

CHAPTER 8

Wages, conditions, safety and entitlements of international student visa holders

Introduction

8.1 Much of the latter part of this inquiry has been devoted to examining the widespread exploitation of international student visa holders working in 7-Eleven stores across Australia. This chapter focuses predominantly on the wages, conditions, safety and entitlements of international student visa holders. However, the chapter also considers the prevalence of undocumented migrant labour, including its relevance to the plight of international student visa workers at 7-Eleven.

8.2 Given that chapter six covered the structural factors that create the vulnerability of temporary visa workers and predispose them to exploitation, this chapter begins by giving some background to the international student visa program and then pointing to additional factors that contribute to the vulnerability of international student visa holders in the workplace.

8.3 This is followed by an exploration of various issues surrounding undocumented migrant labour including the coercion of temporary visa workers into breaching their visa conditions. This is particularly pertinent to the plight of international student visa workers at 7-Eleven.

8.4 The remainder of the chapter examines the exploitation of international student visa holders at 7-Eleven. This includes the various forms of underpayment, the 7-Eleven business model, the systemic nature of the exploitation, broader matters relating to the nature of the franchising relationship, and insights from the work of the Fels Wage Fairness Panel (Fels Panel).

International student visa program

8.5 As noted in chapter two, there were 413 123 student visa holders at 31 March 2015. The Australian Chamber of Commerce and Industry (ACCI) pointed to the varied economic benefits that international students bring to Australia including the contribution of education to export revenue. Education is Victoria's largest export, and the second largest export in New South Wales (NSW) and the Australian Capital Territory (ACT). International students have also provided \$18.5 billion to Australian universities over the last five years.¹

8.6 In addition, international students receive visits from family and friends during their time of study and are therefore responsible for attracting an estimated 160 000 additional overseas tourists to Australia each year, each of which 'typically spend around \$2000 during their stay'.²

1 Australian Chamber of Commerce and Industry, *Submission 10*, pp 16–17.

2 Australian Chamber of Commerce and Industry, *Submission 10*, p. 17.

8.7 The Department of Immigration and Border Protection (DIBP) outlined the financial requirements that an international visa applicant must be able to demonstrate:

In order to meet the financial requirements for the grant of a Student visa, applicants must be able to demonstrate or declare that they have sufficient funds to cover the cost of living and to meet their tuition and travel costs while studying in Australia.

Student visa applicants who are processed under Assessment Level (AL) 1 and streamlined visa processing (SVP) arrangements are required to declare that they have sufficient funds and generally do not need to provide formal evidence of funds to the department.

Student visa applicants who are processed under AL2 and AL3 must provide formal evidence to the department of funds to cover tuition and living costs for the first 12 months of study in Australia for both themselves and any dependents. They must also provide evidence of funds to cover their travel to Australia and school study costs for any dependent children.

Under AL2 and AL3, the amount of funds that students must evidence is as follows:

- tuition costs – as per education provider fees;
- living costs – \$18 610 plus an additional 35 per cent of this amount if a spouse is included, plus a further 20 per cent if a dependent child is also included then a further 15 per cent for every other additional dependent child;
- study costs for dependent children – \$8000 per child; and
- travel costs – cost of travel to and from Australia (as applicable) for all family members.

In addition, while in Australia, students are required to continue to satisfy the criteria for the grant of their visa, including having access to sufficient funds. Failure to do so may result in visa cancellation.³

8.8 All eligible international students holding visa subclasses 570–576 are permitted to work 40 hours per fortnight during the course of their studies.⁴ While accurate figures are unavailable, more than 200 000 international students were estimated to be in paid work in 2011 (out of a total Australian workforce of 11.4 million people).⁵

8.9 Given the lack of accurate data, Unions NSW saw a need for research into the work patterns of international students, in particular the industries that students are

3 Department of Immigration and Border Protection, answer to question on notice, 17 July 2015 (received 11 August 2015); Mr David Wilden, Acting Deputy Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 17 July 2015, p. 46.

4 Migration Regulations 1994 [F2015C00584], regulations 570.617, 571.614, 572.617, 573.617, 574.617, 575.617, 576.614 (by operation of visa condition 8104).

5 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 15.

working in, the actual hours being worked, rates of pay, and whether students report experiences of underpayment or exploitation.⁶

8.10 The participation of international students in the Australian labour market has not been the subject of major policy discussion. Associate Professor Tham attributed the relative 'invisibility' (in policy terms) of international students in the labour market to two factors:

- international students are typically seen as only consumers of higher education; and
- the view of temporary migrant labour has been artificially restricted to work performed by visa workers under dedicated temporary labour schemes such as the 457 visa program, rather than also including de facto temporary labour schemes like the international student program and the Working Holiday Maker (WHM) program.⁷

8.11 Unfortunately, the 'invisibility' of work performed by international students is hiding a substantial amount of exploitation. A recent survey by United Voice of more than 200 international students found:

A quarter of those responding received \$10 or less an hour;

60 per cent earned less than the national minimum wage (\$16.37 an hour);

79 per cent said they knew little or nothing about their rights at work;

76 per cent said they did not receive penalties for weekend or night work.⁸

8.12 Parallels exist between the structural risks common to the exploitation of working holiday makers working in the food production industry and international students working across the 7-Eleven franchise network. Associate Professor Tham identified four common elements in both cases:

- strong pressures to reduce labour costs;
- widespread employer acceptance and practice of meeting these pressures by breaching standards of labour protection (e.g. non-payment; under-payment);
- the availability of a vulnerable migrant workforce; and
- the limited effectiveness of the enforcement agency, the FWO, and the relevant union/s.⁹

8.13 Associate Professor Tham also noted that some features that make 457 visa workers susceptible to exploitation are not present in the case of international

6 Unions NSW, *Submission 35*, pp 3–4; see also Australian Council of Trade Unions, *Submission 48*, pp 45–46.

7 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 16.

8 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 16; see also National Tertiary Education Union, *Submission 7*, p. 1.

9 Associate Professor Joo-Cheong Tham, *Supplementary Submission 3*, p. 2.

students, namely international students are not dependent on their employer for continued residence in Australia. Furthermore, compared to 457 visa workers, 'not as many international students aspire to permanent residence and even when they do, their employers when they are students are unlikely to be the employers sponsoring their permanent residence applications'.¹⁰

8.14 Nonetheless, other factors interacted with the financial pressures faced by international students to increase vulnerability. First, international students had to pay international student fees while having limited access to public goods such as Austudy payments.¹¹ Second, international students had limited authority to work and a breach of this restriction could give the employer leverage to exploit them.¹²

Undocumented migrant labour

8.15 The issue of undocumented migrant labour is explored in this chapter because it is pertinent to the particular vulnerability of international student visa workers. The committee received considerable evidence that 7-Eleven franchisees enticed or coerced international student workers to breach their visa conditions by working more hours than their visa conditions permitted. As a result, a large portion of the hours that international students worked was undocumented (and unpaid).

8.16 Dr Stephen Clibborn from the University of Sydney Business School explained that the term 'undocumented migrant labour' referred to a person who, in performing the otherwise legal act of working, breached migration legislation. Undocumented migrant labour occurs in two main ways:

These people are either in Australia without authorisation (by entering without a visa or by overstaying the term of their valid visa) or they are working contrary to the conditions of their visa (e.g. student visa holders working in excess of 40 hours per fortnight).¹³

8.17 Australia is host to a potentially large pool of undocumented labour. For example, according to estimates from the DIBP, the number of visa overstayers alone had increased to 62 700 by June 2013.¹⁴

8.18 Concerns about both types of undocumented labour—entering without a visa/overstaying the term of a valid visa, or breaching the conditions of a visa—arose during the inquiry. The issues around breaching a visa condition are relevant to international student visa holders and are dealt with at length in later sections. First, however, the links between temporary visa programs, undocumented labour, and national attempts to combat human trafficking and modern slavery are considered.

10 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 17.

11 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 17.

12 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 18.

13 Dr Stephen Clibborn, *Submission 11*, p. 1.

14 Dr Stephen Clibborn, *Submission 11*, p. 1.

National Action Plan to Combat Human Trafficking and Slavery 2015–19

8.19 Several individuals and organisations drew the committee's attention to issues around undocumented migrant labour, including the need to ensure that Australia's temporary visa programs do not unintentionally subvert the National Action Plan to Combat Human Trafficking and Slavery 2015–19 (National Action Plan).¹⁵ This observation is particularly pertinent given the National Action Plan identified the response to labour exploitation in supply chains as a key area of focus.¹⁶

8.20 Ms Heather Moore, Advocacy Coordinator for the Freedom Partnership to End Modern Slavery at the Salvation Army (the Freedom Partnership) drew attention to the relationship between the global problem of human trafficking and slavery and the particular vulnerability of temporary visa workers, given that some of them 'have experienced slavery in a variety of industries, including but not limited to construction, personal and aged care, hospitality and tourism and domestic work'.¹⁷

8.21 In this regard, Ms Moore noted that the legal definition of slavery 'is where any reasonable person would feel they cannot leave—they do not have the freedom to walk away—and they are being exploited'.¹⁸

8.22 The Freedom Partnership therefore highlighted the need to ensure changes to temporary visa programs (for example, increased flexibility without any increase in protections) did not undermine Australia's plan to tackle human trafficking and slavery:

The Government should also refer to the recently released National Action Plan to Combat Human Trafficking and Slavery when considering changes to temporary visa products and carefully assess any proposal to dilute protections for negative impacts on the counter-trafficking strategy. Indeed, The Salvation Army is concerned that both current practice and elements of the proposed visa framework are inconsistent with and may actually undermine Australia's efforts to address this very serious crime.¹⁹

8.23 Of particular concern was a case of severe migrant worker exploitation within Australia's exclusive economic zone (EEZ). Four Filipino workers hired as painters on drilling rigs off the coast of Western Australia were paid \$3 an hour, and worked 12

15 Dr Stephen Clibborn, *Submission 11*; The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*; Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 29*; Mrs Felicity Heffernan, Humanitarian Lawyer, Australian Catholic Religious Against Trafficking in Humans, *Committee Hansard*, 10 July 2015, p. 6.

16 Australian Government, *The National Action Plan to Combat Human Trafficking and Slavery 2015–19*, p. 2.

17 Ms Heather Moore, Advocacy Coordinator, The Freedom Partnership to End Modern Slavery, The Salvation Army, *Committee Hansard*, 26 June 2015, p. 24; see also The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 4.

18 Ms Heather Moore, Advocacy Coordinator, The Freedom Partnership to End Modern Slavery, The Salvation Army, *Committee Hansard*, 26 June 2015, p. 25.

19 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 3.

hours a day, seven days a week. In this case, the Freedom Partnership argued that the activities of a complex web of domestic and overseas labour hire contractors used to recruit the Filipino workers mirrored the usual tactics of people traffickers.²⁰

8.24 The Fair Work Ombudsman (FWO) took the case to the Federal Court and lost when the court ruled that the *Fair Work Act 2009* (FW Act) 'did not apply on the basis that the platforms were not 'fixed' to the seabed and the crew were not majority Australian'.²¹

8.25 After the government removed visa restrictions for migrant workers in the EEZ through a determination under section 9A(6) of the *Migration Act 1958* (Migration Act), a Federal Court challenge to the determination by the Maritime Union of Australia and the Australian Maritime Officers' Union was dismissed on appeal.²²

8.26 In terms of anti-trafficking awareness, the Freedom Partnership pointed out that the court decision removed a visa regime that identified and screened workers employed in Australia's EEZ. It also meant those workers would no longer be covered by the FW Act and the terms and conditions of employment provided for in the National Employment Standards (NES), modern awards or enterprise agreements.²³

8.27 The Freedom Partnership therefore recommended that the maritime worker visa regime be reinstated to ensure workers have equal rights with Australian workers in the EEZ and that the FW Act and any other relevant legislation be amended to ensure migrant workers in the EEZ enjoy the same protections as Australian workers.²⁴

8.28 A second area of concern was the potential for certain classes of visa workers to experience conditions akin to modern slavery. The committee was told that domestic workers on subclass 401 and 403 visas in diplomatic households in Canberra suffered 'horrendous abuse' and 'absolutely humiliating, degrading treatment'.²⁵

8.29 According to the Freedom Partnership, a key component of trying to break the cycle of abusive employment relationships was to have an intervention point such as a health and welfare check that would enable the exploited worker to escape their work situation and talk in private with an independent third party.²⁶ The Freedom Partnership therefore recommended:

20 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 9.

21 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 9.

22 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 10.

23 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 10.

24 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 10.

25 Ms Heather Moore, Advocacy Coordinator, The Freedom Partnership to End Modern Slavery, The Salvation Army, *Committee Hansard*, 26 June 2015, p. 28.

26 Ms Heather Moore, Advocacy Coordinator, The Freedom Partnership to End Modern Slavery, The Salvation Army, *Committee Hansard*, 26 June 2015, p. 28; Mr Luke Geary, Managing Partner, Salvos Legal, The Salvation Army, *Committee Hansard*, 26 June 2015, p. 28.

Domestic workers in the 401 and 403 visa subclasses should be required to report into DIBP at regular intervals so contracts and conditions are appropriately monitored and workers have safe opportunities to seek help when needed.²⁷

8.30 A third area of concern raised by the Freedom Partnership and by Australian Catholic Religious Against Trafficking in Humans (ACRATH) was that the rapid deportation of undocumented workers did not allow sufficient time to assess whether the workers had been subject to human trafficking and slavery:

Of concern to NGOs in the anti-slavery sector is the practice of deporting unlawful workers within time frames too brief to appropriately assess for slavery-like conditions and to provide workers with the time and support required to make informed decisions about cooperating with authorities. Indeed, this is of concern regarding workers in other industries as well, including meat packing and hospitality.

Without direct access to such workers, it is difficult and often impossible to confirm what actions authorities have taken to secure an environment in which workers feel safe to report any offences committed against them.²⁸

8.31 For example, a large number of workers were detained and deported within 24 hours of a market garden compound in Carabooda north of Perth in Western Australia (WA) being raided by authorities. The Freedom Partnership noted that this occurred 'despite strong indicators of slavery-like conditions and police referring to the situation as a 'human tragedy''.²⁹ The DIBP advised that 36 of the 38 workers detained as unlawful non-citizens as part of Operation Cloudburst (a forerunner to Taskforce Cadena) in WA were deported, one will be removed shortly, and one remains in detention.³⁰

8.32 In light of current practices, Ms Moore stressed the need to adopt a victim-centred approach in government responses to the exploitation of temporary visa

27 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 17.

28 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 8; see also Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 29*, pp 2 and 4–6; Mrs Felicity Heffernan, Humanitarian Lawyer, Australian Catholic Religious Against Trafficking in Humans, *Committee Hansard*, 10 July 2015, p. 6.

29 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 8; see also Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 29*, pp 2 and 4–6; Mrs Felicity Heffernan, Humanitarian Lawyer, Australian Catholic Religious Against Trafficking in Humans, *Committee Hansard*, 10 July 2015, p. 6.

30 Mr David Nockels, Commander, Immigration and Customs Enforcement Branch, Investigations Division, Border Operations Group, Australian Border Force, *Committee Hansard*, 17 July 2015, p. 42; Department of Immigration and Border Protection, answer to question on notice, 17 July 2015 (received 11 August 2015).

workers.³¹ The Freedom Partnership therefore recommended 'the government review its operational protocols for securing an environment in which workers feel safe to report crimes committed against them'.³²

8.33 Furthermore, both the Freedom Partnership and ACRATH noted that the counter-trafficking framework provides a right of stay for all temporary migrant workers who are exploited, trafficked, and/or enslaved by their employers. However, there is no independent avenue to seek a right of stay in Australia if authorities do not identify a person as a victim of trafficking. The Freedom Partnership therefore argued that given the propensity to rapidly deport undocumented workers, there should be 'an independent pathway to seek a right of stay to pursue employment claims and other avenues to protection':

All temporary migrant workers who are exploited, trafficked, and/or enslaved by their employers should have an automatic right of stay so they may actively, directly, and meaningfully participate in the legal process including private causes of action, Fair Work and industrial relations claims.³³

Undocumented workers and employment law

8.34 Submitters and witnesses had different views about the extent to which undocumented workers were covered by Australian employment law.

8.35 Dr Clibborn argued that based on current case law (as applied in the Smallwood and Australian Meat Holdings cases), undocumented workers are not covered by Australian employment laws. This has meant that undocumented migrant workers did not receive the protections of the FW Act including the minimum wage, modern awards, NES, unfair dismissal provisions and other employment rights, and in some states, access to workers' compensation.³⁴

8.36 By contrast, the FWO pointed out that it had brought successful court proceedings enforcing the FW Act against employers in cases where temporary visa workers had worked in breach of their visa conditions:

For example, in two of our proceedings against 7-Eleven franchisees, *Fair Work Ombudsman v Bosen Pty Ltd & Anor* (unreported, Magistrates' Court of Victoria Industrial Division, 21 April 2011) and *Fair Work Ombudsman v Haider Enterprises Pty Ltd (in liq) & Anor* (Federal Circuit Court, 30 July 2015, not yet published), the Courts ordered back-payments to be made to workers on student visas who had worked hours in excess of those permitted by their visas.

31 Ms Heather Moore, Advocacy Coordinator, The Freedom Partnership to End Modern Slavery, The Salvation Army, *Committee Hansard*, 26 June 2015, p. 24.

32 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 9.

33 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 12; see also Mrs Felicity Heffernan, Humanitarian Lawyer, Australian Catholic Religious Against Trafficking in Humans, *Committee Hansard*, 10 July 2015, p 6.

34 Dr Stephen Clibborn, *Submission 11*, pp 1–3.

Similarly, in *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA258, the Federal Magistrates Court ordered back-payments to be made to a worker for work performed outside of their sub-class 457 visa, and in *Fair Work Ombudsman v Shafi Investments Pty Ltd & Ors* [2012] FMCA 1150, the Court ordered back-payments to be made to a worker on a sub-class 801 spousal visa who worked in excess of the hours permitted by his visa.³⁵

8.37 The Bosen and Haider cases referenced above by the FWO will be covered in greater detail later in this chapter and also in chapter nine. At this junction, however, it is pertinent to note that both cases involved 7-Eleven franchisees that evaded, to a large extent, the fines imposed by the courts because they liquidated their companies. As a consequence, the underpaid workers only ever received a fraction of the money they were owed. Therefore, even if the extent to which Australian workplace law covers undocumented workers is arguable, the committee notes that the outcomes of the 7-Eleven Bosen and Haider cases show the current system is inequitable.

