



# WAGE THEFT: THE NEW BUSINESS PARADIGM?

*A special report on how the Government actions are targeting employers who underpay workers. The Fair Work Ombudsman is doing great business - are you?*

**PREPARED BY**

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*A note from the author*

## FORWARD

*I have authored a number of blogs/newsletters on the subject of the Fair Work Ombudsman (FWO), and dedicated an editorial to its activities.*

*The FWO has an extremely good media machine that ensures that the term “wage theft” is now well and truly part of our business lexicon – with every other day a business being fined or required to backpay \$millions.*

*In a previous Special Report entitled “Managing Employee Risks”, I reported that there had been a 400% increase in FWO prosecutions over the past two years, with over \$45 million returned to nearly 18,000 employees. Add to this \$4.2 million in fines -on any approximation the FWO had a very successful year.*

*My view on this subject is no secret to my regular readers: breaking the law by the underpayment of workers, places legitimate businesses at a distinct disadvantage because they can always undercut their competitors (see for instance the security company under investigation as a result of a newspaper investigation undertaken by the “Age”).*

### *Is there is a new sheriff in town?*

Not really (see later this report), the FWO has been around a while now, but seems to to have plenty to do because of businesses willing to break the law of employment. Pause for a moment, when you consider the breakthroughs in workplace safety through the relentless efforts of the Work Cover Authority, Taxation Office and (yes) speed cameras that ensure legal compliance.

The FWO will in a very short time join these authorities in ensuring businesses pay its employees according to the award. The workplace laws are complicated! **I call BS on this.**

The award system has never been easier to read. And if you have (for example) a taxation issue you go to your accountant, why not use the same logic with your employees (**for example, a phone call to me is FREE**).

No: I believe this to be a very conscious decision by some businesses to underpay their workers. Not to mention the FWO itself. Its website contain a myriad of information in a simple, user-friendly way. It even has wage calculators to assist in helping businesses do the right thing.

### *But I use payroll software...*

In an article by David Aidone (Herald Sun 23 December 2019) quoted Ashik Ahmed, CEO of “Deputy” a electronic rostering program used by more than 150,000 companies worldwide, complains that the Australian award system was not business friendly because of its many rates of pay.

It would appear that e-payroll systems have caught out a number of the big companies, which has led to \$multi-million’s in backpay. It has been reported that this is taking a huge amount of time and resources just to calculate the underpayments. Hello! The award system (as previously mentioned) has never been easier. And it is a system that that has been in place for decades. I can remember when there were two system: one for Victoria and another for Federal. This was complicated. To use a haphazard algorithm as an excuse for underpaying workers is pathetic.

**Any payroll person worth their salt would know to run parallel payrolls (ie run the “old” and “new” pay-runs concurrently to ensure the integrity of the any new system. I call this expedience over substance.**

*I salute you!*

To all businesses doing the right thing, I congratulate you. Unfortunately (or fortunately?) the only people who may read this Special Report will be those businesses who pay their employees a minimum of their legal entitlements, including base rate of pay, penalties and superannuation.

If you fall into the “naughty” basket. Please ring me.

As I keep on saying, **one FREE phone call may save your business tens of \$thousands.**

Make 2020 your New Year’s resolution to ensure that your payroll systems comply with your award obligations, because the FWO is just warming to the task...

*GREG REIFFEL*  
*JANUARY 2020*

# INTRODUCTION

*What do our national broadcaster, the ABC, Woolworths (including Dan Murphy's and Big W), the Commonwealth Bank, the jeweller Michael Hill, Qantas, and Super Group (Rebel Sport and Super Cheap Auto) have in common (and many, many more businesses)?*

*They were caught out underpaying workers.*

*I have had numerous enquiries from legitimate businesses, who wish to enter into arrangements that allow them to operate legally, whilst remaining competitive.*

*For example, I have just lodged an enterprise agreement on behalf of a security firm which has as its feature a flat rate of pay. Others use Individual Flexibility Agreements (these do not require scrutiny by the Fair Work Commission; however, IFA's can only apply to existing employees).*

*I don't know about you, but I have stopped going to Grill'd because of their hiring practices (and not to mention dodgy cleanliness). My point being: attempting to increase the bottom line by the exploitation of workers is amoral and illegal and can be brand destroying.*

# WHAT WE WILL COVER:

- *Who is the Fair Work Ombudsman? Introducing the Fair Work Inspectors and what they can do.*
- *HR and accountants are caught in the net. Watch out!*
- *What is an Enforceable Undertaking?*
- *The FWO's business plan (who are they targeting?).*
- *Some cases that you may not have read about.*



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# WHO IS THE FAIR WORK OMBUDSMAN?

*The Fair Work Ombudsman has been around since July 2019, taking over from the Workplace Ombudsman (2007 to 1 July 2009), which in turn was previously known as the Office of the Employment Advocate (1997 to 2007).*

*The Fair Work Ombudsman is an independent statutory office, established by the Fair Work Act 2009. The ombudsman is actually a woman by the name of Sandra Parker who reigns over a very efficient organisation.*

It provides services free of charge to all workers and employers across Australia stating that its main role:

“To promote harmonious, productive and cooperative workplace relations (and to) ensure compliance with Australian workplace laws”.

