

Senate Standing Committee on Economics
Inquiry into the unlawful underpayment of employees' remuneration

Attorney-General's Department

Hearing date: 18 September 2020

Hansard page: 53,60

Question type: Spoken

Alex Gallacher **asked the following question:**

Question 1

CHAIR: Can you give us a snapshot of the structure? How many people have you got in your section and that sort of thing?

Mr Hehir: I can give you a high-level overview. I currently have five divisions that report to me. I have got an industrial relations legal division. We have got an employee entitlements and enforcement division. I've got two policy divisions, one which covers work health and safety and bargaining, and another one which covers off awards and casuals policy. The fifth one is the IR secretariat. All up there are about 300 ASL.

CHAIR: On notice, if you could disaggregate that to each specific unit that you've spoken about?

Question 3 (b)

CHAIR: Can we get the Attorney-General's Department to actually cite an example of complexity? You are the people who draft legislation. I would like to see an example of complexity, because despite all of the answers to questions here today, I'm still struggling to get an understanding of this complexity you refer to. I would ask you, on notice, to provide an example of a specific area of complexity which is related to an underpayment. Sorry, Senator Sheldon.

Mr Hehir: That's all right. I'm happy to take that on notice. I would note that while we are responsible for working with parliamentary counsel on the drafting of legislation, we don't draft awards. That's not our responsibility. That's the responsibility of the Fair Work Commission. I'm happy to take on notice the principle.

Senator SHELDON: But in fairness, you've asserted in your submission that complexity is one of the key issues, and you can't explain to us what the complexity is. You can't explain to us whose penalty rates are complex, whose bonuses are complex, whose allowances are complex or what hours are complex—yet you've asserted it, as a senior authority within the

government structures, to say that it's too complex. It's too complex, but you can't tell us.

Mr Hehir: As I said before, I'm not asserting that any individual entitlement, in and of itself, is complex. But we believe the complexity arises with the smaller operators who are less experienced and the interaction and multiplicity of particular entitlements. Where there's confusion, or lack of clarity, that has the potential to lead to—I don't want to use the word 'cause'—an inadvertent underpayment. We're not suggesting that any entitlements at this point need to be cut. What we are looking at, what we've raised, is the information fed to us from many employer groups that they have members who find the awards system complex.

The response to the Senator's question is as follows:

As at 18 September 2020, the date of the Senate Committee hearing, the distribution of ASL across the department's Industrial Relations Group is as follows:

	ASL
Industrial Relations Group Executive	5.5
Employee Entitlements Safeguards and Policy Division	119.7
Employment Conditions Division	54.1
Industrial Relations Legal Division	45.2
Safety and Industry Policy Division	72.3
Total	296.8

Of this ASL, 14.99 ASL was redirected to a temporary Industrial Relations Secretariat Division in the Industrial Relations Group.

As at September 2020, the Industrial Relations Secretariat Division had a total of 19.22 ASL.

In respect of Question 3 (b), the department refers Senator Gallacher to its response to Question 3 (a) from Senator Sheldon.

Senate inquiry into the unlawful underpayment of employees' remuneration

Attorney-General's Department

Hearing date: 18 September 2020

Question date: 25 September 2020

Question type: Written

Mehreen Faruqi asked the following question:

How many investigations and prosecutions of franchisors or holding companies have been pursued since the implementation of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*?

The response to the Senator's question is as follows:

The Protecting Vulnerable Workers amendments commenced on 27 October 2017. Since then, the Fair Work Ombudsman (FWO) has commenced 19 litigations involving franchisors and holding companies. The FWO's website provides a summary of investigations into franchising and holding companies, including:

- unannounced audits at 92 stores under the Retail Food Group (one of Australia's largest multi-brand retail food franchisors) across Australia;
- a national investigation into 76 businesses across 7 franchise brands;
- an investigation into the Gami Chicken & Beer franchise network, including unannounced visits to 19 outlets across Victoria, New South Wales and Western Australia in April 2019; and
- an investigation into the Top Juice Pty Ltd franchise network, including auditing 16 Top Juice outlets across Australia and the Top Juice head office in New South Wales.

