

Senate Education and Employment References Committee

Written Questions on Notice

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

Question number	Question sent	Witness	Question asked by	Answered
1	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
2	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
3	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
4	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
5	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
6a	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
6b	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
7a	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
7b	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
7c	8 October 2015	Department of Immigration and Border Protection	Senator Lines	Yes
1	20 October 2015	Minister Birmingham	Senator McKenzie	Yes
1	22 October 2015	Department of Education and Training	Senator Lines	Yes
2	22 October 2015	Department of Education and Training	Senator Lines	Yes
3	22 October 2015	Department of Education and Training	Senator Lines	Yes

4a	22 October 2015	Department of Education and Training	Senator Lines	Yes
4b	22 October 2015	Department of Education and Training	Senator McKenzie	Yes
1a	3 November 2015	Department of Education and Training	Senator McKenzie	Yes
1b	3 November 2015	Department of Education and Training	Senator McKenzie	Yes
1	27 October 2015	Professor Tham	Senator Lines	Yes
1a	27 October 2015	Professor Tham	Senator Lines	Yes
2	27 October 2015	Professor Tham	Senator Lines	Yes
1a	27 October 2015	Dr Tess Hardy	Senator Lines	Yes
1a	28 October 2015	7-Eleven	Senator Lines	Yes
1b	28 October 2015	7-Eleven	Senator Lines	Yes
1c	28 October 2015	7-Eleven	Senator Lines	Yes
1d	28 October 2015	7-Eleven	Senator Lines	Yes
1e	28 October 2015	7-Eleven	Senator Lines	Yes
1f	28 October 2015	7-Eleven	Senator Lines	Yes
2a	28 October 2015	7-Eleven	Senator Lines	Yes
2b	28 October 2015	7-Eleven	Senator Lines	Yes
2c	28 October 2015	7-Eleven	Senator Lines	Yes
2d	28 October 2015	7-Eleven	Senator Lines	Yes
2e	28 October 2015	7-Eleven	Senator Lines	Yes
3a	28 October 2015	7-Eleven	Senator Lines	Yes
3b	28 October 2015	7-Eleven	Senator Lines	Yes
3c	28 October 2015	7-Eleven	Senator Lines	Yes
3d	28 October 2015	7-Eleven	Senator Lines	Yes
3e	28 October 2015	7-Eleven	Senator Lines	Yes
1a	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
1b	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
1c	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
2a	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
2b	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
2c	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
3a	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes

4	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
5a	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
5b	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
5c	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
6a	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
6b	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
6c	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
6d	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
7a	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
7b	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
7c	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
7d	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
8a	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
8b	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
8c	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
8d	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
8e	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
8f	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
9a	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
9b	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
9c	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
9d	28 October 2015	Fair Work Ombudsman	Senator Lines	Yes
1a	10 November 2015	7-Eleven	Senator O'Neill	Yes
1b	10 November 2015	7-Eleven	Senator O'Neill	Yes
2a	10 November	7-Eleven	Senator O'Neill	Yes

	2015			
2b	10 November 2015	7-Eleven	Senator O'Neill	Yes
2c	10 November 2015	7-Eleven	Senator O'Neill	Yes
2d	10 November 2015	7-Eleven	Senator O'Neill	Yes
2e	10 November 2015	7-Eleven	Senator O'Neill	Yes
2f	10 November 2015	7-Eleven	Senator O'Neill	Yes
3a	10 November 2015	7-Eleven	Senator O'Neill	Yes
3b	10 November 2015	7-Eleven	Senator O'Neill	Yes
3c	10 November 2015	7-Eleven	Senator O'Neill	Yes
3d	10 November 2015	7-Eleven	Senator O'Neill	Yes
4a	10 November 2015	7-Eleven	Senator O'Neill	Yes
4b	10 November 2015	7-Eleven	Senator O'Neill	Yes
4c	10 November 2015	7-Eleven	Senator O'Neill	Yes
4d	10 November 2015	7-Eleven	Senator O'Neill	Yes
5	10 November 2015	7-Eleven	Senator O'Neill	Yes
6a	10 November 2015	7-Eleven	Senator O'Neill	Yes
6a	10 November 2015	7-Eleven	Senator O'Neill	Yes
7a	10 November 2015	7-Eleven	Senator O'Neill	Yes
7b	10 November 2015	7-Eleven	Senator O'Neill	Yes
8a	10 November 2015	7-Eleven	Senator O'Neill	Yes
8b	10 November 2015	7-Eleven	Senator O'Neill	Yes
9a	10 November 2015	7-Eleven	Senator O'Neill	Yes
9b	10 November 2015	7-Eleven	Senator O'Neill	Yes
10a	10 November 2015	7-Eleven	Senator O'Neill	Yes
10b	10 November 2015	7-Eleven	Senator O'Neill	Yes
11	10 November	7-Eleven	Senator O'Neill	Yes

	2015			
12	10 November 2015	7-Eleven	Senator O'Neill	Yes
13	10 November 2015	7-Eleven	Senator O'Neill	Yes
14a	10 November 2015	7-Eleven	Senator O'Neill	Yes
14b	10 November 2015	7-Eleven	Senator O'Neill	Yes
14c	10 November 2015	7-Eleven	Senator O'Neill	Yes
15a	10 November 2015	7-Eleven	Senator O'Neill	Yes
15b	10 November 2015	7-Eleven	Senator O'Neill	Yes
16a	10 November 2015	7-Eleven	Senator O'Neill	Yes
16b	10 November 2015	7-Eleven	Senator O'Neill	Yes
16c	10 November 2015	7-Eleven	Senator O'Neill	Yes
17	10 November 2015	7-Eleven	Senator O'Neill	Yes
18a	10 November 2015	7-Eleven	Senator O'Neill	Yes
18b	10 November 2015	7-Eleven	Senator O'Neill	Yes

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 19 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(TWVP/026) – Parliamentary Inquiry - Consolidated Sponsored Occupation List (CSOL) -

Asked:

Which department or agency is responsible for compiling the CSOL?

How often is the CSOL reviewed and are the reviews regular or ad hoc?

What is the total number of occupations on the CSOL effective 1 July 2015?

What are the criteria for placing an occupation on CSOL?

Is the CSOL a list of occupations for which there is a shortage of suitably skilled labour in Australia? If so, what are the criteria that are used in determining skills shortages?

Answer:

1. The Department of Immigration and Border Protection.
2. The Ministerial Advisory Council on Skilled Migration (MACSM) is currently reviewing the composition of the Consolidated Sponsored Occupations List (CSOL). The timing of future reviews is yet to be determined.
3. The total number of occupations which are relevant for employer sponsored or State/Territory nominated visas (subclasses 186, 190, 402, 457 and 489) is 651.
 - a. There are two relevant legislative instruments which underlie the sponsored/nominated visas:
 - i. IMMI 15/092, dated 25 June 2015 (F2015L01059). It contains two schedules:
 1. Schedule 1 – Skilled Occupation List (SOL) (190 occupations) and
 2. Schedule 2 - CSOL (460 occupations).
 3. The sponsored visas can use both Schedule 1 and Schedule 2, totaling 650 occupations.
 - ii. IMMI 15/108, dated 16 Sep 2015 (F2015L01147) – adds the occupation of Primary School Teacher to CSOL as it was omitted by oversight.

- b. For ease of reference, the Department's website has put the three lists together when describing the relevant occupations for sponsored/nominated visas, and labelled them all as "CSOL"
- 4. The 651 occupations on "CSOL" include all occupations at the Australian and New Zealand Standard Classification of Occupations (ANZSCO) skill levels of 1 to 3, except for a small number of occupations which have been excluded because of integrity concerns. There are also a few highly specific skill level 4 occupations listed on "CSOL".
 - a. Occupations in skills levels 1-3 of the ANZSCO are classified as follows:
 - i. Skill Level 1 Managers - qualification commensurate with a bachelor degree or higher or 5 years relevant experience
 - ii. Skill Level 2 Professionals – qualification commensurate with an Australian Qualifications Framework (AQF) Associate Degree, Advanced Diploma or Diploma or 3 years relevant experience
 - iii. Skill Level 3 Technicians and Trades Workers – qualification commensurate with an AQF Certificate IV; or AQF Certificate III plus minimum two years on the job training. Three years relevant experience may substitute for relevant formal qualifications.
 - b. Occupations which are below ANZSCO level 3 generally fall below the skill threshold and are not eligible for the standard migration programmes. However, these occupations may be accessed through the Labour Agreement programme where a strong business case exists.
- 5. The 651 occupations on "CSOL" are intended to allow employers to address shortages within their workforces in circumstances that they are unable to find suitable qualified workers locally.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 19 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(TWVP/027) – Parliamentary Inquiry - Skilled Occupation List (SOL) -

Asked:

Which department or agency is responsible for compiling the SOL?

What is the total number of occupations on the SOL effective 1 July 2015?

What are the criteria for placing an occupation on the SOL and how are these criteria determined?

Answer:

1. The current department responsible for providing recommendations to the Government for the 2016 Skilled Occupation List (SOL) is the Department of Education and Training.
 - a. Recommendations on the 2015-16 SOL were compiled by the Department of Industry, Innovation and Science for decision by the former Assistant Minister for Immigration and Border Protection.
2. 190.
3. The criteria and methodology that underpins the SOL is determined by the Department of Education and Training and further questions should be directed to this portfolio for response.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 19 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(TWVP/028) – Parliamentary Inquiry - Labour Market Testing

Asked:

Since the introduction of labour market testing (LMT) to cover Nursing, Engineering, and Skill level 3 occupations, there has been a significant reduction in the number of 457 visas nominations in those occupations (50%, 46% and 28% reduction respectively) based on data from 2014. By contrast, nominations for occupations not covered by LMT have fallen, but by a much smaller amount (17%).

- a. What evidence does the Department have that would allow it to determine whether the introduction of LMT was a factor in the reduction in 457 visa nominations in Nursing, Engineering, and Skill level 3 occupations? How significant a factor was the introduction of LMT?
- b. What evidence does the Department have of other factors that may have driven the reduction in 457 visa nominations in Nursing, Engineering, and Skill level 3 occupations? How significant were these other factors?

Answer:

- a. The Department does not have evidence indicating the introduction of LMT was a factor in the reduction in 457 visa nominations in the nominated categories.
- b. The Department does not have evidence of factors that may have driven a reduction in 457 nominations lodged in engineering, nursing and skill level 3 occupations in the mentioned time period.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 19 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(TWVP/029) – Parliamentary Inquiry - MOU between DIBP and FWO -

Asked:

How long has the Memorandum of Understanding (MOU) between the Department of Immigration and Border Protection and the Fair Work Ombudsman been in place?

What are the terms of the MOU?

Have the terms of the MOU been modified since the creation of Border Force, and if so, what are the changes?

Answer:

1. Two years and three months.
2. The terms of the MOU include the exchange of information, shared obligations of the agencies, training and support and administrative and governance arrangements.
3. Yes an Annex to the MOU was signed on 20 May 2015 for provision of direct access for FWO Inspectors to the Department's Integrated Client Service Environment (ICSE) visa system.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 20 October 2015

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(TWVP/030) – Parliamentary Inquiry - Visa Condition 8202 -

Asked:

Visa condition 8202 of the Migration Regulations requires international students to achieve satisfactory course progress and attendance. Visa condition 8202 makes it a visa breach if the educational institution in which an international student is enrolled certifies that the international student is not showing satisfactory progress in the course.

- a. With regard to international students, how many 'not satisfactory progress' reports have been issued per annum by Australia's universities for each of the last 5 years?
- b. What percentage of the total international student cohort does this represent?

