

Queensland Council of Unions

Honorary President: **Rohan Webb** General Secretary: **Ros McLennan** Assistant General Secretary: **Michael Clifford**

31 August 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email legcon.sen@aph.gov.au

Dear Ms Eastern

Re: An inquiry into allegations concerning the inappropriate exercise of ministerial powers, with respect to the visa status of au pairs, and related matters

In recent years the Queensland Council of Unions has been involved in a range of inquiries held by both the Commonwealth and Queensland Parliaments into guest workers, labour hire and wage theft. As a result, we have been made acutely aware of illegal practices being undertaken in some industries in which vulnerable workers have been exploited.

The academic literature and reports handed down by committees investigating these matters have discussed layers of vulnerability associated with guest workers, in particular. Precarious employment that is associated with labour hire arrangements, a poor understating of legal rights and the visa status of guest workers to make it near impossible for guest workers to be able to make complaint about the circumstances of their employment.

The net result has been substantial underpayment of wages and superannuation, sexual harassment, poor workplace health and safety outcomes and the provision of substandard accommodation at inflated rent.

This most recent story that involves the apparent intervention on the part of the Minister regarding the visa status of the au pairs raises some of the employment issues discussed above. On Tuesday 28 August 2018, on 612 ABC talkback it was suggested that an au pair would be likely to receive \$350 per week for full time work. The first question that would need to be asked would be whether the au pair is an employee or independent contractor. If the au pair is an employee, then who is the employer and what obligations are placed on that employer? If the au pair is a

purported independent contractor would they meet the legal definition of independent contractor that has evolved through case law in Australia?

Leaving aside any issue of personal income taxation, if that is the gross amount of \$350 received would amount to approximately 18.5 hours at the minimum wage hourly rate of \$18.93.

The hourly rate of \$18.93 also assumes that there is not a modern award that would cover the work performed by au pairs that would provide for a higher hourly rate. It is also worthy of note that this is the minimum adult rate for a permanent employee and therefore assumes the provision of other entitlements such as annual leave and sick leave. The casual hourly rate includes a loading of 25 per cent bringing the minimum rate to \$23.11 per hour which would enable a little over 15 hours work to be performed for \$350 per week. Alternatively, \$350 for a 38-hour week would result in the au pair being paid \$9.21 per hour.

It is understood that board and lodgings are considered as offsetting the rate of pay received by au pairs. That raises the question as to what the value is placed on the provision of board and lodgings, how was that value set and is Fringe Benefits Tax being paid on that value? Using the casual rate above for a 38-hour week, the least an au pair would be legally entitled to be paid for a 38-hour week is \$878.18. If board and lodgings has been deducted to leave \$350 per week then the board and lodgings have been valued at \$528.18 per week. In our submission such an amount would be excessive in the circumstances.

There appears to be a notion that au pairs are not entitled to the protection of employment regulation. Given the work performed by au pairs and that this activity is considered as work for the purpose of migration laws, we are at loss as to how au pairs are exempted from employment regulations. The discussion above pertains to rates of pay but as we are aware that there are a range of other obligations that are placed on principals who engage workers.

For example, superannuation contributions and workers compensation premiums are required in circumstances in which an employment relationship exists. Even in cases of an independent contractor (which by no means would we suggest is the case for au pairs) the person conducting the business or undertaking is required to provide a safe system of work. Who is ensuring that a safe system of work for the au pairs and what are the repercussions of an au pair being injured in the performance of their duties, say for example being involved in a car accident when dropping children to school?

The circumstances as we understand them clearly set out many employment risks for the au pair workers emanating from the Minister's ad hoc exercise of his ministerial powers, which are the subject of this Inquiry. Given the circumstances around the ad hoc granting of visas for au pairs that is the subject of this inquiry, did Minister Dutton or his office take any steps to ensure these sorts of au pair arrangements don't involve any possible contravention of the various legislative requirements?

In our submission the Senate Legal and Constitutional Affairs Committee should take into consideration any potential breaches to Australian laws that might have been associated with the engagement of the au pairs in question.

Please contact Policy and Research Officer on to discuss this matter further.

Yours sincerely

Ros McLennan
General Secretary