

The Senate

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Education and Employment  
References Committee

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A National Disgrace: The Exploitation of  
Temporary Work Visa Holders

March 2016

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# RECOMMENDATIONS

## Recommendation 1

**2.111** The committee recommends that the Department of Immigration and Border Protection routinely publish data on the number of temporary migrants resident in Australia by length of stay. This data should account for transitions between temporary visa categories. The committee also recommends that brief periods of time spent outside Australia during a transition between visas should not restart the clock on calculating the total length of time spent in Australia on temporary visas.

## Recommendation 2

**2.112** The committee recommends that the Department of Immigration and Border Protection conduct a review of proposals to give greater weight to time spent living in Australia in consideration of applications for permanent residency. The review should also consider the merits of setting a limit on the period of time after which it would be considered reasonable for a temporary visa holder to qualify for permanent residency.

## Recommendation 3

**3.259** The committee recommends that the Department of Immigration and Border Protection be required to maintain an online public register of current labour agreements in operation, as well as any future Designated Area Migration Agreements. The committee also recommends that the register note any exemptions provided under a labour agreement.

## Recommendation 4

**3.260** The committee recommends that the Department of Immigration and Border Protection be required to advise all stakeholders that were consulted as to the outcome of the labour agreement application.

## Recommendation 5

**3.266** The committee recommends that the Temporary Skilled Migration Income Threshold (TSMIT) be indexed to average fulltime weekly ordinary time earnings (AWOTE) as at 1 July 2015 and that indexation occur each financial year.

## Recommendation 6

**3.286** The committee recommends that the Ministerial Advisory Council on Skilled Migration (MACSM) be re-constituted as a genuinely tripartite, independent, and transparent body with responsibility and commensurate funding to provide objective evidence-based advice to government on matters pertaining to skills shortages, training needs, workforce capacity and planning, and labour migration (including Designated Area Migration Agreements and the full range of temporary visa programs with associated work rights). The

**committee further recommends that the reports produced by MACSM be made publicly available.**

#### **Recommendation 7**

**3.302 The committee recommends that the replacement of local workers by 457 visa workers be specifically prohibited.**

#### **Recommendation 8**

**3.303 The committee recommends that the current exemptions on labour market testing for ANZSCO skill levels 1 and 2 be removed.**

#### **Recommendation 9**

**3.304 The committee recommends that the Migration Regulations be amended to specify that labour market testing applies to all positions nominated by approved sponsors under labour agreements and Designated Area Migration Agreements.**

#### **Recommendation 10**

**4.100 The committee recommends that the reconstituted MACSM review the Working Holiday Maker (417 and 462) visa program. The review should include, but not be limited to, an examination of the costs and benefits of the continued operation of the optional second year extension to the visa, and the costs and benefits of providing government with the ability to set a cap on the numbers of Working Holiday Maker program visas issued in any given year.**

#### **Recommendation 11**

**4.101 The committee recommends that the Department of Immigration and Border Protection be sufficiently resourced to allow it to pursue inter-agency collaboration that would enable it to collect and publish the following data on the Working Holiday Maker visa program:**

- the number of working holiday visa holders that do exercise their work rights;**
- the duration of their employment;**
- the number of employers they work for; and**
- their rates of pay, and the locations, industries, and occupations they work in.**

#### **Recommendation 12**

**4.102 The committee recommends that the reconstituted Ministerial Advisory Council on Skilled Migration (MACSM) review the Seasonal Worker program to ensure the program is meeting its stated aims.**

### **Recommendation 13**

**5.78** The committee recommends that employer sponsors of a 457 visa worker (professional) be required to also employ an Australian tertiary graduate in the same enterprise on a one-for-one basis.

### **Recommendation 14**

**5.79** The committee recommends that employer sponsors of a 457 visa worker (trade) be required to demonstrate that apprentices represent 25 per cent of the sponsor's total trade workforce (with the threshold for this requirement being the employment of four or more tradespersons).

### **Recommendation 15**

**5.80** The committee recommends that the current training benchmarks be replaced with a training levy paid per 457 visa holder employed in the business. The committee recommends that the levy be set at up to \$4000 per 457 visa worker and that the levy be paid into existing government programs that specifically support sectors experiencing labour shortages as well as apprenticeships and training programs. The committee notes that this levy would need to be closely monitored to ensure it is paid by the sponsor and not passed on to the visa holder.

### **Recommendation 16**

**5.81** The committee recommends a short review be conducted into the costs to employers of running graduate employment programs, and the desirability and feasibility of directing funds collected from the training levy to assist employers implement and administer graduate programs, such that Australian tertiary graduates are afforded ready access to graduate employment positions.

### **Recommendation 17**

**5.82** The committee recommends that the following data be collected and made publicly available on an annual basis (either by the relevant statutory agency, or the relevant government department):

- all new registrations of nurses and midwives on temporary work visas;
- the number of employers currently sponsoring skilled tradespersons (ANZSCO level 3) on 457 visas;
- the number of apprentices and trainees employed directly by these 457 sponsors, in total and by sponsor industry and state/territory;
- the trades in which those apprentices are being trained, including the number of apprentices in the same trade classifications in which the 457 visa workers are employed; and
- whether the apprentice and trainee numbers in each category have increased, decreased, or have not changed since approval of the employer as a sponsor.

### **Recommendation 18**

**6.95** The committee recommends that the *Fair Entitlements Guarantee Act 2012* be amended to make temporary visa holders eligible for entitlements under the Fair Entitlements Guarantee.

### **Recommendation 19**

**6.96** The committee recommends that the immigration program be reviewed and, if necessary, amended to provide adequate bridging arrangements for all temporary visa holders to pursue meritorious claims under workplace and occupational health and safety legislation.

### **Recommendation 20**

**6.97** The committee recommends an audit of all workers rehabilitation and compensation schemes to determine whether temporary migrant workers who suffer a debilitating, life-long disability as the result of a workplace accident would be treated equally with Australian citizens or permanent residents in similar circumstances. The audit should also determine if a temporary migrant worker's entitlements would be diminished or restricted in any way if that worker were no longer to reside in Australia. Subject to the outcome of the audit, the committee recommends the government consider taking proposals to the Council of Australian Governments (COAG) for discussion.

### **Recommendation 21**

**6.98** The committee recommends that universal free vaccination be extended to the babies and children of all temporary migrants living in Australia, irrespective of their visa status.

### **Recommendation 22**

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

### **Recommendation 23**

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

### **Recommendation 24**

**8.269** The committee recommends that Section 116 of the *Migration Act 1954* be reviewed with a view to amendment such that visa cancellation based on noncompliance with a visa condition amounts to serious noncompliance. The

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

#### **Recommendation 25**

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

#### **Recommendation 26**

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

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

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

#### **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.

#### **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.

### **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.

### **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.

### **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.

### **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.

### **Recommendation 33**

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

# ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACRATH	Australian Catholic Religious Against Trafficking in Humans.
ACCI	Australian Chamber of Commerce and Industry
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
AiG	Australian Industry Group
AIMPE	Australian Institute of Marine and Power Engineers
AFAP	Australian Federation of Air Pilots
AHEIA	Australian Higher Education Industrial Association
AHPRA	Australian Health Practitioner Regulation Agency
AMMA	Australian Mines and Metals Association
AMIEU	Australasian Meat Industry Employees Union
AMOU	Australian Maritime Officers Union
ANMF	Australian Nursing and Midwifery Federation
ANZSCO	Australian and New Zealand Standard Classification of Occupations
ASEAN	Association of Southeast Asian Nations
ASIC	Australian Securities and Investment Commission
ASQA	Australian Skills Quality Authority
ATO	Australian Taxation Office
AUD	Australian Dollar
AWPA	Australian Workforce and Productivity Agency
AWOTE	Australian Weekly Ordinary Time Earnings
CCTV	Closed Circuit Television
CEO	Chief Executive Officer
ChAFTA	China-Australia Free Trade Agreement

COAG	Council of Australian Governments
CSOL	Consolidated Sponsored Occupations List
DAMA	Designated Area Migration Agreement
DET	Department of Education and Training
DIBP	Department of Immigration and Border Protection
DSS	Department of Social Services
EEZ	Exclusive Economic Zone
ETU	Electrical Trades Union of Australia
EU	European Union
FCA	Franchise Council of Australia
FEG	Fair Entitlements Guarantee
Fels Panel	Fels Wage Fairness Panel
FTA	Free Trade Agreement
FTE	Full Time Equivalent
FW Act	Fair Work Act
FWBC	Fair Work Building and Construction
FWO	Fair Work Ombudsman
GLA	Gangmasters Licensing Authority
HRCA	Human Rights Council of Australia
IELTS	International English Language Testing System
IFA	Investment Facilitation Agreement
KAFTA	Korea-Australia Free Trade Agreement
MAC	Ministerial Advisory Council
MACSM	Ministerial Advisory Council on Skilled Migration
MoU	Memorandum of Understanding
MUA	Maritime Union of Australia



NES	National Employment Standards
NFF	National Farmers Federation
NSW	New South Wales
NT	Northern Territory
NTD	National Tenancy Database
NTEU	National Tertiary Education Union
NUW	National Union of Workers
OECD	Organisation for Economic Co-operation and Development
OH&S	Occupational Health and Safety
PAYE	Pay As You Earn
SA	South Australia
SAWIA	South Australian Wine Industry Association
SDA	Shop Distributive And Allied Employees Association
SOL	Skilled occupants List
Statement	Fair Work Information Statement
SWP	Seasonal Worker Programme
TSMIT	Temporary Skilled Migration Income Threshold
UK	United Kingdom
US	United States
VEVO	Visa Entitlement Verification Online
WA	Western Australia
WHM	Working Holiday Maker
WHMs	Working Holiday Makers
WTO	World Trade Organisation



# Chapter 1

## Introduction

### Inquiry terms of reference

1.1 On 24 March 2015, the Senate referred the following terms of reference to the Education and Employment References Committee for inquiry and report by 22 June 2015:

The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, with particular reference to:

- a. the wages, conditions, safety and entitlements of Australian workers and temporary work visa holders, including:
  - i. whether the programs 'carve out' groups of employees from Australian labour and safety laws and, if so, to what extent this threatens the integrity of such laws,
  - ii. the employment opportunities for Australians, including:
    - A. the effectiveness of the labour market testing provisions (the provisions) of the *Migration Act 1958* in protecting employment opportunities for Australian citizens and permanent residents, and
    - B. whether the provisions need to be strengthened to improve the protection of employment opportunities for Australian citizens and permanent residents and, if so, how this could be achieved,
  - iii. the adequacy of publicly available information about the operation of the provisions, and
  - iv. the nature of current exemptions from the provisions and what effect these exemptions have on the reach and coverage of labour market testing obligations and laws regarding wages, conditions and entitlements of Australian workers and temporary work visa holders;
- b. the impact of Australia's temporary work visa programs on training and skills development in Australia, including:
  - i. the adequacy of current obligations on 457 visa sponsoring employers to provide training opportunities for Australian citizens and permanent residents,
  - ii. how these obligations could be strengthened and improved, and
  - iii. the effect on the skills base of the permanent Australian workforce;
- c. whether temporary work visa holders receive the same wages, conditions, safety and other entitlements as their Australian counterparts or in accordance with the law, including:

- i. the extent of any exploitation and mistreatment of temporary work visa holders, such as sham contracting or debt bondage with exorbitant interest rate payments,
  - ii. the role of recruitment agents, and
  - iii. the adequacy of information provided to temporary work visa holders on their rights and obligations in their workplace and community, and how it can be improved;
- d. whether temporary work visa holders have access to the same benefits and entitlements available to Australian citizens and permanent residents, and whether any differences are justified and consistent with international conventions relating to migrant workers;
- e. the adequacy of the monitoring and enforcement of the temporary work visa programs and their integrity, including:
- i. the wages, conditions and entitlements of temporary work visa holders, and
  - ii. cases of 457 visa fraud, such as workers performing duties outside or below the job classification of the visa;
- f. the role and effect of English language requirements in limited and temporary work visa programs;
- g. whether the provisions and concessions made for designated area migration agreements, enterprise migration agreements, and labour agreements affect the integrity of the 457 visa program, or affect any other matter covered in these terms of reference;
- h. the relationship between the temporary 457 visa and other temporary visa types with work rights attached to them; and
- i. any related matter.

That in conducting the inquiry, the committee shall review the findings and recommendations of previous inquiries into such matters, including the Legal and Constitutional Affairs References Committee's report, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*.<sup>1</sup>

### **Conduct of the inquiry**

1.2 Notice of the inquiry was posted on the committee's website. The committee also advertised the inquiry in *The Australian* and wrote to key stakeholder groups, organisations and individuals to invite submissions.

1.3 The committee received 64 submissions as detailed in Appendix 1.

1.4 The committee held ten public hearings:

- 18 May 2015 in Melbourne;
- 12 June 2015 in Brisbane;

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1 *Journals of the Senate*, No. 88—24 March 2015, pp 2374–2376.

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- 19 June 2015 in Melbourne;
  - 26 June 2015 in Sydney;
  - 10 July 2015 in Perth;
  - 14 July 2015 in Adelaide;
  - 17 July 2015 in Canberra;
  - 24 September 2015 in Melbourne;
  - 20 November 2015 in Melbourne; and
  - 5 February 2016 in Canberra.

1.5 A list of witnesses who gave evidence at the public hearings is detailed in Appendix 2.

### **Extension to the inquiry**

1.6 During the course of the committee's inquiry, media investigations raised serious concerns about the exploitation of temporary work visa holders in Australia (see the background section in chapter 2). Against a background of continuing revelations relevant to the committee's terms of reference, the committee sought approval to extend the timeframe for its own inquiries into these and related matters.

1.7 The Senate agreed to five extensions to the inquiry reporting date. On 14 May 2015, the Senate agreed to extend the reporting date to 19 August 2015.<sup>2</sup> On 11 August 2015, the Senate agreed to extend the reporting date to 14 October 2015.<sup>3</sup> During this period, the committee focused largely on matters related to the 457 and 417 (Working Holiday Maker or 'backpacker') visa programs.

1.8 Following revelations of the exploitation of international students on temporary visas working across the 7-Eleven network of stores, the committee agreed to inquire into these matters as well. On 7 September 2015, the Senate agreed to extend the inquiry with the final report due on 11 February 2016.<sup>4</sup>

1.9 The committee held a hearing in Melbourne on 24 September 2015 related to the employment conditions of temporary migrant workers employed at 7-Eleven. Prior to the hearing, the committee invited specific submissions from those witnesses attending the hearing. The committee held further hearings on these matters on 20 November 2015 in Melbourne and 5 February 2016 in Canberra.

1.10 On 30 November 2015, the Senate agreed to extend the reporting date to 25 February 2016.<sup>5</sup> On 22 February 2016, the Senate agreed to a further extension of the reporting date to 17 March 2016.<sup>6</sup>

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2 *Journals of the Senate*, No. 94—14 May 2015, p. 2601.

3 *Journals of the Senate*, No. 104—11 August 2015, p. 2898.

4 *Journals of the Senate*, No. 111—7 September 2015, p. 3039.

5 *Journals of the Senate*, No. 131—30 November 2015, p. 3518.

## Scope and structure of the report

1.11 Although a range of varied and specific matters were raised during the course of the inquiry, certain themes run across one or more of the temporary visa programs. The report is therefore divided into five parts:

- Part I provides an overview of the temporary visa programs;
- Part II considers the impact of temporary visa programs on employment opportunities for Australians and permanent residents;
- Part III considers the impact of temporary visa programs on the training and skills development of Australians and permanent residents;
- Part IV considers issues of vulnerability and exploitation including the wages, conditions, safety and entitlements of temporary visa holders; and
- Part V considers issues of information, education, regulation and compliance.

1.12 The report chapters are structured as follows:

- **Part I: Overview**
  - Chapter 2 Overview of the temporary visa programs. The chapter provides an overview of the temporary work visa programs and labour agreements. It then outlines various reviews and reforms, and finishes by considering the interactions between the various temporary visa programs.
- **Part II: Employment opportunities**
  - Chapter 3 Impact of the 457 visa program on employment opportunities, including:
    - the responsiveness of the 457 visa program to changes in domestic labour supply;
    - the displacement of Australian workers by 457 visa workers;
    - the role of 457 visa workers in rural industries;
    - the 'market salary rate';
    - the Temporary Skilled Migration Income Threshold;
    - the Skilled Occupation List and Consolidated Sponsored Occupation List;
    - the technical competency of foreign workers; and
    - labour market testing.
  - Chapter 4 Impact of the Working Holiday Maker (WHM) (417 and 462) visa program on employment opportunities. The chapter looks at both the WHM visa program and the Seasonal Worker program. It

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considers the role of WHM visa workers in horticulture; labour agreements and enterprise agreements in the meat processing industry; and the impact of WHM visa workers on enterprise agreements and on employment opportunities for local workers in the meat processing industry.

- **Part III: Training opportunities**

- Chapter 5 Impact of temporary visas on training and skills development. The chapter looks at the impact of temporary visas on training and skills development, graduate employment, and future workforce capacity. It then assesses the effectiveness of the current training obligations and considers alternative training obligations.

- **Part IV: Vulnerability and exploitation**

- Chapter 6 Wages, conditions, safety and entitlements of 457 visa holders. The chapter considers the factors that contribute to the vulnerability of 457 visa workers. The chapter also examines the extent to which temporary visa workers are 'carved out' of Australian labour and safety laws and the barriers that temporary visa workers face in seeking access to justice. The chapter includes case studies of exploitation from the construction and nursing sectors.
- Chapter 7 Wages, conditions, safety and entitlements of WHM visa holders. The chapter considers the additional factors that contribute to the vulnerability of WHM visa holders in the workforce and the role played by 417 visa workers in horticulture and fruit picking. The role of certain labour hire companies in the exploitation of temporary visa workers is examined with a particular focus on the labour hire arrangements at Baiada's poultry processing plants in New South Wales.
- Chapter 8 Wages, conditions, safety and entitlements of international students. The chapter begins by considering the additional factors that contribute to the unique vulnerability of international students and undocumented workers in the workforce. The bulk of the chapter examines the exploitation of international students working at 7-Eleven.

- **Part V: Information, education, regulation and compliance**

- Chapter 9 Information, education, regulation and compliance. The chapter examines the provision of information and education to temporary visa workers and other stakeholders. The responsibilities of lead firms such as major supermarkets are considered in helping ensure compliance with workplace law down the supply chain. The role and powers of the Fair Work Ombudsman are examined, along with a range of regulatory and compliance measures under the *Fair Work Act 2009* including the penalty regime and the sham contracting and accessory liability provisions. The issue of the regulation of labour hire companies is also considered.

## **Acknowledgements**

1.13 During the course of the inquiry, the committee has benefitted greatly from the participation of many individuals and organisations located throughout Australia. The committee thanks all those who assisted with the inquiry, especially the witnesses who put in extra time and effort to answer written questions on notice and provide further valuable feedback to the committee as it gathered evidence.

1.14 But most of all, the committee acknowledges the many temporary visa holders that appeared before the committee to recount their experiences. Many of these individuals placed themselves in jeopardy in order to expose appalling and often systemic exploitation. The committee has formed the view that these individuals were motivated by a desire to see positive change in Australia's system of temporary visa programs and to ensure that other temporary visa holders would not endure the exploitation they had experienced. Without their personal accounts, the committee would not have been able to fully appreciate the need for a sufficiently robust regulatory and compliance framework to deliver a temporary visa program that is mutually beneficial for both Australia and for temporary visa holders.

## **Note on references**

1.15 References to the committee Hansard are to the official Hansard with the exception of 5 February 2016 which is the proof Hansard. Page numbers may vary between the proof and official Hansard transcripts for 5 February 2016.



**PART I**  
**Overview**



# CHAPTER 2

## Overview of temporary visa programs

### Background

2.1 The assumption that Australia is solely a country of permanent settlement is now outdated.<sup>1</sup> Labour mobility is a key feature of globalisation and has led to a dramatic increase in the global migration for work.<sup>2</sup> Within Australia, the increasing reliance on temporary (as opposed to permanent) migration marks a transformation in the nature of Australia's migration program away from previous assumptions that migrants to Australia would become permanent residents and citizens.<sup>3</sup>

2.2 Australia's approach to skilled migration has undergone significant change in the last 20 years, most notably with the introduction in 1996 of the Temporary Work (Skilled) (Subclass 457) Program (457 visa program).

2.3 As the terms of reference for this inquiry make clear, the committee was directed to examine the impact of the full range Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders.

2.4 The value of the broad scope of the inquiry was reaffirmed during 2015 as two separate media investigations exposed a range of exploitative practices associated with the employment of temporary migrant visa holders other than 457 visa holders.

2.5 First, on 4 May 2015, an investigation by the Australian Broadcasting Corporation's *Four Corners* program revealed exploitation of certain groups of migrant workers, many on Working Holiday Maker (WHM) (417 and 462) visas, in the meat processing and horticulture industries. Issues included the underpayment of wages, long working hours, and sub-standard living conditions. Unscrupulous labour hire contractors were implicated in many of the instances of non-compliance with Australia's workplace laws.<sup>4</sup>

2.6 Then, on 31 August 2015, a joint investigation by *Four Corners* and Fairfax Media revealed the deliberate falsification of employment records by employers (franchisees) and the systemic underpayment of the wages and entitlements of international students working on temporary visas in many 7-Eleven convenience stores across Australia.<sup>5</sup>

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1 Associate Professor Joo-Cheong Tham, *Submission 3 (supplementary)*, p. 5.

2 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 4.

3 Migration Council Australia, *Submission 27*, p. 3.

4 Caro Meldrum-Hanna and Ali Russell, 'Slaving Away: The dirty secrets behind Australia's fresh food', *Four Corners*, Australian Broadcasting Corporation, broadcast 4 May 2015.

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

2.7 The inquiry therefore considered not only dedicated visas that facilitate temporary migrant work such as the 457 visa program and the Seasonal Worker program (subclass 416 Special Program visa), but also a range of temporary visas that have work rights attached to them including New Zealand (subclass 444), Student (subclasses 570 to 576), Temporary Graduate (subclass 485), and Working Holiday Maker (417 and 462) visas.

2.8 The plethora of temporary visas with work rights attached each raise their own specific and related issues including impacts on the Australian labour market, exploitation of vulnerable migrant workers, non-compliance by employers with workplace laws, and gaps in the regulatory system.

2.9 However, the interaction between the various temporary visa programs also raises fundamental questions for Australian society, including the potential unintended consequences of a growing cohort of indefinitely temporary migrants.<sup>6</sup> Given the over-arching aspect of the interaction between the various temporary visa programs, and the broader context that it gives this report, these matters are covered later in this chapter.

2.10 The notion of 'indefinitely' temporary suggests that the terms 'temporary migrant work', 'temporary work visa programs' and 'temporary work visa holders' invite further analysis. Associate Professor Joo-Cheong Tham defines temporary migrant work as 'work performed by those who have a limited right of residence in Australia' and notes:

Temporary migrant workers are only 'temporary' in the sense that they have a limited right of residence. They are not necessarily 'temporary' in terms of the length of their residence in Australia – many of them would have lived in this country for years. Neither are temporary migrant workers, according to this definition, necessarily 'temporary' in terms of their intention to continue residing in Australia – many aspire to secure permanent residence in this country. Further, reliance on such workers is not necessarily 'temporary' – many key sectors like hospitality and agriculture heavily rely upon temporary migrant workers. These enduring aspects of temporary migrant work in Australia make it apt to speak of the 'permanence of temporary migration'.<sup>7</sup>

2.11 Temporary migrant work also includes 'work performed by migrants who have no legal right to participate in the Australian labour market, for example, tourists and those with an irregular status'.<sup>8</sup>

2.12 The committee acknowledges that much of the policy focus to date on temporary visas has been focussed specifically on the 457 visa program. By examining the range of temporary visas with work rights, this report shines a light on

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6 The term 'indefinitely temporary' is used by Peter Mares; see Peter Mares, *Submission 2*.

7 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 4.

8 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 4.

hitherto less explored aspects of temporary migration policy and makes recommendations across a range of areas.

2.13 This chapter therefore begins by providing an overview of the various temporary migration visas with associated work rights. Next, it outlines various labour agreements under which temporary migrant workers can be brought into Australia. It then summarises the various reviews of the 457 visa program and the key recommendations made by those reviews. The Northern Australia White Paper is briefly considered. The chapter finishes by exploring the implications that arise from the interactions between Australia's various temporary visa programs.

***Temporary visas with associated work rights—an overview***

2.14 This section gives a brief overview of the various visa programs with work rights attached, beginning with the 457 visa program.

*457 visa program*

2.15 The 457 visa program allows skilled workers to come to Australia and work for an approved business for up to four years. The joint submission from the Department of Employment, the Department of Immigration and Border Protection (DIBP), the Department of Education and Training (DET), the Department of Industry and Science, the Department of Social Services (DSS), the Fair Work Ombudsman (FWO) and Safe Work Australia (the Australian Government Departments' submission) states that the 457 visa program:

...enables employers to address short to medium term workforce needs by sponsoring skilled overseas workers on a temporary basis to fill positions where suitably skilled Australian citizens or permanent residents cannot be found.<sup>9</sup>

2.16 The three regulatory phases of business sponsorship instituted at the inception of the 457 visa program remain today:

- approval of the employer as a business sponsor;
- approval of the employer's nomination of the position; and
- the grant of a 457 visa to the worker.

2.17 The Australian Government Departments' submission notes that the 457 visa program is uncapped and driven by employer demand and that:

The flexibility of the programme is beneficial to the Australian economy, contributing to productivity by responding to skills gaps in the Australian labour market.<sup>10</sup>

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9 Department of Employment, Department of Immigration and Border Protection, Department of Education and Training, Department of Industry and Science, Department of Social Services, Fair Work Ombudsman and Safe Work Australia [hereafter Australian Government Departments], *Submission 41*, p. 1.

10 Australian Government Departments, *Submission 41*, p. 1.

2.18 The employer-driven element of the 457 program and the claims of flexibility and responsiveness stand in contrast to the permanent migration intake which is determined and capped on an annual basis by government. The planned permanent migration intake for 2014–15 is 190 000 (128 550 in the skilled stream and 60 885 in the family stream).<sup>11</sup>

2.19 A 457 visa is increasingly seen as a pathway to permanent migration. In 2014–15 to 31 March 2015, the number of 457 visa holders who were granted a permanent residence or provisional visa was 37 430, an increase of 5.2 per cent compared with the same period in the previous program year.<sup>12</sup>

2.20 Table 2.1 below shows the percentages of 457 visa holders who have converted to a permanent or provisional visa over the last five years.

**Table 2.1: percentages of 457 visa holders who have converted to a permanent or provisional visa over the last five years.**

	Financial year of subclass 457 visa expiry				
	2010-11	2011-12	2012-13	2013-14	2014-15
<i>Percentage (%) moved to a permanent / provisional visa</i>	49.6%	50.2%	53.7%	54.5%	44.0%

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

2.21 The pathway most used by 457 visa holders to gain permanent residence is the Temporary Residence Transition stream of the Employer Nomination Scheme or the Regional Sponsored Migration Scheme. The International English Language Testing System (IELTS) test score requirement to gain permanent residence through the Temporary Residence Transition stream is at least a score of five in each of the four test components.<sup>13</sup> IELTS assesses English proficiency on a scale of 1–9 in four skills: listening, reading, writing and speaking.<sup>14</sup>

2.22 Beyond the 457 visa program, however, other temporary visas provide a pathway to permanent residency. The Migration Council of Australia advised the committee that 'in 2013–14, over 58 per cent of new permanent residency visas were granted to people already in Australia on temporary visas'.<sup>15</sup> The links between the

11 Department of Immigration and Border Protection, Fact Sheet: Migrant— Migration programme outcomes for 2010–11 to 2013–14 and planning levels for 2014–15, available at <http://www.border.gov.au/about/corporate/information/fact-sheets/migrant> (accessed 18 August 2015).

12 Department of Immigration and Border Protection, Subclass 457 quarterly report, 31 March 2015, p. 1; see also Dr Joanna Howe, 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, vol. 41, 2013, p. 2.

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

14 International English Language Testing System (IELTS), Australia—What score do you need?, <https://www.ielts.org/what-is-ielts/ielts-for-migration/australia> (accessed 10 March 2016).

15 Migration Council Australia, *Submission 27*, p. 3.

temporary and skilled migration programs and arguments about the respective merits of the two programs are discussed in chapter 3.

2.23 As at 31 March 2015, there were 106 755 primary 457 visa holders in Australia compared to 111 781 at 31 March 2014. This is a reduction of 4.5 per cent (see Table 2.2 below).<sup>16</sup>

**Table 2.2: Primary Subclass 457 visa holders in Australia at 31 March 2015, compared with same date in previous program year.**

	at 31/03/14	at 31/3/15	% change
Subclass 457 primary visa holders in Australia	111 781	106 755	-4.5%

Source: Australian Government Departments, *Submission 41*, Attachment B, Table 1, p. 20.

2.24 It is important to note that the partners and children of 457 visa holders (secondary visa holders) are not subject to the same restrictions as the primary visa holder and have the right to undertake unskilled work.<sup>17</sup>

2.25 There has been a reduction in the numbers of primary and secondary 457 visas granted over the last year (see Table 2.3 below). However, the 71 316 visas granted in 2014–15 is still significantly higher than the 25 786 visas granted in 1996–97.<sup>18</sup>

**Table 2.3: Primary Subclass 457 visas granted in 2014–15 to 31 March 2015, compared with same date in previous program year.**

Applicant Type	2013–14 to 31/03/14	2014–15 to 31/03/15	% Change
Primary	39 767	38 134	-4.1%
Secondary	36 247	33 182	-8.5%
<b>Total</b>	<b>76 014</b>	<b>71 316</b>	<b>-6.2%</b>

Source: Australian Government Departments, *Submission 41*, Attachment B, Table 2, p. 20.

16 Department of Employment, Department of Immigration and Border Protection, Department of Education and Training, Department of Industry and Science, Department of Social Services, Fair Work Ombudsman and Safe Work Australia, *Submission 41*, Attachment B, p. 20.

17 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 5.

18 Janet Phillips and Harriet Spinks, 'Skilled migration: temporary and permanent flows to Australia', *Background note*, Table 3: Temporary migration: overseas student and business long stay (subclass 457) visa grants since 1996–97, Parliamentary Library, Parliament of Australia, 6 December 2012.

2.26 The perception that 457 visas are granted solely to recipients in a foreign country is no longer accurate. Indeed, almost half of all 457 visas granted in 2014–15 (18 118 out of 37 127) were to persons already in Australia (see Table 2.4 below).

**Table 2.4: Primary subclass 457 visas granted in 2014–15 to 31 March 2015 where the client was onshore by last visa held.**

<b>Visa category – Last visa held</b>	<b>2014–15 to 31/03/15</b>
Subclass 457 visa	4 599
Student visa	5 532
Temporary Graduate visa	912
Temporary Resident visa	554
Working Holiday Maker	4 612
Visitor visa	1 773
Other visa	128
Unknown	8
<b>Onshore Total</b>	<b>18 118</b>
Offshore	19 009
<b>Onshore and Offshore</b>	<b>37 127</b>

Source: Australian Government Departments, *Submission 41*, Attachment B, Table 3, p. 20.

2.27 The issue of whether a 457 visa recipient is onshore or offshore at the time of the granting of a 457 visa is relevant to the debate over the relative cost of employing a 457 visa worker as opposed to hiring an Australian citizen or permanent resident. This matter is discussed in chapter 3.

2.28 There are over 1.8 million temporary visa holders in Australia (see Table 2.5 below).



**Table 2.5: Temporary visa holders in Australia at 31 March 2015 by visa category**

<b>Visa category</b>	<b>Primary</b>	<b>Total</b>
Bridging visa holders	108 947	<b>111 173</b>
New Zealand (subclass 444) visa holders	648 993	<b>648 993</b>
Student visa holders	361 742	<b>413 123</b>
Temporary graduate (subclass 485) visa holders	18 220	<b>23 021</b>
Temporary skilled (subclass 457) visa holders	106 755	<b>193 158</b>
Visitor visa holders	285 598	<b>285 641</b>
Working holiday maker visa holders	160 275	<b>160 275</b>
Other temporary visa holders	28 954	<b>36 267</b>
<b>Total</b>	<b>1 719 484</b>	<b>1 871 656</b>

Source: Australian Government Departments, *Submission 41*, Attachment B, Table 4, p. 21.

2.29 Of the total population of temporary visa holders, approximately 1.4 million temporary visas held in Australia at 31 March 2015 have work rights attached to them. The types of visas held by temporary visa holders include:

- New Zealand (subclass 444);
- Student (subclasses 570 to 576);
- Temporary graduate (subclass 485);
- Temporary skilled (subclass 457); and
- Working Holiday Maker (subclasses 417 and 462).<sup>19</sup>

2.30 Removing the large number (648 993) of New Zealand citizens who are visa holders from the calculations still leaves approximately three quarters of a million temporary visa holders in Australia with work rights.

#### *Seasonal Worker Program*

2.31 The original version of the seasonal worker program was introduced in 2008 to allow workers from certain Pacific island countries to work in the Australian horticulture industry for up to seven months.

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<sup>19</sup> Australian Government Departments, *Submission 41*, Attachment B, Table 4, p.21 and Attachment C, p. 22.

2.32 The seasonal worker program has since been expanded to the agriculture and accommodation industries in specified locations. The program is now uncapped with take-up determined by employer demand.<sup>20</sup>

2.33 Participating countries include Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu. Seasonal workers can be employed for up to six months, and seasonal workers recruited from Kiribati, Nauru or Tuvalu can be employed for up to nine months due to the higher costs of transportation to and from Australia for citizens from these countries.<sup>21</sup>

2.34 For all periods of employment, approved employers must guarantee a minimum average of 30 hours' work per week to seasonal workers. Approved employers also need to test the labour market before recruiting seasonal workers.<sup>22</sup> (The seasonal worker program is covered in greater detail in chapter 5).

#### *Working Holiday Maker visa program*

2.35 The Working Holiday Maker (WHM) program includes the Working Holiday (subclass 417) and Work and Holiday (subclass 462) visas. As at 31 March 2015, there were 160 275 WHM visa holders in Australia.<sup>23</sup>

2.36 The WHM visa program began in 1975 and allows young adults (aged 18 to 30) from eligible partner countries to work in Australia while having an extended holiday. It has consistently been seen as a cultural program 'facilitating the travel of young people to and from Australia to have a cultural experience, supplemented with a limited opportunity to work'.<sup>24</sup> Indeed, the DIBP states that 'work in Australia must not be the main purpose of the visa holder's visit'.<sup>25</sup>

2.37 However, the WHM (subclass 417 and subclass 462) visa allows work for the full 12 months of the visa, with the sole restriction on the work rights of a WHM visa holder being that they cannot work for the same employer for more than six months.<sup>26</sup>

2.38 Furthermore, since 1 November 2005, a first-time WHM (subclass 417) visa holder who has carried out 88 days of 'specified work' in regional Australia is eligible

20 Australian government, Seasonal Worker Programme expansion—Q & A, available at [http://docs.employment.gov.au/system/files/doc/other/expansion\\_of\\_the\\_seasonal\\_worker\\_programme\\_-\\_faqs.pdf](http://docs.employment.gov.au/system/files/doc/other/expansion_of_the_seasonal_worker_programme_-_faqs.pdf) (accessed 19 August 2015).

21 Australian government, Seasonal Worker Programme expansion—Q & A.

22 Australian government, Seasonal Worker Programme expansion—Q & A.

23 Australian Government Departments, *Submission 41*, Attachment C, p. 22, Attachment B, Table 4, p.21.

24 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 5.

25 Department of Immigration and Border Protection, What is the Working Holiday Maker program?, available at <https://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-is-the-working-holiday-maker-program> (accessed 19 August 2015).

26 Migration Regulations 1994 [F2015C00584], regulations 417.611, 462.611 (by operation of mandatory visa condition 8547).

to apply for a second WHM visa. 'Specified work' includes agriculture, mining and construction.<sup>27</sup>

2.39 The number of second WHM visa grants has grown rapidly since the program's inception. There were 2692 grants in 2005–06 compared with 45 952 grants in 2013–14.<sup>28</sup> Of the 45 952 second visa grants, 11 295 (24.6 per cent) were to WHM visa holders from Taiwan.<sup>29</sup>

2.40 In 2013–14, approximately one in four first-time WHM visa holders acquired a second WHM visa. The second WHM visa program constituted 20 per cent of the overall WHM program as at 30 June 2014 compared to just 3.3 per cent as at 30 June 2006.<sup>30</sup>

#### *Student visa program*

2.41 All eligible international students holding visa subclasses 570–576 are permitted to work 40 hours per fortnight during the course of their studies (under visa condition 8104).<sup>31</sup>

2.42 As at 31 March 2015, there were 413 123 student visa holders in Australia.<sup>32</sup> Although precise numbers are difficult to ascertain, it was estimated that in 2011, more than 200 000 international students were in paid work.<sup>33</sup>

#### *Temporary graduate visa program*

2.43 International students who have recently graduated from an Australian educational institution can apply for a subclass 485 visa that allows them (and their family) to remain and work in Australia temporarily after completing their studies.<sup>34</sup>

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27 Migration Regulations 1994 [F2015C00584], regulations 417.211; Department of Immigration and Border Protection, Working Holiday Maker visa programme report, 30 June 2014, p. 4, available at <https://www.border.gov.au/ReportsandPublications/Documents/statistics/working-holiday-report-jun14.pdf#search=working%20holiday%20maker%20visa%20program%20report> (accessed 19 August 2015).

28 Department of Immigration and Border Protection, Working Holiday Maker visa programme report, 30 June 2014, p. 4.

29 Department of Immigration and Border Protection, Working Holiday Maker visa programme report, 30 June 2014, p. 7.

30 Department of Immigration and Border Protection, Working Holiday Maker visa programme report, 30 June 2014, p. 4.

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

32 Australian Government Departments, *Submission 41*, Attachment B, Table 4, p. 21.

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

34 Department of Immigration and Border Protection, Graduate visa (subclass 485), available at <https://www.border.gov.au/Trav/Visa-1/485-#> (accessed 20 August 2015).

As at 31 March 2015, there were 23 021 temporary graduate visa holders in Australia.<sup>35</sup>

2.44 The 485 visa has two visa streams. The Graduate Work stream is for international students with an eligible qualification who graduate with skills and qualifications that relate to an occupation on the Skilled Occupation List (SOL). A visa in this stream is granted for 18 months from the date of grant.<sup>36</sup>

2.45 The Post-Study Work stream is for international students who graduate with a higher education degree from an Australian education provider, regardless of their field of study. A visa in this stream can be granted for up to four years.<sup>37</sup>

### ***Labour agreements***

2.46 In contrast to the 457 visa program, the labour agreement stream (Labour Agreements, Project Agreements and Designated Area Migration Agreements) allows for the sponsorship of semi-skilled workers. The Australian Government Departments' submission notes:

A labour agreement is a formal arrangement negotiated between an employer and the Australian Government. It aims to provide a migration pathway for businesses and industries that need semi-skilled and skilled workers for occupations that are not covered by the standard subclass 457 programme. The labour agreement document defines employer obligations such [as] the training requirements for Australian employees.<sup>38</sup>

2.47 Labour agreements are bound by certain conditions which the DIBP assesses on a case by case basis:

Employers seeking to enter into a labour agreement are required to provide a comprehensive submission to DIBP which provides a compelling evidence-base demonstrating there is a genuine skills shortage and there are no suitably qualified or experienced Australians available. Consultation with relevant stakeholders is a mandatory part of the labour agreement process.