Answer:

The data requested is owned by the Department of Education and Training and the question should be directed to this portfolio for response.

Senate Education and Employment Committee

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

QUESTION ON NOTICE to the Department of Education and Training
20 October 2015

Outcome 2.8

Senator McKenzie, written question

Amnesty

Can Minister Birmingham confirm whether or not the Government received any correspondence from Senator Deborah O'Neill regarding her call for amnesty for underpaid 7-Eleven workers, as she asserted at the recent Senate inquiry into s457 Temporary Workers Visas in Melbourne on 24 September 2015?

Answer

The Department of Immigration and Border Protection received correspondence on this matter from Senator Deborah O'Neill on 4 September 2015.

Senate Education and Employment Committee

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

QUESTION ON NOTICE
22 October 2015

Agency: Department of Education and Training

Senator Lines, written question

Skilled Occupation List (SOL)

1. Which department or agency is responsible for compiling the SOL?

Answer

The Department of Education and Training is currently responsible for providing advice on the composition of the SOL. However, the final decision on the composition of the SOL is taken by the Minister for Immigration and Border Protection.

2. What is the total number of occupations on the SOL effective 1 July 2015?

Answer

As at 1 July 2015, a total of 190 occupations are listed on 2015–16 SOL.

3. What are the criteria for placing an occupation on the SOL and how are these criteria determined?

Answer

The process for identifying occupations for inclusion on the SOL follows a rigorous methodology as outlined below:

Step 1 — shortlisting specialised occupations

The first step involves identifying occupations that are most susceptible to supply side constraints and/or most likely to warrant government intervention should supply constraints occur. An occupation satisfies this first step if it meets at least two of the following three criteria.

- *Long lead time* - Skills are highly specialised and require extended education and training over several years.
- *High use* - Skills are deployed for uses intended (i.e. there is a good occupational 'fit' between qualification and occupation).
- *High risk* - Disruption caused by skills being in short supply imposes a significant risk to the Australian economy and/or community.

A fourth criterion, namely High information, requires that the quality of information about the occupation is adequate to evaluating the first three criteria.

Step 2 — analysing occupations for inclusion on the SOL

The second step involves assessing the medium to long-term skill needs of the economy for each occupation identified in Step 1 in order to determine whether it would benefit from skilled independent migration. This analysis is aimed at determining whether an occupation would benefit from skilled independent migration

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over this period. This is done on the basis of stakeholder submissions in combination with information on areas of economic activity where skills imbalances may be observed.

The areas of economic activity considered are:

- the state of the labour market, focusing on indicators that provide insight into current and anticipated occupational conditions
- the recruitment experience, focusing on the outcomes of recruitment activity
- the education experience, focusing on the effect that skills imbalances may have on a student's choice of study
- new entrants, focusing on the outcomes of graduates and migrants entering the labour market.

As part of this process an assessment is made using education, labour market, migration, and general economic and demographic data. It also considers views from Industry Skills Councils, peak industry associations, professional and trade associations, education and training providers, employee representatives, and Commonwealth, State and Territory government agencies and the public.

Based on this analysis, a shortlisted occupation would not be included on the SOL if:

- the occupation is likely to be in surplus in the medium-to-long term
- there are other more appropriate and/or specific migration options (for example, employer or State/Territory nominated or temporary skilled migration)
- the occupation is a niche occupation with few employers or employment opportunities.

It should be noted that the set of indicators for each occupation are considered together rather than separately with respect to either supporting inclusion or exclusion from the SOL. Indicators for occupations tend to be mixed and the advice provided is never based on a single indicator alone.

Stakeholder consultations

Industry intelligence gathered through stakeholder advice is critical to informing decisions about additions and removals from the SOL. This advice is incorporated into the Step 2 analysis through an online submission process and subsequent stakeholder conferences for occupations for which submissions and labour market data may support a change to the current SOL.

Senate Education and Employment Committee

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

QUESTIONS ON NOTICE to Professor Tham – Thursday 24 September 2015 Melbourne

Senator Lines, written questions

Recommendation 1

1. At the hearing, you were questioned about your recommendation that measures should be taken by the Commonwealth Government to actively promote the collective organization of temporary migrant workers, including through the provision of funds.
 - a. Could you expand on this, and in particular, how you envisage it working in practice?

In answering this question, I draw upon my experience convening the Migrant Workers Campaign Steering Group.

By way of background, the Migrant Workers Campaign Steering Group was formed in October 2014 with the purpose of working collaboratively to enhance the protection of the rights of migrant workers in Australia. The steering group defines migrant workers as people who have migrated to Australia and who are working in this country.

Organisations participating in this steering group include the Fair Work Commission, Textile Clothing and Footwear Union, Adult Migrant Education Services, Fair Work Ombudsman, Job Watch, Spectrum Migrant Resource Centre, Office of Multicultural Affairs, Salvation Army, Victoria Equal Opportunity and Human Rights Commission, Footscray Community Legal Centre, Federation of Community Legal Centres, Victoria Legal Aid, Australian Council of Trade Unions and the International Organisation for Migration.

These organisations work together based on the following understandings:

- The imperative that the workplace rights of all workers, including migrant workers, are respected;
- The reality of these rights are being breached for many migrant workers in Australia; and
- The recognition that effective collaborations amongst the relevant organisations are necessary to prevent and address these breaches – especially the systemic causes underlying them.

It is clear from my experience convening the Migrant Workers Campaign Steering Group that much more can be done to actively promote the collective organisation of temporary migrant workers. These measures should be undertaken at various levels. The first concerns the provision of information concerning the workplace rights of temporary migrant workers, including their rights to freely organise into trade unions and other groups. Under section 124 of the *Fair Work Act 2009* (Cth), the Fair Work Ombudsman is required to prepare and publish the Fair Work Information Statement which deals, among others, with the right to freedom of association (available at <https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement>). Section 125, in turn, requires employers to provide this Statement to employees before they commence employment or as soon as practicable after they commenced employment. An easy way to improve the provision of information concerning the workplace rights of temporary migrant workers is to have the Immigration Department provide the Fair Work

Information Statement to migrants upon the issuing of their visas. Another simple measure is to have educational institutions provide the same Statement to their international students upon enrolment. It is crucial here that both the Immigration Department and education institutions provide the Statement in languages other than English – especially given that this Statement is available in 27 other languages.

In order to properly organise, temporary migrant workers need safe spaces to meet and to discuss their workplace concerns and to devise strategies to protect their rights. Another measure then to promote collective organisation of temporary migrant workers is to provide such spaces through public organisations like local councils and educational institutions.

The experience – and a guiding principle – of the Migrant Workers Campaign Steering Group is that there can be more effective collaboration amongst organisations working in this area and that, in many cases, work in this area is fragmented and disjointed. While the member organisations of the Steering Group are mainly Victorian based, there is a case for developing vehicles in other jurisdictions to develop more effective collaboration amongst organisations working in this area. This is an initiative that could be led by the Fair Work Ombudsman in conjunction with key organisations in the other jurisdictions.

Funds directed towards promoting such collective organisation can also be provided. The Victorian Government has recently launched a \$4 million program - the International Student Welfare Grants – in order to support organisations that work with international students.¹ A Commonwealth fund aimed specifically at improving the protection of the workplace rights of temporary migrant workers should be established on an ongoing basis with funds adequate to cover all temporary migrant workers across the country. This fund could be administered by the Fair Work Ombudsman with the allocation of funds determined by an independent panel comprised of government officials, community representatives and academic experts.

The ongoing provision of funds in this area is essential. What is clear from my experience convening the Migrant Workers Campaign Steering Group is that effective measures to promote collective organisation of temporary migrant workers requires *ongoing programs* that need *substantial resources*. Only in this way can the cultural and language barriers and issues of vulnerability that stand in the way of effective protection of the rights of temporary migrant workers be overcome in a sustained manner.

Recommendation 3

2. At the hearing, you were questioned about your recommendation that:
 - Sections 116(1)(b) and 235 of the Migration Act 1958 (Cth) should be amended so as to only apply to serious breaches of visas; and
 - A proportionate system of administrative fines and/or civil penalties should apply to other breaches.
- a. Could you expand on this, and in particular, how you envisage it working in practice?

¹ For details on this program, see <http://www.business.vic.gov.au/support-for-your-business/grants-and-assistance/international-student-welfare-grants>
Also see <http://www.vic.gov.au/news/international-student-welfare-grants.html> (accessed on 4 November 2015).

Section 116(1)(b) of the *Migration Act 1958* (Cth) could be amended by inserting the italicised words:

(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

...
(b) its holder has not complied with a condition of the visa *and such non-compliance amounts to serious non-compliance*.

Section 235(1) of the *Migration Act 1958* (Cth) could be amended by inserting an additional subsection (italicised):

(1) If:

(a) the temporary visa held by a non-citizen is subject to a prescribed condition restricting the work that the non-citizen may do in Australia; and

(b) the non-citizen contravenes that condition; *and*

(c) *such contravention amounts to a serious contravention*.

the non-citizen commits an offence against this section.

With both sections, what amounts to ‘serious non-compliance’ or ‘serious contravention’ will have to be assessed on a case-by-case basis and there is little utility in seeking to further define these phrases. The *Migration Act 1958* (Cth) should, however, list factors that should be taken into account in determining whether there is ‘serious non-compliance’ or ‘serious contravention’. These factors should include:

- Whether the non-compliance/contravention occurred with knowledge of its unlawfulness on the part of the visa-holder;
- The frequency of the non-compliance/contravention;
- The gravity of the non-compliance/contravention;
- Whether the non-compliance/contravention was brought about by conduct of others, including employers;
- Whether the visa-holder had been previously warned by the Immigration Department in relation to the non-compliance/contravention.

Breaches other than those amounting to ‘serious non-compliance’ or ‘serious contravention’ can be dealt with through a system of civil penalties that can be modelled upon section 140Q(1) of the *Migration Act 1958* (Cth) which provides for civil penalties when there is a failure to satisfy a sponsorship obligation by sponsoring employers. The maximum of 60 penalty units (presently \$9 200)² applies to section 140Q(1). To be proportionate, breaches by visa-holders should be considerably lower than those that apply to sponsoring employers – a maximum of 5 penalty units (\$800) would not be unreasonable.

² *Crimes Act 1914* (Cth) s 4AA defines a ‘penalty unit’ to mean \$180.

- a. Since October 2009 when the joint campaign between the FWO and 7-Eleven was announced, on how many of his visits to 7-Eleven stores has Mr Withers ever inquired of the employees about the wages paid to employees? If yes, on what date was the first inquiry made and in what store; and in approximately how many stores in total? What were the responses of employees at each of those stores?
- b. Did Mr Withers ever make such inquiries at the stores operated by Bosen Pty Ltd and at the same stores after they were operated by the new franchisee?
- c. Has Mr Withers ever inquired of the franchisee about the wages paid to employees at any store? If yes, on what date was the first inquiry made and in what store; and in approximately how many stores in total? What were the responses of franchisees at each of those stores?
- d. Has Mr Withers ever met or tried to communicate with any employees who were underpaid, or proven to be underpaid?
- e. Has 7-Eleven used CCTV footage to cross verify underpayment claims in any 7-Eleven stores? If not, why not? If yes, what was the date when CCTV footage was used, and on how many occasions? If yes, on how many occasions has CCTV footage confirmed claims of underpayment?

