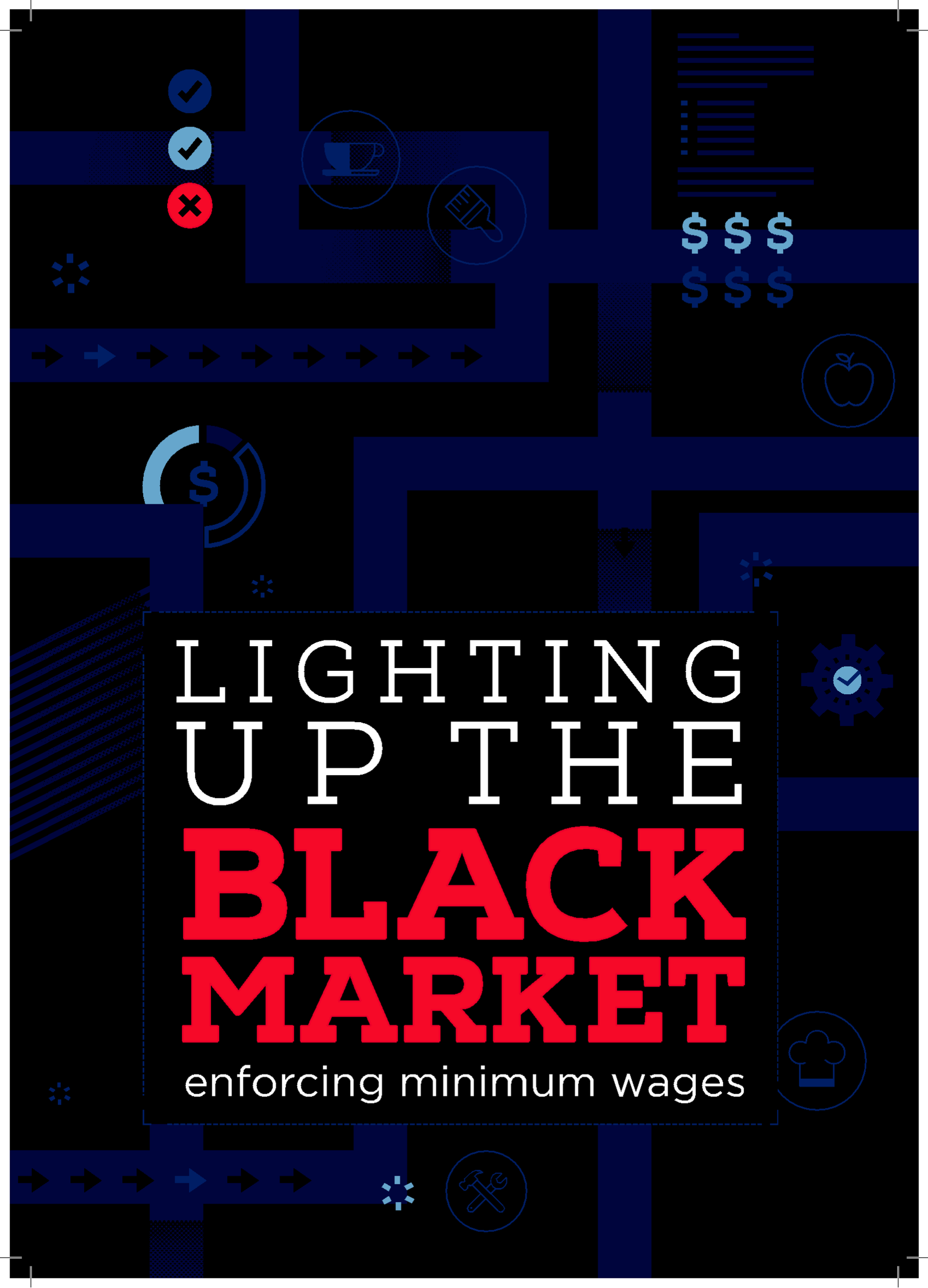
LIGHTING
UP THE
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MARKET
enforcing minimum wages

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Introduction

In some sections of the workforce underpayment of wages has become routine. Employers are unashamedly advertising below Award rates for vacant positions.

This seedy underbelly of exploitation and wage theft has been exposed through high profile examples of migrant worker exploitation. Workers have been threatened against making complaints, with employers taking advantage of workers who have poor English, are on temporary work visas and are young.

A Unions NSW audit of job advertisements on Chinese, Korean and Spanish language websites, found 78% of businesses advertised rates of pay below the minimum Award wage.

The current approach to redressing migrant worker underpayment and *Fair Work Act* protections are not working. The system relies heavily on individuals reporting underpayments to unions or the Fair Work Ombudsman. There is no recognition of how difficult and dangerous it is to take this first step.

When considering making a complaint, workers from culturally and linguistically diverse backgrounds face the dual barriers of language and awareness of their workplace rights. They must also consider how a complaint could threaten their visa or residency status.

These barriers are compounded by industry and legal structures which normalise and perpetuate underpayment. There is a flourishing culture of underpayments in some sections of the workforce where businesses ignore Awards and instead defer to unregulated 'local wage markets' to determine the rates of pay for their staff. Unions have been restricted from accessing these workplaces to investigate and rectify underpayments.

A new approach to uncovering and investigating underpayment is required. Unions need access to workplaces suspected of underpayments in order to investigate contraventions and represent and organise workers to collectively enforce their rights. Penalties for employers found to have knowingly or intentionally underpaid their staff should be significantly increased, including the introduction of criminal penalties and restrictions on individual offenders from managing a corporation. Further, companies found to have underpaid workers should be named and shamed on a national public register of employers.