8.38 In a situation where both the employer and the employee are equally in breach of Australia's migration laws, Dr Clibborn argued that the current state of affairs effectively allows a dishonest employer to profit from the arrangement while at the same time punishing vulnerable temporary visa workers:

If detected by the Department of Immigration and Border Protection (DIBP), employers are subject to penalties including fines, while the employees' penalties may include detainment and deportation. Unscrupulous employers will calculate the savings from long-term exploitation of undocumented workers against the risk of detection and penalty. The workers, on the other hand, will of course never be entitled to recover wages, the underpayment of which allowed the employers to increase their profit margins.³⁶

8.39 The cycle of vulnerability was explained by Carey Trundle, Director of the Overseas Worker Team at the FWO, in an interview with Associate Professor Tham:

When you're looking at student visa's you're looking at 40 hours a fortnight. Well if you don't know your workplace rights and you're working in a restaurant and getting paid \$6 an hour and you're being told you've got to work more than that if you want to keep your job, you've also got to work more than that because you can't live on \$6 an hour, you're in a very vulnerable situation because you've got the employer who has the power over you and then you've also got this fear that you're in breach of your visa so therefore immigration — you're fearful of immigration. So all those things contribute to a level of vulnerability.³⁷

35 Fair Work Ombudsman, Tabled document No. 2, Correspondence from the Fair Work Ombudsman to Mr Peter Harris AO, Chairman of the Productivity Commission, 24 September 2015, p. 3.

36 Dr Stephen Clibborn, *Submission 11*, p. 3.

37 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 18, Interview with Carey Trundle, Director, Overseas Worker Team, Fair Work Ombudsman (25 February 2015).

8.40 The issue of undocumented work arose repeatedly with respect to international student visa holders working in breach of their visa conditions (that is, more than 40 hours a fortnight during term time) at 7-Eleven stores. The issue also arises if an employer employs a person that has no authority to work in Australia. Dr Clibborn argued that this creates a perverse incentive for unscrupulous employers to build the exploitation of undocumented workers into their business model knowing that those workers would either be too frightened to speak out about their exploitation, or would be deported if discovered and would therefore be unable to recoup their underpaid wages from their erstwhile employer.³⁸

8.41 Mr David Wilden, Acting Deputy Secretary with the DIBP pointed to the difficulties in reconciling the conflicting principles and interests at play in this type of scenario:

One of the points of difficulty here is that if the worker is participating in the workforce on a tourist visa they are actually in breach of their visa conditions. There is tension there with the concept of giving them their back pay if they have been in breach of visa conditions, given they had no authority to work. From an Immigration perspective, if you are here not abiding by the conditions of your visa, because you are on a tourist visa, you would by the essence of the action be treated differently than someone with a 457, who is legally here, legally working and being underpaid.³⁹

8.42 With respect to the employer, Mr Wilden noted that the DIBP would, 'in the instances where people are knowingly employing people who are here unlawfully or against the purposes of their visa, take a course against that employer'. However, Mr Wilden acknowledged that would 'not necessarily give recourse to the individual'.⁴⁰ Nonetheless, in relation to the raids conducted as part of Operation Cloudburst in WA, the DIBP confirmed that the employer had not been fined in relation to employing undocumented workers.⁴¹

8.43 Some submitters argued that there is a risk that the current imbalance of rights between employer and undocumented migrant worker may increase the demand for, and supply of, undocumented workers because it is such a profitable exercise for unscrupulous employers. For example, Dr Elsa Underhill reported anecdotal evidence that undocumented workers are competing for harvesting work with working holiday makers (WHMs). This is because contractors supplying undocumented workers are undercutting the rates of pay paid by legitimate contractors and growers, placing downward pressure on the pay and conditions of WHMs.⁴² Furthermore, the rewards

38 Dr Stephen Clibborn, *Submission 11*, p. 3.

39 Mr David Wilden, Acting Deputy Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 17 July 2015, p. 43.

40 Mr David Wilden, Acting Deputy Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 17 July 2015, p. 43.

41 Department of Immigration and Border Protection, answer to question on notice, 17 July 2015 (received 11 August 2015).

42 Dr Elsa Underhill, *Submission 42*, p. 2.

from exploiting undocumented migrant labour have ramifications for the wider labour market and the employment conditions of Australian workers. Dr Clibborn observed that Australia risks a 'race to the bottom' in employment standards:

If a sector of the workforce is not entitled to the benefit of employment laws it establishes perfect conditions for employers, price-taking contractors and other middlemen and women to drive the price of labour down.⁴³

8.44 Both Dr Clibborn and Associate Professor Tham had similar concerns that the gap in legal protection at the intersection of Australia's migration and employment laws inadvertently encouraged more undocumented migrant work and led to the exploitation of both unauthorised and other workers. Both Dr Clibborn and the Freedom Partnership proposed that undocumented migrant workers be afforded access to the same employment protections as Australian workers. Associate Professor Tham specifically recommended that the Migration Act and the FW Act be amended to explicitly state that:

- visa breaches do not necessarily void contracts of employment; and
- the standards under the FW Act apply even when there are visa breaches.⁴⁴

Coercion of temporary visa workers into breaching their visa

8.45 Following on from the above discussion of the issues surrounding undocumented migrant work, one of the key points emphasised by several submitters and witnesses were the draconian consequences under the Migration Act that flowed from a temporary visa worker breaching a condition of their visa. The severity of the consequences was seen as a structural incentive for an employer to entice or coerce a temporary visa worker into breaching a condition of their visa in order to gain leverage over the worker.

8.46 The Shop, Distributive & Allied Employees' Association (SDA) noted the current regulatory framework made it very difficult for an international student to have the Minister for Immigration and Border Protection overturn a visa cancellation:

For all visa holders, the Minister may cancel a visa if its holder has not complied with a visa condition. Further, for international students this cancellation can be done automatically through serving the international student with a notice. An international student then has to apply for revocation of the cancellation, and prove that the breach of the visa condition mandating a limit of 40 hours work per fortnight was due to 'exceptional circumstances' that were beyond their control.

Proof of 'exceptional circumstances' would be extremely hard for an individual international student to provide to the Department of Immigration. Their youth, limited experience in these matters and lack of

43 Dr Stephen Clibborn, *Submission 11*, p. 3.

44 Dr Stephen Clibborn, *Submission 11*, pp 1–2; The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, pp 8–9; Associate Professor Joo-Cheong Tham, *Supplementary Submission 3*, p. 8.

resources or access to support services means it would be difficult for an international student to gather the proof required in order to establish the presence of exceptional circumstances.⁴⁵

8.47 The SDA provided a series of examples to demonstrate how an employer could entice or coerce a 457, 417, or international student visa worker into a breach of their conditions. This could occur by:

- an employer encouraging and/or requiring an international student to work additional shifts knowing this will put the worker in breach of a visa requirement of a fortnightly work limit of 40 hours during term time;
- an employer sponsoring a 457 visa holder and directing that worker to perform a job that is different to the occupation identified in the sponsorship agreement and/or for a wage lower than the Temporary Skilled Migration Income Threshold; or
- an employer paying a working holiday maker in cash at a rate below the national minimum wage in order to retain the job.⁴⁶

8.48 The SDA pointed out that all the above scenarios arise from a power imbalance in the relationship between employer and temporary visa worker:

In each of these situations the temporary migrant worker has 'technically' acquiesced to the exploitative work arrangement but in reality, the employer has exercised their position of power and dominance in the relationship to coerce the worker into breaching either the visa's condition pertaining to work and/or Australian law.⁴⁷

8.49 The SDA therefore argued that the 'regulation permitting deportation for breach of a visa's work condition and/or Australian law' had the potential to place temporary visa workers in an invidious position because it made them 'more susceptible to exploitation by unscrupulous employers who wish to tie them to an exploitative employment relationship'.⁴⁸

8.50 In light of the above, the SDA argued that temporary visa workers should not face 'punitive consequences' where they have breached their visa or Australian law because of coercion or exploitation:

...a migrant worker who is in breach of their visa's work condition or is being remunerated or employed in violation of Australian law should not face the possibility of deportation and/or cancellation of their visa, where the breach is attributable to exploitation or coercion by the employer or a third party.⁴⁹

45 Shop, Distributive & Allied Employees' Association, *Submission 58*, p. 18.

46 Shop, Distributive & Allied Employees' Association, *Submission 58*, p. 12.

47 Shop, Distributive & Allied Employees' Association, *Submission 58*, p. 12.

48 Shop, Distributive & Allied Employees' Association, *Submission 58*, p. 12.

49 Shop, Distributive & Allied Employees' Association, *Submission 58*, pp 12–13.

8.51 Recognising that the definition of exploitation was contested, the SDA stated that work performed below the correct wage or employment conditions should be taken as evidence of exploitation. In this context, the SDA argued that visa cancellation should require the DIBP to establish that the temporary visa worker freely 'sought to enter into an employment relationship in breach of the visa's work condition and/or Australian law'.⁵⁰

8.52 The SDA emphasised that the above recommendations did not represent a 'blanket amnesty' for temporary visa workers (noting that not all temporary visa workers are blameless). Rather, it represented a general amnesty unless the DIBP could produce evidence of culpability on the part of the temporary visa worker.⁵¹

8.53 Stewart Levitt of Levitt Robinson Solicitors had similar concerns about the potential for employers to blackmail international student visa holders over the stipulation on their authorised working hours. He argued that the maintenance of student visa status 'should be solely linked to academic performance rather than...whether the student is engaged in work for in excess of 20 hours per week'. His preference was that the work restriction on student visas be removed from the visa conditions.⁵²

8.54 If, however, the 20 hour work restriction on student visas was kept, Mr Levitt stated that the penalties for breaching the work restriction should be altered to lessen the likelihood of unscrupulous employers coercing vulnerable international student visa holders into breaching their visa conditions:

Should the government wish to maintain a 20 hour work restriction on student visas, then instead of the breach of that restriction giving rise to cancellation of visa, first and second offences should only be punishable by a fine and such a conviction should not be taken into account by the Department of Immigration as evidence of character.

This would remove the propensity for blackmail or extortion which is available to unscrupulous employers who engage in wages fraud against foreign students.

Only a third offence of a similar kind committed by a foreign student should attract visa cancellation.⁵³

8.55 Associate Professor Tham agreed that the current provisions of the Migration Act strengthened the hand of employers in their dealings with temporary visa workers. He also pointed out that the penalties imposed on temporary visa workers for a breach of their visa conditions were manifestly unfair. Associate Professor Tham suggested that temporary visa holders such as international students should only face visa cancellation for a serious contravention of migration law, particularly given the

50 Shop, Distributive & Allied Employees' Association, *Submission 58*, p. 13.

51 Shop, Distributive & Allied Employees' Association, *Submission 58*, p. 13.

52 Stewart Levitt, *Submission 61*, p. 2.

53 Stewart Levitt, *Submission 61*, p. 2.

abundant evidence of enticement and or coercion faced by international students working at 7-Eleven.⁵⁴

8.56 In order to address the concerns about fairness and coerced breaches of migration law, Associate Professor Tham recommended that section 116(1)(b) and section 235(1) respectively of the Migration Act be amended by inserting the italicised words below:

Section 116

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

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

Section 235

(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.⁵⁵

8.57 The Migration Act could list the factors to be taken into account in determining whether there is 'serious non-compliance' or 'serious contravention' including:

- 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; and/or
- whether the visa-holder had been previously warned by the Immigration Department in relation to the non-compliance/contravention.⁵⁶

8.58 Associate Professor Tham argued breaches other than those amounting to 'serious non-compliance' or 'serious contravention' could be dealt with through a

54 Associate Professor Joo-Cheong Tham, answer to question on notice, 24 September 2015 (received 6 November 2015).

55 Associate Professor Joo-Cheong Tham, answer to question on notice, 24 September 2015 (received 6 November 2015).

56 Associate Professor Joo-Cheong Tham, answer to question on notice, 24 September 2015 (received 6 November 2015); see also The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, pp 6–7.

system of civil penalties modelled upon section 140Q(1) of the Migration Act which provides for civil penalties when there is a failure to satisfy a sponsorship obligation by sponsoring employers. Noting a maximum of 60 penalty units applies to section 140Q(1), he suggested a proportionate penalty for a breach by a visa-holder would be 5 penalty units.⁵⁷

8.59 With respect to the work restriction imposed on international student visas, Associate Professor Tham, himself a former international student, explained he had shifted his position on this issue. He 'used to think that this was a very reasonable condition, given its purported objective of ensuring that international students actually devote the majority of their time to the purpose of the visa'. However, he now had serious doubts as to whether the visa condition was either necessary or desirable given the need for international students to maintain satisfactory course progress and the evidence of employers using the visa condition to gain leverage over international students:

Let me address the question of necessity. Visa condition 8202, another mandatory condition for international students, makes it a visa breach if the educational institution in which an international student is enrolled advises the immigration department that the international student is not showing satisfactory progress in the course. If we are thinking about the objective of ensuring that students devote a sufficient amount of time to their course of study, that particular visa condition is sufficient to perform that role. So that goes to the question of necessity.

But I suppose what has really tipped me over the line and changed my views is what we are seeing in 7-Eleven and the hospitality industry more broadly, as another example—that visa condition 8105, together with these draconian penalties, is clearly a mechanism of the exploitation of international students.⁵⁸

8.60 The SDA stated that the question of removing the work restriction on international student visas was complex and that the current limit aimed to balance the following factors:

- viable income requirements for students;
- labour market impacts; and
- ensuring that students are able to devote enough time to their studies which is their primary reason for being in Australia.⁵⁹

8.61 The SDA was of the view that the most effective means to maintain that balance would be to ensure that international students were in a position to receive award wages for the work that they performed. This 'would allow employee/students

57 Associate Professor Joo-Cheong Tham, answer to question on notice, 24 September 2015 (received 6 November 2015).

58 Associate Professor Joo-Cheong Tham, *Committee Hansard*, 24 September 2015, p. 35.

59 Shop, Distributive & Allied Employees' Association, answer to question on notice, 24 September 2015 (received 30 October 2015).

to receive a satisfactory amount of income, maintain minimal impact on the labour market and allow employee/students to devote appropriate time to their studies'.⁶⁰

8.62 In order to achieve this, the SDA argued that allowing temporary visa workers to access a visa amnesty when confronted by exploitation in the workplace would provide temporary visa workers with 'reasonable recourse to enforce minimum wages for the hours worked'. In turn, this would mean 'the 40 hour per fortnight limit need not be disturbed'.⁶¹

The exploitation of international student visa workers at 7-Eleven

8.63 On 31 August 2015, a joint investigation by *Four Corners* and Fairfax Media revealed the deliberate falsification of employment records by employers (franchisees) and the systemic underpayment of the wages and entitlements of international students working on temporary visas in many 7-Eleven convenience stores across Australia. Along with several former employees of 7-Eleven, the investigation was assisted by, amongst others, Mr Michael Fraser, a business and consumer relationship advocate, and Mr Stewart Levitt, a class action lawyer at Levitt Robinson Solicitors.⁶²

8.64 The committee held three public hearings on matters related to 7-Eleven in Melbourne on 24 September and 20 November 2015, and in Canberra on 5 February 2016.

8.65 The remainder of this chapter deals with the evidence from those hearings. It begins with an overview of the 7-Eleven business model, followed by sections on the recruitment and underpayment of international student visa holders at 7-Eleven. This is followed by a discussion of the response from 7-Eleven including the establishment of the independent Fels Panel, the new franchise agreement between 7-Eleven and its franchisees, the Fels Panel claims process, and the barriers to claimants coming forward. The chapter finishes by looking at the respective responsibilities of the franchisor and franchisee and issues relevant to the Franchising Code of Conduct (Franchising Code). The FWO inquiry into 7-Eleven is covered in chapter 9.

60 Shop, Distributive & Allied Employees' Association, answer to question on notice, 24 September 2015 (received 30 October 2015).

61 Shop, Distributive & Allied Employees' Association, answer to question on notice, 24 September 2015 (received 30 October 2015).

62 Adele Ferguson and Klaus Toft, '7-Eleven: The price of convenience', *Four Corners*, Australian Broadcasting Corporation, broadcast 31 August 2015.

7-Eleven history and the business model

8.66 The hearing in Melbourne on 24 September 2015 was attended by Mr Russell Withers, a joint shareholder in 7-Eleven Stores Pty Ltd (7-Eleven) and Chairman of 7-Eleven until his resignation from the board on 1 October 2015.⁶³

8.67 Mr Withers signed a licence agreement in 1976 with 7-Eleven in the United States (US) to bring 7-Eleven to Australia with the first stores opening in 1977. As at 24 September 2015, there were 620 7-Eleven stores in Australia operated by 458 independent franchisees, all operating under their own company structure.⁶⁴

8.68 The 7-eleven franchise agreement works on a split of merchandise gross profit. At the time of the public hearing in Melbourne on 24 September 2015, 7-Eleven retained 57 per cent share of the gross profit and the franchisee received 43 per cent.⁶⁵

8.69 The allocation of costs between the franchisor and the franchisee was as follows. 7-Eleven's 57 per cent share of the gross profit paid for:

- the rent or the provision of the store;
- the equipment in the store;
- the maintenance of buildings, premises and equipment;
- the cost of utilities such as power;
- advertising; and
- an optional payroll service that relied on information provided by the franchisee.⁶⁶

8.70 The franchise agreement established the franchisee as an independent contractor. From the franchisee's 43 per cent share of gross profit, the franchisee was responsible for:

- hiring and remunerating all staff in the store;
- store supplies; and

63 7-Eleven Stores Pty Ltd is privately owned by Mr Russell Withers, his sister Mrs Beverley Barlow, and their spouses (7-Eleven, About Us, <http://www.7eleven.com.au/about-us> (accessed 25 February 2016)). See also Adele Ferguson and Sarah Danckert, 'Russ Withers resigns from 7-Eleven board, CEO Warren Wilmot also stands down', *The Sydney Morning Herald*, 1 October 2015, <http://www.smh.com.au/business/workplace-relations/7eleven-russ-withers-resigns-from-board-ceo-warren-wilmot-also-stands-down-20150930-gjxw28.html> (accessed 2 October 2015).