Termination of franchise agreements

3.
 - a. To date, how many franchise agreements has 7-Eleven terminated in relation to staff payment irregularities?
 - b. Under which section of the franchise code were the franchise terminations implemented?
 - c. On what date were each of those franchise agreements terminated?
 - d. How many stores were involved in each termination and how many employees have been affected/terminated as a result of the franchise agreement(s) being terminated?
 - e. In which cities or regions were the stores (involved in the franchise termination) located?

Questions on notice to 7-Eleven from Senator Lines

Underpayments

1. In October 2009, the Fair Work Ombudsman (FWO) announced a joint campaign with 7-Eleven to audit dozens of franchisees throughout Victoria following ongoing concerns about underpayments of workers.

On 20 January 2010, the FWO announced legal proceedings against Bosen Pty Ltd which owned 7-Eleven stores in Geelong and South Yarra. The case was decided in 2011. The Magistrate ordered the company to pay a penalty of \$120 000 and its directors to pay \$20 000 and \$10 000 respectively. The six 7-Eleven workers listed in the case were owed close to \$100 000 in underpaid wages.

Those workers never received the full amount of their underpaid wages because the two directors paid the penalty but the company was declared bankrupt and did not pay the money that was owed to the workers.

Mr Mohamed Ullat Thodi was owed \$28 410 in underpaid wages. He has received only approximately \$8 000 as a result of the Court case. In addition, Mr Ullat Thodi has never been paid for his training shifts over a period of two and half to three months.

- a. On what date was 7-Eleven first aware that there had been underpayment at either of the franchise outlets run by Bosen Pty Ltd?
- b. On what date did Bosen Pty Ltd first seek to sell the franchise for the Geelong store and on what date was the franchise sold? On what date was the franchise sold?
- c. On what date did Bosen Pty Ltd first seek to sell the franchise for the South Yarra store and on what date was the franchise sold? On what date was the franchise sold?
- d. Did 7-Eleven take any action to ensure that Mr Ullat Thodi was paid the money that he was owed by Bosen Pty Ltd prior to the 7-Eleven franchises operated by Bosen Pty Ltd being sold?
- e. Does 7-Eleven consider that it has a moral obligation to ensure that Mr Ullat Thodi receives the money that he is owed?
- f. Does 7-Eleven consider that it has a moral obligation to pay additional compensation to former employees such as Mr Ullat Thodi for the harm that has been done to them by their experiences as employees at 7-Eleven?

Board responsibilities: risk and compliance

2. Mr Withers has been (until 1 October 2015) a long-standing chair of the 7-Eleven board. A key role of any board of directors is to manage risk and compliance and protect the company's reputation.

In the Bosen case in 2011, Magistrate Hawkins noted that '7-Eleven management admitted to the Court that non-compliance with workplace laws was relatively common amongst 7-Eleven franchises' (at [49], p. 15 of the decision).

Mr Withers stated in his evidence to the committee on 24 September 2015 that he still tries to visit all 7-Eleven stores every year.

Senate Education and Employment Committee
Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

Question on notice to Dr Tess Hardy

1. *This inquiry has heard evidence across a range of cases where workers have not received their full entitlements after a company has been wound up (typically during the course of an investigation by the regulator). In the Bosen case, the Magistrate ordered the company to pay a penalty of \$120 000 and its directors to pay \$20 000 and \$10 000 respectively. The workers never received the full amount of their underpaid wages because the two directors paid the penalty but the company was declared bankrupt and did not pay the money that was owed to the workers.*

The committee has also heard evidence from temporary visa workers employed at Baiada processing plants in NSW who provided evidence showing that they were substantially underpaid for their work. Upon investigation by the Fair Work Ombudsman (FWO), many of the labour hire companies supplying workers to Baiada were wound up and the workers have not received their full entitlements.

- a. *In terms of cases such as or similar to the examples above, could you illustrate how the 'modest' regulatory changes that you propose in your submission (such as 'hot cargo' provisions, alterations to the civil remedy regime and sham contracting and accessory liability provisions, and the introduction of a labour hire licensing regime) might allow temporary visa workers to either secure or recover their full entitlements?*

Response

At the outset, it is important to note that not all of the proposals referred to in my written submission will deal with the problems identified in the questions set out above – which largely relate to the fact that the direct employer entity has effectively rendered itself ‘judgment proof’ through deregistration, winding up, insolvency or otherwise. For example, in my written submission, I propose that the existing sham contracting provisions be amended so that the ‘reckless’ defence is replaced with a ‘reasonableness’ defence.¹ This will address some of the limitations of the current sham contracting provisions, but it will not necessarily deal with the issue of ‘judgment proof’ entities. This response will expand on those proposals which are most relevant to the particular issue identified above.

1) *Accessorial Liability and Alternative Models of Third Party Liability*

Accessorial Liability

One of the key benefits of the accessorial liability provisions² is that it allows the key regulatory agency, the Fair Work Ombudsman (**FWO**), amongst others, to pursue parties beyond the direct

¹ The Productivity Commission has recently endorsed this amendment to the sham contracting provisions. See Australian Government, *Workplace Relations Framework – Productivity Commission Inquiry Report* (30 November 2015), Recommendation 25.1.

² FW Act, s 550.

employer. These provisions are particularly valuable where the direct employer is insolvent or no longer in existence – one of the key problems identified in this Inquiry.³

The FWO has routinely used the accessorial liability provisions to bring enforcement proceedings against the individual directors of failed companies.⁴ It is far more difficult for natural persons to avoid court orders through manipulation of the corporate form and asset-shifting etc⁵ and therefore, it is more likely that individuals will comply with any relevant court orders.⁶

In some rare instances, the accessorial liability provisions have been used to bring proceedings against third party corporations, such as principal contractors⁷ or supply chain heads.⁸ By way of example, the FWO has recently initiated proceedings against ISS Facility Services Australia Limited (**ISS**) – the Australian arm of a multi-national company – alleging it was an accessory to alleged underpayments of temporary migrant workers engaged by a separate contractor, First Group of Companies Pty Ltd. These workers were employed to undertake cleaning at the Melbourne Cricket Ground.⁹

Generally-speaking, these third party corporations are not only better resourced, but they are less likely to wind up the relevant corporate entity in order to avoid the consequences of any relevant court orders. They are therefore in a much more secure financial position to rectify any relevant underpayment and pay any pecuniary penalties which are imposed. Again, this is a key mechanism by which regulators may obtain civil remedies for underpaid workers when the direct employer has been effectively rendered ‘judgment-proof’ through insolvency etc. In addition, the threat of legal liability (and the possibility of significant brand damage) may be enough to prompt voluntary measures amongst lead firms. In the Coles case referred to in my written submission, the FWO was

³ Professor Helen Anderson has written on this issue extensively. See, eg, Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (Melbourne University Press, 2014). See also Helen Anderson et al, *Quantifying Phoenix Activity: Incidence, Cost, Enforcement* (Research Report, Centre for Corporate Law and Securities Regulation, 2015); Helen Anderson et al, *Defining and Profiling Phoenix Activity* (Research Report, Centre for Corporate Law and Securities Regulation, December 2014). For further information on this research project, see Centre for Corporate Law and Securities Regulation, ‘Regulating Fraudulent Phoenix Activity’ <http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity>.

⁴ This is essentially what occurred in the *Bosen* case, amongst many others.

⁵ While some individuals have attempted to avoid court orders by filing for bankruptcy, there is authority to suggest that a statutory stay would not arise under s 59(3) of the *Bankruptcy Act 1966* (Cth), since proceedings under s 546 of the FW Act are not characterised as seeking recovery of debts otherwise provable in bankruptcy. See, eg, *Cotis v Macpherson* (2007) 169 IR 30.

⁶ But compliance with court orders is not always guaranteed: see, eg, *Fair Work Ombudsman v Security Protection Services Pty Ltd & Ors* [2010] FMCA 252 (13 April 2010). See also Fair Work Ombudsman, ‘Regulator acts to enforce Court orders’, Media Release, 1 February 2013.

⁷ In a recent proceeding, the FWO successfully argued that a national security contractor, Security International Services Pty Ltd (**SIS**) had been knowingly involved in the underpayment of a security guard employed by one of SIS’s contractors (i.e. GRI Global Pty Ltd). For further details, see Fair Work Ombudsman, ‘Security Company Fined over \$60,000’, Media Release, 20 November 2015.

⁸ See, eg, *Fair Work Ombudsman v Al-Hilfi & Ors* [2012] FCA 1166 (26 October 2012); and *Fair Work Ombudsman v Al-Hilfi & Ors (No 2)* [2013] FCA 16 (17 January 2013). In this proceeding, the FWO initiated two related proceedings against Coles Supermarkets Australia Pty Ltd (**Coles**) in relation to contraventions committed by trolley-collecting subcontractors of Starlink Operations Group Pty Ltd (**Starlink Operations**). In this particular instance, the FWO alleged that at least 10 trolley collectors were underpaid approximately \$200,000 by subcontractors of Starlink Operations. Starlink Operations had been put into liquidation by the time the proceedings were issued.

⁹ Fair Work Ombudsman, ‘Probe into MCG supply chain finds alleged exploitation of visa-holders working as cleaners’, Media Release, 7 January 2016.

able to not only obtain a remedy for the underpaid workers where compensatory payments may not have otherwise been forthcoming, it provided the regulator with an opportunity to promote systemic and sustainable change throughout the supply chain.¹⁰

However, as pointed out in my written submission, there are at least two potential limitations of the accessorial liability provisions of the *Fair Work Act 2009* (Cth) (**FW Act**).

First, the scope of the accessorial liability provisions – and their application to labour hire, outsourcing and franchising arrangements – is not entirely certain. Without, and until, a significant test case, we will not have a clear sense of whether the accessorial liability provisions under the FW Act are sufficiently flexible to tackle some of the most pressing problems identified in the Inquiry.¹¹ Assuming that it reaches final determination, the case involving ISS referred to above is likely to provide some clarification in this respect. However, in the event that the courts take a relatively narrow approach in relation to the application of the accessorial liability provisions, it may be that further statutory reform is required.¹²

A second limitation has arisen largely as a result of the previous interpretation and implementation of the accessorial liability provisions by the FWO. In particular, as a result of a statement in the relevant Explanatory Memorandum,¹³ the FWO has historically not applied to have compensation orders awarded against third party accessories as it considers that such orders are only available against the relevant employer entity.¹⁴ In order to try to rectify the relevant underpayment in these cases, particularly where the corporate employer no longer exists, the FWO often seeks that all or part of the pecuniary penalty amount awarded against the accessory is paid to the relevant employees.¹⁵ While this approach provides a practical solution to a somewhat technical problem, it is unsatisfactory in a number of respects.

First, it weakens the deterrence effects of the litigation action and may implicitly encourage directors to place corporations into liquidation so to as minimise (if not avoid altogether) the amounts payable pursuant to court orders. Accessories will generally only be liable to pay a pecuniary penalty (as compared to employer corporations which would generally be liable for both compensating the aggrieved employees and paying any pecuniary penalties which are imposed). Depending on the amount of the total penalty which is determined to be appropriate by the court, the employee may not even recover the amount by which they have been underpaid.¹⁶ The deterrence issue is further weakened where the relevant accessory is an individual director rather than a third party corporation. In the former instance, even if an individual is found to be ‘involved

¹⁰ See Tess Hardy and John Howe, ‘Chain Reaction: A Strategic Approach to Addressing Employment Non-Compliance in Complex Supply Chains’ (2015) 57(4) *Journal of Industrial Relations* 563.

¹¹ In particular, the proceeding brought against the security contractor referred to in footnote 7 above is important, however, its precedential value is limited by the fact that it was a judgment of the Federal Circuit Court of Australia and there appears to be no written decision available. Similarly, as pointed out in my written submission, the Coles litigation was also of limited precedential value as the proceedings were concluded by agreement before any final court determination.