With its stated purpose being:

“...to promote harmonious, productive, cooperative and compliant workplace relations in Australia”.



# WHAT DOES THE FWO DO ?

*(apart from prosecute businesses)*

Whilst some business may view the role of the FWO as a policing one (this is also true), the Fair Work Act has charged it with a number of responsibilities, including:

- *The provision of education, assistance, advice and guidance to employers, employees, outworkers, outworker entities and organisations.*
- *The promotion and monitoring of compliance with workplace laws.*
- *Inquire into and investigate breaches of the Fair Work Act.*
- *Take appropriate enforcement action.*

# INTRODUCING THE FAIR WORK INSPECTORS & WHAT THEY CAN DO.

## *What is a Fair Work Inspector?*

*Fair Work Inspectors are government officials appointed by the Fair Work Ombudsman under the Fair Work Act 2009. Fair Work Inspectors are legally able to promote and monitor compliance with relevant workplace laws. The duties of a Fair Work Inspector are wide-ranging, including:*

- Conducting targeted education campaigns in industries and regions.*
- Conducting compliance audits (making sure that you are paying the correct wages, etc).*
- Investigating workplace complaints. Helping in resolving workplace complaints.*
- Investigating suspected breaches of workplace law and enforcing workplace laws – including prosecution via the federal court system.*

*If you are visited by a Fair Work Inspector, they will show their official identity card.*

# WHAT ARE THEIR POWERS?

*Fair Work Inspectors have the power to enter premises and inspect documents and computers. Unlike police who require a search warrant, Fair Work Inspectors do not need the business owner's permission to enter premises. Upon entering the business, Fair Work Inspectors may:*

- Inspect any work, process or object.interview anyone (with their consent).*
- Require a person to tell them who has or who can access a record or document.*
- Require the person with access to a record or document to hand it over while the inspector is on the premises or within a specific timeframe.*
- Inspect and make copies of any record or document kept on the premises.*
- Take samples of any goods or substances after informing the owner or other relevant person in charge of the goods or substances.*
- Ask for a person's name and address, including requiring a person to provide evidence that the name and address provided is correct, for example, a drivers licence.*

# FAILURE TO COMPLY

*This is not a smart move, as attested by a number of prosecutions.*

*However, the Fair Work Inspector must tell the person that they may be liable to a civil penalty should they not comply.*

*The person must comply with these requirements unless they have a reasonable excuse (eg. if they are asked to provide evidence and they do not have a form of identification available).*

# POWERS TO REQUIRE A PERSON TO PRODUCE RECORDS OR DOCUMENTS

*In the course of an investigation, a Fair Work Inspector can issue a written Notice to Produce Records or Documents, requiring a person to provide records or documents at a particular location, within a specified time period (at least fourteen days).*

*A person cannot refuse to comply with a Notice to Produce Records or Documents on the grounds that providing the requested records or documents may incriminate them.*

*Where a person has failed to comply with a written Notice to Produce Records or Documents, the Fair Work Inspector may recommend litigation against the person for civil penalties.*

# INTENTIONALLY HINDERING OR OBSTRUCTING A FAIR WORK INSPECTOR

*Again, a pretty dumb move, as intentionally hindering or obstructing a Fair Work Inspector is a serious offence, which can (and has) attract higher penalties.*

# PROVIDING FALSE OR MISLEADING INFORMATION OR DOCUMENTS

*A person who knowingly or recklessly provides false or misleading information or documents to a Fair Work Inspector is a serious offence and the offender can expect to be charged with a civil penalty.*

*At the time of writing, such penalties are:*

- *\$12,600 per contravention for an individual*
- *\$63,000 per contravention for a corporation.*

# INVESTIGATIONS

Typically, a Fair Work Inspector investigates matters like:

- *Underpayments of wages and entitlements, including entitlements related to termination of employment.*
- *Pay slip, time and wages record-keeping obligations.*
- *Freedom of association (ie compulsory union membership/prevention of an joining a trade union).*
- *Behaviour of union officials (eg right of entry breaches).*
- *Forcing employees to enter into individual flexibility arrangements, guarantees of annual earnings, & deductions from wages.*
- *Contraventions of general protections provisions including adverse action, coercion & misrepresentations in relation to a person's workplace rights.*
- *Employer's obligations under the Paid Parental Leave Scheme.*
- *Sham contracting arrangements (ie calling a person a "contractor", when they should be paid as an employee).*
- *Unprotected industrial action.*
- *Unlawful discrimination.*

# IT CAN TAKE YOU AND YOUR BUSINESS TO COURT

*Both employers and officers have been put on notice that workplace compliance needs to be prioritised from the board level down and that organisations will be held accountable for breaches of workplace laws. The potential for significant financial exposure and reputational damage arising from non-compliance in this area is a risk that should be considered by directors as part of their due diligence obligations.*

*Employment underpayments and compliance “scandals” are emerging on a regular basis. Businesses across Australia, both big and small, are self-reporting or being caught by the FWO for failing to make the correct payments to their workers.*