All employers seeking access to a labour agreement must provide evidence of labour market need, including evidence of their genuine on-going recruitment efforts for the last six months. DIBP also consults with the Department of Employment for its assessment of the labour market in the requested occupations.

While marginal concessions to the TSMIT [Temporary Skilled Migration Income Threshold]<sup>39</sup> may be approved in limited circumstances where there

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35 Australian Government Departments, *Submission 41*, Attachment B, Table 4, p. 21.

36 Department of Immigration and Border Protection, Graduate visa (subclass 485).

37 Department of Immigration and Border Protection, Graduate visa (subclass 485).

38 Australian Government Departments, *Submission 41*, p. 10.

39 The Temporary Skilled Migration Income Threshold (TSMIT) provides an income floor for 457 visa holders. The TSMIT is covered in greater detail in chapter 3.

is a compelling business case, DIBP must be satisfied that overseas workers have sufficient income to support themselves and their dependants, as they do not have access to the same range of benefits and services as Australians. Regardless, the terms and conditions of employment for overseas workers under labour agreements must, at all times, be no less favourable than those for Australian citizens or permanent residents performing the same duties at the same location.

English language proficiency requirements under labour agreements are broadly consistent with the standard business sponsorship stream of the subclass 457 programme. Concessions are only considered where there is a strong business case and the concession would not constitute a work, health or safety risk. Further, employers must demonstrate that overseas workers can adequately access workplace relations protections and can participate in the community.

Consistent with the standard subclass 457 programme, approved sponsors under labour agreements are also required to meet a range of sponsorship obligations, including a satisfactory record of, and an ongoing commitment to, the training of Australians.<sup>40</sup>

2.48 An on-hire labour agreement (OHLA) is a formal arrangement negotiated between an on-hire (also known as labour hire) business and the Australian government. The OHLA is a template agreement which means that the negotiations are restricted to a discussion about occupations, numbers and salaries, and do not include the terms and conditions of the OHLA.<sup>41</sup>

In recognition that many Australian companies do not directly recruit or employ all their own staff but instead use the legitimate business services of companies in the On-hire sector (which includes recruitment agents, labour hire and contract management firms), the On-hire Template Labour Agreement was introduced in 2007. The template allows for labour agreements to be entered into without negotiation on the conditions of the labour agreement. Beyond the ability to on-hire workers to other employers, there are no additional concessions under the template and all nominations must meet the same minimum requirements of the standard subclass 457 programme. Only occupations that are eligible for the standard subclass 457 programme and that are listed on the Consolidated Sponsored Occupation List (CSOL) may be sponsored.<sup>42</sup>

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40 Department of Employment, Department of Immigration and Border Protection, Department of Education and Training, Department of Industry and Science, Department of Social Services, Fair Work Ombudsman and Safe Work Australia, *Submission 41*, p. 16.

41 Department of Immigration and Citizenship, On-hire labour agreements—Information for employers about labour agreement submissions, October 2012, available at <https://skilledmigration.govspace.gov.au/files/2012/10/ON-HIRE-Labour-Agreement-information-booklet-October-2012.pdf> (accessed 19 August 2015).

42 Department of Employment, Department of Immigration and Border Protection, Department of Education and Training, Department of Industry and Science, Department of Social Services, Fair Work Ombudsman and Safe Work Australia, *Submission 41*, p. 10.

2.49 The Australian Government Departments' submission also notes that labour agreements are designed to 'complement' the 457 visa program in that 'they are commonly used by employers in regional areas, to fill niche occupations that few Australians are qualified in or are unavailable'.<sup>43</sup>

#### *Designated Area Migration Agreements*

2.50 A Designated Area Migration Agreement (DAMA) allows states, territories or regions to negotiate an agreement 'under which employers in areas experiencing skills and labour shortages can sponsor skilled and semi-skilled overseas workers'.<sup>44</sup>

2.51 A DAMA has a two tiered structure:

- an over-arching agreement between a Designated Area Representative that is endorsed by a state or territory government and the Australian Government to bring overseas workers to a designated area; and
- individual agreements between employers and the Australian Government that allow employers to sponsor overseas workers to the designated area under the terms and conditions agreed to in the over-arching agreement.<sup>45</sup>

#### *Project Agreements*

2.52 A Project Agreement 'allows infrastructure or resource development projects experiencing genuine skills or labour shortages access to temporary skilled and specialised semi-skilled temporary overseas workers through the subclass 457 visa'.<sup>46</sup>

2.53 A Project Agreement also has a two-tiered structure:

- A project company representing employers within a project will enter into an overarching project deed of agreement with the department. This agreement will be in the form of a 'deed of agreement' and it will outline, among many matters, the occupations and any concessions agreed to, that will facilitate the recruitment of overseas workers on a project.
- Under the overarching project deed of agreement, selected employers endorsed by the project company will enter into a labour agreement with the

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43 Department of Employment, Department of Immigration and Border Protection, Department of Education and Training, Department of Industry and Science, Department of Social Services, Fair Work Ombudsman and Safe Work Australia, *Submission 41*, p. 16.

44 Department of Immigration and Border Protection, Designated Area Migration Agreements—Information about requesting and managing a designated area migration agreement, August 2014, p. 4, available at <http://www.border.gov.au/WorkinginAustralia/Documents/dama.pdf> (accessed 19 August 2015).

45 Department of Immigration and Border Protection, Designated Area Migration Agreements—Information about requesting and managing a designated area migration agreement, August 2014, p. 4.

46 Department of Immigration and Border Protection, Project Agreements—Information about requesting and managing a project deed of agreement, May 2015, p. 6, available at <http://www.border.gov.au/WorkinginAustralia/Documents/project-companies-submission-information.pdf> (accessed 19 August 2015).

Commonwealth to sponsor overseas workers on the project under the terms and conditions agreed to in the overarching deed of agreement. A labour agreement will only be approved where suitably qualified Australians are not available.<sup>47</sup>

### *Enterprise Migration Agreements*

2.54 The Enterprise Migration Agreement Program has ceased due to the softening labour market in the resource sector.<sup>48</sup>

### **Reviews and reforms of temporary visa programs**

2.55 As the principal dedicated temporary skilled migration program, the 457 visa program has been subject to several specific and related inquiries (the first inquiry being undertaken before its inception). There have, however, been inquiries related to other temporary visa programs such as the Knight review<sup>49</sup> of the student visa program.

2.56 This section provides a brief summary of various reviews including:

- an inquiry into the temporary entry of business people and highly skilled specialists (the Roach report) (1995);<sup>50</sup>
- an inquiry by the External Reference Group chaired by Mr Peter McLaughlin into temporary residence (2002);<sup>51</sup>
- an inquiry by the Joint Standing Committee on Migration into temporary business visas (2007);<sup>52</sup>
- an inquiry by the Visa Subclass 457 External Reference Group chaired by Mr Peter Coates into the capacity of temporary migration to ease labour shortages (2008);<sup>53</sup>

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47 Department of Immigration and Border Protection, Project Agreements—Information about requesting and managing a project deed of agreement, May 2015, p. 6.

48 Department of Employment, Department of Immigration and Border Protection, Department of Education and Training, Department of Industry and Science, Department of Social Services, Fair Work Ombudsman and Safe Work Australia, *Submission 41*, p. 16.

49 Mr Michael Knight, Strategic Review of the Student Visa Program, *Report*, Australian Government, 2011.

50 Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists, *Business Temporary Entry: Future Directions*, August 1995.

51 Department of Immigration, Multicultural and Indigenous Affairs, *In Australia's interests: A Review of the Temporary Residence Program*, 2002.

52 Joint Standing Committee on Migration, Inquiry into temporary business visas, *Temporary visas...permanent benefits: ensuring the effectiveness, fairness and integrity of the temporary business visa program*, August 2007.

53 Department of Immigration and Citizenship, *Final Report to the Minister for Immigration and Citizenship*, April 2008.

- the Visa Subclass 457 Integrity Review (the Deegan review) arising from concerns about the exploitation of temporary migrant workers (2008);<sup>54</sup>
- Strategic Review of the Student Visa Program 2011 (the Knight review);<sup>55</sup>
- an inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions] by the Senate Standing Committee on Education, Employment and Workplace Relations;<sup>56</sup>
- an inquiry into the framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements by the Senate Legal and Constitutional Affairs References Committee (2013);<sup>57</sup>
- the Independent Review into Integrity in the Subclass 457 Programme (the Azarias review) (2014);<sup>58</sup> and
- the Skilled Migration and 400 Series Visa Program Review by the DIBP (commenced 2014).<sup>59</sup>

2.57 The Roach review was commissioned by the Keating government. The review found that temporary business migration (and in particular, of highly skilled business executives) to Australia was beneficial and recommended that a streamlined single visa replace the multiple business visas existing at that time.<sup>60</sup> The incoming Coalition government accepted the broad thrust of the Roach report and implemented the 457 visa program in 1996.

2.58 However, skill shortages in the Australian labour market during the 2000s led to significant changes in the 457 visa program with both a substantial expansion in the

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- 54 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review Final Report*, October 2008.
- 55 Mr Michael Knight, Strategic Review of the Student Visa Program, *Report*, Australian Government, 2011.
- 56 Senate Education, Employment and Workplace Relations Legislation Committee, *Inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions]*, 12 March 2013.
- 57 Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, 27 June 2013.
- 58 Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014.
- 59 Department of Immigration and Border Protection, *Reviewing the Skilled Migration and 400 Series Visa Programmes, Discussion Paper*, September 2014; Department of Immigration and Border Protection, *Simplification of the skilled migration and temporary activity visa programmes, Proposal Paper*, December 2014.
- 60 Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists, *Business Temporary Entry: Future Directions*, 1995.



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numbers of 457 visas granted and the inclusion of 'a broader range of skilled occupations, including trades'.<sup>61</sup>

2.59 Labour market testing had been part of the 457 visa program when it was introduced on 1 August 1996. But, on 1 July 2001, the provision was removed with the early implementation by the Coalition government of a recommendation by the External Reference Group review that labour market testing be replaced with a skills and salary threshold.<sup>62</sup>

2.60 The Joint Standing Committee on Migration recommended that the Departments of Immigration and Citizenship and Employment and Workplace Relations apply greater rigour to their assessment of occupations experiencing skill shortages so that the gazetted list of approved occupations 'lists only skilled migration occupations in demand'.<sup>63</sup>

2.61 The report by the Visa Subclass 457 External Reference Group was produced at the height of the resources boom, a time of low unemployment. The report noted certain parts of the economy (such as the resources sector) were facing general labour shortages and that even though the 457 visa program had become 'a general labour supply visa' by default, it was 'not suitable to meet the market requirements for semi-skilled and unskilled labour'. The report therefore recommended that the 'Australian Government pilot other approaches to the provision of a range of labour in specific industries'.<sup>64</sup>

2.62 The Visa Subclass 457 Integrity Review by Australian Industrial Relations Commissioner Barbara Deegan (the Deegan review) was triggered by concerns arising from the expanded nature of the 457 visa program including the exploitation of temporary migrant workers and fears that Australian jobs were being taken by 457 visa workers.

2.63 Noting that workers on a 457 visa only had twenty-eight days before their visa expired to find a new job if they left their sponsored employment, the Deegan review pointed out that the twenty-eight day rule allowed unscrupulous employers to intimidate temporary migrant workers with the threat of being forced out of the country unless they adhered to their employers' demands. One of the key

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61 Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 20.

62 Department of Immigration, Multicultural and Indigenous Affairs, *In Australia's interests: A Review of the Temporary Residence Program*, 2002, pp 29–30, 122–125.

63 Joint Standing Committee on Migration, Inquiry into temporary business visas, *Temporary visas...permanent benefits: ensuring the effectiveness, fairness and integrity of the temporary business visa program*, August 2007, Recommendation 12, p. xviii.

64 Department of Immigration and Citizenship, *Final Report to the Minister for Immigration and Citizenship*, April 2008, pp 10–11, 37.

recommendations of the Deegan review was that the time limit for a 457 visa worker to find alternative employment be extended to ninety days.<sup>65</sup>

2.64 The Deegan review also recommended a 'salary floor' and an obligation on all 457 visa employers to pay market salary rates to all 457 visa workers.<sup>66</sup>

2.65 The Knight review into the Student Visa Program is of relevance to this inquiry in so far as one of the key findings was that the availability of post-study work rights was an essential element in Australian universities remaining a viable destination for overseas students:

The absence of a clearly defined post study work rights entitlement puts Australian universities at a very serious disadvantage compared to some of our major competitor countries. In the past the absence of such an entitlement has not proven to be a dramatic hindrance to Australian universities recruiting international students. But the world has changed. Global competition for quality international students is intensifying and almost certainly will continue to further intensify. Allowing a moderate period of post study work rights will be essential to ensuring the ongoing viability of our universities in an increasingly competitive global market for students.<sup>67</sup>

2.66 In 2013, the former Labor government introduced the Migration Amendment (Temporary Sponsored Visas) bill 2013. The *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Migration Amendment Act) amended the *Migration Act 1958* to:

- require the minister to establish the Ministerial Advisory Council on Skilled Migration to provide advice in relation to the temporary sponsored work visa program;<sup>68</sup>
- require sponsors participating in the temporary sponsored work visa program to undertake labour market testing in relation to nominated occupations;<sup>69</sup>
- provide that labour market testing is undertaken after redundancies and retrenchments have occurred;<sup>70</sup>
- provide for enforceable undertakings between the minister and approved sponsors in relation to sponsorship;<sup>71</sup> and

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65 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review Final Report*, October 2008, p. 13.

66 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review Final Report*, October 2008, p. 8.

67 Mr Michael Knight, *Strategic Review of the Student Visa Program, Report*, Australian Government, 2011 p. viii.

68 *Migration Amendment (Temporary Sponsored Visas) Act 2013*, Schedule 1.

69 *Migration Amendment (Temporary Sponsored Visas) Act 2013*, Schedule 2.

70 *Migration Amendment (Temporary Sponsored Visas) Act 2013*, Schedule 2.

71 *Migration Amendment (Temporary Sponsored Visas) Act 2013*, Schedule 5.

- enable Fair Work inspectors to monitor sponsorship compliance.<sup>72</sup>

2.67 The Migration Amendment Act also amended the Migration Regulations 1994 to give workers on a 457 visa ninety consecutive days to find a new employer,<sup>73</sup> as recommended by the Deegan review.

2.68 The most contentious element of the Migration Amendment Act was the decision to reintroduce labour market testing.

2.69 Despite bipartisan support for a system of skilled migration, the Azarias review noted that the number of inquiries into the 457 visa program was 'a clear indication that it faces a politically and economically divided environment':

In a nutshell, on the one side are those, largely business owners, who need overseas workers to supplement their workforces, while on the other are those, mainly unions, who seek primarily to safeguard the job opportunities and entitlements of workers in Australia.<sup>74</sup>

2.70 The Azarias review sought to answer two key questions:

- how to ensure that the occupations that sponsors seek to recruit for are genuinely skilled ones; and
- how to ensure the Australian public can be certain that Australians have been given first opportunity to fill these jobs.<sup>75</sup>

2.71 The Azarias review proposed the formation of a tripartite ministerial advisory council (to replace the existing Ministerial Advisory Council on Skilled Migration) 'to make recommendations on the occupations that should be included in the department's 457 occupation list'. The review argued that the proposal had several advantages:

It replaces two flawed requirements, the lack of responsiveness of the current occupations list and the inadequacy of labour market testing, with a system which is transparent to all stakeholders; which benefits from their full participation and buy-in; which responds quickly to the dynamic changes in the Australian labour market; which is based on factual evidence rather than poorly substantiated claims; which is objectively analysed by technical experts; and which considerably reduces government silos.

Once the system is up and running, employers will have the flexibility, responsiveness and certainty they need, and their regulatory burden should accordingly be lessened, with no concomitant risk to the community; and

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72 *Migration Amendment (Temporary Sponsored Visas) Act 2013*, Schedule 6.

73 *Migration Amendment (Temporary Sponsored Visas) Act 2013*, Schedule 3.

74 Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 7.

75 Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 8.

stakeholders, including the Australian public, will be more confident about the integrity of the programme.<sup>76</sup>

2.72 The basis for, and composition and role of, a ministerial advisory council is one of the key areas that the committee's inquiry investigated (see chapter 3).

2.73 The Azarias review also recommended changes to the training requirements imposed on visa sponsors. The review found 'strong support for the principle that sponsors should make a contribution to training Australians in return for being able to sponsor 457 visa holders'. However, the review found:

...little support by either sponsors or labour representatives for the current training benchmarks, whose success in achieving the desired outcomes was repeatedly questioned, and whose application was considered to be overly complex.<sup>77</sup>

2.74 Consequently, the Azarias review recommended the training benchmarks be abolished and replaced by a fixed amount (for example, \$400) for each 457 worker employed.<sup>78</sup>

2.75 The Senate Legal and Constitutional Affairs References Committee inquiry into the framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements in 2013 made eleven recommendations.<sup>79</sup> The committee notes that two of the recommendations made by the Senate Legal and Constitutional Affairs References Committee were not supported by the government, three were supported in principle, and six were referred to the Azarias review for further consideration.<sup>80</sup> This report revisits several of the recommendations in later chapters.

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76 Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 9.

77 Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, pp 11 and 12.

78 Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 12.

79 Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, 27 June 2013, pp ix–x.

80 Australian Government, *Response to the Senate inquiry report: The Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, July 2014.

2.76 The DIBP is currently conducting a review of the Skilled Migration and 400 series visa programs.<sup>81</sup> The committee notes that the Working Holiday visa (subclass 417) and the Work and Holiday visa (subclass 462) are not included within the DIBP review of the 400 series visa programs.<sup>82</sup>

2.77 With respect to the DIBP review, the committee received evidence on a gap between the 457 visa program and the subclass 400 visa. The subclass 400 visa can be issued for up to six months' duration, but is generally approved for stays of up to three months. Global immigration law firm, Fragomen, argued that the subclass 400 visa was much more appropriate than the 457 visa for short-term work, but that the criteria for the subclass 400 visa were overly restrictive. Fragomen therefore proposed 'allowing a total of six months' stay in Australia, but over a validity period of 12 months from date of first entry; and removing the initial entry date restriction'.<sup>83</sup> The committee makes no further comment on this suggestion as it understands this matter will be considered by the DIBP review.

### ***Northern Australia White Paper***

2.78 The Abbott government White Paper on Developing Northern Australia (the White Paper) released in June 2015 proposed changes to some of Australia's temporary visa programs. With regard to DAMAs, the White Paper noted:

Australia's first DAMA commenced in the Northern Territory on 10 February 2014. A memorandum of agreement for up to 500 workers is currently in place pending a three year agreement. This is an umbrella agreement that will allow employers in the Northern Territory to sponsor temporary workers including chefs, child care and aged care workers, office managers, and truck drivers.

The Western Australia Government is currently working with the Department of Immigration and Border Protection and the Pilbara Regional Council on a proposed DAMA for the Pilbara region.<sup>84</sup>

2.79 With respect to the WHM visa program, the White Paper stated the government will amend the operation of the program to allow a WHM visa holder to work an additional six months with one employer in northern Australia if they work in the following high demand areas:

- agriculture, forestry and fishing;
- tourism and hospitality;

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81 Department of Immigration and Border Protection, *Reviewing the Skilled Migration and 400 Series Visa Programmes*, Discussion Paper, September 2014; Department of Immigration and Border Protection, *Simplification of the skilled migration and temporary activity visa programmes*, Proposal Paper, December 2014.

82 Department of Immigration and Border Protection, *Reviewing the Skilled Migration and 400 Series Visa Programmes*, Discussion Paper, September 2014, p. 16.

83 Fragomen, *Submission 21*, p. 18.

84 Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia*, June 2015, p. 111.

- mining and construction;
- disability and aged care.<sup>85</sup>

2.80 In addition, the government proposed giving a WHM (subclass 462) visa holder the opportunity to access a second 12 month visa if they work for three months in agriculture or tourism in the north. Given that a WHM (subclass 417) visa holder already has access to a second 12 month visa, the change meant WHM visa holders 'could potentially be able to work for the entire duration of their two year stay in Australia'.<sup>86</sup> The committee makes a recommendation in chapter 8 on the rights and protections available to temporary visa workers under any new visa class or extension to a visa issued under changes arising from the White Paper.

2.81 The White Paper also announced changes to the Seasonal Worker program, stating the government would:

- remove the cap on the number of workers participating in the Seasonal Worker program, making it an employer demand-driven scheme;
- expand the Seasonal Worker program to the broader agriculture industry and the accommodation sector on an ongoing basis;
- invite northern Australia's tourism industry to suggest proposals to trial the Seasonal Worker program in tourism sectors other than accommodation from 1 July 2015;
- remove the minimum stay requirement of 14 weeks, provided workers receive a net financial benefit of at least \$1000 during their stay; and
- simplify cost sharing arrangements by combining the employer's contribution to each seasonal worker's international and domestic airfare to a total of \$500.<sup>87</sup>

2.82 The White Paper also flagged that, subject to the conclusion of the Pacific Agreement on Closer Economic Relations, the government will invite additional Pacific Island Forum countries to participate in the Seasonal Worker program, potentially adding the Cook Islands, Federated States of Micronesia, Niue, Palau and the Republic of Marshall Islands.

2.83 The White Paper noted, however, that employers will still be required to test the local labour market to see if Australian workers are available. In addition, the government 'will have the discretion to cap, exclude and review the placement of

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85 Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia*, June 2015, p. 112.

86 Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia*, June 2015, p. 112.

87 Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia*, June 2015, p. 113.

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seasonal workers in areas with high unemployment and low workforce participation rates'.<sup>88</sup>

### **Interactions between the various visa programs**

2.84 As the above sections demonstrate, temporary visa programs tend to be seen and reviewed in isolation from each other. A consequence of this segregated approach has been that a key feature of Australia's system of temporary migration, the interaction between the various temporary visa programs, has been relatively unexamined.

2.85 This section therefore considers the interaction of temporary visa programs in creating a 'two-step' migration program, and the corresponding potential for unintended consequences such as the creation of a group of indefinitely temporary migrants.

2.86 The notion of an indefinitely temporary cohort of migrants has been explored by Mr Peter Mares, Adjunct Fellow at the Institute for Social Research at Swinburne University of Technology. Mr Mares noted it has become increasingly common for 'a migrant to spend time in Australia on a temporary visa or a series of temporary visas (such as 457 and student visas), before taking the next step to become a permanent migrant'.<sup>89</sup>

2.87 As noted earlier, temporary visas provide a pathway to permanent residency. In 2013–14, over 58 per cent of new permanent residency visas were granted to people already in Australia on temporary visas.<sup>90</sup> A similar trend has occurred in the family stream of the migration program in 2013–14, with 33 per cent of family visas in the permanent migration program granted onshore, often the result of temporary migrants partnering with Australian citizens and permanent residents.<sup>91</sup>

2.88 Submitters such as Mr Mares and the Australian Chamber of Commerce and Industry acknowledged that a 'two-step' migration program, (that is an opportunity to progress from temporary migration to permanent migration), has much to recommend it in terms of a 'try before you buy' approach to migration.<sup>92</sup>

2.89 However, Mr Mares pointed to the prospect of an increasing number of indefinitely temporary migrants arising from the potential mismatch between a capped permanent migration program and an uncapped temporary migration program:

A two-step migration program has much to recommend it, but it has a potential downside. Since the annual *permanent* migration program is

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88 Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia*, June 2015, p. 114.

89 Mr Peter Mares, *Submission 2*, p. 7.

90 Migration Council Australia, *Submission 27*, p. 3.

91 Mr Peter Mares, *Submission 2*, p. 7.

92 Australian Chamber of Commerce and Industry, *Submission 10*, p. 9; Mr Peter Mares, *Submission 2*, p. 7.

capped, but the temporary migration program is open-ended, there is a potential for a mismatch to emerge between the aspirations of *temporary* migrants to become permanent residents and their capacity to do so (in terms of places in the program).

This raises the very real possibility that a large and growing number of temporary migrants will extend their stay in Australia by moving from one temporary visa to another—thus raising the potential for Australia to have an emerging cohort of migrants who are indefinitely temporary.<sup>93</sup>

2.90 The three visa programs at the heart of this inquiry, the 457, WHM, and international student visa programs are central to this scenario. As noted earlier, all three visa programs have grown substantially over the last ten to twenty years and all are now entrenched features of the Australian labour market.

2.91 Mr Mares outlined a scenario under which a person could easily spend a decade and a half in Australia on a series of temporary visas:

An international student arrives in Australia at age 16 to complete the final two years of high school, before a three year undergraduate degree, a year of honours and a two year masters program (or eight years of study in total). The student then spends three years on a 485 graduate post-study work visa. When this visa expires the student is granted a 457 visa for four years.

At the end of this period, this student graduate would be aged 31 and would have spent almost half his or her life in Australia—15 formative years—on a series of temporary visas.<sup>94</sup>

2.92 However, despite having lived in Australia for 15 years, paid taxes, and abided by Australian laws and regulations, the person would not necessarily be able to access the rights of a resident or citizen:

The person in question, however, will not necessarily be on a pathway to becoming an Australian resident and enjoying the rights and entitlements that go with permanent residency and ultimately, citizenship—including the right to vote or stand for office that is fundamental to the meaningful operation of a system of representative democracy.<sup>95</sup>

2.93 This scenario is likely to be exacerbated by the growing trend to promote an Australian high school education to overseas students as a means to create a steady stream of international students for Australia's higher education system. While the above scenario featured a student completing their final two years of high school in Australia, Mr Mares told the committee that Australia is actively encouraging the arrival of children as young as twelve or thirteen to study in Australian high schools.<sup>96</sup>

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93 Mr Peter Mares, *Submission 2*, p. 7, emphasis original.

94 Mr Peter Mares, *Submission 2*, p. 9.

95 Mr Peter Mares, *Submission 2*, p. 9.

96 Mr Peter Mares, *Submission 2*, pp 9–10.



2.94 There is no data on the number of long-term temporary migrants in Australia because the DIBP does not collect data in a form that would allow for it to be calculated. However, Mr Mares provided a range of data that indicated not only an increasing tendency for 'for temporary visa holders to cycle through a range of different temporary visa options', but also the potential for a growing cohort of temporary migrants who fail to progress towards permanent residency and therefore become indefinitely temporary.<sup>97</sup>

2.95 Mr Mares observed at least 2000 people have been in Australia on a temporary visa for at least 10 years and another 18,000 have been in Australia for eight years or more on temporary visas. Mr Mares also noted that about 3000 people who met the eligibility criteria for permanent residency, and who have paid for and had applications for permanent residency lodged for more than five years, are still awaiting a response from the DIBP about their application.<sup>98</sup>

2.96 Both Eventus Corporate Migration and Mr Mares drew attention to the treatment of New Zealanders who arrived in Australia after 2001. As noted earlier, there are approximately 650 000 New Zealanders in Australia. Those that came before 2001 are special category visa holders and are, to all intents and purposes, permanent residents. However, a group of approximately 200 000 New Zealanders that arrived after 2001 do not have a clear pathway to permanent residency.<sup>99</sup> New Zealanders in this latter category are on a visa that is 'officially categorised as a temporary visa by the immigration department, even though it allows an indefinite stay'. In other words, New Zealanders in this category are indefinitely temporary.<sup>100</sup>

2.97 Being indefinitely temporary has consequences in terms of a lack of access to rights and entitlements:

They will never vote and they will never run for office. They pay taxes and they do have access to Medicare, but they do not have access to Centrelink, apart from a very limited six-month window after 10 years. They have to pay full up-front fees for their students to go to university and they pay for the National Disability Insurance Scheme but they cannot access the National Disability Insurance Scheme.<sup>101</sup>

2.98 While Mr Mares did not place an upper limit on the amount of time that a person could reside in Australia as a temporary migrant, he did point out that indefinitely temporary migrants are 'at risk of being permanently excluded from the political community of the nation and permanently denied the benefits and rights of citizenship'.<sup>102</sup>

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97 Mr Peter Mares, *Submission 2*, pp 10–11.

98 Mr Peter Mares, private capacity, *Committee Hansard*, 19 June 2015, pp 47–49.

99 Eventus, *Submission 25*, p. 21.

100 Mr Peter Mares, private capacity, *Committee Hansard*, 19 June 2015, p. 47.

101 Mr Peter Mares, private capacity, *Committee Hansard*, 19 June 2015, p. 47.

102 Mr Peter Mares, *Submission 2*, p. 14.

2.99 Mr Mares proposed two alternative approaches to this dilemma. The first would be to give much greater weight to time spent in Australia on a temporary visa in applications for permanent residency. Mr Mares noted that European Union member states are required to grant 'permanent or long term residence status to foreign nationals who have been long-term temporary residents, usually for at least five years duration' (with time spent on a student visa discounted by 50 per cent compared to time spent working). The second approach would be to cap Australia's various temporary migration programs, particularly the international student, 485 and 457 visa programs on an annual basis.<sup>103</sup>

2.100 Mr Mares argued that:

A migrant who lives in Australia for a significant period of time, who contributes to the economic life of the nation through their labour and their taxes, who has quite possibly paid fees to study here, is a person who for all intents and purposes, makes Australia their home.

The more time temporary migrants spend living, working and studying in Australia, the more financial, cultural, psychological and emotional attachments they are likely to develop.<sup>104</sup>

2.101 Given that one of the fundamental tenets of Australian society is that those subject to the laws of a nation should have a say in how those laws are developed and administered, a question arises as to when a temporary migrant accumulates the rights of a resident of Australia. These rights include:

...rights to have a say in how those taxes are spent, rights to receive protection when they fall on hard times—for example, health care, disability assistance, unemployment benefits and so on—and rights to access to services—child care, education.<sup>105</sup>

2.102 Related to this discussion about rights and responsibilities is the type of migration system that Australia currently has and consequently the type of society that Australia has become. According to Mr Mares, there is a risk that Australia is moving away from a multicultural society based on citizenship to a society where a growing cohort of migrants miss out on the rights that accrue to permanent residents and citizens.<sup>106</sup>

### **Committee view**

2.103 Australia's migration program, particularly since the end of World War Two, has resulted in a citizenship-based multicultural society that stands in stark contrast to the guest-worker model in many other societies.

2.104 Over the last two decades, however, as temporary migrants have become increasingly valuable to Australia, new visa categories have been created such as the

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103 Mr Peter Mares, *Submission 2*, pp 14–15.

104 Mr Peter Mares, *Submission 2*, p. 15.

105 Mr Peter Mares, private capacity, *Committee Hansard*, 19 June 2015, p. 45.

106 Mr Peter Mares, private capacity, *Committee Hansard*, 19 June 2015, pp 45–46.

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485 post-study work visa. Changes to, and the expansion of, various temporary migration visas have been made to accommodate various needs or demands in different sectors of the economy.

2.105 Yet while these changes may have been necessary or beneficial, the range of temporary visa programs and the potential to move from one visa to another has created a range of incentives for temporary migrants to remain in Australia. Running alongside these incentives is an expectation that a temporary migrant will be able to become a permanent resident.

2.106 However, the potential for unintended consequences arises when the numbers of temporary migrants seeking to become permanent residents exceeds the capacity of the permanent migration stream to accommodate them. In this case, a situation may arise where a number of temporary migrants, some of whom may have been in the country for eight years or more, are unable to transition to permanent residency.

2.107 The risk for Australia is the creation of an indefinitely temporary cohort of migrants who lack access to the rights and entitlements of permanent residents and citizens. These are serious issues for an inclusive liberal democracy such as Australia that, historically, has built a citizenship-based multicultural society.

2.108 In order to resolve the issues of a permanently temporary cohort of migrants, the committee received evidence to suggest that time spent living in Australia should be given greater weight in consideration of applications for permanent residency. It was also proposed that eight years continuous residence was a reasonable period of time to fully qualify a temporary migrant for a permanent visa assuming there were no serious character concerns.

2.109 The committee has not formed a view on the weight that should be attached to length of residence in Australia, or the length of time after which it would be reasonable to resolve the status of a temporary visa holder. However, the committee is persuaded that these are matters which merit serious consideration.

2.110 The committee heard that the DIBP gathers information on a temporary visa holder based on the last time they entered the country. However, the DIBP does not appear to have a system that can aggregate the data to provide figures on the number of temporary visa holders that have been in Australia on a series of temporary visas and for how long in total. In terms of ascertaining the number of long-term temporary migrants and designing appropriate policy in this area, the lack of this type of data is a serious deficiency.

### **Recommendation 1**

**2.111 The committee recommends that the Department of Immigration and Border Protection routinely publish data on the number of temporary migrants resident in Australia by length of stay. This data should account for transitions between temporary visa categories. The committee also recommends that brief periods of time spent outside Australia during a transition between visas should not restart the clock on calculating the total length of time spent in Australia on temporary visas.**

**Recommendation 2**

**2.112 The committee recommends that the Department of Immigration and Border Protection conduct a review of proposals to give greater weight to time spent living in Australia in consideration of applications for permanent residency. The review should also consider the merits of setting a limit on the period of time after which it would be considered reasonable for a temporary visa holder to qualify for permanent residency.**

**PART II**  
**Employment Opportunities**



# CHAPTER 3

## Impact of the 457 visa program on employment opportunities

### Introduction

3.1 One of the key concerns about the 457 visa program is the impact the program has on employment opportunities for Australian permanent residents and citizens. Over the last two decades, these concerns have been addressed by adjusting the degree to which the 457 visa program is regulated. To a large extent, regulation of the 457 visa program has therefore involved a trade-off between the efficiency and productivity of the program versus the integrity and equity of the outcomes.

3.2 Submissions generally reflected this tension between the competing aims of efficiency and integrity, namely employers seeking to supplement their workforce with overseas workers in the most efficient and flexible manner, and unions seeking to protect the wages, conditions and job opportunities of Australian workers by requiring certain pre-conditions to be met prior to the hiring of overseas workers.

3.3 At the outset, the committee reiterates two points made in a previous inquiry into these matters by the Senate Legal and Constitutional Affairs References Committee. Firstly, where a genuine skill shortage does not exist in relation to a position, the employment of a 457 visa holder represents a fundamental breach of the program's central aims and must, as a matter of course, impact negatively on the opportunity for local workers to fill that position.<sup>1</sup>

3.4 Secondly, and conversely, where a genuine skill shortage exists in relation to a position, the inability of an employer to readily access a 457 visa worker to fill that position frustrates the key economic objectives of the program and could negatively impact on both business activity (and the employment of local workers) and the availability of critical services.<sup>2</sup>

3.5 Given the concerns about the effect of the 457 visa program on employment opportunities for Australian permanent residents and citizens, the key issues raised by submitters about the 457 visa program include:

- the balance between permanent and temporary migration, and the responsiveness of the 457 visa program to changes in domestic labour supply (in general, proponents such as employers and their organisations argued that the 457 program responded to changes in skills shortages in the domestic

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1 Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, 27 June 2013, p. 18.

2 Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, 27 June 2013, p. 19.

- labour market, while critics such as unions argued that the responsiveness was not evident, particularly in a softening job market);<sup>3</sup>
- the displacement of Australian workers by 457 visa workers;<sup>4</sup>
  - the importance of 457 visa workers to rural industries (particularly in the agricultural sector) that have struggled to attract domestic labour;<sup>5</sup>
  - the threshold up to which the 'market salary rate' is to be applied;<sup>6</sup>
  - the level and indexation of the Temporary Skilled Migration Income Threshold (TSMIT);<sup>7</sup>
  - the composition, flexibility, and regulation of the Consolidated Sponsored Occupation List (CSOL) from which occupations may be sponsored under the 457 visa program (including the make-up of the body responsible for

- 3 Dr Joanna Howe and Professor Alexander Reilly, *Submission 5*, p. 5; Australian Government Departments, *Submission 41*, pp 5–6; Engineers Australia, *Submission 4*, pp 1 and 4; Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 16; Migration Council Australia, *Submission 27*, p. 6; Australian Nursing and Midwifery Federation, *Submission 37*, pp 4–6; Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, p. 27; Australian Council of Trade Unions, *Submission 48*, p. 24; Mr Ron Monaghan, General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 1.
- 4 Mr Benjamin Loeve, *Committee Hansard*, 26 June 2015, pp 2–3; The Australian Federation of Air Pilots, *Submission 15*, p. 2; Australian Maritime Officers Union, *Submission 18*, pp 3–5; Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 32–33; Australian Workers Union, *Submission 44*, pp 1–2; Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 27–28.
- 5 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 19; Mrs Laura Wells, Tastensee Farms, *Committee Hansard*, 12 June 2015, p. 21; Mr David Fairweather, Tastensee Farms, *Committee Hansard*, 12 June 2015, p. 20; Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 9; Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 31; Mrs Roma Britnell, Chair, Markets, Trade and Value Chain Policy Advisory Group, Australian Dairy Farmers Ltd, *Committee Hansard*, 26 June 2015, p. 39; Mr Guy Gaeta, *Committee Hansard*, 26 June 2015, p. 36; Mr Justin Roach, *Committee Hansard*, 26 June 2015, p. 36; Mr Bernard Murray and Mrs Kerry Murray, Owners, Murray Free Range, *Committee Hansard*, 17 July 2015, pp 28–29; Mrs Elizabeth Mary Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 29.
- 6 Australian Institute of Marine and Power Engineers, *Submission 17*, pp 4 and 8; Australian Higher Education Industrial Association, *Submission 20*, pp 2–3.
- 7 Migration Council Australia, *Submission 27*, p. 5; United Voice, *Submission 19*, pp 2–3; Maritime Union of Australia, *Submission 22*, p. 9; Northern Territory Government, *Submission 39*, pp 1–2.



compiling the CSOL), and the balance between permanent and temporary migration;<sup>8</sup>

- the technical competency of foreign workers particularly in sectors where safety is paramount;<sup>9</sup> and
- labour market testing as a means to ensure Australians have the first opportunity to apply for jobs (in general, employers criticised labour market testing as an excessive and unnecessary burden on employers, while unions supported labour market testing but criticised the requirements as lacking rigour).<sup>10</sup>

3.6 In order to provide context for the above issues, the chapter begins by looking at the balance between permanent and temporary migration, and the degree to which the 457 visa program responds to changes in the domestic labour market.