The department is not aware of any investigations or litigations commenced since October 2017 by parties other than the FWO in relation to franchising and holding companies, under the Protecting Vulnerable Workers amendments.

Senate Inquiry into the unlawful underpayment of employees' remuneration

Attorney-General's Department

Hearing date: 18 September 2020

Hansard page: 62

Question type: Spoken

Mehreen Faruqi asked the following question:

Mr Manning: We can only respond by setting out what the government committed to do. The Migrant Workers Taskforce recommended that the worst forms of systemic wage underpayment be criminalised, and the government has made a commitment to do that. Its commitment was to criminalise behaviour which was dishonest and systemic. Consistent with established industrial relations consultation mechanisms, which are separate from the IR reform working group process, it consulted on a draft bill earlier in the year, and, as you would imagine, it's something that's been discussed in that process as well.

Senator FARUQI: Could you take on notice who that consultation has been with—the different organisations and people?

Mr Manning: Yes. It's under the auspices of the National Workplace Relations Consultative Council, which is established under legislation, and the states and territories are part of that as well.

The response to the Senator's question is as follows:

In February 2020, the department consulted with states and territories and the Committee on Industrial Legislation (COIL), a sub-committee of the National Workplace Relations Consultative Council, on a confidential draft of the legislation to give effect to the proposed criminal offence.

Representatives from the following state and territory agencies participated in the confidential consultation process: the Office of Industrial Relations (QLD), the Department of Premier and Cabinet (NSW), the Treasury and Economic Development Directorate (ACT), the Department of Premier and Cabinet (VIC), the Office of the Commissioner for Public Employment (NT), SafeWork (SA), and the Department of Mines, Industry Regulation and Safety (WA).

Representatives from the following organisations participated in the confidential consultation process as COIL members: the National Farmers' Federation (NFF); Housing Industry Association; Australian Industry Group (Ai Group); Australian Chamber of Commerce and Industry (ACCI); Master Builders Australia; Australian Council of Trade Unions (ACTU); Australian Manufacturing Workers' Union; United Workers Union; and the Shop, Distributive and Allied Employees' Association.

Further consultation on legislation to give effect to the proposed criminal offence also took place in recent months as part the JobMaker compliance and enforcement working group. This involved representatives from the following organisations: ACCI, Ai Group, NFF, Council of Small Business Organisations Australia, Australian Hotels Association, the ACTU, the Finance Sector Union, the Australian Services Union and the Independent Education Union.

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Attorney-General's Department

Hearing date: 18 September 2020
Hansard page: 59-65
Question type: Spoken

Tony Sheldon asked the following question:

Question 3(a)

Senator SHELDON: You've made a decision about complexity—that there is a complexity. That is among the main reasons why there is wage theft. Have you got academic research independently that says there is wage theft as a result of complexity?

Mr Hehir: I'd need to take on notice whether we've got academic research. But as I have been saying—

Senator SHELDON: You haven't got any academic research—is that what you're telling me?

Mr Hehir: We take into account—

Senator SHELDON: I want a 'yes' or 'no'.

Mr Hehir: feedback—

Senator SHELDON: I would like a 'yes' or 'no'. Do you have academic research that says that one of the major causes of wage theft is complexity. Do you?

Mr Hehir: Senator, I have taken that on notice.

Senator SHELDON: Can I just describe this. One person's alleged complexity is another person's right to fair wages. You're not able to give examples of where these complexities are, except to talk in general terms to make a series of assertions about testing user feedback. Who did you test, what did you find, and when did you test the information they gave you? If I ask one of my kids whether I pay them enough pocket money and then ask the other child whether I pay enough pocket money, they are both going to agree that I don't pay them enough. It's not a test.

