

Public Submission

Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-compliance

Thank you for the opportunity to submit to the Discussion Paper on Strengthening Penalties for Non-compliance. My background on this issue is as a former hospitality student, employee, and past owner of restaurants in Australia as well as a long-time campaigner on the issue of underpayment in the hospitality industry. When it comes to underpayments, hospitality is over represented, with complaints about hospitality businesses making up 36% of all tip-offs to Fair Works anonymous tip line, the highest of any industry.

Increasing penalties and the powers of the Fair Work Ombudsman has long been overdue and will not only improve employee outcomes but also outcomes for industry with lower levels of predatory competition and greater labour productivity.

Underpayment in hospitality has been an ever-present part of the industry for the nearly 30 years that I have been involved. Unpaid overtime, unpaid penalty rates and non-payment of public holidays have been common place for most hospitality workers for much of their careers and many within the office of the regulator have known this for some time. Instead of the government trying to help with better regulation, more inspections and enforcement, they have made the situation worse with a dramatic increase in unregulated migration. The net result is Australian workers in industries with so-called 'Skill Shortages' have been continually underpaid legal minimum wages and denied natural pay rises. Although the government and media point the finger of blame at industry, government departments who have allowed large numbers of migrant workers with insufficient knowledge of Australian workplace laws into industries that did not have adequate regulatory infrastructure, must take a large part of the blame. Basic economics as well as innumerable examples in nearly all world economies could have warned the government what happens when large numbers of foreign workers, predominantly from developing countries, enter underregulated labour markets. Underpayment could not have become as bad as it is today without the government's involvement.

While increasing penalties for businesses and especially making franchisors responsible for underpayment in their networks is essential, some form of accountability and punishment should also be applied to government departments who ignore clear evidence that their actions or foreseeable consequences of their inaction, are causing underpayments. The aim of the law is to penalise those who cause harm to others and no one should be above the law.

Australian hospitality, along with having the highest incidence of underpayment also has Australia's lowest paid workers (ABS Survey of Employee Earnings and Hours 2018), and has the highest failure rate of all industries tracked by the ABS. This train-wreck state of the industry was caused largely due to government actions and inactions in the labour market.

Criminalising Deliberate Underpayments.

While I and many others have long advocated for stronger penalties for deliberate underpayment it would be unwise and unfair to add criminal sanctions without first ensuring 100% education on the Award for all businesses in Australia and an annual compliance check to uncover underpayments (this is no longer difficult or expensive in our digital world). There are 4 major reasons for this view.

1. Australian businesses will be treated unevenly by the proposed new laws compared with migrant businesses

A large proportion of the worst cases of underpayment in Australia have been perpetrated by migrant business owners exploiting members from their own cultural and linguistic background. This is something even migrant groups have noted in submissions to government on underpaying. The well-known practice has been viewed as “extremely serious” by Australian judges as well as former Fair Work Ombudsman Natalie James saying she was “Increasingly concerned about the number of employers from culturally and linguistically diverse backgrounds who are exploiting workers from within their own ethnic communities.” A Unions NSW audit of job advertisements of Chinese, Korean and Spanish language websites in June 2019 found 79% of businesses advertised pay rates below the minimum award wage. 7 Eleven, Caltex, Chai Time, Domino’s and Retail Food Group franchisees are good examples of this business model at work. Many independent businesses have also followed in their footsteps as evidenced by Fair Work Ombudsman reports. The wide-spread nature of this underpayment business model has been known by those working in hospitality for decades and has been accelerated by a large increase the number of foreign students as well as large increases in immigrant labour and business migration visas into hospitality in recent years. There was and still is very little in the way of educational or enforcement infrastructure to cope with this large influx and this has resulted in not only wide spread underpayment in these communities but also a flow on effect as Australian businesses have attempted to compete in the sector.

