strike, Parmalat implemented an indefinite lockout of its Echuca site workers and negotiations for a new agreement unfolded with the spectre of termination hanging over them.[42]

4.55 The committee was pleased to note that the agreement was not terminated, due at least in part to a delay in the FWC's processing of Parmalat's application for termination.[43]

4.56 With the threat of termination withdrawn, the parties ultimately reached a mutually acceptable agreement through continued negotiation.

Esso Australia

4.57 A case which graced headlines across the country is that of Esso Australia, a company which applied to have enterprise agreements covering its oil and gas onshore and offshore operations terminated in August 2016, following protracted negotiations with employees and the unions representing them, the Australian Workers' Union (AWU), Electrical Trades Union (ETU) and AMWU.

4.58 Both sides agree that negotiations were long-drawn-out.[44]

4.59 Speaking before the committee, executives representing the company described the termination application as a means of bringing negotiations to a head

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40 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 2.

41 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 2.

42 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 3.

43 Parmalat Echuca AMWU and ETU members, *Submission 201*, p. 3.

44 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 5.

and a path 'within the Fair Work Act to essentially get to an end point, rather than ongoing negotiations.'[45]

4.60 The AWU described the potential impact of such a termination:

> Esso has told the AWU that if the EAs are terminated by the FWC, pay rates won't be cut for six months, but after that all bets are off. It is anticipated that in event of a termination, cuts could be 40% or 50%.
>
> Termination of these agreements would inevitably affect the pay and conditions of those in some of the most dangerous workplaces in the country. It is a threat, and one not taken lightly by the AWU, particularly in the light of terminations already achieved in oil and gas, mining and freight industries.[46]

4.61 This case had a pronouncedly different outcome than that of Griffin Coal. In response to the company's application to have its agreements terminated, the unions notified the company that 600 workers would go on strike, potentially affecting gas supplies to Victoria, New South Wales and Tasmania.

4.62 So concerned was the Victorian state government about the prospect of large-scale industrial action against the largest domestic supplier of gas, that it intervened, applying to the FWC to stop termination proceedings and force the parties back to the negotiating table.[47] In this case it is clear that the union's leverage in raising the prospect of large-scale industrial action—which could have brought much of the nation's gas supply to a screeching halt—made the difference for these workers.

Does agreement termination constitute avoidance of the FWA?

4.63 Employers are quick to point out that applying to have agreements terminated is well within the law. For example Griffin Coal submitted:

> The Fair Work Act contains various obligations and mechanisms to facilitate the making of an agreement in good faith. Griffin has complied with all of the rules. There has been no avoidance of the Fair Work Act as stated in the terms of reference for this Inquiry.[48]

4.64 On the face of it at least, none of Griffin Coal's actions appear to be illegal, nor has anyone alleged differently. Instead, these cases expose a flaw in the FWA, because agreement termination allows employers to subvert the bargaining process and coerce employees. The ACTU described the use of such tactics as 'illegitimate':

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45 See Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 32, and Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 5.

46 Australian Workers' Union Victorian Branch, *Submission 193*, p. 4.

47 'Emergency intervention in Esso work dispute to avoid gas and power crisis', *The Sydney Morning Herald*, 2 December 2016, available at: http://www.smh.com.au/business/workplace-relations/emergency-intervention-in-esso-work-dispute-to-avoid-gas-and-power-crisis-20161201-gt2d0z.html (accessed 6 September 2017).

48 Griffin Coal, *Submission 118*, p. 3.

> It is our strong view that such a bargaining strategy is illegitimate, as it is effectively penalising workers for their stance in bargaining. The Fair Work Act is otherwise very clear in not permitting employers to engage in forms of economic coercion against their workforce during bargaining except by way of a lockout in response to protected industrial action.[49]

A problem with the FWA

4.65 Many witnesses called into question the prudence of the FWC's decision to terminate the Griffin Coal agreement, questioning whether the commissioner gave enough weight to the interests of the employees and the wider community.[50]

4.66 Mr Jay Scoffern, a maintenance worker with ten years' service at Griffin Coal, gave this account of his encounter with the commissioner who decided the employees' fate:

> Mr Cloghan told me personally that he couldn't listen to “bush lawyers” and “bush accountants”. Why not? Fair Work to my understanding was a method for lament to strike a fair and honest deal with a big company without the use of lawyers. Not so, I believe not one thing that the AMWU members put forward against the termination of the EBA was considered adequately.[51]

4.67 In assessing an application for agreement termination, a single Fair Work commissioner exercises discretion in determining whether termination is in the public interest. Appealing this decision is almost futile, as a lawyer acting for the AMWU explained:

> The only way you can overturn a single commissioner's decision is to demonstrate that there was an error of law. This is why we say there is a problem with the act. What the full bench ultimately said was that the commissioner applied the legal tests but he exercised his discretion in a particular way. There is a really old authority of the house and the king[52] which effectively says that it is very, very difficult to overturn discretionary decisions of single commissioners.[53]

4.68 In other words, the way in which a single commissioner exercises his or her discretion is very difficult to appeal, since appeals are not an assessment of the rationale behind a particular decision, but rather about the commissioner's authority to exercise discretion.[54]

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49 ACTU, *Submission 182*, p. 15.

50 See for example Mr Mick Murray MLA, Member for Collie-Preston, *Submission 166*, p. 3.

51 Mr Jay Scoffern, *Submission 168*, p. 1.

52 *House v The King* (1936) 55 CLR.

53 Mr Timothy Kucera, Turner Freeman Lawyers, acting for AMWU, *Proof Committee Hansard*, 3 February 2017, p. 17.

54 See discussion in *Proof Committee Hansard*, 3 February 2017, p. 17.

Defining the public interest

4.69 The FWA does not clearly articulate the public interest issues that the FWC should or must consider in making its decisions. The ACTU argued that it is therefore unclear:

> …whether there is any public interest in employers actually continuing to be bound by the agreements they sign; or any public interest in protecting workers from economic coercion when they seek to bargain collectively.[55]

4.70 It is worth noting again that in the Griffin Coal case, the employer argued that the company's survival depended on reducing staffing expenditure.[56] Griffin Coal's Chief Operating Officer, Mr Terry Gray, told the committee that the maintenance workers' salary cuts were necessary in order to prevent the company from continuing to operate at a significant loss:

> We understand quite genuinely that the scale of the change that we are asking the employees to take is significant, that it does create significant financial on-costs for these individuals, but it is in our view a very necessary step in order to take this business forward with sustainability.[57]

4.71 It is also worth noting that the termination did not prevent Griffin Coal's continued financial decline.[58] Together with the fact that terminating the agreement undermined the bargaining process and had a devastating effect on workers, their families and the small Collie community, the 'public interest' remains an obscure justification.

Committee view

4.72 Terminating an existing agreement imposes an unnatural end to the bargaining process. It lowers the bargaining floor and effectively allows employers to coerce employees into accepting anything better than the legal minimum. Put aptly by Mr Ben Davis, Secretary of the AWU Victoria, submitted that the leverage termination gives employers, forces unions and the workforce 'into basically trying to save the silver'.[59]

4.73 The committee is of the view that enterprise agreement termination is being used as an uncompromising bargaining strategy by some employers, with blithe disregard for both employees' right to bargain, and the objectives of the FWA. The committee concludes that these cases expose a failure of the Act to protect workers.

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55 ACTU, *Submission 182*, p. 15.

56 Griffin Coal, *Submission 118*.

57 Mr Terry Gray, Chief Operating Officer, Griffin Coal, *Proof Committee Hansard*, 6 February 2017, p. 2.

58 See www.sbs.com.au/news/article/2017/05/05/collie-wa-mine-owners-receivership (accessed 18 July 2017).

59 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 32.

4.74 There is, however, nothing illegal about employers exploiting loopholes in the FWA to pursue ruthless industrial strategies, and therein lies the problem. Employers are within their rights in applying for expired agreements to be terminated, and the FWC is makes a decision to accept or reject the application applying the test prescribed by the Act as it has been interpreted in *Aurizon*.

4.75 The committee holds that, as EBAs are entered into by agreement by the employer and employees, terminations should only be approved by the FWC when there is mutual agreement of both parties. To allow one party to unilaterally apply and be granted termination appears to fundamentally undermine the purpose employer-employee enterprise agreement making.

4.76 The committee concurs with the AMWU's view that section 225 of the FWA 'in its current form threatens collective bargaining and democratic participation by workers in the industrial instrument that covers their terms and conditions.'[60]

4.77 The committee concludes that section 226 of the Act should be amended to prevent the FWC from terminating an agreement where workers would be worse off as a result of the termination. This would have the effect of protecting the living standards of workers as the parties go about the task of negotiating a new collective agreement. Failing to do so will allow further erosion of the collective bargaining process and expose workers to significant vulnerability. Any remaining concerns about the public interest could readily be covered off via changes to part 2-5 of the Act referred to in chapter 3 of this report.

Recommendation 1

4.78 **The committee recommends section 226 of the Act should be amended to prevent the FWC from terminating an agreement where workers would be worse off as a result of the termination.**

60 AMWU (WA), *Submission 154*, p. 7.

Chapter 5
Labour hire

> The use of labour hire, 'on hire', or 'agency' workers has primarily become an avoidance strategy where the legal fiction of a distinct and separate workforce is used to mask gross exploitation and the shifting of legal liability that would otherwise reside with the host employer under the *Fair Work Act 2009*.[1]

5.1 The term 'labour hire' describes an indirect employment relationship in which an employer, a 'host' company, instead of employing workers, contracts an agency to provide workers in return for a fee. There is thus no direct employment relationship between the host and employee, allowing in some situations the company to avoid certain employment conditions and responsibilities, and denying workers the entitlements and protections associated with direct employment.

5.2 This chapter looks at the use of labour hire through evidence presented by workers, employers and unions. The chapter focuses specifically on the ways in which labour hire is used to avoid responsibilities under the *Fair Work Act 2009* (FWA, the Act), examined through case studies presented by witnesses and submitters.

The growth of labour hire

5.3 Labour hire arrangements have been a feature of the labour market for decades, however their use has grown steadily across industries in recent years.[2] Today Australia is near the top of Organisation for Economic Co-operation and Development (OECD) country rankings for the use of agency work.[3]

5.4 The Australian Chamber of Commerce and Industry (ACCI) submits that the use of labour hire is not in itself a deliberate non-compliance with the FWA, and is instead one of many diverse forms of engagement. ACCI points to a rapidly and perpetually changing employment environment which requires flexibility and adaptability from employers, workers and unions:

> In today's society people will undertake multiple types of work under a variety of arrangements across their working life. There is no 'one size fits all' employment model that will suit the circumstances of all employees or all employers and no single 'right method' of labour engagement.[4]

5.5 The Productivity Commission (PC) looked at reasons for the prevalence of employment forms which differ from traditional ongoing employment arrangements:

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1 Construction, Forestry, Mining and Energy Union, *Submission 200*, p. 3.

2 Australasian Meat Industry Employees' Union, *Submission 158*, p. 3.

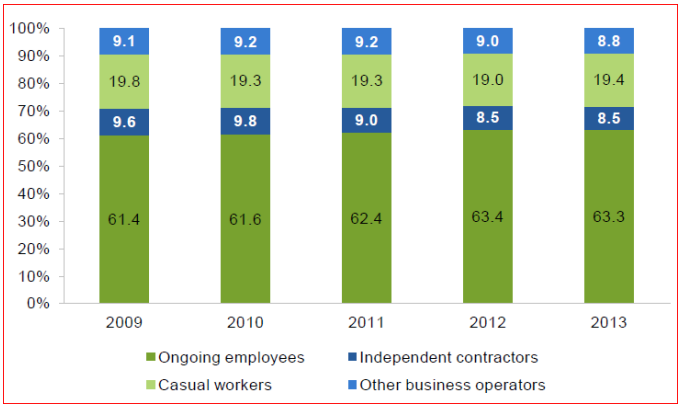
3 Australian Council of Trade Unions, *Submission 182*, p. 4.

4 Australian Chamber of Commerce and Industry, *Submission 148*, p. 7.

> The prevalence of alternative forms of employment depends on the degree to which they meet the needs of employers, match the preferences and circumstances of workers and are affected by institutional factors. Whether or not an employer seeks to use a certain form of work depends on their assessment of how productive and how costly the workers might be.[5]

5.6 The following figure from the PC indicates that casual workers and other forms of non-ongoing employment accounted for almost 40 per cent of employment in recent years:

Figure 5.1—Stability in the forms of employment, 2009–2013, per cent of total workforce



Source: Workplace Relations Framework, Productivity Commission, Final Report, 2015, p. 800.

5.7 Details on the incidence of labour hire use are limited. ACCI submitted that labour hire represents a relatively small percentage of the overall Australian workforce, approximately 1.2 per cent.[6] The Australian Council of Trade Unions (ACTU) reports that there are currently between 2000 and 3500 temporary agencies operating in Australia, but fewer than 2 per cent of these employ more than 100 workers.[7]

5.8 ACCI cites the PC's view that alternative employment arrangements can boost productivity and lower costs, and that the benefits of this ultimately flow to the community as a whole. Furthermore, ACCI quotes the PC's conclusion that arrangements such as labour hire are 'unlikely to undermine employee bargaining power to any great extent.'[8]

5.9 The committee received a considerable volume of evidence challenging this assertion. Although it is indisputable that labour hire arrangements benefit employers

5 Productivity Commission, *Workplace Relations Framework*, Final Report, 2015, p. 801.

6 ACCI, *Submission 148*, p. 8.

7 ACTU, *Submission 182*, p. 8.

8 ACCI, *Submission 148*, p. 8.

and to a certain extent permit flexibility which might be attractive to some workers, case studies the committee looked at suggest that labour hire:

- has a pronounced and disruptive effect on enterprise bargaining; and
- is being used by some employers to minimise costs by undermining the industrial system.

5.10 The critical distinction which must be made is that it is not labour hire *per se* that has the above effects, but rather how employers use labour hire workforces strategically to achieve these outcomes.

5.11 These points are outlined in the following sections.

Disposable workers

5.12 Labour hire was initially envisaged as a way of supplementing existing workforces. Its continued exemption from mainstream industrial regulation means labour hire is now also being used to replace existing workforces.[9] This section looks at what labour hire employment entails.

5.13 Host companies which use labour hire often already have employed workers performing those jobs, but under the protections of the FWA. Labour hire involves the provision of labour only, not additional expertise beyond that held by the company's existing employees. Workers have their services effectively 'rented out' to clients of the labour hire business.[10]

5.14 Host companies which save on staffing costs by using labour hire workforces have very few obligations to those workers, who in turn have very few rights or means to influence their relationship with the host company:

> Employers are successfully shielding their profits from the demands of workers by making a third party employ the workers which shields them from having to take any responsibility…and having any concern or care for the welfare of those workers.[11]

5.15 The ACTU describes the use of labour hire as a rejection of the fundamental policy intent of the FWA, and submits that this manifests in a number of ways:

> a) The common law does not see an employment relationship between the host employer that directs the work and the worker. Further, it has generally rejected the idea that there could be more than one employer;
>
> b) Labour hire workers cannot bargain for a collective agreement with the host employer, or participate in bargaining for such an agreement. Whilst labour hire workers can make a collective agreement with the labour hire agency (subject to the practical barriers which attach to

9 ACTU, *Submission 182*, p. 9.

10 CFMEU, *Submission 200*, p. 4.

11 Mr Michael Nguyen, National Research Officer, Australian Manufacturing Workers' Union, *Proof Committee Hansard*, 15 March 2017, p. 6.

their predominantly casual form of engagement), the agency is not the entity that on a day to day basis controls the work that they perform and the conditions under which and location where it will be performed;

c) Labour hire workers cannot make an unfair dismissal claim against a host employer, even where the host employer is the decision maker as to whether the worker will have a continuing job at the workplace or not;

d) The "General Protections" contained in the *Fair Work Act 2009* (Cth) adapt poorly to the work situations of labour hire workers because in the main they protect the labour hire agency itself from "adverse action" rather than the workers the agency employs and makes available to workplaces; and

e) Workers in labour hire arrangements are less inclined to speak up about matters of concern to them as they understand that the decision to request that they no longer be supplied to the workplace can be made by the host employer at any time, and may mean they have an uncertain period of time before another host engagement becomes available.[12]

5.16 Research from the University of Melbourne, cited by the ACTU, finds that labour hire workers are believed to experience the most volatile weekly hours of work.[13] Some workers report being required to be available on the worksite for a full week, but receiving daily text message notifications telling them whether they would be required the following working day. Such jobs deny workers the ability to bargain for better conditions and lack basic security, including the security of employment needed to obtain a home or car loan.[14] Labour hire workers, the ACTU submits, 'come closest to the "disposable worker" model at the heart of the "just-in-time" workforce that has cemented itself in the Australian labour market over the last twenty-five years:'[15]

> Labour hire is overwhelmingly used as an avoidance strategy and its continued operation in the present regulatory setting is untenable unless one accepts that the workers who are engaged by labour hire agencies are second class citizens.[16]

5.17 In some circumstances, labour hire companies establish opaque corporate and employment structures. While the leading temporary work agencies operating in Australia are Skilled, Manpower, Spotless, Programmed Maintenance Services (Programmed) and Chandler Macleod, these companies often engage subcontractors

12 ACTU, *Submission 182*, p. 8.

13 ACTU, *Submission 182*, p. 5.

14 ACTU, *Submission 182*, p. 11.

15 ACTU, *Submission 182*, p. 8.

16 ACTU, *Submission 182*, p. 10.

through complex and sometimes opaque corporate arrangements which can make it difficult to ascertain which company a particular worker is actually employed by:

> [A] labour hire employee may be legally situated deep within complex layers of inter-corporate subcontracting arrangements as well as the commercial arrangements between the labour hire and host. The case reported in *Matthew Reid v Broadspectrum Australia Pty Ltd* identifies some of the practical difficulties that this can present; namely, complying with the practice and procedure at one's workplace can lead to one being terminated by one's employer – who is *not at one's workplace*.[17]

5.18 The federal government has done little to address concerns regarding labour hire. By contrast, the ACTU reports, some state governments have been more receptive. In Victoria, for example, the state government has considered the findings of an extensive inquiry and agreed to establish a system for licencing labour hire agencies operating in the horticultural, cleaning and meat industries.[18] The ACTU reported that a consultation process is currently underway on labour hire regulation in Queensland and in South Australia, following similar parliamentary inquiries in those states.[19] Since that time the committee understands that a bill has been introduced into the Queensland Parliament to create a labour hire licensing regime in that state.

Loss of conditions

5.19 Legal Aid NSW submits that using labour hire allows host companies to avoid paying redundancy entitlements when they no longer require workers. Even where the worker has spent years performing identical work to an employee of the host company, that worker is not entitled to a redundancy payment.[20]

5.20 This is particularly problematic where the decision that a worker's service is no longer required is seemingly unconnected to the worker's performance or conduct. The CFMEU explains that labour hire workers face jurisdictional impediments and considerable difficulty in making an application for an unfair dismissal remedy:

> Our members have had their employment terminated after having worked on a full time basis for one host employer for a considerable time, often several years. They are often simply told by the labour hire agency that the host employer no longer desires their presence on site. Because of the current prohibitions under the unfair dismissal regime in the FW Act, these labour hire employees do not have any recourse to challenge their dismissals.[21]

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17 ACTU, *Submission 182*, p. 8.

18 ACTU, *Submission 182*, p. 10; Inquiry into the Labour Hire Industry and Insecure Work, final report and government response available at http://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry

19 ACTU, *Submission 182*, p. 11.

20 Legal Aid NSW, *Submission 167*, p. 4.

21 CFMEU, *Submission 200*, pp. 5–6.

5.21 Similarly, even where labour hire workers are dismissed for reasons relating to performance, this may occur without the worker being accorded procedural fairness.[22]

5.22 The Act provides certain provisions requiring labour hire companies to consult with their employees if they are no longer required by the host company. The labour hire company has, for example, an obligation to consider redeploying their employee elsewhere; however, this is subject to redeployment options being available. Legal Aid NSW submits, however, that a large portion of labour hire employees are engaged on a casual basis, and as such they are not entitled to redundancy payouts under the FWA.[23]

5.23 The Australasian Meat Industry Employees' Union (AMIEU) reports that labour hire arrangements help employers minimise their workers' compensation insurance premiums.[24] Reduction of corporate responsibility for injuries and deaths at work is of grave concern, particularly given media reporting around deaths at work in the building and construction industry, where the use of labour hire is rife and some construction sites are known for their concentrations of young, inexperienced workers—unsupervised apprentices, inexperienced backpackers. The committee notes a recent example, the October 2016 death at a Finbar construction site in Perth of a young German backpacker, recruited through a labour hire firm, whose death on site did not prompt the host company to pause work on site or even contact the police promptly.[25]

5.24 The Queensland Council of Unions (QCU) cites research suggesting that labour hire is also used as 'a coercive discipline over the workforce by the threat of unemployment.'[26] The primary reason employers seek to use labour hire, however, is to reduce staffing costs.

5.25 The case study below illustrates this point.

Carlton & United Breweries

5.26 Carlton & United Breweries (CUB) produces some of Australia's best-known beer, including VB, Carlton Draught, Crown Lager and Cascade. The company has around 1500 workers nation-wide; 420 of these are operational employees working in breweries. CUB reports significant investment in training and development, and seeks to position itself as an 'employer of choice' by providing pay and employment conditions which exceed the National Employment Standards (NES) and relevant awards.[27]

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22 CFMEU, *Submission 200*, p. 6. The FWA provides access to procedural fairness for employees.

23 Legal Aid NSW, *Submission 167*, p. 4.

24 Australasian Meat Industry Employees' Union, *Submission 158*, p. 3.

25 Needless death of young girl on Finbar site, CFMEU, https://wa.cfmeu.org.au/news/needless-death-young-girl-finbar-site (accessed 1 August 2017).