CHAIR: It's the end of a fairly long and comprehensive day. I think we have had eight-plus hours of deliberations today. Mr Hehir, if you have anything further to put on the record, please do so. If not, we look forward to some of your answers on notice.

Mr Hehir: As I said, I will take that on notice. But, included in that, we will work through the submissions provided and other discussion papers and identify the relevant pieces from that as

well. Certainly that process was very important in terms of informing us, and that was the intent behind that submission process. But we are certainly happy to take on notice a full response to those questions.

Senator SHELDON: Could you also provide on notice all the employer feedback that you received, the essence of that feedback and the examples that were specifically used. I appreciate that some of them may be appropriate to hand to us with detailed discussions and some of it will be of a general nature. But I would like to know the specific information you relied on to make this assertion about complexity that you have not been able to describe today.

Mr Hehir: I would just note that any submissions we received in relation to that compliance discussion paper are on our website. We can take it on notice and provide a full answer. But if you want to look at those particular submissions, which would be part of the answer, you are able to do that.

The response to the Senator's question is as follows:

There is a body of evidence that the Fair Work system, while less complex than previous frameworks, still creates uncertainty for some employers in seeking to comply with their workplace obligations.

Through the modernisation process, more than 1500 awards were consolidated into 121 modern awards, with each modern award applying to a different industry or occupation. Notwithstanding the modernisation process, the department recognises that some stakeholders continue to perceive complexity and ambiguity as a key issue in determining employment entitlements. Award complexity is a multifaceted issue but can be broadly characterised as relating to the volume of terms and conditions, the need to cross reference multiple documents, overlapping coverage, and the level of prescription.

Modern awards have also been in a constant state of review and change since their commencement. For example, since 2010 there have been 85 changes to the General Retail Award, 82 changes to the Hospitality Award and 74 changes to the Restaurant Industry Award.

In particular, complexity may arise from:

- The length of awards, including the number of pay rates, classifications and clauses, can make it difficult for employers and employees to locate information. For example, in the Hospitality Award, employers must navigate approximately 120 base rates of pay and classifications resulting in around 1,700 pay points.
- Complex coverage clauses in an award can give rise to confusion and a lack of clarity on which award applies to a particular employer and employee, and this can have severe consequences given the variations between different awards. This is exemplified in the Restaurant Award, which requires reference to multiple other awards to determine coverage.
- While almost all awards provide for a 38 hour working week for full-time employees, arrangement of those working hours can differ. Under clause 15.1 of the Hospitality Award, the average of 38 hours per week is worked out in the following ways:
 - a 19 day month, of 8 hours per day,

- four days of 8 hours and one day of 6 hours per week,
- four days per week of 9.5 hours per day,
- five days per week of 7 hours and 36 minutes per day,
- 76 hours over a two week period with a minimum of four days off each two week period,
- 152 hours each four week period with a minimum of eight days off each four week period,
- 160 hours each four week period with a minimum of eight days off each four week period plus an accrued day off,
- any combination of the ways set out above.

Rostering arrangements are then subject to up to 15 clauses and subclauses of further rules that can impact how these arrangements are implemented. To help businesses navigate the Modern Awards, the Fair Work Ombudsman (FWO) launched the Pay and Conditions Tool on its website in 2015.

Summary of selected commentary and views on complexity

a. Review of the Fair Work Act (2011-2012)

The Fair Work Act Review Panel released its report in August 2012, ‘Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation’. The Report acknowledged complexity arising from the creation of the Fair Work system, and for businesses in moving to new award arrangements.¹ The Report noted, in particular, that new provisions relating to the transfer of entitlements between employers “*may make outsourcing and insourcing more complicated or expensive for businesses*”.² The Report also acknowledged concerns raised by stakeholders about complexity as a general issue in the workplace relations system (including the Chamber of Commerce and Industry Queensland and the Australian Human Resources Institute).

b. Productivity Commission Report on the Workplace Relations Framework (2015)

