

# Unions NSW Submission

## Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

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## Introduction

1. Unions NSW is the peak body for trade unions and union members in New South Wales with 48 affiliated trade unions and Trades and Labour Councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce in both the public and private sectors.
2. Unions NSW welcomes the opportunity to make a submission in relation to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, more colloquially known as the **Omnibus Bill**. Unions NSW and its affiliated unions have a proud history of engaging in the parliamentary process to protect and represent the interests of union members. Unions NSW frequently makes submissions to inquiries involving industrial relations and other issues which may impact members. The Inquiry into the Omnibus Bill is one of the most important we have participated in in recent years.
3. The Australian Council of Trade Unions (the **ACTU**) has also made a submission to this Inquiry which Unions NSW has had the opportunity to read and fully endorses.
4. This submission will join submissions made by the ACTU and affiliate unions in calling for significant amendment to the Omnibus Bill. If such amendment is not made, this Bill should be strongly opposed.
5. Noting Unions NSW's extensive research and campaign work in the area of underpayment of employee's remuneration (**wage theft**), this submission will shed additional light on that aspect of the Omnibus Bill and the protections that need to be guaranteed for workers.
6. Four reports produced by Unions NSW which explore wage theft and its effects on migrant workers are annexed to this submission. **Annexure A** is "Lighting Up the Black Market: Enforcing Minimum Wages" (2017), **Annexure B** is "Wage Thieves: Enforcing Minimum Wages" (2018) **Annexure C** is "Wage Theft: The Shadow Market Part One (All Industries Excluding Horticulture)" (2020) and **Annexure D** is "Wage Theft: The Shadow Market Part Two (Horticultural Industry)" (2021) Both reports support this submission.
7. Please note this submission is intended to compliment and not supersede any submission from an affiliate union of Unions NSW. Where an element of the Omnibus Bill has not been addressed, it may be assumed Unions NSW endorses the submission made by the ACTU.

## Problematic Provisions in the Omnibus Bill

8. Unions NSW supports the submission made by the ACTU to this Inquiry. In so doing, we will give a high level overview of key areas of concern Unions NSW also has pertaining to the Omnibus Bill.

### Schedule 1 – Casual Employment

9. New provisions in the Omnibus Bill will remove workplace rights for some casuals and increase insecure employment through the right of employers to define any job as casual at the point of employment<sup>1</sup>. In practical terms, workers may become “stuck” as a casual, notwithstanding changes to their pattern of working if the employer can assert, they made no commitment to providing continuing and indefinite work.
10. Provisions of the Omnibus Bill pertaining to the definition of casual employment are also fundamentally flawed. Whilst unions support a statutory definition of casual employment, we believe it needs to be one which accurately reflects the common law definition that has evolved over time. By contrast, the definition of a *casual employee* in s15A of the Omnibus Bill appears to be a reaction to the Federal Court’s 2020 finding in *Workpac v Rossato* [2020] FCAFC 84 (**Rossato**) that it is imperative to look at whether there was a firm advance commitment in assessing the nature of an employment relationship. Ultimately *Rossato* recognised the entitlement to various forms of leave for employees wrongly classified as casual.
11. The *Rossato* decision was not a new interpretation of law, nor was it the first time large business risked penalty for contravening workplace laws. However, given the size of the breach found and potential cost to many of the Government’s biggest supporters, it appears the inclusion of the s15A definition is an attempt to retrospectively overturn the Federal Court’s decision.
12. Unions do not believe the adverse effects of the new definition are adequately compensated by the Omnibus Bill’s new casual conversion provisions which, whilst superficially requiring an employer to make an offer to a casual employee who they have employed for 12 months and has worked a regular pattern of hours for at least the last 6 months<sup>2</sup>, grant employers significant leeway to avoid making an offer<sup>3</sup>.
13. The “reasonable grounds” for not making such an offer outlined in s66C(2) of the Omnibus Bill create a loophole to release employers from a requirement to provide workers with security.

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<sup>1</sup> Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020, s15A.

<sup>2</sup> *Ibid*, s66B.

<sup>3</sup> *Ibid*, 66C.

The unfairness of this provision is compounded by the apparent absence of an avenue for arbitration to dispute that decision. These changes would operate to the significant detriment of numerous categories of workers who are unable to obtain other employment. Particularly in the current environment, where many households are still feeling the financial effects of the COVID-19 pandemic, these provisions are likely to have deep impacts on communities, individuals' mental health and social security resources.

