Chapter 1

1.1 On 13 October 2016, the Senate referred the following terms of reference to the Education and Employment References Committee for inquiry and report by 7 August 2017:

> The incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009* with particular reference to:
>
> i. the use of labour hire and/or contracting arrangements that affect workers' pay and conditions;
>
> ii. voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions;
>
> iii. the use of agreement termination that affect workers' pay and conditions;
>
> iv. the effectiveness of transfer of business provisions in protecting workers' pay and conditions;
>
> v. the avoidance of redundancy entitlements by labour hire companies;
>
> vi. the effectiveness of any protections afforded to labour hire employees from unfair dismissal;
>
> vii. the approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions;
>
> viii. the extent to which companies avoid their obligations under the *Fair Work Act 2009* by engaging workers on visas;
>
> ix. whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations;
>
> x. legacy issues relating to Work Choices and Australian Workplace Agreements;
>
> xi. the economic and fiscal impact of reducing wages and conditions across the economy; and
>
> xii. any other related matters.[1]

1.2 Subsequently the Senate extended the committee's reporting date until 4 September and then 6 September 2017.[2]

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1 *Journals of the Senate*, 13 October 2016, pp. 330–331.

2 *Journals of the Senate*, 19 June 2017, p. 1472; and 4 September 2017, p. 1816.

Conduct of the inquiry

1.3 Notice of the inquiry was posted on the committee's website. The committee also wrote to key stakeholders to invite submissions. On several occasions the committee advertised the inquiry in regional newspapers prior to holding public hearings in those areas.

1.4 The committee received 212 submissions, as detailed in Appendix 1, and held nine public hearings:

- 3 February 2017 in Collie;
- 6 February 2017 in Canberra;
- 14 March 2017 in Ballarat;
- 15 March 2017 in Melbourne;
- 18 April 2017 in Sydney;
- 19 April 2017 in Newcastle;
- 20 April 2017 in Brisbane;
- 18 May 2017 in Melbourne; and
- 9 June 2017 in Canberra.

1.5 A list of witnesses who gave evidence at the committee's public hearings is contained in Appendix 2.

Structure of the report

1.6 This inquiry came about as a result of growing indications that some corporate employers are seeking to find ways around the rights and protections the Fair Work Act (the Act, FWA) is intended to provide for workers in Australia.

1.7 The committee received a large volume of evidence describing ways in which some employers circumvent the letter and/or spirit of the FWA. It very quickly became clear over the course of this inquiry that avoidance of the legal obligations set out in the FWA occurs in two distinct ways:

1. Overt avoidance, often entailing breaches of the FWA such as underpayment.
2. Exploitation of legislative loopholes and shortcomings which serve to inadvertently limit the protections offered by the FWA.

1.8 The purpose of the FWA, and comparable legislation around the world, is to protect workers in an economic and social environment where there is an intrinsic

power imbalance between the worker and the employer. Having regard to these avoidance strategies the committee finds that the underlying and substantive problem is that the Act as a whole is not working as expected by the Parliament or the Australian community and it needs a thorough root and branch reform.

1.9 The corporate avoidance of obligations to workers has become a business model taking many forms, from blatant non-compliance to sophisticated commercial arrangements that contract out work in order to avoid statutory and collective bargaining agreement obligations. These iterations of the corporate strategy demonstrate that in the typical twenty-first century corporation is very flexible and capable of reorganizing its workforce in new ways aimed at avoiding the statutory obligations of the FWA. It follows that effective laws in this area need to be capable of providing workers and employers with the means to deal with new business models as well as those that are familiar to us today. This approach requires that long-term and effective solutions must facilitate a similarly agile capacity to keep pace and therefore avoid the risk of repeatedly overlaying statutory amendments that close down specific schemes but add complexity and convoluted processes to compliance enforcement efforts.

1.10 The Act was introduced in order to end the WorkChoices legislation that had stripped workers of so many of the rights and protections that had made Australia fair in the first century of federation. It is the committee's view that the economy has reached a level of sophistication and rapid change, especially in the post-GFC era, that the FWA is no longer fit for purpose and is in need of a thoroughly new approach that is based on a new more vibrant and flexible system for creating workplace rights and ensuring compliance with those rights in a modern and dynamic twenty-first century Australian and world economy. Recognising that a new framework is necessarily some way off, the committee also makes a series of specific recommendations in this report. These recommendations are aimed at interim solutions that the Parliament should adopt without delay in order to address specific problems experienced now. They are not an alternative to the more fundamental changes required.

1.11 For reasons of clarity, this report sets out the key issues raised by witnesses and submitters individually. Chapters are therefore divided thematically as follows:

- Chapter 1 (this chapter) sets out the committee's administrative processes.
- Chapter 2 outlines the background and objectives of the Fair Work system.
- Chapter 3 looks at examples where employers have sought to secure approval of new enterprise agreements through existing employees, or voting cohorts, who are not covered by the new agreements.
- Chapter 4 examines a growing trend which sees employers applying to the Fair Work Commission to have enterprise agreements terminated during negotiations for new agreements, thereby reverting staff to award wages and lowering the bargaining floor.
- Chapter 5 addresses the growing use of labour hire arrangements across numerous industries and the deleterious effect this has on workers' wages and

conditions. While the use of labour hire is legal, the committee encountered examples of employees being laid off only to be encouraged to re-apply for the same job through a labour hire company.

- Chapter 6 looks at the illegal practice of sham contracting, whereby employees are treated as independent contractors for legal purposes in order to avoid the payment of entitlements.
- Chapter 7 explores the complex issue of underpayment. Evidence before the committee indicates that underpayment is rife and practically the norm in many industries which employ vulnerable workers. The chapter looks at why the Fair Work system has failed to curb rampant underpayment.
- Chapter 8 focuses on the gig economy, a term which describes a growing trend in workers paid to complete tasks found through an online for-profit portal, often without the protections prescribed in the FWA.
- Chapter 9 looks at wage growth in Australia and the economic implications of wage stagnation and corporate avoidance of industrial obligations.

Note on references

1.12 References to the committee Hansard are to the proof Hansard. Page numbers may vary between the proof and official Hansard transcripts.

Acknowledgement

1.13 The committee thanks submitters and witnesses who contributed to this inquiry, in particular individual Australian workers who brought forward their personal stories and circumstances.