The Productivity Commission released its report, ‘Workplace Relations Framework, Final Report’ in December 2015. The Report noted ongoing complexity within the Fair Work Act, and in Modern Awards. The Report noted, “*To the extent that the structure, language, order, and overlap of provisions contribute to this complexity, awards can be improved further.*”³

In their joint submission to the Productivity Commission’s Inquiry, Professors Stewart and Gahan, and Associate Professors McCrystal and Chapman stated, “*the Australian system of labour regulation must be regarded as extremely complex*”, and through the process of ‘layering’, “*statutes, awards, registered agreements, employment contracts and organisational policies – operate to determine the rules of an employment relationship.*”⁴

c. Fair Work Commission Review of Modern Awards (from 2014)

¹ Fair Work Act Review Panel, *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, Final Report, 2012, at 105.

² Fair Work Act Review Panel, *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, Final Report, 2012, at 207.

³ Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76, Vol 1, Productivity Commission, Canberra, 2015, at 350.

⁴ Stewart, Gahan, McCrystal and Champan, ‘Labour Regulation: Is There a Case for Major Reform’, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework, March 2015, page 23.

The Fair Work Commission (FWC) embarked on a ‘plain language re-drafting’ process in the 4 yearly review of modern awards, commencing in 2014. The review has involved redrafting around ten selected awards in plain language and including ‘standard clauses’ in all modern awards. Justice Ross, President of the FWC, acknowledged that the system could be difficult to navigate. Justice Ross said the FWC's review has prioritised concerns about the complexity of Modern Awards, focusing on plain language translations, stating that “*an award should be able to be read by an employer or an employee at the workplace without needing a history lesson or a paid advocate to interpret it.*”⁵ The FWC’s four yearly review is ongoing, and it is currently finalising exposure drafts and variations of each of the Tranche 3 awards.

d. Black Economy Taskforce (2016-2017)

The Black Economy Taskforce observed that high tax and compliance burdens provide a strong incentive for participation in the black economy, noting that the industrial relations system, including the complexity of the award system, may also have this effect. Many small businesses provided evidence that they have difficulties interpreting how the various awards apply to their employees, and that this complexity contributes to compliance costs.⁶

e. Migrant Workers’ Taskforce (2016-2019)

The Migrant Workers Taskforce Report acknowledged the complexity of the Modern Award system in the context of 7-Eleven’s response to the underpayments uncovered within its network. Recognising the difficulties of ascertaining employment status, hours of work, and relevant rates of pay, the Report noted that individual employees would have effectively been unable to substantiate individual wage claims. The Report commended 7-Eleven’s wage redress scheme, which provided extensive support for claimants to access the scheme and substantiate their claims.

f. Statement by former Fair Work Ombudsman, Natalie James (2019)

Former Fair Work Ombudsman Natalie James was reported to have stated the workplace relations system needs to be examined, as “*The sheer number of different pay rates and payments triggered by a range of factors makes it very challenging to capture and systemise those events and ensure that workforces are appropriately paid.*”⁷

g. Reports and disclosures of non-compliance (2018-2020)

In the past 18 months, the FWO has seen a significant increase in corporate entities, including large corporates, self-disclosing underpayments. While the FWO has observed that non-compliance appears to be consistently driven by ineffective governance and a lack of investment in systems and audits, it has found that a number of underpayments result from honest mistakes⁸⁹ or careless missteps.¹⁰

In July 2018, Maurice Blackburn was reported as having underpaid 400 employees by \$2 million, with underpayments dating prior to 2012. The employer was reported as stating

⁵ABC Radio National, 6 June 2018, ‘Tortuous’ language in industrial awards needs to go, says Fair Work boss.

⁶ The Australian Government the Treasury, *Black Economy Taskforce Final Report* (October 2017), pages 147-148; 159.

⁷ *Australian Financial Review*, 26 June 2019, ‘IR system hits workers and business’.