While it is mandatory for hospitality owners to complete educational courses and to have their businesses audited annually to comply with Food Safety and Liquor Licensing Laws, there is no mandatory education course or annual compliance checks to ensure owners understand their minimum wage obligations. It would seem strange that food and liquor, which combined account for only around 30% of a restaurant/café cost structure, have two audits and inbuilt education requirements, however wages, which on its own represents around 40% of the cost structure of a restaurant/café, have zero formal educational obligations and the FWO audits the average hospitality business only approximately once every 170 years.

Because new migrant business owners often speak English as a second language, have not grown up with an understanding of Australia’s workplace laws and are not formally required to undergo training to understand them before entering into an Australian business, it would be very difficult to convict such a person for deliberate underpaying. As the employees likely to be employed in migrant businesses are also migrants with little understanding of Australia’s workplace laws and are less likely to complain, it would make non-compliance a more likely incidence than in businesses owned by Australian born individuals. Proving an employer was acting with criminal intent in underpaying would be more difficult with a new migrant compared with an Australian born business owners as new migrants could reasonably argue they were ignorant of the law. This would allow new migrant businesses to continue to undercut Australian businesses and labour without fear of criminal sanctions. Many migrant businesses and businesses brought to Australia by the government on business migration visas would not receive criminal convictions however neighbouring Australian businesses trying to compete, conceivably would. This situation can easily be alleviated by a program of mandatory education on the Award to ensure all businesses understand and agree with their obligations (see attached industry-designed compliance model). All businesses would then be on a level playing field in the eyes of the new law.

2. The cost to taxpayers, workers and industry will be far higher than the cost of better compliance measures.

Criminalising underpayment will cost the taxpayer millions in court and penal costs as well as risking potential loss of businesses and the subsequent loss of jobs in those affected businesses.

Hospitality currently has the highest failure rate of all businesses tracked by the Australian Bureau of Statistics, with the average business lasting only 5 years. The costs of a criminal court case whether successful or unsuccessful would close many of these already precarious businesses in Australia.

Any business that relied on a Liquor License would also conceivably close as a criminal conviction would affect the holding of a such a license. The closure of businesses would not only affect owners and their families but also workers in those businesses, who are already Australia's lowest paid workers (ABS Survey of Employee Earnings and Hours 2018).

While losing underpaying businesses is not a major concern in a vastly oversupplied industry like hospitality, costly convictions and diverting taxpayer funds away from compliance toward the cost of incarceration would not be beneficial for workers. Workers would not get the money they are owed as the funds would be swallowed up by courts, lawyers and bankruptcy proceedings.

3. Penalising Australian industry for government failures.

While criminal sanctions are normally seen as a last resort, it seems it is the first (and laziest) resort in relation to underpayment. Despite numerous options proposed over the years to combat underpayment, all of which were ignored, the only response from both Labor and the Coalition so far has been is to propose criminalising underpayment. It is a stroke of a pen for government who can push the problem along the line to the courts rather than fixing the reasons the problem occurred in the first place.

I wrote to the then Labor Government in 2012 regarding the underpayment of wages in hospitality in which I particularly referenced the non-compliance of high-end restaurants. I received a number of letters in return from Tanya Plibersek, Bill Shorten and Brendan O'Connor. Bill Shorten did send the information on to the Fair Work Ombudsman for consideration however they did not act on it. The conclusion from Labor's Minister for Small Business, Brendan O'Connor was that:

"the recent independent review of the Fair Work system found that overall, the Ombudsman has been successful in carrying out educational and enforcement activities; and has the right tools at hand".

Clearly this was not the case. Had the government at the time or the Ombudsman listened to what was accurate and timely advice, wage underpayment scandals including George Calombaris, Neil Perry, Guillaume Brahimi and others could have been stopped far earlier.