¹² Some of the possible reforms – based on alternative models of regulation – are set out in my written submission.

¹³ See Explanatory Memorandum, Fair Work Bill 2008 (Cth) 332 [2177].

¹⁴ But see Helen Anderson and John Howe, ‘Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the Fair Work Act’ (2012) 36 *Melbourne University Law Review* 335.

¹⁵ This was the approach adopted in the 7-Eleven case mentioned earlier: *Fair Work Ombudsman v Haider Pty Ltd & Anor* [2015] FCCA 2113 (30 July 2015).

¹⁶ In the *Haider* case, the director, Mr Mubin Al Haider, was ordered to pay a pecuniary penalty of \$6,970 and this penalty amount was to be transferred to the affected employee, Mr Prakesh Bajagai. However, this penalty amount represented less than a third of the wages owed to Mr Bajagai, namely \$21,298.86.

in' the contravention under s 550, as they are a natural person, they are faced with a maximum penalty that is one-fifth of the penalty set for corporations.

While there have been a number of court decisions which have found that the Federal Court and Federal Circuit Court¹⁷ have the power to order an accessory to pay compensation for loss suffered as a result of a contravention of a civil remedy provision,¹⁸ the FWO's more restrictive approach appears to have continued,¹⁹ at least until very recently. However, some recent test cases instituted by the FWO suggest that their position on this issue may be changing.²⁰ If the courts ultimately find that they have the power to make compensatory orders against persons other than the employer, it may be that this obstacle falls away.

b) Hot Goods Provisions

In my written submission, I have set out a number of alternative models – both from within Australia and beyond – for imposing liability on entities other than the direct employer. These models include the harmonised work health and safety legislation, the supply chain regulation applicable to the textile, clothing and footwear industry and the Israeli reforms which require that principal contractors act as guarantors of employment entitlements in certain circumstances.²¹ In this part, I will expand on another regulatory mechanism which I referred to in my written submission, namely the 'hot cargo' or 'hot goods' provisions which apply in the United States of America (**US**).

As noted in my written submission, these particular statutory provisions have enabled the Wages and Hours Division of the Department of Labor (**WHD**) to enjoin or embargo the transportation of sale of 'goods in the production of which any employee was employed in violation' of the US Fair Labor Standards Act (**FLSA**) – the principal piece of federal legislation governing minimum wages and maximum working hours. Under these provisions, injunctive orders have been issued against a whole range of purchasing firms, including distributors, wholesalers and retailers. While these injunctions are not designed to compensate underpaid employees, they generally have this effect as an enjoined party can seek relief by remedying any past FLSA violations.

Another critical component of the hot goods provision and the way in which they have been effectively used to transform the 'compliance calculus'²² of firms throughout the supply chain are the relevant legislative exemptions. In addition to excluding consumers and common carriers from its coverage, the hot goods provision also exempts purchasers of goods (including a retailer, distributor or other intermediary) where they obtained the relevant goods 'in good faith in reliance on written assurances from the producer' that they were produced in compliance with the Act, and 'without notice of any such violation'.²³ The underlying regulations relating to the hot goods provision further explain that in order to rely on this exclusion, each purchaser has an 'affirmative

¹⁷ This general power is not necessarily available to eligible State and Territory courts. See FW Act, s 545(3) and *Mildren v Gabbusch* [2014] SAIRC 15.

¹⁸ See, eg, *AFMPIKIU v Beynon* [2013] FCA 390 and *Scotto v Scala Bros Pty Ltd & Anor* [2014] FCCA 2374.

¹⁹ See, eg, *Fair Work Ombudsman v Tsurc Pty Ltd & Anor (No 2)* [2015] FCCA 2148.

²⁰ In particular, in two recent proceedings instituted by the FWO in the Federal Circuit Court of Australia, the FWO has sought compensation orders, in addition to pecuniary penalties, against alleged accessories: *Fair Work Ombudsman v Nobrace & Anor*, filed on 31 August 2015; and *Fair Work Ombudsman v Step Ahead Securities & Anor*, filed on 14 September 2015.

²¹ The potential advantages and limitations of these various models are assessed in a forthcoming article: Tess Hardy, 'When Should Lead Firms Be Held Liable for Workplace Contraventions and On What Basis?' (2016) *Australian Journal of Labour Law*.

²² David Weil, 'Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division' (Report, US Department of Labour, May 2010), 88.

²³ Fair Labor Standards Act, § 215(a)(1).

duty' to assure themselves that the goods were produced in compliance with the Act. This generally requires the purchaser to show that they have done all that a 'reasonable, prudent man [sic], acting with due diligence, would have done in the circumstances.'²⁴

The hot goods provision in the FLSA have proved useful not only in obtaining quick remedial relief for vulnerable employees, they have enabled the regulator to bypass the direct employer and enrol companies higher in the supply chain which have a much stronger incentive to establish private monitoring arrangements in relation to subcontractors in order to show that they have fulfilled their relevant statutory duty.

But the hot goods provision is not without its own set of limitations. For a start, it only applies to the transport and sale of goods, and not the acquisition of services. Further, while injunctive relief may serve to facilitate compensatory relief, it is not necessarily as direct or as effective as other types of remedial orders. Finally, the hot goods provision can only be used by the relevant government regulator, and not by employees and their representatives.

As noted in my written submission, the horticulture, food processing and franchising industries in Australia display some of the necessary characteristics that make an embargo-like sanction a particularly powerful one. First, the time between production and sale of the goods is of the essence; and second, there are 'large, highly concentrated business entities that have greater market power than the large set of smaller organisations with which they interact'.²⁵ For example, where there are reasonable grounds for believing that chickens processed in Baiada factories have been handled by workers who have been underpaid in contravention of the FW Act, the hot cargo provisions would effectively allow the FWO to embargo the processed chickens. In these circumstances, it is likely that both the Baiada Group, as well as leading supermarkets and fast food franchisors, would have a strong commercial incentive to rectify any relevant underpayments as quickly as possible in order to enable the supply of processed chickens to continue without further impediment or delay.²⁶ In order to prevent further issues of this nature, lead firms may also be more inclined to ensure that, in the future, all entities in the supply chain, including any labour hire providers engaged by their wholesalers, were compliant with workplace laws.

Presently, however, the FWO faces a major legal hurdle in seeking to adopt this type of enforcement strategy given that there is no equivalent 'hot goods' provision in Australia. That said, under s 545 of the FW Act, the courts have a broad power to 'make any order the court considers appropriate' where it is satisfied that 'a person' has contravened a civil remedy provision. Given that there is no express requirement that the court order be made against the same person who is found to have contravened a civil remedy provision, there is a possible argument that an injunction may be issued against an entity other than the primary wrongdoer in order 'to prevent, stop or remedy the effects of a contravention'.²⁷

²⁴ 29 CFR § 278.1 (2010).

²⁵ David Weil, 'Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters' (2007) 28 *Comparative Labour Law and Policy Journal* 125, 142.

²⁶ This strategy is particularly effective in relation to companies which have a significant market share. In this respect, it should be noted that the Baiada Group - which includes Baiada Poultry Pty Limited and Bartter Enterprises Pty Limited - is the biggest poultry processing corporate group in Australia with a market share of more than 20 per cent. It supplies many of its chickens to leading brands, including Coles, Woolworths, McDonald's and KFC.

²⁷ FW Act, s 545(2)(a).

While this type of order has not yet been sought by the FWO, on at least two occasions, the regulator has obtained freezing orders against the relevant employer entity (and its director).²⁸ In the case involving Trek North Tours, the FWO sought freezing orders after becoming concerned that the company director, Leigh Jorgensen, would strip company assets to avoid paying over \$95,000 in court penalties and compensatory orders.²⁹ In another case involving Grouped Property Services – a cleaning company – the FWO sought freezing orders on an interim basis shortly after commencing legal proceedings, but before any final determination was made by a court. The aim of this interim order was to prevent the operators of Grouped Property Services from dispersing the company’s assets up to the value of the alleged underpayments, which amounted to more than \$300,000.³⁰ While these freezing orders are critical to avoid some of the problems identified in this Inquiry, they are distinctive from the way in which the hot cargo provisions are applied in the US. Most notably, in these cases, the FWO has sought freezing orders against the relevant employer entity (and its director(s)) rather than against lead firms. While the freezing orders may allow the affected workers to recover their entitlements, they are less likely to lead to quick remedial relief for employees. Further, they are unlikely to prompt systemic, voluntary changes throughout the broader supply chain and/or franchise network (as is the case with the hot cargo provisions in the US).

Strengthening the Civil Remedy Regime and Licensing Labour Hire Providers

This Inquiry has highlighted a range of compliance and enforcement issues relating to the use of labour hire agencies, particularly in the food processing industry. Many of these issues were also identified by the FWO in its recent inquiry into the Baiada Group.³¹ In particular, in the Baiada Inquiry, the FWO acknowledged that contracting out labour can be a convenient and legitimate business strategy. However, the regulator also recognised that the competitive procurement processes and poor governance arrangements which characterised the Baiada arrangements can (and did) combine to create an environment ripe for worker exploitation. More specifically, Baiada’s principal operating model was found to effectively ‘transfer costs and risks associated with the engagement of labour to an extensive supply chain of contractors responsible for sourcing and providing labour.’³² This is especially problematic in light of the fact that, during the course of the FWO Inquiry, a large number of entities identified in the supply chain ceased trading. As noted above, the effect of this systematic company collapse was to make the relevant entities immune to enforcement proceedings and the imposition of compensatory orders and pecuniary penalties.

Since the conclusion of the FWO Inquiry, the Baiada Group has adopted a range of measures designed to stamp out worker abuse at its factories, such as improving the transparency and documentation of contractor arrangements, introducing electronic timekeeping and ensuring that all workers are informed of the relevant employing entity and their employment rights.³³ It is arguable that many of these measures could be adopted by other principal contractors/host firms in order to

²⁸ See, eg, *Fair Work Ombudsman v ACN 156 455 828 Pty Ltd trading as Trek North Tours* (Unreported, Penal Notice, Federal Circuit Court of Australia, Jarrett J, 24 July 2015); *Fair Work Ombudsman v Grouped Property Services Pty Ltd & Ors* (Unreported, Penal Notice, Federal Court of Australia, Perram J, 3 July 2014).

²⁹ See Fair Work Ombudsman, ‘Freezing orders imposed against Cairns company, director after non-payment of fines and back-pay’, Media Release, 20 August 2015.

³⁰ See Fair Work Ombudsman, ‘Interim freeze order secured against company which allegedly underpaid workers \$300,000’, Media Release, 2 September 2014.

³¹ The Baiada Group – which includes Baiada Poultry Pty Limited and Bartter Enterprises Pty Limited – supplies many of its chickens to leading brands, including Coles, Woolworths, McDonald’s and KFC. Fair Work Ombudsman, ‘A Report on the Fair Work Ombudsman’s Inquiry into the Labour Procurement Arrangements of the Baiada Group in New South Wales’ (June 2015) (‘FWO Baiada Inquiry’).

³² Ibid 2.

³³ Proactive Compliance Deed between the Office of the Fair Work Ombudsman and Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd dated 23 October 2015.

better ensure workplace relations compliance throughout the production network, particularly in sectors which are notorious for non-compliance, such as cleaning and security. However, it is not clear to what extent firms would be willing to take these steps in the absence of consumer pressure, regulatory scrutiny and/or the credible threat of liability. This gap underlines the importance of additional regulatory measures, such as the licensing of labour hire providers.

