

CHAPTER 9

Information, education, regulation and compliance

Introduction

9.1 This chapter pulls together the remaining education, information, regulation and compliance issues that have arisen during the inquiry.

9.2 The separate consideration of information and education activities from the role of monitoring and compliance in this chapter is somewhat arbitrary. For example, the Harvest Trail inquiry conducted by the Fair Work Ombudsman (FWO) involved an education and awareness raising campaign with a range of stakeholders across the country. This was followed up later by compliance monitoring.

9.3 The chapter begins with an overview of the role and activities of the FWO and the Department of Immigration and Border Protection (DIBP) with respect to employment and migration law. The provision of information and educational materials is then covered, followed by a section that looks at how the FWO seeks to build a culture of compliance, including down supply chains. The remainder of the chapter considers the resources and powers of the FWO, the challenges that it faces in enforcing compliance, and a range of proposals to improve various regulatory mechanisms.

Background to the role and activities of the government agencies

9.4 The FWO was established by the *Fair Work Act 2009* (FW Act) on 1 July 2009. The role of the FWO is to 'provide education, assistance and advice about the Commonwealth workplace relations system and impartially enforce compliance with workplace laws'.¹ The provision of information to temporary visa holders and the monitoring and enforcement of compliance with workplace laws with respect to temporary visa holders therefore falls within the remit of the FWO.

9.5 However, the provision of information to temporary visa holders and the monitoring of compliance with various aspects of immigration law with respect to temporary visa holders and their employers are also carried out by the DIBP.

9.6 The respective roles of the FWO and the DIBP could be viewed as relatively discrete. Mr Michael Campbell, Deputy Fair Work Ombudsman, explained that the DIBP has primary jurisdiction for ensuring that 457 visa workers are paid according to the sponsorship obligations. The FWO's role is to make sure the FW Act is a safety net for all workers in Australia and its jurisdiction is enlivened when wages fall below the safety net (for example, below-award wages). Where an entitlement is above the

1 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, p. 1.

safety net but below the sponsorship obligations, the DIBP has the power to enforce an outcome.²

9.7 However, there is now some overlap in the roles of the FWO and the DIBP following the signing of a memorandum of understanding (MoU) between the two agencies. The MoU formalises operational arrangements around the FWO's role in monitoring 457 visa sponsorship obligations. Since 1 July 2013, the FWO has been responsible for checking, on behalf of the DIBP, that 457 visa holders receive their nominated salary and perform the functions of their nominated position.

9.8 Between 1 July 2013 and 31 December 2014, the FWO monitored 3076 subclass 457 visa holders and identified concerns in about 18 per cent of cases. The FWO refers potential breaches of the sponsorship obligations to the DIBP. The MoU also provides a framework for the regular exchange of operational information.³

9.9 The FWO is involved in inter-agency taskforces such as Taskforce Cadena (see below), and the Inter Agency Phoenix Forum comprising the FWO, DIBP, the Australian Securities and Investment Commission (ASIC), and the Australian Taxation Office (ATO). The impact of illegal phoenix behaviour on the enforcement activity of the FWO is discussed later in the chapter.

Taskforce Cadena and Operation Cloudburst

9.10 Taskforce Cadena was established as a specific joint agency taskforce by the FWO and the DIBP to coordinate a whole of government effort to reduce the exploitation of foreign workers. Taskforce Cadena works, as required, with other relevant agencies including the Australian Federal Police, ASIC, the ATO, and State and Territory law enforcement agencies.⁴

9.11 The Australian Border Force is also undertaking additional supporting enforcement activities—such as Operation Cloudburst in May 2015—which target exploitative behaviour. Operation Cloudburst involved approximately 120 officers from the DIBP working with inspectors from the FWO and State and Federal police, to undertake 11 operations in all states.⁵

9.12 In terms of inter-agency cooperation and approaches, Ms Heather Moore, Advocacy Coordinator for the Freedom Partnership to End Modern Slavery at the Salvation Army (the Freedom Partnership) noted that 'official data on worker exploitation is virtually non-existent'. She maintained that Task Force Cadena offered 'an opportunity to draw on the information various agencies have and move from a

2 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, *Committee Hansard*, 14 July 2015, p. 47; Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 14 July 2015, p. 48.

3 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, pp 3–4.

4 Department of Immigration and Border Protection, answer to question on notice, 9 July 2015 (received 16 July 2015).

5 Department of Immigration and Border Protection, answer to question on notice, 9 July 2015 (received 16 July 2015).

risk management approach to an intelligence approach and a comprehensive approach that addresses all elements of the crime'.⁶

9.13 However, Ms Moore expressed serious reservations about the current practices and culture of compliance that leads to undocumented workers being 'quickly interviewed and swiftly detained and deported'. The Freedom Partnership had therefore proposed that the agencies involved in Taskforce Cadena adopt a victim-centred approach:

That is why we are pushing for Taskforce Cadena to take a different approach, a more victim centred approach, not just in rhetoric but actually in practice, and that requires a paradigm shift in the space around worker exploitation. We are very concerned that we are deporting potential trafficking victims and, even if we are not, that we are depriving a large group of people of access to justice that they should be entitled to.⁷

Concerns about joint agency activities

9.14 The FWO recognised that a visa worker's concerns about their ongoing visa status can operate as a barrier to them approaching the FWO for help. The FWO therefore emphasised the vital importance of government communicating 'to visa workers, employers and their advisers that the FWO can and does enforce Fair Work laws with respect to all workers, including migrant workers, irrespective of their visa conditions'.⁸

9.15 In addition, Ms Natalie James, the Fair Work Ombudsman, emphasised that Fair Work inspectors make it really clear to visa holders that the FWO is not interested in their visa status, but is only concerned with building a relationship with the aim of rectifying matters such as underpayment.⁹

9.16 However, several submitters raised serious concerns about the relationship between the FWO and the DIBP, and in particular, how that relationship might be seen (and possibly misconstrued) by temporary visa holders.

9.17 Dr Stephen Clibborn warned that 'if the FWO is to be a practically effective enforcer of the FW Act for undocumented immigrant workers it must be, and be seen to be, independent of the DIBP'. He held grave concerns that the current arrangements under the MoU would create mistrust amongst temporary visa workers and therefore discourage the reporting of breaches of the FW Act. Instead, he recommended a new MoU that would establish the independence of the FWO and DIBP and confirm that

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

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

8 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.

9 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 72.

the two agencies would not share information about the visa status of migrant workers.¹⁰

9.18 The Shop, Distributive & Allied Employees' Association (SDA) noted that the Commonwealth Ombudsman's Better Practice Guide to Complaints Handling (the guide) recognised the importance of protecting the identity of a complainant. Similarly, the guide also recognised that an underlying principle of whistleblower policy 'is that a whistleblower should not be subject to reprisals because they have made an allegation'.¹¹ By contrast:

Australian immigration law does not accord this special protection to temporary migrant workers who are whistleblowers: a 457 visa holder who reports to the FWO that they have received wages in breach of their sponsorship does this knowing that this information and their identity can be passed onto the DIBP.¹²

9.19 In light of the above, the SDA recommended that the FWO not be allowed to share the identities of temporary visa workers involved in its investigations with the DIBP'.¹³

9.20 Furthermore, the SDA emphasised that the impression amongst temporary visa workers, however inaccurate it may be, was that the FWO passed information on to the DIBP concerning all breaches of work entitlements under visas and not just those relating to breaches of 457 visas. The SDA therefore argued that visa holders with work rights such as international students and Working Holiday Makers (WHMs) 'will be less likely to complain because of the perception that the FWO's role is compromised'.¹⁴

Provision of information and education

9.21 Many submitters and witnesses emphasised the need to not only provide relevant information to temporary visa holders about their workplace rights, entitlements and obligations, but also to convey that information in ways that temporary visa workers could readily access and understand.¹⁵ However, other submitters and witnesses also pointed to the critical importance of employers having

10 Dr Stephen Clibborn, *Submission 11*, p. 4.

11 Shop, Distributive & Allied Employees' Association, *Submission 58*, pp 24–25.

12 Shop, Distributive & Allied Employees' Association, *Submission 58*, p. 25.

13 Shop, Distributive & Allied Employees' Association, *Submission 58*, p. 25.

14 Shop, Distributive & Allied Employees' Association, *Submission 58*, p. 24.

15 See, for example, Unions NSW, *Submission 35*, p. 4; Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 20; Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 29*, p. 2; Associate Professor Joo-Cheong Tham, answer to question on notice, 24 September 2015 (received 6 November 2015); The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 6.

reliable access to up-to-date expert information on workplace law.¹⁶ This was of particular concern to a number of witnesses from regional and rural Australia.¹⁷

Provision of information to temporary visa workers

9.22 The FWO noted that employers have to give every new employee a copy of the Fair Work Information Statement (the Statement) before, or as soon as possible after, they start their new job.¹⁸ The Statement provides new employees with information about their conditions of employment and has information on:

- the National Employment Standards;
- the right to request flexible working arrangements;
- modern awards;
- making agreements under the FW Act;
- individual flexibility arrangements;
- freedom of association and workplace rights (general protections);
- termination of employment;
- right of entry; and
- the role of the FWO and the Fair Work Commission.¹⁹

9.23 Mr Tom O'Shea, Executive Director of Policy, Media and Communications at the FWO, noted that the FWO website had free fact sheets on working in Australia in 27 different languages, as well as YouTube videos in 14 different languages, and a free interpreter service.²⁰

9.24 In May 2015, the FWO ran a digital communication campaign using Facebook, Twitter and social media to guide international students to material on the FWO website in order to help visa holders understand their rights and entitlements.²¹

9.25 Mr Michael Fraser stated that the initial point of contact on the FWO website could be improved by having a 'lodge a complaint' button and a 'translate' button on

16 Eventus, *Submission 25*, pp 9–10; Consult Australia, *Submission 30*, p. 8.

17 See, for example, Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 35.

18 Section 124 of the FW Act requires the FWO to prepare and publish the Fair Work Information Statement which deals, among others, with the right to freedom of association. Section 125 of the FW Act requires employers to provide this Statement to employees before they commence employment or as soon as practicable after they commenced employment.

19 Fair Work Information Sheet, <https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement> (accessed 2 February 2016).

20 Mr Tom O'Shea, Executive Director, Policy, Media and Communications, Fair Work Ombudsman, *Committee Hansard*, 18 May 2015, p. 36.

21 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 71.

the homepage. Mr Fraser also suggested the complaints process could be simplified by providing for the digital submission of complaints:

[The] Lodge A Complaint button takes you to a super simple Complaint Wizard. If the FWO still want the complainant to sign the documents, they could first complete the wizard, then print and sign off on a one page authorisation. The wizard could register the complainant in the system, create a case number and digitally submit the complaint. This would greatly reduce the labour currently required to manually process the paperwork, so the FWO can be doing the work the matters the most.²²

9.26 The DIBP noted that, in cooperation with the FWO, it had reviewed and strengthened the information provided to WHMs and international students. The DIBP sends a visa grant letter to all WHM and international student visa holders to help them find out about their workplace rights and the role of the FWO. The letter includes information on workplace rights and entitlements, links to the FWO website, links to YouTube videos and a link to the Statement.²³

9.27 Mr Ullat Thodi, a former 7-Eleven employee, pointed out that when international students first arrive in Australia, their primary focus is on settling into their studies and surviving financially. He suggested another way to reach international students with information about their workplace rights would be through the provision of that information by universities.²⁴

9.28 Mr George Robertson of the National Union of Workers (NUW) argued that, in addition to temporary visa workers being provided information about their working rights in Australia in their own language, these workers should also receive information about their right to join a union.²⁵

22 Mr Michael Fraser, *Submission 60*, p. 17.

23 Department of Immigration and Border Protection, answer to question on notice, 17 July 2015 (received 14 August 2015); Department of Immigration and Border Protection, answer to question on notice from Senator Lines (received 15 December 2015). The visa grant letters are available on the committee's website. See Department of Immigration and Border Protection, answer to question on notice from Senator Lines, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Additional_Documents.

24 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 7; see also Associate Professor Joo-Cheong Tham, answer to question on notice, 24 September 2015 (received 6 November 2015); Unions NSW, *Submission 35*, p. 4; see also Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 29*, p. 2.

25 Mr George Robertson, union organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 15.

Public funding to assist the collective organisation of migrant workers

9.29 Based on his experience convening the Migrant Workers Campaign Steering Group,²⁶ Associate Professor Tham argued the need for public organisations like local councils and educational institutions to provide spaces where temporary migrant workers can meet safely to discuss their workplace concerns, overcome cultural and language barriers, and devise strategies to protect their rights.²⁷

9.30 Associate Professor Tham observed that the Victorian government had recently launched the \$4 million International Student Welfare Grants program in order to support organisations that work with international students. Noting work in this area is fragmented and disjointed, Associate Professor Tham recommended a Commonwealth fund be established 'aimed specifically at improving the protection of the workplace rights of temporary migrant workers' in Australia.²⁸

Information for employers: Industry outreach

9.31 Employers have a duty to understand their obligations to their employees and ensure compliance with workplace laws. Associate Professor Tham noted that these employer obligations were set out by Judge Riley of the Federal Circuit Court:

It is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employees at the proper rates.²⁹

9.32 Given the obligations placed on employers, several submitters were critical of the decision to abolish the industry outreach officers that worked with employers on various aspects of migration law as it related to the employment of temporary visa workers. Eventus argued that the withdrawal of industry outreach officers had reduced the diffusion of information on labour market testing and other aspects of the 457 visa program. Observing that regional outreach officers 'were recognised by employers as providing a valuable contribution to public understanding of the skilled immigration

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

27 Associate Professor Joo-Cheong Tham, answer to question on notice, 24 September 2015 (received 6 November 2015); see also Ms Heather Moore, Advocacy Coordinator, The Freedom Partnership to End Modern Slavery, The Salvation Army, *Committee Hansard*, 26 June 2015, p. 24; The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 6; Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 29*, p. 2.

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

29 *Fair Work Ombudsman v Hongyun Chinese Restaurant Ltd (In Liquidation) & Ors* [2013] FCCA 52, para 35 (24 April 2015) in Associate Professor Joo-Cheong Tham, *Submission 3*, p. 6.

program', Eventus recommended re-instituting public relations staff such as the regional outreach officers.³⁰

9.33 Likewise, Consult Australia stated that industry outreach officers had proven successful in informing and communicating with industry on all aspects immigration and visa processing and policy:

The expert assistance provided through the IOOs [industry outreach officers] supported a clear flow of information between employers and the department, ensuring up-to-date information regarding changes to policy and legislation was communicated to firms in a timely easy-to-understand format.

In the case of our industry, the professional relationship built between the IOOs and Consult Australia was a big factor in the enhanced level of understanding of the industry and government on the needs of each in the skilled migration and temporary migration arena.

For our member firms, who have increased reliance on specialist engineers and other technical professions, a detailed understanding by the department of the particular issues they face, helped ensure that their skilled migration needs were efficiently met.³¹

9.34 Consult Australia recommended the reintroduction of industry outreach officers with a specific focus on industries whose substantial economic contribution is hindered by ongoing skills shortages:

This more tailored approach to the reintroduction of the IOO program recognises the need to apply fiscal discipline, but also the benefits of the program in supporting access to skills in those areas of the economy driving growth.³²

Building a culture of compliance with workplace law

9.35 As noted earlier, both the FWO and DIBP monitor various aspects of migration and workplace law. The following sections outline the work of both agencies beginning with the DIBP monitoring of the 457 and 417 visa programs, followed by the work of the FWO in both education and awareness raising as well as trying to build a culture of compliance in supply chains (the FWO's enforcement activity is covered later in the chapter).