26 Queensland Council of Unions, *Submission 206*, p. 3.

27 Carlton & United Breweries, *Submission 156*, [p. 3].

5.27 CUB has been taking gradual steps to outsource its workforce since 2009. In 2009, the company outsourced its Abbottsford site in-house maintenance employees to a labour hire company, ABB. At the time, those workers secured an enterprise agreement with ABB which 'substantially maintained the majority of their existing terms and conditions.'[28]

5.28 The labour hire contract was awarded to a new agency, Quant, in 2014, again with substantially preserved terms and conditions for the maintenance workers. In late 2015 Quant entered into bargaining with the maintenance workforce and an Enterprise Agreement, still substantially preserving their terms and conditions, was voted on in early January 2016, and was still in effect.[29] However, seven weeks before that contract expired, 55 maintenance workers were called to an off-site meeting and told that their employment had been terminated.[30] These workers, who became known as the 'CUB55' during the protracted dispute which followed, had over 900 years of combined service at CUB between them.[31]

5.29 This was not a last-minute decision by CUB; it was part of a careful, strategic plan for reducing its expenditure on labour without necessarily changing its workforce. CUB had a pre-arranged, temporary, replacement workforce ready and in place on the next working day—labour hire workers flown in from other breweries, their accommodation paid for—and these workers were brought in on buses in front of long-serving ex-employees protesting outside.[32]

5.30 The CUB55 workers were told they could re-apply for their jobs, but through CUB's new labour hire agency, Catalyst Recruitment, a subsidiary of Programmed, which CUB had entered into a new contract with for the provision of labour hire.[33] Predictably, the contracts on offer through Catalyst entailed considerable reductions in pay and conditions. The ETU explained that the Catalyst enterprise agreement have reduced wages by 65 per cent. It was also a pre-existing agreement which had lain dormant for five years. Its harsh terms and conditions had in fact been put in place years earlier, when Catalyst used three casual employees to secure a non-union enterprise agreement which was in no way connected to CUB.[34]

5.31 Without warning for the workers, Programmed/Catalyst terminated their contract with CUB around September 2016. The ETU reports that 'CUB refused to tell

28 Electrical Trades Union of Australia, *Submission 197*, [p. 16].

29 Mr Alan Dinon, Member, Victorian Branch, Electrical Trades Union, *Proof Committee Hansard*, 15 March 2017, p. 8.

30 See discussion with CUB, *Proof Committee Hansard*, 18 May 2017, pp. 3–4.

31 ETU (Victorian Branch), *Submission 184*, p. 6.

32 See discussion with CUB, *Proof Committee Hansard*, 18 May 2017, p. 4.

33 ETU, *Submission 197*, [p. 16].

34 ETU, *Submission 197*, [p. 16]. The use of small, unrepresentative voting cohorts to secure enterprise agreements is discussed in Chapter 3.

the union the terms and conditions upon which the new employees [were] engaged' at the time.[35]

5.32 Far from being an isolated incident, the AMWU submits that the CUB example reflects a serious consequence of the nature of the labour hire industry more broadly:

> This unfairness is compounded by the influence of the 'labour hire' market, where labour hire employers are under competitive pressure to reduce the amount for which they are prepared to provide the labour, even though they may not have the labour which they are purporting to be providing. This particular example at CUB is the norm in many long term labour hire arrangements, where the incoming labour hire employer attempts to hire all or a significant proportion of the outgoing labour hire employer's employees.[36]

From the workers' perspective

5.33 The committee received a submission from the CUB55 outlining events at the Abbotsford brewery. Excerpts from individual workers are provided below, and tell of the workers' shock at being treated so poorly after years of loyal service.

35 ETU, *Submission 197*, [p. 16].

36 AMWU, *Submission 196*, p. 15.

CUB55 in their own words[37]

So they sacked us on the Friday, on the Monday there was already an alternative workforce doing our job. That takes time.

Chris

I've worked at the Brewery for 40 years…I'm hardly labour hire.

Allen

I worked on Thursday 6pm to 6am and I get a phone call, from a mate actually, not even from the company… I had to go straight after work, after doing a 12-hour nightshift. So I went to the hotel, and we were told we were all sacked. They wouldn't tell us who the contractor was or what the conditions were, but we were told we could apply for our jobs.

Chris B

We all have a unique set of skills, not the skills you can just import. Skills that were learned by us over a number of years, that are unique to this industry. So the injustice of throwing us out, trying to import skills from all walks of Australia. It clearly hasn't worked. It would never work. That is the injustice we all feel.

Paul

The cost on their personal lives is much bigger. You can't read it, you can't see it but everyone is suffering in some way. I am suffering myself too.

Andy

With this new Agreement there is no provision for us apprentices anymore…After 4½ years of a 5 year apprenticeship we are now left, we can't get our trade certificates…At the end of this year we would have been qualified in dual trades, electrical and instrumentation, we can't get that anymore.

Apprentices

I know I work with the most talented guys in Australia. We work really hard to get the machinery up to a world class maintainable standard.

And for that to be thrown away through substandard practices just breaks my heart. A question a lot of people ask us is, how can this happen in our country?

I can't really answer that. I honestly do not know.

Chris

CUB manager's diary entry

5.34 Evidence in the form of a diary belonging to Mr Sebastian Siccita, part of the CUB management team during the industrial dispute, came to light during the inquiry. The contents of the diary, which Mr Siccita and CUB's new management team

37 ETU (Victorian Branch), *Submission 184*, pp. 3–4.

distanced themselves from when questioned by the committee; appear to suggest CUB was prepared to stop at nothing to crush its embattled workers.[38]

5.35 Under the title 'Winning a War', the diary excerpt lists a number of tactical suggestions, quoted below:

- Shoot the shit out of them.
- Play by rules they're not prepared to play by.
- Cut their supply lines and starve them out.[39]

5.36 The excerpt also includes arrows pointing to the words 'lawyer fees' and 'defamation'. The committee sought clarity on whether CUB had a legal strategy in place during the dispute, which CUB management confirmed but did not wish to elaborate on:

> At the time, yes, we had lawyers involved. We would certainly be interested in any attorney-client privilege that would be attached to that.[40]

5.37 The committee notes that Mr Siccita had difficulty recalling whether he was familiar with the diary or its contents despite leafing through its pages during a public hearing. Minutes later Mr Siccita contradicted this position by attempting to retain possession of the diary on the grounds that it was his. The committee thanked Mr Siccita for confirming that the diary was his.[41]

The resolution

5.38 The committee notes that six months after having their employment terminated without warning, following large-scale community picket and campaign and a damaging national boycott of CUB products, the company abandoned its industrial strategy and all workers were reinstated on agreed pay and conditions based on those that applied prior to the dispute.

5.39 It is noteworthy that CUB came under new management in late 2016. Unlike their predecessors, the new management team engaged with workers and the union for an effective resolution to the dispute, and has committed to a more open, consultative and positive relationship with its workers and their representative unions in future:

> One of the first acts of our new management team in October last year was to review the industrial dispute at our Abbotsford brewery and reach an expeditious resolution. We were pleased that the dispute at the Abbotsford brewery was successfully resolved within two months of CUB's new

38 Diary excerpt, p. 1, tabled 18 May 2017. See discussion, *Proof Committee Hansard*, 18 May 2018, pp. 5–6.

39 See discussion with Mr Sebastian Siccita, Abbotsford Plant Manager, Carlton & United Breweries, *Proof Committee Hansard*, 18 May 2017, p. 5.

40 Mr Craig Katerberg, Vice President, Legal and Corporate Affairs, Carlton & United Breweries, *Proof Committee Hansard*, 18 May 2017, p. 5.

41 See discussion with Mr Sebastian Siccita, Abbotsford Plant Manager, Carlton & United Breweries, *Proof Committee Hansard*, 18 May 2017, pp. 5–6.

> management taking up their new roles Returning operations to normal and reaching an amicable outcome with the unions and workers was important for our business in Australia and a statement of how we intend to do business here.[42]

Committee view

5.40 The committee recognises the lack of legal recourse for the CUB55 under the FWA and therefore the critical role the community campaign and national boycott played in resolving the CUB dispute. The committee notes that this is not the only instance of financial pressure coming to bear on a company's actions.

5.41 The committee wishes to acknowledge that CUB's new management team engaged with the inquiry process and took responsibility for the company's actions. The committee particularly applauds CUB's commitment to learning from the experience and taking proactive steps to ensure that its workers are treated fairly, with dignity and respect, in future.

Oxford Cold Storage

5.42 The committee was also provided with an example of a company alleged to have established a number of labour hire companies, as shelf companies, in an elaborate attempt to avoid negotiating enterprise agreements with its employees.

5.43 Oxford Cold Storage is one of the largest cold storage warehouses in the southern hemisphere. The National Union of Workers (NUW) estimates that only 21 workers, out of an approximately 400-strong workforce, are employed directly by the company. The rest, the union states, are employed through eight different employing entities—a mix of legitimate labour hire agencies and labour hire agencies whose workers are employed exclusively at Oxford Cold Storage. It is a complex arrangement:

> In addition, further complicating matters is that four of those entities at Oxford have enterprise agreements registered to them, including Daniel's. Daniel is employed by a labour hire agency, you could say, which has an enterprise agreement which provides for lower pay and conditions than he is currently working on. So it is a very tenuous and precarious position that hundreds of the workers at Oxford are in, because technically their employer is not Oxford; it is a shelf company, more or less, which does not have office space and does not supply workers to any other worksite but nonetheless is the entity which technically has control over their pay and conditions.[43]

5.44 Mr Daniel Draicchio, a worker employed on the site, explained that he was originally employed by a labour hire agency as a casual, at a lower rate of pay than full-time workers on site. Mr Draichhio's employment was transferred through a

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42 Mr Craig Katerberg, Vice President, Legal and Corporate Affairs, Carlton & United Breweries, *Proof Committee Hansard*, 18 May 2017, p. 2.

43 Ms Claire Lewis, Organiser, National Union of Workers, *Proof Committee Hansard*, 15 March 2017, p. 17.

number of different agencies, and he was eventually placed as a permanent employee, with better rates of pay and improved conditions. When the enterprise agreement he was employed under was due to expire, the company asked Mr Draicchio and fellow employees to sign on with a new agency:

> I asked them about the EBA and if we had to negotiate with that. They said, 'No, an EBA has already been filed with Fair Work; you just have to sign over once it's been approved.' So we were called back in and signed over, and that was done; we were on to a new agency. When the EBA expired for Oxford under the 21 people that were doing negotiations, we were sent out a letter to say, 'If you don't sign the new common-law contract by a certain date, your pay will drop.' We did not know what the drop was, because we had never seen our actual EBA; we had never been told about it. We found out it was about $7 less an hour than what we are getting now. There are people that have been there for over 10 years and have never, ever bargained for an EBA—not once.[44]

5.45 Once workers are made permanent, the company allegedly transfers them from shelf company to shelf company, always just before a collective agreement is set to expire, in order to avoid having to negotiate a new enterprise agreement.

> To be clear: the purpose of the transfers—whether it is the sole purpose or not is difficult for us to say, but it is clearly the main purpose, in our view—is to deny workers the ability to collectively bargain. So the transfers occur some months before a collective agreement is set to expire, and people are transferred to an entity that already has a collective agreement in place that will run for probably four years. That cycle has occurred a number of times in relation to a number of different entities at this workplace.[45]

5.46 Despite being moved from employer to employer, the workers continue to perform the same work, on the same site, throughout.

5.47 The committee contacted Oxford Cold Storage for a response. The company submitted that it was proud to employ many long-term workers and offered some of the highest hourly rates of pay in the Victorian cold storage industry. The allegations above were not addressed.[46]

Industry perspectives

5.48 The Australian Industry Group (Ai Group) advocated for flexible workplace arrangements, describing them as fundamental to improved productivity, important for national competitiveness and continuing to raise Australian living standards.[47]

5.49 The Australian economy, Ai Group submits, faces multiple challenges, including seismic shifts in the global economy due to continued industrialisation in populous countries such as China, India and Indonesia, and a rapid pace of

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44 Mr Daniel Draicchio, Member, NUW, *Proof Committee Hansard*, 15 March 2017, p. 18.

45 Mr Dario Mujkic, Industrial Officer, NUW, *Proof Committee Hansard*, 15 March 2017, p. 19.

46 See Oxford Cold Storage, additional information, 7 April 2017.

47 Australian Industry Group, *Submission 179*, p. 4.

technological development. It is essential, Ai Group holds, that workplace arrangements in Australia 'remain agile and in a position to readily adapt to technological changes.'[48]

5.50 In light of this, the committee sought to better understand whether industry groups acknowledge that there are problems in the labour hire sector, and what their views are on the challenges insecure work presents for workers.

5.51 The Recruitment and Consulting Services Association (RCSA), Australia's peak industry body representing employment services, informed the committee that the association takes steps to monitor and address member organisations' behaviour:

> We do not support, as the RCSA supports, on-hire contractor or independent contractor services in unskilled, semi-skilled, or even most trade relationships. We say that it should be the reserve of those who have the bargaining power, the professional insight and the know-how and the back-end capacity to manage what is essentially meant to be a business-to-business relationship. So, if any circumstances arise where we see workers with low bargaining power—especially unskilled and semi-skilled—being engaged as independent contractors, we will call out that behaviour with our members under our code, and we are also prepared to pull them into line to the extent that we have the power to do so.[49]

5.52 The association has developed an employment certification program which is designed to address key failures in the sector:

> Very simply, it deals with issues of fit and proper people to run these businesses…The second one is worker status and remuneration, which goes to the Fair Work entitlements, ensuring that individuals are paid in accordance with those minimum entitlements; work health and safety; migration—we are very mindful of vulnerable workers around migration, and we are working with the foreign worker task force and are about to present to them on our certification program—and financial assurances as well, making sure that there is evidence of them having a sustainable and proven record of reporting and otherwise, so that you do not simply get a mobile phone and say, 'Hey, here's Jimmy the Afghan's labour hire,' as it was recently referred to in the media, 'and I can find you a whole heap of people.' The final one relates to suitable accommodation to try and address the issue of foreign workers being housed in inappropriate conditions.[50]

48 Ai Group, *Submission 179*, p. 4.

49 Mr Andrew Cameron, Chief Executive Officer, Recruitment and Consulting Services Association, *Proof Committee Hansard*, 15 March 2017, p. 40.

50 Mr Andrew Cameron, Chief Executive Officer, Recruitment and Consulting Services Association, *Proof Committee Hansard*, 15 March 2017, p. 41.

5.53 However, the RCSA explained that many complaints around poor conduct made to its ethics registrar relate to the practices of non-members, and as such the association is powerless to compel these companies to be bound by a code.[51]

5.54 Noting that Programmed—the largest labour hire company in the Australian market and a key player in the CUB case—is in fact a member organisation of the RCSA, the committee asked whether, in RCSA's view, Programmed had sought to undermine workers' pay and conditions by seeking to use Catalyst to re-hire the CUB workforce. In response, RCSA informed the committee that its interest was limited to ensuring that members comply with legislation:

> Our interest there is to ensure that any of our members are complying with the legislation that applies in the circumstances. I am sure you and I understand that the Fair Work Act does not prohibit the engagement of individuals for the purpose of making an enterprise agreement.[52]

Committee view

5.55 The committee notes steps the RCSA is taking to ensure that minimum standards are adhered to in the labour hire sector. However, this does not appear to address the key issue around labour hire—the minimum standards do not set a very high bar, which is precisely the reason that employers are supplementing, and in some cases replacing, their workforces through labour hire arrangements.

5.56 The committee is disappointed to learn that CUB and Programmed were not held accountable for their actions during this high-profile dispute, and that the test for appropriate conduct in the sector is whether employers adhere to the letter of the law. The committee is firmly of the view that CUB and Programmed applied an interpretation of the law which suited their financial interests, with little regard for the spirit of the FWA. Considering that CUB and Programmed are alleged to have gamed the system by exploiting loopholes in the FWA—not necessarily contravened the Act—in the committee's view the question of whether the two companies adhered to the legislation is moot.

5.57 Furthermore, the committee is unconvinced by arguments heard from industry groups concerning the challenges facing Australia's economy. There is a propensity to use words such as 'agile' to describe workforces, ignoring the fact that 'agile' often translates to 'casual' or insecure work. There is a large body of evidence, on record as part of this inquiry, indicating that employers are using labour hire specifically to drive down wages and reduce workers' conditions and entitlements. As explained by the AMWU, by giving primacy to enterprise bargaining, the FWA in fact ties productivity to wages at the enterprise level. Labour hire is becoming a vehicle companies are using to break this connection between productivity and wage increases:

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51 Mr Andrew Cameron, Chief Executive Officer, Recruitment and Consulting Services Association, *Proof Committee Hansard*, 15 March 2017, p. 41.

52 Mr Andrew Cameron, Chief Executive Officer, Recruitment and Consulting Services Association, *Proof Committee Hansard*, 15 March 2017, p. 42.

> Within this silo of 'labour hire' the work they perform and the productivity increases they achieve for the business are no longer connected to their wage increases. Their 'host employer' is insulated by the 'labour hire employer' from any pressure to increase wages.[53]

5.58 In this context, it is worth noting that economists, the governor of the Reserve Bank of Australia, and the OECD have warned against further stagnation in wage growth and its deleterious effect on the national economy. Calls for increasing the use of labour hire and other forms of insecure work are, in the committee's view, deeply counterproductive and against the national interest. It is short-sighted to think that allowing wages to fall will have any effect on the economy beyond redistributing wealth in favour of profits for the private sector, as shown in Chapter 9 of this report.

Recommendation 2

5.59 **The committee recommends that federal and state governments work together to establish labour hire licensing authorities in each state and territory, and that licensed labour hire operators be required to provide data on the numbers of workers engaged.**

Recommendation 3

5.60 **The committee recommends that the government legislate to require that a person or organisation supplying a worker to another person or organisation must:**

a) be a licenced labour hire operator; and

b) only engage in such activity through a registered business.

Recommendation 4

5.61 **The committee recommends that, upon establishment of labour hire licensing schemes (Recommendation 2), the government impose a legal obligation for hosts to use only licensed labour hire providers.**

Recommendation 5

5.62 **The committee recommends that the National Employment Standards be amended to provide casual employees, whether directly or indirectly engaged, the right to elect to become a permanent employee after twelve months regular and systematic service with the same employer.**

Recommendation 6

5.63 **The committee recommends that labour hire workers be covered by, be able to participate in and negotiate collective agreements directly with the host employer.**

53 AMWU, *Submission 196*, p. 14.

Recommendation 7

5.64 **Consistent with Recommendation 6, the committee recommends that host employers have responsibility for ensuring all labour standards provided in the *Fair Work Act* are afforded to labour hire workers. Such provisions could draw on the concept of the Person in Control of a Business or Undertaking (PCBU) definition found in the Model OHSWHS laws.**

Chapter 6
Wage theft

> On Saturday morning when I go to a café to buy a coffee, I do not want to ask that person what they are getting paid because I am almost certain the response will be something unlawful.[1]

A freefall to the bottom

6.1 The Australian community has an entirely reasonable expectation that workers in this developed, affluent country will not be exploited. This is a one of the fundamental objectives of the *Fair Work Act 2009* (FWA, the Act), that it will protect workers by setting out basic rights and entitlements in the National Employment Standards (NES) and modern awards.

6.2 Fittingly, one of the committee's terms of reference is whether the NES and modern awards provide an effective floor for workers' wages and conditions. Evidence presented to the committee, however, shows that employers in some industries are underpaying workers with such impunity that the question of an effective floor is almost redundant. In situations where a significant proportion are not complying with the law, that is the NES or modern awards, there is no floor—as put by one witness, there is 'just a freefall to the bottom.'[2]

6.3 This chapter looks at alarming evidence presented to the committee on the underpayment of vulnerable workers, what many submitters deemed to be outright wage theft.

6.4 It is more common than many would imagine, and penalties provided by the FWA are proving powerless to curb it.

The prevalence of underpayment

6.5 Underpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm. Figures cited below are alarming. In Victoria alone, it is estimated that 79 per cent of hospitality employers did not comply with the national award wage system from 2013 to 2016.[3] The national average for noncompliance is brought lower by findings from other states, but is still hardly a figure engendering pride. Nationwide, it is estimated that one in two

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1 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 5.

2 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 5.

3 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 2.

hospitality works are being illegally paid, with similar figures available for the retail, beauty and fast food sectors.[4]

FWO hospitality industry audit

6.6 A March 2016 report from the Fair Work Ombudsman (FWO) looks at the hospitality industry, breaking finding down into three categories:

- Wave 1: Accommodation/taverns and bars;
- Wave 2: Restaurants, cafes and catering; and
- Wave 3: Takeaway foods.[5]

6.7 The hospitality industry employs mostly vulnerable, low-skilled workers, with 60.7 per cent having no post school qualification.[6]

Accommodation/taverns and bars

6.8 Businesses operating the accommodation, tavern or bar sector were found to have the highest rates of compliance, with 69 per cent found to be compliant. Of the remaining 31 per cent, most contraventions were monetary in nature.

6.9 A total of 750 audits were conducted, recovering over $367 000 in lost wages for 629 employees.[7]

Restaurants, cafes and catering

6.10 According to the ABR, there were approximately 41 000 businesses in the accommodation and food services industry in May 2011. The FWO audit looked at 1066 of these businesses, or approximately 2.6 per cent of the total number, checking for compliance with wage and record-keeping obligations.

6.11 Only 42 per cent were found to be compliant with all requirements, with most errors relating to wage entitlements, and $1.2 million in lost wages was recovered on behalf of 2752 employees.[8]

Takeaway foods

6.12 The ABR states that there were over 24 000 businesses in the takeaway services industry in May 2011. The FWO audit looked at 565 of these businesses, or almost 2.4 per cent of the registered number, checking for compliance with wage and record-keeping obligations.

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4 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 2.

5 Fair Work Ombudsman, National *Hospitality Industry Campaign 2012–15*, available at: www.fairwork.gov.au/how-we-will-help/helping-thecommunity/campaigns/campaign-reports (accessed 25 July 2017).

6 Fair Work Ombudsman, *National Hospitality Industry Campaign 2012–15*.

7 Fair Work Ombudsman, *National Hospitality Industry Campaign 2012–15*.

8 Fair Work Ombudsman, *National Hospitality Industry Campaign 2012–15*.

6.13 Nationally, only 33 per cent were found to be compliant with all of their workplace obligations, with the majority of errors relating to underpayment of wages, incorrect payslips and incorrect or non-payment of weekend penalty rates. Only 53 per cent of employers were paying their employees correctly. In total, $582 410 in lost wages was recovered on behalf of 929 employees, while only six formal cautions and one compliance notice were issued.[9]

6.14 Noting that a little under 2.4 per cent of businesses were audited, these figures suggest that workers are likely losing millions to underpayment. The next section looks at case studies from this and other sectors.

From the workers' perspective

6.15 Ballarat Regional Trades and Labour Council (BRTLC) operates a service called the Young Workers Legal Centre, which assists young workers and relies heavily on legal services and lawyers who offer their services on a *pro bono* basis:

> The stories we have received are harrowing and most of them are reporting cash-in-hand payment, but there are also, as our submission states, a significant number of under-award payments and various other breaches—non-payment of entitlements or the lack of applying the award in the proper way.[10]

6.16 Examples are numerous, but have shared features in that young workers are vulnerable to exploitation, are not always familiar with the law, and may be hesitant to report exploitative practices for fear of losing their jobs.

6.17 In one cited example, a young man was working at a Caltex service station when a car drove off without paying for petrol. The worker reported being distressed because his employer would make him pay for the stolen petrol.[11] In another case provided by the BRTLC, a young worker reported feeling powerless to stand up for her legal rights despite being underpaid for years and knowing that her employer was breaking the law:

> Fish and chip shops are particularly bad. I [Brett Edgington, Secretary, BRTLC] have seen a significant number of young workers from the Rubicon Street fish and chip shop. Mainly, they are paid between eight and nine dollars per hour, and mainly they are young people under 19. I spoke to one girl who had been there for several years, who had started on $8, and because she had been there for a number of years she went to $9. As far as I know, there is no WorkCover insurance on those young workers. They are sacked on a whim, and the really distressing story the young girl told me was that she knew that what was happening to her was wrong and knew that the payment was wrong. She looked at me and said, 'Look, if I walked out

9 Fair Work Ombudsman, *National Hospitality Industry Campaign 2012–15*.

10 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 3.