*The Fair Work Ombudsman has made it clear that businesses will no longer be given leniency for failing to have their house in order, even where they self-report underpayments. Identification of underpayments and associated record keeping obligations is now a key focus. Politically, momentum is building for the Federal Government to strengthen penalties to tackle this issue, including the possible introduction of criminal sanctions for deliberate and systematic “wage theft” and the exploitation of vulnerable workers.*



## CONTINUED...

*The Fair Work Ombudsman can ask a court to make orders in relation to contraventions of workplace laws. This can result in financial penalties (ie fines), the payment of compensation (e.g. payment of outstanding monies to employees), injunctions, or that a person or business undertake specific steps such as training or an audit.*

*The Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 has now come into effect, increasing the maximum penalties for conduct including deliberate exploitation of workers and false records.*

# THE FWO HAS ORGANISED LIST OF PRIORITIES FOR THE YEAR 2019-2020.

*The FWO's focus for this financial year will be on the following industries:*

- *Fast food, restaurants and cafes.*
- *Horticulture/harvest trail.*
- *Supply chain risks.*
- *Franchisors.*
- *Sham contracting.*

*Vulnerable workers will continue to be a priority, as will matters that:*

- *Are of significant public interest or concern.*
- *Demonstrate a blatant disregard of laws or repeat offending.*
- *Are of significant scale or impact on workers or the community*
- *Present as opportunities to test the law or use new parts of the law (eg. Protecting Vulnerable Workers, General Protections and / or Accessorial Liability).*

*FWO*

# CASE STUDY NUMBER 1

## OVER \$300,000

*returned to fast food,  
restaurant and café  
workers*

*Fast food restaurant and café workers in New South Wales, Victoria, South Australia and Western Australia have received \$316,674 in back payments for unpaid wages, following Fair Work Ombudsman audits of popular 'cheap eat' food districts.*

*Inspectors audited 156 businesses in Adelaide (Gouger Street, Grote Street, Rundle Street and The Parade), Melbourne (Swanston St, Lygon Street, Sydney Road and St Georges Road), Sydney (King Street in Newtown) and Perth (James Street and Francis Street in Northbridge).*

*Inspectors found that 75 per cent of the audited businesses in Adelaide, Melbourne, Sydney and Perth breached their obligations to workers under workplace laws, leading to 608 workers requiring back payments.*

*FWO*

# CASE STUDY NUMBER 2

# \$730,000

*recovered from popular  
food franchises*

The Fair Work Ombudsman has recovered \$731,648 in unpaid wages for 780 workers after a national investigation into emerging fast food, restaurant and café franchises.

Fair Work Inspectors audited franchises that have recently commenced operations in Australia – **Chatime, GongCha, Hot Star Chicken, PappaRich, Sushi Izu, Nene Chicken & The Sushi 79.**

Franchises were selected based on intelligence data that raised concerns about compliance with workplace laws, including anonymous tip offs.

The most common workplace law breaches related to pay slip obligations, penalty rates & minimum hourly rates of pay.

Fair Work Ombudsman Sandra Parker said: **“During the audits, franchisees reported receiving little guidance from franchisors on workplace law compliance. Franchisors are on notice that they can be held legally responsible if their franchisee stores don’t follow workplace laws and must take reasonable steps to prevent this occurring.”**

# SERIOUS CONTRAVENTIONS

## CASE STUDY

*Perth franchisee faces  
tenfold increase in max  
penalties. 7 January  
2020.*

The Fair Work Ombudsman has commenced its first legal action in Western Australia under the 'serious contraventions' provisions of the Protecting Vulnerable Workers laws, alleging a former Han's Café franchisee in Perth underpaid vulnerable workers despite having previously faced Court for similar conduct.

FWO has commenced legal action in the Federal Circuit Court against Tac Pham Pty Ltd, the former franchisee of the Han's Café Rockingham outlet, and the former general manager of the outlet, Cuc Thi Thu Pham.

It is alleged that the company and Ms Pham breached pay slip laws and underpaid 11 employees - including a number of young and migrant workers - a total of \$5,022 between October 2017 and April 2018. The employees have been backpaid.

# CONTINUED

*It is alleged that two of the contraventions – relating to pay slips and underpayment of minimum wages – meet the definition of ‘serious contraventions’ under the Protecting Vulnerable Laws because of the alleged repeat offending.*

*Under the laws, which came into effect in September 2017, the maximum penalties for serious contraventions are **\$630,000 per breach for a company** and **\$126,000 for an individual**, 10-times the penalties which would ordinarily apply.*

*Fair Work Ombudsman Sandra Parker said that increased maximum penalties were brought in following community concerns about worker exploitation in Australia.*

*“Employers are on notice that the Fair Work Ombudsman is making full use of the Protecting Vulnerable Workers laws to ensure that any individuals or companies who commit serious contraventions are held to account,” Ms Parker said.*

*The legal action comes after the Fair Work Ombudsman secured a total of \$45,000 in penalties in Court against Tac Pham Pty Ltd and Ms Pham last year in relation to pay slip laws being breached and 22 staff being underpaid \$27,920 at Han’s Café Rockingham between December 2014 and December 2015.*

