

Employer Evasion of Worker Entitlements 1986-95: What and Whose?

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ABSTRACT

Employer non-compliance with workers' entitlements is an area seldom explored in Australian industrial relations, generally considered uncommon or the province of 'rogue' employers. This paper provides a picture of the categories of entitlements against which complaints of evasion were made in the federal industrial relations jurisdiction in Australia, between 1986 and 1995 and the characteristics of complainants. The "top 30" awards ranked by extent of underpayment recovered by the federal enforcement agency (1987-95) are also explored to support arguments that intense competition, reduced union density, precarious employment, youth and being female are strongly associated with employer evasion. The increasing prevalence of these factors in the labour market suggests that employer compliance should be more carefully explored in the Australian context.

Introduction

Minimum labour standards enforcement has been largely ignored within the industrial relations literature. When acknowledged, the discussion rarely exceeds a brief overview of the power of inspectorates and unions to inspect wage records and cite employers for non-compliance. Further, the accepted paradigm is that enforcement agencies are functioning without substantial problems and that non-compliance is limited to a small minority of 'rogue' employers (one exception is Bennett 1994). In the aftermath of the 2004 Australian federal election, and with the prospect of further 'reforms' in the industrial relations arena increasing the individualisation of employment relations while potentially decreasing union right of entry powers, the issue of employer evasion of worker entitlements is timely. While it is beyond the scope of this paper to consider the role and policies of enforcement agencies, the areas in which non-compliance are occurring and what types of workers are affected can be considered, to provide some insights into employer evasion. In Australia, this is largely related to compliance with minimum employment entitlements contained in awards, determinations, and agreements formalised through federal and state industrial relations tribunals, although only the federal jurisdiction is being examined here, between 1986 and 1995.

In examining the issue of non-compliance, the characteristics of those making complaints to the official agency are explored first, and consideration of why particular groups are under or over-represented is undertaken. The categories of entitlements complained of being underpaid or evaded are then outlined, showing an unsurprising preponderance of claims regarding underpaid wages or overtime. The "top 30" awards ranked according to 'official' monetary recovery in the federal jurisdiction in Australia between 1987 and 1995 are outlined. This data supports an argument that competition, precarious employment, youth, gender and union density are key factors in evasion. Since 1995 the impetus for casualised employment has accelerated, and combined with decreased trade union presence affects not only the level of compliance with regulation but also the extent to which underpaid employees recover their entitlements. With potential reforms on the agenda to decrease trade union powers to check employer compliance, it is time for this neglected area to be investigated.

The areas of complaint about employer evasion and the types of workers instituting complaints to the official federal enforcement agency are considered below using data from the Arbitration Inspectorate Management Information System.

Complainants and complaints

The data in Table 1 relates to the federal jurisdiction, and indicates that the majority of complaints were made directly by the employee concerned. It is also clear that unions tend to deal directly with complaints from members and only refer small numbers to the Inspectorate. The sizable percentage of complaints initiated by state inspectorates suggests either an active state enforcement policy or a good relationship between the federal and state inspectorates in those states.

TABLE 1
Source of
complaints
(percentage)
(1987-1995)

Complaint	VIC	NSW/ACT	SA	QLD	WA	TAS	NT	AUST
	Source							
Employee	66	70	85	82	96	96	100	72
Union	1	0	1	1	2	1	0	1
State Inspectorate	8	29	14	15	1	2	0	15
Other	24	1	0	3	1	1	0	12

The most common 'other' category source is parents of youth employees. The size of the Victorian 'other' category is officially unexplained but an inspector suggested that it could include situations where employees made a complaint not only on their own behalf but also another employee(s). These situations were classified as an employee complaint in the other states. Having established that employees are the source of the vast majority of complaints, Table 2 below provides an age and sex breakdown of complainant data.