DIBP compliance monitoring of visa programs

9.36 The DIBP runs Visa Entitlement Verification Online (VEVO), an online service for visa holders to check their visa details and work entitlements. Employers can also use VEVO to check if a visa holder is able to work or undertake other

30 Eventus, *Submission 25*, pp 9–10; see also Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 35.

31 Consult Australia, *Submission 30*, p. 8.

32 Consult Australia, *Submission 30*, p. 8.

activities in Australia, such as study. VEVO is accessible from the DIBP website or through a new mobile application.³³

9.37 The DIBP has a range of mechanisms in place for the reporting of compliance issues by phone, fax, letter, email or online report. These include a public do-in line for reporting matters of concern, and call centres for enquiries and reports from visa holders, employers and members of the public.³⁴

9.38 The DIBP uses a targeted risk-based approach to monitor the 36 491 registered active 457 visa sponsors (as at 31 May 2015). The indicators considered for the purposes of targeted monitoring include:

- allegations from visa holders, community members and other third parties;
- information obtained through other areas of the department such as 457 processing areas or compliance activity;
- trends of concern and emerging risks;
- referrals from the FWO;
- analysis of data within departmental systems, for example industry group of sponsor, number of nominations, annual turnover of company, classification level of occupation and salary level; and
- identified links between non-compliant sponsors and other sponsors.³⁵

9.39 The DIBP then assesses whether the identified breaches of a sponsors' obligations were intentional or unintentional. Of the unsatisfactory cases, 609 were sanctioned by cancelling the visa or barring the sponsor from using the 457 program.³⁶

9.40 Following the recently announced collaboration between the DIBP and the Australian Tax Office (ATO), the Migration Council of Australia (Migration Council) recommended that the DIBP and the ATO should match individual tax records to ensure that 457 visa holders were being paid the same income as their Australian counterparts.³⁷

9.41 The Migration Council also recommended further integrity measures including:

33 Department of Immigration and Border Protection, answer to question on notice, 17 July 2015 (received 14 August 2015).

34 Department of Immigration and Border Protection, answer to question on notice, 17 July 2015 (received 14 August 2015).

35 Mr David Wilden, Acting Deputy Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 17 July 2015, p. 46; Department of Immigration and Border Protection, answer to question on notice, 17 July 2015 (received 14 August 2015).

36 Mr David Nockels, Commander, Immigration and Customs Enforcement Branch, Investigations Division, Border Operations Group, Australian Border Force, *Committee Hansard*, 17 July 2015, p. 46.

37 Migration Council Australia, *Submission 27*, p. 11.

- 'spot surveys' to match the income records of 457 visa workers with their original nomination forms;
- an analysis of 457 visa nominations that are at the Temporary Skilled Migration Income Threshold (TSMIT). Given the market salary rate should determine the income of migrants, not the TSMIT, the Migration Council was of the view that an above-average proportion of nominations at the TSMIT indicated possible risk; and
- matching nominated incomes by occupation and industry with the ABS survey of hours and earnings. This exercise would allow an overview of the 457 visa program and identify problematic occupations and industries where segments of the 457 visa population appear underpaid.³⁸

9.42 The Migration Council emphasised that, in the interests of greater transparency, the findings of all analysis should be made public in anonymised form.³⁹

9.43 Changes made to the WHM visa program from 31 August 2015 required pay slip evidence to ensure that participants who undertook 'specified work' (see chapter 2 for further details) in order to qualify for the second year 417 visa were being appropriately remunerated. The DIBP operated a targeted audit process of second WHM (subclass 417) visa applications to verify 'specified work' employment claims.⁴⁰ The FWO welcomed the changes to ensure that proper employment records were being kept.⁴¹

Fair Work Ombudsman campaigns and inquiries

9.44 The FWO viewed its role as building a culture of compliance with workplace law. This necessarily involved a recognition that the reasons for noncompliance varied and so did the tools for building compliance. The FWO noted that most employers wanted to comply with the law and there was, therefore, an important distinction between inadvertent and deliberate noncompliance:

...there is a difference between well-intentioned businesses that make mistakes which result in inadvertent non-compliance with workplace laws, and unscrupulous businesses that have put in place deliberate structures designed to gain a competitive advantage through calculated exploitation of vulnerable workers.⁴²

9.45 In light of the above differences, the FWO observed that it worked cooperatively with employers that had inadvertently breached workplace law in an effort

38 Migration Council Australia, *Submission 27*, p. 11.

39 Migration Council Australia, *Submission 27*, p. 12.

40 Department of Immigration and Border Protection, answer to question on notice, 17 July 2015 (received 14 August 2015).

41 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 14 July 2015, p. 54.

42 Fair Work Ombudsman, answer to question on notice, 5 February 2016 (received 16 February 2016).

'to educate and empower them to address the factors which have led to noncompliance in their workplaces and to achieve voluntary rectification of underpayments'.⁴³

9.46 With recalcitrant employers, the FWO was of the view that a sustainable change in outcomes and behaviour required collaboration between the regulator and a range of stakeholders to eliminate 'deliberate and structural' labour exploitation. The FWO worked with the lead companies who are the 'final beneficiaries of labour', such as supermarkets, franchisors and industry organisations because, as the 'price maker', lead companies were 'in a powerful position to influence behaviour and drive change'.⁴⁴

9.47 To this end, the FWO had commenced several longer term strategic inquiries designed to understand the systemic issues behind noncompliance and liability and to lay the foundations for driving supply chain compliance. The inquiries included:

- the Harvest Trail Inquiry;
- the 417 Working Holiday Visa Inquiry;
- the Baiada Inquiry; and
- the 7-Eleven Inquiry.

9.48 These inquiries are covered in subsequent sections. But first, there is a brief overview of the FWO's overseas workers team.

Overseas workers team

9.49 The FWO prioritised temporary visa workers because of their vulnerability to exploitation and the barriers (such as language, culture, and concerns about visa status) that temporary visa holders face in understanding and enforcing their workplace rights.⁴⁵

9.50 The overseas workers team was 'active in industries known to employ high numbers of visa workers, such as hospitality, horticulture, poultry processing, cleaning, convenience stores and trolley collectors'.⁴⁶

9.51 The FWO overseas workers team had 17 full-time inspectors based in Sydney, Adelaide, Melbourne and Brisbane. However, the Harvest Trail and the 417 campaign also utilised some of the 250 inspectors from the regional network based at 24 locations around the country.⁴⁷

43 Fair Work Ombudsman, answer to question on notice, 5 February 2016 (received 16 February 2016).

44 Fair Work Ombudsman, answer to question on notice, 5 February 2016 (received 16 February 2016).

45 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, p. 2.

46 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, p. 2.

47 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, *Committee Hansard*, 18 May 2015, p. 33.

9.52 The number of complaints to the FWO from 417 visa holders has risen over the last three years and is now larger than the number of complaints from 457 visa holders.⁴⁸

9.53 Working directly with community groups, the FWO had tailored resources and communications campaigns, including social media campaigns, targeting specific groups of visa holders to alert them to their workplace rights.⁴⁹

9.54 The FWO also cooperated with unions in terms of receiving information about areas of concern. Ms James noted that the FWO had positive relationships with several unions including MoUs with the NUW and SDA:

Unions are often our source of information about conduct going on at sites that we do want to be aware of. They do share information with us, and we do work with them. We do keep them up to date on matters where they are representing members in relationship to a particular matter.⁵⁰

9.55 Ms James explained that the FWO pursued its own processes and procedures in those cases that it took on, but in cases where the union was taking action under the FW Act, the FWO would step aside.⁵¹

Harvest Trail inquiry

9.56 The FWO launched the three-year Harvest Trail inquiry in August 2013 in response to ongoing requests for assistance from employees in the horticulture sector, and the FWO's observations of confusion among growers and labour-hire contractors about their workplace obligations.⁵²

9.57 As noted in chapter 7, the committee received evidence about the close working relationship between the FWO and employer organisations. Ms James stated that through the Harvest Trail program for example, the FWO had talked to about 60 different entities including the National Farmers' Federation (NFF) and various growers associations. This process was still at the fact-finding and community engagement stage, with a particular focus on the questions that growers should be asking of labour hire contractors to ensure compliance with workplace laws.⁵³

9.58 The FWO observed that, in their experience, the majority of employers comply with workplace law. For example, as part of the Harvest Trail campaign, the

48 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, p. 4.

49 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, p. 3.

50 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 14 July 2015, p. 51.

51 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 14 July 2015, p. 51.

52 Fair Work Ombudsman, answer to question on notice, 18 May 2015 (received 24 June 2015).

53 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 14 July 2015, p. 51.

FWO identified far more employers and producers complying with workplace laws than employers and producers who were noncompliant.⁵⁴

We have certainly had a really good response to our harvest trail campaign from growers associations and farmers. They do not want to be associated with this kind of conduct. Certainly, in Mildura, we saw local identities and perhaps even local members saying, 'We don't want our town associated with these kinds of stories.' It is that kind of engagement and awareness-raising that we feel actually will begin to change the behaviour, because it means that the people who are unaware of the behaviour that is going on and perhaps unknowingly benefiting from it will start to look down the supply chain and will start to say, 'This is unacceptable; we don't want it going on in our communities and our towns and we're going to do something about it.'⁵⁵

9.59 The FWO noted the fruit and vegetable growing sector attracts a large number of 417 visa holders (as well as other types of visa holders). The Harvest Trail inquiry aimed to ensure pickers received their minimum employment entitlements. The FWO was also keen to understand the drivers of noncompliance with workplace laws in the sector including labour hire arrangements.⁵⁶

9.60 The FWO met growers, labour-hire contractors, hostel operators, harvest workers, industry bodies, local councils, and unions during field trips across Australia.⁵⁷ Table 9.1 below indicates the states and territories in which the FWO had visited growers.

Table 9.1: states, territories and growers visited by the Fair Work Ombudsman in the Harvest Trail inquiry

	ACT	NT	NSW	QLD	SA	TAS	VIC	WA
Mixed crops		x		x				
Strawberries				x			x	x
Cucumbers								x
Cherries			x		x	x	x	
Grapes			x					
Apples and pears			x	x	x	x	x	x
Blueberries			x			x		
Bananas				x				
Mushrooms	x		x	x		x	x	

Source: Fair Work Ombudsman, answer to question on notice, 18 May 2015 (received 24 June 2015).

54 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, *Committee Hansard*, 18 May 2015, p. 38; see also Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 14 July 2015, p. 53.

55 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 18 May 2015, p. 38.

56 Fair Work Ombudsman, answer to question on notice, 18 May 2015 (received 24 June 2015).

57 Fair Work Ombudsman, answer to question on notice, 18 May 2015 (received 24 June 2015).

9.61 After the education and awareness-raising aspect of the Harvest Trail inquiry was completed, the FWO followed up with compliance checks. As a result of compliance checking, the FWO recovered \$232 785 for 470 employees from 37 employers. The FWO also issued:

- 37 formal Letters of Caution warning employers of contraventions;
- 24 Infringement Notices (on-the-spot fines) totalling \$14 250;
- one Compliance Notice requiring contraventions to be rectified; and
- commenced proceedings against one employer in the courts.⁵⁸

9.62 Furthermore, as at 31 March 2015, the FWO had conducted 160 Harvest Trail audits with a 66 per cent compliance rate. The FWO noted that a final report will be published upon completion of the inquiry.⁵⁹

National inquiry into the wages and conditions of 417 visa workers

9.63 The FWO launched the national inquiry into the wages and conditions of 417 visa workers in August 2014 to investigate allegations that workers attempting to qualify for a second year visa by undertaking the necessary 88 days' work in a regional area were being exploited.⁶⁰ (A similar inquiry into the poultry sector launched in November 2013 resulted in the Baiada report in June 2015 and the Proactive Compliance Deed with Baiada: see chapter 7).

Compliance in the supermarket supply chain

9.64 The issue of ensuring compliance with workplace laws down the supply chain was a vexed issue. The committee received evidence on these matters from the FWO, the major supermarkets, and the unions.

9.65 These matters were further complicated by evidence (see earlier chapters) indicating that intensive discounting by the major supermarkets had placed downward pressure on suppliers and producers to cut their costs.⁶¹

9.66 Ms James stated that the FWO engaged with end users such as supermarkets about their supply chain responsibilities, and advised them that it is in their interests—both legal and reputational—to pay attention to what is occurring in their supply chain. In a speech given in August 2014, Ms James focussed on companies at the head of the supply chain:

58 Fair Work Ombudsman, answer to question on notice, 18 May 2015 (received 24 June 2015).

59 Fair Work Ombudsman, answer to question on notice, 18 May 2015 (received 24 June 2015).

60 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, p. 5.

61 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 20; Mr George Robertson, Union Organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 24; Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, Commonwealth of Australia, June 2015, p. 7.

The point I made in that speech is that where you have industries where you have labour intensive, low-skilled work, low profit margins, a high degree of outsourcing and multiple layers in the supply chain, there is a high likelihood there that, unless you put arrangements in place to satisfy yourself that workers are being paid properly, you might be profiting or benefitting from labour that is not being paid lawful rates of pay.⁶²

9.67 Mr Campbell argued it was important to place pressure on major retailers to take responsibility for what occurs in the supply chain:

...the more work we are doing in the horticultural sector the more I see part of the solution being pressure put on employers at the top of the supply chain to take responsibility for what is occurring down the lines.... If Coles, Woolworths and others intend to sell the produce, I think they need to care about how it got to their stores.⁶³

9.68 For example, on 19 June 2015, Ms James, wrote to the following companies (as major customers of Baiada Group) to provide them with the FWO's Baiada report and to invite the companies to meet with FWO to discuss supply chain integrity:

- ALDI Australia—Mr Stephen Kopp, Group Managing Director;
- Coles Supermarkets Australia Pty Ltd—Mr John Durkan, Managing Director;
- KFC Australia—Mr Tony Lowings, Managing Director; and
- Woolworths Limited—Mr Grant O'Brien, Chief Executive Director.⁶⁴

9.69 Ms Vicki Bon, Government and Industry Relations Manager at Coles, noted that Coles was meeting the FWO in July 2015 to discuss the above matters and to develop a joint response.⁶⁵

9.70 In light of the FWO's view that, given their market share and significant purchasing power, the major retailers should look down the supply chain, the committee was keen to ascertain the extent to which the major supermarkets believed they had responsibility for breaches of workplace law that occurred lower down the supply chain.

9.71 In general terms, the major retailers argued that the contracts they had with their suppliers specified that all suppliers were expected to comply with all relevant workplace laws. The supermarkets also argued that the FWO had responsibility for ensuring compliance with workplace law and that those individuals and organisations that had evidence of a breach of workplace law should take that evidence to the FWO, or where appropriate, the police.

62 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 18 May 2015, pp 34–35.

63 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, *Committee Hansard*, 18 May 2015, p. 35.

64 Fair Work Ombudsman, answer to question on notice, 14 July 2015 (received 20 August 2015).

65 Ms Vicki Bon, Government and Industry Relations Manager, Coles, *Committee Hansard*, 14 July 2015, p. 29.

9.72 Ms Armineh Mardirossian, Group Manager of Corporate Responsibility, Community and Sustainability at Woolworths Limited, noted Woolworths had a longstanding relationship with many of its 350 to 400 produce suppliers in Australia and that its trading terms explicitly stipulated the requirement for its suppliers to comply with all relevant laws in the country.⁶⁶

9.73 Woolworths operates a website, telephone service and Facebook site that members of the public can use to contact Woolworths. Woolworths directs any concerns to the relevant area. When alerted to a possible breach of the law, Ms Mardirossian indicated that Woolworths may advise the party making the claim to take the matter to the authorities (such as the FWO). Woolworths might also advise the authorities, and may also consider investigating the matter to determine if there had been a breach of a supplier's code of conduct.⁶⁷

9.74 Mr Ian Dunn, the head of trade relations at Woolworths, noted that Woolworths had signed mutually agreed trading terms with 97.5 per cent of its suppliers. The Trading Terms require all suppliers to provide Woolworths with warranties and indemnities stating that the supplier will abide by all laws, regulations and community standards in Australia. The Trading Terms also mention Woolworths' ethical standards policy.⁶⁸

9.75 Ms Mardirossian explained that Woolworths introduced their ethical sourcing policy in December 2008 and applied the ethical sourcing policy and audit program based on a risk assessment of the source country:

There are a number of analytics that we would look at which are all independent and credible sources, such as cost risk analytics, the World Bank risk analytics, the Corruption Perceptions Index and a number of other tools that we have. The countries get graded in that process according to their risk, whether they are high risk, moderate risk or low risk. Australia is graded low risk, which means that, in our assessment and from the data that is available publicly and some that is proprietary risk analytics, it shows that Australia has a strong rule of law, an independent judiciary, a good human rights track record and very good and independent enforcement agencies, and the law is enforced.⁶⁹

9.76 Noting that Woolworths graded Australia low risk, Ms Mardirossian advised that, since 2010, Woolworths had not conducted audits of ethical sourcing from within

66 Ms Armineh Mardirossian, Group Manager, Corporate Responsibility, Community and Sustainability, Woolworths Limited, *Committee Hansard*, 18 May 2015, p. 1.

67 Ms Armineh Mardirossian, Group Manager, Corporate Responsibility, Community and Sustainability, Woolworths Limited, *Committee Hansard*, 18 May 2015, pp 1–2.