3.7 The next two sections present evidence on Australian labour markets. The first considers evidence that 457 visa workers have displaced Australian workers. The second considers the importance of 457 visa workers in certain sectors of Australian agriculture. The role and impacts of the 417 visa program, including both the

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8 Dr Joanna Howe and Professor Alexander Reilly, *Submission 5*, pp 8–13; Dr Joanna Howe, 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, vol. 41 issue 3, pp 20 and 23; Australian Council of Trade Unions, *Submission 48*, pp 20–22; Unions NSW, *Submission 35*, pp 5 and 7; Maritime Union of Australia, *Submission 22*, pp 6–7; Electrical Trades Union, *Submission 12*, p. 3; United Voice, *Submission 19*, pp 2–3; Australian Chamber of Commerce and Industry, *Submission 10*, pp 8–9; Australian Higher Education Industrial Association, *Submission 20*, pp 1–2; Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, pp 17–18; Migration Council Australia, *Submission 27*, p. 14.

9 Engineers Australia, *Submission 4*, p. 5; Electrical Trades Union, *Submission 12*, pp 8–9; Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, p. 32.

10 Australian Government Departments, *Submission 41*, pp 3–7; Migration Council Australia, *Submission 27*, p. 7; Migration Institute of Australia, *Submission 40*, pp 10–13; Engineers Australia, *Submission 4*, p. 5; Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 27–28; Dr Joanna Howe, 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, vol. 41 issue 3, p. 16; Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, pp 12–13 and 17–18; Australian Council of Trade Unions, *Submission 48*, pp 25–35 and 97–105; The Australian Federation of Air Pilots, *Submission 15*, p. 2; Australian Maritime Officers Union, *Submission 18*, p. 5; Australian Institute of Marine and Power Engineers, *Submission 17*, p. 6; Australian Chamber of Commerce and Industry, *Submission 10*, p. 13; Maritime Union of Australia, *Submission 22*, pp 5–6; United Voice, *Submission 19*, p. 2; Migration Council Australia, *Submission 27*, p. 7; Australian Workers Union, *Submission 44*, pp 1–2; Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 22; Mr Ron Monaghan, General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 2; Ai Group, *Submission 33*, p. 18; Business Council of Australia, *Submission 26*, p. 2.

importance of 417 visa workers in horticulture, viticulture, and fruit picking, and the displacement of local workers by 417 visa workers in the meat processing sector, are covered in chapter 4.

3.8 This is followed by several sections that examine the policy settings around the 457 visa program and Designated Area Migration Agreements (DAMAs), including the 'market salary rate', the TSMIT, the CSOL, the technical competencies required of temporary visa workers, and labour market testing.

3.9 The chapter finishes with the committee's view on these matters.

### **The balance between permanent and temporary migration**

3.10 As background context to the discussion in the next section on the responsiveness of the 457 visa program to changes in the domestic labour market, the committee notes that unions and employers hold conflicting views on the current direction of migration policy, and in particular, the balance between permanent and temporary migration.

3.11 The Australian Council of Trade Unions (ACTU) expressed concern about the greater reliance on temporary migration. The ACTU pointed out that the short-term interests of employers are not necessarily consistent with either the long-term national interest or the interests of migrant workers:

...this trend towards temporary and employer-sponsored migration is effectively outsourcing decisions about our national migration intake to employers and their short-term needs, over the national interest and a long-term vision for Australia's economy and society.<sup>11</sup>

3.12 Concerns about labour migration policy relying too heavily on employer preferences are not just restricted to unions and certain academics. In 2009, the Organisation for Economic Cooperation and Development (OECD) stated:

A regulated labour migration regime would, in the first instance, need to incorporate a means to identify labour needs which are not being met in the domestic labour market and ensure that there are sufficient entry possibilities to satisfy those needs. In theory, employers could be considered the group of reference for determining this, but historically, requests by employers have not been considered a fully reliable guide in this regard, at least not without some verification by public authorities to ensure that the requests represent actual labour needs that cannot be filled from domestic sources.<sup>12</sup>

3.13 The ACTU set out the reasons for their preference for permanent over temporary migration:

...permanent migrants provide a more stable source of skilled workers with a greater stake in Australia's future and in integrating into all aspects of

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11 Australian Council of Trade Unions, *Submission 48*, p. 20.

12 Organisation for Economic Cooperation and Development (OECD), *International Migration Outlook 2009*, p. 134.

Australian community life. With permanent residency, migrants have a secure visa status. This makes them less susceptible (though not immune) to exploitation and less likely to generate negative impacts on other Australian workers in terms of wages, employment conditions and job and training opportunities.<sup>13</sup>

3.14 The ACTU therefore recommended that:

...the current weighting of Australia's skilled migration program towards employer-sponsored pathways should be re-evaluated, with greater emphasis given to the permanent, independent stream as the 'mainstay' of the skilled migration program.<sup>14</sup>

3.15 The Australian Nursing and Midwifery Federation (ANMF) acknowledged that nurses and midwives 'have a strong tradition of international collaboration, with nurses and midwives moving around the globe to gain further training and different clinical experiences', and recognised the 'clear merit in international exchange and diversity'.<sup>15</sup>

3.16 The ANMF noted that nursing features strongly in both the temporary and permanent skilled migration programs (see Table 3.1 and 3.2 below).

**Table 3.1: Number of 457 visa grants to nurses, 2005 to 2013–14**

Year	2005	2006	2007–08	2008–09	2009–10	2010–11	2011–12	2012–13	2013–14
457 visas	2609	3011	3375	3977	2624	2146	3095	2853	1489

Source: Australian Nursing and Midwifery Federation, Submission 37, p. 5.

**Table 3.2: Number of permanent visa grants to nurses, 2005 to 2013–14**

Year	2005	2006	2007–08	2008–09	2009–10	2010–11	2011–12	2012–13	2013–14
457 visas	2161	2174	2478	3492	4133	3400	3160	2930	N/A

Source: Australian Nursing and Midwifery Federation, Submission 37, p. 6.

3.17 While expressing a preference for permanent migration, the ANMF saw a place for temporary migration provided that certain safeguards for both local and overseas workers were met. These safeguards included genuine testing of the labour

13 Australian Council of Trade Unions, *Submission 48*, p. 22.

14 Australian Council of Trade Unions, *Submission 48*, p. 22; see also Electrical Trades Union, *Submission 12*, p. 3; United Voice, *Submission 19*, pp 2–3; Australian Workers Union, *Submission 44*, p. 2.

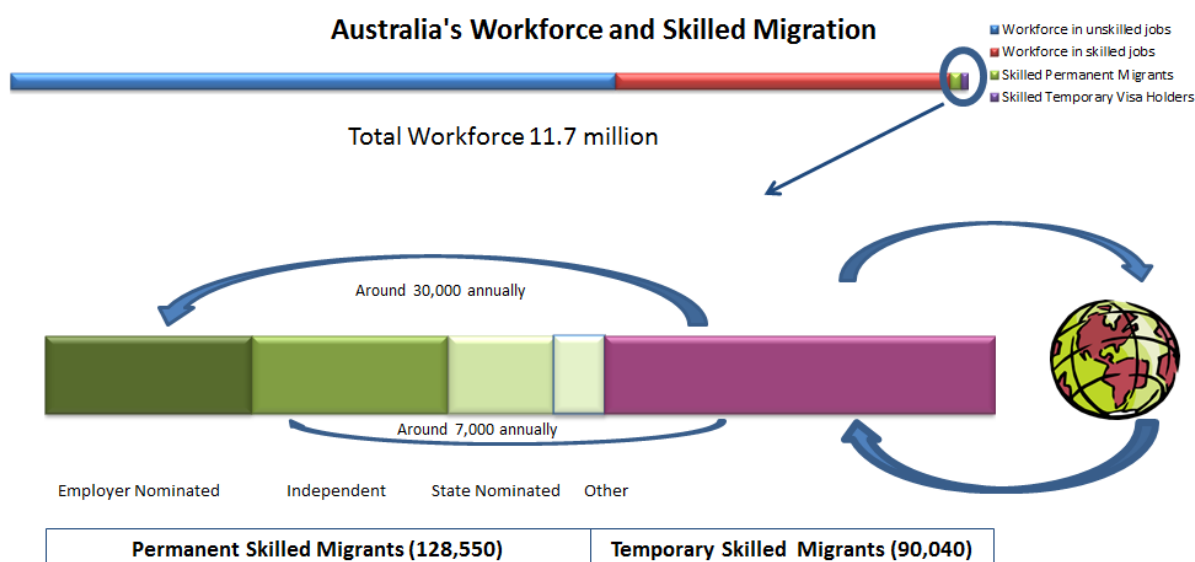
15 Australian Nursing and Midwifery Federation, *Submission 37*, p. 4.

market, investment in the training of local nurses and midwives, and an English language standard of International English Language Testing System (IELTS) 7.<sup>16</sup>

3.18 The preference for permanent over temporary migration was condemned as illogical by the Australian Chamber of Commerce and Industry (ACCI). ACCI noted the economic benefits of growth in the education and tourism sectors that results from the student and Working Holiday Maker (WHM) visa programs. It was also pointed out that temporary work visa programs 'provide an effective feeder into permanent migration' and that there were benefits to 'someone coming temporarily in advance of making a permanent commitment'. Given these connections, ACCI argued that temporary migration should not be reviewed in isolation from permanent migration.<sup>17</sup>

3.19 ACCI estimated the skilled workforce in Australia to be around 4.2 million, of which primary 457 visa holders accounted for around 2.1 per cent of the skilled workforce (see Figure 3.1 below).

**Figure 3.1: Australia's Workforce and Skilled Migration**



Source: Australian Chamber of Commerce and Industry, *Submission 10*, p. 14.

3.20 ACCI made the point that temporary and permanent migration is inextricably linked and that the value of temporary migration in this equation was its responsiveness to immediate needs:

16 Australian Nursing and Midwifery Federation, *Submission 37*, p. 4.

17 Australian Chamber of Commerce and Industry, *Submission 10*, pp 8–9; see also Eventus, *Submission 25*, p. 20.

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The temporary skilled migration programme should be seen as the responsive end of the total skilled migration programme. It enables the fulfilment of immediate needs, and if those needs are temporary, then the worker returns to their own country. If the need is permanent they are sponsored or apply independently to stay.<sup>18</sup>

3.21 Ms Jenny Lambert, Director of Employment, Education and Training at ACCI, also argued that because employer sponsored migration programs required strong employer commitment, the pay and employment outcomes for migrants would likely be superior to those delivered by the independent skilled migration stream.<sup>19</sup>

### **The responsiveness of the 457 visa program to changes in domestic labour supply and skills demand**

3.22 In general terms, the advantage of temporary migration is its ostensible responsiveness to changes in the domestic economy. In theory, a responsive temporary migration program benefits the host nation during both economic upturns and downturns. As Dr Joanna Howe and Associate Professor Alexander Reilly note:

In theory, when permanent migrants lose their jobs, they are a burden on the Australian welfare state, whereas temporary migrants return home.<sup>20</sup>

3.23 One of the key areas of contention regarding the 457 visa program is the responsiveness of the program to changes in the domestic supply of skilled labour. In the main, proponents (such as employers and their organisations) argued that the 457 program responded to changes in skills shortages in the domestic labour market, while critics (such as unions) argued that the responsiveness was not evident.

3.24 The crux of the issue is whether temporary migration has a negative impact on jobs particularly in a softening job market. This boils down to a broader question about the extent to which the 457 visa program responds to changes in the labour market and whether, for example, an increase in domestic unemployment is matched to a reasonable extent by a reduction in demand for 457 visa workers. The more specific question is the extent to which the 457 visa program responds to changes in the supply of skilled labour in particular occupations.

3.25 On the latter question, the Australian Government Department submission provided evidence of an association between the demand for 457 visa workers and skill shortages in the nursing and engineering occupations:

The number of primary subclass 457 visas granted for Midwifery and Nursing Professionals (ANZSCO minor group) and Enrolled Nurse declined from 3239 in 2011–12 to 2999 in 2012–13 to 1597 in 2013–14 (and 832 for the 9 months to 31 March 2015). Department of Employment

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18 Australian Chamber of Commerce and Industry, *Submission 10*, p. 13.

19 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 17.

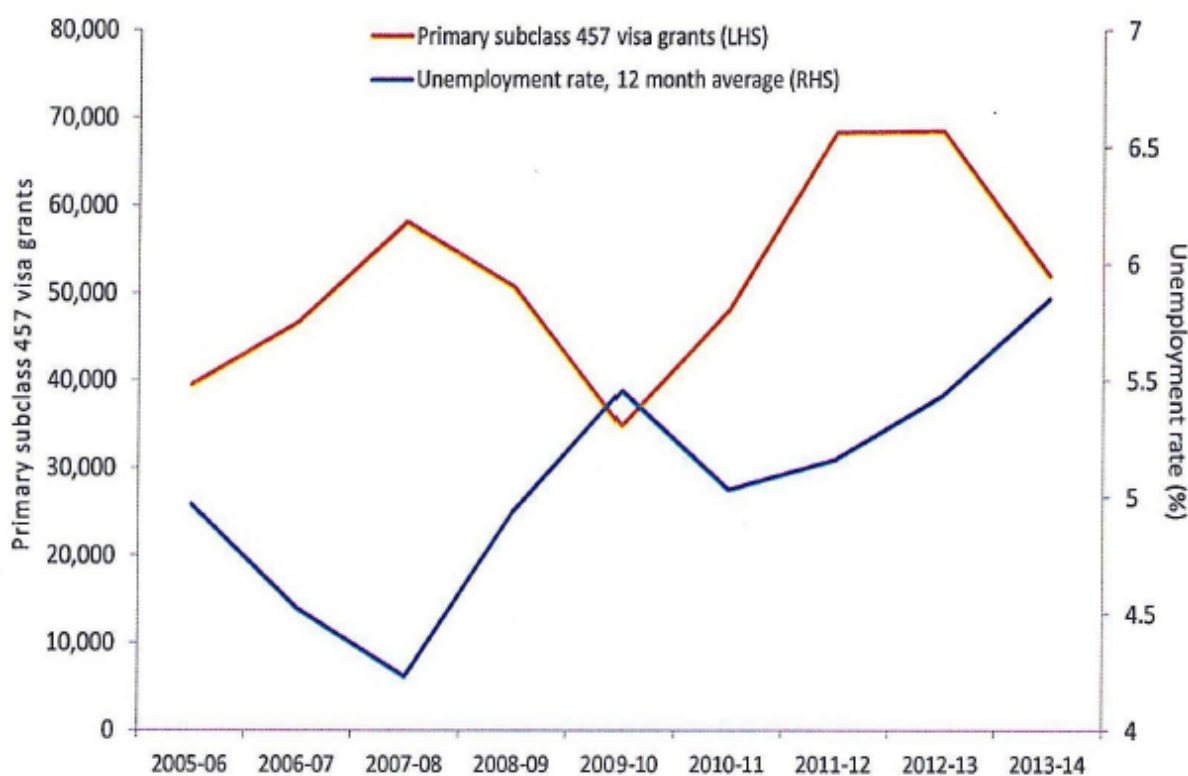
20 Dr Joanna Howe and Professor Alexander Reilly, *Submission 5*, p. 5.

research shows that Registered Nurse has not been in national shortage since 2011.

The number of primary subclass 457 visas granted in the Engineering Professionals (ANZSCO minor group) and Building and Engineering Technicians (minor group, excluding Architecture, Building and Surveying Technicians) declined from 7795 in 2011–12 to 5943 in 2012–13 to 3586 in 2013–14 (and 2349 for the 9 months to 31 March 2015). Most engineering professions ceased to be classified as in shortage on the Department of Employment's national Skill Shortage List in 2013.<sup>21</sup>

3.26 The Australian Government Department submission also provided a graph (Figure 3.2 below) to illustrate a more general association between the granting of 457 visas and the unemployment rate between 2005–06 and 2013–14:

**Figure 3.2: The association of grants of 457 visas and the rate of unemployment.**



Source: Australian Government Department, *Submission 41*, p. 6.

3.27 The committee notes that between 2005–06 and 2009–10, there appears to be a reasonably close association between the granting of primary 457 visas and the unemployment rate. As the unemployment rate fell between 2005–06 and 2007–08, there was an increase in the number of primary 457 visas granted. As the unemployment rate rose between 2007–08 and 2009–10, there was a corresponding decrease in the number of primary 457 visas granted.

21 Australian Government Departments, *Submission 41*, p. 5.

3.28 However, a similar association between the unemployment rate and the granting of visas did not materialise between 2010–11 and 2012–13. During this period, the unemployment rate rose from approximately five to five and a half per cent and yet grants for primary 457 visas also rose from approximately 45 000 to approximately 70 000. Therefore, over a two-year period, the continued increase in the number of primary 457 visas being granted did not respond to the increase in unemployment for a period of two years. As the unemployment rate continued to rise between 2012–13 and 2013–14, the granting of primary 457 visas declined to approximately 50 000 (the figures for 2014–15 were approximately 38 000 based on the figures supplied in Table 2.3). The number of primary 457 visas granted has therefore declined significantly, although not quite to the levels of 2009–10 when the unemployment rate was approximately five and a half per cent (the unemployment rate for the period 2014–15 averaged above 6 per cent).

3.29 In summary, an argument could be made both ways about the responsiveness on the 457 visa program to the unemployment rate. However, it is clear that as Australia's rate of unemployment has increased over the last four years, there has been a time lag of two to three years in the responsiveness of the demand for, and granting of, primary 457 visas.

3.30 The ACTU fundamentally disagreed with the proposition that the 457 visa program was responsive to changes in the domestic labour market. The ACTU pointed to trends in both the general rate of unemployment and trends in particular industry sectors such as construction and food as evidence that the 457 visa program does not reflect the realities of the domestic labour market.<sup>22</sup>

3.31 For example, the ACTU noted that the unemployment rate is above six per cent with over three quarters of a million Australians unemployed and looking for work, and the youth unemployment rate is over 13 per cent with over a quarter of a million young people out of work.<sup>23</sup>

3.32 Given the evidence on the granting of 457 visas at a time of relatively high unemployment, the ACTU maintained:

...labour market testing is a sensible, appropriate, and necessary measure to ensure that, before temporary migrant workers can be employed, there is evidence that employers have made all reasonable efforts to employ Australian workers and that Australian workers are not being displaced.<sup>24</sup>

3.33 Concerns about the responsiveness of the 457 visa program to changes in domestic demand for labour, and a corresponding impact upon job opportunities for local workers, were echoed by certain peak bodies. Engineers Australia noted:

...throughout the years when the demand for engineers was high, the number of 457 visas increased and that there were falls in the number

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22 Australian Council of Trade Unions, *Submission 48*, pp 103–105.

23 Australian Council of Trade Unions, *Submission 48*, p. 24.

24 Australian Council of Trade Unions, *Submission 48*, p. 105.

during the GFC and in 2013–14 when demand conditions changed. However, given the dramatic change in the engineering labour, Engineers Australia is astonished that the 457 visa intake was as high as 5501.<sup>25</sup>

3.34 Noting that the 457 visa program is 'designed to be a safety valve for employers when there is excess demand for engineers', Engineers Australia stated that the demand for engineers under the 457 visa program did not match the situation in the domestic labour market for engineers:

There is no general shortage of engineers in Australia and the number of 457 visa approved last year are far higher than one would expect if some employers experienced difficulties recruiting an engineer practicing in a particular area of engineering, especially in view of there being no skills assessment.<sup>26</sup>

3.35 Engineers Australia stated that the 457 visa program as it applied to the engineering occupation was having a detrimental effect on employment opportunities for Australian engineering graduates particularly in a situation where there was no shortage of engineers in Australia.<sup>27</sup>

3.36 As engineering has become increasingly specialised, Engineers Australia disagreed with the proposition that use of the 457 visa program in its current format was of value to the profession:

Statistics show that pressures in the engineering labour market have eased dramatically in all States and Territories. Jurisdictions were differentiated essentially by when the decline commenced and the rate of deterioration. Engineers Australia sees no evidence of any general shortage of engineers.

As the development of the Australian economy has become more sophisticated, new areas of engineering specialisation have developed. Indeed, the breadth of specialisation is an important characteristic of modern engineering. It is entirely possible that somewhere in Australia an employer is experiencing difficulties recruiting an engineer that matches a particular specialisation. However, given that there are no formal assessments of qualifications and experience for 457 visas, Engineers Australia fails to understand how temporary recruitment assists this situation.<sup>28</sup>

3.37 As a result, Engineers Australia believed that labour market testing should be applied in all cases.<sup>29</sup>

3.38 By contrast, Consult Australia the industry association representing the business interests of consulting firms operating in the built and natural environment,

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25 Engineers Australia, *Submission 4*, p. 4.

26 Engineers Australia, *Submission 4*, p. 1.

27 Engineers Australia, *Submission 4*, p. 4.

28 Engineers Australia, *Submission 4*, pp 5–6.

29 Engineers Australia, *Submission 4*, p. 5.



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argued that the number of engineers on 457 visas varied on a year-on-year basis 'in response to local skills needs and availability':

The numbers of engineers of all levels arriving on temporary visas rose from 2260 in 2003–04 to 7490 in 2007–08, before dropping to 6900 in 2008–09 and further to 4460 in 2009–10, and then rising again to 6940 in 2010.<sup>30</sup>

3.39 Consult Australia stressed the value that a responsive temporary migration program brought to Australian business and submitted that the use of engineers on 457 visas had not been subject to abuse. Consult Australia was therefore very concerned that the inclusion of engineering in the labour market testing regime would hinder project construction:

A flexible temporary skilled migration visa that is responsive to market requirements is therefore essential for engineering-related businesses. Consulting services in particular often require specialist staff to join teams at short notice to address challenges that invariably arise in complex projects.<sup>31</sup>

3.40 Likewise, Fragomen, a global immigration law firm, emphasised both the value of the 457 visa program to the Australian economy and the its responsiveness to fluctuations in the domestic demand for skills:

The boom and then levelling off of demand for skilled workers in most segments of the resources sector demonstrates the value of the subclass 457 programme to the Australian economy. It seems to us inconceivable how many infrastructure projects could possibly have been undertaken without access to the engineers, IT professionals, contract and project managers and other highly skilled professionals from around the world. Australian companies and staff and the underlying labour market in Australia would simply not have been able to meet the demand for this work; either in terms of the volume of workers needed, or the peaks and troughs of demand for particular skills sets as a project moves through its various development phases. Equally, remaining one of the most successful economies in the world in this post-boom period depends partly on maintaining our attractiveness as a regional hub for global business.<sup>32</sup>

3.41 Fragomen also highlighted the importance of two-way intra-corporate transfers that benefit Australia by facilitating the bringing in of skills and knowledge, often at short notice, that cannot be sourced from Australia while also allowing for Australian employees to develop their careers overseas:

Intra-corporate transferees are generally required in Australia because they have proprietary knowledge and/or experience required to achieve business goals for the Australian operations or to deliver a project or train the Australian arm of the business. Because it is proprietary, this knowledge

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30 Consult Australia, *Submission 30*, p. 4.

31 Consult Australia, *Submission 30*, p. 6.

32 Fragomen, *Submission 21*, p. 5.

and experience cannot generally be sourced from the Australian labour market, other than from within the Australian business itself. These transfers are often connected with large project wins or the expansion of a company's operations in Australia but can also result from a policy of assigning individuals to different roles in different country operations as part of the normal course of business or normal career progression. As mentioned, Australian employees in these circumstances also have the opportunity to work in the company's overseas operations and develop their careers.<sup>33</sup>

3.42 In this regard, Fragomen also observed that the movement of employees on intra-corporate transfers does not have a negative impact on the domestic labour market:

A person entering Australia for a specific, short term project requiring proprietary knowledge is not competing with Australians for the role. Because it is proprietary, this experience cannot generally be sourced from the Australian labour market because the skills and expertise are simply not available in Australia outside the business. Similarly, a manager whose offshore role incorporates responsibility for Australian operations, and who is required to visit for days or weeks at a time on a regular basis, is not entering—or even seeking entry—to the Australian labour market despite performing work while in Australia.<sup>34</sup>

3.43 ACCI refuted the perception that the interaction between temporary migration and employment was a zero-sum game and that jobs could be taken by migrant workers. Ms Lambert from ACCI was adamant that the relationship between temporary migration and employment was positive and that migration stimulated economic growth and therefore created jobs.<sup>35</sup>

3.44 Furthermore, Ms Lambert noted that unemployment rates and labour shortages vary dramatically across Australia. She argued, therefore, that a simple correlation between unemployment and the number of temporary migrant workers in Australia was misleading because the demographic of the unemployed was, in general, 'dramatically different' to the demographic being satisfied by 457 visa workers.<sup>36</sup>

3.45 Similarly, the Migration Council of Australia (the Migration Council), a non-partisan research and policy body with an independent board drawn from business, unions and the community sector, maintained that labour markets in advanced industrial economies adjust dynamically to immigration:

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33 Fragomen, *Submission 21*, p. 6.

34 Fragomen, *Submission 21*, p. 19.

35 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 16; see also Fragomen, *Submission 21*, pp 5 and 20.

36 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 21.

There has been a continual discourse that argues that migration crowds out youth employment opportunities. This assertion rests on the claim that 10 additional people will become unemployed, or will remain unemployed at the same time 10 new migrants arrive, with the migrants 'taking' the jobs that could have been filled by our domestic labour force.

Yet this ignores how labour markets work in practice, with new workers adding economic demand or enabling investment, hence generating other positions in the labour market. Employers who use temporary work visas as dictated by legislation should not be substituting migrants for young workers given requirement for market wages and the focus on skilled migration.<sup>37</sup>

3.46 The Migration Council drew on data from their own modelling in Australia as well as various international studies to support their view that 'a flow of new arrivals into a labour market will change both demand and supply in the economy, not a simple displacement of one worker for another', and that, over the longer term, migration had 'very little impact on the unemployment rate'.<sup>38</sup>

3.47 The National Farmers' Federation (NFF) stated that agriculture differed significantly from other parts of the Australian economy in that many parts of the agricultural sector could not support permanent employment. Consequently, the NFF contended that, in general terms, visa workers do not compete with local workers for jobs in agriculture because local workers are not applying for the jobs that visa workers are doing.<sup>39</sup>

3.48 With reference to the resource sector, the Australian Mines and Metals Association (AMMA) pointed out that the demand for temporary skilled workers under the 457 program did in fact match the changes in the economic cycle. For example, as the resource industry moved from the construction phase of projects to the less labour-intensive production phase, the number of primary 457 visa applications lodged by the mining industry in the 2014–15 program year to 31 December 2014 had declined by 1010, or 24.9 per cent, compared to the same period in the previous year.<sup>40</sup>

### **The nature of the Australian labour market**

3.49 The committee notes that, in general terms, labour markets are not uniform. The committee received ample evidence indicating significant differences in labour markets including across industries, occupations, and regions, and over time (for example, at different stages of the business and economic cycle). It is therefore clear that concerns about the availability of labour and employment opportunities for Australians vary significantly according to circumstances.

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37 Migration Council Australia, *Submission 27*, pp 5–6.

38 Migration Council Australia, *Submission 27*, p. 6; see also Eventus, *Submission 25*, p. 5.

39 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, pp 32–33.

40 The Australian Mines and Metals Association, *Submission 34*, p. 3.

3.50 For example, the committee heard from producers in rural Australia about their difficulties in sourcing suitable local labour and their utter dependence on 457 visa workers. Conversely, the committee heard from unions that 457 visa workers were getting and retaining jobs despite the availability of job-ready local workers. In some cases, the committee received evidence of local workers being made redundant while less qualified 457 visa workers took their positions.

3.51 The next section deals with evidence in support of the proposition that 457 visa workers have displaced Australian workers in certain industries.

3.52 This is followed by a section that explores the labour dynamics in the agricultural sector and evidence in support of the proposition that 457 visa workers are essential to the viability and prosperity of rural Australia.

#### ***457 visa workers displacing Australian workers***

3.53 The committee received evidence from several unions that 457 visa workers were being used to fill positions that could have been taken by qualified Australian workers, and that 457 visa workers were also displacing some Australian workers.<sup>41</sup>

3.54 The ANMF highlighted the 'parlous employment situation facing many new Australian graduates'. As a result of a questionnaire completed by over 200 nurses in 2014, the ANMF stated that evidence from the questionnaire showed:

- large numbers of new graduates fail to find employment in their field;
- many graduates receive numerous employment rejections, in one case over 70;
- most graduates fortunate enough to obtain employment are engaged on a precarious basis through agency, part time or casual arrangements;
- many graduates go to extraordinary lengths to obtain work, for example by moving interstate and separating themselves from their families;
- most new graduates are saddled with a HECS debt and many believe their university course was a waste of money; and
- most employers named in the questionnaire as rejecting new graduates use temporary offshore labour.<sup>42</sup>

3.55 A similar questionnaire of nurses and midwives who graduated in 2014 was conducted over ten days in early 2015. It revealed over a third had been unable to gain employment, and only 15 per cent had been offered permanent employment.<sup>43</sup>

3.56 The ANMF therefore drew attention to the disconnect between the lack of employment for graduate nurses and midwives and the continued ability of employers

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41 Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 27–28.

42 Australian Nursing and Midwifery Federation, *Submission 37*, pp 8–9.

43 Australian Nursing and Midwifery Federation, *Submission 37*, p. 11.

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to 'access large numbers of nurses and midwives on temporary work visa arrangements'.<sup>44</sup>

3.57 The committee was keen to understand whether the problem was in fact a maldistribution of the workforce with graduates being unwilling to move to areas where jobs are located in regional and rural parts of the country. The ANMF assured the committee that many graduates have moved states to try to get a job and have gone out to rural areas including in Western Australia to try and secure employment.<sup>45</sup>

3.58 The committee was also keen to understand why, in particular parts of the healthcare sector, overseas workers were preferred to Australian graduates. Mr Nicholas Blake, Senior Industrial Officer with the ANMF, stated that that the ANMF believed that many employers, particularly in the residential aged-care sector, 'see the foreign workforce as more compliant in terms of what they are required to do' and that the barriers to accessing overseas workers have become lower in recent years.<sup>46</sup>

3.59 The consequences for nursing graduates of failing to obtain ongoing, permanent employment can be dire because the Nursing and Midwifery Board of Australia Annual recency of practice registration standard 'requires nurses have a minimum of three months full-time equivalent practice in their profession'. A failure to meet this requirement can mean graduates risk losing their registration, without which they cannot work as a nurse.<sup>47</sup> Significantly, the problem is affecting not just first year graduates, but is in fact an early career problem for nurses and midwives.<sup>48</sup>

3.60 In addition, the failure of a large proportion of graduate nurses to obtain employment has ramifications in terms of investment in the education of professional health workers and future workforce planning.<sup>49</sup> Issues around employment opportunities are covered further in the section on labour market testing. Issues relating to training, graduate programs, and workforce planning, are covered in chapter 5.

3.61 The Australian Federation of Air Pilots (AFAP) submitted that abuse of the 457 visa program was having a detrimental impact on the employment and career prospects of Australian pilots. The AFAP noted that certain regional airlines have employed pilots under the 457 visa program and yet 'all major aviation operators in Australia, including the regional airlines...have significant 'hold files' of qualified

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44 Australian Nursing and Midwifery Federation, *Submission 37*, p. 11.

45 Ms Annie Butler, Assistant National Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 22; Australian Nursing and Midwifery Federation, answer to question on notice, 19 June 2015 (received 2 July 2015).

46 Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 24.

47 Australian Nursing and Midwifery Federation, *Submission 37*, p. 12.

48 Ms Annie Butler, Assistant National Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 21.

49 Australian Nursing and Midwifery Federation, *Submission 37*, pp 11–12.

commercial pilots who wish to progress their careers with that operator'. The AFAP concluded:

The practical impact of pilots being employed under the s457 visa program on the Australian labour market is that Australian pilots remain unemployed or have their career progression delayed.<sup>50</sup>

3.62 The AFAP therefore offered to assist the Department of Immigration and Border Protection (DIBP) in assessing the availability of suitably skilled Australians in cases of employers seeking to employ pilots under the 457 visa program and determining the genuineness of employer claims that suitable Australian candidates are not available.<sup>51</sup>

3.63 The Australian Maritime Officers Union (AMOU) relayed the grave concerns of their members, both younger members and the older generation of seafarers, that their industry was undergoing irrevocable change as a result of what they described as the 'perverse use' of temporary visas. The AMOU has a list of over 100 currently unemployed members<sup>52</sup> and noted that newly qualified seafarers are unable to secure work because multinational companies persist in employing 457 visa workers even where 'suitably qualified locals are willing and able to perform the jobs'.<sup>53</sup>

3.64 The AMOU set out the ramifications for a host of other maritime positions of the short-term approach of employing temporary visa workers. Not only will younger seafarers be denied the opportunities afforded to previous generations in terms of securing a career at sea, but there will be a flow-on effect in later years that will result in 'a scarcity of Australians able to fill the many seafaring associated onshore jobs such as harbour masters, pilots, vessel traffic officers and lecturers at the maritime training facilities' which are positions that have typically been filled in the past by seafarers with many years of experience at sea.<sup>54</sup>

3.65 Ms Ros McLennan, Assistant General Secretary of the Queensland Council of Unions, drew the committee's attention to the top three jobs for 457 visa holders in Queensland: cook; cafe or restaurant manager; and customer service manager. Ms McLennan argued that, taken at face value, these jobs did not appear to be ones for which there would be skill shortages or any lack of Australians willing and able to take those jobs given some training.<sup>55</sup> These matters are considered further in a later section on the skilled occupation lists and also in chapter 5 on training.

3.66 The committee also heard from Mr Benjamin Loeve, a former employee of Downer EDI Mining and Boggabri Coal in regional New South Wales (NSW), who

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50 The Australian Federation of Air Pilots, *Submission 15*, p. 2.

51 The Australian Federation of Air Pilots, *Submission 15*, p. 2.

52 Australian Maritime Officers Union, *Submission 18*, p. 3.

53 Australian Maritime Officers Union, *Submission 18*, p. 5.

54 Australian Maritime Officers Union, *Submission 18*, p. 5.

55 Ms Ros McLennan, Assistant General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 8.

was made redundant and his position taken by a 457 visa worker. As a trade qualified heavy diesel fitter, Mr Loeve had received specialised training from original equipment manufacturers such as Caterpillar and Hitachi and was employed in the maintenance section at the Boggabri coal mine in NSW.<sup>56</sup>

3.67 Mr Loeve stated that about ten months after a number of Papua New Guinea 457 visa workers were brought onto the site, the company made 106 workers redundant, including 40 staff in the maintenance division where Mr Loeve had worked. Eight 457 visa workers were retained as maintenance workers for a further 18 months to do the work of the now redundant Australian workers.<sup>57</sup>

3.68 Mr Loeve made the point that the visa workers did not have the necessary competencies and skills that the Australian maintenance staff had. In addition to making Australian workers redundant to be replaced by 457 visa workers, it also appears that the company hired the 457 visa workers ahead of better qualified Australian workers. Mr Loeve stated that he knew local workers (with trade and original equipment manufacturer training) that applied for jobs at Boggabri Coal but 'were knocked back' at about the time the 457 workers were employed.<sup>58</sup>

#### ***Agricultural labour markets and the role of 457 visa workers***

3.69 The committee heard evidence from farmers and their industry organisations that despite high rates of unemployment in general, and youth unemployment in particular, the agricultural sector experienced ongoing difficulties with the recruitment of willing and able local workers. The difficulties in finding suitable local labour applied irrespective of whether growers were seeking casual short-term employees for intensive periods during the picking season or ongoing year-round employees in livestock production.

3.70 Ms Sarah McKinnon, Manager of Workplace Relations and Legal Affairs at the NFF, estimated that 'about a third of the agricultural workforce in Australia is from overseas', made up largely of 417 visa workers but also 457 workers and seasonal workers under the Seasonal Worker program.<sup>59</sup>

3.71 Growers and their representative associations warned that without the additional labour supplied by the 457 and 417 visa programs, many rural industries were at risk of a contraction in production, and some businesses simply could not continue to operate. These producers therefore stressed the vital importance of the 457 and 417 visa programs in keeping many rural businesses afloat.

3.72 The two following sections present evidence from the pork industry and the wine industry and the role of 457 visa workers in their industries. The role of 417 visa workers in Australian agriculture is covered in chapter 4.

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56 Mr Benjamin Loeve, *Committee Hansard*, 26 June 2015, p. 2.

57 Mr Benjamin Loeve, *Committee Hansard*, 26 June 2015, pp 2–3.

58 Mr Benjamin Loeve, *Committee Hansard*, 26 June 2015, p. 3.

59 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 31.

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*The pork industry*

3.73 The Australian pork industry employs over 20 000 people in Australia and contributes approximately \$2.8 billion in gross domestic product to the Australian economy. The pork industry contributes just over two per cent of total Australian farm production with roughly 1500 pig producers producing around 4.7 million pigs annually.<sup>60</sup>

3.74 Noting that their industry 'has had significant long-standing difficulties attracting and retaining skilled piggery workers', Australian Pork stated that the labour shortages were 'compounded by the perception of the pork industry being a relatively unattractive career choice, exacerbated by the diminishing labour supply in regional Australia'. According to Australian Pork, long term critical shortages existed in recruiting and retaining skilled piggery stock persons.<sup>61</sup>

3.75 Ms Deborah Kerr, General Manager of Policy at Australian Pork Limited, noted that the piggeries were predominantly looking for skilled permanent workers rather than seasonal workers, and the industry therefore strongly favoured recruiting workers under the 457 visa program rather than the WHM (417 visa) program.<sup>62</sup>

3.76 Employees on 417 visas are estimated to comprise 3 to 4 per cent of the pork industry workforce. Australian Pork also indicated there was limited use of labour hire contractors in the pork industry and that there was no knowledge of the extent to which labour hire contractors employed 417 visa holders.<sup>63</sup>

3.77 Ms Kerr explained that the low use of labour hire firms by the pork industry was due to the nature of the work required on piggeries, namely permanent skilled work:

...pigs farrow a couple of times a year. There is always work on a pig farm. That come-and-go workforce is not particularly suitable. The 457 visa holders are what we use more for the purpose of pig production. It is also to do with the skill requirements. We need people employed in our sheds who can look after the animals—can comply with animal welfare laws, can comply with the Model Code of Practice for the Welfare of Animals, which is picked up in many of the states' regulations, and are appropriately trained. And for our 457 visa holders we require the appropriate skill qualification plus three years, or at least five years of experience in our industry overseas, before they will come in. The employer tends to want a different skill set to a 417, so we do not interact very much with a labour hire

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60 Australian Pork, *Submission 9*, p. 1.

61 Australian Pork, *Submission 9*, p. 1.

62 Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 8.