TABLE 2
Source of
complaints
(percentage)
(1987-1995)

Complaint	VIC	NSW/ACT	SA	QLD	WA	TAS	NT	AUST	Work force
AGE (% of complainant age group in each state/territory)									
Less than 20	10	11	14	11	14	16	12	11	9
20 to 24	18	21	23	21	13	22	20	20	15
25 to 34	23	30	29	28	32	33	33	26	27
35 to 44	31	20	21	21	25	12	24	26	25
45 to 54	13	13	9	13	12	12	7	12	17
55 to 59	3	4	2	2	2	2	3	3	5
60 and over	2	3	1	4	1	1	1	2	3
SEX									
Female	30	23	18	28	27	29	37	27	43
Male	70	77	82	72	73	71	63	73	57

Source: Arbitration Inspectorate Management Information System 19987-1996. The final column contains the average workforce percentage for each age group and sex for the period 1986-95 and is derived from ABS Labour Force data.

In respect of the sex of complainants, four of the seven states/territories generally reflect the national average. Both New South Wales and South Australia under-represent female complainants and the Northern Territory over-represents females compared to the national average. However, the most striking aspect is the overall under representation of female complainants, accounting for only 27 percent of total complaints while comprising 43 percent of the workforce. There could be a range of explanations for this anomaly. For example, women could be more likely to make a complaint to their union rather than the inspectorate, simply be less likely to complain, or work in jobs where there is less likelihood of non-compliance by their employer.

The first possibility suggested above is unlikely. Although female employees are no more predisposed against union membership than their male counterparts (Peetz 1998:79-81), between 1982 and 2001 average female union density was 30.5 percent compared to a male union density of 38.2 percent (ABS Labour Force data). Further, of all female complaints made to the inspectorate 12 percent were from union members whilst, of all male complaints, 10 percent were from union members. Thus, in spite of lower union density rates female union members were more likely to make a complaint to the inspectorate than were male union members. This could indicate difficulties accessing union representatives during working hours. Whilst these facts don't emphatically disprove the first proposition, they render it a weak explanation at best.

The second possible explanation, that women as a group are simply less likely to complain, is arguably more defensible. A combination of factors such as socialisation processes, the occupational segmentation of female jobs, and patriarchal employment structures which are more likely to place males in supervisory and managerial positions may dissuade women from making complaints on employer non-compliance with award standards (Gough 2002; Kramar 2002). However, given the 16 percent differential between the number of female complainants and their workforce composition, it would appear unlikely that gender issues alone can explain the anomaly.

On the third possible explanation, that women work in jobs where there is less likelihood of non-compliance by their employer, research suggests that due to female labour market characteristics the opposite is probably true (Gough 2002; Kramar 2002). Arguably, the deferential and ephemeral nature of a sizable portion of female employment offers the most realistic explanation for the under-representation of female complainants. The growth in precarious employment increases the likelihood of non-compliance by employers and decreases the ability of employees to complain due to employer retribution.

'Precarious employment' is an umbrella term that includes a wide range of employment relationships and accurate estimates of the workforce size of those employed in this manner remain problematic. However, accurate statistics are available for some forms of precarious employment, especially casual and part time work (see Romeyn 1992; Casual Employment 2000). These data show that although the increased use of these forms of precarious employment arrangements has penetrated into the male labour market, females remain disproportionately represented. In respect of enforcement issues, arguments advanced relating to choice are ostensibly irrelevant. Even where a person genuinely chooses a precarious form of employment the underlying characteristics of precarious employment attach a higher premium to making a complaint vis-à-vis a permanent employee.

This brief discussion of precarious employment does not pretend to cover all situations facing female employees, nor is it arguing that all people employed under the arrangements discussed are disadvantaged from an enforcement perspective. Rather the purpose is to demonstrate that, firstly, women are more likely to be employed in the two types of precarious employment where statistical evidence is available, that is casual and part time employment. Secondly, precariously employed women often comprise the most vulnerable sectors of this form of employment, such as clothing outworkers. Finally, the argument advanced is that precarious employment (and to a lesser extent the arguments advanced in the second proposition above) offer the best explanation as to why Table 2 shows fewer females complaining about minimum labour standards non-compliance than males.

