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# Green Acres (with apologies to Eddie Albert and Eva Gabor) – domestic service regulation in Australia

Jeff Phillips SC

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*Referring to the recent election news controversy around the issue of Greens Leader, Senator Richard Di Natale's payment of nannies, Jeff Phillips reflects on domestic service in Australia. Domestic service is regulated under the Fair Work Act 2009 (Cth), the Fair Work Regulations 2009 (Cth), and Modern Awards. Among other things, domestic servants must be paid in money not in kind, they should receive penalty rates, and their employer must keep appropriate records of their employment.*

## BACKGROUND

Greens Party leader Senator Richard Di Natale's nanny problem is no doubt common among busy professional couples with young children. This is particularly so if both are working.

Senator Di Natale's nanny problem came about by this bucolically delightful advertisement:

### Live-in-Au Pair

#### Job Description

*\$150 a week + food. April to June. Minimum 6 weeks required.*

*We are a family of 4 (mum, dad and 2 boys aged 3 and 1). We live in the beautiful Otways about an hour and a half from Melbourne, near the amazing Great Ocean Road. We have 50 acres of land, cows, duck, chickens and a dog. We also have an orchard and olive grove and veggie garden. We live a sustainable lifestyle with water tanks and solar power. Dad works away a lot during the week so I am looking for an extra pair of hands around the place to entertain the lads and help with cooking and general domestic duties. We have a self-contained accommodation with own bathroom, kitchen, TV & stereo. A car is also available. Will take couples but weekly wage remains the same.*

Questioned about this arrangement, Di Natale defended allegations of employing help at below minimum wages as the entire package he said was worth \$500 per week because it included rent and food. Senator Di Natale has promised to produce documents supporting the arrangement.

I am not commenting upon the facts in this case: whether Senator Di Natale and his wife Lucy Di Natale have acted consistently with industrial laws binding all private employers. I have not seen the documents nor know the full story. However, the story does place a focus upon a not much discussed part of modern Australia.

## FAIR WORK ACT REGULATION OF DOMESTIC SERVICE

The extent of people working in domestic service in Australia is significant. It is not quite like *Upstairs Downstairs* or *Downton Abbey* with scullery maids courtesying or imperious butlers wearing uniforms. However, domestic service exists on a large scale. This is particularly so with both partners with young children in the workforce. It may come as a shock to a couple employing live-in help that industrial laws apply, because what exists is an employment relationship.

Under the *Fair Work Act 2009* (Cth), work must be paid for in money not in kind, that is, not in food, drink, holidays or accommodation with pleasant views to the sea. Section 323(2) of the Act is expressed in abundantly clear terms. The methods by which an employer must pay an employee are:

- (a) cash;

- (b) cheque, money order, postal order or similar order, payable to the employee;
- (c) the use of an electronic funds transfer system to credit an account held by the employee;
- (d) a method authorised under a modern award or an enterprise agreement.

Such industrial law provisions have existed in Australia for over a century and have their origins in the ancient *Truck Acts*. The preamble to the *Truck Act 1900* (NSW) reads:

“An Act to regulate contracts made with respect to, and the payment of, Wages; to prohibit such payment being made in goods or otherwise than in money ...”

The work of domestic child care may be covered by a Modern Award. The *Children’s Services Award 2010* covers *inter alia* family-based child care and in-home care. There is nothing discernible in that Modern Award which permits payment in kind. It contains minimum rates of pay, overtime and, heaven forbid, penalty rates!

Part of the duties of a live-in nanny is to live in. That is, to be there to help with the kids when required. It is problematic also whether, in such circumstances, one could offset the cost of accommodation as part of the job is to “live-in”. It is also difficult in such circumstances to identify the hours of work, because a live-in nanny is probably on-call to assist, to be “an extra pair of hands ... entertain the lads and help with cooking and general domestic duties”. As long ago as 1946 the High Court’s Justice Dixon in *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, quoting from Milton’s *Paradise Lost*, stated: “he also serves who stands and waits.”

To add to the woes of a busy couple, the *Fair Work Regulations 2009* (Cth) require records be kept of hours worked, wages and allowances paid, overtime and penalty rates paid, and also that pay slips recording the same be given to the employee.

It should also be noted that, as the Fair Work Ombudsman makes clear, employees working as nannies and au pairs are entitled to the national minimum wage and the National Employment Standards.<sup>1</sup>

Maybe some Australian employment laws and awards need to be re-written to reflect what is actually happening in Woollahra, South Yarra, Toowong and the Otways.

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<sup>1</sup> See Fair Work Ombudsman, *Consider nannies and au pairs: Is my babysitter actually an employee?* (9 June 2016) <https://www.fairwork.gov.au/about-us/news-and-media-releases/newsletter/april-2016/consider-nannies-and-au-pairs-is-my-babysitter-actually-an-employee>.