63 Australian Pork, answer to question on notice, 19 June 2015 (received 8 July 2015).



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company per se. As I said, they tend to use 457 visas, and they tend to have them directly on the employee.<sup>64</sup>

3.78 The committee was keen to explore why the pork industry experienced difficulties in recruiting and retaining a suitably skilled domestic workforce despite the high levels of unemployment and youth unemployment in particular, in rural and regional areas. Ms Kerr attributed the difficulties to the nature of the work (including close interaction with animals), the location of the work, and competition for employment from the resource sector:

I think generally agriculture does tend to have difficulties in rural and regional areas, and I think the two states where it is particularly evident are WA and Queensland, where there have been a lot of what were traditionally agricultural employees going to the mining and coal seam gas sectors. We had this translocation of employment of choice, if you like. That is one area. The other area is that to work on a pig farm you have to like working with animals and in particular like working with pigs. It can be a smelly job, and not a lot of Australian workers particularly want to go and work in pig farms. Those who do tend to really enjoy what they do and love what they do, whether they are Australian workers or are under a 457 visa. To attract workers, our producers go out and advertise, and they do all the things they are required to do under the 457 program to justify getting a 457 visa holder in, but they still have difficulty. They cannot retain the workforce they have.

...

My understanding is that our producers have actually done a lot to advertise and to try to keep workers on. Unfortunately, they are in a situation in which they do have a labour shortage. They are competing with somebody who does cropping, for example, so the employee might be driving a tractor rather than working with pigs. That can stop people. Livestock can be particularly difficult and challenging for some employees. So it is not just within the general workforce; it is also within the agriculture sector. Our pig-producing farms are located in the wheat-sheep zone, and often people do not want to relocate to those areas from, for example, a major metropolitan area. There is the usual gamut of limitations around what our producers do, but they certainly try to source Australian workers who are keen to be in piggeries. They just cannot find the appropriate people.<sup>65</sup>

3.79 The committee also heard from pork producers, Mrs Kerry Murray and Mr Bernard Murray from Murray Free Range near Cobram in Victoria, and Mrs Elizabeth Wallace from Windridge Farms in Young, NSW.

3.80 Mr and Mrs Murray and Mrs Wallace recounted their difficulties in attracting suitable labour. Mrs Wallace noted that in the past year, only six out of 17 Australian

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64 Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 9.

65 Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 9.

and permanent resident workers had been retained, and of those six, two were Filipino permanent residents that had previously worked in other piggeries, and one was a Filipino permanent resident with no piggery experience. Of those workers that left Windridge Farms, one left because of drug issues, one resigned, and nine simply did not come to work after five days or less.<sup>66</sup>

3.81 The committee was curious to know whether wages and conditions were a factor in Australians not wanting to work on farms. Mr and Mrs Murray and Mrs Wallace confirmed that their businesses pay above award wages. Mrs Wallace stated that their workers are on a 38 hour week and that any work done above 38 hours a week is paid at time and half or double time, with public holidays paid at triple time or time and a half based on the award. She also noted that the company provided additional staff benefits:

We have regular barbecues for our staff on all sites. We have four sites. We regularly provide barbecues, meals, tea and coffee, a lunch room, shower facilities and amenities that would equal anything in a city area. We give the employees an extra 20 minutes a day for their morning break, and that is paid for by the company and not taken out of their time at work.<sup>67</sup>

3.82 Mrs Wallace stated that a manager of five to ten people at their piggery would be on an attractive salary package of \$85 000 to \$90 000 a year plus a house and car. Similarly, Mrs Murray stated that a foreman who had been with them for five years was on a \$100 000 with a three bedroom house, a car, electricity, phone and fuel.<sup>68</sup>

3.83 Mr Murray dismissed the notion that producers might underpay their 457 visa workers by noting that two of their Filipino workers have now bought their own homes. He also claimed that their farm pays their workers more than the engineers and welders at the local engineering plant and yet still cannot attract Australian workers.<sup>69</sup>

3.84 Both sets of farmers agreed that without the workers from the 457 visa program, their businesses simply could not survive.<sup>70</sup>

3.85 Given that piggeries are looking to retain a permanent skilled workforce, Ms Kerr also noted that the pork industry is actively assisting 457 visa holders to gain permanent residency.<sup>71</sup>

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66 Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 31.

67 Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, pp 29–30.

68 Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 30; Mrs Kerry Murray, Owner, Murray Free Range, *Committee Hansard*, 17 July 2015, p. 30.

69 Mr Bernard Murray, Owner, Murray Free Range, *Committee Hansard*, 17 July 2015, p. 30.

70 Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 32; Mrs Kerry Murray, Owner, Murray Free Range, *Committee Hansard*, 17 July 2015, p. 32.

3.86 The transition of staff from the 457 visa program to permanent residency was confirmed by Mrs Murray. She stated that the Filipino staff currently employed on their farm were previously 457 visa holders and are all now permanent residents.<sup>72</sup>

*The wine industry*

3.87 Mr Brian Smedley, Chief Executive of the South Australian Wine Industry Association (SAWIA) told the committee that over the last decade, approximately 38 winemakers and viticulturists have been recruited by South Australian wine industry employers through the 457 visa system.<sup>73</sup>

3.88 He noted that while these numbers are low in relative terms, the 457 visa program has been 'essential' in enabling wine industry employers to access suitably skilled and experienced winemakers and viticulturists 'where the employer has been unable to fill those roles with domestic applicants'.<sup>74</sup>

3.89 SAWIA also pointed out that the global movement of skilled and experienced winemakers and viticulturists brings mutual benefits to a global industry:

...employees with experience and skills from key overseas winemaking countries, including Spain, Italy, France, Chile, Argentina, USA and South Africa can bring important know-how and different perspectives and skills regarding wine grape growing and winemaking to the benefit of the South Australian wine industry. Just as Australian winemakers and viticulturists can take bring their different experience and skills with them to overseas vintage/wine industry work arrangements.<sup>75</sup>

**Regulations and obligations under the 457 visa program, Designated Area Migration Agreements (DAMAs) and Labour Agreements**

3.90 Employees working under a temporary visa are subject to the same Australian workplace laws as Australian employees,<sup>76</sup> and therefore issues of regulation, compliance and enforcement of these laws are a key aspect of this inquiry, and are dealt with to a large extent in chapter 9.

3.91 In addition to the overarching requirement for compliance with Australian workplace laws, further obligations are in place under the 457 visa program designed to safeguard both the 457 visa worker themselves and the wages, conditions and opportunities of Australian workers.

71 Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 10.

72 Mrs Kerry Murray, Owner, Murray Free Range, *Committee Hansard*, 17 July 2015, p. 28.

73 Mr Brian Smedley, Chief Executive, South Australian Wine Industry Association, *Committee Hansard*, 14 July 2015, p. 1.

74 Mr Brian Smedley, Chief Executive, South Australian Wine Industry Association, *Committee Hansard*, 14 July 2015, p. 1.

75 South Australian Wine Industry Association, *Submission 5*, p. 5.

76 See Australian Government Department, *Submission 41*, p. 1.

3.92 The two key obligations placed on the employer (sponsor) under the 457 visa program are that:

- the employer pays their sponsored employee(s) the amount that was originally agreed under the terms of the sponsorship grant; and
- the sponsored employee does the work for which they were originally nominated.<sup>77</sup>

3.93 The obligation to pay a 457 visa worker the amount agreed under the sponsorship agreement is underpinned by what the migration legislation terms the 'market salary rate' and the TSMIT.<sup>78</sup>

3.94 457 visa holders are also required to work in the occupation for which they were nominated (under visa condition 8107). This requirement is an obligation on both the visa holder and the sponsor.<sup>79</sup>

3.95 The obligations placed on employers combined with other policy settings such as the skilled occupation lists (covered in a later section) play an important part in ensuring that the 457 visa program is used for legitimate purposes and that the entitlements of 457 visa workers are maintained and the employment opportunities of Australian workers are protected.

#### ***Market salary rate***

3.96 Employers seeking to employ a 457 visa worker must guarantee that as part of the sponsor obligation the terms and conditions of employment of 457 visa holders, including pay and hours of work, are no less favourable than the terms and conditions that are, or would be, provided to an Australian citizen performing equivalent work in the same location. In other words, the DIBP must be satisfied that a 457 visa holder will be paid the 'market salary rate'.<sup>80</sup>

3.97 The purpose of this market salary rate requirement is twofold:

- to ensure that Australian workers are protected from any adverse impact on wages; and
- to protect skilled overseas workers from exploitation by ensuring they are not paid less than the market salary rate.<sup>81</sup>

3.98 The obligation on employers to pay at least market salary rates is monitored by the DIBP and the Fair Work Ombudsman (FWO).<sup>82</sup>

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77 Australian Government Departments, *Submission 41*, pp 2–3.

78 Australian Government Departments, *Submission 41*, p. 2.

79 Australian Government Departments, *Submission 41*, p. 3.

80 Australian Government Departments, *Submission 41*, p. 1.

81 Australian Government Departments, *Submission 41*, p. 2.

82 Australian Government Departments, *Submission 41*, p. 2.

3.99 On 18 April 2015, the threshold for exemption from a market salary assessment for the 457 visa program was lowered from \$250 000 to \$180 000<sup>83</sup> legislative instrument.<sup>84</sup> However, the reduction was effectively revoked on 16 June 2015 when the Senate disallowed the legislative instrument.<sup>85</sup>

3.100 Submitters expressed different views on this matter. Employer groups such as the Australian Higher Education Industrial Association (AHEIA) welcomed the reduction in the threshold to \$180 000.<sup>86</sup> In contrast, the Australian Institute of Marine and Power Engineers (AIMPE) argued that the lowering of the market salary rate threshold from \$250 000 to \$180 000 'had an immediate impact with many chief engineers and class 2's losing their jobs'.<sup>87</sup> The AIMPE therefore recommended that the market salary rate threshold of \$250 000 be reinstated.<sup>88</sup>

### ***Temporary Skilled Migration Income Threshold (TSMIT)***

3.101 In addition to the market salary rate, the income of 457 visa workers is also protected by the TSMIT which is designed to ensure that 457 visa holders earn sufficient money to be self-reliant in Australia:

The TSMIT, currently set at \$53 900 per annum, provides an income floor for subclass 457 visa holders, in recognition that visa holders are temporary residents and are not usually eligible for the same income support benefits as Australian citizens and permanent residents.

The TSMIT represents an entry level salary point for the subclass 457 programme. The underlying premise of the TSMIT is that visa holders should be able to reside in Australia without government support and not find themselves in difficult financial circumstances that could make them vulnerable to exploitation or encourage them to breach their visa conditions.<sup>89</sup>

3.102 The Migration Council noted that the TSMIT acts as the floor for wages for migrants on temporary work visas because 457 visa holders cannot fill occupations with a market salary rate below the TSMIT.<sup>90</sup>

3.103 The Migration Council further noted that the TSMIT has traditionally been indexed according to average fulltime weekly ordinary time earnings (AWOTE) each financial year. However, indexation did not occur on 1 July 2014 or 1 July 2015.<sup>91</sup>

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83 The threshold was set at \$180 000 when initially introduced in 2008. It was increased to \$250 000 in 2013.

84 Migration Regulations 1994 – Specification of Income Threshold and Annual Earnings 2015 – IMMI 15/050 [F2015L00569].

85 *Journals of the Senate*, No. 16—16 June 2015, p. 2673.

86 Australian Higher Education Industrial Association, *Submission 20*, pp 2–3.

87 Australian Institute of Marine and Power Engineers, *Submission 17*, p. 4.

88 Australian Institute of Marine and Power Engineers, *Submission 17*, p. 8.

89 Australian Government Departments, *Submission 41*, p. 2.

90 Migration Council Australia, *Submission 27*, p. 5.

3.104 Without indexation, the salary floor decreases in real terms each year as wage inflation occurs, meaning that temporary migrants are less able to support themselves in society. The Migration Council therefore recommended that the TSMIT be indexed as at 1 July 2015 to the AWOTE.<sup>92</sup>

### *Designated Area Migration Agreements (DAMAs)*

3.105 As noted in chapter 2, labour agreements and Designated Area Migration Agreements (DAMAs) allow a proponent to negotiate an agreement under which employers in areas experiencing skills and labour shortages can sponsor skilled and semi-skilled overseas workers.

3.106 Pointing to the softening labour market and the fact that the construction boom in the resources sector had already peaked, the ACTU called on the DIBP and the government to provide evidence to demonstrate the ongoing case for DAMAs to be retained.<sup>93</sup>

3.107 The ACTU was of the view that DAMAs 'should be explicitly limited to skilled and specialised semi-skilled occupations' in 'high-growth, low unemployment regions'.<sup>94</sup> In order to ensure the integrity of a DAMA, the ACTU strongly suggested that a DAMA be vetted by an independent tripartite body and that access to 457 visa workers under a DAMA be restricted to 'best practice' employers.<sup>95</sup>

3.108 The ACTU also recommended that labour market testing should apply to all positions to be filled by a 457 visa worker under a DAMA.<sup>96</sup>

### *Designated Area Migration Agreements and the TSMIT*

3.109 The Northern Territory (NT) government stated that the very low unemployment rate in the NT<sup>97</sup> meant that 'many employers had no other option but to sponsor workers from overseas to fill vacant positions'.<sup>98</sup>

3.110 The NT government pointed out that the TSMIT was above the market salary rate across a number of occupations in the NT. The NT government was therefore concerned that paying 457 visa workers the TSMIT had the potential to generate

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91 Migration Council Australia, *Submission 27*, p. 5.

92 Migration Council Australia, *Submission 27*, p. 5; see also United Voice, *Submission 19*, p. 3.

93 Australian Council of Trade Unions, *Submission 48*, p. 12.

94 Australian Council of Trade Unions, *Submission 48*, p. 84.

95 Australian Council of Trade Unions, *Submission 48*, p. 84.

96 Australian Council of Trade Unions, *Submission 48*, p. 85.

97 As at May 2015, the unemployment rate in the Northern Territory was 4.5 per cent. See Northern Territory Government, Department of Treasury and Finance, *Economic Brief—Labour Force*, May 2015, p. 1.

98 Northern Territory Government, *Submission 39*, p. 1.

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wider wage inflation across the NT, reducing the competitiveness of local businesses and ultimately increasing the cost of living in the region.<sup>99</sup>

3.111 However, under a DAMA, all employers throughout the NT would be able to access the 10 per cent TSMIT concession. This would effectively allow all employers to pay a sponsored temporary visa worker 10 per cent less than the TSMIT, provided that the TSMIT was above the market salary rate for that occupation. It was for this reason that the NT government negotiated a DAMA with the DIBP.<sup>100</sup>

3.112 United Voice noted an increase in the number of regional areas looking to use a DAMA 'to fill the shortfall of workers in particular occupations and sectors where Awards are the dominant mechanism by which conditions of employment are determined'. United Voice noted that the areas where a DAMA might be used were often isolated locations with a higher cost of living. Given that a DAMA allows the designated region to have wages up to 10 per cent lower than the TMSIT (equating to approximately \$48 510), United Voice was concerned that temporary migrant workers 'would not have sufficient income to independently support themselves'. United Voice therefore recommended that DAMAs include the same minimum standards as 457 visas.<sup>101</sup>

3.113 The Maritime Union of Australia (MUA) opposed the use of DAMAs and argued that allowing employers to pay 10 per cent under the TSMIT would undercut wage growth in areas where a DAMA was in operation.<sup>102</sup>

3.114 However, AMMA disputed these assertions by pointing out that the potential 10 per cent reduction in the TSMIT under a DAMA was still required to operate in conjunction with the market salary rate. As AMMA explained, this means that any 457 visa worker must still be paid the comparable Australian worker's salary:

Under a DAMA, TSMIT of \$53 900 can be reduced by up to 10% to a minimum of \$48 510 a year.

However, it must be remembered that employers are required to pay the market salary rate (i.e. what they would pay an equivalent Australian employee) or the concessional income threshold, whichever is higher. That means if an employer pays an Australian worker less than \$48 510 they can bring in an overseas worker if they are prepared to pay that worker at least \$48 510. However, if the market salary rate (i.e. the comparable Australian worker's salary) is \$60 000, the employer must pay the foreign worker \$60 000.

In simple terms, concessions to wages are only available under DAMAs when the equivalent Australian wage is equal to or less than the concessional income threshold of \$48 510. So there is no possibility of

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99 Northern Territory Government, *Submission 39*, p. 2.

100 Northern Territory Government, *Submission 39*, p. 2.

101 United Voice, *Submission 19*, p. 3.

102 Maritime Union of Australia, *Submission 22*, p. 9.

foreign workers undercutting Australian wages as a result of the concessions.<sup>103</sup>

### ***Labour agreements***

3.115 The mandatory stakeholder consultation requirements that apply to labour agreements were criticised by the ACTU as manifestly inadequate:

Despite some improvements to the process in recent years, most notably there is still no requirement for labour agreement proponents to provide unions with any evidence to demonstrate there are in fact shortages in those occupations where 457 visa workers are being sought and what recruitment efforts have been made to fill them.<sup>104</sup>

3.116 In order to reassure the community, the ACTU stated that a labour agreement should include the following evidentiary requirements:

- The evidence on which it is claimed that the nominated occupations, and the number of positions for each occupation, will be required over the life of the agreement, and the evidence for the claim that these positions cannot be filled by Australian citizens and residents.
- Evidence of recent and ongoing recruitment efforts, including evidence of the wage rates the jobs have been advertised at and relocation assistance that has been offered to allow Australian workers to take up the positions.<sup>105</sup>

3.117 The ACTU did acknowledge that:

To their credit, some labour agreement proponents do engage with unions in a meaningful way and have had no difficulties in providing additional evidence and information that is requested.<sup>106</sup>

3.118 The ACTU emphasised that unions have collaborated successfully with employers in order to help fill positions with local workers.<sup>107</sup> However, the ACTU also drew attention to the need for external scrutiny of labour agreements:

It is also worth noting that in several cases where unions have challenged the inclusion of certain occupations in labour agreements on the basis that the positions could be filled locally, the proponents have agreed to drop them off their list of nominated occupations. This highlights the importance of external scrutiny, and the fact that when such scrutiny is applied the professed need for 457 visa labour can become less pressing.<sup>108</sup>

3.119 The lack of transparency and public accountability of labour agreements was also criticised. Mr Henry Sherrell, Policy Analyst at the Migration Council noted that

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103 The Australian Mines and Metals Association, *Submission 34*, pp 17–18.

104 Australian Council of Trade Unions, *Submission 48*, p. 88.

105 Australian Council of Trade Unions, *Submission 48*, p. 88.

106 Australian Council of Trade Unions, *Submission 48*, p. 88.

107 Australian Council of Trade Unions, *Submission 48*, p. 88.

108 Australian Council of Trade Unions, *Submission 48*, p. 89.



it was very hard to find out how many labour agreements are in operation, the conditions they cover and the exemptions they provide. He noted that while there may be some commercial-in-confidence aspects to a company's application for a labour agreement, the remainder of the application should be publicly available to facilitate greater understanding of how and why particular labour agreements are used.<sup>109</sup>

### ***Consolidated Sponsored Occupation List and Skilled Occupation List***

3.120 Australia's skilled migration program operates under two designated lists, one for the temporary skilled stream and the other for the permanent skilled stream:

- the CSOL is a general list of occupations that may be sponsored under the 457 visa program; and
- the Skilled Occupation List (SOL) designates the relevant occupations for the independent points-based permanent skilled migration scheme.<sup>110</sup>

3.121 The CSOL and the SOL are prescribed in a legislative instrument. The current instrument is effective from 1 July 2015.<sup>111</sup>

#### *Skilled Occupation List (SOL)*

3.122 The SOL lists 190 high-value occupations. As such, the SOL 'identifies occupations that would benefit from independent skilled migration for the purpose of meeting the medium to long term skill needs of the Australian economy, where such needs may not be more appropriately met by sponsored migration programs or up-skilling Australians'.<sup>112</sup>

3.123 The Commonwealth Department of Education and Training (DET) is responsible for providing advice on the composition of the SOL. However, the final decision on the composition of the SOL is taken by the Minister for Immigration and Border Protection.<sup>113</sup>

3.124 The functions of the former Australian Workforce Productivity Agency (AWPA) were transitioned into the Department of Industry in July 2014.<sup>114</sup> The

109 Mr Henry Sherrell, Policy Analyst, Migration Council of Australia, *Committee Hansard*, 17 July 2015, p. 6; see also Eventus, *Submission 25*, p. 20.

110 Department of Immigration and Border Protection, Skilled Occupations— Skilled Occupation List (SOL), available at <https://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists> (accessed 18 August 2015).

111 Migration Regulations 1994 – Specification of Occupations, a Person or Body, a Country or Countries 2015 – IMMI 15/092 [F2015L01059]; see also Department of Immigration and Border Protection, answer to question on notice, (received 19 November 2015).

112 Department of Education and Training, 2015–16 Skilled Occupations List, available at <https://education.gov.au/news/2015-16-skilled-occupations-list> (accessed 18 August 2015).

113 Department of Education and Training, answer to question on notice, 22 October 2015 (received 16 December 2015).

114 Department of Education and Training, Former Australian Workforce Productivity Agency (AWPA), <https://www.education.gov.au/former-australian-workforce-and-productivity-agency-awpa-publications> (accessed 2 February 2015).

ACTU were critical of the decision to abolish the AWPA as an independent, tripartite national skills body that previously provided advice on the SOL:

The discussion of the merits of a MAC-type body to provide independent, labour market analysis really points to the mistake the current Government made in abolishing the independent, tripartite national skills body, the Australian Workforce Productivity Agency (AWPA). AWPA had a tripartite board structure supported by a secretariat wide with a wide range of economic, labour market and policy expertise. Among other things, AWPA was responsible for advice on the Skilled Occupations List (SOL) which is used for the permanent skilled migration program.<sup>115</sup>

3.125 Similarly, Dr Howe and Associate Professor Reilly warned that the abolition of AWPA risked diminishing the rigour and transparency around the compilation of the SOL. In their view, a genuinely selective SOL would encourage employers and government to address skills shortages with suitable training as well as send a signal to citizens that the migration intake was indeed focussed on areas of genuine need.<sup>116</sup>

3.126 The DET outlined the current process for identifying occupations for inclusion on the SOL. The first step involves identifying occupations that are most susceptible to supply side constraints and/or most likely to warrant government intervention should supply constraints occur. An occupation satisfies this first step if it meets at least two of the following three criteria:

- long lead time—skills are highly specialised and require extended education and training over several years;
- high use—skills are deployed for uses intended (i.e. there is a good occupational 'fit' between qualification and occupation); or
- high risk—disruption caused by skills being in short supply imposes a significant risk to the Australian economy and/or community.<sup>117</sup>

3.127 The second step involves analysing the medium to long-term skill needs of the economy for each occupation identified in the first step in order to determine whether it would benefit from skilled independent migration. The analysis is done on the basis of stakeholder submissions in combination with information on areas of economic activity where skills imbalances may be observed. The areas of economic activity considered are:

- the state of the labour market, focusing on indicators that provide insight into current and anticipated occupational conditions;
- the recruitment experience, focusing on the outcomes of recruitment activity;

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115 Australian Council of Trade Unions, answer to question on notice, 6 August 2015 (received 17 August 2015).

116 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 11.

117 Department of Education and Training, answer to question on notice, 22 October 2015 (received 16 December 2015).

- the education experience, focusing on the effect that skills imbalances may have on a student's choice of study; and
- new entrants, focusing on the outcomes of graduates and migrants entering the labour market.

3.128 The DET noted that the assessment process incorporates education, labour market, migration, and general economic and demographic data and considers views from Industry Skills Councils, peak industry associations, professional and trade associations, education and training providers, employee representatives, and Commonwealth, State and Territory government agencies and the public.<sup>118</sup>

3.129 The DET also noted that, based on the above analysis, a shortlisted occupation would not be included on the SOL if:

- the occupation is likely to be in surplus in the medium-to-long term;
- there are other more appropriate and/or specific migration options (for example, employer or State/Territory nominated or temporary skilled migration); and
- the occupation is a niche occupation with few employers or employment opportunities.<sup>119</sup>

#### *Consolidated Sponsored Occupation List (CSOL)*

3.130 The CSOL is compiled by the DIBP. It has two components: the 190 occupations listed on the SOL, and another list of 460 occupations (set out below) plus the addition of the occupation of Primary School Teacher which was originally omitted by oversight. The combined total of occupations on the CSOL is therefore 651.<sup>120</sup>

3.131 The CSOL includes Australian and New Zealand Standard Classification of Occupations (ANZSCO)<sup>121</sup> occupations in Skill Levels 1, 2 and 3 (and the occupation of Driller at Skill Level 4). The occupations are classified as follows:

- Skill Level 1 Managers—qualification commensurate with a bachelor degree or higher or 5 years relevant experience;
- Skill Level 2 Professionals—qualification commensurate with an Australian Qualifications Framework (AQF) Associate Degree, Advanced Diploma or Diploma or 3 years relevant experience; and

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118 Department of Education and Training, answer to question on notice, 22 October 2015 (received 16 December 2015).

119 Department of Education and Training, answer to question on notice, 22 October 2015 (received 16 December 2015).

120 Department of Immigration and Border Protection, answer to question on notice, (received 19 November 2015).

121 The Australian and New Zealand Standard Classification of Occupations (ANZSCO) is published by the Australian Bureau of Statistics and is current as at 1 July 2015.

- Skill Level 3 Technicians and Trades Workers—qualification commensurate with an AQF Certificate IV; or an AQF Certificate III plus a minimum of two years on the job training. Three years relevant experience may substitute for relevant formal qualifications.<sup>122</sup>

3.132 The committee notes that the CSOL is a list of skills, rather than a list of occupations where those skills are in short supply. As such, the committee received conflicting evidence about the nature of the CSOL and its impact on the Australian labour market.

3.133 Dr Howe submitted that there are flaws in the CSOL—particularly when compared to the SOL—which include:

- the CSOL is particularly broad;
- inclusion on the list is only determined by skill level and not that the occupation is in shortage;
- use of the CSOL abdicates responsibility for determining skill shortages to employers as the 457 visa is entirely demand-driven;
- the definition of skill used to determine the CSOL is too wide-ranging and includes skilled occupations in which it would only take a short time to train domestic workers; and
- the CSOL does not operate to protect the precarious labour market status of many 457 workers.<sup>123</sup>

3.134 Dr Howe argued that it is difficult for the DIBP to independently assess whether 457 visa workers are being employed in the appropriate position given that the 457 visa scheme is based on employer demand, that there is a broad range of occupations listed on the CSOL under which 457 visa workers are eligible to be sponsored, and that certain occupations listed on the CSOL such as 'Program or Project Administrator' (the second most popular occupation on the CSOL for the 457 visa for 2012–13) have a very imprecise meaning. Dr Howe therefore argued there is a risk that 457 visa workers may be employed for reasons other than genuine skill shortage.<sup>124</sup>

3.135 The MUA criticised the lack of reliable up-to-date data on labour market trends that underpinned the CSOL and Regional Migration Agreements (RMAs). The MUA noted the difficulties it had encountered 'in getting the NT government to

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122 Department of Immigration and Border Protection, answer to question on notice, 19 October 2015 (received 19 November 2015).

123 Dr Joanna Howe, Additional Information: 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, 2013, p. 20.

124 Dr Joanna Howe, Additional Information: 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, 2013, p. 23; see also Unions NSW, *Submission 35*, p. 5.

remove 'Marine Cook' from the RMA...despite significant numbers of unemployed local Marine Cooks being available and seeking work'.<sup>125</sup>

3.136 Unions NSW proposed that a five-year sunset provision apply to occupations listed on the CSOL to provide the impetus to address skill shortages promptly.<sup>126</sup>

3.137 ACCI fundamentally disagreed with Dr Howe's position on the CSOL. Ms Lambert from ACCI argued that any list that underpins an employer nomination scheme has to be an occupation list and not a shortage list because a shortage list could not possibly capture the myriad rapidly changing permutations of skills shortages in a dynamic labour market:

...we need to be very clear about the role of the CSOL, which is the underpinning for employer-nominated both temporary and permanent migration, and the role of the Skilled Occupations List, the SOL, which is the shortages list. The critical thing about anything that underpins employer nomination schemes is that it needs to be just an overarching skills list. It is not a shortages list and it should never be a shortages list. It needs to be a list of skilled occupations that are allowed to be dealt with by migration. The main reason for that is that you cannot possibly analyse every regional town and every business in terms of their needs and say, 'You're not in shortage, because our macro figure says that we're not in shortage.' You could not invent a system that could actually suggest to a particular business in regional town: 'Your shortages that you may think you are experiencing, you are not experiencing, because our figures tell us that.' That is an absurdity. It does not work that way.<sup>127</sup>

3.138 The Migration Council drew attention to difficulties with the CSOL encountered particularly by small business and therefore suggested simplifying the CSOL to mitigate these problems by introducing 4-digit unit codes:

...the classification index is complicated and very specific. For example, under ANZSCO, an Accountant could be: Accountant (general), Management Accountant or a Taxation Accountant. In the workforce, particularly for smaller businesses, one accountant may incorporate each of the duties associated with these occupations into their role. This is because each occupation is defined to by a 6-digit code under ANZSCO, creating a high degree of specificity.

To clarify this issue for employers, migrants and government, the Migration Council recommends the Consolidated Sponsored Occupation List used for temporary work visas be simplified to outline 4-digit unit groups under ANZSCO instead of 6-digit occupations. In the previous example, a sponsor could nominate a unit group 2221—Accountants instead of

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125 Maritime Union of Australia, *Submission 22*, pp 6–7.

126 Unions NSW, *Submission 35*, p. 7.

127 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 18.

specifying exactly which account occupation a 457 visa holder will work in.<sup>128</sup>

3.139 Similar concerns were raised by the AHEIA. The AHEIA stated that the CSOL lacked the flexibility to enable Australian universities 'to compete in the global labour market for the best education resources'. The AHEIA provided an example of how greater flexibility would assist the university sector:

Flexibility currently exists for medical practitioners (and general managers) to work for an employer other than their sponsor or an associated entity of their sponsor. This flexibility should be extended to enable a medical practitioner to alternatively work for a university as a Clinical Academic performing teaching and research closely aligned to their specified occupation. Similarly, flexibility should also be provided to enable a Clinical Academic to work for another employer performing work in their specialist medical field. This outcome would pay proper recognition to the fact that Clinical Academics perform clinical duties within the setting of teaching hospitals or medical research institutes associated with the employing university.<sup>129</sup>

***An independent tripartite panel to advise on temporary migration policy***

3.140 As noted earlier, the 457 visa program is largely driven by employer demand such that an occupation is taken to be in skill shortage if it listed on the CSOL and if an employer can show evidence that their recruitment efforts have failed.

3.141 Critics of the demand-driven approach argued that the current system fails to examine whether the skill shortage is genuinely a skills shortage as opposed to, for example, being a 'skills gap', a 'labour shortage', or a 'recruitment difficulty'.<sup>130</sup>

3.142 These critics warned that the 457 visa program risked capture by special interests and therefore recommended the establishment of a genuine tripartite body to advise government on skills shortages.<sup>131</sup>

3.143 As noted in chapter 2, the Azarias review identified the need to provide a more robust evidence-based approach to improving the transparency and responsiveness of the CSOL.<sup>132</sup> The Azarias review therefore recommended that a new tripartite ministerial advisory council, supported by a dedicated labour market

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128 Migration Council Australia, *Submission 27*, p. 14.

129 Australian Higher Education Industrial Association, *Submission 20*, pp 1–2.

130 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 8; Dr Chris Wright and Dr Andreea Constantin, *Submission 23*, p. 3.

131 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 8.

132 See John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, pp 44–51.

analysis resource, be established in lieu of the existing Ministerial Advisory Council on Skilled Migration (MACSM).<sup>133</sup>

3.144 The Azaraias review suggested that:

...it is important that the advisory committee be tripartite and include representation from key stakeholders such as peak councils, industry and trade unions. This construction would enable the council to create stronger linkages between industry, trade unions, and government to provide advice on matters relating to skilled migration.<sup>134</sup>

3.145 MACSM was created on 1 July 2012 and sits within the Immigration and Border Protection portfolio. It is a tripartite body comprising industry, union and government representatives and was established to provide advice to the Minister and Assistant Minister for Immigration and Border Protection on Australia's temporary and permanent skilled migration programs and associated matters. MACSM had its inaugural meeting on 19 June 2015.<sup>135</sup>

3.146 While the reinstatement of MACSM by the current government attracted responses ranging from cautious optimism to support, disagreements were expressed over the role and constitution of MACSM.

3.147 The ACTU supported the development of a more rigorous eligible occupation list for the 457 visa program through a tripartite MACSM. However, the ACTU was adamant that such a list was 'no substitute for each individual employer having to test the market'. The ACTU was of the view that 'an employer should not be relieved of that obligation just because an occupation might be identified as being in shortage nationally'.<sup>136</sup>

3.148 ACCI was supportive of MACSM and the need for independent stakeholders to be part of the process of providing advice to government on Australia's temporary and permanent skilled migration programs. However, Ms Lambert stated that ACCI thought that MACSM as currently constituted was adequate for its task and that the technical expertise and analysis for the panel was best provided by government.<sup>137</sup>

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133 John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 51; see also Dr Chris Wright and Dr Andreea Constantin, *Submission 23*, p. 3; Eventus, *Submission 25*, p. 1.

134 John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 49.

135 Australian Government Department of Finance, Ministerial Advisory Council on Skilled Migration, <http://www.finance.gov.au/resource-management/governance/register/body/92321/> (accessed 8 March 2016).

136 Australian Council of Trade Unions, *Submission 48*, p. 28; see also Electrical Trades Union, *Submission 12*, p. 4.

137 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 18.

3.149 Dr Howe and Associate Professor Reilly supported the establishment of a genuinely tripartite body such as MACSM, but were critical of the way it is currently constituted. They set out four key criteria for the establishment of a what they viewed as a properly constituted MACSM:

- independent from government;
- genuinely tripartite;
- evidence-based; and
- transparent and publicly accountable.<sup>138</sup>

*Independent from government*

3.150 Dr Howe and Associate Professor Reilly argued that in order for recommendations made by MACSM to be based on the national interest, MACSM needs to operate independently from government. They therefore preferred the appointment of highly respected professional members whose terms do not coincide with those of the government, rather than the current system where labour market analysis is provided by officers of the department.<sup>139</sup>

3.151 In this regard, Dr Howe and Associate Professor Reilly noted that the United Kingdom (UK) has appointed an expert commission, the Migration Advisory Committee (MAC), that was 'established as a non-statutory, non-time limited non-departmental public body funded by the Home Office':

It is comprised of a Chair and four other committee members who are appointed as individuals to provide independent and evidence-based advice to the Government on migration issues. Committee members are selected on the basis of their expertise in law and/or economics. The MAC's modus operandi is to receive questions from the Government, which it seeks to respond to in a timely fashion, usually within three to six months. The MAC's response is in the form of a public report that identifies the questions posed by the government, the economic analysis and its recommendations.

...

Although supported by a secretariat within the Home Office, the MAC is operationally independent and is not influenced by Home Office officials or the Minister. As such, the secretariat takes direction only from the MAC on the deployment of resources delegated to it by the Home Office.<sup>140</sup>

3.152 In order to reinforce the integrity and credibility of its work, Dr Howe and Associate Professor Reilly therefore recommended a similarly independent approach in Australia:

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138 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, pp 8–13.

139 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 9.

140 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, pp 9–10.



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We recommend that the MACSM receive support from relevant government departments such as the Department of Industry, the Department of Immigration and Border Protection, the Treasury and the Department of Employment. However, the MACSM should be operationally independent and not be subject to influence from any one government department or minister.<sup>141</sup>

### *Genuinely tripartite*

3.153 Dr Howe and Associate Professor Reilly argued that a genuinely tripartite body would act as 'a safeguard against regulatory capture by special interests'. They believed MACSM 'should include representatives from both business and unions, as well as, representatives from government and academia' to ensure that its recommendations were 'balanced and credible'.<sup>142</sup>

3.154 While acknowledging that it was a member of MACSM, the ACTU pointed out that MACSM is not a genuinely tripartite body:

There may be a role for a body similar to MAC, but in our view there also needs to be a body that is properly tripartite, not only a body of expert economists, and it should have a role to provide policy advice to the Minister, not only to provide economic and labour market analysis.

In this respect, the ACTU has consistently supported an ongoing legislated role for a tripartite Ministerial Advisory Council for Skilled Migration (MACSM) to provide independent oversight and advice in relation to all elements of the program.

The MACSM was first established under the Labor Government in 2012 and we were disappointed to see it languish for more than 18 months under the current government without a single meeting.

As the Committee would be aware, the MACSM has recently been reconstituted. Part of its role will be a review of the Consolidated Skilled Occupation List, which appears to be akin to the type of work the MAC does in the UK.

The ACTU is a member of the reconstituted MACSM, but there is no longer a crossrepresentative of unions on it as we believe there should be under a genuinely tripartite body. Dr Howe made the observation in her evidence to the Inquiry that 7 of the 8 members of the new MACSM hold the same overall view of the skilled migration program whereas the previous MACSM had a more equal balance of views.<sup>143</sup>

3.155 The ACTU noted that while the UK MAC was not genuinely tripartite, it nonetheless engaged with stakeholders and seemed to perform a valuable role in providing independent advice to government:

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141 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 10.

142 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 8.

143 Australian Council of Trade Unions, answer to question on notice, 6 August 2015 (received 17 August 2015).

The evidence and advice available to the ACTU is that the UK Migration Advisory Committee (MAC) has done a good job since it was established. The MAC has responsibility for providing independent, evidence-based advice to the Government on migration issues and has produced a number of well-reasoned reports into which sectors of the economy are experiencing skill and labour shortages and whether migration should be used to fill shortages.

It should be noted, however, that the MAC itself is not a tripartite body. Instead, its membership comprises a chair, five other independent economists, and several government representatives. There are no representatives from unions, employers, or any other community groups for that matter. That said, unions in the UK have confirmed to us that the MAC has engaged proactively with unions, as it has with others, in developing their advice.<sup>144</sup>

### *Evidence-based analysis of skills shortages*

3.156 Dr Howe and Associate Professor Reilly argued that there was a lack of robust evidence underpinning the inclusion of particular skilled occupations on the CSOL. They suggested that establishing an expert commission on migration in Australia would provide the opportunity 'to develop rigorous, transparent and credible occupational shortage lists for both the permanent and temporary labour migration programs'.<sup>145</sup>

3.157 Dr Howe and Associate Professor Reilly noted that employers may 'use labour migration for a motive other than to meet a genuine skill shortage' and that historically, the OECD has found that the requests made by employers about domestic occupational shortages have not been considered completely reliable.<sup>146</sup>

3.158 Dr Howe and Associate Professor Reilly provided an outline of the combination of objective (labour market indicators and formulas) and subjective (submissions) criteria that the UK MAC uses to inform its assessment concerning the composition of the occupational shortage list:

For the past five years since its inception, the MAC has provided recommendations to government on an annual basis using a combination of both hard economic data and input from stakeholders. With regards to the former, 12 top-down labour market indicators are relied upon to determine if a particular occupation should be deemed as being in shortage. Each indicator has to reach a certain threshold in order for the occupation to be in shortage. This data is publicly released by the MAC and the formulas involved are also available for external scrutiny. This is supplemented by

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144 Australian Council of Trade Unions, answer to question on notice, 6 August 2015 (received 17 August 2015).