The Table 2 data of most concern to age variable arguments is the over representation of complainants in the two youngest age groups (under 20, and 20-24) who comprise 31 percent of complainants but only 24 percent of the workforce. Further, of all casual employees, these two age groups accounted for 25 percent in 1988 (Romeyn 1992:102) expanding to 30 percent in 1999 (Casual Employment 2000). Further survey evidence suggests that younger workers are unaware of work entitlements such as correct wage levels, overtime rates, meal breaks, the right to a pay slip and so on (Australian Young Christian Workers 2001:2). In spite of high casualisation rates and limited employment entitlement knowledge, these two age groups are over represented as complainants. This apparent contradiction is arguably based on a number of factors. One such factor could be that young employees may be faced with higher levels of employer non-compliance. Hence the 7 percent differential between young complainants and workforce composition could *under* represent compliance difficulties faced by these workers.

Table 3 suggests another factor in the level of young complainants may be the type of alleged breaches contained in complaints. Unsurprisingly, employees are more likely to complain about monetary breaches and the top 13 complaint types were all monetary in nature. However, the complaint types are not always consistent across age groups and the two youngest age groups were more likely to make a complaint alleging direct underpayment of wages than the next nearest age group. Although not as significant, the two youngest groups were also more likely to make an overtime complaint than the next nearest age group. With a more direct and immediate effect on take home pay than many other forms of monetary breaches (e.g. superannuation, long service leave), workers confronted with these types of underpayments may be more inclined to make a complaint. As young workers are more likely to face these breaches the number of complaints would be higher.

Another factor that helps explain this age anomaly is union membership. Examining trade union density data from the five ABS trade union membership surveys during this period (1986, 1988, 1990, 1992, and 1994) shows that union density for the two youngest groups averaged 24 percent and 34 percent, respectively, over the period. This compares to an averaged density of 42 percent for the 25 to 34 age group and growing incrementally to a peak average of 49 percent for the 55 to 59 age bracket. As younger workers are significantly less likely to be union members it stands to reason that, as a group, they would be more inclined to make a complaint to the inspectorate while their older counterparts would be more likely to complain to their trade union.

The final factor regarding the above age anomaly links with job mobility and the established fact that workers are more likely to lodge a complaint after they leave that employer. ABS data (1998 Forms of Employment Survey) shows that, in the under 20 age group, 53 percent have been in their current job for less than 12 months, and 76 percent for less than 2 years. For the 20-24 age bracket the figures are 37 percent and 55 percent respectively. As the age of employees increases so does the length of time in the current job. While these figures indicate a higher job turnover rate for younger workers, some caution must be applied as many in the youngest age group will be in their first job. However, these figures are supported by other sources showing high levels of job mobility both voluntary and involuntary (Australian Young Christian Workers 2001). Thus, the higher job mobility level gives younger workers more opportunities to make complaints and the arguably higher levels of employer compliance (Australian Young Christian Workers 2001) gives them reason. It may also be that mobility from a non-compliant employer to a compliant employer makes workers aware of their previous underpayment.

TABLE 3
*Alleged breach
by complainant
characteristics
1986-1995
(percentage)*

<i>Alleged Breach</i>	<i>Age</i>							<i>Sex</i>		<i>Union member</i>	
	<20	20-24	25-34	35-44	45-54	55-59	>60	F	M	Y	N
Under Paid Wages	67	59	49	48	43	37	33	57	50	42	53
Payment in Lieu of Notice	23	25	26	25	25	24	18	20	25	26	24
Pro-Rata Annual Leave	23	20	18	19	17	17	11	16	19	16	18
Superannuation	10	16	17	17	20	19	22	17	16	15	16
Overtime	18	15	14	10	9	7	7	10	13	11	12
Annual Leave	6	7	7	7	10	9	10	7	7	9	7
Redundancy	1	4	6	7	11	15	13	7	6	12	5
Termination	2	3	4	3	4	6	7	3	4	2	3
Long Service Leave	0	0	2	3	6	10	14	2	3	5	2
Allowances	3	3	3	2	2	2	1	2	3	4	2
Penalty Rates	2	3	3	3	2	3	0	4	2	2	3
Loadings	2	3	3	3	3	1	3	3	3	3	3
Sick Leave	3	2	2	3	3	3	4	2	3	4	2

How to read table: Age – of all complaints made by <20s, 67% contained a UPW claim, of all complaints made by 20-24s, 59% contained a UPW claim; Sex - of all complaints made by females 57% contained a UPW claim; Union status - of all complaints made by union members 42% contained a UPW claim.