As noted in my written submission, the licensing regime used by the Gangmasters Licensing Authority (**GLA**) in the United Kingdom (**UK**) is instructive in many respects. As set out in my earlier submission, the GLA – a statutory enforcement agency – was set up in 2006 to protect temporary foreign workers against exploitation by labour hire agencies.³⁴ In particular, under the *Gangmasters (Licensing) Act 2004* (UK), labour hire providers (commonly known as ‘gangmasters’) operating in the agriculture, horticulture, shellfish gathering and associated food processing and packaging sectors are required to obtain a license from the GLA.³⁵

To receive and maintain their licenses, gangmasters must demonstrate compliance with various workplace laws, including the National Minimum Wage and work health and safety standards applicable in the UK.³⁶ Gangmasters must also keep adequate records to demonstrate their compliance with these standards (e.g. records of payment of such wages).³⁷ In addition to complying with all relevant licensing conditions, gangmasters are also required to maintain their status as a ‘fit and proper’ provider, which takes into account whether the gangmaster has tried to obstruct the GLA in the exercise of its functions, any relevant criminal convictions against the gangmaster and any connection with any person or entity deemed to not be fit and proper in the previous two years. It has previously been observed that this last requirement is

an important licensing standard as the GLA has uncovered gangmasters who have had their licences revoked but have continued to run employment agencies by using other individuals as a front for their agency.³⁸

Further, a gangmaster who uses other gangmasters or subcontractors to supply workers is also obliged to ensure that these subcontractors hold a GLA licence. This legislative mechanism is important in addressing the tiers of contractors which perpetuated some of the problems of compliance and enforcement in the Baiada case.

More generally, the licensing regime and record-keeping requirements addresses some of the transparency problems and governance issues which were identified with respect to Baiada. Further, the ‘fit and proper’ person test would provide a powerful incentive for labour hire agencies to cooperate with authorities, rather than obstruct their investigations as was the case with the Baiada Group. Combined, these measures not only enhance detection of employer non-compliance, but work to improve the success of any subsequent enforcement proceedings.

³⁴ Trades Union Conference, *‘Enforcing Basic Workplace Rights: A Guide for Unions and their Members to the Statutory Enforcement Agencies’* (2011) 51.

³⁵ Ibid 51-52.

³⁶ In addition, licensees must demonstrate compliance with relevant laws and regulations dealing with tax, national insurance, forced labour and the employment of migrant workers. The full suite of current licensing conditions is set out in the *Gangmasters (Licensing Conditions) Rules 2009* (UK).

³⁷ In particular, gangmasters must also demonstrate proper workplace management documents and processes are in place, including: worker contracts, itemised pay slips that list deductions, tenancy agreements with worker notice periods not in excess of 10 days, an example of a worker’s file, compliance with gas and electricity safety standards and an understanding of occupational health and safety laws.

³⁸ Trades Union Conference, *‘Enforcing Basic Workplace Rights: A Guide for Unions and their Members to the Statutory Enforcement Agencies’* (2011) 55.

Another unique feature of the GLA regime is its extraterritorial reach. Even where gangmasters are located outside of the UK, they must obtain a GLA licence in order to supply workers into the UK.³⁹ Again, this is critical in light of the way in which temporary foreign workers are frequently recruited in the horticulture and food processing sectors in Australia.

The GLA keeps a public register of all licensed gangmasters, which provides useful information for growers who are obliged to use only licensed labour providers,⁴⁰ as well as trade unions and supply chain heads who may be seeking to determine whether a particular gangmaster is licensed and operating lawfully.⁴¹ This type of register would potentially serve to strengthen the accountability and rigour of the ethical sourcing audits that are currently being carried out by supermarket retailers in Australia.

The GLA regulatory regime is supported by a range of substantial sanctions. For example, the GLA has the power to refuse or revoke a license or grant a license only on specific conditions. In addition, some offences carry custodial penalties up to 10 years imprisonment.⁴² This obviously addresses some of the weaknesses associated with the existing civil remedy regime of the FW Act and deals with some of the problems relating to phoenix activity, which were identified in my written submission.

The success of the GLA model is underlined by the fact that the UK government is currently considering a significant expansion of its powers and remit. Rather than focusing only on licensing in the fresh food supply chain, it is proposed that the GLA is transformed into an organisation that works to prevent serious exploitation across the labour market. While this proposal has not yet been implemented, it does suggest that the licensing model is not only viewed as valuable, but can be usefully extended beyond the fresh food supply chain to other sectors which are notorious for serious and systemic employer non-compliance.⁴³

³⁹ Ibid 54.

⁴⁰ It is a criminal offence for growers (i.e. the host/client organisation) to use an unlicensed labour provider if the workers are in the registered sectors.

⁴¹ TUC, above n 38.

⁴² In particular, the maximum penalty for operating as a gangmaster without a valid licence is 10 years in prison and a fine of up to £5,000. In comparison, the maximum penalty for using an unlicensed gangmaster is six months in prison and a fine of up to £5,000.

⁴³ See Department of Business Innovation & Skills and Home Office, *Tackling Exploitation in the Labour Market – Government Response*, January 2016.

7-Eleven Stores Pty. Ltd.

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9 November, 2015

Education and Employment Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email:

Re: Senate Temporary visa program hearing on 24th September, 2015

I refer to your email of 27 October, 2015 and to the further written questions which have been submitted by Senator Lines.

Referring to those questions under the same heading and number order my responses are as follows:-

Underpayments

7-Eleven has made considerable efforts to ensure the repayment of Mr Thodi, including appointing a consultant to determine the underpayments at that store, retention of specialist legal advisers and direct engagement with the Fair Work Ombudsman.

In response to the specific questions:

1. a. For clarification, Bosen Pty Ltd was the Franchisee of one outlet only and that was at Geelong. The 7-Eleven convenience store at South Yarra (corner Punt and Toorak Roads) was franchised to Australia Xing Pty Ltd which was an entity affiliated with Bosen Pty Ltd. Records indicate that 7-Eleven first acquired an awareness of any payroll issues in relation to those stores in January 2009.
- b. The franchise file does contain a copy of a signed Heads of Agreement in relation to a sale of the Geelong store, but it is undated. File correspondence suggests that the agreement may have been entered into on the 26th day of May, 2009. According to 7-Eleven's store data base changeover (i.e. settlement occurred) on the 14th day of July, 2009.
- c. As noted above, Bosen Pty Ltd was not actually the Franchisee of the South Yarra Store. The franchise file relating to that former franchise does not contain a copy of any Contract or Heads of Agreement. Data base records however indicate that in consequence of a sale, the store changed hands on the 2nd day of August 2011.
- d. 7-Eleven made significant efforts and took considerable action to ensure that Mr Ullat Thodi was paid the money that he was owed.

During the period in the run up to the effecting of a sale of the Geelong store and in the interval before settlement, 7-Eleven engaged with Bosen Pty Ltd and with a consultancy company which it had retained to assist in assessing the amount of the underpayments to staff employed at the store. A position was reached where a figure was arrived at and a promise of payment appeared to have been secured. That payment did not occur and shortly after Bosen Pty Ltd retained new legal practitioners who asserted that their client did not fully understand the process which had been involved and did not admit that there had been any disregard of applicable Awards. Ahead of the scheduled changeover date, those same lawyers despatched a letter objecting to any attempt by 7-Eleven to retain or to divert funds (arising from the settlement) to *"any claims made by former employees"*. What the letter indicated was that *"such claims are presently in dispute and will remain so for an indefinite time after settlement"*. As Bosen Pty Ltd was now contesting the claims, there was no agreement as to either the amount owed, or the ability for 7-Eleven to withhold funds and direct payment to those former employees.

Confronted with that dilemma and having no contractual entitlement to unilaterally deduct and pay the money otherwise, 7-Eleven contacted the Fair Work Ombudsman and asked in writing whether there was any *"legislative ability to withhold"* the funds. The email also alerted the Fair Work Ombudsman to the proposed settlement date and that there would be funds potentially accessible.

By an email which was sent on the 27th July, 7-Eleven was advised by a Targeted Campaign Co-ordinator – Victoria, for the Fair Work Ombudsman that *"as the contraventions in this matter relate to the Workplace Relations Act, we are unable to take any action in regard to the money you are holding"*.

7-Eleven at its own expense retained an external specialist Industrial Law firm to assist specifically in the negotiations with Bosen Pty Ltd in an effort to achieve an outcome which would see the issues resolved and the claims appeased.

- e.&f. 7-Eleven's concern in relation to the occurrence of underpayment (not only of the person referenced in the question) but all other Franchisee employees who have been paid less than proper entitlement is clearly demonstrated by the action it has taken. The independent Panel which it has appointed (chaired by Professor Fels) is empowered by its Terms of Reference to call for, assess and approve claims presented by all current and past employees. 7-Eleven does not involve itself in any way in the deliberations of the Panel nor the specialist accountants appointed to assist the Panel. Notwithstanding that it has no legal obligation to do so, 7-Eleven has committed to ensure that all approved claims are paid. The process is simplistic, devoid of formalities and, perhaps most importantly in the current circumstances, complete confidentiality is observed.

Board responsibilities: risk and compliance

The underpayment of staff by franchisees is of overriding concern for 7-Eleven and significant efforts are underway to remedy instances of underpayment, as well as improve systems in the future.

In response to the specific questions:

2. a. My visits to stores were primarily exercises in goodwill where I would meet with Franchisees and staff with a view to gaining an overall determination of the state of the network. Considerations of particular relevance to those inspections were capital expenditure and

current image. Whilst I did not make specific enquiry of employees in the way referenced in the question, both Franchisees and staff had full opportunity during any of those visits to ask questions and to bring to my attention any matters of concern. At no stage did any employee ask any questions in relation to their remuneration nor seek to raise any issue with me about it.

- b. I have no recollection of making any enquiries of that nature at the store operated by Bosen Pty Ltd at Geelong nor the affiliated franchise (at South Yarra).
- c. I have not myself made any specific enquiry of Franchisees regarding wages. It has always been my expectation that our Franchisees would comply in all respects with their obligations to effect payments in accordance with the applicable Award and in accordance with the Fair Work Act. This is an area of responsibility on which a considerable level of initial instruction and ongoing information and support is and always has been provided by 7-Eleven to its Franchisees.
- d. I have not personally been contacted by any Franchisee or staff member in relation to underpayments. Any issues in this regard have been dealt with by 7-Eleven's management team.
- e. CCTV footage was utilized in relation to an investigation undertaken by 7-Eleven with regard to a store in Perth. It was used to verify information which had been provided to 7-Eleven by staff (in direct contact). The hard drive from the CCTV equipment was retrieved and exchanged for a new unit and a review of the footage available on that hard drive assisted 7-Eleven in confirming that particular practices which had been complained of had in fact occurred. Other than that, CCTV checks are routinely conducted in the course of retail reviews by District Managers as spot checks to verify that the persons detailed on payroll at any particular time were working when stated. It is not possible to indicate on how many occasions CCTV footage has been accessed in that way (as it would entail a detailed review of the innumerable retail review reports across the entire network of stores).

Termination of franchise agreements

- 3. a. One Franchise Agreement has been terminated in consequence of staff payment irregularities but the termination was based on associated conduct which enabled 7-Eleven to rely on a particular provision of the applicable Code. Mere underpayment does not, under either the Oilcode or the Franchising Code of Conduct, provide a basis for immediate termination in itself. In the case of fuel stores (covered by the Oilcode) where three instances of breach can be demonstrated with proper particulars, a right of termination does arise.
- b. The termination referenced in the answer to part a. was effected pursuant to clause 29(1)(g) of the Franchising Code of Conduct.
- c. 8 October, 2015.
- d. One store was involved in the termination. There were 7 employees retained at the time and none of those were affected by the termination as all employees were re-engaged by 7-Eleven (which has taken over operational control of the store).
- e. Perth, Western Australia.