68 Mr Ian Dunn, Head of Trade Relations, Woolworths Limited, *Committee Hansard*, 18 May 2015, p. 3.

69 Ms Armineh Mardirossian, Group Manager, Corporate Responsibility, Community and Sustainability, Woolworths Limited, *Committee Hansard*, 18 May 2015, pp. 4 and 6.

Australia.⁷⁰ Similarly, Coles also regarded Australia as low risk because of its robust workplace laws.⁷¹

9.77 Both Ms Mardirossian and Mr Dunn stated that the allegations aired on *Four Corners* were insufficient at this stage to cause Woolworths to reclassify Australia's risk profile and that Australia's risk level would only be reassessed on the basis of proven evidence. Mr Dunn further noted that, in addition to 350 produce suppliers, Woolworths dealt with 4300 suppliers overall in Australia and that an ethical sourcing audit would impose an additional cost on suppliers.⁷²

9.78 Following the *Four Corners* program in June (that highlighted concerns about breaches of workplace law in both the horticulture and chicken processing sectors), Woolworths wrote to all of its suppliers to remind them of their obligations under the Trading Terms.⁷³

9.79 Woolworths also noted that it had not ceased doing business with suppliers due to allegations made in the *Four Corners* program or raised by the NUW, and that Woolworths would ordinarily 'seek to resolve any issues with our suppliers, rather than unilaterally cease a contract'.⁷⁴

9.80 However, Ms Mardirossian observed that, in the week prior to the *Four Corners* program, one of Woolworths' suppliers, Perfection Fresh, had ceased using a labour hire company following an audit of all of their labour hire companies. In the same week, Covino ceased supplying produce to Woolworths because they were unable to meet the compliance terms stipulated in the contract. Covino had also investigated their own labour hire firms and had stopped using one labour hire firm.⁷⁵

9.81 Ms Bon noted that Coles has an ethical sourcing policy that required suppliers to ensure they complied with all relevant workplace laws and in 2014, Coles had introduced the Coles supply charter. Ms Andrea Currie, Policy and Brand Standards

70 Ms Armineh Mardirossian, Group Manager, Corporate Responsibility, Community and Sustainability, Woolworths Limited, *Committee Hansard*, 18 May 2015, pp 4–5.

71 Ms Andrea Currie, Policy and Brand Standards Manager, Coles, *Committee Hansard*, 14 July 2015, p. 32.

72 Ms Armineh Mardirossian, Group Manager, Corporate Responsibility, Community and Sustainability, Woolworths Limited, *Committee Hansard*, 18 May 2015, p. 10; Mr Ian Dunn, Head of Trade Relations, Woolworths Limited, *Committee Hansard*, 18 May 2015, p. 10.

73 Woolworths Limited, answer to question on notice, 18 May 2015 (received 11 June 2015); see also Mr Ian Dunn, Head of Trade Relations, Woolworths Limited, *Committee Hansard*, 18 May 2015, p. 4.

74 Woolworths Limited, answer to question on notice, 18 May 2015 (received 11 June 2015).

75 Ms Armineh Mardirossian, Group Manager, Corporate Responsibility, Community and Sustainability, Woolworths Limited, *Committee Hansard*, 18 May 2015, pp 5, 6, 7 and 11.

Manager at Coles, noted that the ethical sourcing policy had been in place since about 2005 and had been reviewed in 2010 and 2013.⁷⁶

9.82 Ms Bon outlined the action Coles had undertaken since the *Four Corners* program:

Each supplier has been asked to confirm that it has a process in place to ensure contracted workers are legally entitled to work, contracts with labour hire companies comply with award rates and suppliers pay labour hire companies enough money to allow workers' pay and entitlements to comply with the relevant award. In addition to the suppliers named in the program we have written to all of our direct fresh product and meat suppliers to reinforce with them the importance of meeting their obligations in relation to immigration laws, wages, entitlements, working hours and other benefits.⁷⁷

9.83 Ms Currie noted that Coles had spoken directly to Baiada, D'VineRipe (part of Perfection Fresh), Akers, and Covino. In relation to Baiada, Ms Currie stated that prior to the release of the FWO report into Baiada, Coles had commissioned PricewaterhouseCoopers to conduct a confidential audit of all the work practices at Baiada including the use of labour hire companies, with the report due by 31 July 2015. Ms Currie explained that any audits of a supplier were confidential because the first step, if any issues arose, would be to work with the supplier to correct the issues.⁷⁸

9.84 Mr Robertson of the NUW was of the view that the role of major buyers, and in particular the supermarkets, was 'fundamentally important' in preventing worker exploitation down the supply chain. Mr Robertson contended that the supermarkets should work with the NUW to ensure that all the produce sold by the major supermarkets was ethically produced. He maintained that an ongoing relationship between the union, producers and the supermarkets would enable the supermarkets to ensure that their ethical standards were met in practice.⁷⁹

9.85 In light of the above, Mr Robertson said the NUW had offered to meet with Coles to discuss supply chain matters in an effort to ensure that produce supplied to Coles is produced in compliance with Australian workplace laws. Ms Bon confirmed

76 Ms Vicki Bon, Government and Industry Relations Manager, Coles, *Committee Hansard*, 14 July 2015, p. 23; Ms Andrea Currie, Policy and Brand Standards Manager, Coles, *Committee Hansard*, 14 July 2015, p. 37; Coles, answer to question on notice, 14 July 2015 (received 6 August 2015).

77 Ms Vicki Bon, Government and Industry Relations Manager, Coles, *Committee Hansard*, 14 July 2015, p. 23.

78 Ms Andrea Currie, Policy and Brand Standards Manager, Coles, *Committee Hansard*, 14 July 2015, pp 24–25.

79 Mr George Robertson, Union Organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 15.

that Coles had since met with the NUW. Mr Robertson indicated that Woolworths had declined to meet the NUW.⁸⁰

9.86 Coles stated it had met with the NFF to discuss the NFF's proposal for a Best Practice Scheme for Agricultural Employment and how Coles could support practical proposals from growers, farm groups and relevant government agencies to help guard against any abuse of workers' rights in the food supply chain. Ms Bon said it was her understanding that the NFF had invited the NUW to be part of the industry discussion.⁸¹

The 7-Eleven inquiry

9.87 Ms James explained that 7-Eleven first came to the attention of the FWO from 1 July 2009. The FWO conducted two separate audit activities between 2009 and 2011 that resulted in the recovery of around \$140 000 of underpaid wages and the Bosen litigation (the Bosen litigation is covered in more detail in the later section on enforcement activity).⁸²

9.88 In 2014, as it became obvious to the FWO that 7-Eleven had not improved its compliance with workplace laws and that visa workers across the 7-Eleven network were still being exploited, the FWO began a broader inquiry into 7-Eleven. As part of the inquiry, the FWO conducted site visits at 20 stores and identified serious concerns at a number of them. As at 5 February 2016, the FWO had commenced seven court proceedings (five of which were ongoing) against 7-Eleven franchisees, secured one enforceable undertaking, and recovered over \$200 000 for 30 employees.⁸³

9.89 The FWO inquiry into 7-Eleven will investigate various matters including the underlying causes of noncompliance, the business model used by 7-Eleven, and whether liability for noncompliance extends beyond the franchisee to the franchisor.⁸⁴

9.90 The FWO inquiry will involve proactive compliance work and will conclude in early 2016 with a publicly available report. The FWO envisaged that the report

80 Mr George Robertson, Union Organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 24; National Union of Workers, answer to question on notice, 18 May 2015 (received 11 August 2015); Ms Vicki Bon, Government and Industry Relations Manager, Coles, *Committee Hansard*, 14 July 2015, p. 27.

81 Coles, answer to question on notice, 14 July 2015 (received 6 August 2015); Ms Vicki Bon, Government and Industry Relations Manager, Coles, *Committee Hansard*, 14 July 2015, p. 27; see also National Farmers' Federation, answer to question on notice, 5 February 2016 (received 15 February 2016).

82 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 64.

83 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, pp 64–65; Ms Janine Webster, Chief Counsel, Fair Work Ombudsman, *Committee Hansard*, 5 February 2016, pp 41–43.

84 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 64.

would 'contain recommendations that are designed to achieve real sustainable change in the 7-Eleven network to ensure the franchise is both accountable and compliant'.⁸⁵

9.91 Ms James noted the commonalities between the 7-Eleven inquiry and those into Baiada and the Harvest Trail inquiry:

This matter, like the Baiada matter and like our work on the Harvest Trail, has a number of features in common. It involves a network or chain of entities, where there is an entity or person at the centre or at the top who benefits from the labour of workers for which it is not legally or directly responsible. They often involve low-skill work, vulnerable workers and tight profit margins.⁸⁶

9.92 Ms James was strongly of the view that achieving sustainable outcomes in sectors where deliberately exploitative conduct is occurring required collaborative efforts between regulators and stakeholders including information sharing and joint activities.⁸⁷

9.93 Prior to the screening on 31 August 2015 of the *Four Corners* program on 7-Eleven, the FWO advised that they had met twice with 7-Eleven executives from Head Office including the then National Operations Manager, Ms Natalie Dalbo, as set out below:

We met with 7-Eleven shortly after the commencement of our Inquiry, on **13 October 2014**. At this meeting we:

- explained the Inquiry we had recently commenced and why;
- explained that in complaints received from across states and locations there were very similar allegations around false recording of hours worked and wages paid;
- advised that the conduct we had seen in complaints was similar to that observed in Bosen, and that it was too similar to be a coincidence; and
- explained that the FWO was seeking to look into this further to try to work out why this was happening and where the behaviour was originating.

7-Eleven mentioned that community and cultural groups may be sharing information, and that Head Office were looking at how many payroll hours were worked per store and questioning stores that did not have enough hours to cover their operation.

We met with 7-Eleven again on **5 May 2015**. At this meeting we presented 7-Eleven with the preliminary findings of our Inquiry. We also:

- explained that the Inquiry commenced after FWO received intelligence both from requests for assistance and from various anonymous sources;

85 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 65; Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, *Committee Hansard*, 24 September 2015, p. 66.

86 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 65.

87 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 65.

- advised the intelligence suggested non-compliance with minimum entitlements and false record keeping practices within the 7-Eleven network. Moreover on the back of that intelligence, in September 2014, we undertook unannounced Saturday night visits to 20 city stores to gather evidence;
- advised that out of the 20 stores visited, the majority had provided information in response to notices to produce documents which was inconsistent with what our Inspectors had gathered on the night of the visits; and
- explained the FWO could not be 100% confident in the compliance of any of the stores. The level of non-compliance with record keeping practices, and in particular false record keeping practices, was particularly disappointing. Some stores had provided fraudulent records and/or information to the FWO which was a serious offence.⁸⁸

9.94 The FWO noted that after its audit activities in 2009–2010, 7-Eleven Head Office had assured the FWO that they took the matters seriously and would investigate them further.⁸⁹ Mr Campbell also confirmed that at the meeting on 5 May 2015, the FWO advised 7-Eleven that enforcement actions against franchisees were likely, and 7-Eleven would therefore have been well aware that franchisees were being targeted by the FWO.⁹⁰

9.95 Given that Mr Fraser had spoken to workers at 7-Eleven stores across the country, and yet the FWO had only raided 20 stores, Ms James addressed the question of results in the context of agency resourcing. Ms James stressed that the FWO was focussed on achieving sustainable outcomes in the future and not on auditing every 7-Eleven store across the country:

A central focus of our inquiry is about the future. It is about making recommendations that will achieve real and sustainable change and bring about accountability within the franchise operations. In other words, what we are hoping is that through the engagement we have with 7-Eleven we will be able to assist them to put in place systems and processes that will ensure that this will not happen in future. We feel that the work we are doing with the information and the evidence that we have so far will form the basis of recommendations that will enable us to have that conversation with head office.⁹¹

9.96 Working with the entity at the top of the chain to achieve ongoing compliance is similar to the approach that the FWO adopted in the Baiada inquiry. With respect to 7-Eleven, Ms James pointed out that:

88 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015) (emphasis original).

89 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

90 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, *Committee Hansard*, 24 September 2015, p. 67.

91 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 68.

...ongoing monitoring by the franchise, with the assistance of third parties such as auditors, with some accountability back to us—which other franchises and businesses we have worked with have put in place—might bring about a sustainable change in the 7-Eleven network⁹²

9.97 However, Mr Campbell conceded that after the actions taken by the FWO in 2009 and 2014, the engagement of 7-Eleven Head Office did not have a lasting impact and did not lead to a reduction in noncompliance with workplace laws.⁹³

9.98 Likewise Ms James expressed frustration that despite engagement and discussions with 7-Eleven, the pattern of systemic and deliberate falsification of records had continued for several years:

In the first set of audits, we had some pretty bad results. We recovered over \$160 000 for about 170 workers in Sydney and Melbourne. Then head office came to us and said they wanted to do something about it, so we carried out a second round of audits in Melbourne and Geelong. We did find underpayments there but they were less. We thought that there were improvements going on. We thought that the work we had done with them, and the education, gave them the opportunity to work with their franchisees to make sure that they understood their obligations. So it is disappointing that we invested so much at that point in time to find, in moving forward into 2014, that we are seeing the same kind of conduct—and perhaps even on a larger scale.⁹⁴

Enforcement actions

9.99 As noted earlier, a key focus of the FWO is to work with lead businesses in building a culture of compliance in supply chains. The FWO has pursued various strategies to achieve this including compliance partnerships, enforceable undertakings, as well as litigation.

9.100 The FWO noted that compliance partnerships are 'increasingly popular with businesses who wish to make a strong and public commitment to their employees, franchisees, contractors, customers and the broader community about compliance with workplace laws'. The FWO currently has 13 compliance partnerships with businesses including Baiada and McDonalds.⁹⁵

9.101 As detailed in chapter 7, Baiada accepted as part of the Proactive Compliance Deed that it had an 'ethical and moral responsibility to stamp out exploitation and implement sustainable changes to its business practices to ensure future compliance'. The measures promulgated by the FWO as part of a compliance partnership such as that conducted with Baiada include:

92 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 68.

93 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, *Committee Hansard*, 24 September 2015, p. 68

94 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 69.

95 Fair Work Ombudsman, answer to question on notice, 5 February 2016 (received 16 February 2016).

-
- robust, transparent and verifiable electronic time-keeping, payroll and worker identification systems;
 - regular independent audits and assessments of compliance, both of the business and of the contractors within the network;
 - implementation of workplace relations training, including training 'in-language' for employees from non-English speaking backgrounds;
 - providing greater access, information and co-operation to FWO inspectors and advisors;
 - establishing clear procurement policies and conducting regular reviews of procurement and outsourcing arrangements to ensure ongoing ethical practice; and
 - properly formalised written contracts with suppliers and contractors, with clear requirements for compliance with workplace laws.⁹⁶

9.102 The enforceable undertaking between the FWO and Coles in 2014 also saw Coles become 'the first major supermarket chain to publicly declare that it has an ethical and moral responsibility to join with the FWO to stamp out exploitation'.⁹⁷

9.103 The following sections consider the advantages and disadvantages of the various enforcement activities pursued by the FWO.

Court action

9.104 The FWO noted that it puts between 40 and 50 matters into court each year. Court action typically takes more than a year to resolve and in more complex cases, much longer. The FWO therefore uses court action as a last resort, usually when an employer has deliberately exploited vulnerable workers and refuses to cooperate with the FWO. The FWO pointed out that it actively promotes its litigation program through the media to deter other employers from breaching the law.⁹⁸

9.105 While temporary visa holders made up about 10 per cent of all requests for assistance to the FWO, since July 2009, temporary visa holders represented around 20 per cent of the FWO's legal activity for that period. During that period, the FWO commenced 62 legal matters involving temporary visa holders and recovered almost \$6 million.⁹⁹

96 Fair Work Ombudsman, answer to question on notice, 5 February 2016 (received 16 February 2016).

97 Fair Work Ombudsman, answer to question on notice, 5 February 2016 (received 16 February 2016).

98 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, p. 2.

99 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, p. 1; Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 14 July 2015, p. 52.

9.106 The serious nature of the matters involving temporary visa holders saw an increase in the proportion of cases involving visa holders that the FWO escalated to court action:

While currently 1 in 10 of the people making a complaint to our organisation is a visa holder, a visa holder is involved in 1 in 3 of the matters we have taken to court in the last 18 months.

