



Fair Work
OMBUDSMAN

Victorian Clerical Workers in the Sex Industry Campaign

Final report – January 2014

A report by the Fair Work Ombudsman under the *Fair Work Act* 2009.

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Performance snapshot

Found

71%

employers in contravention

Total

62

businesses audited

More than

\$65k

recovered for 51 employees

Summary

The Fair Work Ombudsman (FWO) has conducted the Victorian Clerical Workers in the Sex Industry Campaign (the campaign).

The aim was to promote and assess compliance with Australian workplace laws, particularly to ensure brothel reception staff and managers were being paid in accordance with the *Clerks – Private Sector Award 2010*.

During the program we assessed the records of 62 employers. We found 44 (71%) in contravention of workplace laws, while 18 (29%) were compliant.

We recovered a total of \$65 508 on behalf of 51 employees who were underpaid.

Further details of our findings can be found in the body of the report.

Purpose of the program

The aim of the campaign was to promote and assess compliance with the *Fair Work Act 2009* (the Act), the *Fair Work Regulations 2009* (the Regulations) and the *Clerks – Private Sector Award 2010* (Clerks Award) in the Victorian Sex Industry.

The objectives of the program were to:

- assess compliance with time and wage record-keeping and pay slip requirements
- assess compliance with award conditions, including hourly rates of pay, penalty rates and allowances
- provide employers with information about FWO's resources, including our online tools.

Our industry partners

In July 2012 we contacted the following stakeholders:

- Australian Adult Entertainment Industry Inc. (AAEI)
- Resourcing Health and Education in the Sex Industry (RHED)
- Australian Federal Police
- Victoria Police – Sex Industry Coordination Unit
- Victorian Department of Justice – Business Licensing Authority (BLA).

The police contacts served two purposes:

- to receive useful background information on the industry
- to ensure that we did not, by our actions, compromise any police investigations.

RHED also provided background information on the industry.

BLA provided a list of brothel licence holders.

We engaged with AAEI in a series of comprehensive discussions about award coverage and classifications and they worked with us on an information and awareness program.

Why did we target this industry?

We were receiving a number of enquiries about the correct wages and conditions for brothel managers. These enquiries seemed to indicate a general lack of knowledge and compliance with award conditions in the industry.

Information that we received from the enquirers, and from RHED, were that the majority of workers performing the brothel manager role were female,

with a significant proportion of persons from non-English speaking background.

Further, we received advice that workers were reluctant to complain for fear that this could result in them losing their jobs and that it would be difficult then to find further work.

What did we do?

Stakeholder engagement

FWO engaged early and often with the AAEL.

Our initial meetings with AAEL prompted a review as to the relevant industrial instrument which applied to the reception staff and brothel managers in the industry.

FWO's initial position was the Clerks Award applied to receptionists and brothel managers.

AAEL submitted the following positions:

1. That no award applied to this category of employees due to:
 - considerable amounts of down time where the employees would undertake other activities that were not clerical in nature;
 - typical hours of operation of brothels largely fell outside the span of ordinary hours in the Clerks Award.

2. The *Hospitality Industry (General) Award 2010* (Hospitality Award) may apply due to the Australian Taxation Office defining their business as hiring rooms.

The FWO explained the application of modern awards did not rely on the hours of work but rather on the basis of industry or occupation.

The FWO explained that the Hospitality Award could not apply as it contains a specific list of the

types of establishments it covers and this does not include brothels.

The AAEL then submitted it wanted its own award to cover their employees. The FWO explained that only the Fair Work Commission could make a modern award and that they were welcome to approach the Commission with such a request.

We considered the AAEL's written submission and visited several brothels to observe the work of their reception staff and brothel managers.

Considering all the evidence, we determined the Clerks Award was the appropriate instrument for the following reasons:

- The work undertaken by receptionists and brothel managers falls within the scope and classifications of the Clerks Award, which is an 'occupation based' award
- Although receptionists and brothel managers may spend some time undertaking ancillary duties that are not clerical in nature, the primary purpose of their engagement is to perform duties which are clerical.