I also reiterate my earlier comments on these issues and emphasise that 7-Eleven does not, in any way, condone this practice. Underpayment, by franchisees, of their employees, in no way benefits 7-Eleven and we are doing all that we can to address this issue.

We have been honest, open and collaborative with the Fair Work Ombudsman in its investigation of franchisees, and, as is touched on in my responses above, have pro-actively sought assistance from the FWO in dealing with these issues as they have arisen. As is also noted above, we have established an independent panel to adjudicate on any underpayment claims and have engaged external consultants to design a system to further address these issues.

These practices are of serious concern to 7-Eleven and we are continuing to look at how we can change our systems to better detect and address these issues.

Yours faithfully

Russell Withers

Questions on notice to Fair Work Ombudsman from Senator Lines

1. Your opening statement (from the hearing on 24 September 2015) notes that, unlike certain other regulatory agencies, FWO inspectors do not have the power to compel evidence.
 - a. Could you outline the importance of a power to compel evidence to the work of the FWO?
 - b. Can you illustrate the difference in outcomes that access to this power might have made in some of the cases that the FWO has pursued (such as the Bosen and Haider cases, and the labour hire companies investigated in the FWO's Baiada report), and why?
 - c. Has the FWO made representations to government regarding this power?

ANSWER

- a. The Fair Work Ombudsman refers the Committee to the evidence of Ms Natalie James, Fair Work Ombudsman, provided to the Education and Employment Legislation Committee Supplementary Budget Estimates hearing on 22 October 2015, on pages 124 and 125 of Hansard.

It is a relatively common occurrence for persons to decline to participate in records of interview with Fair Work Inspectors, and some also refuse or fail to comply with Notices to Produce Records and Documents issued pursuant to section 712(1) of the *Fair Work Act 2009* or produce false records. In those circumstances, it becomes a challenging task for a Fair Work Inspector to assemble the necessary evidence required to prove a contravention of the *Fair Work Act 2009*, including for example evidence of hours worked.

The Fair Work Ombudsman does not have any power to compel individuals to cooperate with Fair Work Inspectors and there is no positive obligation on persons to provide reasonable assistance to an Inspector who is exercising a power while conducting an inspection under section 709 of the Act.

Civil penalty provisions only apply to a person who fails to provide a Fair Work Inspector with their name and address under section 711 of the *Fair Work Act* or to a person who fails to comply with a notice to produce records or documents issued under section 712. An inspector may only enter certain premises for inspection purposes without force and no civil penalty applies for a refusal to grant access, nor for a failure or refusal to comply with a request to do any of the things an Inspector can lawfully require when conducting an inspection as contained in section 709, leaving criminal offences under the Criminal Code as the only redress.

Numerous Commonwealth regulators and agencies have greater compulsive powers than the FWO. These powers take different forms. Examples include:

- Fair Work Building and Construction, Chapter 7, Part 1, Division 3 of the *Fair Work (Building Industry) Act 2012* - power to compel persons to provide information and/or documents and/or attend for examination to answer questions;

- Comcare, Part 9, Division 3, Subdivision 4 of the *Work Health and Safety Act 2011* - power to compel production of documents and that a person answer questions, as well as a power to seize documents and things;
- Australian Securities and Investments Commission, ss 19, 35 and 40 to 47 of the *Australian Securities and Investments Commission Act 2001* - power to compel a person to provide information and/or reasonable assistance and/or to attend an examination to answer questions, as well as a power to seize books (subject to issuing of a warrant);
- Australian Consumer and Competition Commission, ss 135 to 135C and 155 of the *Competition and Consumer Act 2010* - power to compel persons to provide information and/or provide documents and/or attend for examination to answer questions. In addition, there is a power to enter premises in the absence of consent, where the entry is authorised by a warrant or where immediate exercise of search-related powers is required to protect life or public safety. Materials may be seized and force may be used executing a warrant;
- Australian Skills Quality Authority, ss 62 to 71 and 140 of the *National Vocational Education and Training Regulator Act 2011* - power to require a person to produce information, documents or things or to give all reasonable assistance in connection with an application for a civil penalty order. In addition, there is power to enter premises in the absence of consent, where entry is authorised by a warrant. Materials may be seized and force may be used executing a warrant;
- the Secretary of the Department of Immigration and Border Protection, ss 268CA to 268CZH, 486Y and Part E of the *Migration Act 1958* - power to require a person to provide information and/or documents and/or give all reasonable assistance in connection with an application for a civil penalty order. In addition, warrants for entry and seizure may be issued in relation to some matters and force may be used in executing some warrants;
- the Secretary of the Department of Social Services, s 156 of the *Paid Parental Leave Act 2010* - power to require a person to give all reasonable assistance in connection with an application for a civil penalty order.

The provisions set out above contain a range of protections for those who are the subject of an exercise of the relevant power, including checks and balances to ensure that the power is used appropriately, proportionately and only where necessary. In all cases, fines and/or imprisonment may result in cases of non-compliance or the giving of false evidence. Court orders may also be sought in some cases to compel a person to comply.

Conferring further compulsive powers including compulsory examination powers on the Fair Work Ombudsman would assist our Inspectors to address some of the egregious, deliberate, systematic and exploitative examples of non-compliance encountered in our work.

- b. Given the difficulty inherent in addressing a hypothetical question, the Fair Work Ombudsman is not in a position to comment on how access to such a power may have affected the specific outcomes in any particular matter.

- c. Yes. The Fair Work Ombudsman has made representations on this issue at:
 - i. the hearing of this Committee on 24 September 2015, at page 65 of Hansard; and
 - ii. the Supplementary Budget Estimates hearing on 22 October 2015, as referred to in paragraph 1(a) above.

2. Your opening statement (from the hearing on 24 September 2015) notes that 'the Fair Work framework contains mostly civil penalties, which corporations in particular can avoid through phoenixing'.
 - a. If the Fair Work Act contained criminal penalties, is the FWO of the view that it would be able to gather sufficient evidence to meet the higher burden of proof required for a criminal conviction in cases that exhibit similar elements to the Bosen and Haider cases, and to the labour hire companies investigated in the FWO's Baiada report?
 - b. If not, is this a question of resources or of powers or of other matters?
 - c. Is the FWO of the view that the provision of criminal penalties under the Fair Work Act would assist the FWO in its work, including in securing the entitlements owed to temporary visa workers?

ANSWER

The Fair Work Ombudsman refers the Committee to the evidence of Ms Natalie James, Fair Work Ombudsman, provided to the hearing of this Committee on 24 September 2015, at page 65 of Hansard.

The *Fair Work Act 2009* contains only civil penalty provisions, other than some limited offences relating to the conduct of proceedings in the Fair Work Commission. The current maximum civil penalties under the *Fair Work Act 2009* are \$54,000 for a corporation or \$10,800 for an individual. In comparison, many other Commonwealth statutes contain either specific criminal offence provisions, or prescribe much higher maximum civil penalties for contraventions.

For example, the *Corporations Act 2001* contains a range of criminal offences which may attract sanctions including a term of imprisonment or a pecuniary penalty as well as a range of civil penalty provisions which may attract relief including pecuniary penalties and compensation orders. A breach of some obligations, such as a breach of section 208 of the *Corporations Act 2001*, may constitute either a civil remedy contravention or a criminal offence depending on whether the contravenor's involvement was dishonest.

Civil penalties under the *Corporations Act 2001* vary greatly and can be as much as \$1 million for a corporation or \$200,000 for an individual, depending on what provision is contravened. The maximum criminal penalties are \$360,000 or 5 years' imprisonment for an individual and up to \$5 million for a corporation.

By way of further example, the *Competition and Consumer Act 2010* also has higher penalties for civil and criminal conduct. The maximum civil penalty under the *Competition and Consumer Act 2010* is in the region of \$500,000 for an individual and \$10 million (or a higher amount calculated on the value of benefits for the breach) for a corporation. The maximum criminal penalties are \$360,000 or 10 years' imprisonment.

The *Fair Work Act 2009* civil remedy provision regime enables the Fair Work Ombudsman to seek orders for damages (for example, to recover unpaid money owed to employees), declarations that contraventions have occurred and pecuniary penalties which are subject to legislated maximums. In addition, the Court is able to make other orders as it sees fit, including, for example, an order that an employer audit the wages of all of its employees and provide this information to the Fair Work Ombudsman. In many cases the Fair Work Ombudsman is able to seek orders that provide a sufficient specific and general deterrence against non-compliance.

Where the Fair Work Ombudsman is dealing with parties who deliberately set out to avoid their legislative obligations, for example by:

- refusing to comply with notices to produce documents;
- keeping or providing false employment records;
- dissolving corporate employing entities for improper purposes in response to our investigations and/or litigations; or
- transferring assets out of those corporate employing entities to avoid the recovery of unpaid employee entitlements,

the Fair Work Ombudsman has found the existing legal framework is not effectively deterring some unscrupulous employers from engaging in this conduct.

Having the option of criminal penalties that can result in a court ordering a term of imprisonment or a significant pecuniary penalty against an individual may provide a stronger disincentive when dealing with a party who is prepared to deliberately ignore the operation of the *Fair Work Act 2009*.

In criminal proceedings the Applicant must prove its case beyond reasonable doubt, whereas the relevant standard of proof in a civil case is the balance of probabilities. It is therefore more onerous for an Applicant to prove its case in criminal proceedings.

However, given the difficulty inherent in addressing a hypothetical question, the Fair Work Ombudsman is not in a position to speculate about how the provision of criminal penalties under the *Fair Work Act 2009* may have affected the specific outcomes in any particular matter.

3. Your opening statement (from the hearing on 24 September 2015) notes that the civil penalties for offences around record keeping are much lower under the Fair Work Act than, for example, the Migration Act.
 - a. Is the FWO of the view that the ability for higher penalties to be imposed on directors under the Fair Work Act for offences under items such as record keeping would improve the ability of the FWO to recover the full entitlements owed to workers, particularly in instances where a company has been wound up upon investigation by the regulator?

ANSWER

The Fair Work Ombudsman refers the Committee to the evidence of Ms Natalie James, Fair Work Ombudsman, provided to:

- the Education and Employment Legislation Committee Supplementary Budget Estimates hearing on 22 October 2015, on page 124 of Hansard; and
- the hearing of this Committee on 24 September 2015, at page 64 of Hansard.

The Fair Work Ombudsman adds only that the current maximum penalties that may be imposed by a Court for fabricating or refusing to provide records to Inspectors are not effectively deterring some unscrupulous employers who engage in this conduct. When there are no records or the records have been falsified, it makes it challenging for the Fair Work Ombudsman to prove the precise nature and extent of any underpayment of wages.

4. With reference to the remarks of the FWO on page 65 of the transcript (from the hearing on 24 September 2015), could the FWO explain further what the requirements and impediments are to bringing successful action under section 550 of the Fair Work Act?

ANSWER

To succeed against an accessory under section 550 of the *Fair Work Act 2009* (Cth), the Fair Work Ombudsman must first prove the contraventions against the primary contravenor (e.g. the employer). The legal test for accessorial liability requires the FWO to have sufficient evidence to prove that an alleged accessory:

- had actual knowledge of the facts that make up the elements of the particular contravention of the Act alleged to have been breached (or that they deliberately shut their eyes to those facts); **and**
- that they were an intentional participant in the alleged conduct.