This is illustrative of the fact that matters involving visa holders often involve serious and wilful non-compliance, warranting the most serious of enforcement responses.¹⁰⁰

9.107 In the 2014–15 financial year, the FWO:

- commenced 21 court proceedings involving temporary visa workers out of a total of 50 court proceedings commenced; and
- recovered over \$1.6 million in unpaid entitlements for temporary visa workers out of a total of over \$22.3 million.¹⁰¹

9.108 Perhaps the most frustrating aspect (for both the FWO and underpaid employees) of pursuing court action under the current regulatory and penalty provisions of the FW Act is the tendency for employers that have engaged in deliberate underpayment and illegal activity to avoid the full consequences of a court finding. Unscrupulous employers typically avoided paying the full penalty imposed by a court through clever corporate restructuring, asset shifting, and corporate liquidation. The following two cases illustrate how this occurs in practice.

9.109 The case against Bosen was the first litigation the FWO took against a 7-Eleven franchisee. The Bosen matter arose as a result of Mr Mohamed Ullat Thodi approaching the FWO about underpayments during his employment at 7-Eleven stores in Geelong and South Yarra (see chapter 8). The FWO achieved penalties of \$120 000 against the company, and penalties of \$20 000 and \$10 000 against the two directors. However, the company was wound up and the company penalty was not paid. Although the two directors paid their penalties of \$20 000 and \$10 000 respectively, when those penalties were distributed amongst the six employees that were party to the case, the amount fell well short of the \$85 000 of underpaid wages owed to the workers.¹⁰²

9.110 A similar outcome occurred in another court case against a multi-store 7-Eleven franchisee in Brisbane, Mr Mubin Ul Haider. Mr Haider liquidated his company, with the result that his personal fine as a director was a fraction of the underpaid wages owed to his employee:

For example, in *FWO v Haider Enterprises Pty Ltd (in liquidation) & Anor*, Haider Enterprises had owned and operated several 7-Eleven franchises in Brisbane, and was placed into liquidation shortly after the FWO

100 Fair Work Ombudsman, Tabled document No. 1, Public hearing 18 May 2015, p. 3.

101 Fair Work Ombudsman, answer to question on notice, 14 July 2015 (received 20 August 2015).

102 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 71.

commenced court action to enforce a compliance noticed issued by the FWO that required the company to pay \$21 298 in back-pay to a former migrant worker. In this matter, the Federal Circuit Court ordered the second respondent, Mr Haider, to pay a penalty of \$6120 for his admitted involvement in failing to comply with the Notice to Produce issued by the FWO, and a penalty of \$850 for his admitted involvement in the failure to comply with the Compliance Notice. The FWO obtained orders that the penalties be paid to the employee.¹⁰³

9.111 The maximum penalty that can be awarded against an individual is one-fifth of the maximum penalty that can be awarded against a corporation. As seen in the examples above, the result is that under the current FW Act, the penalties ordered against a director are often less than the underpayments owed to a worker(s). In this context, the FWO reiterated their frustration that corporate employers liquidated their companies after the FWO filed a matter in court in order to avoid some of the penalties and payments of underpaid wages ordered by courts¹⁰⁴

9.112 The committee also notes that, as detailed in chapter 7, the FWO report into Baiada found that the web of sub-contracting labour hire companies in the Baiada labour supply chain also liquidated or de-registered their companies upon investigation by the FWO in order to avoid potential penalties.

9.113 A key impediment to pursuing court action has been the lack of accurate employment records kept by employers. Ms James noted that in the last financial year, the FWO had found more 'extreme conduct where there are no records or fabricated records'. Given the critical importance of accurate record-keeping in verifying compliance with workplace laws, the FWO noted that unless an employee had kept quite detailed diary notes, it was very difficult to provide evidence that was acceptable in a court to establish with certainty the hours of work and the amounts of underpayment:¹⁰⁵

The courts have confirmed that employment records are not merely technical or procedural requirements. Provision of false or misleading records can have the effect of preventing any action to remedy significant underpayments of wages, and non-payment of annual leave and superannuation for those workers who may have been entitled to these employment benefits.¹⁰⁶

103 Fair Work Ombudsman, Tabled document No. 2, 24 September 2015, letter to Mr Peter Harris AO, Chairman, Productivity Commission, 18 September 2015, p. 6.

104 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, pp 64 and 66.

105 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 69.

106 Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, Commonwealth of Australia, June 2015, p. 29.

9.114 As at 5 February 2016, the FWO had commenced seven court proceedings (five of which were ongoing) against 7-Eleven franchisees, and had secured one enforceable undertaking.¹⁰⁷

9.115 The visa status of temporary visa workers can also arise as an obstacle to court proceedings. For example, in the Bosen litigation, Mr Ullat Thodi had breached his visa conditions with respect to the work hours restriction. He informed the FWO that he and his fellow 7-Eleven employees would only provide paperwork about the underpayment if the FWO could guarantee they would not be deported. Following consultation between the FWO and the DIBP, the DIBP confirmed an exemption for Mr Ullat Thodi and his fellow employees to enable the FWO to pursue the case against Bosen Pty Ltd and its co-owners and directors. The FWO stated that it worked cooperatively with the DIBP to ensure that visa holders had the right visa status to be able to give evidence in court.¹⁰⁸

Enforceable undertakings

9.116 An enforceable undertaking is an alternative to court proceedings in cases where a person is willing to admit to contraventions. Enforceable undertakings are specifically provided for and legally enforceable under the FW Act and can be accepted if the FWO 'reasonably believes that a person has contravened a civil remedy provision'.¹⁰⁹

9.117 The FWO uses enforceable undertakings where an employer acknowledges they have breached the law, and has accepted responsibility for the breach, and agreed to cooperate with the FWO to remedy the matter. In this respect:

The enforceable undertaking is a company's written commitment to address contraventions, often through back-payment, and to prevent future breaches through initiatives such as training sessions for senior managers and a requirement for companies to perform self-audits and report on compliance at specific times.¹¹⁰

9.118 The FWO executed 42 enforceable undertakings against an employer during 2014–15, a 180 per cent increase on 2013–14. Temporary visa holders were over-represented in these cases, with 20 out of 42 enforceable undertakings in 2014–15

107 Ms Janine Webster, Chief Counsel, Fair Work Ombudsman, *Committee Hansard*, 5 February 2016, pp 41–43.

108 Mr Mohamed Rashid Ullat Thodi, *Supplementary Submission 59.2*, p. 6; Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, p. 6; Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 70.

109 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

110 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

being executed on behalf of temporary visa holders. The FWO actively monitors all the enforceable undertakings that it enters into with another party.¹¹¹

9.119 The FWO recovered more than \$3.7 million in underpayments through enforceable undertakings. The majority (93 per cent) related to wages and conditions breaches, and 48 per cent involved matters relating to overseas workers.¹¹²

9.120 The FWO noted that enforceable undertakings have several benefits including that they:

- minimise costs for all parties;
- enable employees to receive unpaid entitlements promptly;
- facilitate long-term behavioural change; and
- enable legally binding commitments that are different from what a court would typically order such as donating money to community groups and registering for the FWO's My Account service.¹¹³

9.121 With respect to the second dot point above, Ms James noted that in the case of PSP International Trading Pty Ltd involving a 7-Eleven franchisee, the FWO achieved an enforceable undertaking with the store owner (the employer). It was Ms James' understanding that the employer had paid the \$30 000 that he owed his workers.¹¹⁴

9.122 With respect to the final point above, Ms James explained that the FWO is able to be creative with its enforceable undertakings and extract undertakings from an employer beyond those that would be applicable under the FW Act, and therefore beyond what the FWO would be able to achieve through court action. For example, the enforceable undertaking with Benara Nurseries imposed obligations on the company to take steps to ensure that the accommodation used by its workers was 'fit for purpose going forward'.¹¹⁵

Proactive compliance deeds

9.123 A proactive compliance deed differs from an enforceable undertaking in several ways. First, it is not enforceable under the FW Act, but is made and enforced under the general law. Second, a proactive compliance deed does not require a Fair

111 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 14 July 2015, p. 50; Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015); Fair Work Ombudsman, answer to question on notice, 14 July 2015 (received 20 August 2015).

112 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

113 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

114 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 66; Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

115 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 14 July 2015, p. 50.

Work inspector 'to hold any belief that contraventions of civil remedy provisions are occurring or have occurred'. And third, a proactive compliance deed is a 'formal agreement between the FWO and an entity, under general law, to take certain steps aimed at ensuring compliance in that business and, in some cases, in that business's supply chain'.¹¹⁶

9.124 In sum, therefore, a proactive compliance deed enables an employer to make a commitment to comply with workplace laws as well as work with the FWO to ensure their business and, potentially, other businesses the employer deals with, comply with workplace laws.¹¹⁷ The proactive compliance deed between the FWO and Baiada (see chapter 7) accomplished this aim by allowing Baiada to make certain commitments to compliance with workplace laws with respect to the labour hire companies it used to source labour for its processing sites.

Freezing orders

9.125 A freezing order is an asset preservation order made by a court, normally without notice to the respondent party. The aim is to prevent a respondent circumventing a pending or proposed court process by stripping assets out of a company.¹¹⁸

9.126 The FWO explained that the advantage of a freezing order is that it typically restrains a person from removing, disposing of, or diminishing the value of any assets up to the anticipated value of the substantive claim. A limitation is that it does not provide any rights over the assets that are frozen, meaning there is no priority or guarantee of recovering the value of any judgment ultimately awarded.¹¹⁹

9.127 The FWO does not have the power to freeze assets. Instead, the FWO must apply to a court for a freezing order. In order to secure a freezing order, the FWO must present sufficiently persuasive evidence.¹²⁰ For example, in *FWO v Trek North & Anor*, the FWO secured freezing orders against Trek North's owner and director Mr Leigh Alan Jorgensen. In this case, the FWO was concerned that Mr Jorgensen would strip company assets or place the company in liquidation to avoid paying over \$95 000 in court-ordered penalties and back-pay orders.¹²¹

116 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

117 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

118 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

119 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

120 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

121 Fair Work Ombudsman, Tabled document No. 2, 24 September 2015, letter to Mr Peter Harris AO, Chairman, Productivity Commission, 18 September 2015, p. 5.

9.128 Similarly, in the ongoing matter of *FWO v Grouped Property Services & Ors*, the FWO obtained freezing orders against Group Property Services' operators to prevent them from dispersing the company's assets up to the value of alleged underpayments (which were in excess of \$300 000).¹²²

Resourcing of the FWO

9.129 The committee received evidence from several submitters expressing concern about a lack of resources to enable the FWO to monitor and enforce compliance across a range of temporary visa programs.

9.130 Ms Mogg from Queensland Fruit and Vegetable Growers Ltd (trading as Growcom), noted that Growcom was working with the FWO to implement the Harvest Trail campaign in Queensland. However, Ms Mogg expressed concern at what Growcom saw as a manifest lack of resources available to the FWO given the extent to which the law was being broken:

For example, in a meeting with the Fair Work Ombudsman this week on farm, we realised that in an area from Mackay south, down to the New South Wales border, which is some 1200 kilometres, there are five inspectors in Fair Work available to this industry. This is not the only industry those five inspectors cover. And some of those five inspectors are in fact part time. I think this just demonstrates that the resourcing in this area is woefully inadequate to address the urgent requirements and breaches that are currently being conducted.¹²³

9.131 Similarly, the SDA noted the huge challenge presented to the FWO by Australia's geography and the large number of temporary visa workers:

It seems unlikely that the FWO's current resourcing is sufficient, a point which has been highlighted by recent media investigations into exploitation of temporary migrant workers. The FWO currently has 300 inspectors divided into teams: compliance, early intervention, alternative dispute resolution and campaigns. Its inspectorate is required to serve up to 11.6 million workers, over 10 per cent of which are temporary migrants with work rights in the domestic economy.¹²⁴

9.132 Eventus argued that 'despite significant increases in visa charges and associated costs in recent years', the current numbers of Fair Work Inspectors represented 'only a fraction of the resources' required to monitor and enforce compliance with the 457 visa program.¹²⁵

9.133 Eventus stressed the need to target high-risk industries and occupations with unannounced site visits and warned that 'a lack of compliance activities puts the

122 Fair Work Ombudsman, Tabled document No. 2, 24 September 2015, letter to Mr Peter Harris AO, Chairman, Productivity Commission, 18 September 2015, p. 5.

123 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 20.

124 Shop, Distributive & Allied Employees' Association, *Submission 58*, pp 29–30.

125 Eventus, *Submission 25*, p. 18.

integrity of the program at risk' because it increases the chance that unscrupulous operators will be able to 'operate with impunity'.¹²⁶

9.134 By contrast, the Ai Group suggested that the FWO and the DIBP were working effectively to enforce the law and take action against employers breaching the law. The Ai Group also noted that the *Migration Act 1958* (Migration Act) was further amended in 2013 by the *Migration Amendment (Reform of Employer Sanctions) Act 2013* that:

...increased the sanctions, including implementing no-fault civil penalties and increasing criminal penalties, against employers who allow unlawful non-citizens to work or lawful non-citizens to work in breach of a visa condition that restricts or prohibits work.¹²⁷

Proposed changes to the powers of the regulator and regulatory regimes

9.135 A recurring theme in this inquiry has been the extent to which lead firms see themselves as responsible for their supply chain, and the extent to which the law holds leads firms responsible for certain employment relationships. These issues are particularly relevant where the traditional direct relationship between employer and employee has given way to various forms of employment relationships such as labour hire contracting and franchise arrangements.

9.136 Dr Tess Hardy from the Centre for Employment and Labour Relations Law at Melbourne Law School noted that a growing body of evidence indicated that the compliance behaviour of employers was 'often shaped by industry dynamics'. Dr Hardy pointed out certain features common to horticulture, food processing, and convenience stores (three sectors covered in detail in this report), namely that each of these sectors appears to be characterised by:

- intense price pressures;
- a concentration of market power in a limited number of lead firms (either at the top of the supply chain or at the apex of the franchise network); and
- small and geographically dispersed employers, including labour hire providers and franchisees.¹²⁸

9.137 The potential for lead firms to accumulate a substantial amount of power without a concomitant degree of responsibility is perhaps best expressed by a quote from Dr David Weil, a United States (US) labour academic and current Administrator of the Wage and Hour Division of the US Department of Labour, cited in the submission from Dr Hardy:

The failure of public policy makers to fully appreciate the implications of how major sectors of the society organize the production and delivery of

126 Eventus, *Submission 25*, p. 18.

127 Ai Group, *Submission 33*, p. 23.

128 Dr Tess Hardy, *Submission 62*, pp 2 and 3; Dr Tess Hardy, *Committee Hansard*, 24 September 2015, p. 40.

services and products means that lead businesses are allowed to have it both ways. Companies can embrace and institute standards and exert enormous control over the activities of subsidiary bodies. But they can also eschew any responsibility for the consequences of that control.¹²⁹

9.138 Dr Hardy observed that the direct relationship between employer and employee had been fractured by business strategies such as franchising and labour hire. Furthermore, the combination of a fragmentation in corporate structures, 'the doctrine of limited liability, clever corporate structuring and/or deliberate asset-shifting', meant that the traditional forms of enforcement litigation may no longer be effective in achieving compliance, deterrence and compensation. Dr Hardy therefore suggested that punishing an employer further down the supply chain may not address the root causes of noncompliance because it fails to take heed of the power exercised by lead firms:

...it is no longer apparent that punishment of the putative employer will be effective in addressing some of the key drivers of compliance behaviour, which may be determined by more powerful firms positioned higher in the supply chain or at the apex of the franchise network.¹³⁰

9.139 Nevertheless, Dr Hardy noted that reputational-based sanctions could prompt significant changes in compliance behaviour in both the lead firm and throughout a supply chain or franchise network. However, Dr Hardy inserted an important caveat. She warned that the success of 'the influential model of responsive regulation is premised on the regulator having a suite of enforcement tools, including sufficiently strong deterrents, at their disposal'. In other words, the ability to encourage or compel lead firms to accede to voluntary measures, such as a Proactive Compliance Deed, could be undermined if lead firms formed the view that the regulator did not possess a sufficient range of sanctions that it could bring to bear in any given case.¹³¹

9.140 Further, Dr Hardy warned that without effective sanctions, the commitment to support ongoing monitoring regimes made by lead firms and franchisors under voluntary mechanisms such as a Proactive Compliance Deed could recede over time.¹³²

9.141 Given the responsibility of the lead firm is no longer so clear in situations where the employment relationship is fragmented, the remainder of this chapter examines a range of submitter observations in order to ascertain whether the compliance and enforcement regime under the FW Act is sufficiently robust to protect workers from exploitation.