## CONTINUED

*It is alleged that FWO Inspectors discovered the breaches are the subject of the latest litigation when they investigated the business during an auditing campaign. Allegations include underpayment of ordinary minimum hourly rates, penalty rates, minimum shift-pay and an allowance, and breaches of pay slip laws.*

*In addition to the penalties faced for the alleged 'serious contraventions', Tac Pham Pty Ltd faces penalties of up to \$63,000 per contravention for other alleged contraventions and Ms Pham faces penalties of up to \$12,600 per contravention for other alleged contraventions.*

# ACCESSORIAL LIABILITY: HR & ACCOUNTANTS ARE CAUGHT IN THE NET. WATCH OUT!

*Third parties, such as human resources professionals and accountants have also been caught in the web. This is called “Accessorial liability”.*

*Under the Fair Work Act provides that a person who is “knowingly involved in” in a contravention is liable to penalties and other orders flowing from that contravention. A person is “involved in” a contravention if they:*

- Aided, abetted, counselled, procured or induced the contravention.*
- Conspired with others to affect the contravention.*
- Were in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.*

*Most commonly, accessories are individuals involved in running the employing entity that committed the contravention (the ‘primary contravener’). This may for example include company directors, company officers, human resources officers and professional advisers. Accessories can also be other businesses in a position of power within the same supply chain as the employing entity, such as a head contractor or franchisor.*



# CONTINUED

*The courts have determined accessorial liability in numerous judgements. There is a certain obligation to ascertain the facts and apply the law. Ignorance or “turning a blind eye” is not a defence.*

*As one learned judge stated: “The fact of exposure to the obvious may warrant the inference of knowledge. The shutting of one’s eyes to the obvious is not, however, an alternative to the actual knowledge which is required as the basis of intent to aid, abet, counsel or procure.”*

*With another stating: “A thing may be troublesome to learn, and knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a person is said not to know because he does not want to know, where the substance of a thing is borne in upon his mind with a conviction the full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that whereas ignorance is safe, ‘tiz folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise.”*

**Fans of the old TV show “Hogan’s Heroes” would describe this as the Sargent Schulz defence: “I see nothing, I hear nothing, and I say NOTHING!!!”**

*serious contraventions*

# CASE STUDY NUMBER 1

WOOLWORTHS

This is what got Woolworths into trouble, with a FWO enquiry finding that **Woolworths only passed on 90% of the annual national wage increases** to its principal contractors, meaning that the contractor was required to meet an additional amount of wages each year of the contract without additional payment from Woolworths.

This increase was not always passed on by the principal contractors to their subcontractors. One principal contractor was taking as much as 45% of the payments from Woolworths, before passing any payments onto its subcontractors.

*serious contraventions*

## CASE STUDY NUMBER 2

***HR manager among those penalised almost \$400,000 for “systematic” exploitation at restaurant.***

*The Fair Work Ombudsman has secured almost \$400,000 in penalties against a company and three individuals – including an HR manager – for systematically exploiting overseas workers at a Chinese restaurant in NSW and fabricating records to try to cover it up.*

*The penalties have been imposed in the Federal Court after 85 employees at the New Shanghai Charlestown restaurant at Charlestown were underpaid a total of \$583,688 over a 16-month period in 2013-2014.*

*“Following orders” (also known in some cheeky circles as the “Nuremberg Defence”) is not a defence, as was pled by the HR Manager, who was personally fined \$21,760.*

*The penalties were the result of many workers at the restaurant – mostly visa holders from Asia – were paid as little as \$10 an hour. One employee was underpaid more than \$33,000.*

*serious contraventions*

## CONTINUED

*The company had also initially provided fabricated records to inspectors that purported to show staff had been paid correctly.*

*The company later provided the true employment records, only after the issue was raised with them by the Fair Work Inspector and a further Notice to Produce issued, showing the unlawfully low, flat rates the employees were actually paid.*

*Justice Bromwich found that the contraventions involved “serious and premeditated conduct” and “encompassed a widespread, systematic and prolonged failure to accord employees their basic entitlements”.*

*The HR Manager, whose duties included processing payroll and arranging staff wage payments, submitted that her culpability was reduced due to the fact she was at all times acting under the direction of Chen. The HR Manager who was on a s457 visa and paid \$100,00 per annum at the time of the offending, came under special attention, with the judge stating that the HR Manager had “acted in her own interests” in choosing to be a knowing participant in the underpayments and in taking an active role in the creation of false records.*

*serious contraventions*

## WHAT THE JUDGE SAYS:

*“There is nothing wrong with sending the message that an employee should indeed resign if that is the only alternative to continuing to participate knowingly in illegal activity, ideally coupled with reporting the conduct, in a case such as this, to the FWO.*

*In no sense was [the HR Manager] a victim of the conduct. If this aspect of [the HR Manager’s] circumstances is really mitigation at all, it cannot be given much weight. That is so both as a matter of public policy in requiring individuals to put compliance with the law ahead of their personal interests and having regard to [the HR Manager’s] knowledge that the law was being disobeyed for the entire period of over 16 months. Moreover, she took an active role in the attempt to thwart the FWO investigation”.*