11 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

> tomorrow, there are a line of kids at the door who know what is going on, who will take the job'.[12]

6.18 The pressure on young workers is considerable, as it is on workers in regional Australia more widely. This is in no small part due to high unemployment rates in regional centres, with BRTLC reporting that a significant portion of people have no choice but to work in the black, cash-in-hand economy without access to workplace rights.[13]

6.19 Often there is no way for workers in these situations to prove that they were underpaid or exploited in any way. Paper trails are scarce, and employers ready to deny any involvement with the workers:

> It is very difficult to follow-up on this legally because many times, when you find a worker in this situation, the boss will deny they have ever been there. In fact, if Fair Work were to follow up, it appears they never had. There is no paperwork and there is no mention of their name. Some of these businesses hold cash-in-hand books and some of them do not. It is very difficult.[14]

6.20 This lack of wage records presents a particular problem when workers try to put in WorkCover claims. Mr Orry Pilven, a solicitor appearing in a private capacity, explained that he has difficulty working out earnings owed for the purposes of WorkCover in such situations.[15] He added that employers will often exploit young workers' lack of resources and threaten their future employment prospects:

> The first question I get is, 'Won't my employer disparage me to others and I'll never work again in Ballarat?' That is the threat that is often made, particularly within an industry: 'Look, we know everyone in town, and you will never work again. I will put a black mark against your name.' The other problem, particularly with young or disadvantaged workers, is that they often do not have the resources to pursue matters. Obviously, well-resourced employers who are represented by their industry groups know this, and they use this to their advantage—and often there is no office.[16]

6.21 This threat of unemployment is present for workers across sectors and regions:

> I imagine you would have a lot of people that are fearful of raising underpayment issues with their employer, especially if they really need a job, and especially if they have seen their employer sack their previous

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12 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

13 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

14 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

15 Mr Orry Pilven, *Proof Committee Hansard*, 14 March 2017, p. 7.

16 Mr Orry Pilven, *Proof Committee Hansard*, 14 March 2017, p. 7.

> colleagues when such issues are raised. People have mortgages, they have families, they have bills to pay, and depending where you are at, and what area you are in, it is pretty hard to get a job. Hearing from our members from here all the way up the west Wimmera and all the way down to Warrnambool, it is really hard to get a job.[17]

6.22 Furthermore, some employers are suspected of being repeat offenders, engaging in deliberate underpayment in a 'systemic, highly organised and externally advised process.' Despite complaints being raised repeatedly, Mr Brett Edgington, the Secretary of the BRTLC claims that the FWO continues to assume that underpayments are made in error, and not deliberately.[18]

6.23 BRTLC cites examples of cash in hand payments at several Ballarat-based businesses:

> The Bryant Family Trust at Gill's Boatshed collects their till takings every night and saves them up until Thursday. On Thursday, the money goes into little envelopes, normally of $10 or $15 cash in hand, and the employees then come and pick them up. I can only assume that the till takings are then fabricated and the PAYG statements that go off to the ATO are also incorrect. There is a cash-in-hand book that meticulously records the cash in hand of that business, so it is not an oversight. This is a systematic, deliberate act to underpay the workforce both at Gill's Boatshed and at the Golf House restaurant.[19]

6.24 Mr Edgington recounted the experience of a young worker who came through the Young Workers Legal Centre. The case spent many months in mediation through the Fair Work system. During this process the employer made an offer to the young worker which was considerably below the $26 000 she was allegedly owed in unpaid wages, made on the proviso that the worker would sign a confidentiality agreement preventing her from discussing the case in future. This, BRTLC alleged, was not an isolated case.[20]

6.25 The committee also discussed the issue with business groups. Representatives of Commerce Ballarat, for example, suggested that the high reported rates of non-

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17 Mr Kamal Bekhazi, Research and Project Officer, Health Workers Union, *Proof Committee Hansard*, 14 March 2017, p. 36.

18 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 6.

19 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 7.

20 Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Proof Committee Hansard*, 14 March 2017, p. 7. It should be noted that the committee offered all employers who were the subject of adverse comment an opportunity to respond to any allegations made during the course of this inquiry.

compliance might be due to a lack of understanding of the law or confusion around appropriate rates of pay.[21]

Underpayment of temporary migrant workers

6.26 The committee tabled a comprehensive report on the plight of temporary work visa holders in the previous Parliament, in March 2016: A national disgrace: the exploitation of temporary work visa holders.[22] This committee refers readers to that detailed report and the conclusions and recommendations therein.

6.27 In the context of this inquiry, the committee received evidence suggesting that migrant workers are being targeted specifically because they are vulnerable and unlikely to report exploitative practices. In the health sector, the committee heard, the practice affects Australian workers as well. The Australian Nursing Federation reports that Australia's assisted visa program, which exists to help fill temporary skills shortages which cannot be met by employing or training Australian workers, is being misused:

> The health industry provides a good example where nurses are employed on assisted visas whilst Australian nursing students who have recently graduated are unable to find employment in a health service in Victoria. Unfortunately, many of the people who are employed on assisted visas do not fully understand their rights in relation to receiving the same wages and entitlements of Australians employed in the same job, or are unable to raise their concerns due to their vulnerabilities.[23]

6.28 Not only are these workers often unfamiliar with their rights and entitlements, but the employers who hire them, and particularly those in the private sector, appear to exhibit limited understanding of their obligations:

> In the private sector it is much more difficult for us to gain a full understanding of exactly how those people are treated. But we have examples, again, where there are people coming here on visas that do not necessarily understand their entitlements either. For example, some of those visas allow for people to get assistance to go home every 12 months and that type of thing. When I have raised those sorts of things with employers, they have no knowledge or understanding of that, and neither have the people themselves.[24]

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21 See discussion with Commerce Ballarat, *Proof Committee Hansard*, 14 March 2017, pp. 45–49.

22 A national disgrace: the exploitation of temporary work visa holders, Senate Education and Employment References Committee, available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Completed_inquiries/2013-16 (accessed 25 July 2017).

23 Mr Allan Townsend, Industrial Relations Organiser, Australian Nursing and Midwifery Federation, *Proof Committee Hansard*, 14 March 2017, p. 4.

24 Mr Allan Townsend, Industrial Relations Organiser, Australian Nursing and Midwifery Federation, *Proof Committee Hansard*, 14 March 2017, p. 5.

6.29 In other sectors the exploitation and abuse of workers on temporary visas appears to be so widespread it is becoming the norm.

6.30 The Salvation Army states that employers seeking fruit pickers, for example, target migrant workers for exploitation because these workers are usually very hesitant to pursue their legal entitlements or go to the authorities, due in large part to their reliance on the employer for work. The Salvation Army agrees that it can be difficult to prove intent on employers' part in such cases; however, the evidence is considerable and the examples numerous.[25]

6.31 The Australian Council of Trade Unions (ACTU) reports that the Working Holiday Maker visa has become synonymous with unscrupulous labour hire companies, exploitation and abuse. The ACTU cites evidence, released in 2016, which highlights working holiday-makers' experience in Australia:

- 28 per cent did not receive payment for work undertaken
- 35 per cent stated they were paid less than the minimum wage
- 14 per cent revealed they had to pay in advance to get regional work
- 66 per cent felt employers take advantage of people on Working Holiday Visas by underpaying them.[26]

6.32 Working holiday-makers today comprise around 10.8 per cent of the total Australian labour force aged 15–24, and the program has clearly become 'a fertile ground for unscrupulous labour hire companies that abuse their workers'.[27]

6.33 Mr Giri Sivaraman, Principal at Maurice Blackburn Lawyers, related the experience of one working holiday-maker:

> My client is a man named Youngpil Ko. He is about 24 years old, he is Korean, and he was a working holiday-maker. He was living on the Gold Coast and saw a job on a Korean website called SunBrisbane. It did not say much other than the job was for unloading and packing warehouse containers. There was a phone number on the site. He called it. He spoke to a man named Jimmy. Jimmy told Youngpil that he had to get an ABN to do the job, as it was an ABN job. There were flat rates for all of the work, a bit over $20 an hour. Jimmy told Youngpil that he had to live in specific accommodation with up to eight other people, that he had to take the transport that they would give him to the warehouse where the work was done, that the costs of the accommodation and the transport would be deducted from any pay that he would otherwise receive, and that he had no choice about that at all.
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> He was picked up at either 4 am or 6 am and taken to the warehouse. The warehouse was a very large warehouse of a multinational company. He received no training. He never met Jimmy. He got onto the site and met

25 Salvation Army, *Submission 178*, p. 8.

26 Australian Council of Trade Unions, *Submission 182*, p. 22.

27 Australian Council of Trade Unions, *Submission 182*, p. 22.

> another fellow named Andy, and was told: 'This is what you have to do. Start working.' So he would work every day, sometimes up until two, three o'clock in the afternoon, six days a week, up to 11 hours a day, without any training, supposedly getting a flat rate. He did not even know what an ABN was. He asked Andy, 'What's an ABN?' Andy said, 'Don't worry about that; I'll take care of it.' He did not get a contract. He did not know what kind of working relationship he had. He did not get pay slips and had no idea that he was caught up in a labyrinth of subcontracting arrangements. After about three weeks of doing the work, he questioned Andy, because he had not been paid fully for the first two weeks and had not been paid at all for the third week, and Andy said; 'Just keep working, we'll sort it out. Don't worry about it.' He did another two weeks of work, he did not get paid anything and so he eventually quit, because he simply was not getting paid at all.
>
> When he was on the site, he was told to wear a vest that said Vixen Workforce, so he put that on. After he stopped, he initially contacted Vixen; they did not respond. He tried to call Andy and Jimmy; they refused to return his calls and did not respond. He noticed on his bank statement that he had received a payment from a company called Call Now Services. He tried to contact them; they refused to respond, and he could not find out what their true corporate status was. The actual warehouse operator knew nothing about him and was unwilling or unable at that stage to assist him. He contacted the Fair Work Ombudsman, and they said to him, 'You need to make a claim against Vixen to the Queensland Civil and Administrative Tribunal.' He tried to do that. Bear in mind, he is trying to do all of this where English is not his first language, where he has no understanding of the laws under which he is operating or the people he is dealing with. He tried to make the claim to QCAT against Vixen, and that claim was thrown out by QCAT on the basis that he could not establish an employment relationship with Vixen. He tried follow-up CNS, Call Now Services, with no response. He tried to call Andy and Jimmy, with no response.[28]

6.34 One year on, at the time of the committee's hearing in Brisbane, Mr Youngpil Ko had not seen the money owing to him. Not a large sum of money, his lawyer explained, but enough for someone in this young man's situation to be concerned about. Mr Ko, like all workers, is entitled to be paid for work performed, but his plight is far from unique. Due to shortcomings in federal and state laws, cultural and language barriers and unscrupulous employer practices, Mr Ko and other workers like him experience work in Australia as a form of modern day slavery.[29]

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28 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 1.

29 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard, 20 April 2017*, p. 2.

International students

6.35 International students fare badly too. Research indicates that nearly all international students in Australia are paid less than the minimum award rate, and most are paid below the federally mandated minimum wage.[30]

6.36 In some cases, the committee heard, workers are so poorly paid that they hold down more than one grossly underpaid job in an attempt to make ends meet:

> Some of those people had two jobs. Some of them were working 60, 80 or more hours a week. The tragedy of it—and there are many tragedies—was they were being forced to work outside of their visa restrictions—because many of them were students and had visa restrictions—simply to make ends meet because their pay was so low. I had one client who, when you averaged out his pay across the hours he worked, was getting 47c an hour. He had to work a whole day to be able to buy a cup of coffee. You cannot live on those wages so, not surprisingly, they would end up getting a second job. They would then drop out of uni because they had no time to go to classes. There is a really personal aspect to all of this—they would feel like failures. I had clients crying who were so distraught about where they had got to. It was not the Australian dream that they imagined it would be; it was a nightmare.[31]

6.37 Many people who work multiple jobs or long hours are hesitant to approach the FWO, in part if a complaint is litigated and the facts reveal that the student works more than 40 hours per fortnight, the Department of Immigration and Border Protection is informed and the student potentially deported.[32]

6.38 In the rare cases that such workers make a claim, the prolonged recovery of wages process holds little promise for them because their visa restrictions mean they have to leave the country long before the claim can be progressed. As put to the committee, 'they come, they get exploited, chewed up, spat out and then they go'.[33]

6.39 Chronic underreporting of exploitation will continue unless steps are taken to reduce migrant workers' overreliance on their employers and fear of deportation.[34]

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30 Survey by the University of Sydney Business School, available at: http://sydney.edu.au/business/news/2016/foreign_student_workers (accessed 25 July 2017).

31 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 5.

32 Taken to the cleaners: international students underpaid, exploited, available at: www.abc.net.au/radionational/programs/backgroundbriefing/international-studentsexploited/7472384 (accessed 26 July 2017).

33 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 5.

34 ACTU, *Submission 182*, p. 22; United Voice, *Submission 203*, p. 36.

Addressing exploitation of migrant workers

6.40 Migrant workers' industrial rights are all too often 'subordinated by their immigration status.'[35]

6.41 Temporary visas place disproportionate restrictions on the worker, United Voice submitted, ignoring the power balance between the worker and employer and applying penalties to the worker where conditions are breached, irrespective of the reasons for the breach:

> The punitive, rather than protective impetus of visa regulation in regard to workers themselves leads to situations in which exploited workers who have been compelled to breach a condition of their visa can lose the right to remain and work in Australia. A common instance of this is when student visa holders work more than 40 hours per fortnight on the orders of their employer, and are afraid to come forward out of fear that their visa will be terminated. Effectively, temporary migrant workers are punished for the illegal acts of their employers.[36]

6.42 The ACTU cited mounting evidence that some employers go so far as to exert pressure on migrant workers in order to trigger a breach of visa conditions, thus gaining additional leverage over workers.[37] Breaching visa conditions gives the employer leverage by putting the worker in a precarious position:

1. The worker is in fear of approaching authorities for fear of visa cancellation and deportation.
2. The FWA does not apply where a person has breached their visa conditions.

6.43 On the second point, the ACTU adds that the FWA does not apply 'when a person has breached their visa conditions or has performed work in the absence of a visa consistent with any other visa requirements.'[38]

6.44 Given the element of employer coercion, the ACTU concluded, current penalties faced by migrant workers are 'disproportionate and draconian.'[39]

6.45 Exploitation should not, United Voice concluded, result in deportation. The union explained how this could be addressed:

> Uphold temporary migrant workers' right to seek justice without fear of deportation by instituting one-way reporting requirements between the Department of Immigration and Border Protection and the Fair Work Ombudsman. A worker on a temporary visa should feel confident that coming forward to report a claim of underpayment or other breach of the

35 United Voice, *Submission 203*, p. 36.

36 United Voice, *Submission 203*, p. 36.

37 ACTU, *Submission 182*, p. 21.

38 ACTU, *Submission 182*, p. 21.

39 ACTU, *Submission 182*, p. 21.

> Fair Work Act will not result in their having to leave the country or be deported. That workers from overseas are granted the right to remain in the community until civil and/or criminal claims are resolved is especially important when indicators of modern slavery are found.[40]

6.46 Submitters such as United Voice pointed to the critical role unions play in monitoring and enforcing migrant workers' rights:

> Unions are embedded in Australian industries, they have a deep understanding of the problems faced by migrant workers, and they are working productively with other stakeholders to ensure that all workers, regardless of their citizenship, are treated lawfully and fairly in our industries.[41]

6.47 The committee notes that the Turnbull Government believes it delivered a key election commitment by establishing its Migrant Workers Taskforce.[42] The Taskforce, however, excludes workers and unions, making it unlikely that meaningful progress will be made while ever affected workers and their representatives are ignored.

Committee view

6.48 On the basis of evidence presented, the committee concludes that underpayment of wages is a far bigger problem than isolated non-compliance or inadvertent oversight. In some sectors, such as the hospitality industry and jobs involving workers on temporary visas, wage theft is rampant.

6.49 Furthermore, in the committee's view the FWO's estimates of the levels of non-compliance are likely to be a very conservative reflection of the bigger picture. Given that employers are contacted well in advance of FWO audits, they have every opportunity to examine their practices and make necessary changes before an audit takes place. This being the case, the committee concludes that the actual rate of non-compliance is likely to be even higher.

6.50 Given this evidence, it is the committee's view that a lack of union representation on site, the relative youth of the workforce and a lack of permanent right to reside in Australia are each individual risk factors for workers being in a position of vulnerability and when taken together exponentially add to the likelihood that the worker will be subjected to some form of wage theft or underpayment.

6.51 Underpayment of wages has an associated component of underpayment of superannuation. While the committee did not hear direct evidence on this issue it has

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40 United Voice, *Submission 203*, p. 36.

41 United Voice, *Submission 203*, p. 35.

42 See Senator the Hon Michaelia Cash, *Coalition delivers on election commitment to protect migrant workers*, media release, 4 October 2016, available at: https://ministers.employment.gov.au/cash/coalition-delivers-election-commitment-protect-migrant-workers (accessed 25 July 2017).

been widely reported that superannuation underpayments are costing 2.7 million workers an average of $2025 a year.[43]

6.52 According to a December 2016 Industry Super Australia report those workers in 'less secure' employment were at greater risk of superannuation underpayment than those in secure employment.[44]

6.53 With underpayment of superannuation costing $5.6 billion in the 2013-14 year alone, the knock-on costs to the Commonwealth in the form of long term increases in aged pension liabilities make this a major Treasury as well as workplace issue.[45]

6.54 The next section looks at the penalties for non-compliance.

Penalties for non-compliance

6.55 There are few tangible disincentives in place for employers considering underpaying their staff. Penalties are low in comparison to the money wrongly retained by underpaying staff, and there appears to be a propensity to attribute underpayment to oversight, rather than deliberate theft.

6.56 The evidence certainly suggests that some employers might be underpaying workers in the knowledge that penalties are small.[46]

Access to the system

6.57 Employees can contact the FWO if they believe they have been underpaid. The FWO helped resolve a relatively low 29 000 workplace relations matters in 2016, with most resolved through early intervention. It is axiomatic that FWO is quite selective in deciding which cases to pursue to litigation. FWO says that:

> We use a range of methods to resolve these matters. In many cases we assist the parties to understand their rights and obligations and encourage them to resolve the matter with our support and advice. We often find this to be the quickest and most effective way to resolve many matters, particularly where the parties are still in an employment relationship. That is why most of the disputes that come to us are resolved through early intervention strategies or alternative dispute resolution methods such as mediation. Last year, three-quarters of all the matters that we dealt with were settled using these sorts of techniques, without the need for a formal investigation or the use of our formal enforcement powers. If matters are

43 See www.smh.com.au/business/workplace-relations/about-28m-australians-get-underpaid-56b-worth-of-superannuation-inquiry-told-20170322-gv3mxm.html (accessed 6 September 2017).

44 See www.industrysuperaustralia.com/assets/Reports/Final-Unpaid-Super-January-2017.pdf , p.6, (accessed 6 September 2017).

45 See www.theguardian.com/australia-news/2017/apr/12/one-third-of-australians-are-being-underpaid-superannuation (accessed 6 September 2017).

46 Mr Glen Ludbrook, Principal Solicitor, Central Highlands Community Legal Centre, *Proof Committee Hansard*, 14 March 2017, p. 51.

dealt with in this way, they take, on average, less than one month to resolve.[47]

6.58 Matters which require an investigation take an average of 131 days to resolve. Where a matter goes to court, resolution can take years.[48]

6.59 Recouping unpaid wages through the courts is a lengthy and potentially expensive (fees ranging from $215 up to $2570 upfront with a daily hearing cost of $1020)[49] and intimidating process many employees are unlikely to pursue.

6.60 To enforce payment the matter must be taken to either:

- the small claims tribunal, if owed under $20 000; or
- the Federal Circuit Court, if owed more than $20 000.[50]

6.61 The process is costly for the FWO, forcing FWO to prioritise vulnerable workers, and it is also costly for unions. The Health Services Union, for example, reported spending in the vicinity of $100 000 to pursue around half of that amount in unpaid wages for one particular health worker.[51]

6.62 For businesses, however, the cost of enforcement may provide an incentive to take the risk of underpaying staff, relying on the unlikelihood of employees pursuing unpaid wages through the system.[52]

Committee view

6.63 As mentioned above underpayment of wages has an associated component of underpayment of superannuation. The committee believes that it would be more efficient and effective if the recovery processes for underpaid wages and underpaid superannuation were simplified and combined and made directly available to workers and their unions rather than separated between workers/unions/FWO and the ATO.

6.64 Evidence presented to the committee suggests that employers who deliberately underpay workers do so in part because of a crude risk assessment: Because unions have reduced power to inspect wages records, the union and the FWO is unlikely to deploy its limited resources to undertake a prosecution where penalties

47 Ms Natalie James, Fair Work Ombudsman, Fair Work Ombudsman, *Proof Committee Hansard*, 9 June 2017, p. 20.

48 Ms Natalie James, Fair Work Ombudsman, Fair Work Ombudsman, *Proof Committee Hansard*, 9 June 2017, p. 25.

49 http://www.federalcircuitcourt.gov.au/ , http://www.federalcourt.gov.au (accessed 6 September 2017).

50 Mr David Eden, Assistant Secretary, Health Workers Union, *Proof Committee Hansard*, 14 March 2017, p. 34.

51 Mr David Eden, Assistant Secretary, Health Workers Union, *Proof Committee Hansard*, 14 March 2017, pp. 35–36.

52 Mr David Eden, Assistant Secretary, Health Workers Union, *Proof Committee Hansard*, 14 March 2017, p. 36.

might be imposed and the ATO is unlikely to discover underpaid superannuation contributions then the most likely consequence for being found out is that they have to repay the wages—it follows that the potential rewards are significant and the risk is low.

6.65 The committee is not persuaded by arguments suggesting that underpayment is usually the result of oversight, or that the law is too complex for employers to understand. While genuine errors do occur, these tend not to consistently favour the pecuniary interests of one side only—employees may be mistakenly underpaid or overpaid. As the committee did not receive any evidence suggesting that thousands of vulnerable workers have been enjoying millions of dollars' worth of accidental overpayment it is not convinced that the levels of underpayment are due to 'administrative errors'.

6.66 Although there may well be employers who do not take the time to acquaint themselves with the relevant awards, ignorance of the law should not be an acceptable defence. Put simply, if you want people to work for you, you have a legal and ethical responsibility to work out what they should be paid, and then pay them correctly.

6.67 The committee concludes that many employers will only begin to take their obligations towards employees seriously when the financial incentive to underpay workers is removed. The committee is therefore strongly of the view that penalties should be increased so that the consequences of underpayment are serious enough for most employers to decide against taking the risk, and makes a number of recommendations to that end.

6.68 The committee also believes that the incidence of deliberate underpayment revealed by this and earlier inquiries, along with numerous media investigations, does not align with community expectations of our system's capacity to protect vulnerable workers. In the committee's view it is in the public interest to bring underpayment out of the shadows. To this end, the committee supports the introduction of penalty notices for businesses found to be underpaying workers, allowing customers to decide whether they wish to patronise these establishments.

6.69 Furthermore, there is a need for increased monitoring and random checks to ensure compliance. The FWO has neither the resources nor the interest in regular engagement with these workplaces specifically on behalf of the workers. The fact is that unions perform a public good in undertaking regular wage and superannuation compliance checks.

Recommendation 8

6.70 **The committee recommends that the *Fair Work Act* be amended to allow unions greater access to workplaces and workers in order to address the need for increased monitoring and random checks to ensure compliance.**

Recommendation 9

6.71 **The committee recommends that the penalties for wage and superannuation theft be substantially increased in order to provide a more**

effective deterrence. A combination of more likely discovery and higher penalties for offending companies would be beneficial to the community as it would create a level playing field and remove the current competitive disadvantage that complying employers suffer in industries where wage theft is widespread.