### Schedule 2 – Modern Awards

14. As outlined in the ACTU's submission, provisions in the Omnibus Bill facilitating significant changes to a number of the Modern Awards will perpetuate and worsen uncertainty and insecurity for affected workers.
15. For example, the simplified Additional Hours Agreements outlined in s168M means part-time employees employed under the 12 identified Awards can be asked to work hours additional to their agreed/contractual hours without being paid overtime. Whilst the Omnibus Bill makes it clear employees cannot be "required" to work these additional hours<sup>4</sup>, in practice there is likely to be significant pressure felt by employees who are requested to do so. In addition, Awards which include this provision can be amended by regulation – extending the possibility that more part-time workers across industries will feel they have to choose between familial and other commitments and the opportunity to work hours beyond those they are contracted to, with little additional compensation.
16. The Omnibus Bill also introduced "flexible work directives" not dissimilar to provisions introduced to facilitate the JobKeeper scheme. Under the proposed Part 6-4D, employers covered by identified Modern Awards would be able to unilaterally make decisions about the duties their employees perform and the location they perform them at, for up to two years after the law is introduced<sup>5</sup>. Such employers will not be required to meet turnover tests as required under JobKeeper. These provisions, if enacted, would operate to the detriment of workers who would have reduced agency of their employment.

### Schedule 3 – Enterprise Agreements

17. The Omnibus Bill will reinforce the extent to which enterprise bargaining is more heavily regulated than any other contractual relationship in the economy. Whilst unions would

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<sup>4</sup> Ibid, s168M(2).

<sup>5</sup> Ibid, schedule 2, part 3.

welcome the abolition of WorkChoices “Zombie agreements” from 1 July 2022, the majority of the provisions relation to Enterprise Agreements will operate to the disadvantage of workers.

18. In relation to this we refer to the submission made by the ACTU and in particular to the observations made about Schedule 3. Unions NSW echoes and endorses this submission.

#### Schedule 4 – Greenfield Agreements

19. The negative effects of changes to laws regulating the creation of Greenfield Agreements will predominately be felt by low to middle income workers who work on projects in industries such as construction and mining. The Omnibus Bill inexplicably permits construction projects costed to be as low as \$250 million to be declared “Major Projects” and benefit from provisions permitting Greenfield Agreements to apply for up to 8 years without review<sup>6</sup>. This change has the significant risk of stagnating pay and working conditions.
20. Further compounding disadvantage is the potential for employers to include in Greenfield Agreements dispute resolution clauses which do not provide an avenue to arbitration of disputes. The new provisions also preclude workers with an in-term agreement from taking protected industrial action<sup>7</sup>, thereby restraining them from improving their rights and conditions.
21. Accordingly, the provisions pertaining to Greenfield Agreements in the Omnibus Bill will create a class of workers who have fewer rights than everyone else. Unions NSW considers the Omnibus Bill in its present form to have missed an opportunity to deal with some of the serious risks associated with Fly In Fly Out project work, by including conditions to better support the mental health of workers.

#### Schedule 5 – Compliance and Enforcement (Wage theft & underpayments)

22. Reasons to justify systematic wage theft frequently cited by employers include the complexities of the Modern Award system<sup>8</sup> and a general ignorance around obligations. This fabled ignorance has been perpetuated by former federal Workplace Minister Craig Laundy, among others, who claim educating employers is the solution and the majority of wage theft is not

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<sup>6</sup> Ibid, s186(5)(b)

<sup>7</sup> Ibid, s417.

<sup>8</sup> The AFR View ‘Award complexity is the real wage stealer’, *The Australian Financial Review* (online), 31 October 2019 <<https://www.afr.com/politics/federal/award-complexity-is-the-real-wage-stealer-20191031-p53670>>.

deliberate, but the unfortunate result of “genuine administration mistakes”<sup>9</sup>. Only a year ago, Federal Attorney-General Christian Porter claimed that the “vast majority” of underpayments are “not deliberate”<sup>10</sup>.