*From this author’s perspective, all HR professionals should consider joining the Australian Human Resources Institute, for no other reason than the free professional indemnity insurance, but more importantly AHRI member are bound by a Code of Conduct. AHRI members are also expected to follow a model of excellence. I have been an AHRI member for more than 30 years (and have not had cause to make a claim!).*

*serious contraventions*

# CASE STUDY NUMBER 3

*An accountancy firm was caught up in wages underpayment of its clients, it having the role of processing the pays for main parties being prosecuted. The accounting firm could consider itself lucky as the court reiterated that the firm could have fined the following:*

## *Contravention*    **Maximum penalty**

*Failing to pay minimum hourly rate of pay*    **\$51,000**

*Failing to pay evening loading*    **\$51,000**

*Failing to pay Saturday loading*    **\$51,000**

*Failing to pay Sunday loading*    **\$51,000**

*Failing to pay public holiday penalty rate*    **\$51,000**

*Failing to provide rest and meal breaks*    **\$51,000**

*Failing to pay special clothing allowance*    **\$51,000**

**Total \$357,000**

*serious contraventions*

## NO PAYSLEIPS AND POOR RECORD KEEPING

The judge also noted that record keeping and pay slip obligations play a vital role in the capability of the regulator to monitor and enforce compliance with minimum employment standards. The Courts have recognised that proper record keeping “is the bedrock of compliance” with workplace laws.

“Substantial penalties for noncompliance with minimum standards reinforce the importance placed on such standards, and that employers who fail to comply with minimum obligations gain an unfair advantage over those employers who do the right thing”

“Sadly, like each of the other witnesses for Ezy, Ms He’s evidence was so unresponsive and at times self-serving that I am satisfied it amounted to a retrospective rationalisation of her (their) conduct deliberately designed to minimise their liability”.

The Court finding that there should be declarations that the accountancy firm owner was accessorially liable and was fined accordingly.

*serious contraventions*

## **VISA HOLDERS AND INTERNATIONAL STUDENTS.**

*The FWO has set its sights on companies that exploit people not familiar with their rights as an employee. This includes underpayments, withholding money and threatening to report them to the authorities for breaches (real or not) of their visa restrictions. For example, international students can only work a maximum of 20 hours per week during school semesters. Backpackers are another source of “cheap” labour.*

## **UNPAID “TRIAL PERIODS”**

*Some unscrupulous businesses are using unpaid trial periods to get them through (for example) peak periods, then deeming them unsuitable. Free labour. Trial periods must be paid. For further information on this I urge you to read the FWO’s guidance note.*



## “TRIANGULAR” EMPLOYMENT ARRANGEMENTS

*(eg Labour-hire companies)*

*Whilst the Federal Court has caused quite a stir in this area (in particular the WorkPac v Skene decision relating to the employment casual, stating that (despite the payment of 25% loading), the casual in question was entitled to leave entitlements as set down by the NES).*

**The Victorian Government** has also entered the fray with the Victorian Labour Hire Licensing Scheme. Overseen by a new piece of legislation: Labour Hire Licensing Act 2018 & requires businesses that on-hire its employees to be registered. The Act defines labour hire as:

*“A labour hire provider is an individual or organisation that in the course of conducting a business has an arrangement with one or more individuals under which the business:*

*Supplies the individuals to perform work in and as part of a host’s business.*

*In the course of providing recruitment or placement services, recruits individuals for, or places the individuals with a host who has to pay the individuals to perform work in and as part of the host’s business or undertaking and the provider procures or provides accommodation for the individuals for some or all of the period that they are working with the host”.*

## CONTINUED

*The Labour Hire Authority has a team of inspectors whose role is to promote, monitor, investigate and enforce compliance with the Act and regulations.*

*Whilst not having the extensive power of a Fair Work Inspector, Labour Hire Authority Inspectors do have a variety of powers to allow them to monitor compliance with the scheme including, where there are reasonable grounds, the power to:*

- Enter and search premises.*
- Examine and seize anything suspected of being connected with a possible contravention.*
- Inspect, copy or take extracts from documents on the premises and make images or recordings.*
- Seek the assistance of other persons.*
- Where necessary apply to the Magistrates' Court for a search warrant.*

## CONTINUED

To be licensed, a business that provides people to a host is required to pass a “Fit and proper person test”. A business will “fail” this test if within the last:

- 10 years been found guilty of an indictable offence against a person, or an offence involving fraud, dishonesty or drug trafficking that was punishable by imprisonment of 3 months or more (or an equivalent offence committed outside Victoria).
- 5 years been found to have contravened a workplace law, labour hire industry law or minimum accommodation standard, or given an enforceable undertaking in respect of a contravention of one of those laws.
- 5 years had a licence under a labour hire industry law cancelled, suspended or revoked other than at the licence holder’s initiative.
- 5 years, been insolvent or under external administration.
- 5 years, where an applicant is a body corporate, an officer of the body corporate was an officer of another body corporate whose licence was cancelled other than at the licence holder’s initiative.
- 5 years the applicant was an officer of a body corporate and was disqualified from managing corporations under the Corporations Act 2001 (Cth).