Recommendation 10

6.72 **The committee recommends that the *Fair Work Act* be amended to provide a reverse onus of proof so that, where employers are alleged to have underpaid staff, the employer is required to disprove the allegation.**

Recommendation 11

6.73 **The committee recommends that employers' obligations regarding record-keeping be reviewed.**

Recommendation 12

6.74 **The committee recommends that the *Fair Work Act* be amended to require employers to provide a written statement to every employee, before any work is performed, setting out the wages and conditions they are being employed under.**

Recommendation 13

6.75 **The committee recommends that the *Fair Work Act* be amended to empower the Fair Work Ombudsman to display infringement notices on the premises of businesses found to be underpaying staff, and that display of such notices be mandatory where an employer has twice been found to be in breach of relevant laws.**

Recommendation 14

6.76 **The committee recommends that the government introduce a program in Australian secondary schools educating young people on their workplace rights and responsibilities.**

Recommendation 15

6.77 **The committee recommends that the government work with unions, migrant and community organisations, employer groups and employers to address growing exploitation of migrant workers in Australia.**

Recommendation 16

6.78 **The committee recommends that freedom of association provisions within the *Fair Work Act* be strengthened to recognise the role of unions in providing protection and advice to workers and ensure that all workers are informed of their industrial rights on commencement of their employment.**

Recommendation 17

6.79 **The committee recommends that the *Fair Work Act* and *Migration Act* be amended to:**

- **state that a visa breach does not necessarily void a contract of employment;**
- **provide that the protections of the *Fair Work Act* can be enforced even when a person has breached their visa conditions or has performed work in the absence of a visa consistent with any other visa requirements.**

Recommendation 18

6.80 **The committee recommends that there be an onus of proof placed on employers that they have genuinely tested the domestic labour market for available workers before being able to engage temporary visa workers.**

Recommendation 19

6.81 **The committee recommends that employers pay a training levy for any and all temporary visa workers that are engaged. The proceeds from the training levy should be directly invested to close the skills gaps identified in the domestic labour market.**

Chapter 7
Sham contracting

7.1 Employers engage in sham contracting when they mischaracterise an employment relationship as an independent contracting arrangement.

7.2 By doing so, employers are able to avoid obligations which apply under the *Fair Work Act 2009* (the FWA, the Act) when workers are accurately characterised as employees, such as payment of minimum wage rates, various leave entitlements, penalty rates and shift loadings.[1]It is a deliberate strategy to disguise an employment relationship as a commercial contract.[2]

7.3 Sham contracting is illegal, but rife.[3] As an avoidance strategy it has considerable consequences which extend beyond the disadvantage suffered by the workers concerned, who are deprived of the security associated with direct, permanent employment and instead placed in precarious arrangements.

7.4 This chapter explores the practice through case studies, looks at inadequacies in the law which perpetuate the problem, and sets out concrete ways in which to address the issue.

The effect on workers

7.5 The committee heard that it is not uncommon for businesses to only engage workers who have a legal company structure in place.[4] This puts tremendous pressure on workers, outlined in case studies presented by witnesses and submitters below.

7.6 The construction industry has been plagued by sham contracting for many years.[5] One example provided by the Construction, Forestry, Mining and Energy Union (CFMEU) suggests that employers at times exhibit quite flagrant disregard for the law, requiring ongoing employees to become contractors:

> [I]n 2016, Darwin-based concreting company JGA Concreting Pty Ltd, required a number of its concreting employees to obtain ABNs and work on a "sub-contract" basis even though the substance of the working arrangements continued to be that of employer/employee…the company has ceased remitting PAYG tax payments for these workers, is not making superannuation contributions and no longer takes account of the ABN workers for payroll tax purposes. One long term employee has complained

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1 The Electrical Trades Union of Australia, *Submission 197*, p. 14.

2 Construction, Forestry, Mining and Energy Union, *Submission 200*, p. 11.

3 On the prevalence of sham contracting see Maurice Blackburn Lawyers, *Submission 157*, p. 7. CFMEU, *Submission 200*, p. 11; Ballarat Regional Trades and Labour Council, *Submission 186*, p. 5.

4 CFMEU, *Submission 200*, p. 14.

5 CFMEU, *Submission 200*, p. 11.

> that no superannuation contributions have ever been paid for him over many years employment with the company…Semi-skilled concreting and labouring duties are ordinarily incapable of being carried out on a legitimate sub-contract basis as the work requires the direction and control associated with an employment relationship and is non-delegable.[6]

7.7 Similar examples can be found in much other industries as well, as seen in evidence provided by the United Voice union (UV).

7.8 United Voice is an organisation representing over 120 000 Australian workers. United Voice property services members work as cleaners, security officers, parking attendants, caterers, prison officers, life guards, gardeners, gate keepers and others.[7] The union characterises much of its members' work as insecure and low paid with labour hire and sham contracting frequently featuring.[8]

7.9 Whilst employers in the sector have in the past had a chequered history in relation to compliance with their obligations under the relevant award,[9] there is now a recognised trend toward shifting business operations beyond the coverage of the award through sham contracting:

> Contracting out of labour has the general effect of reducing workers' pay and conditions. This reduces the pay and conditions of those engaged through these arrangements and also the pay and conditions generally in sectors where there is significant use of a contracted or labour hire workforce. This is done through a variety of mechanisms…. In the industries which employ United Voice members contracting and labour hire is used precisely because it is prepared to avoid loadings and penalties in contravention of the award and also avoids costs associated with redundancy, and by not 'owning' employees avoids more systemic costs associated with service such as long service leave and the health costs associated with an established permanent workforce.[10]

7.10 UV related the example[11] of Academy Services Pty Ltd, a company providing cleaning services to businesses in the Adelaide CBD:

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6 CFMEU, *Submission 200*, pp. 11–12.

7 http://www.unitedvoice.org.au/industries/property-services (accessed 4 September 2017).

8 United Voice, *Submission* 203, p. 1.

9 https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160530-pioneer-personnel-litigation (accessed 4 September 2017).

10 United Voice, *Submission 203*, p. 9.

11 United Voice, *Submission 203*, p. 10.

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Case study 1: Academy Services

Academy Services Pty Ltd is a company supplying cleaning services to premises mainly in the Adelaide Central Business District. Academy Services is based in Adelaide but operates interstate. Academy Services has made a collective agreement with United Voice: the Academy Services and LHMU Cleanstart Union Collective Agreement 2008 ('the Cleanstart Agreement').

Academy Services has a long history of non-compliance and questionable practices, evidenced by numerous interventions by United Voice's South Australian branch. The company's business model involves both the direct employment of employees, and the engagement of entities it regards as "franchisees".

These franchisees are paid a flat rate per hour of about $28 per hour. They are required to have Australian Business Numbers ('ABNs') and engage other persons to perform the work allocated to them, or to part perform that work. The franchisees typically do not provide holiday pay, sick leave or any other employment related entitlements. They are required to provide their own insurance. The franchisees sign contracts identifying them as franchisees with a series of formal terms consistent with a franchise arrangement. The hourly rate is above the base rate of the Cleanstart Agreement and the Cleaning Services Award 2010, but the work the franchisees typically undertake is at times when loadings or penalty rate would be required to be paid.

Despite the pretence that the cleaning work is being performed by an independent contractor, the hours of work, and their work duties, are dictated by Academy Services. Franchisees are required to perform work exclusively for Academy Services. Academy Services provides all the equipment and materials required for the work. Payments are made periodically in a similar pattern as wages and not on invoices submitted per job.

The franchisees do not engage with building owners or occupiers. This is done exclusively by Academy Services. Academy Services controls all records pertaining to the work done by the franchisees. While franchisees engage employees, Academy Services retained the right to terminate the individual workers *'employment'* with the franchisee.

The success of Academy Services' business model is that it has its own employees working during non-penalty periods, and the franchisees work during penalty periods. The flat fee it pays franchisees is above the base rate that should apply but well below the more significant penalty rates at which the work should be paid.

To date, the Fair Work Ombudsman has failed to intervene.. United Voice has taken cases against Academy Services and has ongoing litigation against Academy Services in the Federal Court.

Academy Services' conduct highlights several key issues in relation to labour hire in the cleaning industry. First, cleaning is an industry where labour hire predominates, very few cleaners are directly engaged by the owners of the workplaces that they clean and maintain. Change of contract and turnover of the work force is a regular feature of the sector. The Cleanstart Agreements are an attempt to provide some security of employment in an industry where contracts change frequently; however, these provisions are often ignored.

7.11 In discussing the impact of sham contracting on the labour market throughout the industry, UV says:

> Critically, contracting and labour hire makes collective bargaining difficult, bargained outcomes harder to maintain and in the majority of cases labour hire is used to undercut the bargained rate in a workplace or sector due to the ability to regularly replace a cohort of workers effectively collapses standards and bargained outcomes. Contracting, sub-contracting, and labour hire operates as a significant feature of the labour market whose effect is to reduce standards to the award safety net and, frequently, to a standard effectively below the award. This creates a competitive logic that dictates that anything more than the minimum is excessive and decreased labour costs are a reasonable expectation of a user of labour. United Voice has observed that this has been an important factor in the collapse of pay and conditions in areas such as cleaning, hospitality and security.[12]

Inadequacies in the legislation

7.12 Sham contracting is made easier by inadequacies within provisions of the FWA which apply to the practice. It is also inadvertently encouraged by taxation laws which provide a financial incentive for employment arrangements to be hidden in some cases.

7.13 The FWA 'prohibits the deliberate disguising of an employment relationship as a contract for services.'[13] The Act also prohibits the dismissal of employees and their subsequent re-engagement as independent contractors who then perform the same or similar work.[14]

7.14 However, provisions of the Act pertaining to sham contracting, specifically section 357, suffer from considerable limitations, as explained by the CFMEU:

> Section 357 is infringed through the making of a representation. The CFMEU has advocated for many years for a "strict liability" type provision that provides for a civil penalty in circumstances where a person who is an employee at law is treated by the employer as an independent contractor. However, as the Act stands, the mere fact that an employment relationship exists but the employee is nonetheless treated as a contractor, does not establish a breach of the section. Whilst the High Court has recently determined that it is immaterial that the misrepresentation was as to the relationship between the employee and the employer or a labour hire company, the misrepresentation requirement is still central to the operation of the section.[15]

12 United Voice, *Submission 203,* p. 11.

13 Ms Jenny Lambert, Director, Education and training, Australian Chamber of Commerce and Industry, *Proof Committee Hansard,* 9 June 2017, p. 11. See also section 357, FWA.

14 CFMEU, *Submission 200,* p. 12.

15 CFMEU, *Submission 200,* p. 12.

7.15 This means that an employer can avoid section 357 of the FWA by proving 'that they did not know and were not reckless as to the representation.'[16]

7.16 The Electrical Trades Union of Australia (ETU) also pointed to recent High Court decisions which only serve to highlight the 'problematic' nature of sham contracting provisions as they stand under the FWA, suggesting that the provisions are too complex and too broad. Employers are able to exploit these shortcomings, the ETU submits, and thereby evade liability.[17]

7.17 Furthermore, Maurice Blackburn Lawyers warned that employees with legitimate entitlements may be failing to seek legal advice based on the assumption that they are not employees, as no definitive test exists at common law differentiating an employee from an independent contractor.[18]

7.18 Adding to this, the burden of proof effectively rests with the employee, because no statutory presumption exists in the Act presuming the worker to be an employee in the event of a dispute:

> This means that the onus effectively rests on the worker to establish, with reference to the common law 'multi-factor test', that they are in fact an employee and not an independent contractor.[19]

7.19 Achieving this, the National Union of Workers (NUW) points out, is an onerous process which many employees would find difficult to understand, let alone enforce. This is particularly the case for newly arrived migrants.[20]

7.20 The NUW cites the high-profile case of Mr Pedro Vannea, who was engaged by a labour supply company, Royal Bay International Pty Ltd, which was in turn contracted by Baiada, as an independent contractor. Royal Bay created a company for Mr Vannea, 'Pedro Vannea Pty Ltd'.

7.21 Mr Vannea boned poultry for below minimum wage over a number of years. Being an independent contractor, Mr Vannea also forewent shift loadings, penalty rates, superannuation, and other benefits applicable to employees under the FWA.[21]

7.22 This arrangement only began unravelling for Royal Blue and Baiada after Royal Blue terminated the contract in January 2014—Mr Vannea was deemed to have taken too many days off after a workplace injury. Following an application to the FWC by the NUW on Mr Vannea's behalf, the FWC ruled that the Mr Vannea was an employee incorrectly characterised as an independent contractor.[22]

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16 Maurice Blackburn Lawyers, *Submission 157,* p. 8.

17 ETU, *Submission 197,* p. 15.

18 Maurice Blackburn Lawyers, *Submission 157,* p. 8.

19 National Union of Workers, *Submission 198,* p. 4.

20 NUW, *Submission 198,* p. 4.

21 NUW, *Submission 198,* p. 4.

22 NUW, *Submission 198,* p. 4.

Committee view

7.23 The committee notes with concern that the Act permits employers the opportunity to prove that mischaracterisation of employees as independent contractors was not done knowingly or recklessly. The fact that the FWA leaves the onus on workers—including some of the most vulnerable workers in society—to prove otherwise is in the committee's view an unacceptable burden. The committee is of the view that this fact alone is responsible for many instances of sham contracting going unchallenged, because it is self-evidently and notoriously difficult for workers to navigate the system and take on deep-pocketed companies.

7.24 The committee particularly notes that there may be many employees who may have been mischaracterised as independent contractors over a period of years. These workers, in situations where their contracts were terminated, may have been deprived of the right to significant redundancy pay.[23]

7.25 The issue of "who is an employee?" has been extensively considered by courts including the High Court. The criteria used are variable and in some instances contradictory, for example, the criteria in the Vabu[24] decision were seen as exhaustive but have been modified in practice, such that what is accepted by the ATO as an employment arrangement is denied to be such by the FWC or the Federal Court.

7.26 Furthermore, the committee notes evidence provided by Maurice Blackburn Lawyers regarding the absence of a definitive test at common law differentiating independent contractor from employee relationships. The committee is firmly of the view that the existence of economic incentives encouraging sham contracting over employment and these must be addressed as the root cause of the growth of sham contracting, the Act must be amended to clearly set out a statutory definition of 'employee' and 'contractor'. This would provide clarity and 'enable individuals to determine the nature of their employment without recourse to the Common Law test.'[25]

Weak civil penalty regime

7.27 The Australian Chamber of Commerce and Industry (ACCI) argues that the Act, through the Fair Work Ombudsman (FWO), actively and effectively enforces provisions relating to sham contracting:

> An employer, whether they are conducting a labour hire business or a business of another kind, has obligations under the Fair Work Act, as well as many other laws. Failing to comply can result in penalties, reputational damage, exposure to liability, back pay and potential litigation.[26]

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23 See Maurice Blackburn Lawyers, *Submission 157,* p. 8.

24 *Hollis v Vabu Pty Ltd* [2001] HCA 44.

25 Maurice Blackburn Lawyers, *Submission 157,* p. 8.

26 Ms Jenny Lambert, Director, Education and training, Australian Chamber of Commerce and Industry, *Proof Committee Hansard,* 9 June 2017, p. 11. See also section 357, FWA.

7.28 Others disagree, pointing out that the increasing prevalence of sham contracting in itself suggests that the penalties for non-compliance with existing provisions under the Act are not providing an adequate disincentive.[27]

7.29 The ETU's submission explained that the civil remedy for sham contracting established by the FWA is virtually powerless in dealing with employers who engage in the practice. This is especially the case when the Act is compared with similar statues, such as the *Competition and Consumer Act 2010*:

> Unlike ASIC [Australian Securities and Investments Commission] and the ACCC [Australian Competition and Consumer Commission], the FWO does not have the power to seek an order disqualifying directors or officeholders from managing corporations for a relevant period; and there is no licensing regime with applies to employers generally (or labour hire agencies more specifically).[28]

7.30 The regime is, as described by the ETU, 'manifestly weak', and contains broad loopholes for employers and corporations to reduce or avoid their obligations under the Act entirely.[29]

Taxation incentives

7.31 In the first instance, some employers misuse sham contracting to avoid the safety net provisions of the FWA and the award system, as well as the industrial system more broadly. The CFMEU explains:

> By attempting to disguise an employment relationship as a commercial contract, employers are also seeking to remove their workers from other legal regulatory regimes that depend on employment status for their operation. For example, the application of taxation laws - such as the obligation to remit PAYG payments, pay payroll tax or utilise an ABN or the alienation of personal income rules – as well as the coverage of workers compensation and occupational health and safety laws and superannuation guarantee provisions, can all be thrown into question by the use of sham contracting arrangements.[30]

7.32 The practice carries broader economic implications however. The CFMEU estimates that sham contracting cost the public purse almost $2.5 billion in 2011 in the construction industry alone.[31] A 2012 Fair Work Building and Construction (FWBC) report indicated that approximately 13 per cent of contractors exhibit typical employment features and may be misclassified as independent contractors:

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27 Ballarat Regional Trades and Labour Council, *Submission 186,* p. 5.

28 ETU, *Submission 197,* p. 15.

29 ETU, *Submission 197,* p. 15.

30 Construction, Forestry, Mining and Energy Union, *Submission 200,* p. 11.

31 CFMEU, *Submission 200,* p. 11.

> Overall this equates to a workforce in the building and construction industry comprised of 61% employees, 34% genuine independent contractors and 5% possibly misclassified contractors.[32]

7.33 Furthermore, employers are not alone in deliberately disguising employment relationships as contractual ones, with some workers seeking to exploit ineffective taxation laws which make the practice lucrative. The CFMEU submitted that:

> Ineffective taxation laws, including the 'alienation of personal services income' (APSI) provisions, are contributing to the sham contracting problem. These rules were introduced ostensibly to reign in revenue lost through the use of companies, partnerships and trusts to disguise income generated by the personal exertions of individual taxpayers. The use of these legal forms allows reduced or deferred tax liabilities through income splitting and work-related deductions not available to employees, and the retention of income in the entity to take advantage of lower tax rates.[33]

7.34 This behaviour is seen across a variety of industries and is not confined to white collar sectors such as IT or consultancy:

> In industries like construction, it is common for people to use a $2 company to provide their services, concreting, plasterboard work and the like, in what is essentially an employee-like fashion.[34]

7.35 It is clear that the incentives provided by 'alienation of personal services income' tax provisions do little to curb sham contracting.[35]

Committee view

7.36 Like other corporate avoidance strategies, sham contracting will not be curbed until and unless the penalties for engaging in the practice outweigh the financial gains which motivate it. The committee strongly urges the government to review how taxation laws may be incentivising the misrepresentation of employment arrangements as contracting relationships for financial gain.

Recommendation 20

7.37 **The committee recommends that the *Fair Work Act* be amended to ensure that all workers have the protections of the Act and access to the labour standards, minimum wages and conditions established under the Act.**

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32 *Working arrangements in the building and construction industry*, available at: www.abcc.gov.au/sites/g/files/net666/f/FWBC_Working%20arrangements%20in%20building%20and%20construction_research%20report_D..._0.pdf (accessed 24 July 2017).

33 CFMEU, *Submission 200*, p. 13.

34 CFMEU, *Submission 200*, p. 13.

35 CFMEU, *Submission 200*, pp. 13–14.

Recommendation 21

7.38 **The committee recommends that the government review taxation law, including 'alienation of personal services income' provisions, with a view to addressing unintended incentives for sham contracting.**

Recommendation 22

7.39 **The committee recommends that the *Fair Work Act 2009* be amended to make sham contracting a strict liability offence.**

Recommendation 23

7.40 **The committee recommends that the existing penalty regime for sham contracting be reviewed with a view to increasing penalties to create a more effective disincentive.**

Recommendation 24

7.41 **The committee recommends that, where the legal status of a worker is in dispute, the party asserting that the worker is an independent contractor be required to establish this by demonstrating that the worker is operating a business and not working under that employer's control.**

Chapter 8

The gig economy: hyper flexibility or sham contracting?

> Our community members found a great feeling of accomplishment when using Airtasker, to the point where they just might break into dance.[1]

8.1 To its proponents, the gig economy is about flexibility and freedom: it is all about choice. There are no employers and employees: there are customers, platforms and entrepreneurs. The customer needs a task to be completed—their food delivered, garden landscaped, legal document reviewed or house cleaned. The entrepreneur has skills and wants to use them how and when s/he chooses, for remuneration s/he sets. For a small fee, the online platform brings them together. There is no need for minimum or maximum hours, no obligatory peak-hour commute, no rigidity and no workplace hierarchy.

8.2 There is also no security of income, no insurance for the worker in case of accident, no superannuation, no personal, annual or paid leave of any description. An entrepreneur with specialised, in-demand skills may agree to sell their expertise for a handsome fee. An entrepreneur with less specialised skills can secure a short-term job, a 'gig', by selling their labour for less than their competitors. And there is no limit to how low fees can go; no minimum amount a person can be paid to do a job, as long as they agree, because—as far as the platform and customer are concerned—the entrepreneur is not an employee. The worse or more desperate a person's financial circumstances, the less they might agree to work for.

8.3 To its proponents, the gig economy is a brave new world allowing people to be masters of their own fate: to choose the work they do and for how much they do it.

8.4 To its critics, the gig economy is dangerously unregulated and creates fertile ground for exploitation: the promise of choice rings hollow.

8.5 This chapter looks at the gig economy through illustrative examples presented by submitters and witnesses.

The rise of the gig economy

8.6 The term 'gig economy' gained prominence at the height of the 2009 global financial crisis, when job losses were rife and workers out of necessity turned to sporadic, casual work: gigs.[2] The term has since evolved; today it most commonly describes peer-to-peer arrangements where for-profit companies create online

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1 Mr Steve Reynolds, Vice President of Marketing, Airtasker: www.campaignbrief.com/2016/09/airtasker-empowers-australians.html (accessed 26 April 2017).

2 UnionsNSW, *Submission 180*, p. 5.

platforms, or 'marketplaces', which pair workers with jobs. In Australia, widely recognised examples include Airtasker, Freelancer, Uber and Deliveroo.

8.7 The rise of the gig economy can partly be attributed to technology paving the way for new, innovative ways of doing business.[3] People have always done 'odd jobs on the side'—for friends and family, or extra cash—but it is the entrepreneurial online platforms which have brought this kind of work into sharp focus. A report produced by Unions NSW estimates the size of the gig economy today:

> The size of the gig-economy is increasing rapidly and attracts millions of users every day. Research conducted on behalf of the NSW Government estimated the sharing economy has contributed $504 million to the State's economy annually, and provided 45 000 people with some form of work.[4]

8.8 It is impossible to say whether those people were paid fairly, how much has been lost in taxation revenue or what people working this way may have foregone in terms of superannuation and other benefits.

Who is the employer?

8.9 Unions NSW describes four key features underpinning work undertaken in the gig economy:

- Work is fragmented into specific individual tasks or jobs and workers are engaged on a task by task basis with no guarantees of continuous work.
- Work is performed by individual workers, but may be commissioned by an individual or a business.
- Labour transactions between workers and individuals/businesses are facilitated by a for-profit company who charge users for this service (e.g., Airtasker, Uber). These transactions are performed through web based applications which are managed and controlled by the for-profit company.
- Workers are classified by the facilitating companies as independent contractors and are not afforded any employment protections or minimum standards in the performance of their work.[5]

8.10 The last feature—being classed as independent contractors—is why workers do not have access to minimum pay and conditions under industrial law, and it is the main point polarising opinions on the gig economy.