64 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 46.

65 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 46.

66 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 46.

- expenses such as telephone, janitorial costs and supply items such as paper bags.⁶⁷

8.71 The balance after the franchisee has subtracted wage costs and other expenses from the 43 per cent split of gross profit is the franchisee's net income.⁶⁸

8.72 A key point of contention in the 7-Eleven scandal was the extent to which 7-Eleven was itself responsible for the problems across its network of stores. Several submitters and witnesses stated that the 7-Eleven business model placed franchisees in an invidious position where the only way that most franchisees could make money was by breaking workplace laws and underpaying their workers. In other words, even though it was the franchisees that were directly responsible for underpaying their employees, the ultimate responsibility had to lie with 7-Eleven because their business model underpinned the systemic abuse of workplace law.

8.73 As the 7-Eleven scandal broke in the media, Professor Allan Fels, a former chairman of the Australian Competition and Consumer Commission (ACCC), had examined the 7-Eleven business model and stated publicly that the only way that the 7-Eleven business model could work for the franchisee was if they underpaid or overworked their employees:

My impression – my strong impression – is that the only way a franchisee can make a go of it in most cases is by underpaying workers, by illegal behaviour. I don't like that kind of model.⁶⁹

8.74 When the committee put this to 7-Eleven, Mr Withers emphatically rejected it, stating that the 7-Eleven model had a 38 year track record as 'a very viable system':

Whilst I respect Professor Fels enormously, I would submit that he really does not have the information to be able to make that judgement.

8.75 As at 31 December 2015, 7-Eleven had 626 stores. Eight of these stores were operated by 7-Eleven, with the remainder operated by a total of 442 Franchisees. 7-Eleven provided the modelling of labour costs based on advice by employment consultants, ER Strategies and consultation with 7-Eleven franchisees:

- the average cost per hour (before associated on-costs) of operating an optimised roster would be \$25.04 per hour in a non-fuel store and \$21.97 per hour in a fuel store;
- the minimum number of staff that would be required to operate a store would average at 1.1 full time equivalent (FTE) for each shift per week over the

67 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 46; see also 7-Eleven, Frequently asked questions, 'Investment: what ongoing costs do I need to pay as a 7-Eleven franchisee?', <http://franchise.7eleven.com.au/faq.html> (accessed 1 March 2016).

68 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 46.

69 Professor Allan Fels, *Sydney Morning Herald*, video, <http://www.smh.com.au/interactive/2015/7-eleven-revealed/> (accessed 2 February 2016).

course of a year. (This staff number includes appropriate allowances for administration and management time, ordering and receiving stock, shift overlaps and promotional changeovers);

- the average minimum weekly cost of operating a non-fuel store is 168 hrs per week x \$25.04 per hour x 1.1 FTE = \$4645.87 per week (before associated on-costs); and
- the average minimum weekly cost of operating a fuel store is 168 hrs per week x \$21.97 per hour x 1.1 FTE = \$4060.06 per week (before associated on-costs).⁷⁰

8.76 Based on these figures, the average *minimum* annual cost of operating a non-fuel store would be \$241 585 and of a fuel store would be \$211 123. In addition, the franchisee has associated on-costs such as leave accruals, superannuation and workers compensation, as well as expenses such as telephone, janitorial costs, supply items such as paper bags, and interest on the business loan.

8.77 Yet documents seen by the joint *Four Corner-Fairfax Media* investigation showed that about 140 7-Eleven stores across Australia generated a gross profit of \$300 000 or less a year for the franchisee.⁷¹

8.78 A second and related point of contention between 7-Eleven and other submitters and witnesses was over whether the problems at 7-Eleven were systemic, or merely a matter of a few rogue franchisees.

8.79 Mr Ullat Thodi declared that the problem of exploitation at 7-Eleven was systemic, but that international students were terrified to come forward because of their fears of deportation:

I believe it is systemic, because I do have mates who worked in Perth, in Brisbane, in Sydney and in Melbourne; I am from Geelong, and still there are people working there who are my mates, at a little less than \$12. I still have a mate in Perth right now who started on \$8 and went up to \$10; I think now he is on \$14. It is still happening right now, everywhere. They are all scared to stand up because of the 20 hour work limit. I believe that if Immigration say in the newspaper that the 20 hour limit does not apply, people will just run in behind it, and you could get thousands of people right now saying, 'Yes, I have been underpaid.'⁷²

8.80 Mr Fraser stated that he had contacted Mr Warren Wilmot, the then Chief Executive Officer (CEO) of 7-Eleven, with evidence that the wage scam was systemic at 7-Eleven and that the problem could only be solved by 7-Eleven Head Office:

This is what I said to Warren Wilmot in my email, I think several times: if it was one store, I could see why you would say it is not the problem, or if it

70 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016).

71 *The Sydney Morning Herald*, <http://www.smh.com.au/interactive/2015/7-eleven-revealed/> (accessed 2 February 2016).

72 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 6.

was two, or maybe even if it was one state; but how does an Indian franchisee in Melbourne and a Pakistani franchisee in Sydney and a Chinese franchisee in Brisbane all know the same scam, and, when you talk to every worker, how do they know that that is just the 7-Eleven model?

So I said to him: 'If this going on, it is systemic and it's not something that can be fixed with a Fair Work complaint or by reporting the franchisee; it is something that must come from head office. They must fix it there, because it's systemic.'⁷³

8.81 Following the *Four Corners* program, Mr Fraser was contacted by many franchisees. According to Mr Fraser, one of the franchisees admitted the underpayment model was systemic across 7-Eleven:

Listen, we all underpay. It is essentially what we signed up to. We bought into the model. We all knew what we were getting into. That is the 7-Eleven model.⁷⁴

8.82 However, the franchisee was unhappy that in the subsequent media glare, 7-Eleven expected the franchisees to pay the correct wages when some of them could not make the model work without underpaying:

They are not happy that 7-Eleven are turning around and saying, 'Now the media are watching, you have got to start doing the right thing—but, don't worry, this will all blow over in a few months and you can go back to business.' A couple of weeks ago, one guy from Surfers Paradise packed up and left. He said, 'If I've got to pay the wages properly, I can't afford to survive.' So he abandoned the store and went back overseas.⁷⁵

8.83 The argument that underpayment at 7-Eleven was systemic was supported by evidence from the Fels Panel. Despite franchisees actively deterring employees from coming forward, Professor Fels noted that 60 per cent of 7-Eleven stores had a claim for underpayment against them. Furthermore, Professor Fels was strongly of the view that more stores should have a claim against them, but employees were being threatened by their employers.⁷⁶

8.84 The third and related point of disagreement between 7-Eleven and other submitters and witnesses was the claim by 7-Eleven that they were unaware of the extent of the problem and that it had taken them by surprise. For example, Mr Withers stated that 7-Eleven had been 'blindsided by the level of underpayment', that 7-Eleven was not aware of the extent of the problem, and that he hoped 'that this is in a minority of franchisees'.⁷⁷

73 Mr Michael Fraser, *Committee Hansard*, 24 September 2015, p. 15.

74 Mr Michael Fraser, *Committee Hansard*, 24 September 2015, p. 17.

75 Mr Michael Fraser, *Committee Hansard*, 24 September 2015, p. 17.

76 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, pp 27 and 28, and 29–30.

77 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, pp 49 and 52.

8.85 Likewise, Ms Natalie Dalbo, the former General Manager Operations at 7-Eleven claimed 7-Eleven was not aware of pervasive underpayment. She stated that based on its audit history, 7-Eleven believed the practice of underpayment was restricted to a few franchisees:

I think if we look through the timeline of audits that have been undertaken by the Fair Work Ombudsman, there was certainly an indication in 2009 that five stores had been found underpaying, through that audit process. At the time of those audits, we genuinely did not believe the practice was widespread, and we worked with the FWO to put in place the appropriate measures to ensure that our franchisees were educated on their responsibilities as employers, and that they were provided and afforded the correct compliance training to meet those obligations.

...

In 2009 there was a joint audit that was undertaken by 7-Eleven and the Fair Work Ombudsman. Again, there were 17 stores out of 56 that had recorded contraventions. Those contraventions varied from evidence of underpayment in some of those 17 stores, to paperwork and payslip contraventions as well. So again, of the 56 stores, there were 17 where there were findings, and we did put in place some increased focus on education and training, and that 2010 audit led to the introduction of what we call our 'retail review program', where we audited payroll compliance.⁷⁸

8.86 However, given the systemic nature of wage exploitation occurring across almost all 7-Eleven stores and in every state in which 7-Eleven operated, submitters and witnesses struggled to believe that 7-Eleven Head Office were unaware that the half-pay model existed.⁷⁹

8.87 The committee put it to 7-Eleven that Head Office had used the franchise structure to insulate itself from any knowledge of underpayment (and the associated risks and liabilities):

I think it has been described as a very thin veil between your organisation, at the head office level, and the actual franchise structure, which has provided with you a degree of plausible deniability of knowledge...⁸⁰

8.88 In response, Mr Wilmot, the then CEO of 7-Eleven rejected this assertion.⁸¹

78 Ms Natalie Dalbo, General Manager Operations, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 49.

79 See, for example, Mr Gerard Dwyer, National Secretary and Treasurer, Shop, Distributive and Allied Employees Association, *Committee Hansard*, 24 September 2015, p. 26; Mr Michael Fraser, *Committee Hansard*, 24 September 2015, p. 15.

80 Senator O'Neill, *Committee Hansard*, 24 September 2015, p. 53.

81 Mr Warren Wilmot, Chief Executive Officer, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 53.

Recruiting international students to work as 7-Eleven employees

8.89 At the public hearing in Melbourne on 24 September 2015, five former employees of 7-Eleven, Mr Mohamed Rashid Ullat Thodi, Mr Pranay Krishna Alawala, Mr Rahul Patil, Mr Ussama Waseem, and Mr Nikhil Kumar Sangareddypeta, recounted their experiences at 7-Eleven.

8.90 To provide the broader context, Mr Ullat Thodi set out the pressures that international students were under that rendered them vulnerable to exploitation. He told the committee that international students were trapped by the combination of high fees they had to pay for their university course and the visa condition restricting them to 20 hours work per week during their periods of study. Most international students could not find work outside of convenience stores such as 7-Eleven because employers would not hire workers with a restriction on the hours they could work. So the international student was typically forced to take a job at a convenience store where they were required to work hours that exceeded their visa condition and were grossly underpaid as part of the bargain. As a consequence of working more than 20 hours a week, the international student was in breach of their visa condition. And yet if the international student did not secure sufficient work, they were unable to pay their university fees and would therefore also be in breach of their visa conditions.⁸²

8.91 Mr Ullat Thodi travelled to Australia from India in February 2007 on a 573 student visa to study a double degree in Architecture and Construction Management at Deakin University (at its Geelong Waterfront Campus). Mr Alawala arrived in Australia on 17 August 2013 from India on a 573 student visa to study a Masters in Tourism and Hospitality Management at James Cook University.⁸³

8.92 Mr Ullat Thodi, Mr Alawala, Mr Patil, Mr Waseem, and Mr Sangareddypeta had similar stories of how they got work at 7-Eleven. They had all applied without success for many jobs on arriving in Australia, and 7-Eleven was the first job offer they got. Having left their resumes at a 7-Eleven store, they were subsequently contacted by the store manager to come in for a training shift.⁸⁴

8.93 Given the long hours that many employees put in at 7-Eleven, the committee was keen to understand how international students managed to combine a full-time study load of 40 hours a week with 40 to 60 hours a week in the workforce.

8.94 Mr Ullat Thodi stated that he was successful in his first two semesters, getting high distinctions and working between 50 and 55 hours a week. However, once he became aware that he was being underpaid and exploited by his employer, it greatly affected his mental health. As a result of trying to deal with the emotional

82 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 5.

83 Mr Mohamed Rashid Ullat Thodi and Mr Pranay Alawala, *Submission 59*, p. 1; Mr Pranay Alawala, *Supplementary Submission 59.1*, p. 1.

84 Mr Rahul Patil, *Committee Hansard*, 24 September 2015, pp 24–25; Mr Ussama Waseem, *Committee Hansard*, 24 September 2015, p. 25; Mr Nikhil Kumar Sangareddypeta, *Committee Hansard*, 24 September 2015, p. 25; Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, p. 1; Mr Pranay Alawala, *Supplementary Submission 59.1*, p. 1.

consequences of being exploited at work, Mr Ullat Thodi began failing his subjects at university. Further, having failed several subjects, Mr Ullat Thodi calculated that he had already paid almost \$100 000 for his degree, and he still had one subject to take in 2016.⁸⁵

8.95 The committee received different perspectives on why so many international students ended up working in convenience stores such as 7-Eleven. Although Mr Patil acknowledged it was difficult to get a job in a new country without experience, he cited the restriction on working hours as the key factor that effectively confined international students to places like 7-Eleven:

When I came in I applied at almost every place I could work for, but most of the companies do not want to hire people who have work restrictions.⁸⁶

8.96 Likewise, Mr Ullat Thodi was firmly of the view that the most important reason for international students failing to secure work outside of places like 7-Eleven was because employers did not want to take on a worker with a visa restriction that limited the hours they could work:

You do not want to hire someone who cannot work more than 20 hours. You do not want to hire someone if you are going to call them to come in for work and they will say, 'I'm over 20 hours.' You have to be someone who is reliable or can work unlimited.⁸⁷

8.97 The committee heard that many franchisees from the Indian subcontinent (India, Pakistan, and Bangladesh) and southern China tended to recruit international students from those same ethnic backgrounds. Mr Ullat Thodi noted that many franchisees were former international students themselves and so they understood, and were able to exploit, the particular vulnerabilities of international students⁸⁸

8.98 Associate Professor Tham pointed out that academic research had found international students faced discrimination in trying to find a decent job, rather than within the labour market itself. Discrimination at the point of entry into the labour market produced vulnerability by 'channelling international student workers into precarious jobs, including those with illegal working conditions, through their willingness to accept inferior working conditions'.⁸⁹

Underpaying the employees at 7-Eleven

8.99 The industrial agreements covering employment in 7-Eleven stores, the General Retail Industry Award 2010 and the Vehicle Manufacturing, Repair, Services and Retail Award 2010, provide for penalty rates and casual loading.

85 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 8.

86 Mr Rahul Patil, *Committee Hansard*, 24 September 2015, p. 27.

87 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 5.

88 Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, pp 3–4.

89 Associate Professor Joo-Cheong Tham, *Supplementary Submission 3*, pp 9–10.

8.100 Yet, the committee heard remarkably similar accounts of widespread underpayment and overworking of staff right across the 7-Eleven network of stores in Australia. For example, many 7-Eleven employees worked alone on Sunday night shifts for \$10 an hour when they should have been paid \$37.05 an hour.⁹⁰

8.101 The underpayment of workers at 7-Eleven took multiple forms. It included the non-payment of work carried out as a trainee, as well as what are termed the 'half pay scam', the 'cash back scam', and the payment by 7-Eleven Head Office of employees' wages into the bank account of the franchisee (employer). These various scams are explained in the following sections.

Unpaid training

8.102 It was clear from the evidence of former 7-Eleven employees who appeared before the committee in Melbourne that being required to perform unpaid work as a trainee employee was a pervasive practice at 7-Eleven. For example, Mr Ullat Thodi worked four to five shifts a week for two months as a trainee. During those shifts, Mr Ullat Thodi cleaned the toilets, bathrooms, shelves, windows, the 7-Eleven sign on the outside of the store, and the air conditioning vent. He also stacked shelves, mopped the floor, and observed staff and customers. Mr Ullat Thodi was not paid for any of those shifts.⁹¹

8.103 Mr Alawala agreed the practice of unpaid training was widespread throughout 7-Eleven franchises. For example, he had rung about 150 friends working across 70 stores in Brisbane and every one of them said that no 7-Eleven stores paid for training shifts.⁹²

8.104 Furthermore, Mr Ullat Thodi told the committee that the work that trainee employees were given did not constitute actual training for the work they would do as a regular employee. For example, a trainee would effectively be required to act as a security guard on busy weekend nights when the owner would reasonably expect to receive drunk and frequently aggressive customers. In practice, therefore, many trainees have worked as unpaid security guards at 7-Eleven stores.⁹³

Half pay scam

8.105 In April 2007, Mr Ullat Thodi met the co-owner of the 7-Eleven franchise in Geelong who told him he would be paid \$10 per hour before tax and that he would be working 40 hours a week but his payslip would show he had worked 20 hours a week

90 Mr Mohamed Rashid Ullat Thodi and Mr Pranay Alawala, *Submission 59*, p. 5.

91 Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, pp 1–2; Mr Pranay Alawala, *Supplementary Submission 59.1*, pp 1–2; Mr Ussama Waseem, *Committee Hansard*, 24 September 2015, p. 23; Mr Nikhil Kumar Sangareddypeta, *Committee Hansard*, 24 September 2015, p. 24.