We advised the AAEL of our decision and offered them the opportunity to work with us to develop information materials to provide to workplace participants.

Information and awareness

After resolving the issue of correct award coverage, we were pleased the AAEL worked in partnership with us on a comprehensive, three month information and awareness strategy.

We provided the industry with a dedicated web page www.fairwork.gov.au/sexindustry where we posted information about the campaign and links to tailored materials.

We developed and circulated tailored information materials in English and Mandarin across the industry in Victoria. This included pay calculations for sample shifts prepared for us by AAEL.

We also conducted two seminars in English, and in Mandarin, to explain the Clerks Award to brothel operators and/or their accountants.

Assessment

In May 2013 we commenced the audit phase of the campaign. We wrote to each of the selected employers to inform them of the campaign and to request copies of time and wage records for a two week period. Due to the particular concerns regarding the industrial instrument, the assessment period chosen was subsequent to the information and awareness phase of the program. In the letter we included information about the online tools and resources available at www.fairwork.gov.au/sexindustry.

When our Fair Work Inspectors received the records from employers, they assessed them against the requirements of the Act, the Regulations and the Clerks Award in regards to the following:

- Record-keeping and pay slips
- base rates of pay
- weekend penalties

- public holiday rates
- overtime rates
- shift rates.

In a number of cases, we spoke with employees to verify the information provided by the business.

Where we found businesses to be compliant with their obligations we notified them in writing.

Where we identified record-keeping or pay slip contraventions we informed employers of the contraventions and provided them with information about correct record keeping practices. We sought written commitment from them that they would maintain compliant records and pay slips in the future.

Where we found employers had underpaid their employees we advised them of the contraventions and asked them to review their time and wage records and to calculate any underpayments owing. We worked with employers to confirm amounts owing and to ensure that all back payments were made to the affected employees.

Whilst working with employers to rectify contraventions, we took the opportunity to ensure they were familiar with our online pay tools to assist them in identifying correct rates of pay in the future.

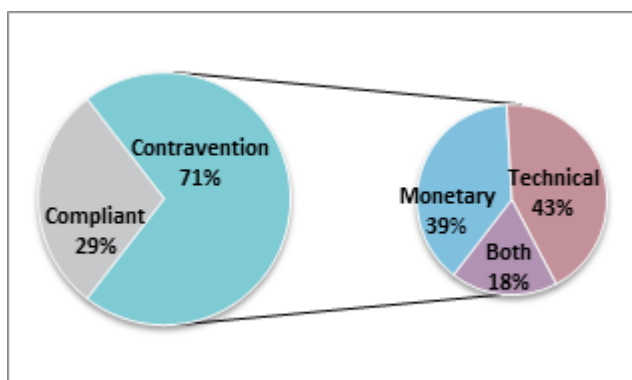
At the conclusion of each audit we wrote to the employer to formally notify them of the outcome and advise that the audit was concluded.

What did we find?

By the end of October 2013 we had completed all 62 audits. We found 18 (29%) businesses compliant with their obligations and 44 (71%) in contravention.

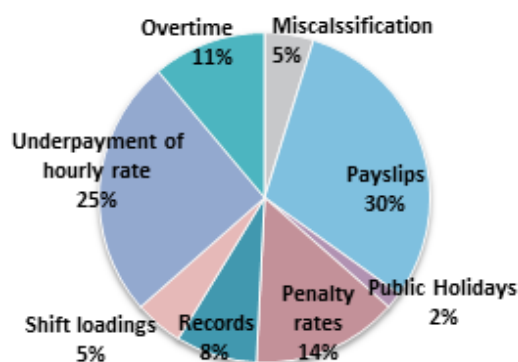
The 44 businesses that we found to be in contravention had a total of 63 individual contraventions between them.

Chart 1: Audit outcomes and contraventions



Nearly one third of the contraventions related to pay slips not being provided in the prescribed form, and a quarter to underpayment of hourly rates.