8.11 There is an argument that if businesses operating in the economy simply connect users, that is, customers and workers, then they are simply an intermediary:

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3 Unions NSW, *Submission 180*, p. 4.

4 *Innovation or Exploitation: Busting the Airtasker Myth*, Unions NSW, available at: https://d3n8a8pro7vhmx.cloudfront.net/unionsnsw/pages/3135/attachments/original/1474529110/Unions_NSW_Report_into_Airtasker.pdf?1474529110 (accessed 19 July 2017).

5 Unions NSW, *Submission 180*, p. 5.

> Supposedly, when a customer and worker are matched they create a separate service contract with each other, which then absolves the gig economy company of any responsibility or involvement with the work that takes place.[6]

8.12 Mr Thomas Costa, Unions NSW Assistant Secretary, pointed out that the 'independent contractor' classification, when 'first envisaged by the law…did not encompass this kind of platform engagement work.'[7] Independent contractors operating in the gig economy—workers—may have their own Australian Business Numbers (ABNs), but many, even though independent by law, are in fact very dependent. Dependent on a single client, having little authority over their work, they are perhaps better described as dependent contractors.[8] They have 'embraced a freedom to choose when to work but are faced with a precarious and paradoxical lack of control.'[9]

8.13 This dependence on the control and direction of the person an individual is working for, Mr Giridharan Sivaraman, Principal at Maurice Blackburn Lawyers, said, is highly reminiscent of employment:

> I think, well, you go, you do the work, you get paid, and you are subject to the direction and control of the person you are doing the work for. If you look at the classic High Court cases on employment, that looks and sounds like employment.[10]

8.14 Similarly, Unions NSW points out that companies operating in the gig economy in most cases exhibit one, if not multiple, features of employment. This calls into question operators' assertions that workers are independent contractors:

> **Charges a work fee to workers using the site/app.** This generally takes the form of a percentage of the fee charged to the customer. For examples Airtasker takes 15 percent of earnings and Uber takes 20 percent of fares.
>
> **Regulates the behaviour of workers.** The public image and brand of the company is regulated. This extends to controlling the public interaction of workers on the website. Workers can be blocked from work for publicly expressing dissenting views.
>
> **Workers are dependent on ratings within the app for work.** Apps provide opportunities for customers to rate workers within the app. Workers are then dependent on the apps internal rating system in order receive work.

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6 Unions NSW, *Submission 180*, p. 7.

7 Mr Thomas Costa, Assistant Secretary, UnionsNSW, *Proof Committee Hansard*, p. 16.

8 Young Workers Centre, *Submission 190*, p. 6.

9 *Uber, Airtasker: new workd of work is not without problems*, Australian Financial Review, 27 December 2016, available at: www.afr.com/business/uber-airtasker-new-world-of-work-is-not-without-problems-20161222-gtgjz2 (accessed 19 July 2017).

10 MR Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 6.

Maintains the right to remove workers and thus restrict their ability to work. Companies maintain the right to block workers from their platforms. This is particularly restrictive considering the market domination of gig-economy platforms in certain industries, making it very difficult for blocked workers to continue working in the area. Workers can be blocked for low ratings, cancelling jobs or speaking out against the company. Workers are given few rights to challenge.

Provides (limited) insurance protection. Some companies provide limited insurance, like Airtasker, Uber and Foodora. However, across all platforms there is no provision for worker's compensation.

Provides equipment to perform work. Deliveroo and Foodora provide branded carry bags for deliveries as well as uniforms.

Regulates the service contract by providing mediation and arbitration. If customers are not happy with services provided, companies will act as mediators in disputes between the worker and the customer.

Controls who performs the work. Gig economy work relies on individual worker profiles and ratings. As such, companies restricts workers from further outsourcing a task or having it partially performed by another contractor. This limits the ability of workers to fully control the nature and performance of their work.

Interviews and screens workers. Airtasker has a subset of workers called 'Airtasker Pro' which requires workers to be interviewed and screened and if they meet the standards specified by Airtasker, these workers are provided with preferential treatment for tasks. Foodora workers must submit an application for work which includes available days and number of preferred hours. Whizz pre-screens workers before providing them with access to the platform. Deliveroo and Foodora require riders to pass a fitness test before they can work on the platform.

Provides training. Runs training which provides specific instruction on how work is to be completed. Whizz runs a training and induction session for their cleaners, providing guidance on how work is to be conducted. Deliveroo and Foodora run training for new delivery riders/drivers covering road safety, branding and use of the app.

Arranges a roster of shifts. Foodora sets shifts which workers can sign up to and receive an additional hourly payment on top of their per delivery commission payments. Foodora can then suspend these shifts if there are fewer customers than expected.

Time limits placed on the completion of work. The company may require work to be completed in a set time. Foodora and Deliveroo set time frames food must be delivered within.[11]

8.15 The above arrangements demonstrate that workers are in fact often dependent on 'gig' companies, the platform operators, for the delegation of jobs. Nevertheless,

11 UnionsNSW, *Submission 180*, p. 8.

while ever they are classed as independent contractors workers are not entitled to workplace protection, including:

- a minimum wage;
- paid leave;
- minimum or maximum hours;
- superannuation;
- protection from unfair dismissal;
- workers' compensation;
- collective bargaining; and
- access to the Fair Work Commission.[12]

8.16 Independent contractors may form or join a union, but can only bargain collectively if specifically authorised by the Australian Competition and Consumer Commission (ACCC).[13]

8.17 Furthermore, some 'gig' companies are known to have partnerships with 'traditional' businesses. This includes food delivery companies such as Deliveroo, whose business is dependent on establishing and maintaining partnerships with participating restaurants. In this example, where workers are treated as independent contractors by businesses in partnership, this profits the restaurant as well and undermines the *Fair Work Act 2009* (FWA):

> Restaurants who in the past may have employed a worker to deliver takeaway food can now shift the costs of employment onto the worker by engaging them as an independent contractor through Deliveroo or Foodora.[14]

8.18 This is a highly illustrative example. In the 'traditional' economy, restaurants which misclassify drivers as independent contractors may be found to be in breach of the FWA and fined accordingly:

> A recent Fair Work Ombudsman audit of Pizza Hut franchises found 24 restaurants had misclassified drivers as independent contractors, with a total of $12 086 of underpayments owed to workers. The Fair Work Ombudsman issued Pizza Hut franchises with $6300 worth of fines and required the workplace noncompliance to be rectified.[15]

8.19 Fines and orders can be avoided, it seems, simply by using an intermediary 'gig' company. The following section looks more closely at Deliveroo.

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12 UnionsNSW, *Submission 180*, p. 8.

13 Young Workers Centre, *Submission 190*, p. 6.

14 UnionsNSW, *Submission 180*, p. 8; Young Workers Centre, *Submission 190*, p. 6.

15 UnionsNSW, *Submission 180*, p. 8.

Deliveroo

8.20 Deliveroo describes itself as a 'food delivery tech business':

> Our online delivery platform joins up customers who want great food, restaurants who seek additional revenue and riders who are looking for well-paid, flexible work. Customers order via our app from one of our partner restaurants, the vast majority of whom had never considered deliveries before Deliveroo. Riders then collect the prepared food and deliver it to the customer by bicycle or scooter.[16]

8.21 From the company's perspective, the platform benefits all involved. Riders enjoy a 'hyper flexible way of working', customers enjoy choice and convenience, and restaurants are able to expand their customer base (and revenue) by offering food delivery.[17]

8.22 Food delivery riders, Deliveroo confirms, engage with the company as independent contractors. Seventy-five per cent of Deliveroo riders are 18 to 29 years old.[18]

8.23 Refuting the mutually beneficial relationship described by the company, the Young Workers Centre (YWC), which helps young Victorians understand and protect their rights at work, suggested that the 'independent contractor' characterisation helps Deliveroo—and other companies operating in the same space, such as UberEATS and Foodora—avoid obligations under the FWA:

> They engage these workers on independent contracts to work as food bike couriers. We believe that Deliveroo are employing these young workers on sham contracts to deliberately circumvent their obligation to provide safety insurance, minimum pay rates and minimum work conditions provided for in the National Employment Standards and relevant industry awards, and it is our belief that they are doing this in order to minimise their labour costs.[19]

8.24 Many of these young workers, YWC added, are visa workers studying or backpacking in Australia.[20] As a cohort, they are particularly vulnerable to exploitation.

Unequal pay for equal work

8.25 The committee heard that independent contractors—riders in Deliveroo's case—operate under difference contracts and do not receive equal pay for equal work:

> [T]here are no minimum standards across Deliveroo contracts in themselves. We have seen over a dozen different contracts that have been

16 Deliveroo, *Submission 210*, p. 1.

17 Deliveroo, *Submission 210*, p. 1.

18 Deliveroo, *Submission 210*, p. 2.

19 Ms Keelia Fitzpatrick, Coordinator, Young Workers Centre, *Proof Committee Hansard*, p. 54.

20 Ms Keelia Fitzpatrick, Coordinator, YWC, *Proof Committee Hansard*, p. 54.

> rolled out by Deliveroo over the past 18 months that employ people doing the same work on different hourly pay rates, and in some circumstances no minimum hourly pay rate at all—so just simply a drop rate or a piece rate.[21]

8.26 What this means, YWC representatives explained, is that the company is able to reduce its costs by offering riders different rates for the same job:

> [F]or example, we were informed several days ago that in the South Yarra area, where Deliveroo is very popular, they have such a high number of riders now that they have moved completely off any hourly rates to just a piecemeal rate entirely, whereas in other areas that is not the case.[22]

8.27 A former Deliveroo rider added:

> I was hired on an $18-an-hour contract, with $2.50 per delivery, and then there were also people who were hired a couple of weeks after me who were on a rate of $16 an hour and $2.50 per delivery, and then there were other people I worked with on contracts with $9 per delivery and no hourly rate. So everyone I worked with would have completely different amounts that they were being paid and ways that they were being paid.[23]

21 Ms Keelia Fitzpatrick, Coordinator, YWC, *Proof Committee Hansard*, p. 55.

22 Ms Keelia Fitzpatrick, Coordinator, YWC, *Proof Committee Hansard*, p. 55.

23 Ms Alison Millward, Volunteer, YWC, *Proof Committee Hansard*, p. 56.

Deliveroo case study – Andrea*

Andrea is a 21 year old food bike courier with Deliveroo. She is engaged as an independent contractor to deliver food on demand around Melbourne rain, hail or shine. The contract Andrea signed up to when she started the job was not the result of negotiations between her and the company, rather it was the standard contract Deliveroo were using at the time. This 'standard' contract does not provide Andrea with any of the minimum pay, conditions or other entitlements set for the industry by the Award. There is in fact, no standard or floor for Deliveroo food bike couriers, as contracts change within a matter of months. Deliveroo riders in Melbourne are currently working identical tasks and jobs, on at least five different contracts as seen by Young Workers Centre. Each contract specifies different pay rates and conditions depending on the date the worker commenced work with the company. Andrea describes being lucky enough to be on a 'good' contract compared with others, despite the fact that her contract undercuts the industry Award as shown below.

No minimum hourly wage. *[Andrea] is paid a below Award base rate with 'bonus' payments for each completed delivery. On a busy night Andrea might be flat out, but if it's quiet she will earn only the base rate of $18, well below the minimum pay rates under the Award of $23.44 for casuals.*

No minimum shift lengths. *Andrea works shifts allocated to her on a roster, just like an employee. However as Andrea has no right to a minimum shift length and no minimum hourly wage, she has no minimum shift pay. Under the Award, Andrea would be entitled to minimum four hour shifts and four hours pay $75 for full or part time worker or $93.76 for casuals.*

No penalty rates. *The chefs, wait staff and others employed in the preparation and cooking of the food that Andrea delivers are entitled to penalty rates for hours worked on their weekends, public holidays or late evening. Despite working the same hours, Andrea's contractor status means she misses out on those penalty rates.*

No superannuation. *Andrea is over 18 and earning more than $450 pre tax per month, so if she were an employee she would be receiving 9.5% super paid into her account to set her up for retirement later in life. Unfortunately in her case, contractors are responsible for their own superannuation. Andrea will have to take a 9.5% pay cut and pay super out of her already below Award pay rates if she wants to keep up her superannuation investment.*

Other. *Andrea's contract states she must 'provide equipment and/or tools necessary to undertake work including but not limited to smart phone, sufficient data plan and appropriate mode of transport' If Andrea was an employee, she would be provided transport, a phone and data or an allowance for these tools required for the job.*

Andrea's contract states she's responsible for obtaining and maintaining all insurances needed including: mode of transport insurance, workers comp insurance, professional indemnity insurance, and public liability insurance.

YWC, Submission 190, p. 6. *Not the worker's real name.

8.28 Deliveroo confirmed that its contracts had been updated since the company's 2015 launch in Australia. This, the company explained, was done to reflect the growth and evolution of the business and riders' changing requirements. Deliveroo submitted that it was factually incorrect to say that 'over a dozen' contracts had been rolled out.[24] The company did not clarify what, in its view, would be a factually correct number.

8.29 YWC supplied a table showing considerable differences between three different Deliveroo contracts.

Table 8.1—Comparison of 3 Deliveroo contracts[25]

CONTRACT DATE	DELIVEROO CONTRACT TERMS	WEEKLY INCOME UNDER DELIVEROO CONTRACT	WEEKLY INCOME UNDER THE AWARD	WAGES STOLEN PER WEEK
November 2015	$18/hour + $2.50/delivery	12 hours @ $18 20 deliveries @ $2.50 $216 + $50 **$266**	9 hours @ $26.72 3 hours @ $32.81 **$338.91** + 9.5% super $32.20	-$72.91 income $32.20 super
February 2016	$16/hour + $2.50/delivery	12 hours @ $16 20 deliveries @ $2.50 $192 + $50 **$242**		-$96.91 income $32.20 super
April 2016	No hourly rate $9/delivery	20 deliveries @ $9 **$180**		-$158.91 income $32.20 super

8.30 Table 8.1 illustrates the financial consequences of variations in hourly pay for riders—people doing the same work. Alarmingly, it also shows how far below the relevant award riders are, as well as the superannuation entitlements lost because riders are not covered by the FWA. This is most pronounced in the most recent contract provided, April 2016, under which the rider is paid per delivery only, rather than receiving an hourly rate, plus fee per delivery.

8.31 Nor do Deliveroo's contracts provide adequate insurance for riders, YWC asserts.[26]

8.32 The company disagreed with this, stating that workers' compensation insurance is provided for all riders in Australia, but that each rider is also required to obtain his or her own public liability insurance coverage.[27] How riders arrange this

24 Deliveroo, *Submission 210*, p. 2.

25 YWC, *Submission 190*, p. 7.

26 Ms Keelia Fitzpatrick, Coordinator, YWC, *Proof Committee Hansard*, pp. 54–55.

27 Deliveroo, *Submission 210*, p. 2.

insurance differs; they can seek out their own policy, or pay to join the company's group scheme:

> Each rider can choose to arrange this cover via their own policy or can choose to join a Deliveroo group scheme available to every rider via a small fee that is deducted from their payments. These requirements are consistent with the usual arrangements for independent contractors.[28]

8.33 Deliveroo did not provide the committee with sample contracts.[29] Contracts provided by YWC do not include workers' compensation insurance. One sample contract states the following:

> 7.6 The Contractor agrees that he/she will obtain and maintain at all relevant times any necessary insurances and insurance cover relating to the performance of the Work and, upon request by the Company, provide proof of such insurance cover to the Company prior to commencing the Work. Such insurance cover should include, but is not limited to:
>
> 7.6.1 any applicable motor vehicle insurance;
>
> 7.6.2 any necessary workers' compensation insurance; professional indemnity insurance; or
>
> 7.6.3 public liability insurance.[30]

8.34 Insofar as the contracts made available to the committee refer to occupational health and safety, they do so to absolve the company of any responsibility toward its riders.[31]

8.35 One former Deliveroo rider gave evidence on this point, describing for the committee how she went about satisfying the arrangements required of an independent contractor:

> My parents bought me insurance for Christmas. It is a dangerous job. A lot of people get car doored or slip on tram tracks, things like that. My brother was deployed [with the military] at the time but my mother would say she was much more worried about me out on the streets than him in Iraq. It is not the safest of jobs. If someone is injured at work and cannot work, not only are they not insured and would have to either have their own insurance or cover their own medical bills but it also means when they are out sick from work they are not getting paid at all. For any shifts they are not able to work, there is no income coming in. I think that is something that is not good.[32]

8.36 The committee now turns to another high-profile gig company, Airtasker.

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28 Deliveroo, *Submission 210*, p. 2.

29 See Deliveroo, *Submission 210*.

30 YWC, *Submission 190*, p. 16.

31 YWC, *Submission 190*, pp. 19–24.

32 Ms Alison Millward, Volunteer, YWC, *Proof Committee Hansard*, p. 57.

Airtasker

8.37 Airtasker was established in 2012. Today the company is the leading provider of task-based services. Unions NSW reports that over 550 000 users generated $3.5 million per month in paid tasks by July 2016—a gig economy success story.[33] According to the *Australian Financial Review*, the number of users had reached 900 000 by the end of 2016.[34]

8.38 The company describes itself as 'a trusted community marketplace for people and businesses to outsource tasks, find local services or hire flexible staff in minutes—online or on your mobile.'[35]

8.39 The platform works by allowing people to post details of tasks to be completed, including an offer of how much these posters are offering to pay. Workers can bid for the task as advertised, or they can bid down the rate of pay in order to secure the job. Bids are blind, visible only to the original job poster, and Airtasker does not involve itself in how much people are paid. In fact, Airtasker's CEO, Mr Timothy Fung told the committee, the company does not benefit if fees are driven down:

> …the quotes that are shared between the prospective worker and the potential customer are not shared with other workers. We have no interest at all in a race to the bottom; in fact, the way that Airtasker makes money is by a service fee that is applied to the overall price of work on the platform. In fact, we are completely incentivised for workers to be well treated and to be paid more. The more they earn, the more we would earn as well. But we do not ever force them to do anything, and we certainly do not tell them how much to be paid or anything like that.[36]

8.40 Unions NSW views the platform's 'blind bidding' differently, finding that it creates 'a competitive environment where workers may seek to undercut the advertised rate to gain a competitive advantage.'[37]

8.41 The fee Airtasker takes is charged only to the worker. Posters deposit payment into an account managed by the company, and Airtasker then releases 85 per cent of that money to the worker, once the job poster declares the work to be complete:[38]

> Airtasker also takes a 15 per cent cut of all the work that is engaged through its site. This is something that does not occur in normal independent

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33 *Innovation or Exploitation: Busting the Airtasker Myth*, Unions NSW.

34 Australian Financial Review, *Uber, Airtasker: new world of work is not without problems*, 27 December 2016, www.afr.com/business/uber-airtasker-new-world-of-work-is-not-without-problems-20161222-gtgjz2 (accessed 5 September 2017).

35 www.airtasker.com (accessed 16 July 2017).

36 Mr Timothy Fung, Chief Executive Officer, Airtasker, *Proof Committee Hansard*, 18 April 2017, p. 1.

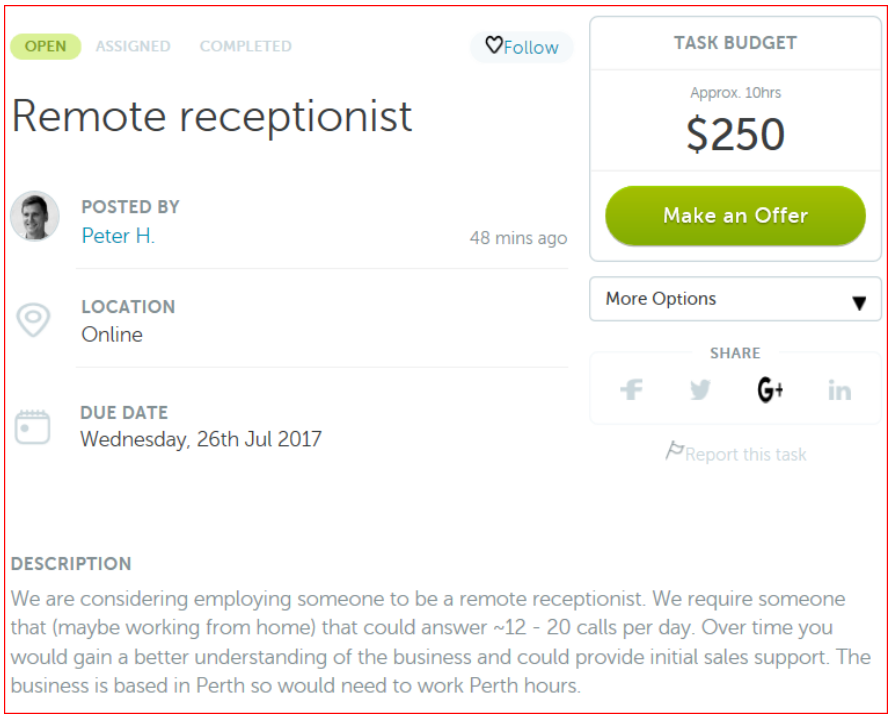
37 *Innovation or Exploitation: Busting the Airtasker Myth*, Unions NSW, p. 3.

38 *Innovation or Exploitation: Busting the Airtasker Myth*, Unions NSW, p. 3.

> contracting type arrangements. There is not a platform or a matchmaker that takes 15 per cent of your wages when putting you together with your client. If you think of the traditional Trading Post, you just pay a one-off advertising fee. There are problems here because Airtasker is happy to take a decent cut of the payment but it is not providing the same sorts of protections that traditional employment would.[39]

8.42 Some posts on the platform clearly indicate businesses are turning to Airtasker to advertise ongoing roles—without the burden of employment. For example:[40]

Figure 8.1— Airtasker sample post



8.43 The post below looks for staff. If the customer—in this case clearly a business—looked for 'temp' staff through an agency, fees would be applicable and charged to the business. Because businesses hiring workers through Airtasker are unburdened by minimum wage requirements, payroll tax, superannuation or other workplace entitlements, the fee is instead passed onto the worker, whose payment absorbs Airtasker's 15 per cent cut:[41]

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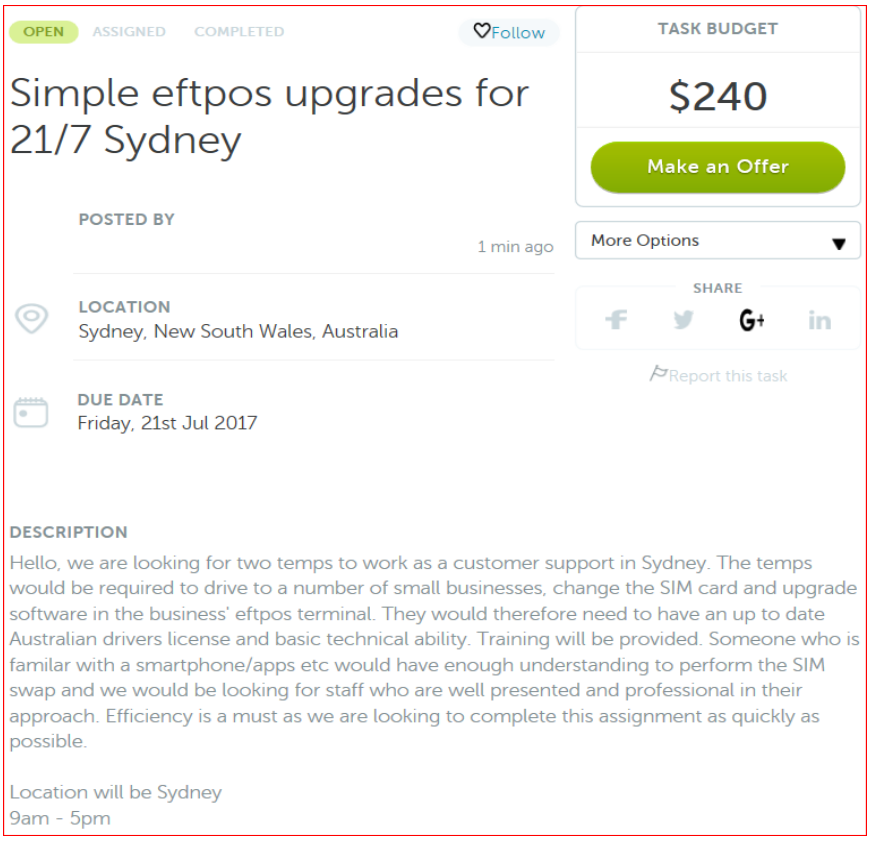
39 Mr Thomas Costa, Assistant Secretary, Unions NSW, *Proof Committee Hansard*, 18 April 2017, p. 16.