Frustratingly, while the government at the time was ignoring good advice on better compliance, Minister for Immigration and Border Protection Chris Bowen was meeting with Neil Perry on a proposal backed by fellow chef Guillaume Brahimi, to loosen 457 Visa requirements for hospitality workers - again with no in-built compliance in the system. Both chefs are now being investigated for underpaying the very workers they lobbied the government to bring in! While the government has been reaping thousands in training levies and visa application charges per migrant worker, they have not been investing any of that money back into compliance to ensure the workers were being looked after or determining whether they were undermining Australian jobs and industry.

4. New rules will not catch cash workers or migration arrangements undermining Australian businesses.

Many business units in Australia deliberately underpay in cash to get around workplace laws. This is already illegal and can attract criminal penalties yet it has not deterred the practice. Businesses

afraid of criminal penalties may turn to cash as it is harder to police and there is less chance of being reported by workers as they are complicit in the arrangement.

There are also currently around 60,000 people in Australia unlawfully after overstaying their visas or having their visa cancelled, one in three of which have been in the country for over 10 years. Many are working in the Australian economy and are not likely to complain about underpayment.

Other workers have come to Australia for a better life or better pay than what is available in their own nation and are happy to be underpaid as it is far better than they would get at home. It is only on the rare occasion when their employer exploits them to an extreme level that their situation becomes known to regulators. Thousands underpaid workers exist under the radar and will continue to do so without better and more regular compliance checks.

Please find attached brief on Fairfield App designed by industry to combat underpayment. This model shows a very inexpensive way to facilitate a fair wage compliance on every small business.

Kind Regards

Henry Honner
Fairfield Compliance

Fairfield

Disrupting the Practice of Underpayment in Vulnerable Industries for a Fair and Level Playing Field



For decades, seemingly unending reports of underpaying in hospitality and other vulnerable industries have been hitting the headlines, from celebrity chefs to international franchises, to neighbourhood businesses. Industry workers and owners have long known those reports were just the tip of the iceberg. But underpaying wasn't just a problem for workers, it was affecting the whole hospitality community, dragging down margins, the value of skills and education, and industry returns. Sadly, with over 100,000 hospitality business active every year in Australia, no business has the market power to change the status quo.

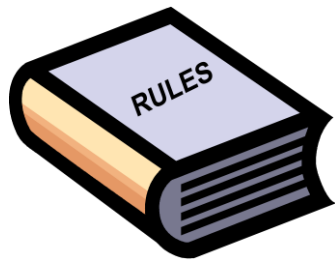
Frustrated at a system that was never going to deliver, a group of industry professionals decided to fix the problem. Working at the coal face, they could see not only why regulators were failing to have an impact, but opportunities to create change that regulators were missing.

Over many years working with a failed system it became clear that there were 6 core reasons behind poor regulatory compliance in hospitality and other vulnerable industries. The designers of the Fairfield System created an app-based compliance regime that would address these core issues to not only deliver better outcomes for the 12 plus regulators who need compliance from hospitality but also deliver it at a far smaller cost.



The aim of Fairfield Compliance is to not only end underpaying for vulnerable workers but also to create a level playing field for honest businesses.

6 core reasons current compliance is failing.



#1. Employees and Employers don't know the Award.

Hospitality employees are generally young, new to the workforce (or industry) and often from foreign countries. Due to these factors a huge percentage are uneducated on the correct pay rates and conditions that apply to them. Many operators are also new to the industry (franchisees) and/or from foreign nations and are unfamiliar with Australian workplace laws.



#2. Hospitality Churn Rate.

With the average hospitality business only lasting approximately 5 years and the employees too churning at almost twice the rate of all industries, it is a challenge to educate the hospitality community on compliance. By the time participants build a bank of knowledge they are on their way out of the industry.



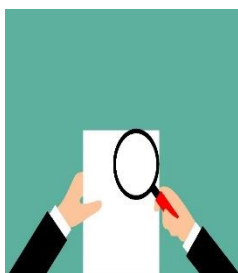
#3. Infrequent Workplace Visits.

The Fair Work Ombudsman audits the average hospitality business approximately once every 170 years. It's hard to educate a community on Australia's workplace laws with such a visitation rate!