Negligence or recklessness is not enough to prove accessorial liability. An impediment to bringing successful section 550 actions is often the ability to obtain sufficient probative evidence to sustain an allegation to the standard required to prove that a person or corporate entity had 'actual knowledge' of particular facts at a point in time.

For example, in a current matter before the court the Fair Work Ombudsman is alleging that a company, its director and a human resources manager knowingly made false or misleading employment records, and made use of those records when they produced them to Fair Work Inspectors.

The Company has admitted that the records were false or misleading, but no respondents pleaded to whether they *knew* that the records were false or misleading, relying on the penalty privilege to avoid doing so (a form of privilege for witnesses who are natural persons, provided for at common law and at section 128 of the *Evidence Act 1995*, which protects against self-exposure to a civil or administrative penalty). Proceedings were subsequently stayed against the company when it went into voluntary liquidation.

The trial proceeded in November against the two accessories and the Fair Work Ombudsman asked the Court to infer that they knew, and are liable for, the false pay records. The accessories maintained their penalty privilege and did not give evidence in the case. This means that the FWO is required to prove its case independently of any evidence from the respondents. The decision in that matter is now reserved.

In the event that the Fair Work Ombudsman is successful in the proceeding, the maximum penalty that the Fair Work Ombudsman can obtain for the three contraventions of the Fair Work Regulations relating to false records is \$2,200 per contravention (based on the penalty unit amount at the time of the alleged contraventions).

5.
 - a. Has the FWO experienced difficulties in successfully bringing matters under the sham contracting provisions in the Fair Work Act?
 - b. If so, what are the main barriers to bringing successful action?
 - c. What changes would help the FWO to achieve more successful outcomes?

ANSWER

Since the commencement of the *Fair Work Act 2009*, the Fair Work Ombudsman has commenced 21 proceedings pursuant to section 357 and/or section 358 of the *Fair Work Act 2009* in respect of alleged sham contracting arrangements. The outcomes of those proceedings are as follows:

- in 7 proceedings liability was established or admitted;
- in 2 proceedings liability was not established;
- in 1 proceeding liability was established in part;
- 11 proceedings are ongoing, or are appeal proceedings.

In respect of “sham” misrepresentations of employment as independent contracting arrangements, Section 357(2) provides a defence if the employer proves that, when the representation was made, the employer did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services.

The Fair Work Ombudsman is currently involved in an appeal before the High Court (*FWO v Quest South Perth Holdings Pty Ltd & Ors* (P38/2015)), in which the Court is being asked to consider the construction of the sham contracting provision at section 357 of the *Fair Work Act 2009* (Cth). In particular, the High Court is considering whether an employer making a statement that a person is a contractor with a third party, such as a labour hire company, is covered by the provision. The High Court reserved its decision on 5 November 2015.

- 6.
- a. What is the difference between an Enforceable Undertaking (EU) and a Proactive Compliance Deed?
 - b. What are the advantages and limitations of an EU as compared to a Proactive Compliance Deed?
 - c. Is a Proactive Compliance Deed legally enforceable?
 - d. What criteria does the FWO use when assessing whether to use an EU or a Proactive Compliance Deed?

ANSWER

Enforceable undertakings are specifically provided for and enforceable under the *Fair Work Act 2009*, and can be accepted if the Fair Work Ombudsman reasonably believes that a person has contravened a civil remedy provision. The Fair Work Ombudsman can take legal action under the *Fair Work Act 2009* to enforce the terms of an enforceable undertaking if it is not complied with.

Proactive compliance deeds are a formal agreement between the Fair Work Ombudsman and an entity, under general law, to take certain steps aimed at ensuring compliance in that business and, in some cases, in that business's supply chain. For example, we refer the Committee to the proactive compliance deeds executed with Asset Industries Australia Pty Ltd, and United Trolley Collections Pty Ltd, available at www.fairwork.gov.au.

Proactive compliance deeds do not require an inspector to hold any belief that contraventions of civil remedy provisions are occurring or have occurred. Proactive compliance deeds are not enforceable under the *Fair Work Act 2009*, but are made and enforced under the general law.

We use enforceable undertakings where an employer has acknowledged they've breached the law, accepted responsibility and agreed to cooperate with us to fix the problem.

The enforceable undertaking is a company's written commitment to address contraventions, often through back-payment, and to prevent future breaches through initiatives such as training sessions for senior managers and a requirement for companies to perform self-audits and report on compliance at specific times.

Enforceable undertakings minimise costs for all parties, enable employees to receive unpaid entitlements promptly and facilitate long-term behavioural change. They also enable legally binding commitments that are different from what a court would typically order if we initiated legal action, such as donating money to community groups and registering for the Fair Work Ombudsman's My Account service.

During 2014–15, we accepted 42 enforceable undertakings, a 180% increase when compared with 2013–14. More than \$3.7 million in underpayments were recovered through enforceable undertakings. The majority (93%) of enforceable undertakings related to wages and conditions breaches, and 48% involved matters relating to overseas workers.

Proactive compliance deeds are a way in which an employer can, for example, make a commitment to compliance with workplace laws and to working with the Fair Work Ombudsman to ensure their business and, potentially, other businesses the employer deals with, comply with workplace laws.

Enforceable undertakings and proactive compliance deeds are published on the Fair Work Ombudsman's website. For further information on enforceable undertakings and proactive compliance deeds, including the criteria applied when deciding on their use, refer to the Fair Work Ombudsman's Compliance and Enforcement Policy, sections 4 and 11.3, at www.fairwork.gov.au.

- 7.
- a. What advantages does an Enforceable Undertaking (EU) have over pursuing a court case?
 - b. Are the evidentiary burdens lower for an EU than for pursuing a court case?
 - c. Is it generally cheaper to secure an EU than it is to pursue a court case?
 - d. When does the FWO consider it is more appropriate to pursue an EU as opposed to pursuing court action?

ANSWER

- a. The Fair Work Ombudsman may offer a person the option to enter into an enforceable undertaking as an alternative to starting legal proceedings.

Enforceable undertakings can deliver superior outcomes in some cases compared to litigation where a person is willing to admit to contraventions. Many of the initiatives included in enforceable undertakings help to build a greater understanding of workplace responsibilities, motivate the company to do the right thing and help them avoid making the same mistake again.

Enforceable undertakings can resolve matters much faster than progressing them through the courts.

When determining whether to enter into an enforceable undertaking, the Fair Work Ombudsman considers whether it would provide a superior outcome over litigation, including the time and cost associated with litigation as well as whether it brings specific and general deterrence and promotes compliance with the Fair Work Act.

For further information, refer to the Fair Work Ombudsman's Compliance and Enforcement Policy, pages 23 to 26. A copy of the policy is available at www.fairwork.gov.au.

- b. Pursuant to section 715(1) and 715(2) of the *Fair Work Act 2009*, a Fair Work Inspector may accept a written undertaking if he or she reasonably believes that a person has contravened a civil remedy provision. An enforceable undertaking requires the agreement of the Fair Work Ombudsman and the relevant employer.

In order to pursue a successful court case, the Fair Work Ombudsman must present evidence that proves to a court the relevant contravention on the balance of probabilities.

- c. Yes.
- d. Please refer to the Fair Work Ombudsman's Compliance and Enforcement Policy, pages 23 to 26.

8. At the recent Senate supplementary estimates hearing on 22 October 2015, Ms James noted that the FWO had achieved some success with freezing orders.
- a. Could the FWO explain what a freezing order does and what it is intended to prevent?
 - b. What are the advantages and limitations of a freezing order?
 - c. Could the FWO explain the process involved in issuing freezing orders? Do they require a court order, or can they be issued by a relevant FWO inspector?
 - d. If a court order is required for a freezing order, what level of evidence does the FWO need to obtain to successfully obtain a freezing order?
 - e. Are the requirements for obtaining a freezing order set at the right level? If the FWO considers that the bar is set too high, does the FWO have any recommendations in this regard? If the bar is set about right, has the FWO considered using freezing orders in other cases, and if not, why not?
 - f. Has Trek North Tours paid the unpaid wages awarded by the court to the visa workers?

ANSWER

- a. A freezing order is an asset preservation order made by a Court, normally made ex parte (without notice to the respondent party). The purpose of freezing orders is to prevent a respondent dissipating or dealing with assets that if done, would frustrate or inhibit a pending or proposed Court process and pose a real danger that any judgment would go wholly or partly unsatisfied.
- b. The advantage is in the form of the order itself, which usually restrains a person from removing assets located in or outside of Australia, or from disposing of, dealing with, or diminishing the value of any assets up to the anticipated value of the substantive claim so the Court process can occur through to judgment. A limitation of freezing orders is that they do not provide any rights over the assets that are frozen, meaning there is no priority or guarantee of recovering the value of any judgment ultimately awarded.
- c. Freezing orders can only be made by a Court, on application by the Fair Work Ombudsman. The Fair Work Ombudsman and Inspectors have no powers to freeze assets.

In making an application for a freezing order, the Fair Work Ombudsman files affidavit evidence with a Court regarding the substantive claim it has against a person or persons (e.g. the amount of identified underpayments), evidence in support of the order being made, the person's assets and persons who may be affected by any freezing order. As an applicant for an order of this kind, the Fair Work Ombudsman would usually be required to give an undertaking as to damages and must be fully frank and make full disclosure to a Court of any defences open to a respondent.

- d. To make an order, the Court must be satisfied that there is a good arguable case against the respondent for the substantive legal claim and a real risk or danger that a judgment or prospective judgment will go unsatisfied. This requires more than a fear of assets being dissipated. Positive proof of an intention to frustrate a judgment would clearly be helpful to obtaining an order but it is possible to obtain an order based on inferences from other objective facts. For example, evidence of new company structures being set up, or a history of corporate restructuring and debt avoidance may be sufficient to obtain an order.
- e. Not applicable.
- f. No.

9. Some witnesses during this inquiry have suggested that the FWO might secure greater cooperation from temporary visa holders if the FWO did not work so closely with the DIBP on certain matters.
 - a. Does the FWO pass on any breaches of work entitlements to the DIBP regarding 457 visa workers?
 - b. Does the FWO pass on any breaches of work entitlements to the DIBP regarding temporary visa workers other than 457 visa workers?
 - c. If legislation were passed that prevented the FWO from passing on the identities of temporary migrant workers involved in its investigations to the DIBP, would that hinder the work of the FWO?
 - d. Would separating the work of the FWO and the DIBP have an impact on the ability of the FWO to carry out its investigative work, and if so, what would those impacts be?

ANSWER

- a. Yes. As part of the Fair Work Ombudsman's visa monitoring role under the *Migration Act 1958*, we check nominated salaries are being paid and the visa holder is performing the nominated position approved in their visa. Where employers are not meeting those obligations, the matter is referred to the Department of Immigration and Border Protection (**DIBP**) for it to assess the appropriate action under migration laws.
- b. The Fair Work Ombudsman refers the Committee to the evidence of Ms Natalie James, Fair Work Ombudsman, provided to this Committee on 24 September 2015 at pages 71 and 72 of Hansard.

The Fair Work Ombudsman enforces workplace laws under the *Fair Work Act 2009* with respect to all workers in Australia, irrespective of their visa status or conditions.

When responding to a request for assistance or investigating an allegation relating to an entitlement under the *Fair Work Act 2009*, the Fair Work Ombudsman does not require a person to disclose their visa status. Rather, Fair Work Inspectors are focussed on enforcing the entitlements provided by the *Fair Work Act 2009*, and not actively seeking information about visa status or compliance.