As a result of this report, Unions NSW will actively audit job advertisements and identify businesses who advertise rates of pay below Award minimums. We will initially seek to engage with these workplaces to ensure they are aware of their workplace obligations. Businesses who are aware of their employment obligations and continue to systematically underpay workers will be pursued by Unions NSW under the Fair Work Act and named and shamed on the Unions NSW webpage

www.wagethieves.com.au

Audit of job advertisements

Online there is an extensive network of websites and social media pages directed at people from specific nationalities and language groups who are new to a particular city of town. The pages provide information and advertisements on social events, rental accommodation and travel advice in specific cities. The pages are generally written in the language of the target community and skew towards young people, particularly those who may be temporarily living in a new city or country. Pages are also a popular place for job advertisements for young people from culturally and linguistically diverse backgrounds.

In March 2016 and April 2017 Unions NSW conducted two audits of online job advertisements written in Chinese, Korean and Spanish. Advertisements were randomly selected from webpages *Hojunara*[1] (Korean), *Sydney Today*[2] (Chinese) and a number of Facebook groups targeted at Spanish speakers from Latin America[3] . They were translated with information recorded on the industry, job, rate of pay and additional information. Some follow up phone calls were made to businesses to collect information on rates of pay if this information was not included in the original advertisement. See *figures one, two* and *three* for examples of job advertisements.

Figure one

A position advertised in Korean for a serving and kitchen aid in a restaurant in Strathfield, paying $13 an hour.

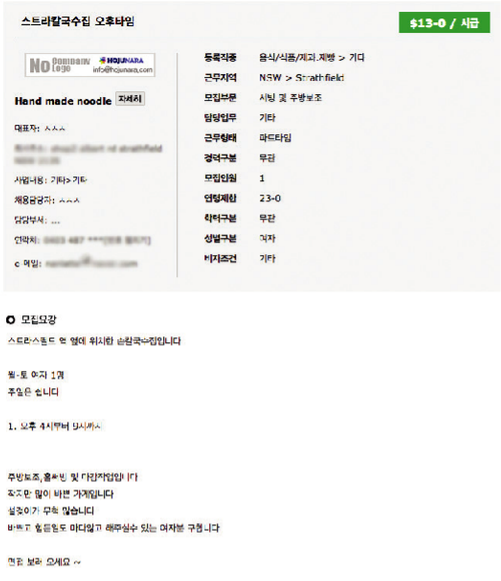
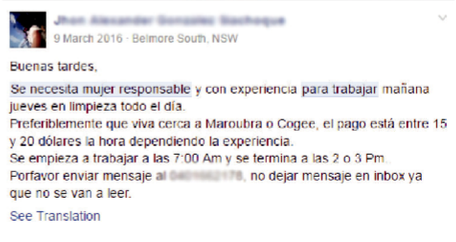


Figure three

A position advertised in Chinese for work in a warehouse, paying $600 a week for 7.5 hours of work a day, equating to an hourly rate of $16.

Figure two

A position advertised on Facebook in Spanish for a cleaner, paying between $15 and $20 an hour.



Results

A total of 200 job ads were analysed in two separate audits in March 2016 and April 2017. Over the two audits, 87 advertisements were in Chinese, 72 in Korean and 41 in Spanish. The main industries were hospitality (86), cleaning (37), transport (16), construction (13) and retail (13) (see *figure four* for a breakdown by industry).

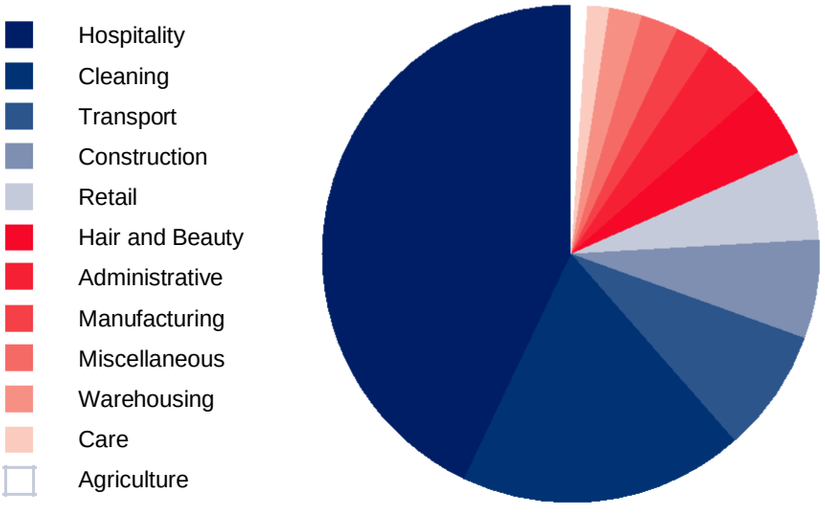
This is a relatively small sample size; however the results showed overwhelming rates of underpayment. The results are a snapshot in time of underpayments and provide strong evidence of endemic underpayments of workers from culturally and linguistically diverse backgrounds.

Overall, 78% of the businesses we looked at, advertised rates of pay below the relevant minimum award rate. On average, underpaid jobs were advertised at $14.03 an hour, representing an average underpayment of $5.28 an hour when compared to the relevant minimum awards*. The lowest rates of pay were $4.20 an hour for a nanny (Minimum award $18.91 in 2015-16) and $9 an hour for an office clerk (Minimum award $18.38 in 2015-16) (both advertised in Chinese in March 2016).