40 Airtasker sample post, available at: www.airtasker.com/tasks/ (accessed 20 July 2017).

41 Airtasker sample post, available at: www.airtasker.com/tasks/ (accessed 20 July 2017). See also *Innovation or Exploitation: Busting the Airtasker Myth*, UnionsNSW, p. 10.

Figure 8.2— Airtasker sample post



8.44 Airtasker co-founder and CEO, Mr Timothy Fung, describes how the company views the difference between the platform and an agency model:

> The way that we would differentiate those two things is that a marketplace gives control to its community members or its participants in the marketplace; whereas an agency is a much more structured and defined type of arrangement, where the marketplace creator itself would control a lot of the price and structure of what goes on on that platform.[42]

8.45 Airtasker takes pride in the transparency its platform offers. This transparency, together with the communication between 'the constituents' on Airtasker's platform, is the main service Airtasker believes it offers.[43]

8.46 It is not clear what is meant by transparency however. The jobs available on Airtasker's platform are highly varied, and include posts looking for highly skilled professions. In one example, a poster looks for a web developer who will work from

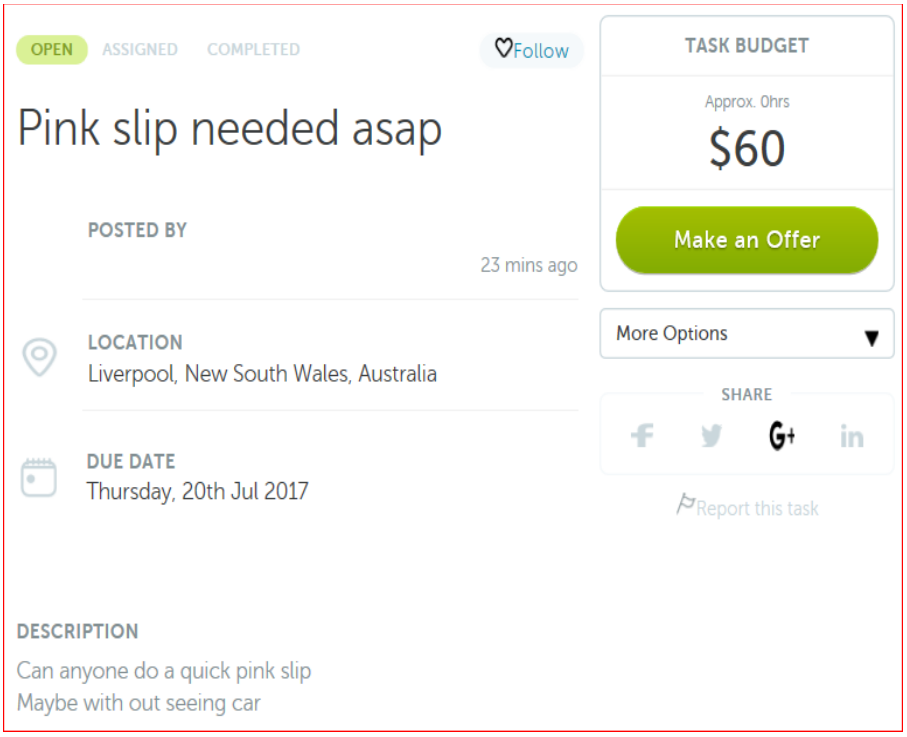
42 Mr Timothy Fung, Chief Executive Officer, Airtasker, *Proof Committee Hansard*, 18 April 2017, p. 1.

43 Mr Timothy Fung, Chief Executive Officer, Airtasker, *Proof Committee Hansard*, 18 April 2017, p. 1.

the posting company's Sydney office. A contract is alluded to but from the post alone it is not clear what the arrangements—including taxation—will be.[44]

8.47 Another post, below, looks for 'someone' to issue a pink slip—which is a safety check, carried out by authorised mechanics and legally required, before car owners can renew their registration in New South Wales. Cars older than five years require a safety inspection before a pink slip can be issued.[45] Without alluding to the age of their car, the poster below, however, looks for someone who can issue the inspection report 'maybe without seeing the car':[46]

Figure 8.3— Airtasker sample post



8.48 Airtasker, in theory, applies restrictions on illegal activities being posted on its platform. It would be of interest to know whether the above poster found a qualified mechanic to issue a safety inspection report 'maybe without seeing the car.'

8.49 The questionable legality of some of the jobs advertised aside, it also raises serious safety concerns, as do other posts. For example, the poster below looks for someone to load heavy pods onto pallets.[47]

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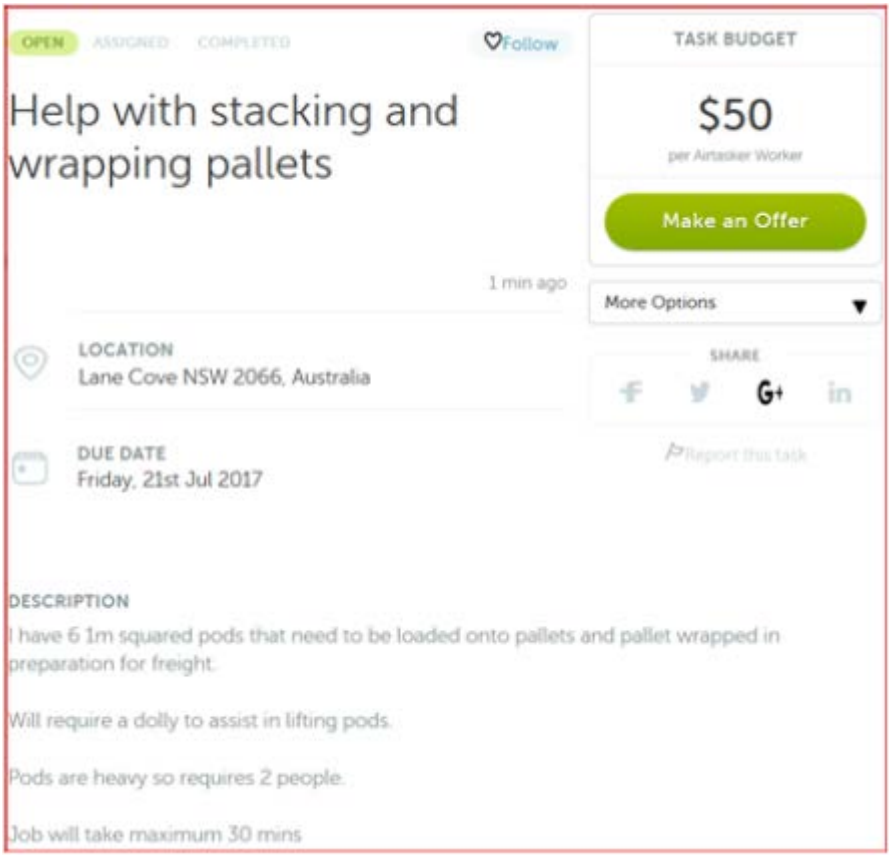
44 Airtasker sample post, available at: www.airtasker.com/tasks/ (accessed 20 July 2017).

45 See Service New South Wales, available at: www.service.nsw.gov.au/transaction/esafety-checks-pink-slips (accessed 20 July 2017).

46 Airtasker sample post, available at: www.airtasker.com/tasks/ (accessed 20 July 2017).

47 Airtasker sample post, available at: www.airtasker.com/tasks/ (accessed 20 July 2017).

Figure 8.4— Airtasker sample post



8.50 It is worth noting that, as independent contractors, whoever 'won' the above task to lift and move heavy objects would not have been covered by workplace health and safety laws.[48] It is also worth noting that Airtasker, despite considering workers to be independent contractors, does not in fact verify whether workers have ABNs.

8.51 Asked whether anyone other than an independent contractor could perform advertised tasks, Mr Fung explained the company's position:

> I believe that the structure of the work lends itself to independent contracting, so, yes, I think it is important that they are independent contractors. But I am not an expert in the various categorisations. When I say 'independent contractor', I clarify by saying that I certainly do not think that any form of employment relationship is being created.[49]

8.52 In other posts, people look for someone to babysit their children. As recently reported by the *Sydney Morning Herald*, Airtasker applies no requirement for Working with Children checks or experience. On the platform, one poster says, 'I have

48 *Innovation or Exploitation: Busting the Airtasker Myth*, UnionsNSW, p. 6.

49 Mr Timothy Fung, Chief Executive Officer, Airtasker, *Proof Committee Hansard*, 18 April 2017, p. 5.

three girls aged 5/6/10 and need someone to watch them tomorrow night.' He assigns the task to a bidder for $75 for three hours.[50]

8.53 The *Herald* reports Airtasker CEO, Mr Fung's, response to concerns:

> 'We are really allowing people to be responsible for their own work,' Mr Fung says. 'If you look at the way people hired babysitters before and the trust signals people relied upon, I would question whether they are more reliable than user reviews are.'
>
> Mr Fung says Airtasker will continue to allow users to post babysitting services. Airtasker has created a police badge so users can add a police verification check to their profiles and Mr Fung says the platform is also working on third party verification through a company called Risq.
>
> 'It is very important that buyers are aware that just because someone has had a police check done, it is not necessarily a 100 per cent signal that you should open up your doors to someone,' Mr Fung says. 'Peer reviews could be a stronger signal than a $45 police check.'[51]

8.54 The article also cites the example of a child care platform in the United States, Urbansitter, which conducts rigorous background checks on all babysitting applicants. Eighty per cent of people applying for babysitting tasks are rejected.[52]

8.55 The range of tasks included above is a fraction of what is available on the Airtasker platform. There are few limitations on what posters can request; these include escort services, illegal activities and tasks regarding school and university assignments.[53] Mr Fung informed the committee that Airtasker seeks to empower people and even drive change in how people value skills:

> …our mission statement is really to empower all people to realise the full value of their skills. We believe that the typical definition of 'skills' has not really taken into account all of the skills that individual people have, and we want to create a platform that allows them to share those skills and to realise the value of those skills.[54]

8.56 Some of the skills sought after in a typical day include:

- **Installing a rangehood kit.** The poster looks for someone to install a rangehood vent kit which will provide ventilation through a tiled roof.

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50 'People are auctioning off their children: Airtasker safety concerns, *Sydney Morning Herald*, 11 July 2017, available at: www.smh.com.au/small-business/startup/people-are-auctioning-off-their-children-airtasker-safety-concerns-20170710-gx84yx.html (accessed 19 July 2017).

51 'People are auctioning off their children: Airtasker safety concerns, *Sydney Morning Herald*, 11 July 2017.

52 'People are auctioning off their children: Airtasker safety concerns, *Sydney Morning Herald*, 11 July 2017.

53 *Innovation or Exploitation: Busting the Airtasker Myth*, UnionsNSW, p. 3.

54 Mr Timothy Fung, Chief Executive Officer, Airtasker, *Proof Committee Hansard*, 18 April 2017, p. 2.

$100 is offered for an 'experienced' tasker, because the poster '[does not] want any leaks in future.'

- **Families to host overseas students.** A poster looks for friendly families to host students from China, requirements unspecified.
- **Plumbing work.** One poster seeks a plumber to fix a toilet for $50. Another would like a complete bathroom pipe relocation—old pipes removed and replaced—for $500.
- **Tax returns.** A poster looks for a bidder who will complete two tax returns for $150, experience unspecified. Another offers $30 to a 'highly qualified professional' who will complete his tax return.
- **Cleaning houses.** One customer looks for someone to clean a two bedroom apartment on an ongoing basis, offering $100 for 'approximately' four hours. Another offers $70 for 'approximately 3.5 hours' work cleaning a three bedroom house. A third needs end-of-lease cleaning work performed for $100.
- **Laying synthetic grass.** A poster offers $25 for someone to fill a 14x5 metre area with synthetic grass.
- **Drinking companions.** A male poster looks for a 'female drinking buddy' in Bondi Beach, offering to pay for the winning bidder's drinks. Another man offers $35 for someone to 'bring [him] alcohol', a bottle of Smirnoff vodka specifically—a female bidder, who reports having a car and being bored, bids on the task.
- **Servicing drug paraphernalia.** An Airtasker customer looks for someone to 'clean [his] bong', which he 'recently smoked "tobacco" out of' but does not know how to clean. He offers $20; of course taskers are free to bid lower.[55]

8.57 The posts above are just a sample—tasks are updated continually, but the scale of opportunity the internet provides takes users of gig platforms beyond the realms of 'odd jobs' posted on community noticeboards:

> The scale that the internet provides means that you can use one website for thousands of jobs, which effectively becomes a matchmaking service or some form of labour-hire service, and it regulates your employment relationship with them…It is not the traditional independent contractor who puts up their own advertisement on the noticeboard or in the Trading Post, who quotes the job with their own terms of service and their own requirements. It just does not occur that way.
>
> There are what Airtasker calls very low friction points in order to engage with the site, but what that really means is that there is very little scrutiny of the people engaging on their site. They just matchmake people and send

55 This is a representative sample of tasks, available at: www.airtasker.com/tasks/ (accessed 20 July 2017).

> them off on their own. In some ways it is very similar to what happened in the past, but it is now on such a massive scale that those lower 'friction points' of entry mean that you are not getting small-business owners; you are not getting independent contractors that have all their own tools and equipment, who have gone out to start their own business with all the risks but also all the advantages of that. You are getting low-skilled workers who are desperate for work going online and signing up for jobs that are, in some cases, very far below the standard employment job you would get with an employer.[56]

8.58 It is clear that a large number of people are making some money working this way. It is also clear that businesses are increasingly turning to Airtasker to find workers, saving considerable money in the process and undercutting regular workers in the process:

> The sharing economy enables businesses to get odd jobs done as they look to expand and grow without hiring one-off expensive contractors. Many businesses also turn to these platforms when it's challenging to find specialised labour or when they are burdened by overheads in agency fees.[57]

8.59 Rather than being an exciting advancement in how people work, the Australian Manufacturing Workers' Union (AMWU) describes the gig economy as a 'mutant form of labour hire and contracting…where they effectively remove the contracting company altogether and make the employees into contractors.'[58]

Disruptive employment

8.60 Gig companies' descriptions of their contributions are effusive, peppered with words and phrases such as 'hyper flexibility', 'choice' and 'new economic opportunities'.[59] Airtasker believes it aligns itself with the workers, because the more they get paid, the more money Airtasker makes:

> I would be careful to say that averages are averages, but overall we ourselves have a complete vested interest in pushing the price up. In fact, a race to the bottom would only reduce our own revenue. We did that on purpose to align ourselves with the workers of our community, to say, 'Only when you win do we win; when you get paid more, we get a bigger fee.'[60]

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56 Mr Thomas Costa, Assistant Secretary, Unions NSW, *Proof Committee Hansard*, 18 April 2017, p. 16.

57 K. Hume, *7 tasks a business never thinks to outsource but should*, available at: www.first5000.com.au/blog/7-tasks-a-business-never-thinks-to-outsource-but-should/ (accessed 20 July 2017).

58 Mr Michael Nguyen, National Research Officer, Australian Manufacturing Workers' Union, *Proof Committee Hansard*, 15 March 2017, p. 6.

59 Deliveroo, *Submission 210*, p. 2.

60 Mr Timothy Fung, Chief Executive Officer, Airtasker, *Proof Committee Hansard*, 18 April 2017, p. 3.

8.61 Recognising that logic—in Airtasker's view, workers often drive fees up rather than down[61]—nonetheless suggests that only workers with specialised skills have the leverage to command higher fees. There is no shortage of cleaning jobs advertised on the platform for below award rates. To suggest that cleaners, not infrequently migrant workers who are a particularly vulnerable cohort of workers, have the leverage to demand higher fees is counterintuitive. Looking at one task on the Airtasker platform,[62] where a poster offers $200 for someone to deliver freight from Seven Hills, NSW, to Young, NSW—an approximately 360 kilometre, almost four-hour drive—it is not difficult to estimate how little a person would be paid after factoring fuel costs into the $200 fee. And yet these jobs are posted, and someone bids for them.

8.62 It is unlikely that the freedom to be paid under minimum wage is really about flexibility and choice, for workers at least. Unions NSW Secretary, Mr Mark Morey, instead points to a steady shift of responsibility onto workers as work is increasingly casualised. The gig economy is just an extension of this phenomenon:

> Some employers are using the traditional definition of 'independent contractor' combined with online platforms to escape their employment obligations. In fact, the traditional definition of an 'employee' ensures that people do have workers compensation, insurance protections and other workplace protections. This expanded use of the definition of a contractor, combined with online platforms, means that employers are now vacating the field of any obligations to those employees.[63]

8.63 The evidence provided to the committee strongly suggests that gig companies and the people who use them are undermining workers' rights, law-abiding businesses and the industrial relations system more broadly. The committee notes those who respect progress, but urge caution:

> [W]e are trying to take a progressive approach, and we are looking at it and working with some law firms that actually represent those gig economy providers to say, 'What is their social contract? What is their responsibility? How does the market rely upon them?' For example, if Airtasker supplies a worker to clean Aunty Margaret's gutter out in Oakleigh in Melbourne, why is that any different to that same individual being assigned or on-hired to perform work cleaning BHP's gutters at the same height et cetera? We think we actually have different rules playing out here. It sounds cool and freelancing is a state of mind, but I am challenging a lot of the younger people and younger generation and saying, 'Be careful what you create here,' because we are actually—and I think it is the case in that circumstance—creating a race to the bottom.[64]

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61 Mr Timothy Fung, Chief Executive Officer, Airtasker, *Proof Committee Hansard*, 18 April 2017, p. 2.

62 As seen on www.airtasker.com/tasks/ (accessed 20 July 2017).

63 Mr Mark Morey, *Proof Committee Hansard*, 18 April 2017, p. 15.

64 Mr Andrew Cameron, Chief Executive Officer, Recruitment & Consulting Services Association, *Proof Committee Hansard*, 15 March 2017, p. 45.

The way forward

8.64 The committee notes that Unions NSW and Airtasker have engaged in ongoing discussions in recent months, and have made progress in some areas:

> For example, when we first released our report Airtasker were advertising recommended rates of pay far below award wages. As a result of our discussions with them, they now recommend that people using their site pay award rates.[65]

8.65 Media reports following the committee's hearing in Sydney hailed a 'landmark agreement' between the two in early May 2017, with Airtasker agreeing to work with the union to increase minimum rates of pay and improve conditions for workers in the gig economy.[66] University of Sydney labour market expert Professor John Buchanan described the agreement as a significant shift in how new economic players interact 'with the collective voice of workers':

> Labour standards start from modest bases. This isn't a full-blown industrial agreement with rock-solid enforceable rights… What it provides is a point of reference for defining relations in the realm of economic practice which has been labour-standards free… This is very important. This is like the Normandy landings…they haven't got to Berlin yet, but they are on the beach and there is a clear beachhead.[67]

Committee view

8.66 Having looked at sham contracting in the previous chapter, the committee can only conclude that 'gig economy' is just a more discrete and sanitised way for companies to abrogate their obligations by requiring workers to be contractors.

8.67 The committee strongly believes that there is nothing incompatible between flexible working and being an employee. The law is entirely capable of regulating, protecting and taxing employers and workers who favour flexible working arrangements. In the words of the general secretary of the Independent Workers' Union of Great Britain:

> The category of self-employed person who carries out their work as part of someone else's business exists. It's called a worker. And they have rights.[68]

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65 Mr Thomas Costa, Assistant Secretary, UnionsNSW, *Proof Committee Hansard*, 18 April 2017, p. 15.

66 Ms Anna Patty, *Airtasker and unions make landmark agreement to improve pay rates and conditions*, Sydney Morning Herald, 1 May 2017, www.smh.com.au/business/workplace-relations/airtasker-and-unions-make-landmark-agreement-to-improve-pay-rates-and-conditions-20170427-gvtvpo.html (accessed 19 July 2017).

67 Ms Anna Patty, *Airtasker and unions make landmark agreement to improve pay rates and conditions*, Sydney Morning Herald, 1 May 2017.

68 J. Moyer-Lee, 'What everyone assumes about rights in the gig economy is wrong', *The Guardian*, available at: www.theguardian.com/commentisfree/2017/mar/22/rights-gig-economy-self-employed-worker (accessed 19 July 2017).

8.68 Gig companies have not invented a new way of working—they have exploited 'a cloak of innovation and progress to reintroduce archaic and outdated labour practices.'[69] The gig economy is normalising labour conditions it took generations of political struggle to stamp out in this country: precarious circumstances in which a person may not know where their next few dollars are coming from: insecure, unprotected, sporadic work.

8.69 Sporadic work may well suit those whose specialised skills service a niche and attract high fees, or those who may indeed choose to do odd jobs for extra, disposable, income. But serious questions and consequences arise for people without specialised skills and without a financial safety net beneath them, or for people who make a living by stringing odd jobs together. Why would a customer turn to an established cleaning business which pays its workers at or above the award, superannuation, insurance etcetera, and therefore charges higher fees, when they can find an online 'entrepreneur' to clean their house, possibly for below minimum wage? And will the customer burden him- or herself with questions about the person who comes to clean their house, how much they are paid and why it is that they might be 'choosing' to work for below minimum wage? It is one thing to be a contractor without sick leave or job security if you are, for example, an in-demand, highly-skilled IT professional commanding generous fees and handpicking jobs. It is another to be a contractor without sick leave or job security if you are a cleaner.

8.70 In previous chapters the committee has looked at ways in which employers have skirted or sought to reduce their obligations under various sections of the FWA, with numerous examples of blithe disregard for workers on display. With the gig economy, however, the committee is faced with employers who—simply by engaging workers as entrepreneurial independent contractors—have quite shrewdly managed to avoid the Act altogether. If this practice is allowed to proliferate, companies whose overheads are higher because they honour workers' entitlements will be placed under unsustainable pressure. This does not bode well for ethical business practice or workers' rights.

8.71 Further to this, in the committee's view the gig economy, as a rapidly growing sector, facilitates cash-in-hand work. The cost of this to the national economy and in particular government tax revenues is likely to be incalculable.