This work is entirely within the jurisdiction of the Fair Work Ombudsman, so it would not be necessary to disclose information about specific matters or employees to DIBP.

However, the Fair Work Ombudsman and the DIBP have an ongoing dialogue and share intelligence and information in a general sense on a range of matters of mutual interest to our agencies. In this regard, the Fair Work Ombudsman and DIBP work collaboratively to achieve whole of government priorities and outcomes. Some interactions are in relation to, and in accordance with, the MOU between the agencies. Other interactions may relate to other operational, compliance, policy or media issues.

- c. The Fair Work Ombudsman is not in a position to comment on the effect of such a change.
- d. As above.

7-Eleven Stores Pty. Ltd.

AKK 24/10/2015 11:47 AM

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24 November, 2015

Education and Employment Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email:

Re: Senate Temporary visa program hearing on 24th September, 2015

Thank you for the further set of supplementary questions, received 10 November 2015. I note that this is the fourth set of supplementary questions since I and Mr Wilmot gave evidence to the Senate Committee on 24 September 2015. For the record, I note that after giving evidence on 24 September, I have dealt with further questions as follows:

- Email from Dr Hodder on 8 October, 2015 setting out a request for further information arising out of a particular question.
 - My letter of 22 October, 2015 responding.
- Email from Dr Hodder on 19 October, 2015 with summary of Questions on Notice.
 - Response dated 29 October, 2015 to Questions on Notice.
- Email from Dr Hodder on 27 October, 2015 with further questions from Senator Lines.
 - Response dated 9 November, 2015 to questions from Senator Lines dated 9 November, 2015.
- Email from Dr Hodder on 10 November, 2015 with additional questions from Senator O'Neill.

In response to the questions sent on 10 November 2015, I respond as follows:

Further Questions

Site visits

1. Mr Withers stated in his evidence to the committee on 24 September 2015 that he still tries to visit all 7-Eleven stores every year.

1 a. Has Mr Withers actually visited every store on an annual basis over the last 5 years?

Response:

I have not visited every store on an annual basis over the last five years. Store visits however have always been a priority and I have toured 7-Eleven Stores every year for the past 38 years both in my capacity initially as Managing Director and later as Chairman. I have been able to get to most of the stores in most of those years. In many years it has been all stores and in some years there have been multiple store visits to all stores.

The last visit to virtually all stores (with only a few exceptions) was in 2011 which followed 7-Eleven's acquisition of the Mobil retail business. Visits did continue during 2012, 2013 and 2014 but the pressure of other business inhibited my ability to get to all stores. I had intended (and was scheduled to) visit all stores again in 2015 and have been to those in Western Australia. However as a result of intervening events and my retirement from the Board, that will not now take place. Notwithstanding that, as it will no doubt be understood, stores are regularly visited by District Managers, Regional Managers, State Managers and other senior management personnel.

Question 1 b. If so, is Mr Withers able to provide diary or documentary evidence to substantiate this claim?

Response

I did not maintain diary or documentary evidence of actual visits. This was because the visits were primarily for goodwill purposes and to afford to Franchisees an opportunity for them to raise directly any issues of concern that they might have. There did not, in those circumstances, seem to be any particular necessity or justification for visits to be specifically documented.

Gross income guarantee

Question 2 a. When was financial assistance for stores earning less than \$120 000 gross income first implemented?

Response

The \$120,000 threshold was introduced in 2004. It is designed to give assistance to a store, particularly in its early stages of business. It has no relationship or relevance to the level of wages paid by the franchisee.

Question 2 d. How many stores actually received assistance using \$120 000 as the trigger for each year over the last ten years?

Response

The following number of franchisees have received income assistance:

FY Year	Count of FSEs
2006/07	39
2007/08	25
2008/09	79
2009/10	45
2010/11	52

2011/12	46
2012/13	47
2013/14	25
2014/15	15
2015/16	280

Note that the numbers for 2015/16 (year to date) relate to the number of franchisees who have received support at the new level of \$310,000.

Question 2 f.

Were there any stores that were eligible for assistance that did not receive financial assistance?

Response

No.

Questions 2 b., c. and e.

2 b. Prior to the recent announcement by 7-Eleven to raise the level for financial assistance to \$310 000 gross income, had there ever been an increase in the trigger level?

2 c. How many award wage rises had there been during the period when the \$120 000 gross income was in position?

2 e. What criteria were used to determine those stores receiving financial assistance?

Response

Sub-paragraphs b, c and e appear to go beyond anything relevant to the Terms of Reference. Accordingly, I seek a ruling from the Chairman of the Committee, in accordance with the resolutions agreed to by the Senate on 25 February 1988:

"1. Procedures to be observed by Senate committees for the protection of witnesses

...

(9) A chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry. Where a member of a committee requests discussion of a ruling of the chairman on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted."

In these answers, I refer to the above as a "relevance objection"

Store lease renewals

Question 3

3 a. Who signs off on store lease renewals?

3 b. Is franchisee profitability a consideration in store lease renewal decisions?

3 c. What other matters are considered in store lease renewal?

3 d. Have you signed off on renewals for stores that generate less than \$310 000 gross income for franchisees over the past two years? If yes, how many in each year?

Response

I take the relevance objection in relation to Question 3.

Board training

Question 4 c. What information did the 2014-15 Board report contain regarding issues around payroll and payroll compliance?

Response

The 2014-15 Directors' Report for 7-Eleven Stores Pty Ltd issued on 25 September, 2015 contained the following:

"The company has become aware of a significant issue in relation to franchisees underpaying their staff. The company is committed to resolving these issues quickly and sustainably through a number of initiatives.

On 31 August 2015, the company announced that it would refund the franchise fees of those franchisees who no longer wish to participate in the 7-Eleven system.

On 3 September 2015, the company announced that it would convene an independent panel chaired by Professors Alan Fels AO and David Cousins AM to undertake an investigation into allegations of non-compliance by franchisees with their payroll obligations. The company has committed to compensate any existing or former employee of 7-Eleven franchisees who has a legitimate claim for underpaid wages as determined by the independent panel.

The company is currently assessing the potential impact of the above initiatives but is not in possession of enough information to provide a reliable financial estimate as the date of this report."

Questions 4 a., b. and d.

4 a. What formal refreshers and training have board members received about their directorial responsibilities generally over the last five years?

4 b. What specific training have board members received over the last five years with regard to compliance with employment law?

4 d. Can you provide a copy of the Board report for each of the last five years?

Response

In relation to paragraphs a, b and d, I take the relevance objection.

Company Associations

Question 5.

What companies or entities are associated with 7-Eleven and the Withers and Barlow families?

Response

I take the relevance objection in relation to Question 5.

Question 6.

6 a. Has 7-Eleven or any company controlled by the Withers or Barlow families made a donation to a political party over the last five years?

6 b. If so, how much and when

Response

I take the relevance objection in relation to Question 6.

Actions to reimburse current and former employees

Question 7.

7. Mr Withers has resigned his position as Chairman of 7-Eleven, presumably in acceptance of the fact that wage non-compliance and record manipulation has been widespread and systemic.

7 a. Will Mr Withers actively seek to address the legacy of wage non-compliance and record manipulation by proactively seeking to reimburse all current and former 7- Eleven employees in the country?

7 b. What strategy does Mr Withers propose to employ to contact and redress the underpayment of employees who may have left Australia?

Response

I reject the assumption contained in Question 7 and refer to the work of the Fels panel. Beyond that, I take a relevance objection in relation to Question 7.

Compliance with employment law

Question 8.

8. 7-Eleven stated in evidence to the committee on 24 September 2015 that there had been a 16 per cent increase in the payroll during the audit period in June and July of 2015.

8 a. Is 7-Eleven of the view that the 16 per cent increase actually represents a shift to 100 per cent compliance with employment law in terms of employees actually receiving their correct award wages and entitlements?

8 b. Based on these figures, does 7-Eleven have a rough figure of what it would cost to reimburse every employee for underpaid wages for each of the last five years?

Response

I refer to the work of the Fels panel. Beyond that, I take a relevance objection in relation to Question 8.

Whistleblower policy

Question 9.

- 9 a. What is 7-Eleven's whistleblower policy?
- 9 b. Is it documented?

Response

I take a relevance objection in relation to Question 9. Under cover of that objection, I say that 7-Eleven has had a whistleblower policy since 2012, and a copy of the current version is attached.

Wage non-compliance and record manipulation

Question 10.

- 10 a. Is it true that some of your longest serving franchisees have engaged in wage noncompliance and record manipulation?
- 10 b. Does this indicate that wage non-compliance and record manipulation has been entrenched in the business for a long time?

Response

I do not know until I receive the results of the work of the Fels panel.

Questions to Mr Wilmot

Questions 11-18.

Response

Mr Wilmot resigned from 7-Eleven before the date of your email. He no longer works for any part of the organisation. You will have to contact him direct if you wish to pursue questions 11-18.

Yours faithfully

Russell Withers

Whistle-blower Policy



Duty to Report

If you think that something is wrong you have a duty to raise questions and report concerns immediately.

7-Eleven will enforce a strict policy against retaliation for good faith reports. No one may threaten you or take any action against you for raising questions or reporting concerns in good faith.

Whistle-blower Service

7-Eleven is strongly committed to maintaining an ethical workplace. You may report matters to any of your supervisors or managers or any level in the Company at which you feel comfortable. But if, for whatever reason you don't think you can, you may use the Whistle-blower Service to report matters of serious misconduct, anonymously if desired.

The Whistle-blower Service supports and provides a safe and confidential environment, protecting staff members who raise concerns about actual, suspected or anticipated wrongdoing within 7-Eleven.

The Whistle-blower Service is intended to be used to address serious matters that threaten to compromise the integrity of the business, including:

- Dishonest, unethical, fraudulent, illegal or corrupt behaviour;
- Breach of any legislation or internal policy;
- Unsafe work practices, environmental or health risks; and
- Any other conduct, deliberate or otherwise, that may cause material financial or non-financial loss to 7-Eleven. All 7-Eleven staff members (including former staff members) make use of the Whistle-blower Service.

Reporting Channels

7-Eleven has a number of policies to support ethical and honest behaviour. These can be found on the 7-Eleven Intranet, and include the:

- Workplace Treatment policy;
- Diversity policy;
- Grievance Handling policy; and
- Competition and Consumer Law policy.

The Whistle-blower Service is intended as a last option, when all other internal reporting avenues have been exhausted. Alternatively, the Whistle-blower Service can be used if you believe the normal reporting processes are not appropriate.

You can call the Whistle-blower Service on 1800 667 471 during ordinary business hours.

Investigating Procedures

The Whistle-blower Service is operated by an external and independent professional services organisation, with employees who are trained in confidential reporting and whistle-blower protection.

The Whistle-blower Service is required to assess the complaint and recommend a course of action. All matters raised will be treated in a confidential, secure and sensitive manner.

Investigation processes will vary depending on the precise nature of the conduct being investigated. The external organisation handling initial Whistle-blower calls will document your concerns and ensure they are relayed to the appropriate people within 7-Eleven.

All investigations must be conducted in a manner that is fair, objective and affords natural justice to all people involved. A matter will not be investigated by someone who is personally implicated in the concern such as to create a conflict of interest.

Where illegal conduct has occurred, matters may be reported to relevant authorities and in some cases the police.

Whistleblowing is not about airing a grievance. It's about reporting real or perceived malpractice. A report may damage the career prospects and reputation of people who are the subject of serious allegations and therefore if your report is not made in good faith or is found to be malicious, deliberately misleading or frivolous, you may be subject to disciplinary action. No action will be taken against an employee where the report was made in good faith but no wrongdoing was identified