The underpayment of workers has worsened over the year of the project. In 2016, 74% of jobs were advertised below the relevant Award rate, this increased to 83% in 2017. The size of the underpayments remained relatively stable over the two years, on average underpaid jobs represented a wage discount of 27% for both years ($5.20 an hour below the award in 2016 and $5.35 an hour below the award in 2017).

Underpayment of temporary migrant workers tends to coincide with the undermining of other labour standards and workplace conditions. A Fair Work Ombudsman inquiry into 417 visas in 2015 found evidence that the underpayment or non-payment of wages was often accompanied by other violations of workplace rights, including working for free in exchange for accommodation, sexual harassment and employer disregard for workplace health and safety obligations[4]. The Unions NSW audit did not collect information on the payment of penalty rates, casual loadings, leave or superannuation. Companies who advertise below Award rates are unlikely to be making additional award payments. As such, it is expected the quantum of the underpayment identified in the audit is probably significantly higher than reported.

Figure four



* All minimum Award rates refer to the relevant awards for the industry/occupation of each advertisement and correspond with the year the position was advertised.

Underpayments by industry

Some industries are worse than others (see *figure five*).

Of the job advertisements audited, 97% in the hospitality industry were below Award minimums. The lowest rate of pay was $10 an hour. In 2016 three companies advertised jobs at this rate, in 2017 this increased to seven companies.

Over the two audits, the average advertised rate in hospitality was $13.60 an hour, $5.79 an hour below the average Award minimums. See *figure six* for a breakdown of hourly rates of pay. Hospitality jobs were common on Chinese and Korean language websites, with both making up about 50% of advertisements, only 22% of Spanish advertisements were in the hospitality industry.

Over 60 per cent of the audited cleaning jobs advertised a rate of pay below the average minimum Award rate of $18.66 an hour. The lowest rate of pay advertised was $10 an hour.

Retail jobs had a high proportion of below Award rates of pay (85%). Of the underpaying jobs, the average rate was $12.09 an hour, representing an average underpayment of $7.36 an hour.

Figure five

Industry	*Number of advertisements*	*Average advertised hourly rate*	*Average Award minimum hourly rate*	*Proportion of advertisements with belowAward rates of pay*
Hospitality	[redacted]	$13.60	$19.39	97%
Cleaning	37	$17.26	$18.66	65%
Transport	16	$17.72	$18.98	56%
Retail	13	$14.08	$19.38	85%
Construction	13	$20.54	$21.90	62%

Figure six Hospitality rates of pay

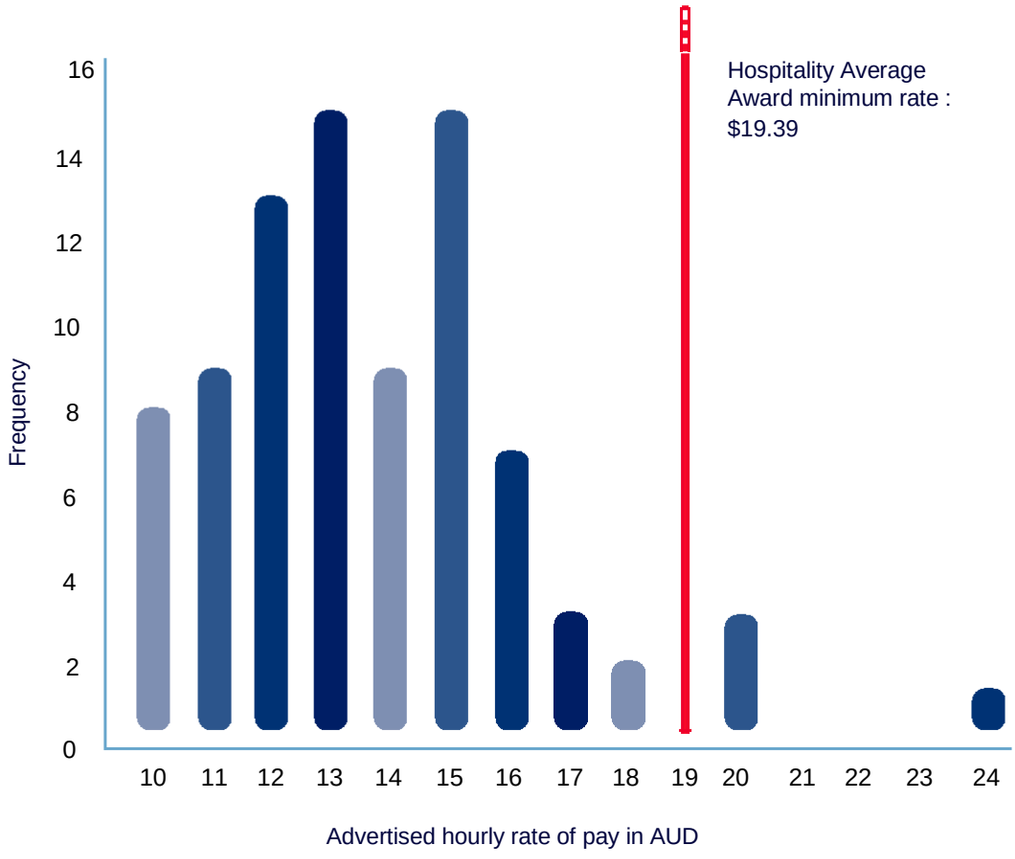
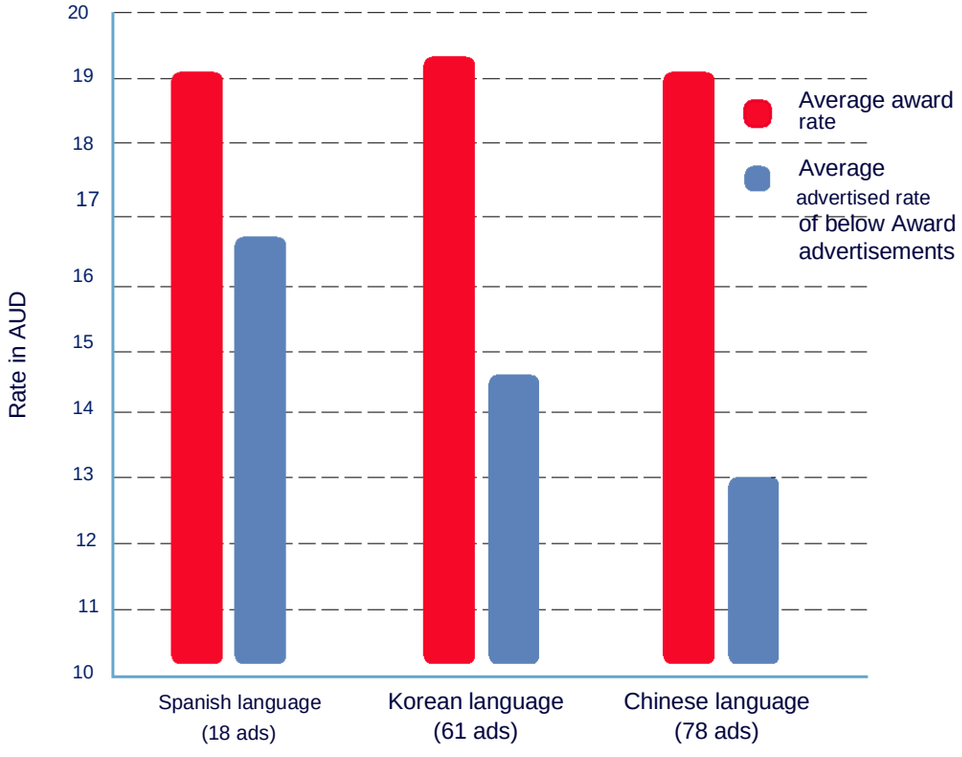