145 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 11.

146 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 11.

evidence through an annual submissions process from employers, unions and others as to which occupations are in shortage.<sup>147</sup>

3.159 It was also observed that the MAC takes a nuanced approach to its recommendations to government about which occupations are deemed to be in shortage. For example, while there may be no general occupational shortage of secondary school teachers, there may be a shortage of secondary school mathematics teachers.<sup>148</sup>

3.160 Further, 'the MAC seeks to differentiate between skill shortages that are best met by temporary migration and those that could be met by increased training of domestic workers'. In this regard, 'the MAC can request a formal review of the training system that trains British workers for that occupation in question'. This approach facilitates a strategic approach to the allocation of training resources in order to improve the employment prospects of local workers.<sup>149</sup>

3.161 Importantly, Dr Howe and Associate Professor Reilly emphasised that while the independent commission makes credible and informed recommendations, the final decisions should be made by elected representatives:

It is important to note that under the model we propose, the MACSM would not make final decisions about the composition of the occupational shortage list. This is a political responsibility best left to elected officials with accountability to the parliament and to the electorate through a cycle of regular elections.

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As such, an Australian expert commission could make recommendations which parliament could modify, reject or allow to take effect. This would provide greater public confidence in the process as an expert commission could develop agreed-upon definitions and measures.<sup>150</sup>

#### *Transparent and publicly accountable*

3.162 Dr Howe and Associate Professor Reilly drew attention to a lack of transparency in the process for determining the composition of the CSOL. The unfortunate outcome of this approach is that there is no way of discerning whether or not the decisions have merit and whether they were based on robust evidence or were instead potentially influenced by special interest lobbying:

One of the key drawbacks of the current Australian approach to managing migration policy is that it is characterised by secrecy and there is a lack of transparency and accountability around decisions. When decisions are made in a non-transparent fashion and internally within government departments, there can be confusion as to whether these decisions were made on a sound

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147 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 12.

148 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 12.

149 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 12.

150 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 12.

basis or because of lobbying by a particular group. The recent addition of flight attendants to the CSOL by the Department is one such example. The addition of this occupation to the occupational shortage list for the subclass 457 visa occurred after the head of the Department met with the CEO of Qantas who was lobbying for the reform. Although adding flight attendants to the CSOL was opposed by unions who were not consulted on this change, a week after the meeting occurred, the CSOL was amended. No public justification was provided by the Department for this change. Whilst this decision may have been evidentially sound and based on data revealing a labour shortage in domestic flight attendants, this remains unproven because of the lack of accountability and transparency that characterises decision-making in the labour migration program.<sup>151</sup>

3.163 Dr Howe and Associate Professor Reilly also submitted that a further advantage of making decisions in a transparent and publicly accountable way is that it would not only improve ministerial decision-making, but would also enhance the quality of public debate on labour migration matters:

This is because a more transparent and rigorous process for selecting occupations to be on a shortage list has the benefit of increasing public confidence that only occupations which are in shortage are eligible for labour migration. In this way, the MACSM can also assist in communicating to the public the shared prosperity and economic gains that ensue from labour migration, leading to greater public acceptance of the use of labour migration to address domestic shortfalls.<sup>152</sup>

3.164 Eventus Corporate Migration strongly supported both the findings of the Azarias review on a reinstated MACSM to provide oversight of the CSOL, and the role of the MAC in the UK. In effect, the position of Eventus broadly aligned with the proposals set out above for an independent body that would review future workforce needs in collaboration with external stakeholders, and advise government on future labour needs.<sup>153</sup>

### ***Technical competency and English language competency***

3.165 Concerns were raised by certain submitters about the technical and English language competency of some temporary visa workers.

3.166 As an approved assessment authority for most engineering occupations, Engineers Australia stated that 'the procedures for permanent migration at least compare to standards expected from new Australian engineering graduates'. However, significant differences exist in the assessment of qualifications of new Australian engineering graduates and applicants for permanent migration as engineers, as compared to engineering applications for the 457 visa program. Engineers Australia therefore expressed grave concerns about the lack of any adequate process for assessing the qualifications of engineering applicants for the 457 visa program:

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151 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 13.

152 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 13.

153 Eventus, *Submission 25*, p. 8.

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Applicants for 457 temporary visas are not required to have their qualifications assessed in any way. Providing an applicant satisfies an employer as to their engineering capacity, they are deemed good enough to be an engineer. Engineers Australia argues that that these arrangements are unsatisfactory and risk compromising the standards of engineering work in Australia.<sup>154</sup>

3.167 It was therefore the view of Engineers Australia that the use of engineers employed under the 457 visa program was problematic in terms of potentially lowering the standards within the profession as a whole.<sup>155</sup>

3.168 The Electrical Trades Union (ETU) voiced similar concerns about the technical competency of foreign workers particularly in sectors where safety is paramount:

While every effort can be made to ensure technical equivalency with Australian standards it is almost impossible for foreign workers to have the knowledge/experience with the Australian standards required to work in a safe and compliant manner.

Electrical regulators are especially concerned that the gap be addressed in regulated trade vocations such as electrical, refrigeration and air conditioning, electricity linework and cable jointing, where the work context may differ markedly in overseas countries and where such differences could endanger lives, infrastructure or systems.<sup>156</sup>

3.169 Mr Matthew Boyd, Branch Organiser for the ETU, pointed out that to qualify as a linesman in Australia a four-year apprenticeship is required, but in some other countries a two-year traineeship allows a person to be qualified as a linesman.<sup>157</sup>

3.170 The ETU therefore recommended formal, independent assessments of visa worker qualifications and recommended that 'the mandatory skills assessment that applies to all permanent General Stream Migration applicants should be the standard applied to all visa types'.<sup>158</sup>

3.171 Mr Boyd raised concerns about the low level of English competency that ETU members encountered among visa workers, particularly given that a critical aspect of being a lineworker is signing and understanding a permit that states where the power is still live and where it has been switched out.<sup>159</sup>

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154 Engineers Australia, *Submission 4*, p. 5.

155 Engineers Australia, *Submission 4*, p. 5.

156 Electrical Trades Union, *Submission 12*, p. 8.

157 Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, p. 32.

158 Electrical Trades Union, *Submission 12*, pp 8–9.

159 Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 31–32.

3.172 Safety concerns were also raised by the Australian Maritime Officers Union (AMOU), particularly where 457 visa workers held positions of responsibility but had only limited command of English:

Many members have related stories of situations where they have worked beside temporary work visa holders who held positions of authority on vessel and were responsible for the health and safety of the crew, the seaworthiness of the ship and the protection of the environment but had only a limited ability to speak or understand English.<sup>160</sup>

3.173 The Freedom Partnership to End Modern Slavery (the Freedom Partnership) noted that it had warned the DIBP 'not to make assumptions about the level of English required for low skilled work'. Consequently, the Freedom Partnership did not agree with lowering English language requirements. However, recognising that the government had accepted the recommendation in the Azarias review to lower the English proficiency requirements, the Freedom Partnership recommended 'providing access to the Adult Migrant English Program or a comparable program, for workers with low to medium IELTS scores'. Such access would reduce social isolation and help migrant workers to connect and share information on the rights and responsibilities of workers in Australia.<sup>161</sup>

### ***Labour market testing***

3.174 Given that the 457 visa program is driven by employer demand for skilled temporary migrant labour, and with unions questioning the impact of the 457 visa program in a softening job market, there has been renewed focus on ensuring that Australians have the first opportunity to apply for jobs.

3.175 This next section sets out the current requirements for labour market testing. This is followed by a section on the potential impact of Free Trade Agreements (FTAs) on the requirements for labour market testing. Subsequent sections set out the key arguments for and against labour market testing. This is followed by alternative methods for determining skill shortages in particular sectors.

### ***Current requirements***

3.176 Labour market testing was reintroduced for the 457 visa program on 23 November 2013. It currently applies to skill level 3 occupations (Technicians and Trades Workers) on the Australian and New Zealand Standard Classification of Occupations (ANZSCO) which are not otherwise exempt from labour market testing on the basis of an international trade obligation. It also applies to occupations in the fields of nursing and engineering.<sup>162</sup>

3.177 The Australian Government Department submission set out the criteria for testing the labour market:

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160 Australian Maritime Officers Union, *Submission 18*, p. 4.

161 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 13.

162 Australian Government Department, *Submission 41*, pp 3–4.

To meet the labour market testing requirement, standard business sponsors must provide evidence to DIBP that they have tested the local labour market in the 12 months prior to nominating an overseas worker for a subclass 457 visa. This may include providing evidence of their attempts to recruit Australian workers, such as advertising details and information on how they determined, on the basis of these attempts, that there were no suitably qualified and experienced Australian citizens, permanent residents or eligible temporary visa holders available to fill the position. Where there are integrity concerns with the provided information, further inquiries may be undertaken to validate the labour market testing process.

Where labour market testing applies, sponsors are required to provide DIBP with information on retrenchments and redundancies in their business or an associated entity that occurred within the four months prior to lodging a subclass 457 nomination. In this case, sponsors must provide information on labour market testing since the redundancies have occurred.<sup>163</sup>

3.178 Labour market testing is not required where its application would be inconsistent with Australia's international trade obligations under the World Trade Organisation (WTO) General Agreement on Trade in Services, and under FTAs. In addition, labour market testing is not required where the nomination is for an occupation at ANZSCO skill level 1 (Managers) or skill level 2 (Professionals), with the exception of the 'protected' occupational categories of nurses and engineers.<sup>164</sup>

3.179 The ACTU strongly supported the *Migration Amendment (Temporary Sponsored Visa) Act 2013* which introduced the labour market testing provisions. In particular, the ACTU welcomed the fact that there was now a legal obligation on employers to provide evidence that they have sought to employ Australian workers in the first instance and that no suitably qualified and experienced Australian was readily available to fill the position.<sup>165</sup>

3.180 The ACTU was also very supportive of the requirement for an employer seeking to sponsor a 457 visa worker to advise the minister if any Australians have been made redundant or retrenched in the previous four months, and which requires labour market testing to be undertaken in such circumstances.<sup>166</sup>

3.181 However, the ACTU noted that the vast majority of all occupations available for sponsorship under the 457 visa program are exempt from labour market testing. All skill level 1 and 2 occupations (except nursing and engineering) are exempt plus occupations covered by FTAs with Thailand, Chile, South Korea and Japan.<sup>167</sup>

3.182 Based on the figures in Table 3.3 below, 77 per cent of all 457 visa grants were exempt from labour market testing in 2014–15 up until 31 December 2014. The

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163 Australian Government Department, *Submission 41*, p. 4.

164 Australian Government Department, *Submission 41*, pp 6–7.

165 Australian Council of Trade Unions, *Submission 48*, p. 25.

166 Australian Council of Trade Unions, *Submission 48*, p. 25.

167 Australian Council of Trade Unions, *Submission 48*, pp 29–30.

ACTU also noted that, depending on the outcomes of the FTAs with China and India, an even greater proportion of occupations could be excluded from labour market testing (see Table 3.3 below).<sup>168</sup>

**Table 3.3: Coverage of labour market testing provisions based on current and likely future exemptions**

457 visa grants	2013–14		2014–15 (to 31 December 2014)	
<b>Total grants</b>	51 939		25 533	
Grants covered by LMT occupational exemptions	38 199	73.6%	19 627	76.8%
(plus) Grants in LMT occupations that are covered by FTA exemptions (e.g. Thailand, Chile, South Korea, Japan)	585	1.1%	275	1.1%
<b>Total grants exempt from LMT</b>	38 784	74.7%	19 902	77.9%
<b>Total grants covered by LMT</b>	13 155	25.3%	5 631	22%
(minus) Grants in LMT occupations from China and India	4159		1774	
<b>Total grants covered by LMT if China and India FTAs have LMT exemptions</b>	8 996	17.3%	3 857	15.1%

Source: DIBP subclass 457 visa quarterly pivot tables in Australian Council of Trade Unions, *Submission 48*, p. 30.

Key: LMT = labour market testing; FTA = Free Trade Agreement.

### *The impact of Free Trade Agreements on the current requirements*

3.183 Under two legislative instruments made under subsection 140GB(2) of the *Migration Act 1958*, which commenced immediately after the Korea-Australia FTA (KAFTA) came into force on 12 December 2014, and immediately after the China-Australia FTA (ChAFTA) came into force on 20 December 2015, the labour market testing condition of the 457 visa program has been removed from the following international trade agreements:

- Japan-Australia Economic Partnership Agreement;
- Thailand-Australia FTA;
- ASEAN-Australia-New Zealand FTA;
- Australia-Chile FTA;
- KAFTA; and

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168 Australian Council of Trade Unions, *Submission 48*, p. 30.



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- ChAFTA.<sup>169</sup>

3.184 Associate Professor Joo-Cheong Tham examined whether international trade agreements to which Australia is a party prohibit the imposition of a labour market testing condition under the 457 visa program. The provisions of the various FTAs that relate to labour market testing are technical and complicated, and are summarised below.

3.185 The power to remove the labour market testing condition of the 457 visa program with respect to FTAs is provided in section 140GBA of the *Migration Act 1958* (Migration Act):

...the power of the Immigration Minister to remove the labour market testing condition of the 457 visa program in relation to international trade agreements can only be exercised when there is an *obligation* under such agreements to which Australia is a party.<sup>170</sup>

3.186 Associate Professor Tham noted that the removal of the labour market testing condition under the 457 visa program in relation to the Japan-Australia Economic Partnership Agreement, the Thailand-Australia FTA, and the ChAFTA appeared to be lawful:

...with ChAFTA, Article 10.4(3) of that agreement prohibits the application of quotas and economic needs test to commitments made under the agreement. A similar situation applies under the Japan-Australia Economic Partnership Agreement through Annex 10(2) of that agreement. With the Thailand-Australia Free Trade Agreement, Chapter 10—Movement of Natural Persons, Annex 8 specifically prohibits labour market testing.<sup>171</sup>

3.187 By contrast, Associate Professor Tham observed that prohibitions on labour market testing were not found in the ASEAN-Australia-New Zealand FTA, the Australia-Chile FTA, or the KAFTA. According to Associate Professor Tham, this meant there was no obligation under these agreements that would enliven the power to remove the labour market testing condition on the basis of international trade agreements pursuant to section 140GBA of the Migration Act. Therefore, the lawfulness of removing the labour market testing provisions from these three FTAs was 'seriously doubtful'.<sup>172</sup>

3.188 In summary, it appears there is a clear legal basis to remove the labour market testing provision from the Japan-Australia Economic Partnership Agreement, the

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169 Determination of International Trade Obligations Relating to Labour Market Testing [F2014L01510]; Determination of International Trade Obligations Relating to Labour Market Testing [F2015L01940].

170 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 5, italics original.

171 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 6.

172 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 6.

Thailand-Australia FTA, and the ChAFTA, but not from the ASEAN-Australia-New Zealand FTA, the Australia-Chile FTA, or the KAFTA.<sup>173</sup>

3.189 With respect to the Trans-Pacific Partnership Agreement (TPP), the TPP appeared, on its face, to restrict labour market testing. However, in its Schedule to Annex II, Australia reserved:

...the right to adopt or maintain any measure with respect to the supply of a service by the presence of natural persons, subject to the provisions of Chapter 12 (Temporary Entry for Business Persons), that is not inconsistent with Australia's obligations under Article XVI of the General Agreement on Trade in Services (GATS).<sup>174</sup>

3.190 In addition, Article 12.4 of the TPP did not prohibit economic needs tests like labour market testing or quotas in relation to commitments with regard to temporary entry of business persons made in Annex 12-A. Therefore, with respect to various articles and the application of the above Schedule, Associate Professor Tham concluded that the TPP did not prohibit the imposition of a labour market testing condition.<sup>175</sup>

3.191 Further, Associate Professor Tham was of the view that the power pursuant to section 140GBA(2) of the Migration Act was '*not* enlivened by the TPP as the TPP does not give rise to any obligation to remove the labour market testing condition'.<sup>176</sup>

3.192 The ETU stated that labour market testing would not occur in any of the following circumstances:

- the worker you nominate is a citizen of Chile or Thailand, or is a Citizen/Permanent Resident of New Zealand;
- the worker you nominate is a current employee of a business that is an associated entity of your business that is located in an Association of South-East Asian Nations (ASEAN) country (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam), Chile or New Zealand;
- the worker you nominate is a current employee of an associated entity of your business who operates in a country that is a member of the World Trade Organisation (WTO), where the nominated occupation is listed below as an 'Executive or Senior Manager' and the nominee will be responsible for the entire or a substantial part of your company's operations in Australia;

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173 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, pp 6–7.

174 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 3.

175 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, pp 1–4.

176 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 5, italics original.

- your business currently operates in a WTO member country and is seeking to establish a business in Australia, where the nominated occupation is listed below as an 'Executive or Senior Manager'; or
- the worker you nominate is a citizen of a WTO member country and has worked for you in Australia on a full-time basis for the last two years.<sup>177</sup>

3.193 Unions expressed concern about the impact that certain clauses within FTAs signed by Australia would have on the domestic labour market and the opportunities for Australians to have first access certain jobs.

3.194 The ETU stated that a key union concern related to 'attempts to manipulate the classification of workers' so that they fell into an exempted category, for example, 'mid-level employees 'dressed up' as executives and senior managers under the intra-corporate transferee's category'.<sup>178</sup>

3.195 Mr Owen Whittle, Assistant Secretary of UnionsWA noted that the new investment facilitation agreements (IFAs) in the ChAFTA allowed companies with projects worth more than \$150 million 'to negotiate to bring in lower skilled workers, rather than just skilled workers, at wage rates that fall below the current floor for a standard 457 visa'.<sup>179</sup> The Freedom Partnership warned that it was 'unclear how the government will ensure access to protections for workers' who come under the ChAFTA IFAs.<sup>180</sup>

3.196 Mr Whittle was concerned that a similar provision would be included in the proposed FTA with India. UnionsWA were of the view that 'blanket 457 visa concessions' did not 'have anything to do with international trade' and therefore should not be included in FTAs.<sup>181</sup>

3.197 The Freedom Partnership also expressed concern that despite the ongoing concerns about exploitation of WHM visa holders in Australia (see chapter 7), the ChAFTA included a Work and Holiday Arrangement that provided working holiday visas for up to 5000 Chinese workers.<sup>182</sup> The committee makes a recommendation in chapter 8 on the rights and protections available to temporary visa workers under any visa issued pursuant to an FTA.

#### *Effectiveness of labour market testing*

3.198 During the inquiry the committee heard a number of views relating to the current labour market testing provisions. This section presents arguments about the effectiveness of labour market testing and the following sections present arguments

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177 Electrical Trades Union, *Submission 12*, pp 13–14.

178 Electrical Trades Union, *Submission 12*, p. 14.

179 Mr Owen Whittle, Assistant Secretary, UnionsWA, *Committee Hansard*, 10 July 2015, p. 26.

180 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 14.

181 Mr Owen Whittle, Assistant Secretary, UnionsWA, *Committee Hansard*, 10 July 2015, p. 26.

182 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 15.

about the relative costs of employing 457 visa workers, and the costs that labour market testing imposes on employers.

3.199 The effectiveness of labour market testing has been a highly contested issue between employers and unions. Opinion was sharply divided on the merits of labour market testing as a means to ensuring that Australians get first access to jobs.

3.200 Dr Howe was scathing about the current labour market testing requirements as being both inefficient and ineffective:

...employer-conducted labour market testing penalises decent employers who wish to use the 457 visa in areas of genuine skill shortage through making them go through the farce of advertising, but it is also ill-equipped to deter unscrupulous employers from evading the statutory requirement of advertising jobs locally.<sup>183</sup>

3.201 Consult Australia agreed with Dr Howe's view and also noted that it was consistent with the Azarias review which found that:

On the evidence presented to us we have concluded that the labour market testing provisions introduced in 2013 are easily circumvented and do not prevent employers from engaging overseas workers in place of Australians. In addition, recruitment practices are highly diverse across occupations and industries: to design a system that encompasses this diversity is impractical. While the provisions are symbolic of what is trying to be achieved, in practice they do not assist in achieving the objective of providing evidence that suitable Australian workers are not available. Therefore the requirement adds unnecessary regulatory cost for little or no actual benefit. In its current form the labour market testing requirement is costly for sponsors who have done the right thing and subject to manipulation by those that have not made a serious effort to find a local worker.<sup>184</sup>

3.202 Likewise, the NT government observed that the current labour market testing regime 'adds little or no value in protecting the integrity of the subclass 457 visa scheme as it is uniformly applied regardless of the location of business or their employment practices'.<sup>185</sup>

3.203 In general, employers have criticised labour market testing as an excessive and unnecessary burden on employers, while unions have supported labour market testing but criticised the requirements as lacking rigour.

3.204 The ACTU presented evidence based on unpublished DIBP data on the effect of labour market testing since its re-introduction in 2013. The data showed significant

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183 Dr Joanna Howe, Additional Information: 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, 2013, p. 16; see also Eventus, *Submission 25*, p. 6; Consult Australia, *Submission 30*, pp 6–7.

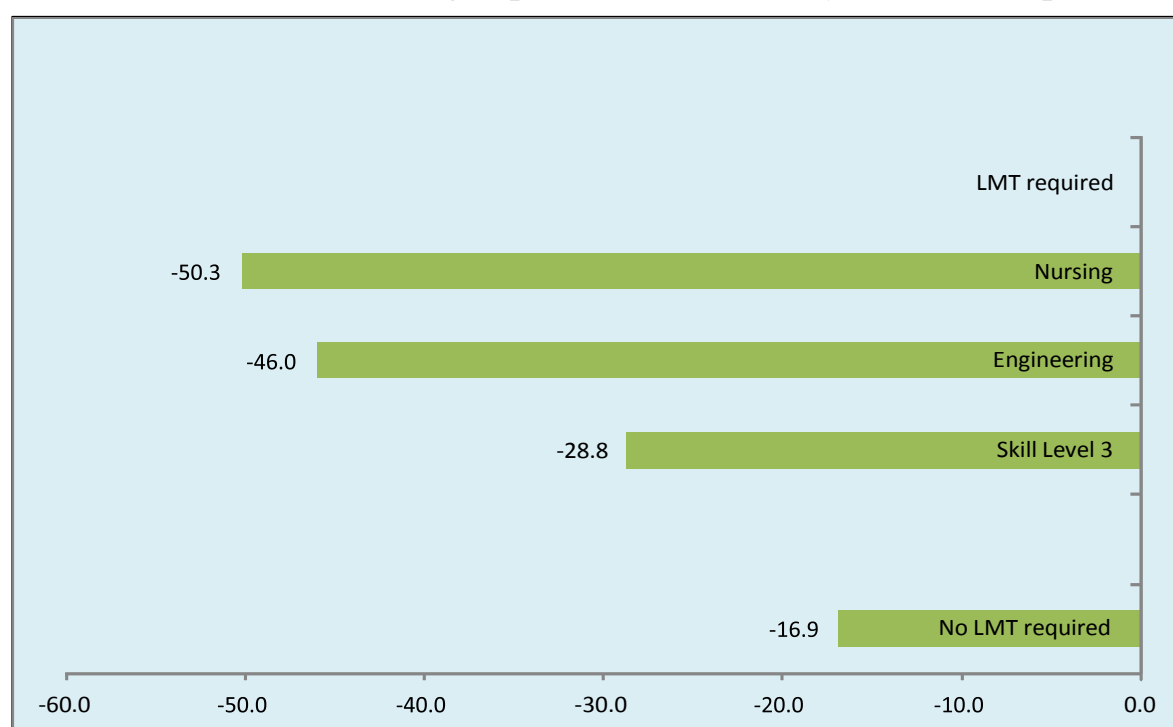
184 Consult Australia, *Submission 30*, p. 6; see also Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, pp 45–46.

185 Northern Territory Government, *Submission 39*, p. 2.

reductions in 457 visa nominations in those occupations covered by labour market testing (see Figure 3.2 below):

Data made available to unions on the operation of labour market testing to 30 September 2014 shows that it is having a significant effect on those occupations it covers. This is evidenced by a much larger decline in 457 visa nominations by employers in occupations covered by labour market testing, compared to average monthly numbers in the occupations exempted from labour market testing. Nominations for non-LMT occupations have fallen by 17% whereas LMT occupations have fallen by 50% in Nursing, 46% in Engineering and 29% in Skill level 3 occupations.<sup>186</sup>

**Figure 3.2: Percentage change in average monthly 457 visa nominations lodged (a) after labour market testing implemented, and (b), by selected occupations**



Source: DIBP unpublished data, June and November 2014, (BE7406 and BE7826), in Australian Council of Trade Unions, *Submission 48*, p. 27.

3.205 The AIMPE supported this analysis and noted that since the introduction of labour market testing, the majority of its members had been able to find work.<sup>187</sup>

3.206 ACCI disputed the conclusion by the ACTU that the decline in 457 visa nominations was attributable to the re-introduction of labour market testing. ACCI noted several salient factors that could account for the trend:

Evidence that the visa granted for trade occupations has fallen since labour market testing was introduced does not take into account other significant

<sup>186</sup> Australian Council of Trade Unions, *Submission 48*, p. 26.

<sup>187</sup> Australian Institute of Marine and Power Engineers, *Submission 17*, p. 6.

influences such as the introduction of the 'genuiness' test, the work of the FWO and DIBP in ramping up compliance and a drop off in economic conditions in industries that were accessing the programme including mining.<sup>188</sup>

*Relative costs of employing local and overseas workers*

3.207 The Migration Institute of Australia (Migration Institute) is the peak organisation representing the Australian migration advice profession. The Migration Institute maintained that the economics of recruiting and hiring overseas workers effectively ensured that local workers would be preferred and that dodgy employers would be deterred by the extra effort and cost of employing overseas workers:

The cost of becoming a Subclass 457 Business Sponsor, nominating and bringing overseas skilled workers to Australia, exceeds the cost of recruiting and employing from local labour forces, especially in the higher salary bands. Sponsors only revert to the more costly practice of sponsoring overseas workers where local labour is not available. The operation of market forces and cost effective business practices should ensure that the lower cost recruitment method is preferred, making the need to demonstrate LMT redundant as a mechanism for protecting local jobs.

As the 457 programme is primarily designed for skilled occupations and to fill genuine labour market shortages, businesses legitimately requiring high skilled recruits are likely to be able to absorb these costs, while those seeking to exploit the system with marginal salary levels and in sham positions are occupations are less likely to bother.<sup>189</sup>

3.208 This view was supported by the NT government which pointed out that 93 per cent of the businesses in the NT were small to medium enterprises, the vast majority of them employing less than 20 staff:

The costs and complexity of sponsoring overseas workers under the subclass 457 visa scheme are not insignificant, particularly for the smaller business cohort. Therefore, for the overwhelming majority of Northern Territory employers these factors alone are sufficient to ensure that sponsoring overseas workers is a last resort.<sup>190</sup>

3.209 In this regard, Mr Wayne Parcell, Director of the Migration Institute and a partner at Ernst and Young, noted that an Ernst and Young survey of about 1500 client employers revealed that the costs of recruiting an overseas worker and bringing them to Australia were as follows:

- more than 10 per cent of the employers said it cost them less than \$5000;
- more than 30 per cent said it cost them between \$5000 and \$10 000; and

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188 Australian Chamber of Commerce and Industry, *Submission 10*, p. 13.

189 Migration Institute of Australia, *Submission 40*, p. 13; see also South Australian Wine Industry Association, *Submission 5*, p. 5.

190 Northern Territory Government, *Submission 39*, p. 3.

- 50 per cent of them said it cost them more than \$10 000.<sup>191</sup>

3.210 Likewise, AMMA completely rejected the idea that skilled migrants were 'able to cheaply displace the employment prospects of Australian workers'. Indeed, AMMA argued that their commissioned research demonstrated that it 'may cost up to \$60 000 more to employ a foreign national rather than an Australian to work in the resource industry when relocation, recruitment and compliance costs are taken into account'.<sup>192</sup>

3.211 However, the ACTU argued that the notion that it was far more costly for employers to employ overseas workers was incorrect. Noting that almost half of all 457 visas are being granted onshore (to workers already in Australia), the ACTU pointed out that 'the extra costs to hire the overseas worker over an Australian citizen or permanent resident are often negligible'.<sup>193</sup>

3.212 This trend is even more apparent in the food and construction trades where over 81 and 75 per cent respectively of all 457 visas are granted 'to foreign nationals already in Australia at the time of the visa grant, many already working for their 457 sponsor on other temporary visas, particularly student visas and working holiday visas'.<sup>194</sup>

3.213 The large pool of temporary onshore migrant labour is an outcome of the combination of Australia's temporary visa programs. The ACTU noted that officials from what was then the Department of Immigration and Citizenship had acknowledged in 2013 that onshore temporary visa holders are eligible to apply for a 457 visa if they can find an employer willing to sponsor them. The presence of this pool of onshore visa holders has had a dramatic impact on the increase of onshore 457 visa applications and this has occurred at a time when the domestic labour market has softened.<sup>195</sup>

#### *The administrative costs of labour market testing*

3.214 The Migration Council based their critique of labour market testing on the premise that there was no evidence to support the claim that labour market testing benefits Australian workers. According to this view, therefore, labour market testing merely places a cumbersome administrative burden on employers.<sup>196</sup>

3.215 Likewise, the NT government pointed to extensive research that identified ongoing skilled and low-skilled labour shortages in the NT. In such a tight labour

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191 Mr Wayne Parcel, Director, Migration Institute of Australia, *Committee Hansard*, 17 July 2015, p. 12.

192 The Australian Mines and Metals Association, *Submission 34*, p. 3.

193 Australian Council of Trade Unions, *Submission 48*, p. 98.

194 Australian Council of Trade Unions, *Submission 48*, p. 99.

195 Australian Council of Trade Unions, *Submission 48*, pp 100–101.

196 Migration Council Australia, *Submission 27*, p. 7; see also Consult Australia, *Submission 30*, pp 6–7.

market, the NT government argued that labour market testing merely imposed more 'red tape' on small and medium sized businesses while doing nothing to protect job opportunities for Australian workers.<sup>197</sup>

3.216 Fragomen stressed the potential economic losses that flowed from what they described as an inflexible, protectionist approach that increased the delays in sourcing labour with the requisite skills:

...particularly for time-sensitive project work or in other circumstances where work must begin urgently. Even a delay of a few days in a visa being granted can result in loss of production and potential penalties for the employer. In circumstances where project timetables can shift regularly, it is simply not possible for employers to plan their visa needs with the degree of malleability that would enable them to allow for processing delays.<sup>198</sup>

3.217 The Migration Institute made the point that the 457 visa program is the most heavily regulated of all the temporary work visa programs. The Migration Institute noted that on top of the regulatory mechanisms built into the 457 visa program, recent developments meant that 457 visa workers were well covered by both migration and employment legislation. These developments included the risk tiering approach implemented by the DIBP to monitor business sponsors, the memorandum of understanding between the DIBP and the Australian Tax Office (ATO) to access salary payment details of 457 visa workers through their tax file number, and increased resources directed to compliance and enforcement.<sup>199</sup>

3.218 The Migration Institute also questioned the need for labour market testing for 457 visa nominations given the vast majority of temporary visa holders are not 457 visa workers. The Migration Institute noted that this much larger cohort of temporary migrant workers are more likely to compete with Australian workers trying to enter the job market:

The student and working holiday visa holders particularly congregate in the lower levels and lower skilled sectors of the labour market and potentially compete with new entrant and low skilled Australian workers at this level.<sup>200</sup>

3.219 Ms Lambert of ACCI began her critique of labour market testing by making the point that under the 457 visa program, 'an obligation for 457 visa sponsors to commit to employing Australians is already built into the system', and that employers support that objective and the obligation to treat migrant workers no less favourably than Australian workers:

There is a basic obligation in the program to do it. That was there before labour market testing came back in and that is there now for occupations which do not require labour market testing. It is a fundamental tenet of the

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197 Northern Territory Government, *Submission 39*, p. 3.

198 Fragomen, *Submission 21*, p. 14.

199 Migration Institute of Australia, *Submission 40*, pp 10–11.

200 Migration Institute of Australia, *Submission 40*, p. 13.



program that there is an obligation on sponsors to put Australian employment first.

It is part of the very objectives of the 457 program that is very strongly supported by the employer communities that the 457 program is there to enable businesses to sponsor a skilled overseas worker if they cannot find an appropriately skilled Australian. The second part of it is to protect those workers and to make sure that they are no less favourably treated than Australians. Employers across the community fundamentally support those two basic objectives. That is not labour market testing.<sup>201</sup>

3.220 While insisting that employers supported the twin objectives of the 457 visa program, ACCI was contemptuous of labour market testing obligations on employers arguing that the requirements were excessive, inefficient and ineffective:

Labour market testing only works in the same way that asking employers to walk through wet cement does. It provides a regulatory burden that means that some will not be bothered. This is not good policy as it does not allow the programme to be responsive to need.<sup>202</sup>

3.221 The Ai Group pointed out that the additional cost of hiring a 457 visa worker meant a business was already 'effectively prompted' to test the market. By contrast the labour market testing as currently required was unnecessary and bureaucratic:

For example, advertising in a period of time before applying can be costly when a business may know from past experience that their chances of sourcing labour locally are non-existent. Delays caused by such testing could prevent a business from meeting urgent commercial needs. Labour market testing is inefficient and unnecessary red tape for business.<sup>203</sup>

3.222 Ernst and Young stated that labour market testing imposed a significant burden for no observable benefit and was 'inappropriate in a modern global economy'. Ernst and Young therefore recommended that labour market testing be abolished.<sup>204</sup>

3.223 A similar view was expressed by Mrs Rita Chowdhury, Vice-Chair of the Migration Law Committee at the Law Council of Australia. She stated that labour market testing has created an unnecessary administrative burden because an employer only has to show evidence of advertisements, but does not have to demonstrate that they could not find a local worker. In other words, labour market testing as currently conceived merely forces employers to go through the motions for no actual benefit in terms of finding a local worker to fill a skilled position.<sup>205</sup>

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201 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 17.

202 Australian Chamber of Commerce and Industry, *Submission 10*, pp 12–13.

203 Ai Group, *Submission 33*, p. 18; see also Business Council of Australia, *Submission 26*, p. 2; Consult Australia, *Submission 30*, pp 6–7.

204 Ernst and Young, *Submission 24*, p. 4.

205 Mrs Rita Chowdhury, Vice-Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 17 July 2015, p. 40.

3.224 Ms Donna Mogg, Commercial Services Manager at Growcom agreed that labour market testing was important to ensure that Australian workers were given first preference, but pointed out that employers in the horticulture industry had a 'fairly strong sense of what skills are available' in their region at any given time and that repeated testing was onerous and time consuming.<sup>206</sup>

3.225 Ms McKinnon from the NFF advised that the NFF did not oppose the principle of labour market testing, but suggested it was burdensome and unnecessary for farmers wanting to use the seasonal worker program:

To make the seasonal worker program work well, you have to invest in it over a number of years. You will not get to that point unless you realise that you are going to have an ongoing labour force need because you cannot fill your need from the local market. So, you have made a decision to go with a good program which brings you in returning, reliable, productive workers every year, but you are still required, before you access workers over that program, to advertise under the labour market testing rules. So, you do that; you advertise your jobs. And you cannot say, when you advertise for the job, that only Australians need apply, because that would be discriminatory. But that is why you are advertising: because you are required to test for Australians, for local workers.

So, you advertise your job, and what happens is that lots of backpackers apply. You get a stream of backpackers applying for work, and you have decided as a business that you are not going to use backpackers anymore; you are going to use the seasonal worker program. But you then have to process a number and a number and a number of backpacker applications, even though you have no intention of hiring those workers. You might get the odd application from an Australian, and that will be considered, along with all of them, but really we do not see that in this circumstance.<sup>207</sup>

3.226 The ACTU disputed claims that labour market testing provisions are too onerous and create a burden on employers. The ACTU noted that labour market testing should occur as a matter of course 'if an employer was genuine about sourcing Australian workers first'. Furthermore, the ACTU noted that 'the majority of 457 visa occupations are not even covered by the labour market testing laws by virtue of various exemptions in place'.<sup>208</sup> Finally, the ACTU pointed out that:

...the 457 visa program is not, and should not, be designed to provide an unfettered right for employers to take on temporary overseas workers. Even during periods when the program has been very poorly regulated, access to the 457 visa program has always, at least in theory, been subject to certain conditions and obligations, including an overriding tenet of the program that it is there only to fill skill shortages that cannot first be filled by

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206 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 22.

207 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 35.

208 Australian Council of Trade Unions, *Submission 48*, p. 97.

Australian workers. In that sense, the labour market testing laws simply give practical (and long overdue) effect to what has always been an understood principle underpinning the program endorsed by both sides of politics.<sup>209</sup>

### ***Proposals for improving labour market testing***

3.227 While the NT government supported the intention of labour market testing, it was very critical of its current application, arguing that it was a monolithic and impractical approach that took no consideration of the actual labour market conditions in various regions of the country.<sup>210</sup>

3.228 The NT government therefore argued that labour market testing 'could be made far more effective through better targeting'. Proposals for improvement included that the DIBP adopt a 'risk-tiering' approach to focus on areas of potential misuse. In other words, more resources should be directed to compliance rather than additional regulations.<sup>211</sup>

3.229 The NT government also argued that greater flexibility would reduce unnecessary burdens on employers. This could be achieved by concessions and/or exemptions to labour market testing requirements 'for employers located in areas of low unemployment and in 'micro' labour markets, such as regional and remote areas of the NT'.<sup>212</sup>

3.230 The MUA submitted that the current requirements for labour market testing were neither credible nor robust. Noting the advice provided on the DIBP website, the MUA pointed out that the requirements for labour market testing could conceivably be satisfied by a Facebook post. Furthermore, the MUA argued that the current requirements lacked transparency because of the difficulty in independently verifying that adequate labour market testing had occurred in a given instance.<sup>213</sup>

3.231 While voicing similar concerns about the content of job advertisements, the ANMF was also concerned that employers were placing unreasonable requirements in job advertisements that effectively excluded recent Australian nursing graduates from employment:

It is now becoming commonplace to see advertisements that require extensive years of experience and multiple nursing qualifications. We believe in many cases these vacancies could have been readily filled by an Australian worker eligible to practice nursing who may have graduated in the preceding one to two years.<sup>214</sup>

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209 Australian Council of Trade Unions, *Submission 48*, p. 97; see also Unions NSW, *Submission 35*, p. 3.