92 Mr Pranay Alawala, *Committee Hansard*, 24 September 2015, p. 5.

93 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 5.

to avoid visa problems. The co-owners of the store never informed Mr Ullat Thodi of the minimum wage or advised that his employment was covered by an award.⁹⁴

8.106 Mr Ullat Thodi worked six night shifts a week at the Geelong store from 7:30pm to 8:30am, up to 78 hours a week. However, he was only paid (at half pay) for the hours between 8.00pm and 8.00am. Mr Ullat Thodi stopped working at the Geelong store in December 2007 and began working at another 7-Eleven store owned by the same franchisees in South Yarra, Melbourne. At South Yarra, Mr Ullat Thodi worked between 9.30pm and 8.30am, between 50 and 60 hours a week. Again, Mr Ullat Thodi was only paid (at half pay) for the hours between 10.00pm and 8.00am. Mr Ullat Thodi was not allowed to take any meal or rest breaks while working at either of the 7-Eleven stores. After paying tax, Mr Ullat Thodi received about \$5 an hour.⁹⁵

8.107 Mr Ullat Thodi stated that after he filled in a timesheet at the Geelong store, the manager then entered the information into the computer. There was no timesheet at the South Yarra store.⁹⁶ Mr Ullat Thodi noted that his employer destroyed all the paper records. However, Mr Ullat Thodi did keep a detailed diary of all his shifts (apart from his initial training shifts).⁹⁷

8.108 The co-owners told Mr Ullat Thodi that he would be in trouble with the DIBP if he talked to anyone about his pay. The co-owners did not threaten to report him to the DIBP. Rather, they said that if he spoke out, then the DIBP would find out about it and then he would be deported:

It is not straightforward wording. It is sort of a mental, emotional trick, if I can say it that way. They will say, 'Hey, the other family members, we are helping you out; you can work more than 20 hours provided you don't say anything to anyone about your pay, about the hours you work, because if you say it outside, you will be in trouble.' They would not say that they would be in trouble; they said 'you' will be in trouble because you are working more than 20 hours. Obviously I did not know how much the minimum pay was. So, they would say to not tell anyone, because if you do you will be in trouble. So, you tend to believe in them, thinking that these people are helping you out. You would not think about it the other way: what are the benefits they get out of it?—until maybe later on when you get kicked out of the job and think about what was actually happening.⁹⁸

8.109 In January 2008, Mr Ullat Thodi requested a pay rise from \$10 to \$11 an hour. The co-owner said they would consider it in a few months. In May 2008, Mr

94 Mr Mohamed Rashid Ullat Thodi and Mr Pranay Alawala, *Submission 59*, p. 2; Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, p. 5.

95 Mr Mohamed Rashid Ullat Thodi and Mr Pranay Alawala, *Submission 59*, p. 2; Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, p. 5.

96 Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, p. 4.

97 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 3.

98 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, pp 4 and 8; Mr Mohamed Rashid Ullat Thodi and Mr Pranay Alawala, *Submission 59*, p. 2.

Ullat Thodi was fired. Mr Ullat Thodi did not dispute being sacked because he realised that, after receiving wages of \$5 an hour after tax and paying for the return train fare from Geelong to South Yarra each day, he was hardly making any money.⁹⁹

8.110 Mr Alawala worked at two 7-Eleven stores in Brisbane owned by the same franchisee. He was paid \$10 an hour and worked between 10.00pm and 7.00am. He frequently had to do an extra unpaid hour or two in the morning. After having worked his first fortnight, Mr Alawala did not get any pay. Upon approaching the manager, Mr Alawala was told that the owner was busy and people were not getting paid. After he had worked 94 hours and not been paid, Mr Alawala looked for another job.¹⁰⁰

8.111 Mr Alawala found work at another 7-Eleven store. Once again he had to perform a series of unpaid training shifts including a night shift. Mr Alawala was told by the owner that he would be paid \$18 an hour. Mr Alawala never received a pay slip, and his wages were paid directly into his bank account. However, when he actually received his pay, Mr Alawala did his own calculations and realised he was being paid at \$15 an hour. After this, Mr Alawala's pay rate varied between \$13 and \$18 an hour. Like Mr Ullat Thodi, Mr Alawala was paid a flat rate and never received penalty rates or overtime irrespective of whether it was a Sunday night shift or a public holiday.¹⁰¹

8.112 While he usually worked between 16 and 24 hours a week, Mr Alawala was sometimes required to work seven night shifts in a row when there was a staff shortage. Although his rostered shifts were 10.30pm to 6.30am, Mr Alawala usually had to work an additional two to three hours unpaid work each morning after his shift officially finished.¹⁰²

8.113 Mr Alawala noted that he was 'not allowed to sit down, drink water or rest' during his shift. Furthermore, because he was not allowed to close the door of the store at any time during the shift, Mr Alawala was unable to use the bathroom at any time during his shift.¹⁰³

8.114 Mr Waseem worked at 7-Eleven between March and August of 2014. After a week's unpaid training, he started on \$11 an hour for the first two months, after which his pay was increased to \$12 an hour.¹⁰⁴

8.115 Mr Sangareddypeta worked at 7-Eleven from December 2013 until June 2015. After a week's unpaid training, he also worked for \$10 an hour which increased to \$11 an hour after two months. He was paid \$12 an hour for night shifts. After six months, his pay was increased to \$13 an hour for day shifts and \$14 an hour for night shifts.

99 Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, p. 6.

100 Mr Pranay Alawala, *Supplementary Submission 59.1*, pp 2–3.

101 Mr Pranay Alawala, *Supplementary Submission 59.1*, pp 5 and 7.

102 Mr Pranay Alawala, *Supplementary Submission 59.1*, p. 4.

103 Mr Pranay Alawala, *Supplementary Submission 59.1*, p. 5.

104 Mr Ussama Waseem, *Committee Hansard*, 24 September 2015, p. 23.

Mr Sangareddypeta was fired after he could not do one shift because he was sick. He simply received a text message stating 'I can't keep your position anymore'.¹⁰⁵

8.116 Mr Rahul Patil worked at 7-Eleven for twelve months. He was told that he would be paid \$10 an hour and that was the rate that he would get at any 7-Eleven store. Eventually, his pay was raised to \$11 an hour.¹⁰⁶

8.117 Mr Waseem and Mr Patil never received pay slips from their employer. While Mr Sangareddypeta got a pay slip, it only showed half the hours that he had worked. Furthermore, he had to sign a sheet declaring he had only worked the lesser number of hours.¹⁰⁷

8.118 The accounts of the former employees were supported by subsequent evidence from the Fels Wage Fairness Panel (Fels Panel). The evidence uncovered by Professor Fels was even more disturbing. Not only did the Fels Panel discover that the underpayments occurred across almost the entirety of the 7-Eleven chain of stores (covered later), but the underpayments were even more dramatic with many employees receiving only a third of the wage to which they were entitled:

There is what we call the half-pay scheme—that is, the franchisee only records half the hours worked by the employee in the payroll system. However, it turns out that that is bit misleading because there are quite a few cases where only about a third of the hours were recorded in the payroll system. But, anyway, the effective rate paid to the employees was only a half or sometimes a third of the award.¹⁰⁸

Cash back scam

8.119 Following the screening, on 31 August 2015, of the *Four Corners* program on wage exploitation at 7-Eleven, the committee heard evidence that 7-Eleven was forced to clamp down and persuade franchisees to pay the correct wages to their employees. However, a new scam sprang up almost immediately.

8.120 Mr Fraser stated that within 48 hours of the program being broadcast, he began receiving telephone calls from all around Australia that a new scam had replaced the half pay scam. Even though it appeared employees were being paid the correct wages for their work, in reality the franchisees were now demanding that the employee pay part of it back to the franchisee in cash so that it could not be traced. This became known as the cash back scam.¹⁰⁹

105 Mr Nikhil Kumar Sangareddypeta, *Committee Hansard*, 24 September 2015, p. 24.

106 Mr Rahul Patil, *Committee Hansard*, 24 September 2015, p. 24.

107 Mr Ussama Waseem, *Committee Hansard*, 24 September 2015, p. 25; Mr Rahul Patil, *Committee Hansard*, 24 September 2015, p. 25; Mr Nikhil Kumar Sangareddypeta, *Committee Hansard*, 24 September 2015, p. 25.

108 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 28.

109 Mr Michael Fraser, *Committee Hansard*, 24 September 2015, p. 18.

8.121 Mr Gerard Dwyer, National Secretary and Treasurer of the SDA provided the committee with documents¹¹⁰ that confirmed the SDA had received consistent evidence on the half pay scam and the cash back scam:

...quite often, they have to work double the hours that are on their pay slip. Effectively, they are getting half the pay. That is quite common. The other common approach is that people work the right hours, but, to make sure they get the wages down to the \$9, \$10 and \$11 rates, people are required to give that back as cash and that cash is often used by the franchisee to pay other employees who do not appear on the books anywhere. It is a recycling of the wages outlay to pay others in cash.¹¹¹

8.122 Once again, investigations by the Fels Panel confirmed that the cash back scam was pervasive and ongoing:

That involves the employee receiving their pay for the hours worked but the employee is then forced by the franchisee to pay back a portion in cash. We have received a number of consistent reports from claimants that, since the discovery of the scandal, franchisees who are operating the half-pay scheme are now operating under the cash-back scheme in the hope that it will not be detected by any investigations made by head office.¹¹²

8.123 The committee notes that the cash back scam forms part of the case against a 7-Eleven franchisee in the Brisbane Federal Circuit Court. The FWO alleges that Mai Pty Ltd and its director, Mr Seng-Chieh Lo, underpaid about 12 7-Eleven \$82 000. The FWO further alleges that while Mr Lo appeared to have paid the underpaid wages back to the employees out of his own bank account, he subsequently approached the employees to demand that the moneys be paid back to him in cash.¹¹³

Common bank account

8.124 The third manifestation of underpayment involved the payment by 7-Eleven Head Office of employees' wages into the franchisees bank account. This gave the franchisee (employer) a free hand to control the amount of money that they would give their employees. The number of employees whose wages were paid into their employers' bank accounts and the sums of money involved were staggering. The Fels Panel identified about \$77 million owed to around 1500 workers that was paid into the employers' bank accounts:

The third scheme is the common bank account. In this instance all employees or a group of employees' salaries are paid into one bank account—as a number of you have mentioned this morning. The bank

110 Shop, Distributive and Allied Employees Association, Tabled Document 25, Melbourne, 24 September 2015.

111 Mr Gerard Dwyer, National Secretary and Treasurer, Shop, Distributive and Allied Employees Association, *Committee Hansard*, 24 September 2015, p. 22.

112 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 28.

113 Ms Janine Webster, Chief Counsel, Fair Work Ombudsman, *Committee Hansard*, 5 February 2016, p. 41.

account is either that of the franchisee or it belongs to someone who the franchisee has influence over. Then it is up to the franchisee how much or how little of that they pay on to the employee. We think this is pretty reasonably widespread within the 7-Eleven network. Investigators for the panel have identified in the payroll system—if you go from July 2011 to September 2015—four years—that about 1467, say 1500, employees were paid by that means. About \$77 million was paid into those common bank accounts.¹¹⁴

8.125 One example in particular illustrates the scale and complexity of the franchisee bank account scam. One franchisee with 20 bank accounts of his own employed 90 workers whose wages were paid into his bank accounts. About \$3.6 million of workers' wages over a four year period between July 2011 and September 2015 was paid into the employer's bank account.¹¹⁵

Unpaid superannuation

8.126 Given the extent of wage underpayments, it appears many employees either did not receive superannuation payments, or may have received a lesser amount than that to which they were entitled. Mr Ullat Thodi stated that he was never paid superannuation during the time he worked at 7-Eleven.¹¹⁶

8.127 Although Mr Alawala was paid superannuation during his time at the second 7-Eleven store, he was not sure whether the superannuation amounts had been calculated correctly, particularly given the inaccuracies in the employment records regarding the actual hours that employees worked.¹¹⁷ Unpaid superannuation is another matter the Fels Panel is seeking to rectify on behalf of 7-Eleven claimants (see later section).

Workplace health and safety

8.128 Former employees at 7-Eleven stores told the committee about the absence of sick pay, a lack of compensation for workplace injury, and exposure to threats from customers and sometimes actual physical violence at work.

8.129 Employees would frequently have to deal with fights between customers at the store, some of which required the police to be called. On occasions, staff were assaulted by customers and suffered injuries. Mr Ullat Thodi stated that a friend who worked at the 7-Eleven store in Geelong was attacked by drunk customers coming into the store and subsequently got a \$2000 bill for an ambulance. The employer never paid the ambulance fee.¹¹⁸

114 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 29.

115 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 29.

116 Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, p. 5.

117 Mr Pranay Alawala, *Supplementary Submission 59.1*, pp 7–8.

118 Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, pp 3–4; Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 11.

8.130 Mr Alawala stated that the store he worked in had no lock-up system or safety mechanisms, and yet as the sole night shift worker on duty, he had to deal with customers who were drunk and aggressive. Mr Alawala recounted that a friend at another 7-Eleven store was robbed at knifepoint.¹¹⁹

8.131 Workers also reported suffering workplace injuries, some long-lasting, and that they never received sick pay or compensation for work-related injuries.¹²⁰ Mr Alawala suffered a serious back injury lifting heavy items that had been delivered to the store. After putting all the stock away, he went home in severe pain and was unable to get out of bed for four days. Mr Alawala did not receive any sick pay, and shortly after this incident, he quit his job at 7-Eleven.¹²¹

Staff required to pay for goods stolen by customers

8.132 Employees told the committee that staff at 7-Eleven stores were required to pay the franchisee if a customer drove off without paying for petrol. For example, Mr Alawala stated that he paid the owner a total of \$200 for petrol that had been stolen on four or five occasions when he had been rostered on duty.¹²²

8.133 Likewise, Mr Waseem recounted that he had to pay for items that had been shoplifted and the amounts were deducted from his wages by his employer.¹²³

Visa rorting by 7-Eleven franchisees

8.134 Evidence from several submitters and witnesses indicated that the 457 visa system is being rorted by 7-Eleven franchisees. Essentially, a 7-Eleven franchisee offered to act as a 457 visa sponsor for an international student employee (on an existing student visa) in return for the payment by the employee of several thousands (and possibly tens of thousands) of dollars to the franchisee.¹²⁴

8.135 Mr Ussama Waseem, a former 7-Eleven employee stated that 'there are lots of franchisees who offer permanent visas...for around \$45 000 to \$50 000'.¹²⁵

8.136 Mr Fraser noted that former employees of Mr Mubin Ul Haider, a 7-Eleven franchisee in Brisbane, have alleged that he charged between \$40 000 and \$70 000 to procure a visa.¹²⁶

8.137 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, pointed out that not only had the FWO

119 Mr Pranay Alawala, *Supplementary Submission 59.1*, p. 6.

120 Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, p. 4.

121 Mr Pranay Alawala, *Supplementary Submission 59.1*, pp 10–11; Mr Pranay Alawala, *Committee Hansard*, 24 September 2015, p. 11.

122 Mr Pranay Alawala, *Supplementary Submission 59.1*, p. 8.

123 Mr Ussama Waseem, *Committee Hansard*, 24 September 2015, p. 23.

124 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, pp 1–2.

125 Mr Ussama Waseem, *Committee Hansard*, 24 September 2015, p. 21.

126 Mr Michael Fraser, *Committee Hansard*, 24 September 2015, p. 13.

commenced litigation against Mr Haider for underpayment of his workers, but that the DIBP had also barred Mr Haider from sponsoring more 457 visa employees for 2 years 'due to underpayment of other staff members (on 457 visas from India), lack of wage records and lack of co-operation with the Department of Immigration regarding these issues'. On 15 August 2015, the Migration Review Tribunal of Australia upheld the decision to bar Mr Haider from sponsoring 457 visa workers.¹²⁷

8.138 Mr Levitt also claimed that 7-Eleven franchisees sponsored family relatives from overseas as 'spurious' executives to work in the franchise. In practice, these alleged executives played 'little or no role' in the business. However, the franchisee falsified the records with hours worked by international students attributed 'to 457 visa holders, to make it appear that the 457 visa holder was actually closely engaged' in the running of the business.¹²⁸

8.139 With respect to the above allegations, the committee notes evidence of the deliberate falsification of records by 7-Eleven franchisees. For example, Mr Alawala stated that his employer sometimes directed him to log in to the computer system using the login code of another staff member.¹²⁹

8.140 In addition, Mr Ullat Thodi stated that during the court case against his employer, it emerged that his employer had created fictitious workers for the records. However, these people were 'ghost' workers: they did not exist and never actually worked in the store. Because half the hours that international students worked were never entered into the records, these hours could be allocated to the fictitious workers. Furthermore, the money that should have been paid to the international students for their work went straight to the franchisee through the accounts of the fictitious workers.¹³⁰

The response from 7-Eleven

8.141 At his first appearance before the committee, Mr Withers indicated that 7-Eleven took responsibility, both for the problem and, for fixing it:

It would be easy for us to say that this is the responsibility of the offending franchisees but the reality is, whatever the extent of the problem, this has happened on our watch and we want to make it right.¹³¹

8.142 Mr Withers agreed with the committee's assessment that the overarching systems 7-Eleven had in place were inadequate to detect the pervasive falsification of records and systemic wage abuse.¹³²

127 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 29*, p. 10.

128 Stewart Levitt, *Submission 61*, p. 3.

129 Mr Pranay Alawala, *Supplementary Submission 59.1*, p. 4.

130 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 6.

131 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 47.

8.143 Indeed, of 1500 unannounced audits last year, 7-Eleven issued 158 breach and warning notices issued to franchisees. However, only one warning related to a failure to comply with payroll minimum standards. By contrast 62 notices related to 'Failure to maintain 7-Eleven image'.¹³³

Independent review panel

8.144 As part of its response to the problem, Mr Withers stated that 7-Eleven had appointed an independent panel to determine any claims for underpayment made by employees and former employees. The work of the Fels Panel is covered in greater detail in subsequent sections.¹³⁴

8.145 Mr Withers committed his company to settling any claims determined by the Fels Panel 'promptly and without further investigation'. He also pointed out that there was 'no time limit and there are no statutes of limitation on claims' and that the work of the Fels Panel was confidential.¹³⁵

8.146 At a subsequent hearing in Canberra on 5 February 2016, the new chairman, Mr Michael Smith confirmed that 7-Eleven was working with the Fels Panel and the FWO to identify and take action against ongoing instances of underpayment including the cash back scam.¹³⁶

Audit activity

8.147 Ms Natalie Dalbo, the former General Manager Operations at 7-Eleven, explained that 7-Eleven was in the process of auditing all its stores for payroll noncompliance. As at 24 September 2015, it had completed 505 of 620 audits. Mr Withers also noted that 7-Eleven had acted on a request to report any anomalies it discovered in the payroll system during the audit process to the FWO.¹³⁷

8.148 Mr Withers stated that because franchisees returned payroll information on employees and the numbers of hours worked to Head Office, 7-Eleven simply did not know how many franchisees had been underpaying their employees. Mr Withers agreed that franchisees had not been telling 7-Eleven the truth.¹³⁸

132 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 56.

133 7-Eleven, answer to question on notice, 24 September 2015 (received 29 October 2015).

134 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 46.

135 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 46.

136 Mr Michael Smith, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 6.

137 Ms Natalie Dalbo, General Manager Operations, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 48; Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 51.

138 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, pp 46 and 47.