Figure seven Underpayments by language group



Underpayments by language group

Job advertisements in Chinese

There were 87 Chinese language advertisements translated from *Sydney Today* (46 in 2016 and 41 in 2017). Over the two years 89% of advertisements offered rates of pay below the minimum Award rate. In 2017, 100% of jobs advertised rates of pay be low the minimum wage. The most common industries were hospitality (43), retail (9), transport (8) and administration (7). The average advertised payment was $14.10 an hour. Of the jobs advertising below the Award rate, the average rate was $12.99 an hour, an average underpayment of $6.25 an hour.

Job advertisements in Korean

There were 72 Korean language advertisements translated from *Hojunara* (38 in 2016 and 34 in 2017) with 84% offering rates of pay below the minimum Award rate. The most common industries were hospitality (35), cleaning (13) and hair and beauty (6). The average advertised payment was $15.75 an hour. Of the jobs advertising below the Award rate, the average rate was $14.61 an hour, an average underpayment of $4.81 an hour.

Job advertisements in Spanish

There were 41 Spanish language advertisements translated from Latin American Facebook pages (21 in 2016 and 20 in 2017) with 44% paying below the minimum wage. Job ads were targeted towards Latin Americans. The most common were cleaning (18), hospitality (9), construction (5) and transport (5). Of the jobs advertising below the Award rate, the average rate was $16.56 an hour, an average underpayment of $2.70 an hour.

The audit of job advertisements identified an endemic underpayment of workers, particularly in cleaning, hospitality and retail industries. Job advertisements provide a clear indication of intent to pay below the minimum wage and imply other workers in these businesses are also underpaid.

Who's getting underpaid & why?

Based on the websites/ pages used to advertise jobs, workers employed in these positions are likely young and from a culturally and linguistically diverse background. Workers applying for these positions may also be working on a temporary work visa with a number of advertisements making specific reference to visa requirements. Research indicates these three characteristics are strongly correlated with underpayment and exploitation in the workplace[5].

A 2016 survey of 1433 international students and 959 local students from Sydney, found 87% of international students and 43% of local students who worked in hospitality were underpaid for weekday work[6].

A recent Fairfax investigation in Wollongong put a human face to underpayments with 67 young people coming forward to tell their story. These workers were offered rates of pay as low as $10 an hour[7]. In 2015/16 the Fair Work Ombudsman received 1,820 requests for assistance from visa holders with only 38 civil penalty litigations undertaken involving a visa holder[8].

A mix of individual and demographic characteristics as well as legislative gaps feed into exploitation and prevent underpayments from being reported. specifically:

Undocumented work

Working outside of visa restrictions has been used to prevent workers from making complaints, fearing it will affect their ability to remain in Australia[9]. There are a number of ways workers on temporary visas can be considered to be working illegally. Working holidaymakers are working illegally if they are employed by the same employer for more than six months. International students are restricted from working over 20 hours a week and 457 visa workers are restricted from working in any job/ industry not included in their visa. Additionally, temporary visitors may be working without a visa that allows work rights or may have overstayed their original visa. There are serious penalties for visitors and migrants who contravene their visa requirements including deportation.