The next table is more general in nature but provides insight into the arguments advanced above. Table 4 provides a longitudinal analysis of complaints from 1986 to 1995. The first issue of note is the decline in time over complaints relating to payment in lieu of notice, pro-rata annual leave and sick leave. As these apply generally to permanent employees, their decline is positively associated with an increase in precarious employment.

Another issue concerns the Bell-type curve for superannuation complaints. The lack of complaints in the first three years can be attributed to the majority of award employees (almost the entire private sector) not enjoying superannuation entitlements. The initial increase in complaints after 1989 represents both initial employer resistance to its inclusion in awards and employee recognition of its importance. Data in later years reflects the positive effects of the 1991-92 enforcement blitz and the gradual acceptance of 'super' as a community standard.

TABLE 4
Complaint Type
by Year
1986-1995
(percentage)

Alleged Breach	Year									
	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
Under Paid Wages	48	52	48	52	48	44	42	48	58	65
Payment in Lieu of Notice	36	37	38	30	31	26	24	26	20	10
Pro-Rata Annual Leave	22	27	34	30	23	21	14	16	15	9
Superannuation	0	0	0	3	11	26	30	22	16	13
Overtime	11	13	11	12	10	10	12	13	13	14
Annual Leave	8	6	4	5	6	6	7	8	7	11
Redundancy	1	0	1	1	5	10	10	9	6	4
Termination	0	0	0	0	4	7	8	2	3	1
Long Service Leave	2	2	3	2	3	4	3	3	2	2
Allowances	3	3	2	3	3	3	2	2	3	2
Penalty Rates	3	2	1	2	1	2	2	4	3	4
Loadings	3	1	1	2	1	2	3	4	3	3
Sick Leave	4	5	4	4	3	2	2	2	1	2

Source: AIMIS 1986-1996

The key reason for employees complaining to the enforcement agent is monetary recovery. Table 5 provides a rich insight into a number of issues raised previously by linking these to monetary recoveries. Linking the award code in column one of Table 5 to the corresponding industry produces interesting results as 22 of the top 30 underpayments recovered awards operate in four industries. The manufacturing industry (including the two main textile, clothing and footwear (TCF) awards) is represented by 9 awards. The transport industry is represented by 6 (5 relating to road transport and one to aviation), tourism (including resorts, hotels, cafes, etc) by 4, and retail trade by 3 (which made the top 30 list even though they only covered employees in the Northern Territory and the ACT).

Whilst varying between industry sectors, a common characteristic of all these industries is the intensity of commercial competition. Quinlan (2001) presented strong evidence that this characteristic strongly associated with award evasion in the long haul trucking industry due to the considerable commercial gains that can be achieved. These characteristics and arguments are also extremely relevant to the number one award, V019 (Vehicle Industry – Repair, Services and Retail Award).

Three single-issue awards are also included in Table 5 (M309 Metal Industry (Superannuation) Award; M160 Metal Industry (Long Service Leave) Award; and B145 Business Equipment Industry (Technical Services) Superannuation Award). Both M309 and M160 have a very low ratio of breach per inspection (0.530 and 0.025 respectively) but have high average underpayments (\$413 and \$3,754 respectively). Whilst B145 has a high average underpayment (\$511) it also has an uncharacteristically high breach per inspection ration of 4.927. This latter point could suggest that a blitz strategy may have been run on that award.

Table 5 also shows that very high average underpayments are not limited to single issue awards as three of the four awards in this category are general awards in the transport industry (two covering road transport and one aviation). The average underpayment recovered under T092 (Transport Workers' (Interstate Drivers) Award) was \$3,626, under P059 (Pilots' (General Aviation) Award) it was \$1,318, and under T091 (Transport Workers (Passenger Vehicles) Award) it was \$1,230. An examination of the inspection trends for these awards provides an explanation for these high average wage recoveries. All three awards were subject to low levels of inspection (106, 204 and 274 inspections respectively) and only had modest breach per inspection ratios (1.075, 2.299 and 1.948 respectively). Combined, these data suggest that non-compliance had occurred for a considerable length of time, possibly years. This argument is consistent with Quinlan's (2001) finding in respect of the long haul trucking industry.