8.149 Ms Dalbo noted that 86.5 per cent of stores, or 536 stores in total, currently used the 7-Eleven payroll system. Given the numbers of stores using the 7-Eleven payroll system varies between years, it is not possible to make accurate comparisons across years. However, it is clear to the committee that the total weekly payroll costs jumped by \$403 000 a week between June 2015 and September 2015 following the audit activity and the *Four Corners* program:

- the total payroll for the week ending 27 July 2014 (552 stores) was \$1.613 million.¹³⁹
- the total payroll for the week ending 7 June 2015 (536 stores) was \$1.845 million.¹⁴⁰
- the total payroll for the week ending 20 September 2015 (536 stores) was \$2.248 million.¹⁴¹

8.150 From the week ending 7 June 2015 to the week ending 20 September 2015, out of a total of 597 stores, 74.9 per cent (447 stores) showed an increase in payroll expenditure. Of the remaining 150 stores, 24.8 per cent (148 stores) showed a decrease in payroll expenditure. Two stores did not indicate any change in payroll expenditure.¹⁴²

8.151 For the financial year 2014–15, the average profit in stores which traded for that period (subject to temporary closures for maintenance) was \$167 332, with the range being a loss of \$48 815 to a profit of \$1 212 243. For the financial year 2014–15, the average profit of those stores in the lowest income band was \$73 464 with the median being \$80 680. The range of earnings in this band was a loss of \$48 815 to a profit of \$116 081.¹⁴³

Training for franchisees

8.152 Ms Dalbo noted that while the recruitment of franchisees happens through the 7-Eleven website, 'it has historically been the fact that many of our franchisees predominantly come from referrals from other franchisees'. Ms Dalbo noted that permanent residency was a requirement for obtaining a 7-Eleven franchise and that 7-Eleven had recently tried 'to broaden the pool of applicants by doing more online and digital advertising'.¹⁴⁴

139 7-Eleven, answer to question on notice, 24 September 2015 (received 29 October 2015).

140 Ms Natalie Dalbo, General Manager Operations, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 60.

141 Ms Natalie Dalbo, General Manager Operations, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, pp 56 and 60.

142 7-Eleven, answer to question on notice, 24 September 2015 (received 29 October 2015).

143 7-Eleven, answer to question on notice, 24 September 2015 (received 29 October 2015).

144 Ms Natalie Dalbo, General Manager Operations, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 55.

8.153 Mr Wilmot disputed the claim that franchisees appeared to be unaware of their legal responsibilities regarding compliance with workplace law. He pointed out that 7-Eleven provided information to the franchisee on how to cost a roster, and that the franchisee needed to present that information to a bank as part of their business plan in order to qualify for a loan. Further, the franchisee needed to get legal sign off 'so that a lawyer has actually explained the agreement and their obligations to them before they actually join'.¹⁴⁵

8.154 In outlining the training that 7-Eleven provided to franchisees, Ms Dalbo argued that it was not reasonable to argue that a franchisee could be unaware of their workplace obligations to employees:

There is considerable training through our 7-Eleven franchise systems training, which goes for nine weeks, that focuses on payroll and payroll compliance and obligations. We provide copies of the award and access through our in-store portal, and via the e-learning module, to the Fair Work Ombudsman website. We talk about obligations and we provide details around penalty rates, through an external third-party expert. We also provide external support, at our cost, for franchisees to engage directly with the HR provider to get independent advice of 7-Eleven around their rights and obligations. I do not think it is reasonable, based on the training we provide, to believe that any franchisee is not aware of their workplace obligations as employers.¹⁴⁶

8.155 Furthermore, Mr Wilmot emphasised that in the cases the FWO had pursued, it was clear the franchisees understood their obligations, but had deliberately chosen to break the law.¹⁴⁷

Variation of the franchise agreement

8.156 The committee invited 7-Eleven to a second public hearing in Canberra on 5 February 2016. 7-Eleven was represented by Mr Robert (Bob) Baily, the interim CEO of 7-Eleven (replacing former CEO, Mr Wilmot), Mr Michael Smith, the new Chairman of 7-Eleven, and Mr Russell Withers, the former chairman and now shareholder of 7-Eleven.

8.157 Both Mr Smith and Mr Baily confirmed that 7-Eleven took responsibility for paying all claims put forward by the Fels Panel. However, behind this up-front responsibility, he also confirmed that 7-Eleven had an agreement with its franchisees to share responsibility for those claims. 7-Eleven had agreed to pay the first \$25 million in claims, after which the franchisees would pay the next \$5 million in claims, and above \$30 million there would be a fifty-fifty split between 7-Eleven and the franchisees. In other words, 7-Eleven had an agreement with its franchisees that would

145 Mr Warren Wilmot, Chief Executive Officer, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 55.

146 Ms Natalie Dalbo, General Manager Operations, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 55.

147 Mr Warren Wilmot, Chief Executive Officer, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 55.

enable it to recoup some of the money paid out in claims once the total payments exceeded \$25 million.¹⁴⁸

8.158 The apportioning of responsibility to franchisees for the payment of claims above \$25 million was a key part of the variation to the franchise agreement between 7-Eleven and its franchisees. The variation agreement was reached on 16 October 2015 and signed by the vast majority of its franchisees (98.7 per cent as at 31 December 2015).¹⁴⁹ (Two copies of the variation franchise agreement, generally applicable to fuel and non-fuel stores respectively, are available on the committee's website).¹⁵⁰

8.159 In addition, any claim for underpayment arising from the period after 1 September 2015 will be the sole responsibility of the franchisee. In other words, the variation agreement places liability for all future underpayments of workers on the franchisee.¹⁵¹

8.160 On the other side of the ledger, the new franchise agreement massively increased the minimum profit guarantee from \$120 000 to \$310 000 and altered the gross profit split to allocate an increased share to franchisees and a reduced share to 7-Eleven (previously 57 per cent share to 7-Eleven and 43 per cent to the franchisee). The key elements of the variation agreement were:

- a guaranteed gross profit share of \$340 000 for non-fuel stores and \$310 000 for fuel stores;
- gross profit share to be split on a sliding scale:
 - up to \$500 000, 50 per cent to 7-Eleven and 50 per cent to franchisees;
 - from \$500 001 to \$1 million, 53 per cent to 7-Eleven and 47 per cent to franchisees; and
 - over \$1 million 56 per cent to 7-Eleven and 44 per cent to franchisees;
- commission on petrol increased from 1 to 1.5 cents per litre;
- 7-Eleven to fully fund all in-store credit and debit card costs and the operation of the Smartsafe program;
- 7-Eleven to fund and support franchisees should they choose to introduce enterprise bargaining agreements with their staff; and

148 Mr Michael Smith, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 8; Mr Robert Baily, interim Chief Executive Officer, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 8.

149 Mr Robert Baily, interim Chief Executive Officer, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 8.

150 See 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Additional_Documents.

151 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016).

- a guaranteed initial payment structure to give clarity on responsibilities for monies recovered from franchisees for underpayment by the Fels Panel.¹⁵²

8.161 Mr Smith explained how 7-Eleven saw the links between the various changes to the franchise agreement:

The first issue is the responsibility that 7-Eleven corporately has taken on to meet the legitimate claims of people who were not paid. That is undiminished and undivided—full stop. Behind that is an arrangement that 7-Eleven has with its franchisees, to which the franchisees have agreed, and that is to say, 'Let's rethink the way that all this works,' and part of that is for us to alter our model, to push a significant amount of value to their side of the equation, and also to increase the level of minimum guarantee. Part of that also says that franchisees must accept, in the past and future, the responsibility for them paying their staff. We have said it not reasonable for 7-Eleven to meet all of the obligations without seeking some compensation from franchisees, that franchisees' staff were underpaid. In an agreement separate from our commitment to pay the staff, we have agreed with our franchisees that we will pay the first \$25 million of the claims. To the extent that the claims run over the next \$5 million, they have agreed they will pay the next \$5 million, and thereafter we would split the arrangement. So they are quite different things, with the agreement of the franchisees in exchange for very significant financial benefits that we have provided.¹⁵³

8.162 However, Mr Smith emphasised that it was the franchisees that had the legal requirement to both pay the correct wage to their workers and to correct any previous underpayments. In this sense, it could be argued that 7-Eleven was, in effect, relieving franchisees of their legal burden for the first \$25 million of underpayments:

...the legal requirement is for the franchisee to make good on wages that they have not paid. We are saying we will step in and pay all of those. What we are saying to our franchisees, which I do not believe needs a contract, is that we will pay all of the first \$25 million without seeking any recourse for what is already their legal requirement. Thereafter, we will split what is up.¹⁵⁴

8.163 Mr Baily advised that a consultative panel of franchisees would be set up to assess the allocation of retrospective pay claims amongst franchisees. He also noted that he had not received any concerns from franchisees regarding their liability to contribute to the payment of claims above \$25 million.¹⁵⁵

152 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016).

153 Mr Michael Smith, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 9.

154 Mr Michael Smith, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 9.

155 Mr Robert Baily, interim Chief Executive Officer, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, pp 8 and 10.

8.164 Other elements of the variation agreement provided 7-Eleven with greater ability to monitor the compliance of franchisees with employment law. These included that:

- all franchisees are now required to pay their staff through the centralized 7-Eleven Stores payroll service, directly into the franchisee staff's bank account. Cash payment of wages and paying staff wages into the franchisee's own account is prohibited;
- full rostering and visa records must be maintained at the store at all times for immediate inspection at any time;
- all hours worked by franchisee staff must be recorded in the electronic time and attendance system, and must be declared to be true and correct by franchisees and their staff;
- franchisee staff must be paid all entitlements automatically upon termination. Pay slips will contain all employment entitlements and be available for franchisees to view electronically;
- franchisees must promptly and fully repay employees (either directly or through 7-Eleven) where underpayment has been determined, unless they can prove otherwise;
- payroll non-compliance is now treated as a material breach in the recently-signed new agreement. Any payroll non-compliance detected in stores is logged and breach notices are issued to franchisees. These notices require franchisees to rectify the breach in a reasonable time or face termination of the agreement;
- franchisees must fully cooperate with 7-Eleven and any other party appointed to investigate and report in relation to payroll compliance, which would include the Fels Panel; and
- 7-Eleven is undertaking targeted retail and operating compliance and audit inspections by a designated working group to help monitor store operation more closely.¹⁵⁶

8.165 7-Eleven admitted it was aware of instances where the wages of employees were paid into the bank account of the franchisee. However, Mr Smith said that 7-Eleven had been unable to prevent this in the past, but the new variation agreement explicitly prohibited this practice.¹⁵⁷

8.166 Mr Baily noted that 7-Eleven had been having regular weekly meetings with the FWO and the Fels Panel to explore processes for monitoring and auditing compliance with the variation agreement. The compliance monitoring process was being driven by a steering group. One of the recommendations from the steering group

156 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016).

157 Mr Michael Smith, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 11.

was biometric sign in and sign out to try and get around the problem of employees only being paid for half their actual hours worked.¹⁵⁸

8.167 7-Eleven advised that 11 stores had not signed the variation agreement. In two cases (three stores in total), the franchisee was overseas, and in another case, the franchisee owned three stores. Of the eight franchisees that had not signed the variation agreement, there were still two franchisees whose employees' wages (11 employees in total) were still being paid into the franchisees' bank accounts.¹⁵⁹

8.168 7-Eleven also provided details of the meetings held with franchisees about the variation agreement during September, October and November of 2015. Details of the key meetings held with the largest groups of franchisees are set out in Table 8.1 below.

Table 8.1: Specific meetings attended by Bob Baily with other representatives of 7-Eleven Stores Pty Ltd

Date	Venue	Stores / Franchisees
7 October 2015	7-Eleven Mt Waverley Head Office	6 Franchisees
8 October 2015	Rosehill Gardens Racecourse	213 stores
9 October 2015	Brisbane Convention and Exhibition Centre	128 stores
12 October 2015	Melbourne Convention and Exhibition Centre	223 stores
12 October 2015	Perth Convention and Exhibition Centre	4 stores
16 October 2015	7-Eleven Mt Waverley Head Office	7 Franchisees
4 November 2015	7-Eleven Tullamarine store	3 Franchisees
24 November 2015	7-Eleven Mt Waverley Head Office	7 Franchisees

Source: 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016).

158 Mr Robert Baily, interim Chief Executive Officer, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 11.

159 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016).

Table 8.2: Specific meetings attended by other representatives of 7-Eleven Stores Pty Ltd

Date	Venue	Stores / Franchisees
9 September 2015	Radisson Hotel Sydney	3 Franchisees
15 October 2015	7-Eleven Mt Waverley Head Office	3 Franchisees
26 October 2015 – 6 November 2015	Individual Visits to all stores	All stores (where Franchisee available)
30 October 2015	7-Eleven QLD State office	c.40 Franchisees (smaller sub-meeting with 6 Franchisees)
30 October 2015	7-Eleven VIC State office	10 Franchisees
30 October 2015	7-Eleven NSW State office	c.60 Franchisees (smaller sub-meeting with 4 Franchisees)

Source: 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016).

8.169 7-Eleven also reiterated that they had put a buy back structure in place that was open until 31 January 2016. The buy-back offer related to A stores, that is stores that had been purchased directly from 7-Eleven:

Buy Back Offer (A stores only)

The offer to buy back stores is being made to assist franchisees, who no longer wish to participate in the 7-Eleven system, to affect an orderly exit. This offer is only available to stores purchased directly from 7-Eleven, that is 'A' coded stores. If a multi-site franchisee wishes to participate in the buy back, all stores operated by the Franchisee would need to be included, those coded A would be covered by the buy back, with stores coded B and beyond covered by the Franchise Fee refund.

- Any franchisee who purchased a store directly from 7-Eleven Stores Pty Ltd, will be able to elect to return (sell back) that store to 7-Eleven.
- 7-Eleven will refund the original Franchise Fee paid in full (excluding any application or training fees).
- The date of transfer shall be mutually agreed but will not be, in any event, later than 2 months after signing the agreement to hand back the Store.
- For franchisees of multisites, the offer must extend to all stores, as a dissatisfaction with the system cannot occur in one location only, but rather in all.
- This offer will remain open until 31 January 2016.¹⁶⁰

8.170 7-Eleven also had a franchisee refund offer open until 30 June 2016 for B and onwards stores, that is, stores that had been purchased from a previous franchisee:

Franchise Fee Refund (B and onwards stores only)

¹⁶⁰ 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016).

7-Eleven has committed that for any existing franchisee, who no longer wants to participate in the system, 7-Eleven Stores Pty Ltd will refund the Franchise Fee paid, and will help to sell any store where a goodwill payment has been made. This offer is only available to stores purchased from outgoing franchisees, i.e., stores with a letter code 'B' and beyond.

- Any franchisee who believes its operation of a store is not viable, where full and proper wages are paid, can immediately enlist 7-Eleven's assistance to procure a sale of the goodwill of that franchise.
- 7-Eleven Stores Pty Ltd will refund to the outgoing franchisee, an amount that equates to no more than the original franchisee fee paid (excluding any application or trading fees). This refund amount will be capped at the difference between the goodwill being received upon sale and the sum of the original goodwill and franchise fee paid (excluding any application or training fees).
- For the avoidance of any doubt, 7-Eleven retains the right to charge the incoming Franchisee the currently applicable Franchise Fee.
- 7-Eleven, at its discretion, may reduce the fee charged to the incoming franchisee, with regard to the stores gross income or the overall circumstances where doing so would assist the franchisee to achieve a comparable return of goodwill.
- The offer will remain open until 30 June 2016.¹⁶¹

8.171 Given the changes that provided a greater share of the gross profit to franchisees and the massive increase in the minimum gross profit guarantee, a question arose as to why franchisees were continuing to underpay their workers. Was it simply that the franchisees in the 7-Eleven network were greedy or was it that, despite the variation agreement, the business model still imposed an untenable financial burden on franchisees?

8.172 The committee put it to 7-Eleven that large numbers of terrified franchisees had approached the committee on an anonymous basis to claim there was an underlying profitability problem with 7-Eleven and that they were experiencing severe financial constraint under the variation agreement.¹⁶² In response, 7-Eleven stated that they had no knowledge of the issues put to them, but they encouraged any franchisee with issues to approach them. Furthermore, Mr Smith argued that 7-Eleven was confident the new variation agreement allowed any 7-Eleven store to be run profitably.¹⁶³

8.173 The committee also put it to 7-Eleven that large numbers of decent small businesses across Australia had been unfairly put out of business because they had

161 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016).

162 Senator O'Neill, *Committee Hansard*, 5 February 2016, p. 36.

163 See *Committee Hansard*, 5 February 2016, pp 14–21.

been undercut by a 7-Eleven franchise model that relied on the systemic underpayment of wages. Mr Withers disagreed with this proposition.¹⁶⁴

Independent Claims Pty Ltd

8.174 7-Eleven set up Independent Claims Pty Ltd (Independent Claims) as a separate company to pay the claims determined by the Fels Panel. The committee raised concerns about the financial arrangements 7-Eleven had with Independent Claims with regard to paying all the claims determined by the Fels Panel.¹⁶⁵ Mr Smith assured the committee that Independent Claims served an administrative function only:

It has no capacity to step between 7-Eleven and the responsibility it is setting for itself. It is not something that quarantines funds. It is an administrative mechanism and there is no shield or protection that that provides in the process.

...

If, for example—it is inconceivable—but if, for example, Independent Claims, for whatever reason, was unable to make the payment, then 7-Eleven corporately, through another bank account, would do it. It offers us no protection. It is simply an administrative device.¹⁶⁶

Fels Wage Fairness Panel

8.175 On 31 August 2015, 7-Eleven announced its intention to establish an independent panel to examine claims of underpayment of staff by its franchisees. On 3 September 2015, 7-Eleven announced the appointment of Professor Allan Fels AO, a former chairman of the ACCC, as chair and Professor David Cousins AM, a former commissioner at the ACCC, as panel member. The panel is known as the Fels Wage Fairness Panel (the Fels Panel).¹⁶⁷

8.176 The terms of reference for the Fels Panel as set out by 7-Eleven are as follows:

To undertake an investigation into allegations of non-compliance by 7-Eleven's Franchisees with their payroll obligations and in particular to:

1. Invite the submission by any person ('Claimant') who is, or has been, an employee of a 7-Eleven Franchisee of any claim for alleged underpayment of wages whilst so employed ('Claim') whether by reason of:

¹⁶⁴ See *Committee Hansard*, 5 February 2016, pp 14–21.