Second year visa

Working holidaymakers (417 visa) can apply for a second year visa by performing 88 days work in a regional area. An investigation by the Fair Work Ombudsman found the desire for a second year visa has led to workers agreeing to work below minimum standards and at times for free[10]. In some cases migrant and visitor exploitation goes beyond just the workplace with reports of sexual harassment, bullying and assault on their prope

Youth unemployment

Across Australia youth unemployment is sitting at 13.3%, significantly higher than the overall unemployment rate of 5.9%[11]. Youth unemployment is higher in regional areas such as 15.6% on the Central Coast and 20.1% on the Mid-North Coast[12]. High rates of youth unemployment and fears of being 'blacklisted' for complaining can lock young people into jobs, even if they are underpaid.

Awareness of rights

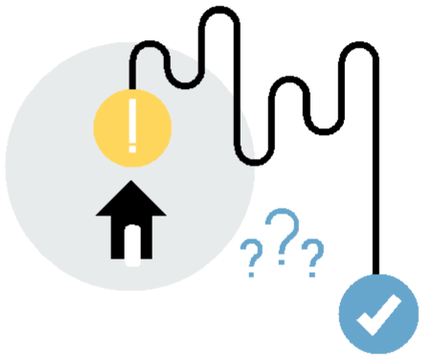
For young people who haven't worked for long, or international guests who are working in Australia for the first time, it's hard to know exactly what the minimum rate of pay is, what your rights at work are or who to ask for help. It's impossible for workers to make a complaint about the violation of a workplace right or of an unfair dismissal claim if they don't know it exists.

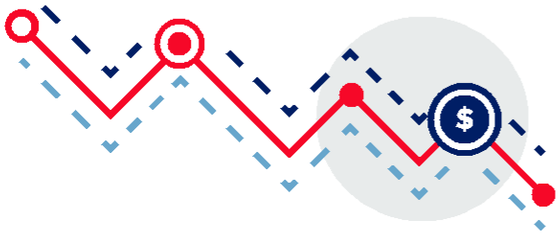
Language barriers

The majority of information on workplace rights and the process for making a complaint are in English. For workers from culturally and linguistically diverse backgrounds this may act as a barrier to seeking further information or assistance. Migrants and visitors who do not speak English often rely on other members of their community for information. This relationship of inter-community dependence allows nefarious employers to take advantage of recent migrants and workers from culturally and linguistically diverse backgrounds.

Structural issues feeding underpayment

There are broader structural issues at play which allow businesses to routinely underpay workers without fear of consequence. A culture of local wage markets, restricted access for unions to audit underpayments and limited human resource capacity within small businesses has seen a flourishing of underpayments. Unfortunately, there is also a dark underbelly of businesses who go unchecked and prey on vulnerable workers, purposefully threatening and underpaying workers for personal business gain.





Artificial wage markets

The audit of job advertisements identified endemic underpayment of culturally and linguistically diverse workers in cleaning, hospitality and retail industries. Employers in these industries, who have been caught underpaying workers, have often claimed they were guided by an artificial wage market within their industry/geographical area.

In 2016 the Fair Work Ombudsman took action against the Malaysian restaurant Mamak and found 6 employees had been underpaid $87,000. In his findings Judge Smith noted the underpayments stemmed from informal market research undertaken by the owners on what other restaurants in Sydney's Chinatown were paying workers[13]. This excuse was also employed by a Queensland Korean cleaning business that paid workers $14 an hour and was forced to make $16,000 in back payments to two workers[14]. In 2015 Sydney Sushi Bar, Sushi Izu and Cairns cleaning company JHH International also claimed to have relied on local markets and research to set pay rates[15].

Right of entry

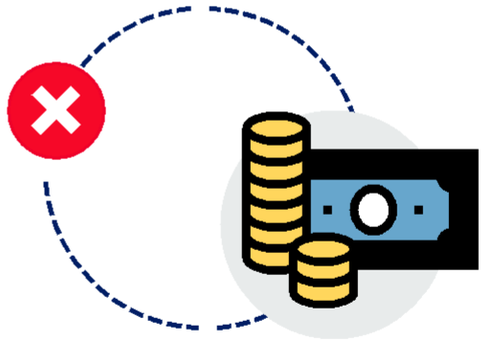
The Fair Work Act now restricts unions from conducting workplace checks on businesses suspected of underpaying and exploiting workers. The audit of job advertisements has demonstrated rampant underpayments in the majority of businesses. Despite this, unions are now only able to check the pay records of union members. The barriers culturally and linguistically diverse workers face in making complaints, often also hinder union membership where workers are scared to 'rock the boat'.

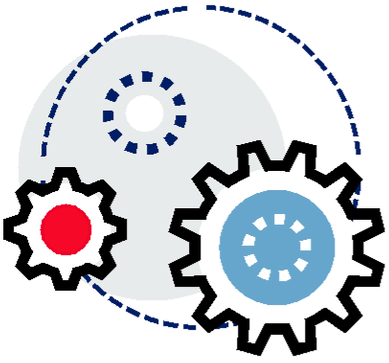
The Fair Work Ombudsman undertakes audits of businesses to ensure compliance with workplace laws. These audits have recovered underpaid wages for workers, particularly those from culturally and linguistically diverse backgrounds. However, audits have also uncovered a number of repeat offenders, who despite being caught and fined, continue to underpay workers.