23. Noting business owners manage to navigate commercial leases, complex business sale and structure contracts and the means to legally reduce taxation obligations Unions NSW considers these arguments to be nonsense. There is a plethora of resources available to employers, produced and distributed by the Fair Work Ombudsman (**Ombudsman**) and Australian Taxation Office (**ATO**) which aid employers to correctly pay workers their entitlements. In addition, many employers are members of employer peak bodies who are available to provide accurate and timely advice on employers’ responsibilities regarding their employees.
24. By contrast, companies and employers engaging in wage theft practices seem to have adopted such practices as a business model<sup>11</sup>. The general opportunity to exploit workers in Australia, coupled with the lack of enforcement of industrial laws and/or consequences for breaking these laws, makes the illegal undercutting of workers to save money an attractive and easy prospect.
25. In the experience of Unions NSW, wage theft is predominately caused by the opportunity for employers to cut business costs with very little chance of being caught. Unions NSW understands the Ombudsman has approximately 177 inspectors conducting workplace investigations under the current system of auditing<sup>12</sup>. This equates to roughly to one inspector for every 72,000 employed people in Australia<sup>13</sup> and is not enough to competently and adequately protect the rights of workers. Presently, the chance of an employer getting caught underpaying employees is attractively low.
26. Recent highly publicised cases has shed light on the systematic and far-reaching exploitation of vulnerable workers in our communities<sup>14</sup>. The 7-Eleven case, which played out over several

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<sup>9</sup> Anna Patty and Noel Towell, ‘Pressure mounts on federal Labor to pledge to criminalise wage theft’, *The Sydney Morning Herald* (online), 25 May 2018 <<https://www.smh.com.au/business/workplace/pressure-mounts-on-federal-labor-to-pledge-to-criminalise-wage-theft-20180525-p4zhjj.html>>.

<sup>10</sup> Dana McCauley, ‘Employers could be forced to name and shame themselves over wage theft’, *The Sydney Morning Herald* (online), 18 February 2020 <<https://www.smh.com.au/politics/federal/employers-could-be-forced-to-name-and-shame-themselves-over-wage-theft-20200217-p541iz.html>>.

<sup>11</sup> Migrant Workers Taskforce, Commonwealth of Australia, *Report of the Migrant Workers’ Taskforce* (2019) 37.

<sup>12</sup> David Marin-Guzman, ‘Employer groups should police underpayments: unions’, *The Australian Financial Review* (online), 5 March 2020 <<https://www.afr.com/work-and-careers/workplace/employer-groups-should-police-underpayments-unions-20200305-p54748>>.

<sup>13</sup> Australian Government, *Industry Information* (3 February 2020) Labour Market Information Portal <<http://lmip.gov.au/default.aspx?LMIP/GainInsights/IndustryInformation>>.

<sup>14</sup> Laurie Berg and Bassina Farbenblum, ‘Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program’ (2018) 41(3) *Melbourne University Law Review* 1035, 1038.

years and included an Ombudsman's inquiry into compliance in the network<sup>15</sup> demonstrated underpayment was a business model and required conduct in order for franchisees to make a profit<sup>16</sup>.

27. Unions NSW does acknowledges there are cases where small business operators genuinely make errors. However, the root of the issue lies not in lack of education but in a poor industrial culture that has developed through lack of deterrence to comply.
28. Unions NSW welcomes items 1-5 of Schedule 5 of the Omnibus Bill which significantly increase the maximum penalties for employers found culpable of the non-payment, late payment or underpayment of wages and entitlements. In their submission to this Inquiry, the ACTU has made important observations about the operation of the new provisions which Unions NSW supports.
29. Notably, the provision in s 546(3A) will mean penalties ordered by an authorised Court or Tribunal will no longer be paid to the person or organisation that brings the claim and must be paid to the Commonwealth. Noting the extremely low enforcement by the Ombudsman, individuals and unions who are better placed to reveal and act upon instances of wage theft will be disincentivised by their inability to recover the costs of running the matter through the receipt of the penalty.
30. Unions NSW also welcomes the increasing of the limit of underpayment claims in the small claims jurisdiction from \$20,000 to \$50,000, however we believe this jurisdiction remains an inaccessible forum for the most vulnerable workers in society.
31. The process for recovering unpaid wages through the court system is overly complex, time consuming and expensive. The current process under the Fair Work Act for making claims up to \$20,000 involves an individual making an application to their state Magistrate's Court or the Federal Circuit Court and paying filing fees of up to \$400<sup>17</sup>. Additionally, applicants must

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<sup>15</sup> Fair Work Ombudsman, Commonwealth of Australia, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (2016) 4.