210 Northern Territory Government, *Submission 39*, p. 3.

211 Northern Territory Government, *Submission 39*, p. 3.

212 Northern Territory Government, *Submission 39*, p. 3.

213 Maritime Union of Australia, *Submission 22*, p. 5.

214 Australian Nursing and Midwifery Federation, *Submission 37*, p. 19.

3.232 The ANMF therefore proposed 'that sponsors demonstrate that their attempts to fill positions locally also included realistic prerequisites with regard to academic qualifications and years of experience'.<sup>215</sup>

3.233 To improve the robustness and veracity of the labour market testing process, both the MUA and United Voice recommended the establishment of a skilled workforce database(s) listing people looking for work.<sup>216</sup> The MUA proposed an unemployed assistance service as set out below:

1. People seeking work in a specific industry and/or location contact the database and are able to list themselves on the database.
2. The database provides contact details (mobile telephone and email) and the job category they work in and or are qualified to do. These details are then collated.
3. Every Monday people seeking work are contacted by SMS to confirm they are still looking for work—if they do not confirm by Wednesday they are removed from the database. This ensures the accuracy of the database.
4. Employers and agents are sent the database details in table form three times per week by email. The database shows the types of skills and contact details of the people looking for work.
5. If employers seek a position(s) to be filled, they contact the person directly and take matters from there.<sup>217</sup>

3.234 The MUA argued that an unemployed assistance service had several advantages. The service would be relatively straightforward to coordinate and, if using the service was free, participation rates would be high. Furthermore, workers would be able to self-manage their availability for work, employers would have ready access to a pool of experienced local labour, and workers and employers could be matched quickly.<sup>218</sup>

3.235 The MUA proposed that it be mandatory for an employer to use such a database to satisfy the labour market testing requirements and that use of the database should be a precondition to accessing the 457 visa program.<sup>219</sup>

3.236 The ACTU also had some recommendations that would, in their view, strengthen the labour market testing provisions and improve the system:

- labour market testing should be conducted for at least four weeks for it to constitute a meaningful attempt to recruit Australian workers;

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215 Australian Nursing and Midwifery Federation, *Submission 37*, p. 19.

216 United Voice, *Submission 19*, p. 2.

217 Maritime Union of Australia, *Submission 22*, pp 5–6.

218 Maritime Union of Australia, *Submission 22*, p. 6.

219 Maritime Union of Australia, *Submission 22*, p. 6.

- given the potential for rapid change in labour markets, labour market testing should be considered valid for no longer than four months;
- job advertisements should contain basic mandatory information such as the job title, main duties and responsibilities, location, relevant industrial instrument, necessary skills, qualifications and experience, and the salary and conditions';
- job advertisements should be prohibited from targeting temporary visa workers;
- advertising should be local and national at genuine market rates; and
- job advertising should be supported by information on what the results were (for example, the number of applications received, the number of applicants hired, and reasons why unsuccessful applicants were not considered suitable).<sup>220</sup>

3.237 Given the current high levels of unemployment and under-employment amongst Australian professionals, the ACTU also recommended the government reverse current exemptions on labour market testing for skill levels 1 and 2.<sup>221</sup>

3.238 Similarly, Ms Ruth Kershaw, Research Consultant at the Victorian Branch of the ETU questioned why electricians and linesmen were still on the skills in demand list given that the unemployment rate amongst ETU members was particularly high, and was getting worse with the 'downturn in power construction and manufacturing'.<sup>222</sup>

3.239 United Voice also made a series of recommendations to improve transparency around the use of temporary visas and to ensure that 'current salary requirements are being met':

- the DIBP should be required to publish information for which temporary visa nominations have been approved, including data by industry sector and detailed occupation groupings;
- the DIBP, or an authorised agency such as the ATO, should also collect and publish regular data on actual salaries paid to temporary visa holders; and
- the FWO should also be required to publish information on temporary visas where their investigations uncover issues relating to workers on these visas, and that information should include salary level, occupation, and sector.<sup>223</sup>

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220 Australian Council of Trade Unions, *Submission 48*, pp 28–32; see also Unions NSW, *Submission 35*, p. 6; Australian Workers Union, *Submission 44*, pp 1–2.

221 Australian Council of Trade Unions, *Submission 48*, p. 35.

222 Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, p. 27.

223 United Voice, *Submission 19*, pp 2–3.

### *Proposals to change the 457 visa nomination process*

3.240 Various organisations including employers, unions and independent analysts proposed changes to the 457 visa nomination process. Certain proposals involved a trade-off—such as replacing labour market testing with a sponsorship nomination fee—while other proposals recognised a strong compliance record. These proposals are covered below.

#### *Higher nomination fees and altered nomination timeframes*

3.241 The Migration Council proposed changes to the sponsorship model, arguing that this would reduce administrative costs for business and at the same time discourage rogue employers from exploiting the 457 visa program. In exchange for abolishing labour market testing, the Migration Council proposed an increased nomination fee for employers seeking to sponsor a 457 visa worker. The Migration Council argued that the increased cost of the nomination fee would be offset by the reduction in administrative costs:

...the Migration Council recommends an improved price signal that increases the initial cost to nominate a temporary work visa in exchange for a reduction in administration costs...

A higher nomination fee would better discourage exploitative employers to immediately seek migrants on temporary work visas instead of Australians by increasing the difference in price between the two options.<sup>224</sup>

3.242 Furthermore, the increased nomination fee would restore to some extent the price differential between recruiting a 457 visa worker and an Australian that has, in many instances, been eroded by virtue of the fact that almost half 457 visa workers are now recruited onshore (and therefore cost no more to recruit than an Australian citizen).<sup>225</sup>

3.243 Unions also recognised that the issue of a price signal is important. For example, the ACTU noted that the claim made by employers that employers will always seek to employ Australians first because it is easier and cheaper than recruiting overseas is rendered fallacious by the substantial shift to onshore recruitment of 457 visa workers.<sup>226</sup>

3.244 The Migration Council also proposed a tiered system to better support the 'market salary rate'. This system would enable closer monitoring at more regular timeframes of 457 visa workers on lower salaries:

In addition to raising the price signal, a tiered system of nominations should be introduced to better support the 'market salary rate'. This would shorten the validity of the nomination for lower salaried migrants. For example, instead of all 457 visa nominations being valid for four years, the following validity could be introduced:

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224 Migration Council Australia, *Submission 27*, p. 7.

225 Migration Council Australia, *Submission 27*, p. 7.

226 Australian Council of Trade Unions, *Submission 48*, p. 98.

2 years: Salary above TSMIT but below AWOTE;

3 years: Salary above AWOTE but below the Fair Work High Income Threshold; and

4 Years: Above the Fair Work High Income Threshold.<sup>227</sup>

3.245 The AHEIA proposed a reward and incentive system 'such as priority visa processing and fee concessions' for employers with a strong compliance history.<sup>228</sup>

3.246 The ETU recommended rewarding employers 'who meet or exceed their obligations to labour market testing and domestic employment and training' by introducing 'fee reductions via a sliding scale linked to performance targets in the areas of labour market testing, wages and training'.<sup>229</sup>

### **Committee view**

3.247 The goal of the 457 visa program is to enable employers to address short to medium term workforce needs by sponsoring skilled overseas workers on a temporary basis to fill positions where the employer is unable to find suitably skilled Australian workers. Evidence to the inquiry confirmed broad acceptance that the goal of enabling employers to readily access skilled migrant labour must be balanced against the twin principles of protecting the employment opportunities and work conditions of Australian workers, and ensuring that 457 visa workers enjoy no less favourable conditions than Australian workers and are not otherwise subject to abuse or exploitation.

3.248 In order for the 457 visa program to be effective in achieving this balance, the employment of 457 visa workers must match genuine, short-term skill shortages. Concerns must therefore arise when evidence is presented that 457 visa workers have been employed in occupations not subject to skill shortages, take positions normally filled by Australian graduates (covered in chapter 5), suffer gross exploitation (covered in chapter 6), and when demand for 457 visa workers seems unresponsive to the trend in unemployment.

3.249 Meeting these criteria is essential to ensure that temporary migrant labour is not exploited and does not undercut Australian wages and conditions or reduce job opportunities for Australians. Given this criteria, the key question then becomes how to assess the genuineness of employer needs. In general, there have been two approaches to this question.

3.250 The first approach, broadly put in evidence to the committee by employers, is that a business is best placed to judge the skills shortages that it is confronted with and best placed to determine the need for temporary visa workers. Employers also argued that bringing skilled workers to Australia from overseas involves significant costs for employers, and that those employers are unlikely to incur these costs if they can find

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227 Migration Council Australia, *Submission 27*, p. 8.

228 Australian Higher Education Industrial Association, *Submission 20*, p. 2.

229 Electrical Trades Union, *Submission 12*, p. 4.

the skilled local workers. In sum, this approach accepts the claims made by employers regarding skills shortages and their need for temporary migrant workers.

3.251 The second approach, broadly put in evidence to the committee by unions and certain academics, is that there should be either independent verification of the employer's labour needs, and/or a requirement for employers to demonstrate that they have explored the availability of suitably skilled local labour. Unions noted that the demand for temporary migrant labour is currently driven by the special interests of employers and may not necessarily coincide with the national or public interest.

3.252 The committee received evidence that a key indicator of the effectiveness of the 457 visa program in addressing genuine skills shortages is the responsiveness of the demand for 457 visa workers to changes in the general rate of unemployment, and to changes in the supply of skilled labour in particular occupations.

3.253 Evidence to the committee indicated that the responsiveness of the 457 visa program to the upturn in the unemployment rate lagged by two to three years. Furthermore, the committee received evidence that the 457 visa program was having a detrimental impact on the employment opportunities for Australian graduates in specific occupations such as engineering and nursing.

3.254 The committee acknowledges that it received conflicting evidence regarding the balance between permanent and temporary migration. In theory, the value of temporary migration is that it allows business to meet short-term skills shortages. In this respect, there is an advantage in having some element of temporary migration because addressing skills shortages solely through the permanent migration scheme could result in a skills surplus, particularly if a sector that was booming experienced a sudden down-turn (the resources sector for example). Addressing short-term skill shortages with the 457 visa scheme should be a way of moderating these types of rapid transformations in discrete segments of the skilled job market.

3.255 However, the committee is concerned that the broader temporary visa program, and specifically the 457 visa program, is not sufficiently responsive either to higher levels of unemployment, or to labour market changes in specific skilled occupations.

3.256 The committee notes that the effectiveness and legitimacy of the 457 visa program is to a large extent underpinned by the combined effect of various policy settings. The committee is of the view that it is better to correct structural problems within the design of the 457 program than it is to monitor and ensure compliance with the program's aims that may, in part, arise from poorly calibrated and unresponsive policy settings.

3.257 The committee notes that the 457 visa program has been subject to several substantial reviews and revisions under successive governments in order to ensure its integrity and effectiveness. Given the concerns raised in this inquiry, it is therefore appropriate to review the policy settings of the 457 visa program and labour agreements at this juncture to ensure they are set correctly.



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### ***Labour agreements and Designated Area Migration Agreements***

3.258 Labour agreements provide for the sponsorship of semi-skilled overseas workers, as well as concessions to the Temporary Skilled Migration Income Threshold (TSMIT). Evidence to the committee highlighted a disturbing lack of transparency around both the numbers and substantive conditions of labour agreements. The committee considers the transparency of labour agreements is essential for public accountability and community endorsement.

#### **Recommendation 3**

**3.259 The committee recommends that the Department of Immigration and Border Protection be required to maintain an online public register of current labour agreements in operation, as well as any future Designated Area Migration Agreements. The committee also recommends that the register note any exemptions provided under a labour agreement.**

#### **Recommendation 4**

**3.260 The committee recommends that the Department of Immigration and Border Protection be required to advise all stakeholders that were consulted as to the outcome of the labour agreement application.**

3.261 The committee's recommendations regarding labour market testing for labour agreements are contained at the end of this section.

### ***Temporary Skilled Migration Income Threshold (TSMIT)***

3.262 Evidence to the committee confirmed that the TSMIT is an essential aspect of the policy settings underpinning the 457 visa program. The TSMIT acts as a salary floor for 457 visa holders and ensures that these workers are able to support themselves in Australia.

3.263 The TSMIT has traditionally been indexed according to average fulltime weekly ordinary time earnings (AWOTE) each financial year. However, indexation did not occur on 1 July 2014 or 1 July 2015.

3.264 Without indexation, the TSMIT decreases in real terms each year, meaning that temporary migrants on 457 visas are less able to support themselves in society.

3.265 The committee is of the view that the TSMIT should be indexed as at 1 July 2015 to the AWOTE, and that indexation should occur each financial year.

#### **Recommendation 5**

**3.266 The committee recommends that the Temporary Skilled Migration Income Threshold (TSMIT) be indexed to average fulltime weekly ordinary time earnings (AWOTE) as at 1 July 2015 and that indexation occur each financial year.**

### ***Market salary rate***

3.267 The requirement to pay the 'market salary rate' effectively means that employers must guarantee that the terms and conditions of employment of 457 visa holders, including pay and hours of work, are no less favourable than the terms and

conditions that are, or would be, provided to an Australian performing equivalent work in the same location. The requirement serves the dual purpose of ensuring Australian workers are protected from any adverse impact on wages, and protecting skilled migrant workers from exploitation by ensuring 457 visa workers are not paid less than the market salary rate.

3.268 Although submitters expressed different views on this matter, the committee is of the view that \$250 000 is an appropriate threshold for the requirement to pay the 'market salary rate' and should be retained.

### ***The Consolidated Sponsored Occupations List***

3.269 The Consolidated Sponsored Occupations List (CSOL) specifies the occupations that can be sponsored under the 457 visa program. As such, it forms an important element in assessing the extent to which the 457 visa program addresses areas of genuine skills shortage.

3.270 The CSOL is a broad list of occupations incorporating the Skilled Occupations List (SOL) and includes most occupations defined in levels 1 to 3 of the Australian and New Zealand Standard Classification of Occupations (ANZSCO).

3.271 The committee heard evidence that the CSOL is not a list of occupations subject to skill shortages, but rather a particularly broad, imprecisely defined, and poorly targeted list of occupations.

3.272 The committee heard arguments that the imprecise meanings of certain occupations (for example, 'Program or Project Administrator') listed on the CSOL, the very broad range of occupations listed on the CSOL, and the fact that the 457 visa program is based on employer demand make it difficult to assess whether 457 visa workers are being employed in the appropriate position. This gave rise to concerns that the CSOL is open to abuse.

3.273 On the other hand, the committee heard evidence from employers that the CSOL has to be an occupation list and not a shortages list because a shortage list could not possibly capture the myriad rapidly changing permutations in a dynamic labour market. Arguments were also made that the classification index underlying the CSOL is too complicated and overly specific.

3.274 On balance, the committee is concerned that the broad nature of the occupations listed on the CSOL undermines the value of the CSOL as a regulatory mechanism because it allows the sponsorship of occupations for which a skills shortage does not necessarily exist in Australia. The committee also notes that the compilation of the SOL appears to involve a much more rigorous process than that for compiling the CSOL.

3.275 In saying that, however, the committee is critical of the government's decision to abolish the Australian Workforce Productivity Agency (AWPA). As is the case with the CSOL, the committee is convinced of the value that an independent, tripartite body can add in terms of providing rigorous, independent, expert and transparent advice to government regarding the compilation of the SOL.

3.276 The committee is therefore of the view that there needs to be a much more rigorous, independent, evidence-based, and transparent process in place for determining the CSOL. The details for such a process are described below.

***Independent tripartite panel to advise on migration policy***

3.277 The committee notes that the Azarias review identified the need to provide a more robust evidence-based approach to improving the transparency and responsiveness of the CSOL. The Azarias Review recommended the establishment of a new tripartite ministerial advisory council, supported by a dedicated labour market analysis resource, be established.

3.278 The committee notes the government's decision to establish the Ministerial Advisory Council on Skilled Migration (MACSM). However, the committee is of the view that the MACSM is neither genuinely tripartite, nor sufficiently independent from government.

3.279 In this regard, the committee condemns the abolition of the former AWWA. Disbanding the only independent source of research and policy advice on matters relating to tertiary education and the needs of the labour market was a particularly short-sighted and counter-productive move. Incorporating these functions into the Department of Industry effectively compromises the ability of the government to receive independent expert advice on these matters. Further, the consequent lack of transparency and public accountability flowing from this decision seriously diminishes the credibility of ministerial decisions on matters of workforce capacity, skills training, and, ultimately, labour migration.

3.280 To address these matters, the committee recommends that the MACSM be re-constituted to embody elements of the United Kingdom Migration Advisory Committee such as operational independence, and public accountability in its deliberations. This should help ensure the development of rigorous, transparent, and credible occupational shortage lists for both the permanent and temporary labour migration programs.

3.281 At the same time, MACSM needs to be genuinely tripartite. In this regard, a close examination of the membership of MACSM reveals that seven out of the eight members of the current MACSM hold a similar view of the skilled migration program, and that the Australian Council of Trade Unions is the sole union presence on MACSM. An impartial observer cannot help but conclude that the current MACSM does not present a reasonably balanced range of views.

3.282 These are important matters. If MACSM is to be deemed credible by the broader public, it must be seen to be representative. To be fit for purpose, therefore, MACSM needs to include representatives from business, unions, government, and academia.

3.283 It is the committee's view that a genuinely independent tripartite body would be able to perform a de facto labour market testing function in that it would be able to scrutinise employer claims that a particular skills shortage exists.

3.284 Properly constituted, MACSM could improve the integrity of the CSOL and provide valuable independent advice to government. It is expected that this advice

would differentiate between skill shortages that are best met by temporary migration and those that could be met by increased training of Australian workers. Such advice would not only add value to ministerial decision-making on migration matters, but might also increase public acceptance of temporary labour migration where necessary to address domestic skills shortages.

3.285 In this regard, the committee considers that a properly constituted MACSM would be well-placed to address key policy questions such as the reliance of key sectors of the Australian agricultural sector (in particular, horticulture, orchards, and vineyards) on 417 visa holders. As will be evident in chapter 7, the committee has grave concerns about the exploitation of whole classes of temporary visa holders such as 417 visa holders. It is clear to the committee that while specific recommendations around labour hire, monitoring and compliance are made in subsequent chapters, holistic solutions to labour shortages in specific industry sectors need far greater consideration than they have hitherto received.

### **Recommendation 6**

**3.286 The committee recommends that the Ministerial Advisory Council on Skilled Migration (MACSM) be re-constituted as a genuinely tripartite, independent, and transparent body with responsibility and commensurate funding to provide objective evidence-based advice to government on matters pertaining to skills shortages, training needs, workforce capacity and planning, and labour migration (including Designated Area Migration Agreements and the full range of temporary visa programs with associated work rights). The committee further recommends that the reports produced by MACSM be made publicly available.**

#### *Intra-corporate transfers*

3.287 The committee received evidence that stressed the value of intra-corporate transfers and the need to introduce a dedicated intra-corporate transfer stream within the 457 visa program. The committee notes that the Senate Legal and Constitutional Affairs References Committee report into the 457 visa program considered that the arguments in favour of establishing a dedicated stream had merit, and therefore recommended that a dedicated pathway for intra-company transfers be introduced into the 457 visa program. The committee further notes that the government referred this recommendation to the Azarias review.

#### *Cost of employing 457 visa workers*

3.288 The committee received evidence from employers and independent organisations stating that the additional costs of employing an overseas worker were substantial. The implication of this proposition was that an employer would only incur these extra costs if a suitable Australian worker could not be found. In effect, it was argued that the cost involved in hiring an overseas worker would deter unscrupulous operators that might be seeking to circumvent the system.

3.289 The committee does not dispute that, in many cases, there may be a substantial additional cost to employing a 457 visa worker if that visa worker is brought in from overseas. However, the most recent statistics from the Australian

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Government Department submission show that almost half of all primary 457 visas granted in 2014–15 (to March 2015) were for people already in Australia.

3.290 It seems clear to the committee that in instances where the 457 visa applicant is already in Australia, it is hard to avoid the conclusion that the hiring of a 457 visa worker may actually involve negligible extra cost to the employer. This effectively negates the argument that the hiring of an overseas worker necessarily incurs greater cost to the employer than hiring an Australian worker.

### ***Labour market testing***

3.291 The committee received a substantial amount of evidence from growers and producers in regional Australia regarding the difficulty in attracting (and, in some instances, retaining) suitable labour. The committee recognises that labour markets are diverse and the demands for labour vary across industries, regions, and time. At the same time, the committee also received evidence that the employment opportunities for Australians across numerous sectors of the economy had declined.

3.292 Further, although the extent to which it is occurring is difficult to quantify, the committee is deeply disturbed by evidence of workers losing their jobs only to be replaced by 457 visa workers. In this regard, the committee is of the view that there should be a prohibition against replacing local workers with 457 visa workers.

3.293 The committee notes that the vast majority of all occupations available for sponsorship under the 457 visa program are exempt from labour market testing (all ANZSCO skill level 1 and 2 occupations except nursing and engineering, plus occupations covered by Free Trade Agreements with Thailand, Chile, South Korea, China and Japan). In fact labour market testing only applies to ANZSCO skill level 3 occupations (technicians and trades).

3.294 The committee also notes evidence it received that in the food and construction trades, over 81 and 75 per cent respectively of all 457 visas were granted to foreign nationals already in Australia at the time of the visa grant, many already working for their 457 sponsor on other temporary visas, particularly student visas and working holiday visas.

3.295 Given the potential for a 457 visa worker to be employed at no greater cost than employing a local worker, the committee considers it essential that the policy settings of the 457 visa program are calibrated so as to ensure that local workers still get the first opportunity to apply for jobs and that 457 visa holders are only employed in occupations subject to genuine skills shortages.

3.296 The committee notes evidence from the Australian Federation of Air Pilots and the Australian Maritime Officers Union that qualified pilots and seafarers respectively are unable to secure work because companies persist in employing 457 visa workers even where suitably qualified locals are willing and able to perform the jobs.

3.297 Conversely, the committee notes the Australian Institute of Marine and Power Engineers submitted that the majority of its members had been able to find work since the introduction of labour market testing.

3.298 The committee is also persuaded by unpublished data from the Department of Immigration and Border Protection that shows a much larger decline in 457 visa nominations by employers in occupations covered by labour market testing, compared to average monthly numbers in the occupations exempted from labour market testing.

3.299 The committee therefore considers labour market testing to be an essential aspect of the 457 visa program and that the current labour market testing provisions should be retained. In this regard, the committee notes that in its response to the Azarias review, the government resisted industry pleading to remove the labour market testing provisions in the current legislation.

3.300 Given the current high levels of unemployment and under-employment amongst Australian professionals, however, the committee is of the view that the labour market testing should be further strengthened. In particular, the current exemptions on labour market testing for ANZSCO skill levels 1 and 2 should be removed, and labour market testing should be required prior to all 457 visa nominations.

3.301 Further, the committee is of the view that labour market testing should apply to all positions for which a 457 visa holder is nominated under labour agreements and Designated Area Migration Agreements.

#### **Recommendation 7**

**3.302 The committee recommends that the replacement of local workers by 457 visa workers be specifically prohibited.**

#### **Recommendation 8**

**3.303 The committee recommends that the current exemptions on labour market testing for ANZSCO skill levels 1 and 2 be removed.**

#### **Recommendation 9**

**3.304 The committee recommends that the Migration Regulations be amended to specify that labour market testing applies to all positions nominated by approved sponsors under labour agreements and Designated Area Migration Agreements.**

## CHAPTER 4

### **Impact of the Working Holiday Maker (417 and 462) visa program on the employment opportunities and entitlements of Australian workers**

#### **Introduction**

4.1 The Working Holiday Maker (WHM) (417 and 462) visa program (and the international student visa program) differs markedly from the 457 visa program. These differences have impacts on the labour markets in which the WHM (and international student) visa holder works and on the visa holder themselves. In particular, WHM visa holders and international students:

- do not need to be paid market wages;
- are not limited to employment in specified industries with labour shortages; and
- their employers are not required to demonstrate that they have attempted to fill the position with Australian workers.<sup>1</sup>

4.2 Concerns about these differences between the WHM visa program and the 457 visa program were expressed by a number of submitters and witnesses. The key issues raised were:

- the critical dependence of Australian agriculture on the WHM visa program;
- the impact of the WHM visa program on the opportunities for locals to secure jobs;
- the lack of data about the WHM visa program;
- the impact of the WHM visa program on the opportunities for locals to get training and up-skilling (see chapter 5); and
- the exploitation of WHM visa holders (see chapter 7).

4.3 The committee received little evidence on the impact of the international student visa program on employment opportunities for Australians (although it received a large body of evidence on the exploitation of international student visa holders in the workforce—see chapter 8). However, the committee did receive some evidence relating to the Seasonal Worker program, and that is considered in this chapter.

4.4 The chapter begins by exploring the nature of the WHM visa program, including general concerns about the scale and growth of the program, the lack of accurate data about the program, its overall purpose, and the actual uses to which it is

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1 Dr Joanna Howe and Professor Alexander Reilly, *Submission 5*, p. 5.

being put. This is followed by a brief consideration of issues raised in relation to the Seasonal Worker Program.

4.5 The rest of the chapter considers two vital industries located in rural and regional Australia: horticulture and meat processing. The first part explores the critical importance of the WHM program to the horticulture and orchard sectors. The second part examines labour agreements, enterprise agreements, and the role of WHM visa holders in the meat processing sector, including the impact of 417 visa holders on enterprise agreements, and evidence that 417 visa holders are reducing the opportunities for Australian workers to get work in the meat processing industry.

### **The nature of the Working Holiday Maker program**

4.6 As noted in chapter 2, the Working Holiday Maker (WHM) (417 and 462) visa program allows young adults (18 to 30) from eligible partner countries to work in Australia while having an extended holiday. Although the Department of Immigration and Border Protection (DIBP) states that 'work in Australia must not be the main purpose of the visa holder's visit', the visa allows work for the full 12 months of the visa, with the sole restriction being that a WHM visa holder cannot work for the same employer for more than six months.<sup>2</sup> In sum, the WHM visa program is a lightly regulated program with the ostensible aim of facilitating cultural exchange.

4.7 However, the rapid expansion of the WHM program and changes to the work rights associated with the program, including the incentives to work in regional Australia to secure a second year visa (see chapter 2), have fundamentally changed the nature of the WHM visa. Indeed, Dr Joanna Howe and Professor Alexander Reilly pointed out that the WHM program is no longer merely a cultural program, but is better understood as 'a labour market program, used to fill perceived labour shortages in specified industries'.<sup>3</sup>

4.8 A similar view was put forward by Ms Carla Wilshire, Chief Executive Officer of the Migration Council of Australia. She emphasised the need to address, in holistic policy terms, the labour market needs of regional Australia, and also pointed to the dangers of relying on a poorly regulated program to address those needs:

The original intention of the working holiday program was very much around cultural exchange. One of the things that has started to happen is that it is increasingly being used as a mainstay, particularly within regional areas. What that actually points to—and it is something which I think would be very beneficial for the committee to look at—is that in a sense we have not properly looked at a migration program that meets the needs of regional Australia; it has been done on an ad hoc policy basis. We think this is something that desperately needs attention. You need to look in a systematic policy way at the increasing needs of regional Australia around labour. How do you resolve that? It is either through the movement of

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2 Department of Immigration and Border Protection, What is the Working Holiday Maker program?; Migration Regulations 1994 [F2015C00584], regulations 417.611, 462.611 (by operation of mandatory visa condition 8547).

3 Dr Joanna Howe and Professor Alexander Reilly, *Submission 5*, p. 5.



domestic labour internally within the country or through migration solutions. If you look at it in a very comprehensive systematic policy way you will find that, increasingly, regional Australia will need to turn to aspects such as the working holiday-maker program, which does not have the proper regulatory supports in it.<sup>4</sup>

4.9 The views put forward by academics and the Migration Council on the changing use of the WHM visa reflect the bulk of the evidence received during the inquiry, namely that the WHM visa is now being used primarily as a working visa.

4.10 The substantial growth in the WHM visa program was of great concern to several unions, particularly given the significant levels of domestic youth unemployment in Australia. The ACTU pointed out that the total number of WHM visa holders in Australia is now equivalent to around 7.7 per cent of the total Australian labour force aged 15–24 years.<sup>5</sup> These concerns are covered in greater depth in the section on the meat processing sector.

4.11 In addition, several unions expressed concern about the way in which the WHM visa program was being abused by labour hire agencies. In particular, unions noted that labour hire companies in Australia used their links to labour hire agencies in overseas countries to line up full-time work for overseas nationals before those nationals even entered Australia.<sup>6</sup>

4.12 The ACTU made several recommendations regarding the WHM visa program including that the DIBP conduct an assessment of the WHM program with oversight from the Ministerial Advisory Council on Skilled Migration (MACSM).<sup>7</sup>

4.13 The ACTU further proposed the working rights attached to the WHM visa be 'reviewed and remodelled so that it operates as [a] genuine holiday visa with some work rights attached, rather than a visa which in practice allows visa holders to work for the entire duration of their stay in Australia'.<sup>8</sup>

4.14 The ACTU also argued that labour market conditions in Australia should be the factor that determines that determines the quantity of WHM visas made available in any given year. Noting that Canada currently sets a cap on the number of WHM visas it grants,<sup>9</sup> the ACTU recommended the Australian government have the ability to cap numbers for the WHM visa program.<sup>10</sup>

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4 Ms Carla Wilshire, Chief Executive Officer, Migration Council of Australia, *Committee Hansard*, 17 July 2015, p. 7.

5 Australian Council of Trade Unions, *Submission 48*, p. 42.

6 Australian Council of Trade Unions, *Submission 48*, p. 42.

7 Australian Council of Trade Unions, *Submission 48*, p. 43.

8 Australian Council of Trade Unions, *Submission 48*, p. 43.

9 Government of Canada, International Experience Canada – travel and work in Canada, available at <http://www.cic.gc.ca/english/work/iec/> (accessed 25 August 2015).

10 Australian Council of Trade Unions, *Submission 48*, p. 43; Ms Gerardine Kearney, President, Australian Council of Trade Unions, *Committee Hansard*, 26 June 2015, p. 1.

4.15 The ACTU was highly critical of the scant data on the WHM visa program and requested that the DIBP publish the following:

- the number of working holiday visa holders that do exercise their work rights;
- the duration of their employment;
- the number of employers they work for; and
- their rates of pay, and the locations, industries, and occupations they work in.<sup>11</sup>

4.16 With regard to data collection, Mr David Wilden, acting deputy secretary at the DIBP, noted that the WHM visa program is created by the Department of Foreign Affairs and Trade under a Memorandum of Understanding with respective partner countries. He pointed out that, unlike the sponsorship process in the 457 visa program, the DIBP has no control points to collect the data proposed by the ACTU. Establishing the requisite control points would require changing the WHM visa conditions. This would in turn require changing the nature of the WHM visa program which would require renegotiating all the memorandums of understanding.<sup>12</sup>

4.17 The Australian Chamber of Commerce and Industry (ACCI) emphasised both the economic benefits to Australia of the WHM scheme, in particular the money spent by Working Holiday Makers (WHMs) on accommodation, transport and education, as well as the reciprocal cultural exchange between Australia and partner countries.<sup>13</sup>

4.18 ACCI quoted the following statement from the Joint Standing Committee on Migration inquiry into WHMs, arguing that the sentiments remain true today:

The working holiday program provides a range of cultural, social and economic benefits for participants and the broader community. Those benefits show that the program is of considerable value to Australia and should continue to be supported.

Young people from overseas benefit from a working holiday by experiencing the Australian lifestyle and interacting with Australian people in a way that is likely to leave them with a much better understanding and appreciation of Australia than would occur if they travelled here on visitor visas. This contributes to their personal development and can lead to longer term benefits for the Australian community.<sup>14</sup>

4.19 In terms of reciprocal arrangements between countries party to the WHM program, the committee notes the Fair Work Ombudsman (FWO) reported that

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11 Australian Council of Trade Unions, *Submission 48*, p. 43.

12 Mr David Wilden, Acting Deputy Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 17 July 2015, p. 47.

13 Australian Chamber of Commerce and Industry, *Submission 10*, pp 8 and 15.

14 Joint Standing Committee on Migration, *Working Holiday Makers: More Than Tourists*, Parliament of the Commonwealth of Australia, August 1997, p. xv, in Australian Chamber of Commerce and Industry, *Submission 10*, p. 15.

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31 Australians were granted a Taiwanese WHM visa in 2013 compared to 15 704 Taiwanese granted an Australian WHM visa for the same period.<sup>15</sup>

### **The Seasonal Worker program**

4.20 The Migration Institute of Australia pointed out that the Seasonal Worker program is a strictly regulated program that provides benefits to both Pacific Island workers and farmers (the employers):

In contrast the Seasonal Worker visa programme for Pacific Islanders, a seven month temporary worker visa, successfully protects their working terms and conditions of employment and safety through the strict regulation of sponsoring employers and labour hire companies and the banning of those that do not abide by the required conditions of the programme. These temporary visa holders are paid award wages and are provided with suitable accommodation, health care and transport to and from their homelands.

This programme has been successful in providing both a steady temporary workforce for farmers at harvesting times when an Australian labour force has been either unavailable or unwilling, and jobs and income that do not exist on their home islands. Many Australian growers now employ the same workers year after year, having successfully trained and 'acclimatised' them to the Australian working environment.<sup>16</sup>

4.21 Ms Sarah McKinnon, Manager of Workplace Relations and Legal Affairs at the National Farmers' Federation (NFF) stated that the NFF were 'huge supporters' of the Seasonal Worker program and 'have been seeking to have it expanded to the broader agriculture sector for some time'.<sup>17</sup>

4.22 The NFF was also of the view that the changes to the Seasonal Worker program announced in the Northern Australia White Paper (see chapter 2) would particularly benefit the dairy industry and the wool industry and would enable the greater attraction and retention of reliable seasonal workers.<sup>18</sup>

4.23 While Ms Donna Mogg from Growcom, had a positive view of the Seasonal Worker program, she noted that it was an expensive program to begin with.<sup>19</sup> The cost of the program was confirmed by Ms McKinnon who noted that, aside from the regular wages and conditions, it cost approximately \$2000 to bring a worker to

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15 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. 13.

16 Migration Institute of Australia, *Submission 40*, pp 11–12.

17 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 32.

18 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 32.

19 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 22.

Australia and support them under the Seasonal Worker program.<sup>20</sup> However, Ms Mogg stated that there were clear benefits for growers who were involved with the Seasonal Worker program for a few years:

We had one citrus grower from Gayndah reporting savings of around 22 per cent to her total wage bill. That has nothing to do with underpaying people; these people were being paid very well. This has to do with the efficiencies of a well-trained, returning workforce. So we have actually heard very good things.<sup>21</sup>

4.24 Despite the benefits the program offers to both growers and workers, the World Bank has drawn attention to the slow uptake of places in the Seasonal Worker program, noting that, on average, only 65 per cent of the available places had been filled.

4.25 The World Bank attributed the low uptake of the program to 'the prevalence of illegal workers and backpackers in the horticulture industry' and that this remained 'the key constraint on employer demand for the Seasonal Worker program'<sup>22</sup>

### **Agricultural labour markets and the role of WHM visa workers**

4.26 As noted in chapter 2, the committee heard evidence from a range of farmers and their industry organisations that despite high rates of unemployment in general, and youth unemployment in particular, the agricultural sector experienced ongoing difficulties in recruiting willing and able local workers. The difficulties in finding suitable local labour were particularly apparent where growers were seeking casual short-term employees for intensive periods during the picking season.

4.27 Growers and their representative associations warned that without the additional labour supplied by the WHM visa program, many rural industries were at risk of a contraction in production, and some businesses simply could not continue to operate. The following section presents evidence on the labour force dynamics of the horticulture and fruit picking sectors.

4.28 However, the committee notes evidence it received that seasonal labour shortages extend far beyond the horticulture sector in other regional and rural areas. The NT government noted that many NT employers relied heavily on the WHM visa program to meet customer demand in peak season:

In the Northern Territory's hospitality, primary and construction sectors, these visa holders, in peak season, can account for more than 50% of some employers' workforces. Without access to this workforce source,

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20 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 34.

21 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 22.

22 Mr Jesse Doyle and Professor Stephen Howes, *Australia's Seasonal Worker Program: Demand-side Constraints and Suggested Reforms*, Discussion paper, World Bank Group and Australian National University, 2015, p. 1.

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particularly in high demand seasons, many Northern Territory employers would struggle to meet customer needs and maintain their operations.<sup>23</sup>

***The importance of WHM visa worker to the horticulture industry***

4.29 The committee heard evidence about the labour market requirements in the horticulture industry from Ms Mogg of Growcom. Growcom is the peak industry body for fruit and vegetable growers in Queensland. The committee also heard from strawberry growers on the Sunshine Coast in Queensland, Mr David Fairweather and Mrs Laura Wells from Tastensee Farms.

4.30 Ms Mogg noted that the Queensland horticulture sector contributes around \$2.7 billion per annum to the state's economy and that the horticulture industry in Queensland is larger than cotton, dairy and grains. She outlined the number of businesses and the seasonal nature of employment in the Queensland horticulture industry:

We estimate that there are some 2 700 farms in Queensland and probably—although it is hard to estimate because statistics are not good—around 25 000 workers in this industry. The majority of them would be seasonal, casual, transient and/or backpackers. Production in horticulture is the most labour intensive of all the agricultural industries, often requiring large numbers of employees for relatively short periods of time. Labour costs represent up to 60 per cent of overall operating costs for many businesses.<sup>24</sup>

4.31 Ms Mogg observed that there was intense competition within and amongst horticulture production regions, and that growers are price takers rather than price makers because of the dominance over the retail trade for horticulture produce exerted by Australia's two major supermarkets.<sup>25</sup>

4.32 Ms Mogg also explained the challenges in attracting local labour to remote rural locations for short intensive periods, as well as the competition for labour posed by the resource sector:

Horticulture businesses are usually located in regional and/or remote regions, where demand for labour is high during peak seasons, but this kind of temporary labour, and the volume and availability of this temporary labour source, is limited. The seasonal nature of the industry poses significant constraints in terms of attraction, career development and continuity of skilled labour. Increasing competition for labour from the higher paying LNG and coal seam gas sectors, and previously the mining

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23 Northern Territory Government, *Submission 39*, p. 10.

24 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 19.

25 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 19.

sector, particularly machinery operators, continues to be a drain on our industry and a high concern to our producers.<sup>26</sup>

4.33 The committee notes certain similarities between the challenges faced by producers in the pork industry and those in the horticulture industry. However, there are key differences, in particular the nature of the employment requirements. The pork industry requires permanent long-term employees, while the horticulture industry relies on casual short-term employees (who may return on an annual basis).

4.34 These differences manifest in the type of visa workers that the two industries seek to attract. As noted earlier, the pork industry relies heavily on the 457 visa program. By contrast, the horticulture sector has a heavy reliance on the WHM (417 visa) program.