Just this year, Fire and Stone Restaurant faced $72,000 in penalties for its second offence of underpaying workers[16], multi-million dollar packing service Rapid Pak underpaid workers $23,4798 and had previously underpaid workers $60,000[17] and Gold Coast Restaurant Samurais Paradise was found to have paid a worker as little as $8 an hour. Immediately following the payment of back pay, it reverted back to the $8 rate[18].

Unions are the most effective organisation to empower workers to ensure they are paid fairly in the long term. Only unions can collectively organise workers to ensure they are able to hold employers accountable long after a Fair Work Ombudsman investigation has finished.

Not enough is done to proactively ensure business compliance with workplace laws or to ensure ongoing compliance. There are 12 million workers across Australia[19], yet the Fair Work Ombudsman only has 240 inspectors nationwide. More resources are needed to ensure workplaces are systematically audited. The right for unions to audit records in businesses suspected of underpaying workers must be reinstated so they can proactively assist in redressing the systematic underpayment of workers.





Small business

The audit of job advertisements indicated a high number of small businesses were advertising below Award rates. In underpayment cases, small businesses have argued they do not have the resources
or industrial knowledge to be aware of Award minimums. These claims have often been rejected by the courts, particularly when businesses have not made efforts to reach out to the Fair Work Ombudsman or employer associations for assistance[20]. Whether such claims are correct or not, there is an opportunity for business peak bodies to be more proactive in communicating the obligations of being an employer.

Small workplaces may also act as a barrier to workers speaking out against underpayment. They are unlikely to be unionised and workers are often working side-by-side with their employers.

Intentional underpayment of workers

Some underpayments are just malicious and intentional where employers exploit the power imbalance and vulnerability of workers, even threatening workers with interference in their visa processes to coerce them against making a complaint.

Investigations of 7/11 convenience stores revealed the franchise business model was reliant on the underpayment of workers. An elaborate scheme of book-keeping forgery and threats to staff was used to hide rampant underpayment of workers mostly from culturally and linguistically diverse backgrounds and on temporary work visas[21]. The use of blackmail to underpay and silence workers was also found to be rampant

on farms and factories across Australia[22]. These investigations uncovered wide scale underpayments; however it's suspected many other businesses, particularly small businesses continue to operate similar business models and go unchecked.

Enforcing minimum wages

There are a number of barriers which prevent individuals from making complaints as well as resource and structural issues which feed the cycle of underpayment. The current approach to stamping out underpayment of culturally and linguistically diverse workers under the *Fair Work Act* is not working. A shift is needed to remove the onus on individual workers to make complaints towards providing opportunities for unions to empower workers to collectively challenge underpayments. There is also a need to increase penalties against businesses advertising below Award rates of pay, including ensuring compliance and increasing pressure on non-compliant businesses through reputational damage.

Strengthening rights for union audits

Where there is evidence of underpayment in a workplace, unions should be able to exercise their right of entry to investigate further. The *Fair Work Act* should be amended to provide unions with access to these workplaces and the opportunity to speak to the affected workers.

Workers have the right to organise and collectivise in their workplaces, this is the most effective way for workers to win and maintain their rights at work. The current approach of 'spot audits' by the Fair Work Ombudsman has not delivered sustainable or long term results for workers, with many employers systematically re-offending after being audited.

Harsher penalties for repeat offenders

Some businesses knowingly underpay their workers and the current fines are not acting as a sufficient deterrent. The consequences for wage theft need to be significantly increased, with the introduction of new offences under the *Fair Work Act* making it a criminal offence to knowingly and/or repeatedly underpaying workers. The legislation should maintain discretion for first time offences. However, if an employer systematically underpays workers, they are stealing wages and this should be treated as theft.

Some employers have demonstrated, through repeated and intentional underpayment, they are not capable of upholding their legal responsibilities. In these instances, courts should be empowered to make orders against individual employers, disqualifying them from being the director of a company for a certain period of time.

Many businesses who exploit and underpay workers are customer facing and are open to brand damage. Employers who have been found guilty of underpaying workers should be listed on a public register that is searchable and updated regularly. A register currently exists which lists all companies issued penalties by the NSW Food Authority relating to offences which would have an impact on public health or safety[23]. The register ensures businesses are accountable to their customers and the broader community when it comes to maintaining health standards. Similarly, businesses should be held accountable to the public when it comes to paying their workers.