9.142 As context to the discussions on the powers of the FWO, penalty regimes, accessory liability and joint employment legislation, this section begins with a brief

129 David Weil in Dr Tess Hardy, *Submission 62*, p. 8.

130 Dr Tess Hardy, *Submission 62*, pp 5 and 6.

131 Dr Tess Hardy, *Submission 62*, pp 7 and 8.

132 Dr Tess Hardy, *Submission 62*, p. 19.

outline of the challenges posed to the FWO's enforcement activity by illegal phoenix behaviour.

Illegal phoenix activity

9.143 The FWO noted that illegal phoenix activity (as opposed to legal phoenix activity) generally 'describes the situation that arises where companies are deregistered or liquidated with the intention of avoiding liabilities and continuing the operation of the business'.¹³³

9.144 In a letter to Mr Peter Harris AO, Chairman of the Productivity Commission, the FWO described how the manifestation of illegal phoenix behaviour at the intersection between the FW Act and the *Corporations Act 2001* hindered the enforcement work of the FWO.¹³⁴

9.145 Ms James noted that when an employer is an incorporated entity (as opposed to a sole trader or partnership), the company bears legal responsibility for providing the correct employee entitlements. However, the FWO is unable to pursue enforcement action against a company that has been liquidated or deregistered:

Section 471B of the *Corporations Act 2001* (Cth) provides that, while a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with a proceeding in court against the company or in relation to the property of a company, or enforcement process in relation to such property, except with the leave of the Court and in accordance with the terms imposed by the Court. Similarly, section 440D provides that, during the administration of a company, a proceeding in a court (other than a criminal proceeding or a prescribed proceeding) against the company or in relation to any of its property cannot be begun or proceeded with except with the administrator's written consent or with the leave of the Court.¹³⁵

9.146 While the FWO cannot pursue enforcement action against a company that has liquidated or deregistered, the FWO can pursue enforcement action against the director of a deregistered or liquidated company.¹³⁶ However, the penalties that are able to be imposed on an individual director are much lower than those able to be imposed on a company. In practice, this has usually meant that the penalties imposed by the courts on a director are insufficient to even cover the underpaid wages of temporary visa workers (see, for example, the Bosen and Haider cases cited earlier).

9.147 The FWO pointed out that illegal phoenix activity undermined the FWO's compliance work by restricting the FWO's ability to recover back-payments owed to

133 Fair Work Ombudsman, Tabled document No. 2, 24 September 2015, letter to Mr Peter Harris AO, Chairman, Productivity Commission, 18 September 2015, p. 4.

134 Fair Work Ombudsman, Tabled document No. 2, 24 September 2015, letter to Mr Peter Harris AO, Chairman, Productivity Commission, 18 September 2015, pp 4–6.

135 Fair Work Ombudsman, Tabled document No. 2, 24 September 2015, letter to Mr Peter Harris AO, Chairman, Productivity Commission, 18 September 2015, pp 4–5.

136 Fair Work Ombudsman, answer to question on notice, 14 July 2015 (received 20 August 2015).

workers from the company. The ability to get around court-imposed sanctions also significantly reduced the deterrent effect of litigation pursued by the FWO. The FWO therefore argued that effective deterrents against directors were needed to combat illegal phoenix activity.¹³⁷

9.148 In addition to the current regulatory framework being insufficient to deter employers from deliberately breaching employment laws, the committee received evidence that the inability of the FWO to recover the underpaid wages of employees is having a detrimental impact on the willingness of workers to come forward with allegations of underpayment and exploitation. For example, as noted in chapter 8, Mr Ullat Thodi stated that exploited international students will not bring a claim against their employer because, not only do they fear deportation, but they point out that despite winning a court case, Mr Ullat Thodi lost his job, his mental health, and the FWO only recovered a fraction of his underpaid wages.¹³⁸

Powers of the FWO

9.149 Over the course of several hearings, the FWO outlined the extent of their powers and the extent of civil penalty provisions that apply to a failure to comply with the lawful requests of a Fair Work Inspector.

9.150 Ms James noted that FWO inspectors had the power to enter premises without force and require records to be handed over, but many times the records were non-existent. In these circumstances, the FWO did not have the capacity to compel people to speak with the FWO, to participate in an interview, or to give evidence to the FWO. Ms James further noted there were 'strong disincentives for people to talk to us voluntarily' and therefore the FWO experienced real barriers in getting the evidence to put certain matters into court including, for example, evidence of hours worked.¹³⁹

9.151 The FWO pointed out that it was 'relatively common' for persons to decline to participate in records of interview with Fair Work Inspectors, and some also refused or failed to comply with Notices to Produce Records and Documents issued pursuant to section 712(1) of the FW Act, or produced false records. Civil penalty provisions only applied to a person who failed to provide a Fair Work Inspector with their name and address under section 711 of the FW Act or to a person who failed to comply with a notice to produce records or documents issued under section 712.¹⁴⁰

9.152 The FWO had no power to compel individuals to co-operate with Fair Work Inspectors and there was no positive obligation on persons to provide reasonable assistance to an Inspector who was exercising a power while conducting an inspection under section 709 of the FW Act. There was no civil penalty for a person who refused

137 Fair Work Ombudsman, Tabled document No. 2, 24 September 2015, letter to Mr Peter Harris AO, Chairman, Productivity Commission, 18 September 2015, p. 5.

138 Mr Mohamed Rashid Ullat Thodi, *Committee Hansard*, 24 September 2015, pp 6 and 8.

139 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 18 May 2015, p. 35.

140 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

to grant access to a Fair Work Inspector, nor for a failure or refusal to comply with a request to do any of the things an Inspector can lawfully require when conducting an inspection as contained in section 709.¹⁴¹

9.153 According to the FWO, conferring further compulsive powers including compulsory examination powers on the FWO 'would assist our Inspectors to address some of the egregious, deliberate, systematic and exploitative examples of non-compliance encountered in our work'.¹⁴²

9.154 In this regard, the FWO noted that 'numerous Commonwealth regulators and agencies have greater compulsive powers than the FWO and that these powers take different forms. Examples include:

- Fair Work Building and Construction, Chapter 7, Part 1, Division 3 of the *Fair Work (Building Industry) Act 2012*—power to compel persons to provide information and/or documents and/or attend for examination to answer questions;
- Comcare, Part 9, Division 3, Subdivision 4 of the *Work Health and Safety Act 2011*—power to compel production of documents and that a person answer questions, as well as a power to seize documents and things;
- Australian Securities and Investments Commission, ss 19, 35 and 40 to 47 of the *Australian Securities and Investments Commission Act 2001*—power to compel a person to provide information and/or reasonable assistance and/or to attend an examination to answer questions, as well as a power to seize books (subject to issuing of a warrant);
- Australian Consumer and Competition Commission, ss 135 to 135C and 155 of the *Competition and Consumer Act 2010*—power to compel persons to provide information and/or provide documents and/or attend for examination to answer questions. In addition, there is a power to enter premises in the absence of consent, where the entry is authorised by a warrant or where immediate exercise of search related powers is required to protect life or public safety. Materials may be seized and force may be used executing a warrant;
- Australian Skills Quality Authority, ss 62 to 71 and 140 of the *National Vocational Education and Training Regulator Act 2011*—power to require a person to produce information, documents or things or to give all reasonable assistance in connection with an application for a civil penalty order. In addition, there is power to enter premises in the absence of consent, where entry is authorised by a warrant. Materials may be seized and force may be used executing a warrant;

141 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

142 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015); see also Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, *Committee Hansard*, 18 May 2015, p. 35.

- the Secretary of the Department of Immigration and Border Protection, ss 268CA to 268CZH, 486Y and Part E of the Migration Act—power to require a person to provide information and/or documents and/or give all reasonable assistance in connection with an application for a civil penalty order. In addition, warrants for entry and seizure may be issued in relation to some matters and force may be used in executing some warrants; and
- the Secretary of the Department of Social Services, s 156 of the *Paid Parental Leave Act 2010*—power to require a person to give all reasonable assistance in connection with an application for a civil penalty order.¹⁴³

9.155 With regard to the above powers, the FWO noted that various protections were in place 'including checks and balances to ensure that the power is used appropriately, proportionately and only where necessary'.¹⁴⁴

9.156 The FWO also noted that, with respect to the above regulators and agencies, noncompliance or the giving of false evidence could result in fines and/or imprisonment.¹⁴⁵

Penalty regime under the Fair Work Act 2009

9.157 During the course of the inquiry, the committee received evidence that pointed to the limited penalty regime under the FW Act in terms of the low nature of the civil penalties, the apparent impunity with which unscrupulous operators managed to avoid the full consequences of the existing penalty regime, and the lack of criminal penalties for serious breaches of the law.

9.158 Both Dr Hardy and the FWO pointed out that the FW Act contains only civil penalty provisions (other than some limited offences relating to the conduct of proceedings in the Fair Work Commission). The current maximum civil penalties under the FW Act are \$54 000 for a corporation or \$10 800 for an individual.¹⁴⁶

9.159 By comparison, the FWO observed that many other Commonwealth statutes contained either specific criminal offence provisions, or prescribed much higher maximum civil penalties for contraventions:

- the *Corporations Act 2001* contains a range of criminal offences which may attract sanctions including a term of imprisonment or a pecuniary penalty as well as a range of civil penalty provisions which may attract relief including pecuniary penalties and compensation orders. A breach of some obligations, such as a breach of section 208 of the *Corporations Act 2001*, may constitute

143 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

144 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

145 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

146 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015); Dr Tess Hardy, *Submission 62*, pp 11–12.

either a civil remedy contravention or a criminal offence depending on whether the contravenor's involvement was dishonest;

- civil penalties under the *Corporations Act 2001* vary greatly and can be as much as \$1 million for a corporation or \$200 000 for an individual, depending on what provision is contravened. The maximum criminal penalties are \$360 000 or 5 years' imprisonment for an individual and up to \$5 million for a corporation; and
- the maximum civil penalty under the *Competition and Consumer Act 2010* is in the region of \$500 000 for an individual and \$10 million (or a higher amount calculated on the value of benefits for the breach) for a corporation. The maximum criminal penalties are \$360 000 or 10 years' imprisonment.¹⁴⁷

9.160 The FWO noted that the civil remedy provision regime under the FW Act enabled the FWO to 'seek orders for damages (for example, to recover unpaid money owed to employees), declarations that contraventions have occurred, and pecuniary penalties which are subject to legislated maximums'. The FWO further noted that 'the court is able to make other orders as it sees fit, including, for example, an order that an employer audit the wages of all of its employees and provide this information to the FWO'. The FWO stated that the above orders provided, in many cases, 'sufficient specific and general deterrence against non-compliance'¹⁴⁸

9.161 However, the situation was very different when the FWO had to deal with parties who deliberately set out to avoid their legislative obligations, for example by:

- refusing to comply with notices to produce documents;
- keeping or providing false employment records;
- dissolving corporate employing entities for improper purposes in response to our investigations and/or litigations; or
- transferring assets out of those corporate employing entities to avoid the recovery of unpaid employee entitlements.¹⁴⁹

9.162 For example, the absence of records or false records was central to the exploitation of temporary visa workers at 7-Eleven. Yet the maximum penalty under the FW Act for knowingly making false or misleading records is 20 penalty units (\$3600) for an individual. By contrast, the maximum penalty under the Migration Act for providing false or misleading information relating to a non-citizen is 1000 penalty units (\$180 000) for an individual, or up to 10 years imprisonment.¹⁵⁰

147 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015); see also Dr Tess Hardy, *Submission 62*, p. 12.

148 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

149 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

150 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 65.

9.163 The FWO was of the view that the existing legal framework did not effectively deter unscrupulous employers who deliberately set out to avoid their legislative obligations. The FWO therefore suggested that:

Having the option of criminal penalties that can result in a court ordering a term of imprisonment or a significant pecuniary penalty against an individual may provide a stronger disincentive when dealing with a party who is prepared to deliberately ignore the operation of the Fair Work Act 2009.¹⁵¹

9.164 The Franchise Council of Australia (FCA) was strongly of the view that 'the current level of fines in the FW Act should be increased'. The FCA also strongly supported 'additional provisions to ensure directors of an employer entity are personally liable in the event of the entity being liquidated without satisfying debts to employees and penalties to Fair Work Australia'.¹⁵²

9.165 Professor Allan Fels, the former head of the Australian Competition and Consumer Commission (ACCC), was firmly of the view that the penalties and enforcement arrangements under the FW Act were 'obviously weak'.¹⁵³

9.166 Likewise, Professor David Cousins, a former ACCC Commissioner, stated that compared to consumer law, the penalty provisions under the FW Act were 'totally anomalous' and hindered the FWO in deterring noncompliance with workplace law.¹⁵⁴

Sham contracting provisions

9.167 Sham contracting is a way in which an employer seeks to avoid the protective provisions afforded to an employee under employment legislation such as the FW Act. The FW Act prohibits an employer from 'misrepresenting an actual or proposed employment relationship as an independent contracting arrangement'.¹⁵⁵ In other words, sham contracting is illegal.

9.168 Section 357(1) of the FW Act states:

(1) A person (the **employer**) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.¹⁵⁶

151 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

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

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

154 Professor David Cousins, Panel Member, Fels Wage Fairness Panel, *Committee Hansard*, 5 February 2016, p. 38.

155 Dr Tess Hardy, *Submission 62*, p. 9.

156 *Fair Work Act 2009*, s. 357(1), emphasis original.

9.169 However, section 357(2) provides a defence against 'sham' misrepresentations of the employment relationship 'if the employer proves that, when the representation was made, the employer did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services'.¹⁵⁷

9.170 Section 358 prohibits an employer from dismissing, or threatening to dismiss, an employee in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.¹⁵⁸

9.171 Section 359 prohibits an employer from making a statement that the employer knows is false in order to persuade or influence an employee or former employee to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.¹⁵⁹

9.172 Unlike a genuine labour hire arrangement, sham contracting occurs when:

...one or more parties seek to disguise (either deliberately or recklessly) the reality of the relationship between the worker and either that entity, or other entities. For example, a company may claim wrongly that a worker is an independent contractor when they are in fact an employee, or that the worker does not have an employment relationship with another company when they do.¹⁶⁰

9.173 The FWO noted that sham contracting is more prevalent in situations where 'there are multiple levels of contracting between the business receiving the benefit of the labour and the people working in the business'.¹⁶¹

9.174 The FWO also noted that companies engage in sham contracting for a variety of reasons including:

- to avoid the responsibilities associated with having employees, such as paying annual and personal leave; or
- to ensure that the business is unable to meet debts owed to employees when they are claimed, because the employing entity is undercapitalised.¹⁶²

157 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

158 *Fair Work Act 2009*, s. 358.

159 *Fair Work Act 2009*, s. 359.

160 Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, Commonwealth of Australia, June 2015, p. 29.

161 Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, Commonwealth of Australia, June 2015, p. 29.

162 Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, Commonwealth of Australia, June 2015, p. 29.

9.175 Since the inception of the FW Act, the FWO had commenced 21 proceedings pursuant to section 357 and/or section 358 of the FW Act in respect of alleged sham contracting arrangements. The outcomes of those proceedings are as follows:

- in 7 proceedings liability was established or admitted;
- in 2 proceedings liability was not established;
- in 1 proceeding liability was established in part;
- 11 proceedings are ongoing, or are appeal proceedings.¹⁶³

9.176 In terms of the defences available under section 357(2), Dr Hardy noted that employers have successfully pleaded 'that at the time they made the representation they did not know, and were not reckless to, the true nature of the working relationship'. Dr Hardy concurred with various previous inquiries that recommended section 357(2) of the FW Act be amended to replace the 'recklessness' defence with a 'reasonableness' defence such that:

...the defence to a sham contracting action under s 357(1) would only be available where the employer is able to prove that at the time the representation was made, the employer believed that the contract was a contract for services rather than a contract of employment, and 'could not reasonably have been expected to know otherwise'.¹⁶⁴

Accessorial liability

9.177 As noted earlier, Ms James noted it was up to companies at the top of the supply chain (such as supermarkets and head franchisors) to assess risk, responsibility, liability, and reputation in terms of informing themselves and acting on what is occurring down the supply chain, especially in light of community debate and media coverage of particular issues.¹⁶⁵

9.178 The accessorial liability provisions are set out at section 550 of the FW Act:

- (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
- (2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person:
 - (a) has aided, abetted, counselled or procured the contravention; or
 - (b) has induced the contravention, whether by threats or promises or otherwise; or
 - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - (d) has conspired with others to effect the contravention.¹⁶⁶

163 Fair Work Ombudsman, answer to written question on notice following public hearing on 24 September 2015 (received 18 November 2015).