#4. It pays to underpay.

In the last decade 150,431 businesses have entered the hospitality industry and a whopping 136,130 have failed, closed their doors or otherwise left the industry (ABS Counts of Accommodation and Food Services Businesses Including Entries and Exits). The competition, much of it underpaying workers to keep prices down, is far scarier than a regulator who might visit you once every 170 years.



#5. Narrow Methodology That Won't Pick Up All Underpayments.

Due to a lack of presence on the shop floor, a large percentage of Fair Work's compliance is done through emails and phone calls with limited onsite inspections. Cash wages, unrecorded overtime, incorrect classification of employees, unpaid tuition costs, illegal visa charges and a host of other problems go undetected even from the small number of workplaces that are audited.



#6. Compliance is too expensive.

Using the Fair Work's current methods, providing a robust, high-visitation compliance programme would cost tens of millions of dollars per year.

How Fairfield Will Fix It.

While its clear wage compliance in Australia has been failing for decades, other forms of compliance are not. Hospitality does not have a big problem adhering to mandatory food safety compliance, nor fire regulations or Liquor Licensing requirements. The prime reason for these positive outcomes is that the businesses are inspected every year (or more than once per year) and the businesses fund the cost of their own inspection. The problem with doing the same with wage compliance is the required information is not always on premises or organised in a way inspectors can view it quickly and easily. Another problem is the additional cost of another layer of compliance on top of the over \$6000 restaurants and cafes already spend every year in compliance fees and charges, not to mention the labour costs associated with reporting.

“If we manage to eradicate just the bottom 1% of exploiting businesses the remaining industry will share in \$450 million of extra trade.”

To solve these problems the Fairfield App formalises information businesses *already* collect when onboarding a new employee: Award rates and conditions, employee classifications, Responsible Service of Alcohol/Gaming Certificates, etc into a digital employee profile. This profile is then signed off by employers and employees to comply with existing legislation requiring employees to be communicated their work rights within a reasonable time (something currently not complied with by industry). The information in the app can then be quickly checked once or twice per year using existing regulatory visits: during food safety audits, Liquor Licensing inspections or even remotely in the app. Other forms of compliance can also be checked, like APRA AMCOSS licenses, Trade Waste Certificates and the app even provides an anonymous way for employees to report workplace hazards (faulty wiring, broken guards on machinery, sexual discrimination, bullying, etc).

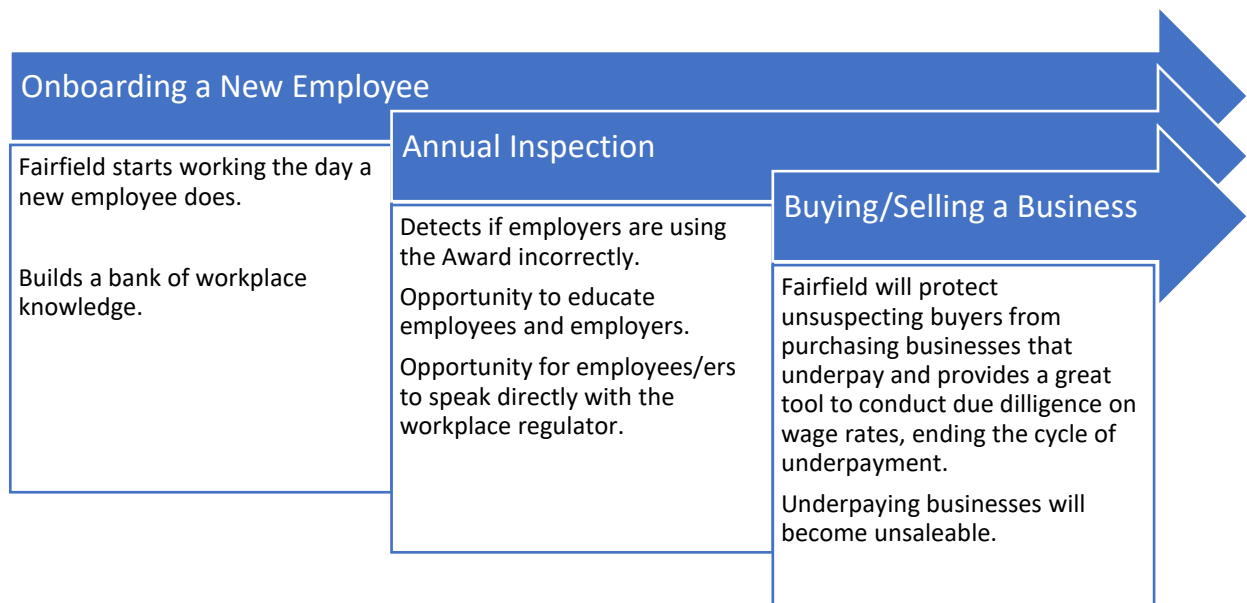
Not only does Fairfield help regulators it also enables wage due diligence for business buyers, ensuring they're not buying and continuing bad employment practices, something we know has been occurring for decades. Fairfield works in a similar way to a Roadworthy Certificate for a second-hand car. Via the app, employers can show their wage compliance to prove they are not selling a business with inherent problems and even print a declaration of compliance.