Actively policing jobs advertisements

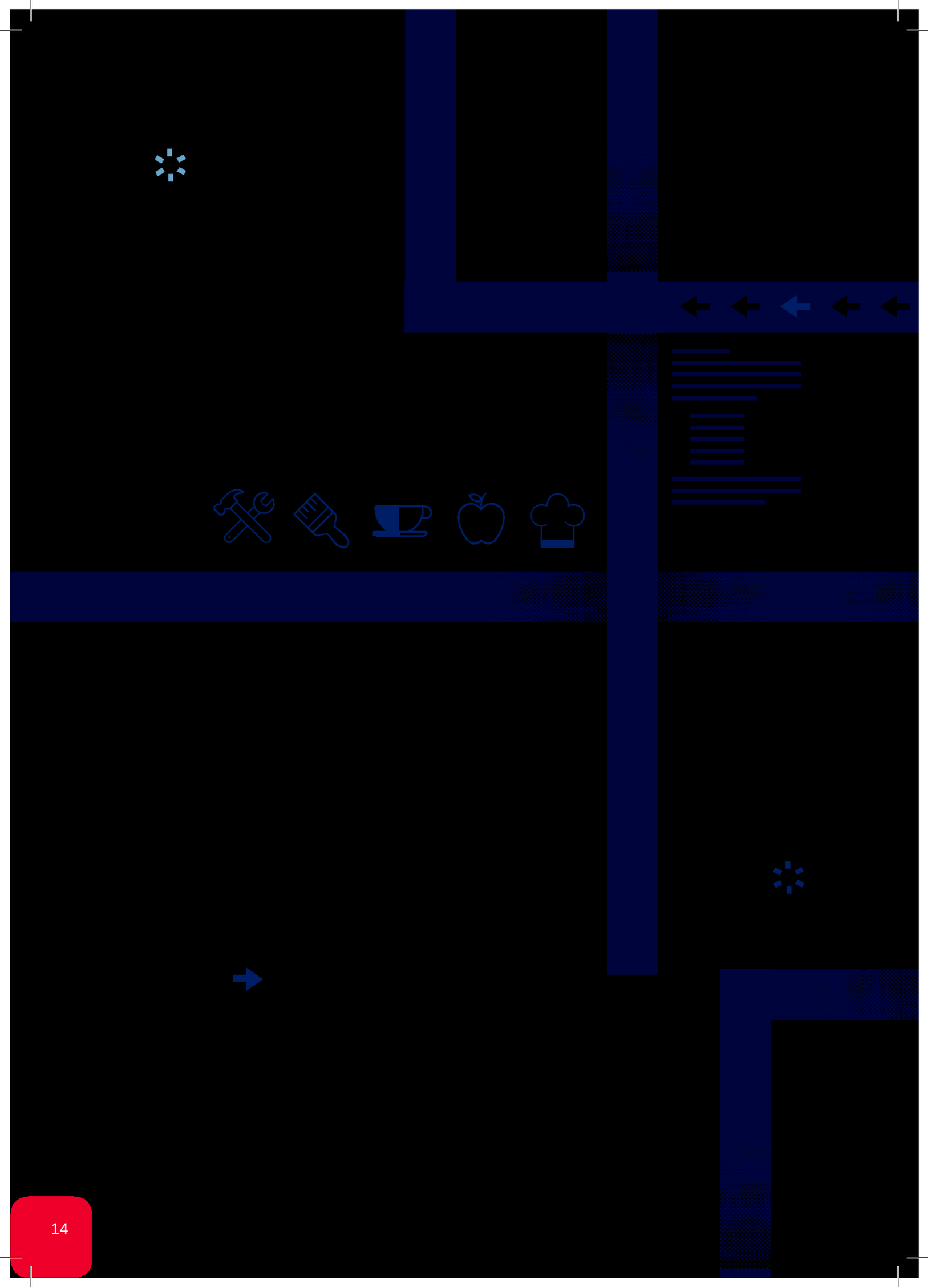
Posting a job advertisement with below award rates is a clear intent to underpay a worker. Unions NSW will actively monitor job advertisements on non-English language sites to identify businesses underpaying staff. Unions NSW is interested in working with these employers to rectify underpayments and ensure workers receive back pay. Further, Unions NSW will consider all options available under the *Fair Work Act* to ensure non-cooperative businesses comply with their workplace obligations. This will include publishing a register of underpaying businesses on the Unions NSW website.

Conclusion

Swift and proactive steps need to be made to stamp out exploitation and wage theft from workers from culturally and linguistically diverse backgrounds. Relying on individual workers to assert their rights ignores the reality of their vulnerability and facilitates an environment of wage theft.

Unions play a crucial role in upholding and enforcing workplace rights. But legislative change is needed to ensure all workers have the right to collectively organise, particularly in the face of such endemic and gross exploitation and underpayment. Unions need to be able to investigate and speak with workers in businesses where there is evidence the business is underpaying their workers.

Workers need to be empowered to collectively enforce their rates of pa[redacted]d conditions at work, while companies who underpay workers need to be held publicly and legally accountable for their actions.



Endnotes:

1. http://www.hojunara.com/

2.https://www.sydneytoday.com/

3. Facebook pages: Trabajos para latinos en Australia, Españoles y latinos en Sydney, Colombianos en Sydney – Australia, Chilenos en Sydney, Latinos en Brisbane, Colombianos en Melbourne, Mexicanos en Melbourne, Latinos en Sydney, Latinos en Cairns

4. Fair Work Ombudsman, Australian Government (2016), Inquiry into the wages and conditions of people working on the 417 Working Holiday Visa Program', Research report, p. 24

5. Clibborn (2015) 'Why undocumented workers should have workplace rights', The Economic and Labour Relations Review, vol.26:3, pp. 465-73; Fair Work Ombudsman (2016), Annual Report 2015-16;

6. S. Clibborn

7. Patty A. (2017), 'The great student swindle', Sydney Morning Herald, available at: http://www.smh.com.au/interactive/2016/great-student-swindle/

8. S. Clibborn, Fair Work Ombudsman (2016), Annual Report 2015-16,

9. Berg, L. (2015) Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour, London, UK, Taylor & Francis.

10. Fair Work Ombudsman, Australian Government (2016), Inquiry into the wages and conditions of people working on the 417 Working Holiday Visa Program', Research report, p. 24

11. ABS, Labour Force, February 2017

12. ABS, Labour Force, February 2017

13. Fair Work Ombudsman v Mamak Pty Ltd & Ors [2016] FCCA 2104

14. Fair Work Ombudsman (2015), 'Business unaware of minimum pay rates short-changed Korean backpackers $16k', media release. Available at: https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/december-2015/20151202-jhh-international-eu-presser