164 Dr Tess Hardy, *Submission 62*, p. 11.

165 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 18 May 2015, p. 37.

166 *Fair Work Act 2009*, s. 550, emphasis original.

9.179 The accessory liability provisions mean that a person or entity may be liable even if they were not the direct employer of the worker whose workplace rights had been breached. However, that person or entity must be 'knowingly involved' in a contravention of the FW Act in order to satisfy a charge of accessory liability:

To succeed against an accessory under section 550 of the FW Act, the Fair Work Ombudsman must firstly prove the contraventions against the primary contravenor (e.g. the employer). Then, the Fair Work Ombudsman must prove accessorial liability.

The legal test for accessorial liability requires the FWO to have sufficient evidence to prove that an alleged accessory:

- had actual knowledge of the essential facts that make up the elements of the particular contravention of the Act alleged to have been breached (which encapsulates the concept of being 'wilfully blind', that is they deliberately shut their eyes to those facts); **and**
- they were an intentional participant in the alleged conduct.¹⁶⁷

9.180 In this regard, the FWO pointed out that negligence or recklessness is not enough to prove accessorial liability:

To bring a successful section 550 action, an applicant must present sufficient probative evidence to sustain an allegation to the standard required to prove that a person or corporate entity had 'actual knowledge' of particular facts at a point in time.¹⁶⁸

9.181 In 72 per cent of the 50 matters the FWO put into court in 2014–15, the FWO involved an accessory in the matter as well as the employer.¹⁶⁹ The vast majority of accessories joined to FWO proceedings were directors and or managers.¹⁷⁰

9.182 By contrast, Dr Hardy noted that the FWO had brought few cases against a separate corporation said to be 'involved in' a contravention by the direct employer. A major exception occurred when the FWO relied on section 550 of the FW Act to allege that Coles was liable in relation to contraventions (underpayments) committed by trolley-collecting labour hire companies engaged by the supermarket chain to provide workers to collect trolleys.¹⁷¹

9.183 However, the court proceedings were discontinued before the final hearing when the FWO entered an enforceable undertaking with Coles (under which Coles

167 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015) (emphasis original); Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 65.

168 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

169 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 24 September 2015, p. 65.

170 Fair Work Ombudsman, answer to question on notice, 24 September 2015 (received 18 November 2015).

171 Dr Tess Hardy, *Submission 62*, p. 9.

ensured that the underpayments were rectified). As a result of the court case being discontinued, Dr Hardy argued that the scope of the accessorial liability provisions and their application to labour hire, outsourcing and franchising arrangements is not entirely certain. In particular, she noted that the criteria necessary to satisfy accessory liability have not been authoritatively determined including:

- the requisite level of knowledge the accessory needs to have about the essential matters constituting the contravention;
- whether 'wilful blindness' is sufficient to meet this knowledge requirement; and
- whether, in respect of corporate accessories, it is possible to aggregate the knowledge of various employees and thereby prove that the corporation itself had requisite knowledge of the contravention.¹⁷²

9.184 For example, with respect to a lead firm sourcing labour through a labour hire company or companies, the FWO noted some of the conditions under which an individual or entity might be accessorially liable:

A company or individual who is part of the supply chain can be accessorially liable where it is determined that the company or individual is aware or at the very least turns a blind eye to the fact that sums paid by the principal contractor to companies within the supply chain are not sufficient to meet the lawful labour costs of performing the work.¹⁷³

9.185 Dr Hardy noted that the lead firm tended to be better-resourced than labour hire contractors. This meant that the lead firm was 'less likely to wind up the relevant corporate entity in order to avoid the consequences of any relevant court orders', and would be 'in a much more secure financial position to rectify any relevant underpayment and pay any pecuniary penalties which are imposed'.¹⁷⁴

9.186 There are no specific penalties for accessorial liability under section 550 of the FW Act. The FWO noted that the maximum penalty depends on the penalty applicable to the underlying contravention. For example, the maximum penalties that can be imposed by a court for a breach of a term of a modern award under the FW Act 2009 are:

- 60 penalty units per contravention for an individual (60 x the current value of a penalty unit (\$180) = \$10 800); and

172 Dr Tess Hardy, *Submission 62*, p. 9; see also Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016); Dr Tess Hardy, *Committee Hansard*, 24 September 2015, p. 44.

173 Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, Commonwealth of Australia, June 2015, p. 28.

174 Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

- 300 penalty units per contravention for a body corporate (300 x the current value of a penalty unit (\$180) = \$54 000).¹⁷⁵

9.187 The issue of seeking compensation orders against an accessory was also raised. Dr Hardy observed that, historically, the FWO had 'not applied to have compensation orders awarded against third party accessories' as it appeared to have considered that such orders were only available against the relevant employer entity.¹⁷⁶

9.188 Ms James explained that, previously, the FWO had a position that, in taking action against an accessory under section 550, the FWO sought penalties against the accessory, but did not seek to directly recover the underpayments against the accessory:

So what that might mean, for example, is that if we took action against a company that had gone into liquidation, and we took action also against the director as an individual, who was knowingly involved in that breach, then we would seek a penalty against that director, but we would not seek the underpayments be paid back by the director.¹⁷⁷

9.189 Ms James noted that the FWO would, as a matter of course, ask the court that the penalty be paid to the employee. However, Ms James pointed out that the penalty was frequently far less than the underpayment that the employee was owed.¹⁷⁸

9.190 In light of the above, Ms James stated it was her view that the FWO should be using all means to secure unpaid wages for workers, and that it was in the public interest that the FWO sought 'to test the boundaries of the law'. More recently, therefore, the FWO has sought orders from the court for an accessory to pay the unpaid amount of wages. These cases are currently before the courts. Ms James further suggested that, in the case of an individual director, a successful court order for a director to repay a very large underpayment might be a particularly effective deterrent.¹⁷⁹

'Hot goods' provisions

9.191 Dr Hardy provided evidence on the 'hot cargo' or 'hot goods' provisions which apply in the United States of America (US). These particular statutory provisions have enabled the regulator in the US to enjoin or embargo the transportation or sale of goods, in the production of which, any employee was employed in violation of US labour laws.¹⁸⁰

175 Fair Work Ombudsman, answer to question on notice, 14 July 2015 (received 8 August 2015).

176 Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

177 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 5 February 2016, p. 43.

178 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 5 February 2016, p. 43.

179 Ms Natalie James, Fair Work Ombudsman, *Committee Hansard*, 5 February 2016, pp 43–44.

180 Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

9.192 Although injunctions under the 'hot goods' provisions are not designed to compensate underpaid employees, Dr Hardy remarked that they often have this effect in practice because an enjoined party can seek relief by remedying any past violation of labour laws.¹⁸¹

9.193 Dr Hardy explained that a crucial aspect of the 'hot goods' provisions was the way the relevant legislative exemptions have transformed the 'compliance calculus' of firms throughout the supply chain:

In addition to excluding consumers and common carriers from its coverage, the hot goods provision also exempts purchasers of goods (including a retailer, distributor or other intermediary) where they obtained the relevant goods 'in good faith in reliance on written assurances from the producer' that they were produced in compliance with the Act, and 'without notice of any such violation'. The underlying regulations relating to the hot goods provision further explain that in order to rely on this exclusion, each purchaser has an 'affirmative duty' to assure themselves that the goods were produced in compliance with the Act. This generally requires the purchaser to show that they have done all that a 'reasonable, prudent man [sic], acting with due diligence, would have done in the circumstances'.¹⁸²

9.194 Dr Hardy pointed to the benefits that the hot goods provisions have afforded both workers and the regulator:

The hot goods provision in the FLSA [Fair Labor Standards Act] have proved useful not only in obtaining quick remedial relief for vulnerable employees, they have enabled the regulator to bypass the direct employer and enrol companies higher in the supply chain which have a much stronger incentive to establish private monitoring arrangements in relation to subcontractors in order to show that they have fulfilled their relevant statutory duty.¹⁸³

9.195 Despite certain limitations, Dr Hardy suggested that two of the characteristics of the horticulture, food processing and franchising industries in Australia listed below would make an embargo-like sanction very powerful:

- the time between production and sale of the goods is of the essence; and
- there are large, highly concentrated business entities that have greater market power than the large set of smaller organisations with which they interact.¹⁸⁴

9.196 In light of these characteristics, Dr Hardy noted that a hot goods provision would provide lead firms, supermarkets, and fast food franchisors with 'a strong

181 Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

182 Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

183 Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

184 Dr Tess Hardy, *Submission 62*, p. 19.

commercial incentive to rectify any relevant underpayments as quickly as possible in order to enable the supply' of products to continue without further delay.¹⁸⁵

Labour hire licensing

9.197 Dr Howe argued the need for a regulatory framework that would address some of the structural vulnerabilities faced by, for example, 417 visa workers in the horticulture sector. She proposed a combined set of measures that would include:

- an enforceable code of conduct that all the major retailers sign up to and which growers would also need to sign up to sell produce to a major retailer;
- labour hire licensing; and
- a regular auditing process.¹⁸⁶

9.198 Dr Howe described how this comprehensive system operated in the US:

In Florida there is something called the Coalition of Immokalee Workers. What the regulatory framework looks like there, very briefly, is that there is a code of conduct that all the big retailers have signed up to. If you are a tomato grower, you need to have signed up to that code of conduct or you cannot sell your produce through the big retailers. What that code of conduct has—it is not just some airy fairy document, it is enforceable—is mandatory collective organisation, so those workers are collectivised because it is recognised that that gives them some security. Secondly, all labour hire companies are licensed through that process. They have to be registered. Thirdly, there is a comprehensive auditing process, so tomato growers are audited for their employment practices, not just through paper but through someone visiting them.¹⁸⁷

9.199 Various unions recommended a licensing system for labour hire firms that use temporary visa workers.¹⁸⁸ Mr Robertson stated that the NUW had been advocating for a system of labour hire licensing for many years.¹⁸⁹

9.200 Mr Robertson also made the point that while many domestic workers had a better understanding of their workplace rights than migrant workers, labour hire operators also engage many local workers. In his view, the problem of exploitation by labour hire companies therefore went deeper than just visa issues. Consequently, the NUW favoured a licensing regime for labour hire operators that would put some

185 Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

186 Dr Joanna Howe, *Committee Hansard*, 14 July 2015, p. 59.

187 Dr Joanna Howe, *Committee Hansard*, 14 July 2015, p. 59.

188 Australian Council of Trade Unions, *Submission 48*, p. 44; Mr Ron Monaghan, General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 3; National Union of Workers, *Submission 38*, p. 4.

189 Mr George Robertson, union organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 15.

protections in place for all workers, and also make it easier for unions and the FWO to identify the labour hire company.¹⁹⁰

9.201 As noted in chapter 7, research by Dr Elsa Underhill confirmed evidence received during the inquiry that the exploitation of WHM visa holders was intensified when WHMs were employed by contractors rather than growers. Dr Underhill reiterated the substantial difficulties that WHM visa holders faced in trying to locate a labour hire contractor that only communicated by text message. With no legal requirement for the contractor to have an official address, Dr Underhill argued that 'the absence of a licensing system for contractors and labour hire agencies increased the risks of low and non-payment of wages experienced by WHMs'.¹⁹¹

9.202 The committee received evidence about the licensing of labour hire contractors in other jurisdictions. Dr Hardy noted that the licensing of labour hire contractors had been introduced in the United Kingdom (UK) in 2006 following a spate of cases involving the severe exploitation of migrant workers.¹⁹²

9.203 Known as 'gangmasters' in the UK, labour hire contractors and the licensing scheme are overseen by the Gangmasters Licensing Authority (GLA) located in the UK government Home Office. According to its website, the GLA protects workers from exploitation and its licensing scheme regulates businesses that provide workers to agriculture, horticulture, forestry, shellfish gathering and food and drink processing and packaging.¹⁹³

9.204 Dr Hardy described various components of the UK labour hire licensing scheme:

- gangmasters must demonstrate compliance with workplace laws in order both to receive and maintain their licenses;
- the GLA keeps a public register of all licensed gangmasters, which provides useful information for growers who are obliged to use only licensed labour providers, as well as trade unions who may be seeking to locate a particular gangmaster or determine whether a particular gangmaster is licensed and operating lawfully;
- all workers engaged by gangmasters are covered by the scheme, regardless of whether they are considered employees or independent contractors;
- gangmasters must demonstrate that they provide adequate accommodation to workers;

190 Mr George Robertson, union organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, pp 15–16.

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

192 Dr Tess Hardy, *Submission 62*, p. 20.

193 United Kingdom government, Gangmasters Licensing Authority, <https://www.gov.uk/government/organisations/gangmasters-licensing-authority>

- gangmasters must demonstrate that they comply with employment, tax and national insurance requirements;
- gangmasters are required to maintain status as a 'fit and proper' provider, which takes into account whether the gangmaster has tried to obstruct the GLA in the exercise of its functions, any relevant criminal convictions against the gangmaster and any connection with any person or entity deemed to not be fit and proper in the previous two years;
- gangmasters must not only pay the relevant minimum wage, they must keep adequate records to demonstrate payment of such wages;
- gangmasters that use other gangmasters or subcontractors to supply workers are obliged to ensure that these subcontractors hold a GLA licence; and
- where gangmasters are located outside of the UK, they must obtain a GLA licence in order to supply workers into the UK.¹⁹⁴

9.205 Dr Hardy also pointed out that 'the regulatory regime is supported by a range of substantial sanctions'. This includes the power of the GLA 'to refuse or revoke a license or grant a license only on specific conditions' as well as custodial penalties for certain offences.¹⁹⁵

9.206 The combination of meaningful sanctions, consumer pressure and the reputational concerns of major firms has led to a collaborative approach between the GLA, supermarkets, unions and suppliers (including growers) to develop various guides and protocols to 'ensure the relevant licensing standards are applied throughout the food produce supply chain'.¹⁹⁶

9.207 Dr Hardy also noted that various stakeholders had pointed out that reputable labour hire contractors might even benefit from a licensing regime because it would help eliminate unscrupulous contractors that undercut the legitimate companies.¹⁹⁷

9.208 The FWO had a different perspective on the regulation of labour hire companies. From the FWO's perspective, the key element in the supply chain was the lead company. Mr Campbell argued that if a lead company had appropriate systems in place (for example, electronic timekeeping) to assure themselves and the regulator that the workers on-site were being employed in compliance with workplace laws, then a lack of record-keeping by the labour hire contractors 'becomes irrelevant at that point'.¹⁹⁸

194 Dr Tess Hardy, *Submission 62*, p. 20; Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

195 Dr Tess Hardy, *Submission 62*, p. 20.

196 Dr Tess Hardy, *Submission 62*, pp 20–21.

197 Dr Tess Hardy, *Submission 62*, p. 21.

198 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, *Committee Hansard*, 18 May 2015, p. 37.

Joint employment legislation

9.209 The committee received some evidence from submitters regarding the concept of joint employment legislation. Dr Hardy noted that 'the concept of joint employment was originally developed in the context of US employment-based regulation':

In general terms, the doctrine of joint employment is a legal device which allows the court to ascribe liability and responsibility to two separate legal entities where both entities are found to exercise a requisite degree of control over the worker or otherwise share employer-like functions between them.¹⁹⁹

9.210 The Australasian Meat Industry Employees' Union (AMIEU) argued that joint employment legislation was necessary to combat the illegal phoenix behaviour that had been prevalent in the Baiada labour supply chain.²⁰⁰

9.211 The Australian Council of Trade Unions (ACTU) supported the introduction of joint employment legislation as part of a broader suite of measures to address illegal phoenix activity. The ACTU noted that 'in circumstances where a labour hire company went into liquidation but was a joint employer with the host company, the workers could still have recourse to the host for any unmet entitlements'.²⁰¹

9.212 Stewart Levitt of Levitt Robinson Solicitors argued that:

The law should be amended to make it a rebuttable presumption that a master franchisee or the ultimate franchisor is deemed to be a 'joint employer' for the purposes of establishing civil liability at common law and also under the *Fair Work Act 2009*. The burden of proof should shift to the master franchisee or franchisor, to prove at least on the balance of probabilities, that they were not aware that wages fraud was being committed by the franchisee.²⁰²

9.213 Dr Hardy was more circumspect. She noted that introducing joint legislation into the Australian workplace context would be complex, and might introduce uncertainty and lead to unintended consequences. Her view was that it would be 'simpler and more straightforward to address key compliance and enforcement issues through expansion of some of the existing mechanisms under the FW Act' (such as the penalty regime and amendments to the sham contracting provisions).²⁰³

9.214 In light of the above, Dr Hardy outlined ways in which a degree of responsibility could be placed on the host firm. She cited the 2011 labour law reforms in Israel where direct responsibility for breaches of minimum employment standards

199 Dr Tess Hardy, *Submission 62*, p. 16.

200 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 15.