## CONTINUED

*And a licensed provider is required to declare that they will company with:*

- *Taxation laws.*
- *Superannuation laws.*
- *Occupational health and safety laws.*
- *Workers compensation laws.*
- *Labour hire industry laws.*
- *Workplace laws.*
- *Migration laws.*
- *Applicable minimum accommodation standards (eg farm workers).*

*In short, there is another cop on the beat focussed on an industry notorious for underpaying workers. Also noting, that I represent some businesses who fall into this category and they welcome the scrutiny to weed-out (eg security officers) who may be paid a flat rate as little as \$10.00 per hour regardless of when they work. Host employers (eg night clubs), I have been told, have cut back on the number of security personnel provided to them by security firms, as they too can be liable for breaches.*

*If carried out properly, this assist in making a level playing field for those businesses who make their best efforts to comply with their legal obligations, despite being continually undercut by businesses that seek a competitive advantage by underpaying their workers.*

*Young People*

## CASE STUDY

**\$40,000**

*penalty after teenager  
not paid*

The Fair Work Ombudsman has secured a \$41,040 penalty against the former operator of a Sunshine Coast-based business after he was involved in a failure to pay an 18-year-old labourer any wages for almost a month's work.

Attain Solutions provided civil works and underground services for the installation of telecommunications infrastructure to entities contracting to the NBN Co Limited for work on the National Broadband Network in Queensland.

The young employee was not paid anything at all for 150 hours of work digging trenches and laying pipes at various locations in South-East Queensland between June 1 and 26, 2017.

In addition to the penalty, the Court has ordered Mr Wells to back-pay the employee \$3,945 (plus interest) in wages and entitlements for the work performed.

## CONTINUED

*The Fair Work Ombudsman investigated after the employee requested assistance – and the Federal Circuit Court found Mr Wells also breached workplace laws through his involvement in failing to comply with a Notice to Produce records or documents issued during the investigation.*

*Fair Work Ombudsman said any employer who fails to meet their fundamental obligation to pay an employee wages for work performed risks facing serious consequences.*

*“We will not tolerate employers blatantly breaching workplace laws by failing to pay an employee their lawful wages for work performed. Employers should note that we treat the exploitation of young workers very seriously, who can be particularly vulnerable if it is their first job.”*

*Judge Michael Jarrett found that the breaches by Mr Wells were deliberate, noting that in 2016 the Fair Work Ombudsman had issued him with four Compliance Notices and had formally cautioned him twice.*

*Cash back schemes*

## CASE STUDY

*7-Eleven outlet and  
Ramen restaurant  
fined*

**\$171,849**

The Fair Work Ombudsman took legal action against the franchisee of a 7-Eleven retail outlet for allegedly exploiting three international students through a cash-back scheme.

Following 7-Eleven head office setting up a payroll system in 2016 for ensuring employees were paid lawful minimum rates, the company tried to disguise underpayments of 3 employees by requiring them to pay back thousands of dollars in wages.

The 3 employees were Chinese students, aged between 21-24, who were in Australia on student visas. Ms Lin, from Taiwan, was also in Australia on a student visa.

Xia Jing Qi was required by 7-Eleven Head Office to use a system that recorded hours of work by scanning employees' fingerprints, with Head Office then processing the payroll.

Ms Lin told the 3 employees they would be paid through this payroll system but then specified a weekly sum for each of them to pay back via a safe box in store or to her account.

The matter is the eleventh legal action by the Fair Work Ombudsman against a 7-Eleven franchisee. More than **\$1 million in penalties** have been ordered in 7-Eleven cases.

*Racial discrimination*

## CASE STUDY

**\$200,000**

*in penalties in FWO's  
first racial  
discrimination case*

The Fair Work Ombudsman's first racial discrimination litigation has resulted in penalties of \$211,104 against the former operators of a Tasmanian hotel after they deliberately exploited two Malaysian employees of Chinese descent.

The FWO successfully prosecuted the company & its owner breached the racial discrimination provisions of the Fair Work Act by treating the two Malaysian employees, who are husband-and-wife, differently to Australian staff by underpaying them a total of more than \$28K, requiring them to work extra hours & failing to record their hours of work.

Fair Work Ombudsman stating that:

“It is an uncomfortable truth that racial discrimination is a driver behind some of the exploitation of migrant workers in this country. All workers in Australia are entitled to our minimum wages, irrespective of their background, language skills or visa status. Despite hospitality industry workers making up 7.2 per cent of the labour market, legal actions against hospitality employers account for almost one-third of our litigation activity”.