Chart 2: Contravention types



The underpayments we identified in 19 businesses ranged from less than \$40 to more than \$10 000 per business.

Fourteen of the 19 businesses repaid a total of more than \$1 000.

Case study – confusion can lead to underpayments

Jenny* is a brothel manager of a business that we audited. When the inspector assessed the records for the business they found that based on the duties Jenny was performing she should be paid at level 4 in accordance with the Clerks Award. However she was not being paid at this rate nor was she receiving overtime or penalty rates.

The inspector raised this matter with Suzie*, the owner of the business. Suzie admitted to being confused about the requirements of the award.

The inspector explained the details of the award and as a result Suzie agreed to pay Jenny \$5615 which she was owed.

*pseudonym

Other findings

Where mistakes had been made, the employers rectified them voluntarily. The most common contravention we found related to pay slips missing some required information. Examples included missing ABNs or the name of the employee’s superannuation fund.

Case study – employees or contractors?

Joseph* engaged a number of managers as contractors. However, we had concluded that the managers should have been classified as employees.

We did not consider that Joseph's arrangement was classified as a sham contract, as he had not recklessly misrepresented the relationship.

Joseph was also paying his workers a flat rate of pay which was above the minimum award rate but not sufficient to cover penalties.

We believed that Joseph had not entered into this arrangement intending to underpay entitlements. Rather he had received advice that this was a practical way to manage his cash outflows as all hours would be paid at the same rate.

When we discussed our findings with Joseph he agreed to classify his managers as employees and to recalculate his workers entitlements and rectify any underpayments.

*pseudonym

The monetary contraventions we identified were across a number of entitlements. Often these were as a result of minor errors in relation to one employee and indeed one obligation of the Clerks Award.

In some cases we found brothel managers engaged as contractors. When we examined these cases we found the following scenarios:

- Managers who were operating their own business and supplementing their business earnings with income from working for the brothel when they had available time. We accepted these as contractor engagements.
- Managers who were engaged by the brothel and not running any other business while working there. We determined these were employment relationships and asked the employers to rectify the arrangement.

Case study – check work patterns when setting salaries

Patricia* was paying her managers an agreed salary in accordance with the annual salary provision of the Clerical Award. The agreed rate was significantly above the award rate and met or exceeded the entitlements for most of her employees.

However, several managers only worked weekends. In these cases the salary was not sufficient to cover the weekend penalty rates.

To rectify this matter, Patricia back-paid the employees and is now paying according to the award.

*pseudonym

Concluding remarks

The findings of the program highlight the importance and need for ongoing education and compliance activity in this sector.

We recognise the majority of contraventions identified appeared to be genuine errors by employers rather than deliberate attempts to underpay their employees and that employers voluntarily rectified all of the contraventions we identified.

Because of the program, those employers found in contravention now have correct information about their obligations and are aware of the resources we provide to assist them.

It is hoped the provision of information by the FWO, in cooperation with AAEL, combined with the audit activity, will influence the industry in the longer term to become more compliant.

About the Fair Work Ombudsman

The Fair Work Ombudsman is an independent agency created by the *Fair Work Act 2009* on 1 July 2009.

Our vision is fair Australian workplaces, and our mission is to work with Australians to educate, promote fairness and ensure justice in the workplace.

Our education and compliance campaigns target specific industries to assist them achieve compliance with national workplace laws. Our focus is usually industries that need assistance with compliance and employ vulnerable workers.

We like to work with relevant industry associations and unions to deliver our campaigns. We rely upon

their 'real world' knowledge and communication channels to design and deliver our education activities and products.

This report covers the background, method and findings of the Victorian Clerical Workers in the Sex Industry Program.

For further information and media enquiries please contact media@fwo.gov.au.

If you would like further information about the Fair Work Ombudsman's targeted campaigns please contact Steve Ronson, Executive Director - Dispute Resolution and Compliance (steven.ronson@fwo.gov.au).

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