8.72 The committee concludes that the FWA and governments have failed to keep pace with the inescapable challenges presented by technology, and urges policymakers to act without delay in ensuring that legal definitions of 'employee' and 'employer' are clarified so as to cover all workers.

8.73 Finally, the committee is alarmed by reports that unqualified, unvetted, anonymous online users are bidding on jobs involving children, and considers this to be of the utmost gravity. The committee strongly urges online platforms facilitating such arrangements to act without delay to ensure that every precaution is taken to protect the safety of children.

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69 *Innovation or Exploitation: Busting the Airtasker Myth*, UnionsNSW, p. 1.

8.74 The committee again thanks Airtasker and Deliveroo for engaging with the inquiry process. The committee is confident that legislative change to protect workers in the gig economy is imminent. Companies which understand this and work with unions and government to drive positive change will be best placed to grow their business in a legal and ethical way. The committee notes Airtasker's commitment in this regard:

> We are happy to work with the various bodies to really support doing the right thing by the Australian economy. Certainly, in terms of what we can do, there are some technical limitations, but what our jobs are is to try and improve the system and make it better for people.[70]

8.75 It should be noted that the committee repeatedly approached Uber, the subject of considerable criticism and concern, without success. In this instance the committee chose not to summons Uber to appear at a public hearing, being of the view that the company's unwillingness to engage with Parliament speaks for itself.

Recommendation 25

8.76 **The committee recommends that the *Fair Work Act* be amended to ensure that all workers have the protections of the Act and access to the labour standards, minimum wages and conditions established under the Act, so that these rights accrue to dependent and on demand contracting, preventing those arrangements from being disguised as independent contracting. These amendments should capture the dependant contractor who is dependent upon a labour hire company, a company using a work allocation platform or a major corporation using a relationship power imbalance to exercise control over the worker.**

Recommendation 26

8.77 **The committee recommends that the government initiate a review to determine the tax implications of the gig economy and examine legislative and regulatory mechanisms to minimise the avoidance of legitimate Commonwealth tax arrangements.**

Recommendation 27

8.78 **8.1 The committee recommends that the government, as a matter of priority, bolster the employment conditions of workers engaged in the gig economy by requiring platform providers to verify all platform users comply with minimum standards.**

Recommendation 28

8.79 **The committee recommends that the government legislate to ensure that workers in the gig economy are protected by a minimum wage by requiring**

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70 Mr Timothy Fung, Chief Executive Officer, Airtasker, *Proof Committee Hansard*, 18 April 2017, p. 8.

platform providers to provide clear minimum labour price guidelines aligned to the relevant award for different categories of work, along with information about the relevant union for the category of work (where multiple unions would have coverage the ACTU should be provided as a point of referral).

Recommendation 29

8.80 **The committee recommends that the federal government work with state and territory safety regulators to review health and safety and workers' compensation legislation to ensure that companies operating in the gig economy are responsible for the safety of workers engaged in the gig economy.**

Chapter 9

Broader implications of corporate avoidance of the *Fair Work Act*

9.1 It stands to reason that increases in gross domestic product (GDP) should be reflected in wage growth—workers should benefit from the economic growth their labour helps create. In Australia, this is increasingly not the case. Instead, latest statistics reveal that the proportion of economic output paid to workers in Australia has fallen to an all-time, record low.[1]

9.2 Wage stagnation must be seen in the context of this inquiry. In previous chapters, the committee looked at corporate avoidance strategies individually. Each of the subjects covered in the chapters of this report are, however, linked, and together they paint a picture of blithe disregard for the spirit, and at times the letter, of the *Fair Work Act 2009* (FWA) in some sections of corporate Australia. The use of labour hire, sham contracting, avoidance of collective enterprise bargaining, downright wage theft—each of these examples represents a scramble by some employers to identify weaknesses or loopholes in the legislation which allow them to drive down wages and strip workers of conditions to the greatest extent possible, in the interests of boosting profit margins. Profit margins achieved through undermining the regulatory floor on wage reduction become eroded across industries and the economy as businesses adhering to the FWA core tenets of good faith bargaining lose business or are induced to compete on the same terms, to remove the relative advantage and margins of unethical competitors.

9.3 Wage stagnation is not only problematic in the context of fairness, however; it impedes economic growth and is stirring increasing concerns among economists and budget forecasters alike.

9.4 This chapter looks at the broader implications of corporate avoidance of industrial law.

Wage stagnation

9.5 GDP is the overall measure of a country's production—the total market value of goods and services produced. Producing goods and services is impossible without labour—workers. A report from the Australia Institute, *Labour Share of Australian GDP Hits All-Time Record Low*, provides valuable context and is outlined below.

9.6 While wage growth continues to slow, total quarterly nominal GDP grew by over $31 billion in the year ending March 2017. Only 9.9 per cent of new GDP was

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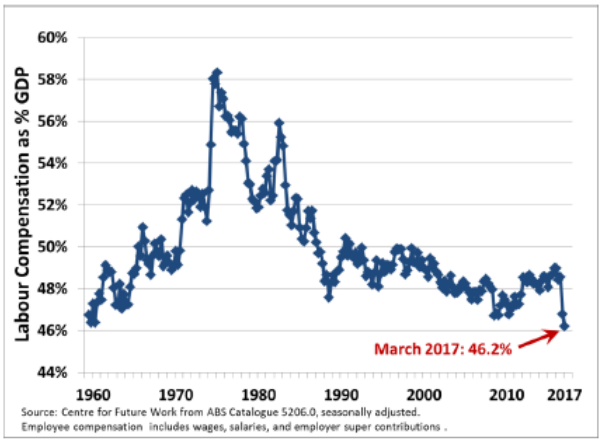
1 The Australia Institute, *Labour Share of Australian GDP Hits All-Time Record Low*, 13 June 2017, www.tai.org.au/sites/defualt/files/Labour_Share_Hits_Record_Low.pdf (accessed 28 July 2017).

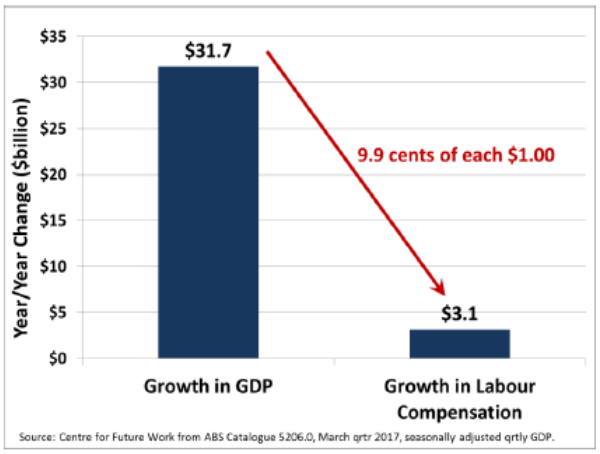
reflected in higher labour compensation and overall labour compensation as a share of nominal GDP fell to 46.2 per cent.[2] The graphs below, based on data released by the Australian Bureau of Statistics (ABS), illustrate the disparity in wages versus GDP growth rates:

Figure 9.1—Labour compensation as a share of nominal GDP[3]



9.7 In other words, the Australia Institute concluded, less than 10 cents of each dollar in new GDP produced in the past year resulted in increased labour compensation. As seen by the graph below, 'the link between GDP expansion and workers' incomes has never been weaker.'

Figure 9.2—GDP growth and labour compensation[4]



2 The Australia Institute, *Labour Share of Australian GDP Hits All-Time Record Low*, 13 June 2017, p. 1.

3 The Australia Institute, *Labour Share of Australian GDP Hits All-Time Record Low*, 13 June 2017, p. 1.

4 The Australia Institute, *Labour Share of Australian GDP Hits All-Time Record Low*, 13 June 2017, p. 2.

9.8 Furthermore, it should be noted that the measure of labour compensation used by the ABS includes salaries paid to executives and senior managers. The true degree to which labour compensation for typical workers is dropping is in all likelihood even more pronounced, as a breakdown of the share of national income going to executive and non-executive workers is not available.[5]

The law is skewed against collective bargaining

9.9 The increase in precarious work is only part of the picture. In the view of some of Australia's leading labour law experts, the problem stems from the fact that the past thirty years of policy-making have diminished workers' ability to negotiate higher wages.[6] Rules imposed on unions have been so draconian, and the pendulum swung so far in employers' favour, that collective bargaining—the primary vehicle for growth and maintenance of wages and conditions—is under attack, even under the FWA. Previously of concern only to workers whose wages dwindled while costs of living rose, the effects are spreading across the economy, as growth has now slowed so that it threatens economic stability:

> We have an industrial environment that was designed to disempower workers and disempower unions… We are now seeing that it has shifted the power balance way too much in favour of employers and workers aren't getting the share that is needed for economic stability.[7]

9.10 The reason for this is that reducing wages reduces consumer spending, thereby reducing public financing through taxation—from the goods and services tax, income tax and tax on profits. This equates to decreasing public spending and investment, further reductions in consumer spending, slowing employment and falling productivity in the longer term.[8] This is the view of the Organisation for Economic Co-operation and Development (OECD), which reports that rising wage differentials and inequality will only serve to inhibit economic growth.[9]

9.11 Furthermore, considering that the FWA was designed to foster enterprise agreement it is concerning that rates of enterprise agreement making appear to be declining.[10] Therefore the FWA is not successfully fulfilling this function, and as a result Australia's industrial system is falling behind international standards.

9.12 Evidence before this committee suggests that our industrial system is in need of an overhaul.

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5 The Australia Institute, *Labour Share of Australian GDP Hits All-Time Record Low*, 13 June 2017.

6 *Reserve Bank boss Philip Lowe urges workers to push for pay rises*, ABC news, 19 June 2017.

7 Emeritus Professor Dick Bryan, quoted in *Reserve Bank boss Philip Lowe urges workers to push for pay rises*, ABC news, 19 June 2017.

8 ACTU, *Submission 182*, p. 27.

9 OECD, *In It Together: Why Less Inequality Benefits All*, May 2015, www.oecd.org/social/in-it-together-why-less-inequality-benefits-all-9789264235120-en.htm (accessed 30 July 2017).

10 'Fall in collective agreements blamed on union coverage', *The Australian*, 1 June 2017.

Committee view and conclusion

9.13 Slowing wage growth despite growing GDP is highly pertinent in the context of this inquiry. Increasing income polarisation and a falling share of labour compensation are inescapably tied to the growing trend in parts of corporate Australia of avoiding provisions of the FWA—provisions which are intended to bolster enterprise agreement-making and ensure that workers get a fair share of the economic growth their labour plays a critical role in generating.

9.14 The FWA was intended to bury the inequities of the Coalition's WorkChoices legislation. Initially at least, the Act did so, preventing employers from placing workers on new individual agreements and instead fostering collective enterprise bargaining. Nearly a decade on, however, growing corporate disregard for the objectives of the FWA is evident as loopholes in the Act are being exploited.

9.15 The committee agrees that casual employees, whether directly engaged or through labour hire firms, who work regular, systematic hours for a single employer over lengthy periods, are in fact engaged in ongoing jobs—but denied the 'security or peace of mind that comes with a permanent job.'[11] The committee is also firmly of the view that many 'independent contractors', including those engaged through online portals, are instead 'dependent contractors who work at the behest and under the control of the host employer.'[12]

9.16 The committee concludes, however, that Australia's industrial system is failing to achieve one of the fundamental objectives at the heart of the FWA—promoting enterprise bargaining as the optimal vehicle for protecting workers' rights.

9.17 It is difficult, noting the sheer weight of evidence presented to this committee on corporate avoidance and at times even malfeasance, to conclude anything other than that the system is being exploited by employers seeking to avoid their obligations to workers. Given examples of avoidance and even underpayment seen in evidence before the committee, it is also difficult to conclude anything other than that some employers pay wages almost grudgingly, at the lowest possible rates, looking for ways to manipulate the industrial system wherever possible.

9.18 The committee notes that there have been calls, from no less than the Reserve Bank of Australia, for workers to demand higher wages.[13] This inquiry has shown, however, a concerning trend of workers being unable to hold onto existing conditions under the current industrial system, let alone being in a position to seek higher wages in their own interests or that of the national economy.

9.19 The committee has seen how de-unionisation, the removal of organising rights for workers and a lack of rights for workers representatives to engage with underpayments and breaches of employment conditions has created a free for all in

11 National Union of Workers, *Submission 198*, p. 3.

12 National Union of Workers, *Submission 198*, p. 3.

13 Quoted in 'Tough rules on unions have stifled Australian wages', *Sydney Morning Herald*, 5 July 2017.

some parts of the economy where the FWO has little interest or ability to prevent employer abuses.

9.20 Often the committee has heard evidence of a lack of knowledge on what the appropriate wage rate or condition a worker should receive for a particular job. There is a clear need to provide additional information and easier access to justice with many workers being denied their rights by employers making cold calculations about likelihood of detection, potential for punishment, scale of penalty and making a determination that avoidance of the law and exploitation of workers is a profitable path.

9.21 The committee has seen clear evidence of a system that has become unbalanced with substantial power vested in employers who are able to make use of multiple vehicles to further diminish workers power to negotiate higher wages and better conditions at the enterprise level. The definitions which categorise employer and employee are too restrictive and these definitions must be reviewed to ensure they are adequate to protect the interest of workers. This should include examination of application of the provisions of WHS legislation that places responsibility with the controller of the business. It should also encourage workers to join their union and allow workers to collectively negotiate at the point of economic power.

9.22 Technological advancements are not in of themselves imbued with positive or negative attributes. The committee has seen how the use of technology with little regard for the social and economic context in which it operates can recreate problems that policy makers thought were adequately addressed. The gig economy, appropriately regulated to conform with social standards on labour rights, can provide additional flexibility and opportunity for many people. A gig economy that is not appropriately regulated and only conforms to the free market theory of "clearing prices" results in underpaid workers, undermined labour markets and the personal and social problems associated with uncompensated injured workers.

9.23 In many cases it appeared that the avoidance of the FWA was accompanied by an equal desire to minimise or avoid tax obligations on the part of the employer, or controlling economic entity, which speaks to a broader cultural concern in some parts of the Australian business community. This has negative knock on impacts for commonwealth revenue, market competition (where those complying are at a disadvantage) and overall aggregate demand which in turn will lead to lower government investments, less wage growth and, an increase in inequality.

9.19 Unless the law is amended to close loopholes which are being exploited and protect workers in an increasingly fragmented workforce, a further erosion of wages growth and the industrial system is inevitable. It is an inescapable fact that the world the FWA was designed to regulate is rapidly changing. Policymakers have not kept pace with this change. Noting the need for considerable improvements to our industrial system, the committee urges policymakers to bear in mind that labour, economic growth and national prosperity have one goal: ensuring a decent standard of living for all Australians. As put by the National Union of Workers:

> We all need work that allows us to make not just a decent living, but a decent life. Time to be with and care for our families, time to be part of our

> communities. We need the ability to plan ahead, save for a rainy day and take a holiday. These are what we should all expect in exchange for our work.[14]

9.20 The committee calls on policymakers to consider and implement its recommendations, and put into place a modern and fair industrial system.

Senator Gavin Marshall

Chair

Senator Chris Ketter

14 National Union of Workers, *Submission 198*, p. 1.

Coalition Senators' Dissenting Report

1.1 Coalition Senators recognise the important role that private enterprise, particularly small business, plays in the Australian economy and strongly disagrees that Australian businesses are undertaking a campaign of "corporate avoidance" of the *Fair Work Act 2009* (Fair Work Act).

1.2 The Coalition understands that Australia needs a stable, reliable industrial relations system to keep businesses profitable, ultimately allowing them to employ more Australians, and keep our economy strong. The Coalition believes that corporate Australia overwhelmingly seeks to operate within the law, with there being significant legal sanctions and reputational risks to companies who seek to exploit workers or avoid their responsibilities.

1.3 Coalition Senators applaud the Turnbull Government's recent moves to strengthen the Fair Work Act to protect vulnerable workers being exploited by unscrupulous employers. This demonstrates the Coalition's commitment to ensuring that rogue businesses are held to account, whilst not punishing the overwhelming majority who do the right thing.

1.4 Unfortunately, it is clear that this inquiry has proceeded on the flawed and dishonest premise that the commercial decisions of employers to structure their operations in a way that best suits their needs within the constraints of the system amounts to "corporate avoidance" of the Fair Work Act. To that end, it is important to note the submission of the Department of Employment about this matter:

> "The *Fair Work Act 2009* (Fair Work Act) does not operate so as to restrict employers from structuring their operations as best suits their needs, including commercial decisions about the mix of full-time, part-time, casual, labour hire or independent contractors engaged by a business. This is subject to complying with their statutory requirements including redundancy entitlements and the transfer of business provisions.[1]

1.5 There has been no evidence provided to the inquiry to suggest that there is widespread avoidance of the Fair Work Act by companies. Instead, Labor Senators have appeared to rely on that oft-cited maxim of Dennis Denuto from the movie "The Castle" that "it's the vibe of the thing" as a basis to prosecute their attacks on private enterprise, particularly small business, and benefit their backers in the union movement.

1.6 Not only is the premise of this inquiry fundamentally flawed, it has been misused by a number of unions in an attempt to re-agitate industrial disputes where they did not get their way. This inquiry has been used to settle old scores—essentially by re-litigating the John Holland Federal Court case and punish certain organisations who have acted contrary to demands by the union movement. In this respect, Coalition

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1 Department of Employment, *Submission 149*, p. 4.

Senators consider it to have been an abuse of the Parliament to allow its forums to be exploited by vengeful unions for such a purpose.

1.7 This inquiry has also been used to push a policy agenda favoured by the union movement of giving the unions more power and placing new restrictions on organisations, such as labour hire companies and those involved in the 'gig' economy where unions find it difficult to recruit new members. If unions lack power in these areas it is not due to issues of "corporate avoidance" of industrial laws, and it is dishonest to attempt to make such a link.

1.8 The arguments advanced by unions and Labor Senators in this inquiry are not only misconceived but are also highly hypocritical given the evidence provided to the inquiry that many State branches of the Labor Party were identified as having signed agreements with small cohorts of employees at the time of the vote—a "corporate avoidance" according to the principles of the Labor Senators. By way of example, the ALP Queensland branch signed an agreement in 2013 with only five employees, and the ALP Tasmanian branch signed an enterprise agreement with just one employee in 2012.

1.9 Moreover, the approach of Labor Senators to this inquiry, in attempting to make unsubstantiated claims of corporate "avoidance" of the Fair Work Act, completely ignored the extent of deliberate avoidance and breaching of such laws by significant elements of the union movement.

1.10 Coalition Senators are of the view that it is utterly farcical for Labor Senators to have feigned indignation at imagined "avoidance" of laws by corporate Australia, when at the same time, the most senior members of their own union movement are openly advocating that unions should be able to break those very same laws.

1.11 The Secretary of the Australian Council of Trade Unions, Sally McManus, told the National Press Club earlier this year:

> "I believe in the rule of law where the law is fair, when the law is right…
> But when it's unjust, I don't think there's a problem with breaking it."

1.12 More recently, two senior leaders of the CFMEU in Victoria—John Setka and Shaun Reardon—are facing serious criminal charges of blackmail. Their legal representatives have sought to quash serious criminal charges of blackmail brought against them on the basis that criminal proceedings cannot apply to "industrial" behaviour. Remarkably, this situation was met with the response by Ms McManus that the criminal laws of this country should be amended so that they do not apply to criminal acts committed by union officials when they consider themselves to be acting in an "industrial capacity". In other words, union officials should be able to use their status to avoid with impunity criminal laws that apply to every other member of society.

1.13 This inquiry has occurred in the context of a serious crisis of avoidance of industrial laws within the union movement, most notoriously by Australia's wealthiest (and most corrupt) union, the CFMEU. The extent of this crisis has been made clear by numerous court judgements and judicial commentary on the CFMEU's deliberate policy of non-compliance with industrial (and other laws).

1.14 For example, the Federal Court in *Australian Building Construction Commissioner v Construction, Forestry, Mining and Energy Union and Ors* concluded that:

> The conduct of the CFMEU seen in this case brings the trade union movement into disrepute and cannot be tolerated.
>
> In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition. Such acceptance would pose a serious threat to the rule of law upon which our society is based. It would undermine the authority of Parliament and could lead to the public perception that the judiciary is involved in a process which is pointless, if not ridiculous.[2]

1.15 In a further case before the Federal Court, Justice Jessup found that:

> The CFMEU's record of non-compliance with legislation of this kind has now become notorious… That record ought to be an embarrassment to the trade union movement.
>
> Quite obviously, over the years the CFMEU has shown a strong disinclination to modify its business model in order to comply with the law.[3]

1.16 Judge Jarrett stated in the Federal Circuit Court in 2016 that:

> The CFMEU has an egregious record of repeated and wilful contraventions of all manner of industrial laws.
>
> The CFMEU…through its officers, employees and delegates, has a long and sorry history of industrial unlawfulness.
>
> Choosing unlawful means to further its industrial objectives appeared to be the business model of the CFMEU.
>
> The gravity of the offence is substantially increased by the prior history of the CFMEU and the moral culpability and propensity for unlawful conduct to achieve its own ends that it so clearly demonstrates. There is plainly a need to impose punishment to deter the CFMEU and others like it from treating this country's industrial laws as little more than an annoyance.[4]

1.17 In another case before the Federal Circuit Court in 2014, Judge Burnett stated:

> There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only

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2 [2017] FCAFC 53 per Dowsett and Rares JJ (at [99]-[100]).

3 Director, *Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 772.

4 Director, *Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCCA 1692.

> reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts.[5]

1.18 Rather than focus on this questionable commitment to the rule of law from their union allies, Labor seeks to punish businesses by suggesting "corporate avoidance" of the Fair Work Act, but without actually providing evidence to support their cause.

1.19 This inquiry has not uncovered "corporate avoidance" of the Fair Work Act and has struggled to demonstrate circumstances where companies have breached this Act, an Act which was wholly set up by the former Labor Government.

1.20 At the same time, this inquiry has uncovered questionable practices by sections of the Australian union movement, particularly the Shop, Distributive and Allied Employees' Association (SDA).

History

1.21 The *Fair Work Act 2009* was introduced by the then Rudd Labor Government in 2009, and it was touted as a centrepiece of that Government's legislative agenda of a new industrial relations system.

1.22 The then Minister for Workplace Relations, the Hon. Julia Gillard, spoke proudly of the objectives of the Fair Work Act in her second reading speech, which was made a year after the election of the Rudd Government in 2007:

> The bill aims to achieve productivity and fairness through enterprise-level collective bargaining underpinned by the guaranteed safety net, simple good faith bargaining obligations and clear rules governing industrial action.
>
> This bill seeks to assist employees to balance their work and family responsibilities by providing for flexible arrangements.[6]

1.23 Less than eight years after the introduction of the Fair Work Act, Labor Senators are now arguing that the legislation they created as their election centrepiece is seriously deficient, cannot be trusted to achieve its original objectives, and is being widely avoided by players in the industrial relations framework.

1.24 By Labor's own admission, they could not be trusted to create the industrial relations framework in this nation when in government but are now trying to argue that their recommendations should be adopted and changes made to the Fair Work Act.

1.25 This inquiry, and the recommendations of Labor Senators, included numerous examples of imagined "avoidance" that was actually compliance, together with examples of hypocrisy, selective analysis and double-standards. Two examples, in

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5 Director, *Fair Work Building Industry Inspectorate v Myles* [2014] FCCA 1429.