¹⁶⁵ Senators Lines, McKenzie, O'Neill and Rice, *Committee Hansard*, 20 November 2015, pp 17–18.

¹⁶⁶ Mr Michael Smith, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 11.

¹⁶⁷ Professor David Cousins, Panel Member, Fels Wage Fairness Panel, *Committee Hansard*, 20 November 2015, p. 9.

- a. payment at a rate lesser than that required under the relevant Modern Award or any applicable enterprise agreement;
 - b. understatement of hours worked;
 - c. persons other than the Claimant having been paid for hours worked by the Claimant;
 - d. non payment of penalty rates when applicable; or
 - e. otherwise;
2. Review and assess each Claim and as considered appropriate, interview the Claimant and/or request the production from the Claimant of such notes, pay slips, records of payment or other documents or material as may be relevant to or support the Claim;
 3. In relation to any Claim where the payroll service made available by 7-Eleven was availed of, requisition from 7-Eleven copies of such of the payroll records and documents pertaining to the Claimant as may be relevant to the Claim;
 4. Where practicable make enquiry of and seek from the franchisee by whom the Claimant is or was employed such explanation, information, payroll and staff attendance records or other documents or material as may be deemed necessary or appropriate;
 5. Interview and take statements from former co-employees of the Claimant or other persons considered to have an awareness of, or otherwise are able to provide information relevant to, the Claim;
 6. Arrive at a determination in relation to each Claim as to:
 - a. whether and for what amount the Claimant has been underpaid;
 - b. the period during which the Claimant was underpaid; and
 - c. the circumstances in which or the method by which such underpayment occurred;
 7. As soon as practicable following the making of a determination in relation a Claim provide to 7-Eleven's Chief Executive Officer a report of the Panel's findings together a certification as to the amount of money by which the Claimant is considered by the Panel to have been underpaid.¹⁶⁸

8.177 The Fels Panel was supported by an independent secretariat managed by Deloitte that provided 'specialist investigation and forensic accounting services and other relevant services'. Dr Cousins advised that both the Fels Panel and Deloitte were appointed independently by 7-Eleven.¹⁶⁹

168 7-Eleven, answer to question on notice, 24 September 2015 (received 29 October 2015).

169 Professor David Cousins, Panel Member, Fels Wage Fairness Panel, *Committee Hansard*, 20 November 2015, pp 9 and 17.

Contacting potential claimants

8.178 The communications company Bastion S&GO was also appointed to assist the Fels Panel. Dr Cousins outlined the role of the secretariat:

Deloitte has established a website to register claims and advise claimants of progress of these matters. A dedicated telephone hotline and call centre has also been established by Deloitte. Bastion S&GO has developed social media tools to facilitate contact with claimants and potential claimants.¹⁷⁰

8.179 The Fels Panel described the approach taken to contacting potential claimants:

The Panel has been actively encouraging claimants to come forward to it. This has been done through the media, including social media and the website; third party advocates; and letters to employees of franchisees. Earlier this week a letter was sent by the panel to 15 000 current and former employees. We expect to hold public meetings in the major centres in coming weeks and to have a more targeted communications with employees of franchises—the subject of relatively high numbers of claims.¹⁷¹

8.180 The Fels Panel explained the rationale behind using a social media campaign (including a Facebook page and Twitter) and community engagement to contact potential claimants as opposed to, for example, using government agencies:

Very few claimants, if any that the Fels Panel is aware of, obtained their employment via a recruitment agency here or overseas. Most claimants that have interacted with the Fels Panel and Secretariat obtained employment through a friend or relative. It is for this reason that the social media campaign and community engagement program devised by engagement specialists consulting to the Fels Panel have devised a strategy in reaching what is a tight knit community.

An enquiry of government agencies in other countries is likely to yield the same result as outlined above. It may be tantamount to reporting claimants to government authorities (which the Fels Panel has undertaken not to do); and/or the Fels Panel is unlikely to be given information from these departments due to privacy.¹⁷²

Processing claims

8.181 Ms Siobhan Hennessy, a partner in Deloitte, explained the process used in assessing a claim of underpayment. Deloitte prioritised the more straightforward claims that could be verified against existing 7-Eleven payroll system records to substantiate that the person had been on the payroll at a particular store during the nominated period. Deloitte then used any data such as payslips and verbal evidence to

170 Professor David Cousins, Panel Member, Fels Wage Fairness Panel, *Committee Hansard*, 20 November 2015, p. 9.

171 Professor David Cousins, Panel Member, Fels Wage Fairness Panel, *Committee Hansard*, 20 November 2015, p. 9.

172 Fels Wage Fairness Panel, answer to question on notice, 20 November 2015 (received 17 December 2015).

extrapolate 'and say, by and large, their claim holds'. In the more complex cases, an assigned investigator applied a methodology that was 'fair and reasonable'.¹⁷³

8.182 The committee questioned the Fels Panel about whether the 7-Eleven payroll system was sufficiently sensitive to correctly allocate a person overtime if they had, for example, worked more than 12 hours during a day. Ms Hennessy pointed out that the Fels Panel provided an estimated determination to each claimant that set out the ordinary hours, overtime, and leave amounts. Furthermore, Dr Cousins stated that if a claimant did not accept their determination, the Fels Panel would review it again.¹⁷⁴

8.183 The documents associated with the claims process are set out below. The Fels Panel documents sent to claimants are available on the committee's website and includes the:

- Letter to claimant;
- Determination amount form;
- Declaration; and
- Frequently asked questions.¹⁷⁵

8.184 The 7-Eleven documents sent to claimants are available on the committee's website and includes the:

- Deed of Acknowledgement and Assignment (Deed) Covering letter;
- Deed; and
- Payment details form.¹⁷⁶

8.185 The Fels Panel outlined the steps that occurred once a person accepted a settlement:

When the Fels Panel determines a claim successful, the claimant is sent a letter that explains how the Fels Panel determined the specific gross amount of underpayment by 7-Eleven. The successful claimant can either accept the determined figure by the Fels Panel or they can request for it to be reviewed again if they disagree with the amount. If they accept the determined amount they must sign and return a declaration that confirms that the information submitted by them was true and accurate. The Fels Panel then

173 Ms Siobhan Hennessy, Partner, Deloitte, *Committee Hansard*, 20 November 2015, pp 10–11.

174 Ms Siobhan Hennessy, Partner, Deloitte, *Committee Hansard*, 20 November 2015, p. 11; Professor David Cousins, Panel Member, Fels Wage Fairness Panel, *Committee Hansard*, 20 November 2015, p. 12.

175 See Fels Wage Fairness Panel, answer to question on notice, 20 November 2015 (received 17 December 2015), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Additional_Documents

176 See Fels Wage Fairness Panel, answer to question on notice, 20 November 2015 (received 17 December 2015).

forwards the claimant's declaration and the determined gross amount to 7-Eleven.

Independent Claim Pty Ltd on behalf of 7-Eleven will then send a deed of release and assignment to the claimant to sign and return before payment as well as a request for the bank details for the payment to be made to 7-Eleven have informed the Fels Panel that payments will be issued every Thursday for successful claimants that have returned their deed of release by COB the Tuesday before. They will calculate the tax amount to be deducted from the gross payment. Independent Claim Pty Ltd will forward the PAYG to the claimant and to the Fels Panel as confirmation of payment.¹⁷⁷

8.186 Independent Claims is a separate company set up by 7-Eleven to pay the Determination Amount recommended by the Fels Panel. This meant that even though an employee was technically owed money by their employer (the franchisee), the employee would not need to pursue their direct employer because Independent Claims would pay any claim determined by the Fels Panel.¹⁷⁸

8.187 In addition to explaining the process for determining the claim, setting out the claim amount, and offering a claimant the opportunity to have the claim amount reviewed, the Fels Panel Letter to claimant also explained that the Deed was an acknowledgement that a claimant could not 'make a further claim for the same entitlements from the franchisee employer' or 'seek further repayment in relation to this claim via the Panel in respect of the named 7-Eleven store'.¹⁷⁹

8.188 Furthermore, the Deed assigned to 7-Eleven the right to ask the franchisee to pay back to 7-Eleven some or all of the money paid to a claimant (in effect, to pursue the debt). The Deed therefore meant that in return for a payment by Independent Claims of an amount determined by the Fels Panel, a claimant gave Independent Claims the right to pursue the employer(s):

This will give 7-Eleven the option to (if required) pursue the franchisees for the money that Independent Claims has paid to you. You will not be able to pursue your employer/s for more back-pay. The amount paid to you by 7-Eleven will mean that you have received all the money owing to you.¹⁸⁰

8.189 The Fels Panel Letter to claimant noted that if 7-Eleven asked a franchisee to pay 7-Eleven back an amount of the underpayment, the identity of the claimant would not be disclosed to the franchisee:

...this process is entirely confidential and your identity will not be disclosed to your former employer/s at any time by the Panel, 7-Eleven or

177 Fels Wage Fairness Panel, answer to question on notice, 20 November 2015 (received 17 December 2015).

178 Fels Wage Fairness Panel, Frequently asked questions.

179 Fels Wage Fairness Panel, Letter to claimant.

180 Fels Wage Fairness Panel, Frequently asked questions; see also Fels Wage Fairness Panel, Letter to claimant.

Independent Claims Pty Ltd. In recovering amounts from 7-Eleven stores, 7-Eleven (and Independent Claims) will not disclose to your 7-Eleven store employer/s or prior employer/s details of individual identities or amounts paid to individuals.¹⁸¹

8.190 As noted earlier, if an employee believed they were still being underpaid for the period after they had lodged a claim, they would still be will be able to make a separate (and new) claim in relation to that period of time.¹⁸²

8.191 The Fels Panel also explained that part of the documentation given to claimants required a claimant to acknowledge they had the opportunity to seek independent legal advice:

One of the terms of the Deed is an acknowledgement that you have had the chance to seek independent legal advice before signing the Deed. It is matter for each individual whether they choose to seek advice before signing the Deed, however please be aware that this option is open to you and you are encouraged to exercise it if you have any concerns or require clarification beyond which the Panel can provide.¹⁸³

8.192 Ms Hennessy reassured the committee that the Fels Panel treated all claims equally and consistently regardless of whether the person had accessed legal or advice or not and that the Fels Panel was keen to ensure a claimant did not feel a need to get legal advice in order to be treated differently:

Given the demographic, we are also very keen that they not feel that they have to go to the expense of getting independent advice. We treat them with the same level of urgency and consideration whether they come to us of their own accord or with a lawyer. We do not want people to be inhibited by feeling that they have to go to the expense of getting legal advice in order to get their claim paid.¹⁸⁴

8.193 In addition to underpaid wages, superannuation would also be paid into a claimant's superannuation fund based on the determination amount.¹⁸⁵

8.194 The Fels Panel reiterated the commitment that 7-Eleven had given to pay any claim determined by the Fels Panel and that 7-Eleven had not imposed a cap on the amount of payments or a time limit on the process:

7-Eleven has made an unequivocal commitment to the Fels Panel to pay any employee, past or present, that we find has been underpaid and to pay, without question, the amount we determine they should be paid. 7-Eleven has also reaffirmed that there is neither a financial cap on our decisions, nor

181 Fels Wage Fairness Panel, Frequently asked questions; see also Fels Wage Fairness Panel, Letter to claimant.

182 Fels Wage Fairness Panel, Letter to claimant.

183 Fels Wage Fairness Panel, Frequently asked questions; see also Independent Claims Pty Ltd, Deed of Acknowledgement and Assignment.

184 Ms Siobhan Hennessy, Partner, Deloitte, *Committee Hansard*, 20 November 2015, p. 11

185 Fels Wage Fairness Panel, Frequently asked questions.

any time limit although it has been the Fels Panel's hope that the process for making claims could be wound up by the middle of the coming year.¹⁸⁶

8.195 As at 5 February 2016, the Fels Panel indicated it had received 2169 submissions that indicated a person would like to make a claim. Out of this number, Professor Fels estimated that maybe 1500 submitters would provide sufficient information for the Fels panel to process a claim. As at 5 February 2016, there were about 1000 claims with sufficient information to fully process.¹⁸⁷

8.196 As at 5 February 2016, the Fels Panel had made 188 determinations equating to \$4.36 million. Of these, 149 determinations equating to \$3.76 million had been accepted by the claimant and forwarded to 7-Eleven for payment. Of these, 117 equating to \$2.82 million had been paid.¹⁸⁸

Barriers to claimants coming forward—fear of deportation

8.197 Professor Fels emphasised the fact even though 60 per cent of stores had a claim against them, he was of the view that more stores should have a claim against them:

There is no question that people are not coming forward to the extent we believe they should.¹⁸⁹

8.198 Professor Fels provided two main reasons for the small number of people that had submitted a claim so far. The first reason was fear of deportation for having breached their visa status:

There are some individuals who continue to be reluctant for fear that immigration authorities may take action against them for breaching visa working conditions. This, however, has been assisted somewhat by the latest announcement from the immigration department that it will not take action against a person for breaching a visa working condition if the only reason they have come to Immigration's attention is that they have made a claim to the panel.¹⁹⁰

8.199 The Fels Panel considered 'that its investigations would be best served by the government not taking action against employees who highlight genuine claims of

186 Fels Wage Fairness Panel, answer to question on notice, 20 November 2015 (received 17 December 2015).

187 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 26.

188 Ms Siobhan Hennessy, Partner, Deloitte, *Committee Hansard*, 5 February 2016, p. 26; Professor David Cousins, Panel Member, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 27.

189 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, pp 27 and 28, and 29–30.

190 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 30.

abuse'. Recognising that an amnesty was a difficult issue for government, the Fels Panel had had discussions with the DIBP on these matters.¹⁹¹

8.200 Several former employees argued that 7-Eleven employees are hesitant to come forward and make claims against 7-Eleven because they fear being deported for having breached their visa conditions. These witnesses therefore emphasised the critical importance of announcing a total visa amnesty for international students to report exploitation while working at 7-Eleven.¹⁹²

8.201 Mr Fraser stated that a visa amnesty was 'extremely important' for the exploited international students at 7-Eleven:

There is a guy I talk to who does not work in a 7-Eleven but knows a large community of Indians and Pakistanis, and he said to me: 'Michael, these 7-Eleven workers want to come forward, but they want the piece of paper. You bring that piece of paper that says they won't get in trouble, and you will be blown away by how many thousands come forward.'¹⁹³

8.202 When asked about when the amnesty needed to occur, Mr Fraser simply said: 'yesterday'.¹⁹⁴

Barriers to claimants coming forward—threats and intimidation from franchisees

8.203 The second reason given by Professor Fels for why so few claimants had come forward was a pervasive and ongoing campaign of deception and intimidation by a large number of franchisees:

We believe, however, based on many reports provided to us from the claimant community that potential claimants may be subject to threats from their franchisees if they put in a claim. We believe there is a strong, powerful and quite widespread campaign of deception, fearmongering, intimidation and even some physical actions of intimidation by franchisees. It is quite widespread—it is not just a few bad apples—and it continues to this day to a not insignificant extent.¹⁹⁵

8.204 Professor Fels explained that in threatening their employees, sometimes with physical violence, the franchisees also exploited their employees' lack of knowledge:

They [the franchisees] do, first of all, exploit the lack of knowledge of the employees. For example, quite a few employees are told: 'If you put in a claim then that will have to go to a full court of law, a hearing. You won't have the evidence. All sorts of things will come out.' That would be typical

191 Dr David Cousins Panel Member, Fels Wage Fairness Panel, *Committee Hansard*, 20 November 2015, p. 9.

192 Mr Mohamed Rashid Ullat Thodi and Mr Pranay Alawala, *Submission 59*, p. 8; Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 3; Mr Pranay Alawala, *Committee Hansard*, 24 September 2015, p. 11.

193 Mr Michael Fraser, *Committee Hansard*, 24 September 2015, p. 16.

194 Mr Michael Fraser, *Committee Hansard*, 24 September 2015, p. 16.

195 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 30.

exploitation of their lack of knowledge. A lot of employees actually believe it. But there are also the other obvious things: 'You'll lose your job. You'll be reported to Immigration, and your chances of being deported are very high, and, in any case, any money you get we will demand it back from you anyway.' And there have been some threats of physical intimidation, physical action—violence, if you like—against these people or even, in some cases, their families overseas.¹⁹⁶

8.205 Given the nature of the threats, Professor Fels agreed that it was fair to describe what was occurring as 'a racket'.¹⁹⁷

8.206 Although the Fels Panel had conveyed to 7-Eleven their grave concern about the intimidation of employees by franchisees, they were cautious about identifying every franchisee because they had considerable concerns about the 'very close and intimate relationships' between certain 7-Eleven regional managers and the franchisees. Professor Fels stated categorically that some regional managers were well aware of the various scams and intimidation that were still happening.¹⁹⁸

8.207 Furthermore, given that 7-Eleven had stated its intention of recovering money from franchisees once the payout of claims exceeds \$25 million, Professor Fels was of the view that 7-Eleven was under an even greater obligation to encourage people to come forward and that the company should be doing much more in this regard. This was because the franchisees had an added incentive to deter their employees from coming forward because the franchisees themselves would be liable for the financial restitution of employees once the total of claims exceeded \$25 million. Professor Fels said it was therefore incumbent on 7-Eleven to take decisive action against recalcitrant franchisees and certain regional managers to stamp out bad behaviour:

I believe they have to demonstrate an unconditional, unequivocal commitment to rooting out the bad franchise behaviour, to demonstrate, in a way that every franchisee understands, that there is no acceptance of this and that action will be taken by 7-Eleven to put an end to any such behaviour by any such franchisee. They need to move more quickly, boldly, on rooting out this franchisee behaviour, which continues to this day; it may have been reduced, but we still know it is going on quite significantly. They need to address people who are currently not behaving properly and also people who have a bad history in this regard. They also need to move on at least some of their regional managers; to this day, some of them know what is going on right now.¹⁹⁹

Ongoing underpayments

8.208 Another major issue uncovered by the Fels Panel was the extent of ongoing underpayments. Professor Fels reiterated his view that under the previous business

196 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 31.

197 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 31.

198 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, pp 30–32.