⁸ The Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2018-19.

⁹ *Australian Financial Review*, 27 October 2019, ‘Big business ‘taken eye off the ball’ over underpayments’;

¹⁰ FWO Media Release, 30 October 2019, ‘FWO responds to Woolworths’ self-disclosure’.

the underpayments arose from an ‘error’, which was the result of an “ambiguous overtime provision in the enterprise agreement”.¹¹

h. Determinations of the Federal Circuit Court

Recent decisions of the Federal Circuit Court provide examples of complex award coverage matters. For example, in the matter of *Surace v Peoplesmove Pty Ltd*,¹² the employer, employee and Court each believed a different Award applied. In *Hazell v Sewell*¹³ Judge Altobelli found that DJs are not covered by the Live Performance Award, despite the Award’s clear intention to to “provide broad coverage in the field.” Judge Altobelli further stated, “The drafting on the Award provisions is complex – perhaps unnecessarily so.”

i. Industrial relations consultation (2019-2020)

In September 2019, the department released a discussion paper titled *Improving protections of employees’ wages and entitlements: Strengthening penalties for non-compliance*, followed by a further discussion paper in February 2020 titled *Improving protections of employees’ wages and entitlements: further strengthening the civil compliance and enforcement framework*. Discussion questions were included to seek stakeholder feedback on the recommendations of the Migrant Workers’ Taskforce report, and the penalties, compliance and enforcement framework in the Fair Work Act.

The department received fifty submissions in response to the first discussion paper, and eight submissions in response to the second. The discussion papers and the publicly available submissions can be viewed on the Attorney-General’s Department’s website at: <https://www.ag.gov.au/industrial-relations/consultations>.

A number of submissions raised concerns about complexity as a general issue, or in relation to specific elements of the system. Submissions raising these concerns included AiGroup, AUSVEG, Australian Chamber of Commerce and Industry, the Australian Small Business and Family Enterprise Ombudsman, the Business Council of Australia, the Housing Industry Association, the Law Council of Australia, Ms Melissa Kennedy, the National Farmers Federation, the Association of Professional Staffing Companies Australia and the Australian Fresh Produce Alliance. In their submission, the Australian Council of Trade Unions (ACTU) also accepted that some employers could be categorised as having “made genuine mistakes...[which] are rectified once identified”.¹⁴

AUSVEG also noted that the addition of overtime rates for casuals in the Horticulture Award with only a two week introductory period, proved difficult for small businesses who had to build the new component into their business model. The Association of Professional Staffing Companies Australia noted that employers struggle to match Awards to roles in emerging job titles and, in many instances, this is compounded when there are multiple workers in one location engaged under different awards.

j. Article published in the Workplace Review (2020)

The department acknowledges ongoing academic commentary about complexity in the

¹¹ *Sydney Morning Herald*, 20 July 2018, ‘Maurice Blackburn’s \$1 million pay muck up short changes 400 staff’.

¹² *Surace v Peoplesmove Pty Ltd (trading As Carhood) [2018] FCCA 601*.

¹³ *Hazell v Sewell [2020] FCCA 2446*.

¹⁴ Australian Council of Trade Unions, 25 October 2019, Response to Attorney-General’s Department Discussion Paper.

workplace relations system. For example, in their article, ‘Wage theft’, authors Kirsty Stewart, Rick Manuel and Kaz Eaton stated that industrial instruments “*are usually lengthy and poorly drafted, making it very difficult to identify with precision matters such as the correct classification, hours of work, penalties and related issues.*” The authors are barristers in private practice in South Australia.

k. Senate Inquiry into the unlawful underpayment of employees’ remuneration (2019-2020)

A number of submissions made to the Inquiry raise complexity. For example, 7-Eleven Stores Pty Ltd provided an extensive list of examples of challenges in payroll compliance. While the submission highlighted these are not excuses for underpayment, it sought recognition that the ramifications of inadvertent errors can be significant.