Described as a Win-Win for employees and business, the Fairfield App can disrupt wage theft and deliver hospitality the benefits of a level playing field. If it just eradicated the bottom 1% of rogue businesses, who underpay vulnerable workers to undercut their competitors, the remaining industry will share in \$450 million of extra trade. The system will also reduce costs of for regulators and industry by combining regulatory visits into less inspections and delivering information more efficiently.

Business Trading Name ABC Restaurant and Cafe		Superannuation and Work Visas	
ABN or ACN 20 479 230 880		Wage Rates Penalti	
Name First: Amy Last: Tan		Existing Super Account or Defi Employer Default Fund	
Address Unit 2 236 University Way Street Address Address Line 2 Carlton City 3053		Training and Certificartes	
State / Province / Region Victoria Australia		Registered Training Contract Hospitality Trainee	
Renumeration includes Holiday Pay: Yes		Contract Number HT00041878	
Minimum hourly rate Mon- Fri \$18.81		Registered Training Provider Trainee Skills Australia	
		Responsible Service of Alcohol Certificate Number	

(Fairfield Employee Profile Samples.)

Leverage Points to Eradicate Underpayment



How do we fund a check on every business?

With Fairfield, the maximum cost of an industry-wide compliance check is just \$62 per year per business, or less than 1% of a venue's current compliance cost. And if participating regulators/stakeholders help we can drive the costs even lower.

Many regulators will benefit from better compliance. For every unpaid worker WorkCover is also underpaid. With Fairfield, the ATO will receive its correct share of tax revenue from higher wages and a reduction of cash wages, superfunds will see greater inflows, more businesses paying APRA AMCOSS license fees will increase the royalty payments to performing artists and songwriters and better compliance with Trade Waste Certificates will mean more funds to clean our waterways. Even a small contribution from the regulators who receive a financial benefit will go a long way toward making Fairfield cost-neutral. And there are not many people in industry who don't think a fraction of visa fees should go towards in-built wage compliance to ensure Australia's migration system is not undercutting Australian jobs and industry!

So what is stopping us?

Endemic underpaying and an uneven playing field is crippling the hospitality industry. Restaurant/café oversupply, increased investment risk, falling asset values, falling labour productivity, squeezed margins, increased cost of education and the loss and devaluation of skills are all being caused by this preventable problem.

If we start fixing the problem today, every hospitality participant, throughout their entire employment lifecycle, will be better off. From kitchenhand, to waiter, to manager, to chef, to owner and even investor (George Calombaris' investor is a good example) - everyone will be far better off.