199 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 32.

model, 'a huge number' of franchisees could not make a go of it without underpaying their employees. However, under the variation agreement, Professor Fels stated it was too early to say whether the new business model had fixed the system sufficiently to allow all franchisees to make a go of it while complying with all workplace laws.²⁰⁰

8.209 Ms Hennessy stated that the Fels Panel provided 7-Eleven with a quantitative summary of the types of unlawful behaviour that were occurring:

We provide information by claim, store and franchisee to 7-Eleven, de-identifying, of course, all of the information about the individual claimant, so that they too can see the hotspots. In processing the claims you get a lot of qualitative and quantitative data. We send that quantitative data across. We also send, again on a de-identified basis, a report that summarises the nature of the substance of claims that we are seeing. It would report on things like: in a particular store, you have the cashback system operating.²⁰¹

8.210 Ms Hennessy also indicated that employees had provided documentary evidence of the cash back scam including screen shots of a text message from the franchisee telling their employee that had to pay them a certain amount of money back. More recently, employees have been told to hand over the cash to their employer around the back of the store so the transaction is not captured on the in-store CCTV.²⁰²

8.211 The cash back scam also creates further issues because the employee is effectively paying tax on wages that they have never received. This is because the employee pays tax on the full amount of their wages, but then they have to withdraw half their pay out of their bank account and give it back in cash to their employer.²⁰³

8.212 The committee raised concerns about employee confidentiality down the track once 7-Eleven began approaching the franchisees to recoup money from the payment of claims above a total of \$25 million. Ms Hennessy stated that the Fels Panel had received undertakings from executives at 7-Eleven that when 7-Eleven approached the franchisees, the priority would be to preserve the confidentiality of the claimants and that 7-Eleven would, wherever possible, present the franchisee with a bulk request that represented the totality of all the claims they had had to settle for that store.²⁰⁴

Franchising Code of Conduct

8.213 The Franchising Code of Conduct (Franchising Code) arose as a matter of concern during the inquiry primarily as a result of claims made by 7-Eleven that they were unable to terminate a franchise agreement even if the franchisee had committed a serious breach of workplace law, including the absence or deliberate falsification of records such as timesheets, and the deliberate underpayment of employees.

200 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 33.

201 Ms Siobhan Hennessy, Partner, Deloitte, *Committee Hansard*, 5 February 2016, p. 34.

202 Ms Siobhan Hennessy, Partner, Deloitte, *Committee Hansard*, 5 February 2016, p. 34.

203 Ms Siobhan Hennessy, Partner, Deloitte, *Committee Hansard*, 5 February 2016, p. 34.

204 Ms Siobhan Hennessy, Partner, Deloitte, *Committee Hansard*, 5 February 2016, pp 36 and 38.

Termination of a 7-Eleven franchise agreement

8.214 Ms Dalbo stated that under the Franchising Code, 7-Eleven was not in a position to terminate a franchise agreement on the basis of a contravention of workplace laws. She pointed out that when 7-Eleven identified a breach they would issue a notice and if the franchisee rectified the breach then, under the Franchising Code, 7-Eleven did not have the ability to terminate an agreement:

Under the franchising code, you cannot terminate if the breach is rectified, regardless of how many times the franchisee commits the same breach, as long as each time you serve the notice they fix it. You catch them again, and they fix it. You catch them again, and they fix it. This can go on ad nauseam.²⁰⁵

8.215 Mr Wilmot also noted that even after the FWO identified a breach, if the franchisee rectified the breach and paid back the underpaid wages and/or entered into an enforceable undertaking, then that was considered to be a rectification of the breach under the Franchising Code.²⁰⁶

8.216 Noting it was typically 'the franchisee's responsibility to seek, appoint, train, pay and manage all staff, and meet all workplace obligations', the FCA agreed with the claim made by 7-Eleven, namely that it is not currently possible under the Franchising Code 'to terminate a franchise agreement even in the event of serious breach of workplace obligations by a franchisee':

A franchisor can only serve a notice of breach, which then allows a franchisee an opportunity (usually within 30 days) to remedy the breach. Remedial action by a franchisee such as providing an undertaking not to re-offend, compensating prejudiced employees and attending refresher training would prevent termination.²⁰⁷

8.217 However, there was some uncertainty on these matters when Mr Withers stated that 'where proven, immediate termination of the franchise will occur for any intentional underpayment of franchise staff'.²⁰⁸

8.218 7-Eleven confirmed that as at 29 October 2015, no franchise agreement had been terminated as a result of a franchisee failing to rectify a breach notice. There had been only one termination (of a store in Perth) related to a payroll issue and that involved 'fraudulent conduct (an available ground under the Franchising Code) associated with the manner in which underpayment of staff had been effected'.²⁰⁹

205 Ms Natalie Dalbo, General Manager Operations, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 59.

206 Ms Natalie Dalbo, General Manager Operations, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 54; Mr Warren Wilmot, Chief Executive Officer, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 54.

207 Franchise Council of Australia, *Submission 63*, p. 3.

208 Mr Russell Withers, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 24 September 2015, p. 47.

209 7-Eleven, answer to question on notice, 24 September 2015 (received 29 October 2015).

8.219 However, at the subsequent hearing in Canberra on 5 February 2016, the new chairman, Mr Michael Smith confirmed that 7-Eleven had taken action against ongoing instances of underpayment including the cash back scam and had terminated two franchise agreements in NSW in January 2016 on this basis.²¹⁰

The 7-Eleven franchise model

8.220 The Franchise Council of Australia (FCA) is the peak body for Australian franchising. The FCA supplied figures on the size of the Australian franchising sector:

There are approximately 1180 business format franchise systems in Australia, with an estimated 79 000 outlets employing more than 460 000 people with an estimated \$144 billion of annual turnover.²¹¹

8.221 Mr Kym De Britt, General Manager of the FCA noted that a key element of the FCA's work was to educate its members about compliance with workplace law. He noted that the FCA was also working with the FWO to launch a program that would educate franchisors 'on how to detect if a franchisee is breaching workplace regulations'.²¹²

8.222 The FCA noted that the 7-Eleven model was not typical of the franchise sector, either in terms of the size of the franchise network, the size of its Head Office and range of services that 7-Eleven offered to the franchisee, or the profit distribution model:

7-Eleven's approach of a comprehensive day to day business model including the payment of all invoices on behalf of the franchisee, provision of a payroll service, and a financial model that operates on a split of gross profit, is not typical of a franchise network. Most franchises are structured to celebrate and support the independent nature of the individual franchisees with the business owner operating the business independently within the support network of product, deals, training and profile provided by the franchisor.²¹³

8.223 Mr Michael Paul, a franchisor and chairman of the FCA noted that franchising 'is the backbone of Australia's small business community' with 95 per cent of franchisors and almost all franchisees falling within the definition of small business. He noted the Griffith University survey, *Franchising Australia 2014*, found:

...25 per cent of franchise systems in Australia operate at 10 or less franchise units, and around 62 per cent of franchise systems operate at less than 50 franchise units. Only five per cent of franchise systems operated more than 500 franchise units. 7-Eleven operates 620 franchise units,

210 Mr Michael Smith, Chairman, 7-Eleven Stores Pty Ltd, *Committee Hansard*, 5 February 2016, p. 6.

211 Franchise Council of Australia, *Submission 63*, p. 2.

212 Mr Kym De Britt, General Manager, Franchise Council of Australia, *Committee Hansard*, 20 November 2015, p. 32.

213 Franchise Council of Australia, *Submission 63*, p. 2.

running a business of a vastly greater scale than the majority of franchise systems in Australia.²¹⁴

8.224 Similarly, while the average total number of staff employed in a franchisor's Head Office was 21, 7-Eleven employed over 120 staff at Head Office. Mr Paul noted that the resources and infrastructure at 7-Eleven Head Office enabled it 'to deliver a comprehensive day-to-day business model, including, for example, the payment of invoices on behalf of franchisees and the provision of a payroll service' as well as 'ancillary administrative services, such as bookkeeping and payroll, to their franchisees'.²¹⁵

8.225 7-Eleven had operated for many years on a split of gross profit that allocated 53 per cent to 7-Eleven Head Office and 47 per cent to the franchisee (out of which, the franchisee paid wages). By contrast, Mr Paul noted that 'virtually all other franchise systems in Australia operate a system where the franchisor takes a small royalty of around six to eight per cent of a franchisee's revenue income'.²¹⁶

8.226 The FCA emphasised that it made no value judgments about which business model was 'better or more sustainable for franchisor and franchisee alike but is merely seeking to demonstrate the significant difference between the 7-Eleven model and the rest of the franchising sector'.²¹⁷

8.227 However, the FCA observed that the evidence suggested the problems with 7-Eleven were more likely associated with the unique nature of the 24-hour convenience industry, rather than policy issues within the broader franchising sector.²¹⁸

Potential amendments to the Franchising Code of Conduct

8.228 The Franchising Code is a mandatory industry code that applies to the parties to a franchise agreement. It is regulated by the Australian Competition and Consumer Commission (ACCC).²¹⁹

8.229 The ACCC assesses all franchising-related complaints that it receives for compliance with the Franchising Code and the *Competition and Consumer Act 2010*.

214 Mr Michael Paul, Chairman and Franchisor, Franchise Council of Australia, *Committee Hansard*, 20 November 2015, p. 26.

215 Mr Michael Paul, Chairman and Franchisor, Franchise Council of Australia, *Committee Hansard*, 20 November 2015, p. 26.

216 Mr Michael Paul, Chairman and Franchisor, Franchise Council of Australia, *Committee Hansard*, 20 November 2015, p. 26.

217 Mr Michael Paul, Chairman and Franchisor, Franchise Council of Australia, *Committee Hansard*, 20 November 2015, p. 26.

218 Franchise Council of Australia, *Submission 63*, p. 2; Mr Michael Paul, Chairman and Franchisor, Franchise Council of Australia, *Committee Hansard*, 20 November 2015, p. 28.

219 Australian Competition and Consumer Commission, Franchising Code of Conduct, <https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct> (accessed 2 February 2016).

The ACCC generally focuses 'on ensuring that franchisors comply with the Code's requirements relating to disclosure, termination and dispute resolution'. Overall, the ACCC reported a high level of compliance with the Franchising Code.²²⁰

8.230 Mr Sean O'Donnel, a director and franchising legal professional with the FCA explained the characteristics of the Franchising Code including the respective rights of the franchisor and franchisee as well as the mandatory system of mediation:

The code provides a base minimum. Essentially the code is set up to protect franchisees in the sense that most of the code is about providing an incoming franchisee with a range of disclosure information that you would not normally get if you were buying a regular business. The code also prescribes a franchisor has certain rights when it comes to things like marketing funds. There are rules and regulations around, when you take money from a franchisee for marketing, how you use it that money. Also, more importantly, there is a mechanism, which is a mandatory system of mediation. If there are disputes between franchisees and franchisors, it tries to resolve those disputes, which then correlates with the limited rights of franchisor to terminate a franchisee and that is to protect franchisees. The idea being that it is obviously usually a significant investment and there are only limited circumstances in which a franchisor can terminate a franchisee immediately. There are circumstances where they can give them notice of a breach and there is a remedy period but that also brings into play the mediation process so that if they disagree with the dispute, they can take that to mediation have it resolved and that is funded essentially through the government.²²¹

8.231 Mr Paul also added that the disclosure document is a central part of the Franchising Code. The disclosure document ensures that franchisees 'are fully informed on the most important details about that particular franchise before making a decision'.²²²

8.232 In clauses 26 to 29, the Franchising Code sets out the mandatory requirements that must be observed by all franchisors when terminating a franchise agreement.

8.233 The ACCC explained that the Franchising Code 'does not provide franchisors with the automatic right to terminate a franchisee for a serious breach of workplace legislation'. However, it does 'provide franchisors with the ability to terminate a franchise agreement for a serious breach of workplace legislation in certain circumstances'. The ACCC set out these circumstances below:

If a franchisor proposes to terminate a franchise agreement because of a breach of the agreement by the franchisee, the Code requires the franchisor

220 Australian Competition and Consumer Commission, answer to question on notice from Senator Lines (received 15 December 2015).

221 Mr Sean O'Donnel, Director and Franchising Legal Professional, Franchise Council of Australia, *Committee Hansard*, 20 November 2015, p. 31.

222 Mr Michael Paul, Chairman and Franchisor, Franchise Council of Australia, *Committee Hansard*, 20 November 2015, p. 31.

to give the franchisee reasonable notice of the breach, in writing and to tell the franchisee what they need to do to remedy the breach. The franchisor must also allow the franchisee a reasonable period of time to remedy the breach (although this period need not be more than 30 days). If the franchisee remedies the breach within the specified period of time in the breach notice, the franchisor is not permitted under the Code to terminate the franchise agreement on this particular ground.

If a franchise agreement contained a clause requiring the franchisee to comply with all applicable laws, or with workplace legislation specifically, and a franchisee failed to comply with workplace legislation (i.e. by not paying its staff in accordance with the applicable award), the franchisee would be in breach of the franchise agreement.

The franchisor could then issue a breach notice to the franchisee requiring the franchisee to remedy the breach. This notice must set out clearly what the franchisee must do to remedy the breach (for instance, it might state that the franchisee must undertake an immediate audit and organise additional salary payments to its employees before a certain date to effect full compliance with the award).

If the franchisee remedies the breach (i.e. by undertaking the required audit and paying its employees the amount they have been underpaid by the nominated date), the franchisor would not be permitted to terminate the franchising agreement on the basis of the stated breach. Conversely, if the franchisee does not remedy the breach, the franchisor would be permitted to terminate the agreement.

The Code also allows a franchisor to terminate an agreement without notice to the franchisee, or without first issuing the franchisee with a breach notice, if the franchisee acts fraudulently in connection with the operation of the franchised business (refer to in subclause 29(1)(g) of the Code), provided the express terms of the franchise agreement allows for this.

Inadvertent or mistaken underpayment of employees is unlikely to be considered fraudulent conduct. However, certain circumstances surrounding the underpayment of employees in some situations may amount to fraudulent behaviour, particularly where dishonesty and deliberate conduct designed to obtain a financial advantage by the franchisee is involved. As such, it may be possible to terminate a franchise agreement immediately if a franchisee commits a serious breach of workplace legislation.²²³

8.234 The ACCC pointed out that a franchisor can include a clause in its franchise agreement requiring a franchisee to comply with all relevant laws, or with workplace legislation specifically. Many franchise agreements include these types of clauses.²²⁴

223 Australian Competition and Consumer Commission, answer to question on notice from Senator Lines (received 15 December 2015).

224 Australian Competition and Consumer Commission, answer to question on notice from Senator Lines (received 15 December 2015).

8.235 However, if a franchise agreement states that a franchisee must comply with all relevant laws, before they can be terminated for breaching a law, they must be given a reasonable time to remedy the breach. This provides a level of safeguard to franchisees.²²⁵

8.236 The FCA supported any amendments to the Franchising Code that would 'allow a franchisor to immediately terminate a franchise agreement if a franchisee commits a serious breach of workplace legislation'.²²⁶

8.237 Dr Tess Hardy from the Centre for Employment and Labour Relations Law at Melbourne Law School noted that 'as an employer, the franchisee is automatically required to comply with all relevant workplace laws, including provisions of the FW Act.' There did not seem to be, therefore, any need to amend the Franchising Code to clarify the 'employment standard' expected of franchisees.²²⁷

8.238 However, Dr Hardy did point out that:

Under the current provisions of the Franchising Code, it is not entirely clear that the franchisor can terminate the agreement without notice where there are reasonable grounds for believing that contraventions of the FW Act have occurred, or are likely. This is one aspect of the Franchising Code, amongst others, which may require further clarification and possible amendment.²²⁸

8.239 Professor Fels pointed to two contrasting observations on the Franchising Code. On the one hand, he was of the view that the Franchising Code needed to be stronger in its protection of franchisees but, unfortunately, big business had exercised pressure on governments over many years not to make it too strong. On the other hand, Professor Fels was sceptical of the claim made by 7-Eleven that they could not terminate a franchise agreement with a franchisee that had broken the law.²²⁹

8.240 Professor Fels was also of the view that, while not exempting franchisees from liability, there should be some sort of shared liability on the franchisor. This would include obligations on the franchisor to take steps to ensure compliance with workplace laws by the franchisee. This could include a requirement for the CEO or the chair or the board 'to sign off annually that they are satisfied that there is a proper compliance system in place'.²³⁰

8.241 Finally, Stewart Levitt argued for legislative change to govern franchise agreements, similar in terms to the former section 106 of the *Industrial Relations Act*

225 Australian Competition and Consumer Commission, answer to question on notice from Senator Lines (received 15 December 2015).

226 Mr Michael Paul, Chairman and Franchisor, Franchise Council of Australia, *Committee Hansard*, 20 November 2015, p. 26.

227 Dr Tess Hardy, answer to question on notice, 24 September 2015 (received 18 January 2016).

228 Dr Tess Hardy, answer to question on notice, 24 September 2015 (received 18 January 2016).

229 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 37.

230 Professor Allan Fels, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 37.

1996 (NSW), 'to empower a Court to declare wholly or partly void or to vary any franchise agreement, found to be unfair'. Mr Levitt noted the comments by Professor Fels to the effect that the 7-Eleven franchise agreement imposed such an onerous economic model on the franchisee that 'the franchisee was placed under extreme financial pressure to cut labour costs'. Mr Levitt argued that 'such a contract should be deemed to be unfair and liable to be varied or set aside by a Court'.²³¹

Committee view

8.242 The committee received evidence that undocumented work by migrant labour has resulted not only in the severe exploitation of highly vulnerable workers, but also impacted Australia's labour markets, including placing downward pressure on the wages and conditions of Australian workers and undercutting the majority of legitimate employers that abide by Australian workplace laws.

8.243 The committee heard there were two broad types of undocumented work: that performed by people in Australia without authorisation (by entering without a visa or by overstaying the term of a valid visa) and that performed by people working contrary to the conditions of their visa.

8.244 Evidence to the committee indicated that following multi-agency taskforce investigations and raids, undocumented workers working without a valid visa were detained and deported swiftly.

8.245 To be clear, the committee does not, in any way, condone undocumented migrant work. However, serious issues arise from these actions. Several non-governmental organisations reported that the police described the situation at one of the raided sites as a 'human tragedy'. Yet, if a group of highly traumatised undocumented workers were detained and deported within 24 hours, it would not allow an appropriate assessment of whether human trafficking and slavery-like conditions were involved.