The last issue to be discussed in respect of Table 5 is the breach to inspection ratios. This statistic acts as a proxy for an employer's propensity towards compliance with the minimum labour standards set out in an award. The higher the ratio the greater the inclination toward non-compliance. All nine awards with a breach to inspection ratio of greater than three, have two important common characteristics. First, all nine awards cover a high percentage of female employees and four of the nine are generally considered female dominated awards. Second, all nine awards operate in industries where high levels of precarious employment are found. This supports arguments made above.

TABLE 5
Enforcement characteristics of top 30 Awards ranked by amount of underpayment recovered 1987-1995

<i>Award Code</i>	<i>Number of Inspections</i>	<i>Monetary Breaches Detected</i>	<i>Ratio of Breaches per Inspection</i>	<i>Monetary Breaches Finalised</i>	<i>Amount of Underpaym. Recovered \$</i>	<i>Average Underpaym. per Monetary Breach \$</i>
V019	13,445	20,995	1.561	23,626	7,145,752	302
H008	6,193	23,999	3.875	26,026	3,202,805	123
C037	1,835	13,032	7.102	12,168	2,884,306	237
M039	4,689	3,989	0.850	5,301	2,628,785	496
M055	3,078	10,725	3.484	10,281	1,848,202	180
F002	3,618	3,844	1.062	3,927	1,448,390	369
T140	664	1,074	1.617	2,039	1,202,374	590
R007	1,134	1,146	1.010	2,401	1,175,354	490
C191	31	5,877	189.580	6,002	986,528	164
T007	628	3,208	5.108	2,670	961,826	360
R017	1,499	5,490	3.662	4,096	766,431	187
T125	562	1,242	2.209	1,323	737,798	558
T028	885	935	1.056	777	595,995	767
S070	235	196	0.834	1,347	517,679	384
P059	204	469	2.299	380	500,938	1,318
P143	998	955	0.956	903	433,395	480
F029	636	738	1.160	729	421,511	578
G014	1,116	1,273	1.140	977	399,496	409
L020	515	2,008	3.899	2,033	376,921	185
T091	274	534	1.948	292	359,280	1,230
M309	1,299	689	0.530	795	328,000	413
R018	511	1,546	3.025	1,566	313,590	200
M160	3,153	80	0.025	83	311,597	3,754
B145	193	951	4.927	593	302,851	511
S001	294	563	1.914	715	298,695	418
C114	430	473	1.100	596	297,724	500
T092	106	114	1.075	79	286,425	3,626
H021	464	1,996	4.301	2,013	274,206	136
E068	266	522	1.962	403	264,409	656
C238	53	1,660	31.320	1,980	226,671	114

How to read table: Between 1987 and 1995 for award number V019 there were 13,445 inspections that uncovered 20,995 monetary breaches for a ratio of monetary breaches per inspection of 1.56. The number of monetary breaches finalised was 23,626 leading to the recovery of \$7,145,752 for an average monetary recovery of \$302.

Conclusion

Being a young or female worker, working in a female dominated industry or industry with a high proportion of females employees, working in precarious forms of employment, or working in industries with strong competitive pressures, increases the chance of being underpaid across a range of entitlements. The pressures on underpaid workers to not complain while in employment, especially precarious employment, probably result in the figures discussed above being a vast underestimate of non-compliance in the federal jurisdiction during this period. These figures represent the tip of the iceberg, with trade union, individual worker, court settled and other recoveries not being included. In some forms of employment workers would never complain, so strong is the fear of retribution through blacklisting and similar methods. For young workers, job mobility provides opportunities for complaint after employment has ceased and may increase their awareness of payment anomalies. Trade union membership provides another avenue for complaint, but as young and female workers and those working in precarious employment are less likely to be union members, this compounds their problem. Intense competition, reduced union density, precarious employment, and being young or female are all strongly associated with employer evasion of worker entitlements. With increased competition from globalisation, likely increased assaults on unionisation through individual contracts and management practices, continued attempts to create peripheral employment relations, and with increasing feminisation of the workforce the issues raised above should raise concerns about employer evasion in Australia, workers' ability to recover their entitlements, and the likely effects of further moves to reduce union powers.

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