<sup>16</sup> Adele Ferguson and Klaus Toft, '7-Eleven investigation: Business model ripping off workers, former consumer watchdog says', *ABC News* (online), 31 August 2015 <<https://www.abc.net.au/news/2015-08-31/7-eleven-business-model-ripping-off-workers-allan-fels/6733658>>.

<sup>17</sup> Federal Circuit Court of Australia, *General Federal Law Fees* (1 January 2020) Federal Circuit Court of Australia <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl/fees-gfl>>.

prepare affidavits and carry out legal service upon their employer, once they have correctly identified the entity paying (or not paying) their wages<sup>18</sup>.

32. For many workers, particularly vulnerable workers such as young and migrant workers it is neither possible or affordable to seek to recover stolen wages<sup>19</sup>. The *National Temporary Migrant Work Survey* showed 42% of participants would not try to recover wages from their employer because they “don’t know what to do”, whilst 16% responded “the forms are too complicated”, demonstrating this group had attempted to start the process but were deterred by the inherent difficulty.
33. It can take months for Courts to provide a decision and this does not include the time required to have a Court Order enforced. For example, a former employee of Allans Billy Hyde received a favourable court decision, but months later, had still not been paid<sup>20</sup>. In such cases, the onus falls on the aggrieved employee to commence further proceedings to have the Court Order enforced.
34. A more simplified process is urgently needed. The Commission’s jurisdiction should be expanded and vested with the power to decide on disputes regarding wage theft outside of underpayment disputes arising in other industrial matters. The Commission process is more time efficient, less reliant on technicalities and is more accessible for workers. This will provide a more user-friendly forum for all employees and especially temporary migrant workers to enforce their entitlements.
35. Criminalising systematic wage theft will also necessitate some amendments to immigration laws. Recent case law identifies the deficiencies of the current visa regime in respect of migrant workers’ ability to pursue their unpaid entitlements.

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<sup>18</sup> Laurie Berg and Bassina Farbenblum, ‘Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia’ (October 2018) 15.

<sup>19</sup> Ibid, 42.

<sup>20</sup> Triple J, ‘Owed \$20K: Fair Work Ombudsman failing underpaid workers, victims say’, *Hack*, 27 June 2018 (Avani Dias and Matilda Marozzi).



### **Case Study: Sebastien**

In 2017, Sebastien (a French citizen) made an unfair dismissal claim against the Italian restaurant, Baia the Italian Pty Ltd. Sebastien had his visa sponsorship withdrawn by his former employer while lodging an underpayment claim of \$11,000. Although an expediated hearing before the Commission was requested, the process was slowed down by the company's refusal to respond to the application or to identify the appropriate office bearer. The company had previously told Sebastien to 'go ahead' and contact the Ombudsman as the company had never been prosecuted.

By the time the Commission ruled in favour of Sebastien he had already returned to France, making enforcement of the finding against the company, who refused to participate in the hearing, near impossible.

36. Lengthy court processes and visa limitations create a disincentive for migrant workers to enforce their rights. Workers who have had their wages stolen should not have their claims limited by their ability to remain in the country.
37. Visa holders pursuing workplace entitlements should be granted a visa extension allowing them to remain and work in Australia until their claim has been settled. A similar safeguard already exists for witnesses or complainants in criminal law cases<sup>21</sup>, providing them with the right to temporarily remain in the country, for the period needed to assist with the case. No equivalent alternative is available for victims of wage theft or other workplace rights violations.
38. Workers most likely to be exploited such as migrant workers and young people are no more likely to be able to navigate a system because of the provisions in the Omnibus Bill. We believe there needs to be a better thought out solution to the endemic that is wage theft.

## **Conclusion**

39. Unions NSW agrees that the Industrial Relations system in Australia requires reform. Like the ACTU and our affiliate unions, we remain ready to and enthusiastic about being part of that process. However, the Omnibus Bill appears disingenuous in its presentation, and is targeted far more at assisting business owners and the Government's own associates than in supporting the majority of Australians and in particular vulnerable workers.
40. We urge the Committee to look closely at union submissions to the Inquiry and recommend significant amendment to highlighted areas of concern to remove red tape and create a fairer environment for all. If such amendments cannot be made or other parties are unwilling to make them, then the Omnibus Bill should be opposed and never enacted.

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<sup>21</sup> *Migration Act 1958* (Cth), ss155 – 161.