8.246 The National Action Plan to Combat Human Trafficking and Slavery 2015–19 provides a right of stay to temporary migrant workers who have been trafficked and/or enslaved by their employers. The rapid deportation of undocumented workers risks denying justice to persons who may have been subject to human trafficking and/or slavery.

8.247 Rapid deportation also further tilts the balance of power in favour of those unscrupulous employers who deliberately use undocumented workers as part of their business model. An undocumented migrant would be too frightened to speak out for fear of deportation (if an opportunity to speak out even arose). Furthermore, if a worker is deported, there is no possibility of their employer being required to pay back wages to the worker(s) as a result of court proceedings. In effect, the system as it currently operates risks creating a perverse incentive for unscrupulous employers to use undocumented migrant labour.

231 Stewart Levitt, *Submission 61*, p. 2.

8.248 The committee received conflicting advice on how to address these matters. Some submitters argued that all temporary migrant workers who are exploited, trafficked, and/or enslaved by their employers should have an automatic right of stay. This would allow them to pursue legal processes to, for example, recover underpaid wages from their employer. Allowing such a course of action might, along with increased penalties against employers who deliberately breach workplace laws, help change the calculations made by some employers about whether to comply with Australian workplace laws.

8.249 However, the DIBP pointed out that undocumented workers are working without authority. There is therefore a difficulty in provided unauthorised workers with an opportunity to recoup underpaid wages. The system therefore treats undocumented workers differently to a temporary visa worker who is here legally, working legally, and being underpaid. Although the Department did not say it, presumably there is also a risk that allowing an undocumented worker to pursue a claim for underpaid wages could also create a perverse incentive for undocumented workers to seek to work when they are not authorised to do so.

8.250 Nevertheless, the committee notes that undocumented migrant work involves both the employee and the employer in a breach of workplace law. The committee recognises that, in practice, the current situation benefits unscrupulous employers (and hurts legitimate employers) and involves the severe exploitation of migrant workers. Shifting to a more victim-centred approach may allow exploited migrant workers access to justice. It would also shift a greater onus onto employers to ensure that they were only employing temporary visa workers legally allowed to work and in conformity with their visa conditions.

8.251 This is an onus already borne by the majority of employers that operate legitimately, yet it is one that some employers have deliberately evaded. If an employer engaged an undocumented worker (in breach of the law) and was potentially liable for underpaid wages and penalties, then this may act as a deterrent sufficient to outweigh any perverse incentive for undocumented workers to actively seek work in Australia.

8.252 In light of the above, it seems appropriate to suggest that the DIBP review the procedures used in cases involving severe worker exploitation to ensure that a victim-centred approach exists in practice such that the potential victims of people trafficking and slavery-like conditions are afforded an adequate opportunity in a safe and secure environment to report any offences committed against them.

Recommendation 22

8.253 The committee recommends that the Department of Immigration and Border Protection review the procedures used in cases involving severe worker exploitation to ensure that a victim-centred approach exists in practice such that the potential victims of people trafficking and slavery-like conditions are afforded an adequate opportunity in a safe and secure environment to report any offences committed against them.

8.254 The hearings into 7-Eleven revealed that undocumented work performed in breach of a visa condition (as opposed to visa overstayers and persons in Australia without a visa) is a huge problem in Australia. International students who were legally allowed to work in Australia were required to work hours in excess of their visa conditions precisely so their employers could then exploit the technical breach of their visa conditions in order to underpay them and rob them of their wages and other workplace entitlements.

8.255 The committee received evidence that the visa conditions applicable to international students (the restriction on hours of work during term time) render them uniquely vulnerable to this type of coercion and exploitation. Working (or being required to work) in breach of a visa condition renders an international student liable to visa cancellation and deportation and effectively excludes such workers from the protections of employment law under the FW Act. This further reinforces the power of unscrupulous employers over their workers and provides a perverse incentive for employers to breach the law by coercing their employees to breach the law. Several submitters therefore recommended that the visa condition restricting the hours that an international student can work be removed.

8.256 However, other submitters argued that the primary purpose of an international student visa is to allow a foreign student to pursue a course of study while in Australia, with the ability to supplement their income by working up to 40 hours a fortnight during study periods. Furthermore, the FWO (with the approval of the DIBP) has successfully pursued court cases even though the temporary visa worker had breached their visa conditions.

8.257 Several submitters argued that the best course of action would be to remove the draconian penalties (such as visa cancellation and deportation) for a breach of workplace law by the employee if that employee was being exploited (that is, they were working for less than minimum wages and conditions). This would remove some of the fear faced by international students and would provide a safer avenue than currently exists for them to come forward and make a claim about exploitation in the workplace.

8.258 The committee recognises that the issues around student visas are complex. Having weighed the evidence, the committee is persuaded that the potential exclusion of undocumented migrant workers from the protections afforded by the FW Act and other employment legislation provides a perverse incentive for unscrupulous employers to exploit vulnerable workers.

8.259 While the committee acknowledges that undocumented migrant labour is a fraught area, the committee nonetheless recommends certain amendments to the FW Act and Migration Act to diminish these perverse incentives.

8.260 Noting that the issue of whether a visa breach voids an employment contract has not been conclusively determined by the courts, the committee considers the FW Act should be amended to ensure that visa breaches do not necessarily void a contract of employment.

8.261 In line with the above recommendation, the committee is keen to ensure that the law reflects a victim-centred approach and that a breach of visa conditions should not necessarily end any further applications for underpayment or poor treatment. The committee is also keen to ensure that the legal settings contribute to a reduction in unlawfulness, and in this case, a reduction in the incidence of undocumented work.

8.262 The committee therefore considers that the FW Act and the Migration Act should be amended to state that the FW Act applies even when there are visa breaches.

Recommendation 23

8.263 The committee recommends that the *Migration Act 1958* and the *Fair Work Act 2009* be amended to state that a visa breach does not necessarily void a contract of employment and that the standards under the *Fair Work Act 2009* apply even when a person has breached their visa conditions or has performed work in the absence of a visa consistent with any other visa requirements.

8.264 The committee is particularly concerned about the pressure that certain employers have exerted on temporary visa workers to breach a condition of their visa in order to gain additional leverage over the employee. The committee recognises the reality that unscrupulous employers have exercised their power in the employment relationship and the employee has been rendered vulnerable to exploitation.

8.265 The potential for visa cancellation and deportation has placed numerous temporary visa holders in an invidious and precarious position with regard to their employer. The current penalties (visa cancellation and deportation) facing a temporary visa holder for breach of a visa condition are manifestly unfair, especially considering the element of employer coercion involved in visa breaches, and compared to the often derisory penalties to which employers have been subject for gross and deliberate breaches of the law.

8.266 Furthermore, measures that address the issues of fairness and coercion would likely assist the authorities and the FWO by making it much more likely that a temporary visa worker would feel safer coming forward to report instances of exploitation. In this regard (and despite the fact that the FWO has previously received, on an ad hoc basis, an assurance from the DIBP not to pursue a temporary visa worker for visa breaches if they come forward to report exploitation), the committee is persuaded that the fear of being reported to the DIBP, or that the DIBP will become aware of their visa breach and therefore will act to deport them, strongly discourages temporary visa workers from coming forward and therefore acts as a brake on the reporting of claims by visa workers.

8.267 Without clear-cut changes, the chronic under-reporting of exploitation to the FWO by temporary visa workers will continue. The committee acknowledges that government is not going to substantially increase the resources of the FWO. However, the status quo is not acceptable. On this basis, the committee considers that changes to relevant laws are required to encourage temporary visa holders to come forward and furnish the FWO with the information necessary to pursue investigations of malpractice.

8.268 The committee is therefore of the view that visa cancellation should be restricted to cases of serious noncompliance with a visa and serious contravention of a visa condition. Seriousness could take into account factors such as the frequency and gravity of the noncompliance or contravention, whether the visa-holder freely sought to enter into an employment relationship in breach of the visa's work condition and/or Australian law, whether the noncompliance or contravention was brought about by the conduct of others including employers, and whether the visa-holder had been previously warned by the DIBP in relation to the noncompliance or contravention.

Recommendation 24

8.269 The committee recommends that Section 116 of the *Migration Act 1954* be reviewed with a view to amendment such that visa cancellation based on noncompliance with a visa condition amounts to serious noncompliance. The committee further recommends that Section 235 of the *Migration Act 1954* be reviewed with a view to amendment such that a contravention of a visa condition amounts to a serious contravention before a non-citizen commits an offence against the section.

8.270 The above recommendation removes the excessive penalties that may currently apply for a breach of a visa condition, and therefore effectively helps remove one of the structural elements (the fear of deportation) that employers have used in order to gain leverage over international students in order to exploit them. Bearing this in mind, the committee is not persuaded that removing the existing work restrictions on the international student visa is warranted at this juncture. Noting the primary purpose of an international student visa is study with some limited work rights attached, the committee is of the view that the current arrangements should strike the right balance if the suite of measures (including the above recommendation) outlined in this report are enacted.

8.271 For the sake of completeness, and to avoid any doubt, the committee is also of the view that the recommendations made earlier in this chapter in terms of the rights and protections available to temporary visa workers and undocumented workers should also explicitly apply to any new visa class or extension to a visa issued under changes arising from the Northern Australia White Paper, and any visa issued pursuant to a Free Trade Agreement.

Recommendation 25

8.272 The committee recommends that any new visa class or extension to a visa issued under changes arising from the Northern Australia White Paper, and any visa issued pursuant to a Free Trade Agreement, explicitly provide that any temporary worker is afforded the same rights and protections under the *Fair Work Act 2009* as an Australian worker. The committee further recommends that any work performed in breach of a condition under any new visa class or extension to a visa arising from the Northern Australia White Paper, or any visa issued pursuant to a Free Trade Agreement, does not necessarily void a contract of employment and that the standards under the *Fair Work Act 2009* apply even when a person has breached their visa conditions.

7-Eleven

8.273 The committee particularly thanks the former employees of 7-Eleven who appeared at the public hearing in Melbourne. Their accounts of appalling exploitation and intimidation by their franchisee employers painted a bleak picture of working life in Australia for substantial numbers of temporary visa workers. Their stories were not isolated occurrences to be brushed off as one-off incidents caused by a few rogue employers. Rather, the overwhelming body of evidence indicated that the problem of underpayment at 7-Eleven was, and may remain, widespread and systemic.

8.274 The committee also heard that franchisees were well aware of what they were buying into when they purchased a 7-Eleven franchise, namely that the model worked on underpaying workers. It therefore seems inconceivable that 7-Eleven Head Office did not know of, or did not suspect, what was occurring in its franchise network.

8.275 It simply is not good enough for Mr Withers to assert that the 7-Eleven franchise network has been a successful business since its inception when it seems clear to most objective observers that the majority of franchisees could not make a go of their business unless they broke the law and underpaid their workers.

8.276 7-Eleven stated that it is working to rid itself of rogue franchisees that do not meet the standards that 7-Eleven and the wider community expect. The committee agrees it is vitally important to stamp out the fabrication of records and deliberate underpayment of workers that the vast majority of franchisees engaged in. The committee reiterates that it in no way condones the abhorrent behaviour of so many franchisees.

8.277 However, the committee is wary of what appears to be a well-oiled public relations exercise that seeks to distance 7-Eleven from the practices of its franchisees. In the committee's view, the 7-Eleven business model and gross profit split was a key element in the underpayment of workers because it effectively placed often highly-indebted small business owners (the franchisees) in an invidious position. Based on evidence from Professor Fels himself, most franchisees could not make a go of a 7-Eleven franchise unless they underpaid their workers. This is no sound basis for a business.

8.278 The committee is not in a position to comment on whether the variation agreement between 7-Eleven and the vast majority of franchisees will permit franchisees to make a reasonable income while also paying every employee the correct wage. However, the massive increase to the minimum gross profit guarantee to franchisees, and the shifting of a greater percentage of the gross profit split from the franchisor to the franchisee, can be taken as a *de facto* admission that the previous model was fundamentally flawed because it funnelled too much money to Head Office at the expense of the franchisee and the workers.

8.279 It also seems likely that a further consequence of the mass underpayment of wages across the 7-Eleven chain of stores would have been to create an uneven playing field where other businesses paying the correct wages and entitlements to their workers would have been at an enormous and unfair disadvantage.

8.280 To some extent, it could be argued that 7-Eleven has now had to take responsibility for its flawed business model. 7-Eleven appointed the Fels Panel to review claims for underpayment, and 7-Eleven has committed to paying claims that could amount to several tens of millions of dollars. However, under the variation agreement, 7-Eleven has the ability to pursue franchisees to recoup a proportion of the claim moneys once the total of claims, as seems very likely, exceeds \$25 million. This raises two key issues: first, the balance of power and responsibility in a franchise relationship and, second, the financial incentive for franchisees to deter employees from making a claim for underpayment.

8.281 With respect to the balance of power and responsibility in a franchise relationship, the Franchising Code is designed to protect the franchisee from a franchisor abusing its more powerful position in the relationship. However, a conflict exists between competition law (including the Franchising Code) and workplace law.

8.282 One option put to the committee would be to amend the Franchising Code to allow the franchisor to terminate a franchise agreement in the event of a serious breach of workplace law by the franchisee (as opposed to the current situation where some submitters claimed that a franchisee could effectively remedy a series of breach notices ad infinitum and there was nothing further a franchisor could do). It was argued that amending the Franchising Code in this fashion would allow the franchisor to act to protect its brand image as well as act as a deterrent to other franchisees considering underpaying their employees.

8.283 However, the Franchising Code is designed to ensure that a powerful franchisor cannot unfairly terminate the franchise agreement with a small business owner. This protection is pertinent in the 7-Eleven case given that the franchisor's business model was, to some degree, implicated in the illegal mass underpayment of workers in 7-Eleven stores. Given this context, the committee is cautious about making any recommendation that could allow a franchisor such as 7-Eleven to, on the one hand, run a self-serving and unfair business model that disadvantages its franchisees and ultimately the workers, and on the other hand, evade any responsibility for breaches of workplace law by its franchisees, and have the freedom to shift the totality of the blame onto the franchisee and terminate the franchise agreement.

8.284 If there were to be a change to the Franchising Code that gave the franchisor greater power to more easily terminate a franchise agreement with a franchisee who had committed a serious breach of workplace law, there would also need to be some way of ensuring that the franchisor also assumed some responsibility for the practices of the franchisee. Yet, this cannot be done by absolving the franchisee of any responsibility, particularly as the franchisee is the direct employer of the worker. Rather, further consideration needs to be given to ways in which both franchisor and franchisee can be led to behave in ways where both parties see it as in their respective and mutual interests to ensure that all workplace laws are complied with and workers are treated with dignity and according to the law. The committee is therefore of the view that the Franchising Code merits further consideration regarding the respective responsibilities of franchisors and franchisees with respect to compliance with workplace law.

Recommendation 26

8.285 The committee recommends that Treasury and the ACCC review the Franchising Code of Conduct (and if necessary competition law) with a view to assessing the respective responsibilities of franchisors and franchisees regarding compliance with workplace law and whether there is scope to impose some degree of responsibility on a franchisor and the merits or otherwise of so doing.

8.286 The committee further recommends that Treasury and the ACCC review the Franchising Code of Conduct with a view to clarifying whether the franchisor can terminate the franchise agreement without notice where there are reasonable grounds for believing that serious contraventions of the *Fair Work Act 2009* have occurred.

8.287 The committee further recommends that consideration be given to the merits or otherwise of any amendment that would allow the franchisor to terminate the franchise agreement without notice where there are reasonable grounds for believing that serious contraventions of the *Fair Work Act 2009* have occurred.

8.288 The committee will make recommendations in the next chapter on a range of matters including the penalty regime. At this juncture, however, the committee observes that the penalties under the FW Act are relatively insignificant. However, as the 7-Eleven case has demonstrated, the repayment of underpaid wages can be a considerable expense (and a considerable deterrent) if the repayment mechanism is effective. In this regard, the committee commends 7-Eleven for establishing the independent Fels Panel and notes the public commitment made by 7-Eleven to pay, without question, any determination assessed by the Fels Panel.

8.289 The open and frank discussions that the committee has had with the Fels Panel and Deloitte stand in marked contrast to the apparent evasiveness of Baiada. Under the Proactive Compliance Deed with the FWO (see chapter 7), Baiada established a claims and repayment mechanism. Yet, the committee has received no substantive information about the number of claims received or processed by Baiada. The committee notes the very limited time period for the lodging of a claim and therefore retains grave concerns about the operation and effectiveness of the mechanism at remedying the litany of underpayments by labour hire contractors supplying labour to Baiada.

8.290 The contrast between the approaches of 7-Eleven and Baiada therefore suggests that if a repayment mechanism is going to have a powerful deterrent effect, it is essential to have an independent system that makes it relatively easy to prove a case that there has been underpayment and to quantify what the repayment should be, as well as an adequate timeframe for the making of claims.

8.291 As is evident from the Fels Panel, the process of establishing contact with employees and former employees, creating a confidential and safe environment for temporary visa workers to come forward to lodge a claim, and resolving claims fairly, can be a complex and protracted exercise.

8.292 Nevertheless, the quantum of money involved in the 7-Eleven repayments is an order of magnitude larger than that available under any penalty regime. It is therefore of enormous value to the affected workers who are able to reclaim money through the process, and it also serves as a warning to other lead firms that they have responsibilities for what occurs in their franchise network or supply chain.

8.293 The second key issue arising from the variation agreement, given that 7-Eleven has stated it will seek to recover money from the franchisees once the total of claims exceeds \$25 million, is the in-built incentive that has been created for franchisees not to cooperate with 7-Eleven and to deter, including by intimidation and physical violence, any employee from coming forward to make a claim. The deception and intimidation by franchisees, combined with understandable fears on the part of temporary visa workers that they may be liable to visa cancellation and deportation, has had a hugely negative impact on the number of employees who have come forward to the Fels Panel.

8.294 Furthermore, it was clear from the evidence of Professor Fels that he does not believe 7-Eleven has taken matters seriously enough as yet and that 7-Eleven has not done enough to encourage employees to come forward, particularly given the financial incentive that franchisees have to try and prevent employees from making a claim.