6 The Hon. Julia Gillard MP, *House of Representatives Hansard*, 25 November 2008, p. 11189.

relation to labour hire and penalty rates, illustrate the flawed approach that was adopted throughout the inquiry.

Labour hire companies

1.26 Coalition Senators recognise that labour hire companies have a role to play in the Australian economy, providing employment for thousands of Australian workers and valuable services to business.

1.27 The evidence provided by the Department of Employment made it clear that labour hire companies are subject to the same rules as other employees. This applied in reference to paying workers redundancy entitlements:

> Labour hire companies are subject to the same workplace relations requirements in relation to redundancy entitlements as other employers.
>
> The NES set out the minimum entitlements in relation to notice of termination and redundancy pay for permanent employees, including those employed by labour hire companies.[7]

1.28 The Department of Employment also noted that labour hire companies were not only subject to unfair dismissal provisions, but that the Fair Work Commission demonstrated a willingness to protect employees of labour hire companies:

> The unfair dismissal protections in the Fair Work Act apply to labour hire employees in the same way that they apply to more traditional employment relationships.
>
> While it will always depend on the particular factual circumstances, recent decisions of the Fair Work Commission demonstrate a general willingness to ensure that labour hire employees are afforded protection from unfair dismissal by a labour hire company.[8]

1.29 Further, the Department noted:

> As such, the use of labour hire arrangements does not constitute avoidance of the Fair Work Act provided these obligations are complied with.[9]

1.30 Labor has not demonstrated that labour hire companies seek to avoid their responsibilities under the Fair Work Act, nor has the case been made that there has been widespread attempts by labour hire companies to breach the Act.

Penalty rates

1.31 Disturbingly, this inquiry uncovered significant evidence about the role of certain unions in negotiating enterprise agreements which cut penalty rates and not appearing to represent the best interests of their members. The SDA was accused of a significant amount of wrongdoing.

1.32 Mr David Suter, a former Coles employee, told the inquiry:

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7 Department of Employment, *Submission 149*, p.10.

8 Department of Employment, *Submission 149*, p.11.

9 Department of Employment, *Submission 149*, p.4.

> At the meeting I attended, the assistant store manager was waiting at the door of the meeting room and watching who attended, and he was present throughout the meeting, although he popped out a few times. There was no objection to this from the SDA representative while I was present. At no time did any representative of Coles or the SDA advise us that our conditions were below those set out in the award. At no time did Coles or the SDA advise us that our take-home pay would be less than if we were on the award.[10]

1.33 The Retail and Fast Food Workers Union (RFFWU) noted about SDA negotiated agreements:

> In the retail and fast food sectors alone, approximately 500 000 workers are employed under SDA negotiated agreements at any one time. The estimated loss (compared to the minimum remuneration provided by the Award) to workers employed under these agreements is in excess of $300,000,000 each year.[11]

1.34 Coalition Senators are concerned about these reports, along with other reports in the media after this inquiry stopped taking submissions, which suggest that the SDA has represented their members poorly and believes the Education and Employment References Committee should further investigate these claims.

Conclusion

1.35 Coalition Senators believe that Australian businesses must follow the rule of law and strongly disagrees with the assertion by the Labor Party that there has been a campaign of "corporate avoidance" of the Fair Work Act.

1.36 Whilst it appears Labor Senators are concerned with some aspects of their Act created by the Rudd and Gillard Governments, it appears that Australian businesses are overwhelmingly complying with their responsibilities under this industrial relations framework, given the paucity of evidence of any actual breaches of the Act in the evidence considered.

1.37 Coalition Senators welcome recent moves by the Turnbull Government to make amendments to the Fair Work Act to address a number of specific issues where genuine problems have been identified. These changes included banning corrupting payments between employers and registered organisations representing employees, and protecting vulnerable workers from exploitation.

1.38 It is important that Australian employees and employers have the certainty of a strong industrial relations framework and that large scale changes are not made unnecessarily. Overall, the Committee's report has not demonstrated that there is a widespread problem of "corporate avoidance" of the Fair Work Act. Instead, the allegation of "avoidance" has been used as a dishonest vehicle to push union policy agendas that are in reality motivated more by a desire for greater union power to achieve their favoured outcomes in certain types of disputes. This inquiry would have

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10 Mr David Suter, *Proof Committee Hansard*, 18 May 2017, p. 23.

11 Retail and Fast Food Workers Union, *Submission 208*, point 5.

been more accurately entitled an inquiry into “corporate compliance with the Fair Work Act in various case studies of industrial disputes where particular unions did not get their way.”

1.39 Coalition Senators are concerned that this inquiry has been conducted in the context of an environment of deliberate avoidance of the Act by certain unions, which is apparently of no consequence or concern to Labor Senators or their union sponsors.

1.40 Coalition Senators reject the flawed and dishonest premise of this inquiry and reject the “findings” of Labor Senators, which have failed to reveal substantive issues of non-compliance and have instead relied on a “vibe of the thing” approach.

1.41 Coalition Senators reject the recommendations of the Chair’s report which are based on this false premise and flawed methodology.

Senator Linda Reynolds CSC
Deputy Chair

Appendix 1

Submissions and additional information

Submissions

Number	Submitter
1	Confidential
2	Confidential
3	Confidential
4	Confidential
5	Confidential
6	Confidential
7	Confidential
8	Confidential
9	Confidential
10	Confidential
11	Confidential
12	Confidential
13	Confidential
14	Confidential
15	Mr Shaun Newman
16	Mr Richard Edmands
17	Mr John Nielsen
18	Ms Marie Duffy
19	Ms Rebecca Coles
20	Mr Allan Mearns
21	Ms Louise Noble
22	Mr Paulo Gomes
23	Mr Leon De Lisle
24	Lindsay Johnston
25	Mr Robert Phillips
26	Confidential
27	Confidential
28	Confidential
29	Confidential
30	Confidential
31	Confidential
32	Confidential
33	Confidential
34	Confidential

35	Confidential
36	Confidential
37	Confidential
38	Confidential
39	Confidential
40	Ms Linda Gillies
41	Mr Peter White
42	Ms Bienne Tam
43	Mr Michael Mounteney
44	Ms Cristie Lacaze
45	Mr James Scanlon
46	Mr Wayne Bridge
47	Mr Tom Clarke
48	Ms Emma Cound
49	Ms Michelle De Stefano
50	Mr Tony Konjarski
51	Mr David Manion
52	Confidential
53	Mr Andy Matchett
54	Ms Catherine Whalley
55	Confidential
56	Confidential
57	Confidential
58	Confidential
59	Confidential
60	Confidential
61	Confidential
62	Confidential
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66	Confidential
67	Confidential
68	Confidential
69	Confidential
70	Confidential
71	Confidential
72	Confidential
73	Confidential
74	Confidential
75	Confidential
76	Mr Michael Donohue
77	Ms Catherine Hales
78	Mr David Drummond

79	Confidential
80	Dene McMillan
81	Confidential
82	Confidential
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91	Confidential
92	Confidential
93	Confidential
94	Confidential
95	Confidential
96	Confidential
97	Confidential
98	Confidential
99	Confidential
100	Ms Fiona Martin
101	Ms Bianca Chisholm
102	Mr Rex Meechin
103	Mr Scott Johnston
104	Mr Allan Pitter
105	Ms Maureen Hill
106	Mr Zoltan Petri
107	Confidential
108	Confidential
109	Confidential
110	Confidential
111	Confidential
112	Confidential
113	South Australian Government
114	Confidential
115	Confidential
116	Confidential
117	Confidential
118	Griffin Coal
119	Mr Jim Angel
120	Mr David Fahey
121	Mr Gilbert Texier
122	Ms Lynette Mcintosh

123	Confidential
124	Confidential
125	Confidential
126	Confidential
127	Confidential
128	Mr Peter Bates
129	Mr Robert Russell-Brown
130	Mr Bill Hubble
131	Ms Rhonda Roberts
132	Housing Industry Association
133	Mr Ryan McShane
134	Cheyne Crellin
135	Ms Sharyn Neale
136	Ms Alena Ward
137	Ms Sandra Betts
138	Mr Graham Wood
139	Mr Trevor Rose
140	Ms Suzannah Mellon
141	Mr Neil Forsyth
142	Mr Tomas Campbell
143	Confidential
144	Confidential
145	Esso Australia
146	Confidential
147	Victorian Trades Hall Council
148	Australian Chamber of Commerce and Industry
149	Australian Government Department of Employment
150	Queensland Government
151	Confidential
152	Ms Sonja Frith
153	Mr Brett King
154	Australian Manufacturing Workers' Union, West Australian Branch
155	Confidential
156	Carlton & United Breweries
157	Maurice Blackburn Lawyers
158	The Australasian Meat Industry Employees' Union
159	Confidential
160	Community and Public Sector Union
161	Mr Tyson Barry
162	Mr Chad Mitchell
163	Mr Rodney Latham
164	Mr Aaron Roberts
165	Mr Michael Sewell
166	Mr Mick Murray MLA

167	Legal Aid New South Wales
168	Mr Jay Scoffern
169	Mr Paul Beauglehole
170	Ms Jane Beauglehole
171	Mrs Leonie Scoffern
172	Mr Brett Pernich
173	Mr Greg Avins
174	Mr Jamie Putland
175	Maritime Union of Australia, Queensland Branch
176	WEstjustice (Western Community Legal Centre)
177	Victorian Government
178	The Salvation Army
179	Ai Group
180	Unions NSW
181	UnionsWA
182	Australian Council of Trade Unions
183	Uniting Church in Australia, Synod of Victoria and Tasmania
184	Electrical Trades Union (Victorian Branch)
185	Australian Maritime Officers Union
186	Ballarat Regional Trades and Labour Council Inc
187	JobWatch
188	Employment Law Centre of WA
189	Ms Laura Blandthorn
190	Young Workers Centre
191	Shop, Distributive & Allied Employees' Association
192	Queensland Nurses' Union
193	Australian Workers' Union Victorian Branch
194	Chamber of Commerce and Industry of Western Australia
195	Confidential
196	Australian Manufacturing Workers' Union
197	Electrical Trades Union
198	National Union of Workers
199	Shearers and Rural Workers Union
200	Construction, Forestry, Mining and Energy Union
201	Parmalat Echuca AMWU and ETU members
202	AGL
203	United Voice
204	Australian Institute of Marine and Power Engineers (AIMPE)
205	Australian Services Union
206	Queensland Council of Unions
207	Confidential
208	Retail and Fast Food Workers Union
209	Dnata
210	Deliveroo Australia Pty Ltd

211	Parmalat Australia Ltd
212	Confidential

Additional information

- Document provided by Senator Gavin Marshall.
- Document (2) provided by Senator Gavin Marshall.
- Response by Oxford Cold Storage to comments made by the National Union of Workers at a public hearing in Melbourne, 15 March 2017.
- Clarification of evidence by United Voice, relating to a public hearing in Sydney, 18 April 2017.
- Response by Victorian Hospitals' Industrial Association to comments made by the Health Workers Union at a public hearing in Ballarat, 14 March 2017.
- Response by Hepburn Health to comments made by the Health Workers Union at a public hearing in Ballarat, 14 March 2017.

Tabled documents

- Document tabled by Mr Timothy Kucera of the Australian Manufacturing Workers' Union (West Australian branch) at a public hearing in Collie, W.A., 3 February 2017.
- Document tabled by Ms Donna Davies at a public hearing in Collie, W.A., 3 February 2017.
- Document tabled by Ms Donna Davies at a public hearing in Collie, W.A., 3 February 2017.
- Document tabled by Mr Mick Murray MLA, member for Collie-Preston, Parliament of Western Australia, at a public hearing in Collie, W.A., 3 February 2017.
- Document tabled by Mrs Leonie Scoffern at a public hearing in Collie, W.A., 3 February 2017.
- Document tabled by Mr Charles Cameron of the Recruitment and Consulting Services Association at a public hearing in Melbourne, 15 March 2017.
- Documents tabled by Mr Ben Davis of the Australian Workers Union at a public hearing in Melbourne, 15 March 2017.
- Documents tabled by Mr Ben Davis of the Australian Workers Union at a public hearing in Melbourne, 15 March 2017.
- Document tabled by Senator Gavin Marshall at a public hearing in Melbourne, 18 May 2017.
- Document tabled by Senator Ketter at a public hearing in Canberra, ACT, 9 June 2017.

- Document tabled by Fair Work Ombudsman at a public hearing in Canberra, ACT, 9 June 2017.
- Document tabled by Fair Work Ombudsman at a public hearing in Canberra, ACT, 9 June 2017.
- Document tabled by Senator McKenzie at a public hearing in Canberra, ACT, 9 June 2017.

Answers to questions on notice

- Answer to question taken on notice by Mr Steven McCartney and Mr Glenn McLaren of the AMWU (WA Branch), asked by Senator Pratt at a public hearing in Collie, W.A., 3 February 2017.
- Answer to written question on notice by the CFMEU, asked by Senator McKenzie, received 22 February 2017.
- Answer to question taken on notice by Griffin Coal, asked by Senator Marshall at a public hearing in Canberra, 6 February 2017, and by Senator Pratt, received 28 February 2017.
- Answers to questions taken on notice by the Health Workers Union at a public hearing in Ballarat, Victoria, on 14 March 2017, received 4 April 2017.
- Answer to question taken on notice by Mr Richard Owen, Chairman ExxonMobil Australia Group of Companies, asked by Senator Marshall, at a public hearing in Melbourne, 15 March 2017.
- Answers to questions taken on notice by AGL at a public hearing in Melbourne, 15 March 2017.
- Answers to questions taken on notice by the Housing Industry Association at a public hearing in Sydney, 18 April 2017.
- Answers to questions taken on notice by Carlton United Breweries at a public hearing in Melbourne, 18 May 2017.
- Answers to questions taken on notice by the Retail and Fast Food Workers Union at a public hearing in Melbourne on 18 May 2017.
- Answers to questions taken on notice by the Victorian Hospitals' Industrial Association at a public hearing in Melbourne on 18 May 2017.
- Answers to questions taken on notice by the ACTU at a public hearing in Canberra on 9 June 2017.

Appendix 2

Public Hearings

Collie, Western Australia, 3 February 2017

Committee Members in attendance: Senators Marshall (Chair), McKenzie (Deputy Chair), Collins and Pratt (participating member)

Witnesses

Mr Mick Murray MLA, Member for Collie-Preston, Parliament of Western Australia

Panel of Griffin Coal employees
Mr Jay Scoffern, current employee, Griffin Coal
Mr Paul Beauglehole, current employee, Griffin Coal
Mr Chad Mitchell, current employee, Griffin Coal
Mr Brett Pernich, current employee, Griffin Coal
Mr Neil Weir, employee until 2016, Griffin Coal

Australian Manufacturing Workers' Union, W.A. Branch
Mr Steven McCartney, State Secretary, AMWU
Mr Glenn McLaren, Lead Organiser, AMWU
Mr Timothy Kucera, Lawyer, Turner Freeman as engaged by the AMWU

Shire of Collie
Mr David Blurton, Chief Executive Officer, Shire of Collie

Collie Chamber of Commerce and Industry
Mr Glyn Yates, President, Collie Chamber of Commerce and Industry

Collie community representatives
Mrs Jane Beauglehole
Ms Donna Davies
Mr Steve Davies
Ms Holly Matakiewicz
Mrs Leonie Scoffern
Mrs Debra Miller
Mr Bruce Miller

Canberra, ACT, 6 February 2017

Committee Members in attendance: Senators Marshall (Chair), McKenzie (Deputy Chair), Sterle (participating member) and Pratt (participating member)

Witnesses

Griffin Coal
Mr Terry Gray, Chief Operating Officer, Griffin Coal
Mr Tom Neumair, Support Services Manager, Griffin Coal

Ballarat Victoria, 14 March 2017

Committee Members in attendance: Senators Marshall (Chair) and McKenzie (Deputy Chair)

Witnesses

Ballarat Regional Trades and Labour Council Inc
Mr Brett Edgington, Secretary
Mr Allan Townsend, Industrial Relations Officer
Mr Clinton Bannam, Regional Organiser
Mr Orry Pilven, Solicitor

Shearers and Rural Workers Union
Mr Mark Pryor, National President
Mr Bernard Constable, National General Secretary
Mr Phillip Broughton, National Assistant General Secretary

Panel of individual employees (McCain Foods)
Mr Ross Kenna, Delegate, Australian Manufacturing Workers Union (AMWU)
Ms Angela McCarthy, Union Official, AMWU

Panel of individual employees (Parmalat)
Mr Mato Lucic, AMWU Shop Steward
Mr Brett Kyne, AMWU Delegate
Mr Damian King, Electrical Trades Union (ETU) Victorian Branch Organiser
Mr Adam Pankhurst, ETU Shop Steward

Health Workers Union
Mr David Eden, Assistant Secretary
Mr Kamal Bekhazi, Research and Project Officer

Commerce Ballarat
Ms Hayley Coates, Deputy Chair
Mrs Jodie Gillett, Chief Executive Officer
Central Highlands Community Legal Centre
Mr Glen Ludbrook, Principal Solicitor

McCain Foods
Mr Brian Neylon, Human Resources Manager Australia and New Zealand
Mr Karl Thin, Plant Manager, Ballarat Potato

Melbourne Victoria, 15 March 2017

Committee Members in attendance: Senators Marshall (Chair), McKenzie (Deputy Chair) and Sterle (participating member).

Witnesses

Esso Australia
Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies
Mr Andre Kostelnik, Production Operations Manager
Mr Mike Wells, Area Procurement Manager

Australian Manufacturing Workers Union
Mr Michael Nguyen, National Research Officer

Electrical Trades Union
Ms Ruth Kershaw, Strategic Research and Special Project
Mr Alan Dinon, Member of the Electrical Trades Union

Victorian Trades Hall Council
Mr Luke Hilakari, Secretary

National Union of Workers
Ms Claire Lewis, Official
Mr Dario Mujkic, Industrial Officer
Mr Daniel Draicchio, Member

AGL Energy
Mr Doug Jackson, Executive General Manager, Group Operations
Mr Tony Chappel, Government and Community Engagement

Construction, Forestry, Mining and Energy Union
Mr Dave Noonan, Assistant National Secretary
Mr Tom Roberts, Senior National Legal Officer (via teleconference)
Mr Andrew Thomas, National Industrial Officer (via teleconference)

Australian Workers Union Victorian Branch
Mr Ben Davis, Secretary

Recruitment and Consulting Services Association
Mr Charles Cameron, Chief Executive Officer

Mr Simon Schweigert, Media and Government Relations

Salvation Army
Ms Heather Moore, National Policy and Advocacy Coordinator

WEstjustice
Ms Catherine Hemingway, Employment Project Senior Solicitor

Young Workers Centre
Ms Keelia Fitzpatrick, Coordinator
Ms Alison Millward, Volunteer
Ms Penny McCarthy, Client

Sydney, New South Wales, 18 April 2017

Committee Members in attendance: Senators Marshall (Chair) and McKenzie (Deputy Chair)

Witnesses

Airtasker
Mr Tim Fung, Chief Executive Officer

Housing Industry Association
Mr David Humphrey, Senior Executive Director, Business, Compliance and Contracting
Ms Melissa Adler, Executive Director, Workplace Relations

Unions NSW
Mr Mark Morey, Secretary
Mr Thomas Costa, Assistant Secretary
Ms Kate Minter, Research Officer

Australian Institute of Marine and Power Engineers
Mr Martin Byrne, Federal Secretary
Mr Adrian Morris, Marine Engineer
Mr Raif Karamov, Engineer

Australian Industry Group
Mr Stephen Smith, Head of National Workplace Relations Policy
United Voice
Ms Jo Anne Schofield, National Secretary
Mr Stephen Bull, National Industrial Coordinator

Australian Maritime Officers Union
Mr Jarrod Moran, Industrial Officer

Newcastle West, New South Wales, 19 April 2017

Committee members in attendance: Senators Marshall (Chair) and McKenzie (Deputy Chair)

Witnesses

Hunter Workers
Mr Daniel Wallace, Secretary

Maritime Union of Australia
Mr Ian Bray, Assistant National Secretary
Ms Elyane Drouart, Senior National Industrial Officer
Mr Adam Jacka, National Legal Officer

Legal Aid New South Wales (via teleconference)
Ms Bridget Akers, Solicitor

Brisbane, Queensland, 20 April 2017

Committee members in attendance: Senators Marshall (Chair) and McKenzie (Deputy Chair), Paterson, Ketter (participating member) and Watt (participating member)

Witnesses

Maurice Blackburn Lawyers
Mr Giridharan Sivaraman, Principal

Queensland Nurses Union
Dr Liz Todhunter, Research and Policy Officer
Mr Alan Shepherd, Professional Officer
Mr Kevin Crank, Industrial Officer

Australasian Meat Industry Employees' Union
Mr Matthew Journeaux, Queensland Branch Secretary
Mr Craig Buckley, Queensland Branch Industrial Officer

Australian Meat Industry Council
Mr Kevin Cottrill, Chief Executive Officer
Mr Ken McKell, Human Resources Manager

Growcom
Ms Rachel Mackenzie, Chief Advocate

Queensland Council of Unions
Mr John Martin, Research and Policy Officer

Ms Imogen Beynon, Queensland state lead, National Union of Workers
Ms Samarah Wilson, Member, United Voice
Mr Mitchell Laidley, Member, United Voice
Mr Bruce Lillywhite, Member, United Voice

Melbourne, Victoria, 18 May 2017

Committee members in attendance: Senators Marshall (Chair) and McKenzie (Deputy Chair) and Ketter (participating member)

Witnesses

Carlton & United Breweries
Mr Peter Filipovic, Business Unit President, Australia
Mr Craig Katerberg, Vice President, Legal and Corporate Affairs
Mr Sebastian Siccita, Abbotsford Plant Manager

Victorian Hospitals Industrial Association
Mr Stuart McCullough, Chief Executive Officer

JobWatch Legal Practice
Mr Ian Scott, Senior Lawyer

Retail and Fast Food Workers Union
Mr Josh Cullinan, Secretary
Mr David Suter, Delegate and Member
Mr Ben Dobson, Member
Mr Spencer Howard, Member

Shop, Distributive & Allied Employees' Association
Mr Gerard Dwyer, National Secretary, Treasurer

Australian Services Union
Ms Ingrid Stitt, Branch Secretary
Ms Maria Scafi, Delegate
Mr Craig Shugg, Delegate

Dnata (via teleconference)
Mr Robert Larizza, Head of Human Resources
Mr Brett Fuller, Head of Ground Services

Canberra, ACT, 9 June 2017

Committee members in attendance: Senators Marshall (Chair), McKenzie (Deputy Chair), Bilyk and Ketter (participating member)

Witnesses

Australian Council of Trade Unions
Mr Trevor Clarke, Director, Industrial and Legal

Australian Chamber of Commerce and Industry
Ms Alana Matheson, Deputy Director, Workplace Relations
Ms Jenny Lambert, Director, Employment, Education and Training

Office of the Fair Work Ombudsman
Ms Natalie James, Fair Work Ombudsman
Mr Michael Campbell, Deputy Fair Work Ombudsman
Ms Janine Webster, Chief Counsel
Mr Anthony Fogarty, Executive Director, Policy, Analysis and Reporting