201 Australian Council of Trade Unions, answer to written question on notice from Senator Lines (received 17 August 2015).

202 Mr Stewart Levitt, *Submission 61*, p. 2.

203 Dr Tess Hardy, *Submission 62*, p. 18.

in sectors such as cleaning and security was placed on the host firm, not as an employer, but as a guarantor. The Act specified three factors used to determine whether the host firm would bear responsibility for the breaches of workplace law:

First, whether the client has taken 'reasonable steps' to prevent any infringement of workers' rights by the contractor (i.e. labour hire provider), including by establishing a procedure whereby workers can bring complaints about the contractor directly to the client.

Second, the client may avoid liability under the Act if they can show that they hired a 'certified wage-checker' to perform periodical checks of pay and made sure that any identified underpayments were promptly rectified.

Third, the client will be automatically liable for any relevant underpayments of the agency worker where the client is found to have paid the contractor a contract price which falls below the minimum required by the Act.²⁰⁴

9.215 The third point above is relatively self-explanatory. That is, a host firm must put enough money into the labour supply chain to fulfil the minimum requirements. With respect to the FWO investigation into Baiada, it appeared that Baiada was putting enough money into the labour supply chain to meet these requirements. However, as noted in chapter 7, the FWO had serious concerns that Baiada had not taken 'reasonable steps' to ensure that the labour hire contractors supplying workers to the Baiada sites in NSW were in fact complying with the relevant workplace laws. In this regard, Dr Hardy suggested that the first point could be quite powerful because it provides an incentive for the host firm to care about the employment conditions of the workers at its sites.²⁰⁵

International Convention on Protection of the Rights of All Migrant Workers and their Families

9.216 The committee received evidence on the United Nations *International Convention on Protection of the Rights of All Migrant Workers and their Families* (the convention).

9.217 The Human Rights Council of Australia (HRCA) recommended that the Australian government ratify the convention. The HRCA noted that while the convention 'does not create any new substantive rights', it advances human rights for migrant workers domestically and globally 'by reinforcing a trend to a shared minimum international standard':

Australia is already a party to, or has ratified, all of those major human rights treaties which contain the rights that are reflected in the convention. The value of the convention is that it recognises that migrant workers are a

204 Dr Tess Hardy, *Submission 62*, p. 18.

205 Dr Tess Hardy, *Submission 62*, pp 18–19.

vulnerable population who are at special risk of not having their human rights observed and protected.²⁰⁶

9.218 Mr Andrew Naylor, Chairperson of the HRCA noted that ratification of the convention does not necessarily provide temporary migrant workers with access to all sectors of the economy because the convention contains provisions for the government to impose restrictions on the extent to which temporary migrant workers are permitted to work in Australia. Furthermore, it is open for a government, when signing and ratifying a convention, 'to opt out or to reserve their position in respect of particular articles'.²⁰⁷

9.219 Ms Angela Chan, National President of the Migration Institute of Australia argued that, based on the nature of its economy and its position in the region, Australia should ratify the convention:

I think that, as a country in South-East Asia and a leading country, we should meet as many international obligations as possible, and this convention looks at protecting the rights of migrant workers and their families in the host country. I do not think that is a big thing to expect of Australia, who is an advanced economy. We are very proud of saying we are an advanced, First World economy, so I do not see that costs and compliance should be an issue.²⁰⁸

9.220 While several organisations argued that ratifying the convention would encourage a greater policy focus on migrant workers, Dr Joanna Howe and Professor Alexander Reilly pointed out that international students are excluded from protection under the convention.²⁰⁹

Committee view

9.221 Evidence to the inquiry noted that labour hire can be a valuable way to fill temporary labour gaps, particularly in seasonal industries like horticulture that require workers for short, intensive periods. Likewise, the committee heard that franchising had given many small-business owners the opportunity to become part of a successful brand. The committee therefore states at the outset that it is concerned to ensure that lawful and legitimate business practices continue to prosper.

9.222 However, it has also become apparent through this inquiry that certain parts of the labour hire industry and the franchise sector have been a breeding ground for the

206 Human Rights Council of Australia, *Submission 43*, p. 2; Mr Andrew Naylor, Chairperson, Human Rights Council of Australia, *Committee Hansard*, 17 July 2015, p. 23.

207 Mr Andrew Naylor, Chairperson, Human Rights Council of Australia, *Committee Hansard*, 17 July 2015, pp 24–25.

208 Ms Angela Chan, National President of the Migration Institute of Australia, *Committee Hansard*, 17 July 2015, p. 11.

209 Dr Joanna Howe and Professor Alexander Reilly, 'Meeting Australia's labour needs: The case for a new low-skill work visa', *Federal Law Review* (forthcoming), 43(2), p. 25; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990, Article 3 (e).

widespread and egregious exploitation of temporary visa workers Both these sectors reflect a trend where lead firms have increasingly moved away from the traditional direct employment of labour to a system of indirect employment. Numerous submitters and witnesses remarked on the highly competitive nature of various supply chains, the squeeze on profit margins, and the consequent downward pressure on the wages and conditions of workers.

Provision of information and educational materials

9.223 The committee received evidence that many temporary visa workers have a minimal or non-existent understanding of Australian minimum wages, and workplace laws and customs. Furthermore, temporary visa workers have few connections to support networks that could assist them in finding out about and securing their workplace rights.

9.224 The committee is of the view that there needs to be a preventative approach to the exploitation of temporary visa workers that includes the provision of information and educational materials, plus due attention to the structural design of the temporary visa programs, complemented by an adequately resourced regulator and appropriate penalties under the FW Act.

9.225 The DIBP provided the Grant Notification and Visa Grant Notice that the department provides upon the grant of a temporary visa. The Visa Grant Notice provides advice on workplace rights including links to the Fair Work Information Statement, links to videos at the FWO website, and links to information on finding out about the relevant minimum wage.

9.226 However, the committee understands that the key focus of many temporary visa workers on arrival in Australia is survival. It is therefore important that there are other sources of information as well as other avenues for support once temporary visa workers have begun to settle into the country.

9.227 Many submitters pointed to the enormous benefit that international students bring to both the university sector and the broader economy. The committee is firmly of the view that universities have a duty of care to their international students. There should be a greater onus on universities to take better care of international students through a proactive information campaign around workplace rights.

Recommendation 27

9.228 The committee recommends that universities consider how best they might develop proactive information campaigns for temporary visa workers around workplace rights.

9.229 The committee also received evidence about the valuable work done by temporary migrant support networks where temporary migrant workers can meet safely to discuss workplace concerns, overcome cultural and language barriers, and devise strategies to protect their rights.

9.230 The committee notes the International Student Welfare Grants program recently launched by the Victorian state government. The committee is of the view that funding should be available on a national basis to help improve the protection of

the workplace rights of temporary visa workers. This funding should be made available to non-governmental organisations, registered organisations, employer associations, and advocates on a submission-only basis.

Recommendation 28

9.231 The committee recommends that the Department of Immigration and Border Protection provide funding on a submission basis for non-governmental organisations, registered employer organisations, trade unions, and advocates to provide information and education aimed specifically at improving the protection of the workplace rights of temporary migrant workers.

Monitoring and enforcing compliance

9.232 The committee also heard about the difficulties that the regulator and the unions face in trying to monitor compliance with workplace law and gather sufficient documentary evidence about the exploitation of temporary visa workers. The difficulty in monitoring compliance and securing evidence can be traced to a range of factors.

9.233 First, visa workers are understandably wary of the risks in speaking out about their exploitation given the tenuous nature of their residency in the country. This fear is compounded in many instances by employers coercing their employees into breaching a condition of their visa in order to gain leverage over them. The committee is of the view that the recommendations 23, 24 and 25 made in chapter 8 will help to address these matters.

9.234 However, given the fear that amongst so many temporary visa holders about their precarious visa status and the potential for deportation over minor, inadvertent or coerced breaches of their visa conditions, the committee is also concerned about the perceptions that temporary visa workers have of the relationship between the FWO and the DIBP.

9.235 The committee received conflicting evidence on the relationship between the FWO and the DIBP. The committee acknowledges the FWO has told the committee in evidence that Fair Work inspectors make it clear to visa holders that the FWO is not interested in their visa status, but is only concerned with building a relationship with the aim of rectifying matters such as underpayment.

9.236 Furthermore, the committee recognises the FWO has secured agreement from the DIBP in the past (in the Bosen case, for example) to not pursue temporary visa holders for a breach of their visa conditions in order to allow the FWO to pursue litigation on behalf of exploited temporary visa workers. The DIBP has also given a similar commitment not to pursue visa matters against temporary visa workers who come forward to make a claim for underpayment to the Fels Wage Fairness Panel with respect to their employment at 7-Eleven.

9.237 It is unlikely that the perceptions of temporary visa workers about the relationship between the FWO and the DIBP, however misconstrued, can be reversed in the short term. Indeed, greater confidence in the powers and independence of the FWO may only come about over time as the FWO is able to achieve greater success in litigation outcomes that recover the full sum of underpayments for exploited

temporary visa workers. The recommendations on the powers of the FWO and changes to the penalty should assist in this regard.

9.238 However, the committee is concerned to reinforce what appears to already be the operating procedure for the FWO with regard to the DIBP. The committee therefore is of the view that the memorandum of understanding between the FWO and the DIBP should prohibit the FWO from providing the DIBP with the identities of temporary visa workers who have reported instances of exploitation.

Recommendation 29

9.239 The committee recommends that the identities of migrant workers who report instances of exploitation to the Fair Work Ombudsman or to any other body should not be provided to the Department of Immigration and Border Protection. The committee further recommends that this prohibition should be written into the Memorandum of Understanding between the Fair Work Ombudsman and the Department of Immigration and Border Protection.

9.240 The second reason for the difficulties faced by the FWO in monitoring compliance with workplace laws is the fact that unscrupulous employers who deliberately break workplace laws and exploit their employees either do not keep records, or else deliberately falsify or destroy them.

9.241 In light of these illegal practices, the inability of the FWO to obtain evidence from those suspected of breaching workplace laws, and from those suspected of being an accessory to such a breach, raises questions about the appropriateness of the powers available to the regulator and its ability to carry out its designated tasks, including the protection of vulnerable workers and the pursuit of enforcement litigation that seeks to impose civil penalties.

9.242 When confronted by the falsification of evidence, or a pre-determined decision by an unscrupulous employer not to keep records precisely to avoid presenting the regulator with documentary evidence, or indeed a lead firm or head franchisor that denies it had any knowledge of underpayments in its supply chain or franchise network, the FWO struggles to proceed further. In such circumstances, the FWO risks being seen as a toothless tiger.

9.243 Moreover, even when the FWO has pursued successful court action, the derisory penalties currently available under the FW Act often do not cover the underpayments due to the workers, and are manifestly insufficient to act as a deterrent to illegal behaviour.

9.244 This was clearly evident during the inquiry where it became apparent that certain employers built the potential for a minimal penalty into their business model.

9.245 Furthermore, it was also apparent from the evidence provided by the FWO that certain employers were able to avoid the major part of any penalties by simply indulging in various forms of corporate restructuring such as asset shifting and illegal phoenix behaviour including liquidating or deregistering their companies upon investigation by the FWO.

9.246 Given the price pressures operating throughout a supply chain, often driven by the market power of a major retailer such as a supermarket or franchisor, it was pointed out to the committee that the thrust of the regulatory regime should be directed to shifting the behaviour of employers at the level of the market as a whole, rather than just at the level of the individual workplace.

9.247 In this respect, the committee notes that the FWO has sought to harness the power and resources of lead firms to commit, albeit on a voluntary basis, through measures such as a Proactive Compliance Deed, to take actions to secure compliance with workplace law from the companies in the relevant supply chain.

9.248 The committee therefore recognises that the FWO has attempted to leverage its limited resources by shifting part of the enforcement burden onto lead firms such as Baiada that are in a position to absorb some of those costs and that responsibility.

9.249 Nevertheless, various submitters and witnesses drew attention to the limitations of a voluntary approach. In particular, the committee heard that voluntary approaches may only be effective if, and only if, the regulatory regime contains sufficient incentives and sanctions to induce or compel a lead firm to actively participate driving structural change.

9.250 For example, the committee notes that Baiada suggested that the steps it had taken as a company to ensure compliance with workplace laws through its labour hire supply chain could provide a model for others across various industry sectors.

9.251 The committee does not necessarily disagree with this view. However, the committee is concerned that, in the absence of consumer pressure on the readily identifiable brand of a lead firm, there is currently little incentive for lead firms to engage in this sort of compliance monitoring because the powers of the regulator appear inadequate in certain instances, and, in many cases, there is no credible threat of liability or sanction.

9.252 These considerations bring the committee to the issue of the resourcing of the FWO, the powers of the FWO, and the various measures currently available under the FW Act including the penalty regime, the accessory liability provisions, and the sham contracting provisions.

Resourcing of the Fair Work Ombudsman

9.253 One of the key themes that became apparent through this inquiry is that, until recently, the widespread and appalling treatment of temporary visa workers in Australia largely went unnoticed for years.

9.254 The committee was particularly struck by the scale of the underpayments uncovered by the FWO and the fact that cases involving temporary visa workers accounted for a disproportionate amount of the total cases pursued by the FWO.

9.255 The size of the problem was made plain during the inquiry as the committee received evidence from:

- 457 visa workers in the construction industry and the nursing sector;

- 417 visa holders recruited by labour hire companies to work in the meat processing and horticulture sector sectors; and
- international student visa holders working in 7-Eleven stores around the country.

9.256 Yet, growers, employer organisations, and unions remarked on the small network of FWO field officers covering a vast array of industry sectors with a wide geographical spread across Australia. The committee was left in no doubt that many groups viewed the FWO as woefully under-resourced.

9.257 The committee understands that the FWO has leveraged its resources to achieve compliance outcomes with lead firms as well as pursuing some litigation outcomes against companies and persons that have breached workplace law.

9.258 The committee is of the view that it is absolutely vital the FWO be adequately resourced to do its job effectively. However, in a period of budget constraints, the committee recognises that the budget and resources of the FWO is the proper subject of an independent review (the committee makes a recommendation on this matter below).

Powers of the Fair Work Ombudsman

9.259 The FWO gave evidence to the inquiry that it is constrained in its evidence gathering capacity by its inability to obtain evidence from persons who have chosen to deliberately contravene workplace laws, including those who may be an accessory to illegal activity.

9.260 The FWO noted that it is a relatively common occurrence for persons to decline to participate in records of interview with Fair Work Inspectors, and some also refuse or fail to comply with Notices to Produce Records and Documents issued pursuant to section 712(1) of the FW Act 2009 or produce false records.

9.261 The FWO pointed out that in such circumstances, it becomes a challenging task for a Fair Work Inspector to assemble the necessary evidence required to prove a contravention of the FW Act, including for example evidence of hours worked.

9.262 The FWO observed that it does not have any power to compel individuals to co-operate with Fair Work Inspectors and there is no positive obligation on persons to provide reasonable assistance to an Inspector who is exercising a power while conducting an inspection under section 709 of the Act.

9.263 Furthermore, civil penalty provisions only apply to a person who fails to provide a Fair Work Inspector with their name and address under section 711 of the FW Act or to a person who fails to comply with a notice to produce records or documents issued under section 712.

9.264 An inspector may only enter certain premises for inspection purposes without force and no civil penalty applies for a refusal to grant access, nor for a failure or refusal to comply with a request to do any of the things an Inspector can lawfully require when conducting an inspection as contained in section 709, leaving criminal offences under the Criminal Code as the only redress.