4.35 Similar to the pork industry, growers and their industry associations in the horticulture sector asserted that the industry was utterly reliant on temporary visa labour to harvest the produce:

Working holiday makers, 417 visa holders, are the lifeblood of our industry. We would like to make that really clear. Without those workers this industry would be in dire straits indeed. The large, flexible labour force ensures that the harvest gets in and that the product is in fact sold. Without them, much product would be left to rot or perish, to the clear detriment of growers, communities, consumers and the Australian economy.<sup>27</sup>

4.36 Once again, the committee was keen to understand why the horticulture industry experienced difficulties in attracting local workers. Mr Fairweather stated that their strawberry farm required up to 140 people over a six month season.<sup>28</sup> Ms Mogg emphasised that the nature of the supplementary labour force required in the industry was unattractive to most Australians:

I think the point has to do with the large numbers of short-term employees. If you are operating out of Caboolture, for example, and you need 250 or 300 workers for a period of six to eight weeks, that workforce is not easy to recruit within the local area. We need to accept that what we have is an ongoing need for supplementary labour. That is important. The anecdotal evidence that we get a lot of is that Australian workers do not want to do this job.<sup>29</sup>

4.37 Mr Fairweather stated that, as manager at Tastensee Farms, they 'always give preference to Australian workers, but we do not always get Australian workers'.<sup>30</sup> Ms

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26 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 19.

27 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 19.

28 Mr David Fairweather, Tastensee Farms, *Committee Hansard*, 12 June 2015, p. 20.

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

30 Mr David Fairweather, Tastensee Farms, *Committee Hansard*, 12 June 2015, p. 20.

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Mogg stated that despite Growcom working with local employment providers, Australians were simply unwilling to do the work:

As I said, one of our programs is focused on workforce planning and working with business owners to talk to them about how they better plan their workforce. That includes working with particularly local employment coordinators and local job providers around getting these guys on. What we consistently hear is: 'You'll get 10 who turn up and three days later you'll have one left.' They do it because they have a requirement to comply with Centrelink reporting obligations or, in truth, this is hard yakka, this is hard work, and not a lot of people are prepared to spend six or seven hours outside bending, lifting, pulling, tugging, pushing et cetera. It can be difficult work. I consistently hear from our growers that they will employ local workers and they would prefer to employ Australian workers, but the source of that labour is not there.<sup>31</sup>

4.38 Mrs Wells agreed with the position put by Ms Mogg. She noted that while they always preference Australian workers, the combination of hard labour, and unstructured, insecure part-time work through the planting period followed by long hours of intense work during the two month picking season, was unappealing to most Australians:

We always give preference to Australian workers. We do all our hiring through our Facebook page. I look for them, I search for them. Essentially last year we had 10 people, out of 200, that were Australian. One, Andrew, ended up staying for the entire season. I trained every single one of them, but one out of that 10 stayed.<sup>32</sup>

4.39 Mrs Wells did, however, point out that Tastensee Farms had a few veteran Australian workers that had returned to work on their farm over a twenty year period:

We have a lot of returning Australians who work for us in that period. They wait for the season to commence. They work for us and a lot of them have for 20-plus years, but finding new recruitment of Australian people has been difficult, essentially because there is no structured time of employment and that kind of thing.<sup>33</sup>

4.40 Given the nature of the work, the 417 visa workers were both a good fit for Tastensee Farms and essential to the business continuing:

I guess that is why the 417s for us in the strawberry industry are vital, because they do not have families here. They do not have lifestyle; they have the idea to work hard for a short period of time, earn some good money, travel and spend it in our country. For us it has worked. It came

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31 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 21.

32 Mrs Laura Wells, Tastensee Farms, *Committee Hansard*, 12 June 2015, p. 21.

33 Mrs Laura Wells, Tastensee Farms, *Committee Hansard*, 12 June 2015, p. 21.

about five years ago and it was a godsend, really. It was a lifeline to our industry.<sup>34</sup>

4.41 The South Australian Wine Industry Association (SAWIA) noted that temporary work visa holders 'are not used on a regular basis in the wine industry'. However, WHM visa holders have been used in situations where an insufficient number of local applicants apply for casual vineyard or crushing work during the vintage (harvest) period.<sup>35</sup>

4.42 SAWIA pointed out that WHM visa workers were well-rewarded for short intensive bursts of work:

Casual vintage workers performing largely unskilled work who are prepared to work long shifts during a condensed period of time (3-10 weeks) can expect to earn an income of approximately \$1600-\$1700 per week taking, shift loadings, weekend and overtime penalties under the Wine Industry Award 2010 into account.<sup>36</sup>

4.43 The committee received similar evidence about the problem of getting workers for short intensive periods from New South Wales (NSW) orchardist, Mr Guy Gaeta, who stated that despite workers on his farm being able to earn between \$200 and \$600 a day during the fruit picking season, there simply were not enough local workers willing to do the work:

We have been orcharding since 1986. To tell you the truth, we had never used any backpackers till the year 2000. We always had enough travelling people around the countryside. But, since 2000, they have either got too old or they have died. If we did need anybody, we used to go to the unemployment service, when it was run by the government, and we used to get people. But now we cannot get any. We desperately need the backpackers, because, out of about 40 people during our cherry harvest, which only goes for a maximum of five weeks—that is maximum—we employ four Australian citizens. Nobody else wants to come and pick cherries. I would never turn away an Australian for a backpacker, but we cannot do without them. They are a vital part of our business now. We still employ Australians but, like I said, it is four out 40.<sup>37</sup>

4.44 The difficulties in obtaining seasonal labour were corroborated by Mr Justin Roach, a cattle and poultry farmer from Tamworth NSW. He stated that his business did employ three permanent Australian workers in key positions on the farm, and they had been there for five years.<sup>38</sup> However, the business also needed a lot of casual staff to do two to three weeks work on a two month cycle. After experiencing significant

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34 Mrs Laura Wells, Tastensee Farms, *Committee Hansard*, 12 June 2015, p. 21.

35 South Australian Wine Industry Association, *Submission 5*, p. 4.

36 South Australian Wine Industry Association, *Submission 5*, p. 4.

37 Mr Guy Gaeta, *Committee Hansard*, 26 June 2015, p. 36.

38 Mr Justin Roach, *Committee Hansard*, 26 June 2015, p. 37.



difficulties in recruiting local labour, Mr Roach had used 417 visa workers and this had 'been a really positive experience'.<sup>39</sup>

4.45 The committee heard similar evidence about labour recruitment from Mrs Roma Britnell, a dairy farmer from south-west Victoria and chair of the markets, trade and value chain policy advisory group with Australian Dairy Farmers Ltd. Mrs Britnell recounted that their business employed permanent staff, and that while they could retain staff in higher level jobs, they were unable to retain local staff for milking and feeding the cows. They have therefore resorted to training and employing a 417 visa worker for a period of a year at a time to assist with milking and feeding.<sup>40</sup>

### **Meat processing labour markets and the role of WHM visa workers**

4.46 At hearings in Brisbane, Sydney and Adelaide, the Australasian Meat Industry Employees' Union (AMIEU) painted a picture of the sweeping changes in the meat processing sector in terms of the growth in the hiring of WHM visa workers and the consequent declining employment prospects for local workers.<sup>41</sup>

4.47 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) noted that when Steggles owned the chicken processing plant in Beresfield (Newcastle), the workforce of 700 was 'predominantly Australian citizens'. Since Baiada took over, the plant has increased in production by about 30 per cent. Yet while the permanent local workforce is about 600, there are now about 700 visa workers on site.<sup>42</sup>

4.48 At the Thomas Foods International sheep processing facility in Tamworth, in the New England region of NSW, the AMIEU estimated that about 70 per cent of the workforce was temporary visa workers.<sup>43</sup>

4.49 Miss Sharra Anderson, Branch Secretary of the AMIEU (South and Western Australia) described what had occurred at Thomas Foods International site at Murray Bridge, a regional centre about 70 kilometres from Adelaide. The Thomas Foods site is one of the largest processing companies in the industry, employing between 1000 and 1100 workers. Miss Anderson stated that between 500 and 600 WHM visa holders were employed by five different labour hire companies at the Thomas Foods site.<sup>44</sup>

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39 Mr Justin Roach, *Committee Hansard*, 26 June 2015, p. 36.

40 Mrs Roma Britnell, Chair, Markets, Trade and Value Chain Policy Advisory Group, Australian Dairy Farmers Ltd, *Committee Hansard*, 26 June 2015, p. 39.

41 See also Name withheld, *Submission 46*; Ms Lisa Chesters MP, *Submission 45*.

42 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, pp 13–14.

43 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 14.

44 Miss Sharra Anderson, Branch Secretary, Australasian Meat Industry Employees' Union (South and Western Australia), *Committee Hansard*, 14 July 2015, pp 12 and 15–17.

4.50 Mr Courtney did not accept that there was currently a genuine need to access workers on temporary visas to fill the less skilled positions, mainly because the unemployment rate is so high in the regional centres where abattoirs are located. Furthermore, Mr Courtney pointed out that the less skilled entry level jobs provide a career path to the higher skilled occupations, and the increasing reliance on temporary migrant workers has reduced the opportunities for local employment.<sup>45</sup>

4.51 As an example of the potential for the employment of local workers in meatworks, Mr Courtney told the committee that the Northern Co-operative Meat Company in Casino NSW directly employed about 1200 workers, employed no more than 20 backpackers on 417 visas, and had training programs in place to engage most of the local school leavers through career paths. He said that the loyalty between workers and the business could be measured by the longevity of the workforce, with over 250 people with 25 years or more of service to the company and the union.<sup>46</sup>

4.52 The committee received conflicting evidence from unions and employers over the need to employ temporary visa workers in skilled operations such as boning, and the actual qualifications or skills that temporary visa workers require in order to perform that work. This is a key point of contention, and it intersects with both the labour agreements and the enterprise agreements in the industry. In particular, the AMIEU drew attention to the negative impact that the extensive hiring of WHM visa workers was having on the operation of union-negotiated enterprise agreements with major industry employers.

4.53 The next section therefore looks at labour agreements in the meat processing sector and the history around the use of 457 visa workers in the industry. This is followed by a look at the labour procurement arrangements of two chicken processing companies, Hazeldene's and Baiada.

4.54 The final section presents two case studies from Queensland where the extensive hiring of WHM visa holders has diminished the employment prospects of local workers.

### ***Labour agreements and enterprise agreements in the meat processing industry***

4.55 Mr Courtney noted that a registered labour agreement for the meat industry was negotiated in 1998 and that the AMIEU was part of the process that implemented the 457 visa program. He stated that the AMIEU had 'no problem with accessing international labour when there is a genuine need for it' and that in 2001–02, many larger employers accessed skilled boners, slicers and slaughtermen from South America.<sup>47</sup>

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45 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 14.

46 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 21.

47 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 14.

4.56 Mr Matthew Journeaux, Assistant Branch Secretary of the AMIEU (Queensland) noted that around 2005, many meat processing companies started sponsoring 457 visa workers from Brazil, China, the Philippines, the United Kingdom and Vietnam to perform the skilled roles.<sup>48</sup> He acknowledged there was a need for 457 visa workers in 2005 when the resources boom was in full swing. However, he also pointed out that the AMIEU was active in instigating, and supportive of, the meat industry labour agreement, under which, an employer is required to reduce its reliance on 457 visa workers, and therefore has to prioritise upskilling local workers.<sup>49</sup>

4.57 Mr Journeaux also noted the AMIEU had enterprise agreements at most of the meat processing sites in Queensland. The agreements had both similarities and differences:

There are different systems of work within meat processing, whether it is paid by a piecework type of arrangement, whether it is kilos or bodies or units, but there are some that are time based arrangements as well, with quantum of work and that attached.<sup>50</sup>

4.58 Under the enterprise agreement, Mr Journeaux noted that a skilled worker such as a boner or slicer would typically earn \$32 an hour, while the award rate is \$19 an hour. This represents a rate of pay approximately 30 per cent higher than the award. A labourer such as a packer would typically earn \$24 or \$25 an hour under the agreement while the award rate is \$17.20 an hour. This represents a rate of pay approximately 20 to 30 per cent higher than the award.<sup>51</sup>

4.59 The differential for skilled meatworkers in South and Western Australia is comparable to the Queensland figures, but the differential for labourers is much less with labourers under the agreement receiving just over \$19 an hour compared to the award rate of \$17.20 an hour.<sup>52</sup>

4.60 The significant difference in wage rates between union-negotiated enterprise agreements and the award, particularly for the skilled operations such as boning, provides a strong incentive for employers to source contract labour to perform the skilled operations.<sup>53</sup>

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48 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 10.

49 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, pp 12–14.

50 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 12.

51 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 12.

52 Miss Sharra Anderson, Branch Secretary, Australasian Meat Industry Employees' Union (South and Western Australia), *Committee Hansard*, 12 June 2015, p. 15.

53 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 12.

4.61 The committee was therefore keen to understand the proportion of temporary visa workers employed in skilled operations such as boning, the skills that the visa workers in the boning rooms had, and the difficulties that employers experienced in getting suitably skilled local labour.

*Hazeldene's Chicken Farm*

4.62 The committee heard evidence from Hazeldene's Chicken Farm Pty Ltd (Hazeldene's) about its business model, and in particular, its employment practices in terms of direct employment versus labour contractor arrangements.

4.63 Hazeldene's is a family owned and operated poultry business located in Lockwood, 14 kilometres from Bendigo in Victoria. Incorporated in 1957, the business began as a hatching and egg-producing operation. In 1972 the family business started slaughtering chickens for the growing chicken meat market at the rate of 400 chickens per week. By 1984 the business was processing 20 000 chickens per week. The business currently processes 550 000 chickens per week, holds around six per cent of the national poultry market, and has contracts with Coles, Aldi and Woolworths.<sup>54</sup>

4.64 Hazeldene's has an enterprise agreement and directly employs 720 people across farming, processing and administration. Direct employment is up from 480 five years ago, an increase of 50 per cent. Of the 720 direct employees, four are 457 visa holders from South Africa employed in highly technical farming roles in the business. There are no 417 visa holders in direct employment. Hazeldene's noted that, as a family business, it has close contact with its employees and prefers to employ directly rather than use labour hire contractors.<sup>55</sup>

4.65 Mrs Ann Conway, People and Performance Manager at Hazeldene's advised that Hazeldene's also uses a labour hire company, Drake International, to supply some of its process workers. The process workers are on the enterprise agreement.<sup>56</sup>

4.66 Two labour hire contractors, ENB Enterprises and Stanley Corporation supply boners to Hazeldene's. While many of the approximately 130 boners are permanent residents, about one third is 457 and 417 visa workers. Hazeldene's outsourced the boning work about 15 years ago due to both a shortage in skilled boners at that time and the growth in the company business.<sup>57</sup>

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54 Mrs Ann Conway, People and Performance Manager, Hazeldene's Chicken Farm, *Committee Hansard*, 19 June 2015, p. 37.

55 Mrs Ann Conway, People and Performance Manager, Hazeldene's Chicken Farm, *Committee Hansard*, 19 June 2015, p. 37; Hazeldene's, *Response to submission 45*, pp 1–2 and covering letter from John Hazeldene.

56 Mrs Ann Conway, People and Performance Manager, Hazeldene's Chicken Farm, *Committee Hansard*, 19 June 2015, p. 38

57 Mrs Ann Conway, People and Performance Manager, Hazeldene's Chicken Farm, *Committee Hansard*, 19 June 2015, pp 39–40; Hazeldene's, *Response to submission 45*, p. 2.

4.67 All the boners are paid according to a services agreement based on the Poultry Processing Award 2010. Boners are classified as Level 5 under the Poultry Award (\$18.66 an hour as at 30 June 2015). Hazeldene's does not directly employ boners, but under the Enterprise Agreement, a Level 5 employee would get \$21.79 an hour. In answer to a question on notice, Hazeldene's advised that the boners were paid an above award entitlement that includes piece rates, but did not specify what that entitlement was.<sup>58</sup>

4.68 One of the key issues that arose during this inquiry was the accountability mechanisms that lead firms had in place to ensure that the workers being supplied to the lead firm by labour hire contractors were receiving the correct rates of pay. Many witnesses (including the regulator) identified cash payments and the failure to maintain accurate employment records as a major problem. These matters are covered further in chapters 7, 8, and 9.

4.69 Hazeldene's advised that one of the boning contractors paid their employees by electronic funds transfer and the other paid by cash, but that the second boning contractor would also be paying by electronic funds transfer by the end of July 2015. In terms of checking that contracted employees were paid correctly, Hazeldene's advised that prior to 9 June 2015, it had conducted ad hoc payslip checks. After 9 June 2015 Hazeldene's advised it would conduct sample checks on a quarterly basis.<sup>59</sup>

#### *Baiada*

4.70 The committee received evidence from the Baiada Group (including both Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd) about its business model, and in particular, its employment practices in terms of direct employment versus labour contractor arrangements. The majority of this evidence is contained in chapter 7 as it pertains to the employment conditions of temporary visa workers employed at Baiada.

4.71 Mr Grant Onley, Human Resources Manager at Baiada, provided the committee with some information relevant to the employment of workers in the boning rooms. Mr Onley stated that of the 6000 workers employed by Baiada, about 13 to 14 per cent were contract workers, and that nearly all the contract workers were employed in the boning rooms.<sup>60</sup>

4.72 According to Mr Onley, Baiada did not have within its permanent directly-employed workforce, people with the necessary skills to perform boning work.<sup>61</sup>

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58 Mrs Ann Conway, People and Performance Manager, Hazeldene's Chicken Farm, *Committee Hansard*, 19 June 2015, pp 39–40; Hazeldene's, answer to question on notice, 19 June 2015 (received 16 July 2015).

59 Hazeldene's, answer to question on notice, 19 June 2015 (received 16 July 2015).

60 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, pp 34–35.

61 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 38.

4.73 Over 90 per cent of the employees in the boning rooms were contract labour on a piece rate under the award.<sup>62</sup> Under the Poultry Processing Award, Mr Onley advised there is:

- Level 1: induction;
- Level 3: processing functions like packing of chickens, packing of tray packs; and
- Level 5: boning and filleting.<sup>63</sup>

4.74 In this regard, the committee notes the FWO has stated that where a modern award or enterprise agreement provides for piece rates, 'there remains a requirement to ensure workers receive wages that equate to award minimums'.<sup>64</sup>

### ***Impact of WHM visa holders on local employment opportunities in Queensland***

4.75 This section presents evidence from the AMIEU at the Brisbane hearing into the impact of WHM visa workers on the employment opportunities for local workers in meat processing plants in regional and rural Queensland.

4.76 Mr McLauchlan, Branch Organiser for the AMIEU (Queensland) recounted his experience from Wallangarra Meats, a small plant owned by Thomas Foods on the NSW-Queensland border. The plant employs between 180 and 200 employees, and 220 at peak times of the year.<sup>65</sup>

4.77 In 2013–14, the AMIEU received complaints from workers that the sons and neighbours of existing workers could not get a job at the plant at the same time the union observed an increase in the number of 417 visa workers being employed there.<sup>66</sup>

4.78 At a meeting with the company on 12 February 2015, the production manager and the works manager told Mr McLauchlan that the company could not find 'suitable locals'. On 19 February, Mr McLauchlan visited three employment service providers, Campbell Page and Mission Australia in Stanthorpe and BEST Employment in Tenterfield. Every provider stated in very similar terms that they had local workers ready and willing to start work immediately:

I could send 12 suitable employees down there now, and eight of them have had Q fever needles and are right to start.

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62 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, pp 34–35.

63 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 46.

64 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. 9.

65 Mr Ian McLauchlan, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 16.

66 Mr Ian McLauchlan, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 16.

...

We do have suitable people for the meat industry. We supply labour to Canterbury Meats at Warwick, so we know what is suitable for your industry.

...

Thank God someone is going to do something to help our locals. It takes the union.<sup>67</sup>

4.79 On 4 March 2015, Mr McLauchlan organised a meeting at Stanthorpe RSL with Campbell Page, Mission Australia, the AMIEU, management from Wallangarra Meats, and 15 jobseekers. While the 15 jobseekers were told at the meeting that they would be offered a job, Mr McLauchlan was only aware of three jobseekers that were subsequently taken on at the meatworks.<sup>68</sup>

4.80 Mr McLauchlan organised a similar meeting on 18 March 2015 at Tenterfield Bowls club with BEST Employment and 30 jobseekers, of whom 26 to 28 were suitable to be employed at the meatworks. On 24 March 2015, Mr McLauchlan visited the plant again and saw numerous 417 visa workers. He estimated that 417 visa workers make up about 70 per cent of the workforce at Wallangarra Meats. Concerned that there did not appear to have been any action on employing local people, Mr McLauchlan invited the media and the employment service providers to tour the plant. Subsequently, Mr McLauchlan estimated that between eight and 12 local people got work.<sup>69</sup>

4.81 Mr Brunjes, a Shed Secretary with the AMIEU (Queensland), relayed a very similar story from Mareeba on the Atherton Tableland. He had worked at the same poultry processing plant for almost 21 years. The plant was previously owned by Australian Poultry and then Bartter brothers. Mr Brunjes told the committee that the plant 'ran for probably 15 years on a totally local workforce'. Following its acquisition by Baiada Poultry, in the last five years, he suggested that there were only about 86 locals in a total workforce of about 200. The rest were overseas workers.<sup>70</sup>

4.82 Following efforts by the AMIEU in collaboration with various employment agencies, Mr Brunjes told the committee that 12 to 15 locals have been employed in the last six to eight months at the Baiada plant in Mareeba. However, he submitted that Baiada 'is very reluctant to change' and that the labour hire company that Baiada use, AP Global, 'just deals with visa holders'. By contrast, the previous labour hire company used by Baiada, QITE, dealt 'totally with locals'. In terms of the labouring

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67 Mr Ian McLauchlan, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 16.

68 Mr Ian McLauchlan, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 16.

69 Mr Ian McLauchlan, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, pp 16–17.

70 Mr Frederick Brunjes, Shed Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 17.

jobs at the meatworks, Mr Brunjes stated that the temporary visa workers are recruited in Asia and have already been allocated jobs before they arrive in Australia. Meanwhile, school-leavers in a regional area are unable to get work at the plant.<sup>71</sup>

4.83 Mr Brunjes outlined for the committee how the labour hire subcontractors supplying workers to the Baiada site had also replaced long-term skilled Australian workers with temporary visa workers. The plant previously employed 16 to 18 Australian boners over a period of 15 years, but Mr Brunjes stated that since AP Global had taken on the contract to supply labour, there were now four local boners and 28 overseas boners. Furthermore, the overseas boners did not have the requisite skills, and had to be trained on-site.<sup>72</sup>

### **Committee view**

4.84 Evidence to the inquiry indicated that regional and rural Australia has particular labour market needs that have not been properly addressed, either through internal migration, or through adequate training. The committee received a large amount of evidence that the nature of the employment requirements in the horticulture and orchard sectors meant that growers were unable to source sufficient casual short-term labour, particularly during the picking season, from the local labour market. Growers and their representative associations warned that without the additional labour supplied by the WHM visa program, many rural industries were at risk of a contraction in production, and some businesses simply could not continue to operate. To be clear, the committee did not receive any evidence that indicated that the reliance of the horticulture sector on the WHM visa program was having a negative impact on employment opportunities for Australian workers in that sector.

4.85 The committee notes that the changes to the Seasonal Worker program announced in the White Paper to reduce costs to business, increase worker numbers and allow more countries and industries to participate should encourage the growth of the program. Although there was no direct evidence to the inquiry about a negative impact from the program on employment opportunities for local workers, the ACTU was critical about the lack of consultation over the government's decision to expand the Seasonal Worker program. The ACTU also cautioned that the use of labour hire companies and similar intermediaries in the Seasonal Worker program could increase the risks of workers under the program being exploited.

4.86 With the above caveats in mind, evidence to the inquiry therefore supports the view that the Seasonal Worker program is an adequately regulated program that offers benefits to employers and to the workers in the program. Nevertheless, the committee is of the view that a more prudent approach would be to include the Seasonal Worker program within the remit for review of a re-constituted MACSM.

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71 Mr Frederick Brunjes, Shed Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 17.

72 Mr Frederick Brunjes, Shed Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 17.



4.87 However, the committee also notes the heavy reliance of the horticulture industry on the WHM visa program to address supply gaps in the rural labour market. The committee is disturbed by reports that the Seasonal Worker program is under-subscribed and is being undercut by the WHM visa program. The WHM visa program is a poorly-regulated program, and the bulk of the evidence to the inquiry showed that the WHM visa program has been abused by unscrupulous labour hire companies in Australia with close links to labour hire agencies in certain south-east Asian countries.

4.88 The ostensible basis of the WHM visa program is to provide a cultural exchange and to allow visa holders the opportunity to work during their holiday in Australia. The committee is therefore concerned that the rhetoric of the previous Abbott government in the White Paper on Northern Australia flies in the face of the supposed aims of the program by blatantly stating that potential changes would allow a WHM visa holder to work an entire year for the one employer and to work for the entire two years of their visa. In effect, the government clearly views the WHM visa as a de-facto working visa to bring low-skilled labour into the country.

4.89 It is clear from the evidence received by the committee that labour hire companies and certain employers already view the WHM visa program in these terms and are in fact not only using the program to fill potential shortfalls in labour, but also to gain access to cheaper labour.

4.90 The committee acknowledges, as did the meatworkers union, the AMIEU, that there may have been instances in the early 2000s when there was a shortage of skilled labour. However, that is no longer the case, particularly if appropriate training and upskilling was occurring within meat processing sites.

4.91 The boning room in a chicken processing site is staffed by skilled labour paid at a higher rate, either under an enterprise agreement, or under the award. The committee received evidence from one chicken processor that the majority of the labour in their boning rooms was in fact permanent residents (employed under contract), and that about a third was made up of visa workers. On the other hand, the committee received evidence from another company that suggested that while almost all of the labour in the boning room was on contract, very little of it was local labour.

4.92 The large-scale hiring of temporary visa workers in skilled positions points to a lack of commitment by employers to upskilling suitable local workers from within the pool of lower-skilled labourers, particularly given evidence that local workers have had to train visa workers to perform skilled tasks. In this regard, the committee is concerned about evidence suggesting some employers are hiring unskilled 417 visa workers to perform skilled tasks. The lack of commitment to training local workers contrasts markedly with what the committee understands to be the historical method of recruiting skilled boners, slicers and slaughterers, namely upskilling local workers from within the existing pool of labourers (this matter is covered in greater detail in chapter 5).

4.93 In addition to the impacts on training and upskilling, the committee is concerned that the use of labour hire companies to provide contract labour to fill skilled positions within meat processing plants puts downward pressure on wages. In a situation where all the labour in a skilled area such as a boning room is on contract

and paid according to the award, then if the remainder of the workforce is on an enterprise agreement, the use of contract labour undercuts the enterprise agreement and the wages of Australian workers in what is already a comparatively low-paid industry.

4.94 In light of the issues discussed above, the committee can understand that a business would want to have the agility to respond to either upturns or downturns in demand by having a certain amount of flexibility in its labour hire arrangements. However, it is not clear to the committee why two-thirds of the skilled labour force could not be employed permanently with flexibility being provided by sourcing the remaining third on contract as required, unless the overall intent is to lower labour costs even further.

4.95 In this regard, the committee concludes that the use of labour hire companies to supply contract workers to a meat processing site is a deliberate strategy to cut labour costs above and beyond any legitimate need for a certain degree of flexibility in the numbers of meatworkers employed at any one time.

4.96 The committee acknowledges that this strategy may be pursued in response to business pressures brought to bear either by cost-cutting by competitors or the pressures brought to bear by the purchaser, including the major supermarket chains. The committee is therefore of the view that workers supplied to a workplace by a labour hire company should be bound by the enterprise agreement at the site and not by the award.

4.97 Furthermore, as evidence to the committee has demonstrated, the large scale and widespread hiring of 417 visa workers severely curtails the employment prospects of local workers in rural and regional areas of Australia, areas that are already suffering from higher than average levels of unemployment and youth unemployment in particular.

4.98 In terms of labouring positions within meatworks, one of the questions that arose for the committee was whether it was possible for meatworks located in rural and regional Australia to fill all or most of their labouring positions with local workers. Of course, these questions cannot be answered definitively, but the committee heard from the AMIEU that most meat processing plants used to employ their labour directly. The committee also heard that a farmers' cooperative in northern NSW continues to employ about 1200 workers directly, employs no more than 20 WHM visa holders, and has training programs to provide local school leavers with a career entry path into the meatworks.

4.99 In contrast to the evidence from the horticulture sector, the committee therefore finds it difficult to believe that there is a genuine shortage of unskilled labour in the vicinity of most of the meat processing plants in regional Australia. The committee has received numerous examples of local workers being willing and able to work but unable to obtain employment. Further, the committee has heard that when an existing business is sold, the new owners use labour hire companies that source most of their labour internationally through the 417 visa program. Evidence to the committee has demonstrated that this was the dominant business model in the sector.

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**Recommendation 10**

**4.100** The committee recommends that the reconstituted MACSM review the Working Holiday Maker (417 and 462) visa program. The review should include, but not be limited to, an examination of the costs and benefits of the continued operation of the optional second year extension to the visa, and the costs and benefits of providing government with the ability to set a cap on the numbers of Working Holiday Maker program visas issued in any given year.

**Recommendation 11**

**4.101** The committee recommends that the Department of Immigration and Border Protection be sufficiently resourced to allow it to pursue inter-agency collaboration that would enable it to collect and publish the following data on the Working Holiday Maker visa program:

- the number of working holiday visa holders that do exercise their work rights;
- the duration of their employment;
- the number of employers they work for; and
- their rates of pay, and the locations, industries, and occupations they work in.

**Recommendation 12**

**4.102** The committee recommends that the reconstituted Ministerial Advisory Council on Skilled Migration (MACSM) review the Seasonal Worker program to ensure the program is meeting its stated aims.



**PART III**  
**Training opportunities**



## CHAPTER 5

### Impact of temporary visas on training and skills development

#### Introduction

5.1 An underlying principle of the 457 visa program is that employers who sponsor a 457 visa worker will train and upskill local workers so that reliance on temporary visa workers can be reduced over time.

5.2 A key point made by several submitters and witnesses to both this and previous inquiries has been the negative impact that temporary visa programs have had on the opportunities for training across a range of industry sectors. Concerns were also expressed that recent Australian higher education graduates were missing out on employment opportunities due to a decline in the provision of graduate employment programs and an employer preference for recruiting visa workers. These submitters argued that the decline in workforce training and graduate employment had serious implications for Australia's future workforce capacity.

5.3 Conversely, other submitters and witnesses pointed out that the introduction of training benchmarks under the 457 visa program addressed these concerns, first, by imposing additional training costs on sponsoring employers to remove any perverse incentive to employ overseas workers, and second, by creating funds that would contribute positively to the national training effort.

5.4 This chapter therefore considers the impact of Australia's temporary work visa programs on training and skills development in Australia, the utility of the current training obligations, and proposals for improving their effectiveness so as to ensure the development of Australia's skills base and future workforce capacity.

#### Impact of 457 visas on training and skills development, graduate employment programs, and future workforce capacity

5.5 Several unions stated that the incentive for employers to train Australian workers has been undermined by the easy availability of temporary visa workers.<sup>1</sup> These unions identified cost as a relevant factor in the decision by certain employers to recruit overseas workers rather than train or up-skill Australian workers.

5.6 The Australian Federation of Air Pilots (AFAP) submitted that 'in certain instances the 457 visa program has operated to reduce training and skills development of Australian commercial pilots'. The AFAP provided an example where an airline introduced a new aircraft to Australia and then advertised for pilots under the 457 visa program. Although 'there were numerous experienced and qualified pilots on similar turbo-prop aircraft within Australia', it appeared the airline was trying to avoid the cost of providing 'specific training to the Australian pilots (instead preferring pilots

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1 See, for example, the Australian Council of Trade Unions, *Submission 48*, p. 51.

already qualified on the type)'. AFAP made the point that recruiting 457 visa workers in these circumstances effectively reduced skills development within Australia.<sup>2</sup>

5.7 Likewise, the Australian Institute of Marine and Power Engineers (AIMPE) expressed concern about the dearth of relevant training for Australians trying to enter the marine industry and that employers were finding it cheaper to employ 457 visa workers than to train Australian workers. The AIMPE noted:

Gradually shipping companies have begun reducing the intake of cadets and trainee engineers into the marine industry. It is much easier for them to access the current temporary work visa programs and it is cheaper than to train. Meeting the current benchmark training requirements is easy to get around. This trend has serious and long term implications for marine engineers' employment in this country. Such benchmarks are ineffective and have not helped at all in the marine industry sector.<sup>3</sup>

5.8 Similarly, unions expressed concerns about the impact of temporary work visa holders on, firstly, the professional formation and career progression of Australian tertiary education graduates, and secondly, on the future workforce.

5.9 The Australian Council of Trade Unions (ACTU) pointed to an alarming drop in graduate employment in 2014:

...the latest figures show that only 68.1% of new bachelor degree graduates seeking full-time work were in full-time jobs in 2014, down from 76.1% in 2012. This is the lowest in the history of the series, which began in the early 1970s. In Western Australia, the results of a recent survey found just 53.1% of graduates were in full-time employment compared with 68.5 % in 2011.<sup>4</sup>

5.10 Specific concerns about increasing unemployment rates amongst engineering graduates and an inability to secure professional consolidation on the job were expressed by Engineers Australia:

When temporary migrant engineers are used in adverse demand circumstances, there are likely to be impacts on employment opportunities for new Australian engineering graduates. Statistics show that unemployment among new engineering graduates has increased which is a problem in its own right. However, professional formation for new graduates is undertaken on the job and when positions are occupied by temporary migrants, opportunities for professional formation for new graduates are restricted.<sup>5</sup>

5.11 Along with the impact on individuals of an inability to secure graduate employment, however, unions also pointed to systemic consequences in terms of effective workforce planning and the provision of a future workforce.

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2 The Australian Federation of Air Pilots, *Submission 15*, p. 2.

3 Australian Institute of Marine and Power Engineers, *Submission 17*, pp 5–6.

4 Australian Council of Trade Unions, *Submission 48*, p. 49.

5 Engineers Australia, *Submission 4*, p. 4.



5.12 The Australian Nursing and Midwifery Federation (ANMF) noted that while graduates possess substantial theoretical knowledge, they 'require further consolidation of their clinical skills to become a skilled practitioner'. Furthermore, graduate nurses need to obtain sufficient employment in order to retain their registration and be able to work as a nurse.<sup>6</sup>

5.13 Ms Annie Butler, Assistant National Secretary of the ANMF noted that their union had 'predicted for some time that in 10 to 15 years we are going to see perhaps half the nursing and midwifery workforce retire'. To prepare for this eventuality, university places were increased such that Australia now produces sufficient nursing graduates.<sup>7</sup>

5.14 Mr Nicholas Blake, Senior Industrial Officer with the ANMF noted that, historically, most healthcare facilities had a graduate program that employed nursing graduates. Indeed, twelve month graduate programs developed and implemented by an employer have been 'identified nationally as an effective way to deliver support for newly qualified nurses and midwives moving from the academic environment into the workforce'.<sup>8</sup>

5.15 However, the ANMF argued that temporary visa programs are not being used as intended because 'increasingly employers are reducing graduate nurse programs in favour of a greater reliance and utilisation of temporary overseas workers'.<sup>9</sup>

5.16 Ms Butler warned that the current inability of nursing graduates to transition into the professional workforce is a serious structural problem with potentially long-term negative consequences for the future workforce.<sup>10</sup> This is not only a lost investment in the education of professional health workers, but if not remedied, 'will represent a lost generation of Australian graduates to the Australian health and aged care sectors'.<sup>11</sup>

5.17 By contrast, Fragomen submitted that the root cause of the deficit in the training and skills development of Australian workers was a lack of government investment in training and skills development over the previous 20 years, particularly in the STEM subjects of science, technology, engineering and mathematics. Fragomen

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6 Australian Nursing and Midwifery Federation, *Submission 37*, p. 12.

7 Ms Annie Butler, Assistant National Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 21.

8 Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 23; Australian Nursing and Midwifery Federation, *Submission 37*, pp 12–13.

9 Australian Nursing and Midwifery Federation, *Submission 37*, p. 13.

10 Ms Annie Butler, Assistant National Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 21.

11 Australian Nursing and Midwifery Federation, *Submission 37*, p. 12.

contended that there was a limit on the extent to which the shortfall in training and skills development could be met by the private sector.<sup>12</sup>

5.18 Fragomen argued that the issue of training and skills development and its relationship to the use of the 457 visa program was being examined from the wrong angle. In their view, the lack of adequate training and skills development opportunities for Australians was causing business to use temporary visa programs as an alternative source of skilled labour, rather than the use of temporary visa programs leading to a reduction in training and skills development opportunities for Australians.<sup>13</sup>

### **Impact of 417 visas on training in the meat processing sector**

5.19 The committee heard evidence from the Queensland Branch of the Australasian Meat Industry Employees' Union (AMIEU) regarding training in the meat processing sector, and the impact that the heavy reliance on temporary work visas is having on the provision of training to Australian workers.

5.20 Mr Matthew Journeaux, Assistant Branch Secretary of the AMIEU (Queensland), noted the meat industry, and in particular red meat processing, 'is a very traditional industry'. It is 'very labour intensive and very competitive' and 'does not have huge amounts of technological improvements'.<sup>14</sup>

5.21 Mr Journeaux gave a breakdown of the skill sets in the industry:

The workforce typically consists of 30 per cent highly skilled—slaughterers, boners and slicers—and approximately 70 per cent labourers with varying degrees of skill required to perform their roles.<sup>15</sup>

5.22 There are no formal apprenticeships for meatworkers working in the meat processing industry. Instead, the training for skilled work occurs on the job with suitable candidates selected from the pool of existing employees performing unskilled roles at the establishment:

Typically the skilled positions have been filled from the labouring pool where labourers show promise and are trained to become slaughterers, boners and slicers. ...The candidates for training in those more skilled positions would typically perform their training on the job, where they would be assigned a mentor and their training would take place on the chain.<sup>16</sup>

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12 Fragomen, *Submission 21*, p. 22.

13 Fragomen, *Submission 21*, p. 22.

14 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 10.

15 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 10.

16 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 10; Australasian Meat Industry Employees' Union (Queensland Branch), *Submission 52*, p. 2.

5.23 As noted in chapter 4, both Mr Journeaux and Mr Grant Courtney, Branch Secretary of the AMIEU (Newcastle and Northern NSW Branch), had noted that the AMIEU was an active and supportive player in the meat industry labour agreement under which, an employer is required to reduce its reliance on 457 visa workers. In order to meet those obligations, an employer must therefore have processes in place to prioritise the upskilling of the local labour force.<sup>17</sup>

5.24 It was within this context that the AMIEU drew attention to what they saw as a 'disturbing' new trend that had emerged since 2010, namely the extensive hiring of large numbers of 417 visa holders (also known as the Working Holiday Maker or 'backpacker' visa) such that 417 visa workers now made up 'a significant proportion of the unskilled workforce of most meat processing establishments'.<sup>18</sup>

5.25 The AMIEU made two key points about this new practice. First, the hiring of 417 visa workers reduced the opportunities for local workers to obtain unskilled employment in meat processing plants. And second, because of the way training occurs in the meat processing sector, hiring 417 visa workers reduced 'the pool of local workers in the workforce who could be trained for skilled positions' and therefore deprived local workers of opportunities for training and upskilling.<sup>19</sup>

### **The effectiveness of the current training obligations**

5.26 The Australian Government Department submission noted the 457 visa program 'is not intended to address long-term workforce needs', but rather 'support and complement existing domestic education, training and skills development'.<sup>20</sup>

5.27 In 2009, training benchmark requirements were introduced for the 457 visa program 'to ensure that employers are working to reduce their future reliance on the program through the provision of training and skills development to Australian citizens and permanent residents'.<sup>21</sup>

5.28 The two training benchmarks in the 457 program require subclass 457 sponsors operating in Australia for 12 months or more to demonstrate:

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17 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, pp 12–14.

