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27 August 2018

Mr Stephen Palethorpe  
Secretary  
Senate Standing Committee on Education and Employment  
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Dear Mr Palethorpe

### Answers to Questions on Notice

On Wednesday 25 July 2018, the Fair Work Ombudsman (**FWO**) appeared before the Standing Committee on Education and Employment in Devonport, Tasmania, to provide evidence to the *Inquiry into exploitation of cleaners working in retail chains*.

Please find attached the FWO's responses to questions taken on notice from Acting Chair Senator Cameron and Senator Abetz in the course of the FWO's appearance.

On behalf of the FWO I would like to thank you for the opportunity to provide evidence to the Committee.

Yours sincerely

Anthony Fogarty  
Executive Director  
**Policy, Analysis and Reporting Branch**  
**Fair Work Ombudsman**



**Question 1:**

**ACTING CHAIR:** *The actual committing of the wage theft against these workers was supported by a lack of payslips, a lack of record keeping. Has that contributed to the problem about getting evidence to prosecute?*

**Mr Campbell:** *It has frustrated some of our investigations, yes.*

**ACTING CHAIR:** *How many contract companies are before the courts at the moment?*

**Mr Campbell:** *Four.*

**ACTING CHAIR:** *Was one case dropped because of lack of evidence?*

**Mr Campbell:** *I don't believe so. I can take that on notice. It doesn't spring to mind when you raise it like that.*

**Answer:**

No.



### Question 2:

**Senator ABETZ:** *It would have been good for both yourselves and Woolworths if this information could have been brought to the committee in, let's say, a week or two weeks time with a finalised situation so the committee could be fully apprised of this initiation of the inquiry, the findings of the inquiry, Woolworths's reaction to it and then the finalisation of the deed. That would have been exceptionally helpful for the committee. I place on record from the coalition's point of view our regret that, for reasons that I think are pretty obvious, you were called here under threat of subpoena, as were Woolworths, whereas, if your presence here would have been delayed by a week or two weeks, we could have had the final product and been apprised of how this had started in 2014 and now come to finalisation, given that, as I understand it, this committee's report is only due on 15 October this year, which would have given the committee plenty of time. But I think, as we all know, there's a particular event coming Saturday which may have made this hearing so urgent as to provide you and Woolworths with a threat of a subpoena.*

*Having said that, I invite you to take on notice, once the deed is finalised, to provide to the committee a copy of that deed.*

**Ms Parker:** *Certainly.*

### Answer:

The Fair Work Ombudsman will provide a copy of the final proactive compliance deed to the Committee once it has been published.



### Question 3:

**ACTING CHAIR:** *If the franchising legislation had applied to Woolworths, would that have been helpful for the Fair Work Ombudsman?*

**Mr Campbell:** *I couldn't comment on that.*

**ACTING CHAIR:** *You don't want to comment or you can't comment?*

**Mr Campbell:** *It's beyond my capability to comment, because it's not part of the legislation. If you've heard from Andrew Stewart and Dr Hardy on the subject, no doubt they've got a more informed view. But what we use—and I think pretty well—is section 550 to tie those involved in contraventions to the contraventions. We've done that with a reasonable amount of success. Where we haven't, we've been able to shine attention on sloppy supply chains and get outcomes. That's what we've done in this case.*

**ACTING CHAIR:** *But I think it's reasonable for me to be asking you: if other parts of industrial legislation had applied in this case, would it have made your job any easier? I think it's a practical issue I'm asking you about.*

**Ms Parker:** *We're not avoiding it. It's more that that legislation is quite specific.*

**ACTING CHAIR:** *Yes.*

**Ms Parker:** *We'd need to consider it. We can take it on notice and have a think about it. I just think it's a little vague to try to extrapolate it across, because this is about contracting and the other is about franchising, and they're quite different arrangements.*

**ACTING CHAIR:** *But the principles are the same—the principle of workers being ripped off.*

**Ms Parker:** *Certainly the outcome of potential behaviour is the same.*

### Answer:

Division 4A of Part 4-1 of the *Fair Work Act 2009* sets out the responsibility of responsible franchisor entities and holding companies for certain contraventions of the *Fair Work Act 2009*.

The FWO's Inquiry found that cleaning services at Woolworths supermarket sites were provided by contractors and contractor employees.

The differences between franchising or subsidiary relationships and contracting relationships are such that it is difficult to state the implications for the FWO's Inquiry if Division 4A, or some adaptation of Division 4A, had been applicable to the factual circumstances.



### Question 4:

**ACTING CHAIR:** *I will put a number of questions on notice because I wouldn't mind getting some details around what's the difference between a compliance deed and an enforceable undertaking.*

**Mr Campbell:** *I can do that quickly, if you are interested.*

**ACTING CHAIR:** *I will put them on notice as we have another witness. I am pretty keen to know the rules, for obvious reasons.*

### Answer:

#### *Enforceable Undertakings*

Enforceable undertakings are a statutory tool available to the FWO pursuant to section 715 of the *Fair Work Act 2009*, in circumstances where the FWO reasonably believes a person has contravened a civil penalty provision of the Act.

The FWO may offer a person the option to enter into an Enforceable Undertaking as an alternative to starting legal proceedings, if that person acknowledges their contraventions, accepts responsibility and agrees to take meaningful steps to fix the harm. Enforceable Undertakings can commit employers to a broad range of practical outcomes often unavailable through court orders, and underpayments can be recovered for employees much faster than through litigation.

Enforceable Undertakings are set out in a publicly available and legally binding document. Importantly, the FWO can take legal action in a court to enforce the terms of an Enforceable Undertaking if it is not complied with.

#### *Proactive Compliance Deeds*

Proactive compliance deeds are the documents that the FWO uses to formalise its compliance partnerships. The FWO encourages employers that want to publicly demonstrate their commitment to creating compliant, productive and inclusive Australian workplaces to enter partnership agreements with us.

Compliance partnerships give employers and their staff certainty that their systems and processes are working effectively and help build a culture of compliance. Compliance partnerships also provide opportunities for franchise operators and head contractors to work with their franchisees and sub-contractors to drive workplace improvements throughout their supply chain.