## **FWO ANONYMOUS REPORTING TOOL**

*The Fair Work Ombudsman has a popular Anonymous Report function, available in 16 languages other than English, allows visa-holders to report workplace concerns anonymously to the agency in their own language.*

*Information on the website also includes fact sheets on workplace discrimination and workplace rights and entitlements for 457 visa holders.*

*FWO targeting a small  
country town near you*

## CASE STUDY

*Regional workers back  
paid*

**\$190,000**

*Fair Work Ombudsman audits of 600 workplaces in remote and regional locations across Australia have recovered \$191,125 for 268 workers. Fair Work Inspectors visited towns across five states and the Northern Territory, including Kununurra, Katherine, Longreach, Roxby Downs and Broken Hill, to check compliance with workplace laws.*

*The FWO selected regions for audit based on intelligence, such as requests for assistance from workers, as well as broader information such as census data. Employers were randomly selected. Most workplace breaches discovered related to underpayment of hourly rates and failure to meet payslip requirements. The FWO issued 45 formal cautions, 14 infringement notices (on-the-spot fines) and nine compliance notices to rectify these breaches and improve future compliance.*

*Back payments made by businesses ranged from \$36 to a worker in Coober Pedy, South Australia, to \$11,946 to two employees of a business in Stawell, Victoria.*

## CONTINUED

Acting Fair Work Ombudsman stating:

*“Employees in smaller communities may be reluctant to raise workplace concerns where employment options may be limited. As a result of our workplace audits, tens of thousands of dollars have been put back in the pockets of workers in remote and regional Australian towns”.*

And a “warning” of note:

*“Fair Work Inspectors will continue to promote workplace compliance in remote and regional Australia by visiting workplaces, and we will check businesses have improved their workplace practices through our National Compliance Monitoring program”.*

## ENFORCEABLE UNDERTAKINGS

Most EUs are “self-reported”, that is the business in question has found a mistake and reported it to the FWO (presumably before the FWO finds an issue), thus recognising the mistake and getting ahead of the problem. However, as mentioned earlier, the FWO will show no mercy in such events, but may save the self-reporting business from costly legal proceedings.

## WHAT IS AN ENFORCEABLE UNDERTAKING?

An enforceable undertaking (EU) is a written agreement between the FWO and someone who has not followed an Australian workplace law (eg. an employer). EUs are used to fix a problem and make sure it doesn't happen again. EUs are used instead of taking an employer to court. This may occur where:

- An investigation has shown that workplace laws have not been followed;
- The employer is prepared to voluntarily fix the issue; and
- They agree to preventative actions for the future.

## HOW AN ENFORCEABLE UNDERTAKING GETS MADE

The FWO prepares the draft agreement; with the employer being able to provide input and seek independent legal advice before signing the agreement. All EUs are published on the FWO website.

## WHAT HAPPENS IF A BUSINESS DOES NOT COMPLY WITH AN EU?

*As a famous person once said: “Crikey!” You must wonder at the mentality of some business owners/executives who blatantly fail to heed the terms of an EU. Apart from the blatant disregard for the law, entering into an EU saves the business and individuals from prosecution through the courts.*

*The FWO treats such non-compliant very seriously and can and will take the offender to court. This in turn leading to enormous legal costs and the prospect of being fined in addition to the requirement to backpay their employees (sometimes with interest payments).*

*Noteable EUs.*

# CASE STUDY NUMBER 1

SAFFRON INDIAN  
GOURMET PTY  
LTD

*The Fair Work Ombudsman has commenced legal action to enforce terms of a Court-Enforceable Undertaking (EU) that was executed with Saffron Indian Gourmet Pty Ltd (Saffron) earlier this year (2019).*

*Saffron, which operated a restaurant located at Broadbeach on the Gold Coast, and its Director and sole shareholder, Sridhar Penumechchu, entered into the EU after Fair Work Inspectors found 22 employees had been underpaid a total of \$54,470.*

*Saffron and Mr Penumechchu had admitted to underpaying the employees in the EU.*

*The FWO alleges that the restaurant failed to comply with terms of the EU that required it to back-pay the employees in full (\$49,000 of the underpayments are outstanding) and make a \$25,000 donation to the Gold Coast Community Legal Centre.*

*It is further alleged that the company failed to engage an external professional to complete an audit of the pay and conditions of all employees; complete online training; or provide records and other evidence to demonstrate it is complying with the Fair Work Act.*

*Noteable EUs.*

## CASE STUDY NUMBER 2

WA foster carers  
back paid \$6 million  
by not-for-profit  
company

Home-care services organisation Lifestyle Solutions Ltd has back-paid foster carers in remote Western Australia more than \$6 million after breaching Australia's workplace laws.

The registered not-for-profit has entered into a Court-Enforceable Undertaking with the Fair Work Ombudsman after self-disclosing that it underpaid 124 current and former employees.

Lifestyle Solutions has agreed to back-pay affected employees a total of \$6.36 million in wages, superannuation and interest.

Fair Work Ombudsman Sandra Parker said that a Court-Enforceable Undertaking was appropriate as the organisation had demonstrated a strong commitment to back-paying workers, stating that:

“The Court-Enforceable Undertaking commits Lifestyle Solutions to stringent measures to protect their employees, including developing new systems to ensure future compliance, funding external audits over the next two years and rectifying any further underpayments.”

## CONTINUED

Interestingly, the company has now “converted” its workers to “Guaranteed Annual Earnings” contracts which means that workers will receive more than the high-income threshold, over which Award entitlements do not apply. The threshold is currently \$148,700.

Under the Court-Enforceable Undertaking, the organisation must apologise to affected workers; display public, workplace and online notices detailing its breaches and information about employee entitlements; register with the My Account portal and complete online courses for employers; and fund workplace relations training for payroll and human resources staff.