9.265 The FWO noted that numerous Commonwealth regulators and agencies have greater compulsive powers than the FWO and that these powers take different forms. For example:

- Fair Work Building and Construction (FWBC) has the power to compel persons to provide information and/or documents and/or attend for examination to answer questions;
- Comcare has the power to compel production of documents and that a person answer questions, as well as a power to seize documents and things;
- ASIC has the power to compel a person to provide information and/or reasonable assistance and/or to attend an examination to answer questions, as well as a power to seize books (subject to issuing of a warrant);
- the ACCC has the power to compel persons to provide information and/or provide documents and/or attend for examination to answer questions. In addition, there is a power to enter premises in the absence of consent, where the entry is authorised by a warrant or where immediate exercise of search-related powers is required to protect life or public safety. Materials may be seized and force may be used executing a warrant; and
- the Australian Skills Quality Authority (ASQA) has the power to require a person to produce information, documents or things or to give all reasonable assistance in connection with an application for a civil penalty order. In addition, there is power to enter premises in the absence of consent, where entry is authorised by a warrant. Materials may be seized and force may be used executing a warrant.

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

9.267 The FWO was of the view that conferring further compulsive powers, including compulsory examination powers, on the FWO would assist its Inspectors to address some of the egregious, deliberate, systematic and exploitative examples of non-compliance encountered in its work.

9.268 In addition, it appears to the committee that the power to compel evidence may be relevant to the ability of the FWO to make full use of the accessory liability provisions under the FW Act, particularly with reference to obtaining evidence from lead firms such as a head franchisor or the head of a supply chain.

9.269 For example, evidence to this inquiry challenged the notion put forward by 7-Eleven that it was unaware of the racket that its franchisees were running. The committee shares the view of many submitters and witnesses, that the protestations by the former chairman of 7-Eleven and other senior executives that they were simply unaware of the mass underpayment of employees defy belief.

9.270 The committee is strongly of the view that it would be in the public interest to get to the bottom of these matters. The committee is mindful of the frustration expressed by several witnesses that the FWO appears unable to obtain evidence from key executives and board members at 7-Eleven that would allow it to ascertain whether or not 7-Eleven was wilfully blind, or perhaps, complicit in what was occurring throughout its franchise network.

9.271 The committee is therefore persuaded by the evidence from this inquiry that the powers of the FWO require careful review in order to assess their appropriateness (the committee makes a recommendation on this matter below).

Penalty provisions

9.272 Evidence from a broad range of submitters drew attention to the fact that the current penalty regime under the FW Act does not deter deliberate contraventions of workplace law. Professor Allan Fels, for example, the former chairman of the ACCC, noted that the penalties and enforcement arrangements under the FW Act are 'obviously weak'.

9.273 The current maximum civil penalties under the FW Act are \$54 000 for a corporation or \$10 800 for an individual. By contrast, the penalties under other Commonwealth legislation such as the *Corporations Act 2001* and the *Competition and Consumer Act 2010* are an order of magnitude higher. The maximum civil penalty under the *Competition and Consumer Act 2010* is in the region of \$500 000 for an individual and \$10 million for a corporation.

9.274 Furthermore, the maximum penalty under the FW Act for knowingly making false or misleading records is 20 penalty units (\$3600) for an individual. By contrast, the maximum penalty under the *Migration Act 1954* for providing false or misleading information relating to a non-citizen is 1000 penalty units (\$180 000) for an individual, or up to 10 years imprisonment.

9.275 This is of vital concern given that the absence and deliberate falsification of employment records played a crucial part in the exploitation of temporary visa workers at 7-Eleven, and of 417 visa workers supplied by labour hire contractors to work in the meat processing and horticulture sectors.

9.276 Indeed, the current penalty regime under the FW Act almost invites unscrupulous employers to treat the law with impunity. The current penalties on company directors under the FW Act operate as the equivalent of a parking fine for some of the unscrupulous 7-Eleven franchisees, and directors of labour hire companies, who have built the systematic exploitation of visa workers into their business models.

9.277 Furthermore, even when the FWO has secured a conviction, employers that deliberately set out to avoid their legislative obligations have evaded the full consequences of the existing penalty regime through various forms of corporate restructuring, asset shifting, and liquidating the company.

9.278 The derisory penalties under the FW Act therefore undermine the enforcement activity of the FWO by sending the wrong signal to unscrupulous employers. Furthermore, they offer no comfort to legitimate businesses whose operations are

undercut by dodgy operators. In addition, because the penalties obtained from directors are insufficient to cover the total amount of underpayments, vulnerable employees who have been ripped off, and have taken their case to the authorities, are left out-of-pocket. This further discourages other employees from coming forward with evidence of unlawful activity.

9.279 As many submitters have pointed out, there is a clear need to increase the penalty for directors in order to send the right signal and to help combat the pernicious effects of illegal phoenix activity. Furthermore, the penalties for the deliberate falsification of employment records or the failure to keep adequate employment records need to be increased.

9.280 It is therefore clear to the committee that the penalty regime under the FW Act and the resources and powers of the FWO are in need of urgent review.

Accessory liability provisions

9.281 The FWO advised the committee that the accessory liability provisions under the FW Act mean that a person or entity may be liable even if they were not the direct employer of the worker whose workplace rights had been breached. However, that person or entity must be 'knowingly involved' in a contravention of the FW Act in order to satisfy a charge of accessory liability. Negligence or recklessness is not enough to prove accessorial liability.

9.282 The committee notes the view of some submitters that because the FWO has brought few cases against a separate corporation said to be 'involved in' a contravention by the direct employer, the scope of the accessorial liability provisions and their application to labour hire, outsourcing and franchising arrangements has not yet been conclusively determined by the courts.

9.283 This legal uncertainty includes the criteria necessary to satisfy accessory liability, including the requisite level of knowledge the accessory needs to have about the essential matters constituting the contravention. This uncertainty extends to whether 'wilful blindness' is sufficient to meet this knowledge requirement, and whether, in respect of corporate accessories, it is possible to aggregate the knowledge of various employees and thereby prove that the corporation itself had requisite knowledge of the contravention.

9.284 Some submitters also expressed the view that, depending on the decisions made by the courts, the accessory liability provisions may not be sufficiently flexible to deal with some of the cases uncovered during the course of this inquiry. As noted in the section on the powers of the FWO, these questions are particularly relevant to the question of whether 7-Eleven Head Office may be liable as an accessory to what was occurring in its franchise chain.

9.285 The committee also notes the FWO has cases before the courts seeking to directly recover underpayments against an accessory (as well as seeking penalties). The committee is pleased the FWO is testing the boundaries of the law in this area in an effort to put unpaid wages back into the hands of workers.

9.286 The committee concurs with the FWO that, in the case of an individual director, a successful court order for a director to repay a very large underpayment

might be a more effective deterrent than the woefully inadequate penalties currently applicable under the FW Act.

9.287 Given the FWO inquiry into 7-Eleven is still underway, and other cases are before the courts, the limits of the accessory liability provisions and the ability of the FWO to make full use of them is not entirely certain.

9.288 At the same time, the committee recognises the accessory liability provisions need to be seen as a credible threat before they can play an effective role in changing the compliance calculus of lead firms in Australia.

9.289 The committee is therefore of the view that the utility of the accessory liability provisions, and the ability of the FWO to make full and effective use of them, should also form a part of the independent review.

Sham contracting provisions

9.290 Evidence to the inquiry suggested that the sham contracting provisions in the FW Act may not be working as originally intended. This is because, in part, the defences available to a sham representation are relatively generous and somewhat ambiguous.

9.291 It was suggested to the committee that the FW Act be amended to replace the 'recklessness' defence with a 'reasonableness' defence such that the defence to a sham contracting action under s 357(1) would only be available where the employer was able to prove that at the time the representation was made, the employer believed that the contract was a contract for services rather than a contract of employment, and could not reasonably have been expected to know otherwise.

9.292 Given the seriousness of sham contracting and its implication in many instances of worker exploitation, the committee is persuaded that tightening up the defences to the sham contracting provisions will improve worker protection by helping ensure that employers take all reasonable steps to assure themselves that the relationship in question is not an employment relationship.

9.293 The committee also received evidence that previous inquiries had already recommended the 'recklessness' defence be replaced with a 'reasonableness' defence. The committee further notes that the Productivity Commission Inquiry Report on the Workplace Relations Framework (30 November 2015) found that:

It is too easy under the current test for an employer to escape prosecution for sham contracting. Recalibrating the test from one of 'recklessness' to 'reasonableness' is justified.

9.294 The committee is strongly of the view that the government should act promptly on the Productivity Commission finding, and therefore recommends that the 'recklessness' defence in section 357(2) of the FW Act be replaced with a 'reasonableness' defence.

Recommendation 30

9.295 The Committee recommends that the 'recklessness' defence in section 357(2) of the *Fair Work Act 2009* be replaced with a 'reasonableness' defence.

9.296 However, the committee notes that the FWO has a case on appeal in the High Court. This follows a decision by the Full Court of the Federal Court that adopted a narrow interpretation of the sham contracting provisions.

9.297 The committee received evidence that unless this narrow interpretation is reversed on appeal, it may mean that the sham contracting provisions can be readily circumvented by certain types of third party contracting arrangements.

9.298 Depending on the High Court decision, the sham contracting provisions may, therefore, be in need of further review to the extent that they can be readily circumvented by certain types of third party contracting arrangements.

Recommendation 31

9.299 The committee recommends that the government commit to undertake an independent review of the resources and powers of the Fair Work Ombudsman, and the penalty, accessory liability, and sham contracting provisions under the *Fair Work Act 2009*. The government should appoint, by 30 June 2016, an independent tripartite panel to conduct the review.

9.300 The review should make recommendations on the adequacy of the resources of the Fair Work Ombudsman; the appropriateness of the powers of the Fair Work Ombudsman; the appropriateness of the penalty provisions under the *Fair Work Act 2009*; the utility of the accessory liability provisions under the *Fair Work Act 2009*; and the utility of the sham contracting provisions under the *Fair Work Act 2009*.

9.301 The committee further recommends that the review report be provided to the Minister of Employment by 30 October 2016, and that the report be tabled in both Houses of Parliament by 30 November 2016. The committee provides Terms of Reference for the review in Appendix 3.

Labour hire licensing

9.302 The committee received harrowing evidence from temporary visa holders who had been exploited by unethical labour hire contractors. It is clear from the evidence, that some of the worst exploitation of temporary visa workers occurred at the hands of labour hire companies.

9.303 One of the proposals put to the committee by several submitters (to deal with rogue operators) was the introduction of a licensing regime for all labour hire contractors. The committee was pointed to the example of the Gangmasters Licensing Authority in the UK that licenses and regulates labour hire companies.

9.304 Evidence to the committee set out the various components of the UK labour hire licensing scheme including that:

- labour hire contractors must demonstrate compliance with workplace laws;
- there is a public register of all labour hire contractors;
- all workers engaged by labour hire contractors are covered by the scheme, regardless of whether they are considered employees or independent contractors;

- labour hire contractors must demonstrate that they provide adequate accommodation to workers;
- labour hire contractors must demonstrate that they comply with employment, tax and national insurance requirements;
- labour hire contractors are required to maintain status as a 'fit and proper' provider;
- labour hire contractors must pay the relevant minimum wage and keep adequate records;
- labour hire contractors that use other labour hire contractors or subcontractors to supply workers are obliged to ensure the subcontractors hold a licence; and
- where labour hire contractors are located overseas, they must obtain a licence in order to supply workers into the UK.

9.305 A significant benefit of labour hire licensing is the creation of a level playing field for legitimate labour hire companies and for businesses that use labour hire contractors to source labour. A public register of licensed labour hire contractors would also help supermarkets and other lead firms assure themselves that their supply chains are free of worker exploitation.

9.306 Labour hire licensing would also allow the FWO and trade unions to easily locate a particular labour hire contractor and verify whether that contractor is licensed and operating lawfully.

9.307 In budgetary terms, the licensing regime would be self-funding because the cost of administering the scheme would be covered by the license fee. The licensing regime could also incorporate sanctions in that the licensing authority could be given the power to refuse or revoke a license based on specified breaches of the licensing regime.

9.308 The committee is of the view that a licensing regime for labour hire contractors is vital to disrupt the current business model of unscrupulous labour hire contractors in Australia (who use their connections with labour hire agencies located overseas) to supply vulnerable temporary visa workers to pre-allocated jobs in Australia. In this context, labour hire licensing can be seen as an essential element in restoring Australia's global reputation as a fair society.

Recommendation 32

9.309 The committee recommends that a licensing regime for labour hire contractors be established with a requirement that a business can only use a licensed labour hire contractor to procure labour. There should be a public register of all labour hire contractors. Labour hire contractors must meet and be able to demonstrate compliance with all workplace, employment, tax, and superannuation laws in order to gain a license. In addition, labour hire contractors that use other labour hire contractors, including those located overseas, should be obliged to ensure that those subcontractors also hold a license.

'Hot goods' provision

9.310 The committee received evidence that the hot goods provisions in the United States have transformed the compliance calculus of firms throughout the supply chain. Noting the potency of embargo-like sanctions when the time between production and sale of a good is of the essence, the committee can see the potential value of the regulator having recourse to such a power in the horticulture and food processing sectors.

9.311 The committee deems the hot goods provisions to be worthy of further consideration should the other measures proposed in this chapter fail to adequately reset the compliance calculus. However, the committee is of the view that reviewing the resources and powers of the FWO and increasing the penalty regime under the FW Act are the first order of business.

Joint legislation

9.312 Many submitters and witnesses noted that lead firms at the head of supply chains should shoulder more responsibility for ensuring compliance with workplace law.

9.313 Many also suggested that legislative amendments should be considered that might have the effect of apportioning some degree of liability to, for example, a head franchisor. The committee made recommendations on this matter in chapter 8.

9.314 The committee received conflicting evidence on the desirability and effectiveness of joint employment legislation. While there were calls from some stakeholders to introduce joint employment legislation modelled on that used in other jurisdictions, the committee was also cautioned about the potential for unintended consequences and the potentially counterproductive impacts for workers if a lead firm sought to further distance itself from the employment relationship.

9.315 The committee is of the view that the recommendations it has made regarding changes to certain provisions under the FW Act and changes to the powers available to the FWO are the logical first step to changing the compliance calculus.

9.316 In light of the relatively modest but potentially powerful changes that can be effected to alter the sham contracting provisions and the penalty regime, the committee is not persuaded that joint employment legislation is either desirable or necessary at this juncture.

9.317 It is the committee's view that the recommendations it has put forward should be implemented first and carefully monitored to assess their impact, before further changes such as joint legislation are considered. In this regard, the committee therefore expresses its confidence that the recommendations it has made in this report are sufficient to change the compliance calculus in Australia.

International Convention on Protection of the Rights of All Migrant Workers and their Families

9.318 Evidence to the committee noted that ratification of the United Nations *International Convention on Protection of the Rights of All Migrant Workers and their Families* would not create any new substantive rights, and that provisions under the

convention would still allow the government to impose restrictions on the extent to which temporary migrant workers are permitted to work in Australia.

9.319 However, ratification would signal that Australia recognises migrant workers and their families to be a particularly vulnerable group. Given the scale of the exploitation of temporary visa workers revealed during this inquiry, the committee is persuaded that ratification of the convention would be a positive step towards encouraging a greater policy focus on Australia's system of temporary visa programs and the protection of temporary migrant workers in Australia.

Recommendation 13

9.320 The committee recommends that Australia ratify the *International Convention on Protection of the Rights of All Migrant Workers and their Families*.

Concluding comments

9.321 The reality of Australia's geography, the increasing use of temporary visa workers, and financial constraints around adequately resourcing the FWO, mean that compliance monitoring and enforcement by the regulator is only one aspect of the equation.

9.322 It is for this reason that the committee has also recommended a range of measures in this report. These include further efforts to improve the dissemination of information to temporary visa holders, and proper attention to the structural design of the various temporary visa programs including the establishment of a genuinely tripartite body to oversee matters relating to skills shortages, training, and labour migration.

9.323 At the end of the day, unless the suite of measures outlined in this report is implemented, the unfettered exploitation of temporary visa workers will continue. This will have serious consequences for the temporary visa workers themselves, and will place further downward pressure on the wages and conditions of local workers.

9.324 Further media exposés of exploitation also risks eroding public confidence in the system of temporary migration. Given the vital role played by temporary labour migration in many sectors of the economy, particularly rural and regional Australia, this is a major concern.

9.325 Finally, Australia's reputation as a fair wage country risks being irreparably damaged, particularly in countries in south-east Asia and on the Indian subcontinent. The committee is confident that the measures proposed in this report will help ensure that Australia's temporary visa programs benefit temporary visa workers as well as bring benefits to Australian society and the Australian economy.

Senator Sue Lines

Chair