16. Fair Work Ombudsman (2015), 'Sushi bar reimburses Korean backpacker, revamps workplace practices after $5000 underpayment', media release, available at: https://www.fairwork.gov.au/ about-us/news-and-media-releases/2015-media-releases/february-2015/20150211-fine-food-gallery-eu-release

17. Fair Work Ombudsman (2017), $72,000 in penalties after international student exploited, dismissed by text message', media release, available at: https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/march-2017/20170327-golden-vision-2nd-penalty-mr

18. Fair Work Ombudsman (2017), 'packing company delivered $220k penalty after "appalling greed" in underpaying migrant workers', media release, available at: https://www.fairwork.gov.au/ about-us/news-and-media-releases/2017-media-releases/march-2017/20170324-acc-services-penalty

19. Fair Work Ombudsman (2017), 'Gold Coast restaurant operator allegedly paid overseas workers as little as $8 an hour', media release, available at: https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/march-2017/20170307-samurais-paradise-litigation

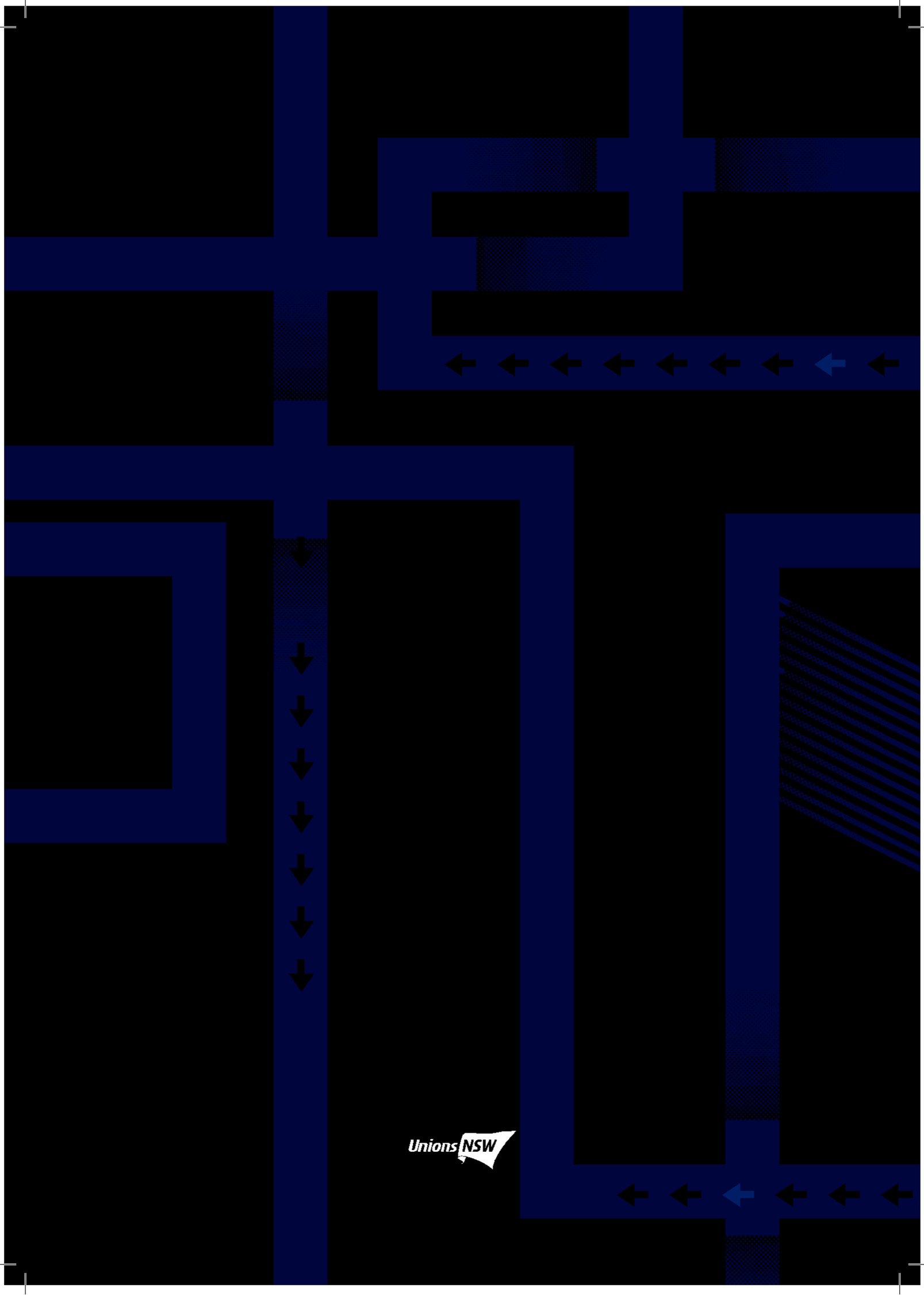
20. ABS, Labour Force, February 2017

21. Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd (No 2) [2016] FCA 1563

21. A. Ferguson and K. Toft (2015), 7-Eleven: The Price of Convenience, Four Corners, aired 31 August 2015.

22. C. Meldrum-Hanna and A. Russell (2015) Slaving Away, Four Corners, 4 May 2015 .

23. http://www.foodauthority.nsw.gov.au/penalty-notices/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