*Noteable EUs.*

# CASE STUDY NUMBER 3

**Burger chain back-pays \$1.1 million to workers**

*The Australian arm of a Japanese burger chain has back paid \$1.12 million to 285 former and current Queensland workers and will face ongoing scrutiny of its workplace practices.*

*MOS Burger Australia Pty Ltd has entered into a Court-Enforceable Undertaking after a Fair Work Ombudsman investigation found the company had underpaid 285 workers across the company's six stores.*

*Fair Work Inspectors found that the company had paid unlawfully low flat rates to workers, and misclassified some employees as part-time when they were in fact casuals.*

*Breaches of workplace laws included failures to pay ordinary hourly rates, casual loadings, and penalty rates for night, weekend and public holiday hours.*

## CONTINUED

The FWO commenting:

*“We considered that a Court-Enforceable Undertaking was an appropriate enforcement tool as the company conducted a comprehensive audit of its pay records from when it commenced trading in Australia, fully back-paid workers and overhauled its processes to comply with workplace laws.”*

*“Court-Enforceable Undertakings are serious instruments with extensive commitments from companies. We will monitor compliance with each commitment and won’t hesitate to take court action if they are not upheld. This matter is a warning to all employers that if they don’t get workplace compliance right from the beginning they can be left with extensive and expensive consequences.”*

*Noteable EUs.*

# CASE STUDY NUMBER 4

Courier company  
failed to provide  
paid meal breaks

*A failure to provide paid meal breaks has resulted in national parcel delivery company Couriers Please Pty Ltd underpaying staff \$382,065 over a period of eight years.*

*After being prompted by a query from an employee last year, Couriers Please conducted an internal audit and found that it had not provided a 20-minute paid meal break (per award provisions) to 245 current and former employees performing shift work.*

*Couriers Please has admitted to breaching workplace laws, which first occurred when it implemented an electronic payroll system in 2010 until the issue was identified last year.*

## CONTINUED

*“The Court-Enforceable Undertaking commits Couriers Please to stringent measures to protect their employees, including developing new systems to ensure future compliance, funding external audits over the next two years and rectifying any further underpayments.”*

*Under the Court-Enforceable Undertaking, the organisation must display public, workplace and online notices detailing its breaches and information about employee entitlements; register with the My Account portal and complete online courses for employers; and fund workplace relations training for payroll and human resources staff.*

*In addition to the compliance measures and back-paying workers in full, the company will make a gesture of contrition through a \$50,000 payment to the Commonwealth Government’s Consolidated Revenue Fund.*

*Couriers Please, a fully owned subsidiary of Singapore Post, has nationwide coverage across Australia and delivers more than 18 million parcels a year.*

*About the author.*

## ABOUT GREG REIFFEL



Greg Reiffel is a highly knowledgeable and accomplished consultant having:

- Over 30 years experience in HR, Employee & Industrial Relations and OH&S
- Worked across various sectors such as: Civil Construction; Education; Utilities Management; Local Government Manufacturing & FMCG; and Non-profit organisations.
- Experience working with key employer bodies such as: Victorian Employers Chamber of Commerce & Industry (VECCI), Civil Contractors Federation (CCF).

Qualifications include:

- Graduate Diploma of Business: (Industrial Relations/Human Resource Management) equivalent to Bachelor Hon's
- Certificate IV in Training & Assessment
- OH&S Lead Auditor Certification
- Work Effectively with Aboriginal & Torres Strait Island People Certification

Greg is also a Certified Professional member of the Australian Human Resources Institute (AHRI).

# WHAT CLIENTS HAVE TO SAY...

'HE HAS GREATLY RAISED THE BAR IN TERMS OF WHAT I EXPECT FROM THE HUMAN RESOURCE PEOPLE THAT I NOW COME IN CONTACT WITH."

"GREG HAS BEEN OFFERING ME HR AND INDUSTRIAL ADVICE FOR OVER 15 YEARS, IT IS ALWAYS PROMPT AND CONCISE."

"ETHICAL, HONEST AND TOTALLY PROFESSIONAL IN HIS DEALINGS AND CAN BE RELIED ON TO ADD VALUE TO ANY BUSINESS."

"GREG HANDLED VARIOUS EMPLOYMENT ISSUES, SOME OF WHICH WERE UNDER CHALLENGING CIRCUMSTANCES, AND BUILT A RAPPORT WITH OUR STAFF AND CONTRACTORS."

# NEED ASSISTANCE WITH HR & INDUSTRIAL RELATIONS?

I CAN SAVE YOU \$10,000'S IN BACK PAY OR  
'GO AWAY' PAYMENTS, ENSURE YOUR  
BUSINESSES REPUTATION, HANDLE ALL  
DIFFICULT HR CIRCUMSTANCES AND HELP  
ELIMINATE EMPLOYEE MANAGEMENT RISKS  
DESCRIBED IN THIS REPORT.

FOR A FREE CONSULTATION PHONE CALL:

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CONSULTATION:

**GREG@GREGREIFFELCONSULTING.COM.AU**

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