18 Mr Matthew Journeaux, Assistant Branch Secretary, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 10; Australasian Meat Industry Employees' Union (Queensland Branch), *Submission 52*, p. 3; Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 14.

19 Australasian Meat Industry Employees' Union (Queensland Branch), *Submission 52*, p. 3; Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 14.

20 Australian Government Department, *Submission 41*, p. 7.

21 Australian Government Department, *Submission 41*, p. 7.

- recent expenditure, by the business, to the equivalent of at least two per cent of the payroll of the business, in payments allocated to an industry training fund that operates in the same industry as the business (benchmark A); or
- recent expenditure, by the business, to the equivalent of at least one per cent of the payroll of the business, in the provision of training to Australian citizens or permanent residents employed by the business (benchmark B).<sup>22</sup>

5.29 This means that if a business cannot prove it uses one per cent of its payroll to train its workers, it must pay two per cent of its payroll into a registered training organisation or training fund. In cases where a business has traded in Australia for less than a year, 'it must have an auditable plan to meet the training benchmarks'.<sup>23</sup>

5.30 The committee received evidence that businesses in certain industries regularly exceeded the training benchmarks. The Australian Mines and Metals Association (AMMA) pointed out training the local workforce was their 'first priority' and that the mining industry spent over \$1.15 billion on training in 2011–12.<sup>24</sup>

5.31 Indeed, AMMA noted that, compared to the existing training benchmarks for the 457 visa program where employer sponsors are required to spend either 1 or 2 per cent of total payroll on training Australians, 'companies in the resource industry exceed those requirements, in fact contributing up to 5 per cent of payroll to training as an industry'.<sup>25</sup> Likewise, Fragomen also noted the majority of their clients had comprehensive training programs in place because they recognised the inherent value in skills development.<sup>26</sup>

5.32 The committee also received evidence of collaboration between unions and employers in the training sphere in an effort to fill skill capacity and training gaps and compensate for the lack of suitable vocational training.

5.33 For example, in 2010, the Maritime Union of Australia (MUA) and industry employers jointly established the not for profit company Maritime Employees Training Limited (METL) as a response to a skill shortage of seafarers. The MUA noted that establishing training organisations 'is neither cheap nor easy' and required extensive research, planning and networking with industry. However, by the end of the 2012–13 financial year, METL had facilitated the training of over 100 seafarers and 36 had completed their traineeship, either with METL or with another employer.<sup>27</sup>

5.34 The above examples notwithstanding, the committee heard various criticisms about the operation of the current training requirements under the 457 visa program.

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22 Australian Government Department, *Submission 41*, p. 7.

23 Australian Government Department, *Submission 41*, p. 7.

24 The Australian Mines and Metals Association, *Submission 34*, p. 4.

25 The Australian Mines and Metals Association, *Submission 34*, p. 5.

26 Fragomen, *Submission 21*, p. 22.

27 Maritime Union of Australia, *Submission 22*, p. 7.

5.35 Mr Henry Sherrell, Policy Analyst at the Migration Council of Australia (Migration Council) was critical of the lack of an adequate 'paper trail' to determine if a particular company was in fact meeting its obligations under training benchmark A or training benchmark B. He noted there was no publicly available data about the size of the funds under training benchmark A and who is receiving those funds.<sup>28</sup>

5.36 Mr Sherrell also pointed to the difficulties encountered by employers in actually proving that they meet the training benchmarks:

Anecdotally, many employers complain that, when you become a sponsor, the hardest part is demonstrating that you spend one per cent on training. Many pass that threshold, but going through the process to document and prove it is hard.<sup>29</sup>

5.37 The ANMF and the ACTU argued that the current requirements are ineffective because employers are not obliged to provide training in the same positions that they employ temporary visa workers. The ANMF suggested that the nursing profession benefited little from the current arrangements because the training resources are 'typically consumed by medical staff, specialists and senior management'.<sup>30</sup>

5.38 The ACTU also pointed to inequities within the current scheme such that an employer using just one 457 visa worker is required to meet the same training benchmark as an employer using multiple 457 visa workers.<sup>31</sup>

5.39 It was recognised that the availability of temporary overseas labour is not the only factor contributing to a deteriorating record on skills formation. The ACTU argued that the 'historical infrastructure for skills formation in Australia has been steadily dismantled over the last two decades':

On the one hand we have seen a proliferation of private training colleges as a contestable training market has been set up, and public training providers have lost funding and resources. On the other hand, many of the large public utilities or enterprises which once provided the core of the skilled blue-collar workforce have been privatised and have radically decreased their training commitment.<sup>32</sup>

5.40 However, employers also made the point that deficiencies in the national training effort relate not only to specific vocational skills and the resourcing of training institutions, but also to a broader failure to ensure that young people have basic employability skills.

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28 Mr Henry Sherrell, Policy Analyst, Migration Council of Australia, *Committee Hansard*, 17 July 2015, p. 5.

29 Mr Henry Sherrell, Policy Analyst, Migration Council of Australia, *Committee Hansard*, 17 July 2015, p. 5.

30 Australian Nursing and Midwifery Federation, *Submission 37*, p. 13; see also Australian Council of Trade Unions, *Submission 48*, p. 50.

31 Australian Council of Trade Unions, *Submission 48*, p. 50.

32 Australian Council of Trade Unions, *Submission 48*, p. 52.

5.41 For example, in response to committee questions about steps that could be taken to address high youth employment in terms of encouraging local workers to consider working in agriculture, Ms Sarah McKinnon, Manager of Workplace Relations and Legal Affairs at the National Farmers' Federation stated:

Schools do not regularly offer or encourage agricultural courses, because of the difficulty they have in getting their students out into the farm and back each day and the costs that that involves, so there is not great take-up in the TAFE jurisdiction—in the VET area. We do need to do more about getting these young people job ready for the kind of work that they are asked to do, because in agriculture a lot of the training is done on the job. So we do not always need structured, formal training before we get people out onto the farm, but what we do need is for them to have those basic job-ready skills: motivation, what to wear, the importance of turning up every day at the same time for the same period and those kinds of basic skills. I think we need to do a lot more work, particularly in the areas where there is high youth unemployment.<sup>33</sup>

### **Proposals to replace the current training arrangements**

5.42 Given the trenchant criticism of the inadequate operation of the current training benchmarks, and the lack of any hard data with which to measure their effectiveness, several submitters and witnesses proposed alternative arrangements.<sup>34</sup>

5.43 In general, many of the proposals aimed to:

- ensure that employers who have a genuine need to sponsor overseas workers to fill skill shortages are also training the future workforce, and thereby reducing their need to rely on temporary overseas workers in future;
- increase employment and training through trade apprenticeships, traineeships and graduate degrees in the specific occupations allegedly in short supply; and
- increase the cost of accessing 457 visa workers relative to the cost of training Australian workers, especially young people in entry-level positions.<sup>35</sup>

### ***Requirements to engage Australian graduates, trainees, and apprentices***

5.44 The key proposal put forward by several unions was a requirement to employ Australian graduates, trainees, and apprentices in the same occupations where the employer is seeking to use 457 visa workers. These submitters argued that the measures would develop the future skills base and reduce employer reliance on overseas workers.

5.45 In this regard, the committee notes that similar recommendations have a long history and that the 2008 Deegan review suggested comparable requirements around

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33 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 33.

34 See Australian Council of Trade Unions, *Submission 48*, p. 50.

35 See for example, Australian Council of Trade Unions, *Submission 48*, pp 54–55.

the training commitments of Australian employers and the employment of Australian graduates:

Employers seeking to benefit by bringing overseas workers to Australia should be required to make some tangible commitment to the training of Australians in the skills sought. The commitment could be commensurate with the level of overseas labour employed but should also have a real connection to training in the appropriate area of skill. Large employers could be required to hire a percentage of apprentices or new graduates. This, at least, might ensure that Australian graduates were not passed over for employment opportunities because they lacked relevant work experience and because it is more cost effective to employ experienced employees from outside Australia. Small employers could participate in industry-wide training schemes or contribute to scholarship or training funds in appropriate areas.<sup>36</sup>

5.46 In terms of trade and technical occupations, the ACTU proposed that employer sponsors of 457 visa tradespersons 'must demonstrate that Australian apprentices represent at least 25 per cent of the sponsor's total trade workforce'. The threshold for this requirement would be the employment of four or more tradespersons.<sup>37</sup>

5.47 With regard to trainees and cadets, the AIMPE recommended that all employers using 457 visa workers 'be required to employ a new entrant trainee or cadet engineer to be trained for the position that is filled by the temporary worker'.<sup>38</sup>

5.48 In relation to graduate employment, the ANMF recognised that running a graduate employment program came at a cost to an employer 'because new graduates need support in the early period of their employment' whereas overseas workers may already have the requisite skills. However, the ANMF noted there were also 'cultural, professional and healthcare systems issues' that overseas workers faced on arrival in Australia and that it may therefore take some time for overseas workers to adjust. Consequently, while there may be instances where it could be cheaper to employ overseas labour, in other instances, the cost of bringing both graduates and overseas workers up to speed would be roughly equivalent.<sup>39</sup>

5.49 The ANMF emphasised the importance of graduate employment programs in building workforce training capacity and therefore recommended:

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36 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review Final Report*, October 2008, p. 42.

37 Australian Council of Trade Unions, *Submission 48*, p. 55; see also Mr Ron Monaghan, General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 8; Unions NSW, *Submission 35*, p. 3.

38 Australian Institute of Marine and Power Engineers, *Submission 17*, p. 6.

39 Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, pp 23–24.

- every nurse or midwife graduate be afforded and guaranteed access to a graduate program to ensure the next generation of nurses and midwives are retained in the sector;
- each employer of a nurse on a temporary work visa be required to employ one graduate nurse on a full time basis for each nurse at the enterprise employed under a temporary work visa; and
- a 457 sponsor of nurse labour be entitled to a direct payment from the Commonwealth in recognition of the start-up costs and administration of graduate programs.<sup>40</sup>

5.50 More generally, the ACTU proposed that:

...where employers are sponsoring 457 visa workers in professional and managerial occupations, recent Australian higher education graduates with less than 12 months' paid work experience should represent at least 15% of the sponsor's managerial and professional workforce.<sup>41</sup>

### ***Training levy***

5.51 The committee notes that the Azarias review proposed replacing the current training benchmarks with a training levy that would be paid into existing government programs run out of the industry and employment departments that specifically support apprenticeships and training.

5.52 The proposed levy would be \$800 per visa holder for a large business, and \$400 per visa holder for a small business. In practice, the more 457 visa workers employed, the greater the levy that would be paid.<sup>42</sup>

5.53 While several submitters supported replacing the current benchmarks with a training levy, there was sharp disagreement over the size of the levy to be imposed.

5.54 The Migration Council supported the levy amounts proposed by the Azarias review.<sup>43</sup>

5.55 However, the ACTU argued that 'the proposed contribution rate falls far short of what is required and is actually a step backwards from the current 1 per cent payroll requirement'. Instead, the ACTU proposed a \$4000 levy for each 457 visa worker employed. This levy would 'be paid to an approved industry training fund, group

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40 Australian Nursing and Midwifery Federation, *Submission 37*, p. 12; Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 25.

41 Australian Council of Trade Unions, *Submission 48*, p. 58.

42 Mr Henry Sherrell, Policy Analyst, Migration Council of Australia, *Committee Hansard*, 17 July 2015, p. 5; Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 61.

43 Mr Henry Sherrell, Policy Analyst, Migration Council of Australia, *Committee Hansard*, 17 July 2015, p. 5.



training company or the Commonwealth (where no relevant fund or training company exists).<sup>44</sup>

5.56 The ACTU further noted that the 'amount of \$4000 is the same as the standard incentive payment the employer would have received if they had actually trained an Australian apprentice'. According to the ACTU, this measure would provide the appropriate incentive to an employer to take on an apprentice:

This means that if 457 visa sponsors actually employ a new apprentice, they will be entitled to a payment from the Commonwealth for this same amount. This provides an incentive to take on Australian apprentices as the net cost to the sponsor will be zero if they do so.<sup>45</sup>

5.57 As noted earlier, the ANMF and the ACTU were critical of the current requirements under the 457 visa program because employers are not obliged to conduct training in the same occupations that they employ temporary visa workers. The ANMF and the ACTU therefore recommended that training funds be directly linked to the occupation in which the employer was sponsoring temporary visa workers.<sup>46</sup>

5.58 By contrast, Ernst and Young was concerned that an annual training fund contribution would 'result in an unreasonable financial burden on many sponsors':

The proposed fund will impose an additional financial burden on employers, and large employers in particular, who invest in training their Australian employees regardless of any immigration requirements and who already make investments in upskilling and engaging target groups such as youth and Indigenous Australians.<sup>47</sup>

5.59 To address this, Ernst and Young proposed that simplification and deregulation could be achieved by:

- retaining current training benchmark B: expenditure of at least 1 per cent of payroll on training Australian citizen and permanent resident employees; and
- replacing training benchmark A (contribution to an industry training fund of 2 per cent of payroll) with the proposed annual training fund contribution.<sup>48</sup>

### ***Data collection***

5.60 The committee received evidence about the paucity of accurate publicly available information across a range of areas related to the employment of temporary visa workers and training.

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44 Australian Council of Trade Unions, *Submission 48*, p. 57; see also Mr Ron Monaghan, General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 8.

45 Australian Council of Trade Unions, *Submission 48*, p. 57.

46 Australian Nursing and Midwifery Federation, *Submission 37*, p. 14; Australian Council of Trade Unions, *Submission 48*, p. 57.

47 Ernst and Young, *Submission 24*, p. 6.

48 Ernst and Young, *Submission 24*, p. 7.

5.61 The ANMF stated it was very difficult to obtain information on both the number of people that come to Australia and work under different visa arrangements, and the domestic training effort by 457 visa sponsors in the occupations where 457 visa workers are being sought.<sup>49</sup>

5.62 Ms Butler noted that the nursing regulatory authority would have figures on the number of migrants gaining registration as enrolled and registered nurses. However, she did note the overall numbers may be difficult to ascertain if some temporary migrant workers in aged care did not have a requirement for registration.<sup>50</sup> Nonetheless, the ANMF recommended that the Australian Health Practitioner Regulation Agency (AHPRA) publish annually all new registrations of nurses and midwives on temporary work visas.<sup>51</sup>

5.63 As noted earlier, the Migration Council drew attention to the absence of data on the training benchmarks and submitted that the lack of data hampered any attempt to examine the effectiveness or otherwise of the training benchmarks.<sup>52</sup>

5.64 The ACTU was highly critical of the absence of data about the trends in national training:

It remains a glaring hole in the governance and transparency of the program that there continues to be no information available on, say, how many apprentices are being trained by sponsors who are employing 457 visa workers or whether the number of apprentices being trained by these sponsors is increasing or decreasing over time.

As outlined above, if the standard of 25% was applied to the current 457 tradespersons workforce of 27 790, the expected number of apprentices and trainees across those workplaces would be almost 7000 – but this information is not available.

Without this information, it is simply not possible to verify if there is in fact any training dividend at all from the 457 visa program.<sup>53</sup>

5.65 In order that the public could be reassured that employers of 457 visa workers were in fact offering meaningful training, and developing Australia's future skills

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49 Ms Annie Butler, Assistant National Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, pp 20–21; see also Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 20.

50 Ms Annie Butler, Assistant National Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, pp 20–21; see also Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 20.

51 Australian Nursing and Midwifery Federation, *Submission 37*, p. 8.

52 Mr Henry Sherrell, Policy Analyst, Migration Council of Australia, *Committee Hansard*, 17 July 2015, p. 5.

53 Australian Council of Trade Unions, *Submission 48*, p. 58.

base, the ACTU recommended that the following data should be collected and made publicly available:

- the number of employers currently sponsoring skilled tradespersons (ANZSCO level 3) on 457 visas;
- the number of apprentices and trainees employed directly by these 457 sponsors, in total and by sponsor industry and state/territory;
- the trades in which those apprentices are being trained, including the number of apprentices in the same trade classifications in which the 457 visa workers are employed;
- whether the apprentice and trainee numbers in each category have increased, decreased, or have not changed since approval of the employer as a sponsor; and
- the details of any other substantive action taken by the sponsor to increase apprentice and trainee training in each category (other than directly employing apprentices) e.g. participation in group training schemes as the host employer, cadetships and the results of such action.<sup>54</sup>

### **Committee view**

4.16 One of the key prerequisites for community acceptance of the 457 visa program is that skilled migration should complement domestic training. It should not be used as a substitute for training Australian workers, graduates, and apprentices. The committee is particularly mindful that the community needs to be reassured that temporary work visa programs are not having a negative impact on training opportunities for Australians, particularly young Australians.

5.66 Evidence to the inquiry has demonstrated the links between the demand for temporary visa workers and training and skills development in Australia, the skills base of the permanent Australian workforce, and future workforce capacity.

5.67 It is of the utmost concern, therefore, when evidence indicates that the 457 visa program has undermined the incentive for employers to train Australian workers, graduates and apprentices. It is a clear indication that the 457 visa program is not being used as intended when employers have taken what may appear to be the cheaper route of recruiting 457 visa workers rather than training Australian workers.

5.68 This is a particularly short-sighted approach, with obvious costs to those Australian workers, graduates and apprenticeship applicants that will miss out on opportunities for training and upskilling. In addition, there are implications for workforce capacity. Employing 457 visa workers rather than training Australians will perpetuate skills gaps in areas of identified need. Perhaps more seriously though, Australia risks creating skills gaps for the future by denying Australian workers and graduates of tertiary institutions the opportunities to develop requisite skills in areas of future workforce need.

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54 Australian Council of Trade Unions, *Submission 48*, pp 58–59.

5.69 The evidence to the inquiry makes it clear that the current training requirements are ineffective and in need of complete overhaul. They are simply not meeting the needs of either our current or future workforces. This is not to say that that promoting training is or should be a core aim of the 457 visa program. Rather, as noted in previous inquiries, it is to note that the 457 visa program should make a positive contribution to the national training effort. The committee believes this contribution is best achieved by removing ineffective obligations and replacing them with the correct incentives and more effectively targeted requirements.

5.70 Clearly, these matters are intimately related to the primary goal of ensuring that the 457 visa program is only used to enable employers to address short to medium term workforce needs by sponsoring skilled overseas workers on a temporary basis to fill positions where the employer is unable to find suitably skilled Australian workers.

5.71 In this regard, the committee notes that establishing a genuinely tripartite, independent, and transparent body with responsibility for providing objective evidence-based advice to government on matters pertaining to skills shortages, training needs, workforce capacity and planning, and labour migration (see Recommendation 6 (chapter 3)) would, if implemented, go a long way towards ensuring the 457 visa program is used as intended. Such a body could also provide advice on fostering greater coordination at a national level around training as well as greater integration between the supply and demand for skills and training. An independent expert body could also address one of the key questions raised by many submitters and witnesses: if approximately three quarters of a million temporary visa holders in Australia have work rights (this figure does not include the approximately 650 000 New Zealand (subclass 444) visa holders with work rights), what efforts are being made to identify skills gaps and train Australians to fill positions in those occupations?

5.72 Over and above Recommendation 6, however, specific measures should be taken to produce positive training outcomes for Australian workers and reduce the need to rely so heavily on temporary visa workers. In this regard, the committee endorses the views of the Deegan review on these matters.

5.73 With the Deegan proposals in mind, it is clear to the committee that a successful transition to graduate employment is a key element of securing Australia's future workforce capacity. To this end, the revival of graduate employment programs across a range of industry sectors is a high priority. Further, the committee is of the view that where an employer has hired a temporary visa worker, the employer should be required to employ a graduate in the same enterprise/location on a one-for-one basis.

5.74 Mindful of the additional costs that employers may face in terms of training Australian tertiary graduates (as compared to employing temporary visa workers), the committee considers a short review is appropriate to assess the extent of any potential additional costs involved in running a graduate training program, and the desirability and feasibility of directing funds collected from the training levy (see below) towards such a program, in order to ensure that graduates gain ready access to graduate employment positions.

5.75 In terms of trade and technical training, the committee is persuaded of the need to expand apprenticeships in areas where employers are recruiting 457 visa workers. Given that the Commonwealth provides a standard \$4000 incentive payment to an employer that engages an apprentice, it seems reasonable to expect employers that sponsor a 457 trade worker to also make a quantifiable commitment to training Australian apprentices in the same occupations where temporary visa holders are being employed.

5.76 Noting the training benchmarks imposed on 457 visa sponsors are not a proportional payment and do not reflect the number of 457 visa workers employed in a business, the committee agrees with the Azarias review that the benchmarks should be abolished and replaced with a training levy that would be paid per 457 visa holder employed in the business. However, the committee regards the levies proposed by the Azarias review as insufficient to ensure the correct incentives are in place to ensure that employers make a genuine commitment to training Australian workers, graduates, and apprentices.

5.77 Finally the paucity of accurate data across a range of areas relating to the employment of temporary visa workers needs to be addressed as a matter of urgency in order to underpin meaningful action on training to address identified skills shortages.

### **Recommendation 13**

**5.78 The committee recommends that employer sponsors of a 457 visa worker (professional) be required to also employ an Australian tertiary graduate in the same enterprise on a one-for-one basis.**

### **Recommendation 14**

**5.79 The committee recommends that employer sponsors of a 457 visa worker (trade) be required to demonstrate that apprentices represent 25 per cent of the sponsor's total trade workforce (with the threshold for this requirement being the employment of four or more tradespersons).**

### **Recommendation 15**

**5.80 The committee recommends that the current training benchmarks be replaced with a training levy paid per 457 visa holder employed in the business. The committee recommends that the levy be set at up to \$4000 per 457 visa worker and that the levy be paid into existing government programs that specifically support sectors experiencing labour shortages as well as apprenticeships and training programs. The committee notes that this levy would need to be closely monitored to ensure it is paid by the sponsor and not passed on to the visa holder.**

### **Recommendation 16**

**5.81 The committee recommends a short review be conducted into the costs to employers of running graduate employment programs, and the desirability and feasibility of directing funds collected from the training levy to assist employers**

**implement and administer graduate programs, such that Australian tertiary graduates are afforded ready access to graduate employment positions.**

### **Recommendation 17**

**5.82 The committee recommends that the following data be collected and made publicly available on an annual basis (either by the relevant statutory agency, or the relevant government department):**

- **all new registrations of nurses and midwives on temporary work visas;**
- **the number of employers currently sponsoring skilled tradespersons (ANZSCO level 3) on 457 visas;**
- **the number of apprentices and trainees employed directly by these 457 sponsors, in total and by sponsor industry and state/territory;**
- **the trades in which those apprentices are being trained, including the number of apprentices in the same trade classifications in which the 457 visa workers are employed; and**
- **whether the apprentice and trainee numbers in each category have increased, decreased, or have not changed since approval of the employer as a sponsor.**

5.83 Although this chapter has focussed primarily on the 457 visa program, the committee also has serious concerns about the effect of the 417 visa program on the opportunities for training and upskilling local workers.

5.84 The widespread use of 417 visa workers in the meat processing industry is not only impacting employment opportunities for local workers, particularly in regional areas, but is drastically reducing the opportunities for the training and upskilling of a local labour force, and as a consequence, exacerbating and prolonging skills shortages.

5.85 Reducing the pool of local workers that may be considered suitable for training and upskilling as slaughterers, boners and slicers in the meat processing industry will, in practice, entrench dependence on 457 visa workers to fill those skilled roles. This is short-sighted, counter-productive, and iniquitous.

5.86 Furthermore, using 417 visa workers in this manner undermines an underlying principle of the 457 visa program, namely that employers who sponsor a 457 visa worker will train and upskill local workers to address skills gaps so that reliance on 457 visa workers can be reduced over time. It also undermines the meat industry labour agreement, because to the extent that one of the requirements under the labour agreement is for an employer to reduce its reliance on 457 visa workers, an employer must prioritise the upskilling of its local workers.

5.87 The committee will have more to say on the 417 visa program in chapter 5. In light of the above, however, the committee therefore emphasises the critical importance of examining the impacts of the full array of temporary work visas in combination, rather than just assessing their operation in isolation.

**PART IV**  
**Vulnerability and Exploitation**





## CHAPTER 6

### Wages, conditions, safety and entitlements of 457 visa holders

#### Introduction

6.1 One of the recurring themes of this inquiry has been the exploitation of temporary visa workers. The next three chapters examine the wages, conditions, safety and entitlements of three sets of temporary visa workers. This chapter has a particular focus on 457 visa workers; chapter 7 focusses on Working Holiday Maker (WHM) visa holders; and chapter 8 focusses on international student visa holders.

6.2 The chapter begins with an examination of the underlying structural factors that render temporary visa workers vulnerable to exploitation. It then considers, in general terms, whether temporary visa programs 'carve out' groups of employees from Australian labour and safety laws and, if so, to what extent this threatens the integrity of such laws. This is followed by a section that looks at the challenges and barriers that 457 visa workers face in seeking access to justice and a remedy for exploitation.

6.3 There are two case studies of the exploitation of 457 visa workers: one in the construction industry, and one in the nursing sector. The chapter concludes with the committee's views on these matters.

#### Vulnerability of temporary migrant workers

6.4 One of the key debates surrounding the exploitation of temporary visa workers is not just the extent to which it occurs, but the reasons for it. While some submitters blamed a few rogue employers for the problem, the committee received a substantial body of evidence to indicate that there are underlying structural factors that contribute to the vulnerability of temporary visa workers to exploitation.

6.5 Associate Professor Joo-Cheong Tham argued that widespread noncompliance with workplace laws is best explained by 'the interaction of precarious migrant status with the dynamics of poorly regulated labour markets; labour markets where precarious migrant status can become the currency for noncompliance'.<sup>1</sup>

6.6 These dynamics are particularly apparent in the cleaning, taxi-driving and hospitality industries which are, according to Associate Professor Tham, governed by 'precarious work norms' including poor working conditions and the frequent breach of labour laws.<sup>2</sup>

6.7 Associate Professor Tham therefore disagreed with the proposition that noncompliance with labour laws was an aberration that could be attributed to a few rogue employers'.<sup>3</sup> Instead he argued that the vulnerability of temporary migrant

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

2 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 20.

3 Associate Professor Joo-Cheong Tham, *Committee Hansard*, 24 September 2015, p. 33.

workers arises from a series of over-lapping structural factors that contribute to the precarious nature of their status, including:

- dependence on a third party for the right of residence;
- limited right of residence;
- limited authority to work; and
- limited access to public goods.<sup>4</sup>

### ***Dependence on a third party***

6.8 Several submitters and witnesses stated that the high level of dependence on the sponsoring employers (which is built into the design of the 457 visa program) is the main factor that determines the vulnerability of 457 visa workers to non-compliance with workplace laws.<sup>5</sup>

6.9 JobWatch, an independent, not-for-profit employment rights community legal centre was established in 1980 and is based in Melbourne. JobWatch pointed out that the inherent power imbalance in the employment relationship is ameliorated to some extent by employee entitlements and protections in the *Fair Work Act 2009* (FW Act). However, the dependence of the 457 visa worker on the sponsoring employer had the effect of exacerbating the power imbalance between employer and employee.<sup>6</sup> A similar view was expressed by Ms Jessica Smith, a senior solicitor at the Employment Law Centre of Western Australia (Employment Law Centre of WA).<sup>7</sup>

6.10 This view of vulnerability has historical precedent. In 2008, the Deegan review drew attention to the unique status of temporary visa workers in the Australian workplace:

Despite the views of some employers and employer organisations, Subclass 457 visa holders are different from other employees in Australian workplaces. They are the only group of employees whose ability to remain in Australia is largely dependent upon their employment, and to a large extent, their employer. It is for these reasons that visa holders of this type are vulnerable and are open to exploitation.<sup>8</sup>

6.11 Importantly, the Deegan review also found:

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4 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 8.

5 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 8; Mr Andrew Naylor, Chairperson, Human Rights Council of Australia, *Committee Hansard*, 17 July 2015, p. 23; JobWatch, *Submission 36*, pp 4–6; Ms Jessica Smith, Senior Solicitor, Employment Law Centre of Western Australia, *Committee Hansard*, 10 July 2015, pp 16–17; Australian Council of Trade Unions, *Submission 48*, p. 20; Maritime Union of Australia, *Submission 22*, p. 8.

6 JobWatch, *Submission 36*, pp 4–6.

7 Ms Jessica Smith, Senior Solicitor, Employment Law Centre of Western Australia, *Committee Hansard*, 10 July 2015, pp 16–17.

8 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review Final Report*, October 2008, p. 69.

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If these employees are visible and their treatment is open to scrutiny then exploitation is less likely to occur. The more invisible the visa holder, the more opportunity there is for exploitation.<sup>9</sup>

6.12 The visibility of temporary visa workers is covered in greater depth in chapter 8 in the section on the particular vulnerability of undocumented workers.

6.13 The lack of freedom to choose an employer led the Australian Council of Trade Unions (ACTU) to express concern about the increased vulnerability of 457 visa workers:

At the individual level, employer-sponsored visas where workers are dependent on their employer for their ongoing visa status increase the risk for exploitation as workers are less prepared to speak out if they are underpaid, denied their entitlements, or otherwise treated poorly.<sup>10</sup>

6.14 The Maritime Union of Australia (MUA) concurred, arguing that dependence on an employer provided 'a strong disincentive for an employee to stand up for their rights' and an equally 'strong incentive for unscrupulous employers to 'lord it over' employees'.<sup>11</sup>

6.15 The MUA was therefore of the view that the dependence of a 457 visa worker on their employer rendered the 457 visa program an inappropriate 'policy tool to balance the protection of employees rights and entitlements with the capacity of the Australian economy to meet skills shortages'. Consequently, the MUA recommended that a visa holder's right to remain in Australia should not be contingent upon the visa holder remaining employed by the same employer.<sup>12</sup>

6.16 Dependence also occurs when temporary visa workers are offered a contract of employment in their country of origin, but on arrival in Australia, the workers are presented with a new contract. The need to remain in Australia because of the debt incurred renders migrant workers vulnerable to this type of exploitation and means they have 'no choice but to accept those conditions'.<sup>13</sup>

6.17 The committee heard that the nexus between engagement by the sponsoring employer and the ability to remain in Australia creates a fear amongst visa workers that they will be sent home to their country of origin if they complain and therefore 'also explains why 457 visa workers are reluctant to complain of ill-treatment or illegal conduct'.<sup>14</sup>

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9 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review Final Report*, October 2008, p. 69.

10 Australian Council of Trade Unions, *Submission 48*, p. 20.

11 Maritime Union of Australia, *Submission 22*, p. 8.

12 Maritime Union of Australia, *Submission 22*, p. 8.

13 Ms Ros McLennan, Assistant General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 5.

14 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 10; Mr Andrew Naylor, Chairperson, Human Rights Council of Australia, *Committee Hansard*, 17 July 2015, p. 23.

6.18 Dr Joanna Howe pointed out that this level of structural dependence would be exacerbated for Chinese workers brought to Australia by Chinese employers under the Chinese Australia Free Trade Agreement (ChAFTA):

And the biggest point is that their migration status is linked to their employment status, so under the IFA, unlike any of the other visa arrangements we have, an employer will be able to fly in Chinese workers and their right to stay in Australia will be contingent upon their employer agreeing. That worker is extremely vulnerable because if they complain they will get sent back home, and they know that, and the huge income disparities between China and Australia mean this worker knows that even if he or she is being paid below the minimum, even if he is living in cramped accommodation, even if he is being treated poorly, he is still getting a higher wage than in China. The fact that migration status is linked to employment status basically creates the structural conditions for this worker to be exploited.<sup>15</sup>

### ***Limited right of residence***

6.19 Dependence on an employer not only for work but, ultimately, the right to stay in the country, has left some 457 visa workers vulnerable to exploitative conditions. This dependence is exacerbated in cases where a temporary visa holder is either seeking to extend their stay in the country (for example, in the case of a WHM visa holder seeking to qualify for a second year visa), or, in the case of a 457 visa holder, seeking to use the 457 visa as a pathway to permanent residence.<sup>16</sup>

6.20 The ACTU stated that trying to progress from a temporary 457 visa to a permanent employer-sponsored visa creates problems because:

...temporary overseas workers with the goal of employer-sponsored permanent residency have their future prospects tied to a single employer. Under visa rule changes effective from 1 July 2012, 457 visa workers must stay with their 457 sponsor for a minimum period of 2 years before becoming eligible for an employer-sponsored permanent residency visa with that employer.

Again, this makes them much more susceptible to exploitation and far less prepared to report problems of poor treatment in the workplace for fear of jeopardising that goal.<sup>17</sup>

6.21 This view has historical precedent with the Deegan review receiving evidence that:

...where a visa holder has permanent residency as a goal that person may endure, without complaint, substandard living conditions, illegal or unfair

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15 Dr Joanna Howe, *Committee Hansard*, 14 July 2015, p. 58.

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

17 Australian Council of Trade Unions, *Submission 48*, p. 20.

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deductions from wages, and other similar forms of exploitation in order not to jeopardise the goal of permanent residency.<sup>18</sup>

### ***Limited authority to work***

6.22 The limited authority of a 457 visa worker to work means, in practice, that a 457 visa worker can be even more vulnerable if they are employed in violation of workplace laws:

It is a cruel irony that if a 457 visa worker is engaged by an employer in violation of labour laws, this can, in fact, strengthen the hand of the employer. For instance, a 457 visa worker who works in a job classification different (most likely lower) from that stated in his or her visa would be in breach of Visa Condition 8107. Not only would the visa be liable to cancellation in this scenario, but the worker would also be committing a criminal offence. Even when a violation of labour laws does not involve a breach of the worker's visa, there can still be a perception that the worker's participation in illegal arrangements, if disclosed, might jeopardise the visa, or his or her prospect of permanent residence. In these circumstances, continuing in illegal work arrangements might be seen as preferable to the regularisation of status.<sup>19</sup>

6.23 Research from Dr Stephen Clibborn at the University of Sydney Business School reinforced this perspective on the unique vulnerability of temporary visa workers that are coerced into breaching their visa status by unscrupulous employers precisely so the employer gains extra leverage over the worker in order to exploit them.<sup>20</sup> This particular aspect of the vulnerability of temporary visa workers is covered in greater detail in chapter 8 in the section on undocumented migrant workers.

### ***Limited access to public goods***

#### ***Fair Entitlements Guarantee***

6.24 One of the key questions pertaining to any temporary visa program is the extent to which the worker is eligible for the same entitlements as Australian citizens and permanent residents.

6.25 Mr Peter Mares, Adjunct Fellow at the Institute for Social Research at Swinburne University of Technology, drew the committee's attention to the Fair Entitlements Guarantee (FEG). He noted that according to the Department of Employment, the purpose of the FEG was to assist people 'owed certain outstanding employee entitlements following the liquidation or bankruptcy of employers'.<sup>21</sup>

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18 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review Final Report*, October 2008, p. 49.

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

20 Dr Stephen Clibborn, *Submission 11*, pp 2–3.

21 Peter Mares, *Submission 2*, p. 2; Australian Government Department of Employment, General Employee Entitlements and Redundancy Scheme, available at <https://www.employment.gov.au/general-employee-entitlements-and-redundancy-scheme-geers>

6.26 Under the *Fair Entitlement Guarantee Act 2012*, a person must be an Australian citizen or, under the *Migration Act 1958*, the holder of a permanent visa or a special category visa<sup>22</sup> in order to be eligible for payments. Mr Mares pointed out that the eligibility criteria for the FEG necessarily disqualified temporary visa holders from accessing government assistance 'when their employer goes bust owing them money'.<sup>23</sup>

6.27 Mr Mares cited the example of Swan Services Cleaning Group that went into administration in May 2013, and which owed \$2.3 million in unpaid wages and \$7.2 million in annual leave entitlements to around 2500 workers. Mr Mares noted that:

A large proportion of the Swan Services workforce – about half of its staff in Victoria – was made up of international students. Many were left with up to three weeks' worth of unpaid wages and some were owed close to \$3000.<sup>24</sup>

6.28 Mr Mares therefore concluded that with respect to the FEG:

...the entitlements of temporary visa holders are inferior to the conditions enjoyed by Australian citizens, permanent residents and New Zealanders (Special Category Visa holders).<sup>25</sup>

#### *Workers' compensation entitlements*

6.29 The committee received evidence that posed questions around the workers' compensation entitlements of temporary visa holders. The committee heard that there is legal uncertainty about whether temporary visa workers would be treated equally with Australian citizens or permanent residents if they suffered a debilitating, life-long disability as a result of a workplace accident. Mr Mares recommended that a legal audit of all workers rehabilitation and compensation schemes should be undertaken with particular attention paid to whether the entitlements of a temporary visa worker would be diminished or restricted in any way if that worker were to cease residing in Australia.<sup>26</sup>

6.30 These matters are particularly relevant if a 457 visa worker were to suffer a workplace injury that prevented them from working for a period of three months or more. In these circumstances, if a 457 visa worker had to leave the country for not meeting their sponsorship and employment obligations, they might be ineligible for workers' compensation because they would be residing overseas.

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22 *Fair Entitlements Guarantee Act 2012* (Cth), Part 2 Division 1 sub-division A para 10(1)(g) Special category visa holders are New Zealanders.

23 Peter Mares, *Submission 2*, p. 2.

24 Peter Mares, *Submission 2*, p. 2.

25 Peter Mares, *Submission 2*, p. 2.

26 Peter Mares, *Submission 2*, p. 3.

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*Free childhood immunisation*

6.31 Universal free childhood vaccination in Australia is restricted to citizens, permanent residents, and other people eligible to hold a Medicare card. Mr Mares pointed to evidence from health authorities that indicated migrants are at risk of having lower immunisation rates than the broader community and that migrants may face additional barriers in accessing immunisation on the basis of their temporary visa status.<sup>27</sup>

6.32 Although international students and 457 visa holders are required to take out private health insurance that may rebate the cost of vaccinations (at least up to the level of the standard Medicare rebate), Mr Mares pointed out that 'this restriction may result in immunisations being postponed or not carried out at all'.<sup>28</sup>

6.33 Mr Mares therefore proposed that universal free vaccination be extended to encompass the babies and children of all temporary migrants regardless of their temporary visa status.<sup>29</sup>

*Universal free school education*

6.34 The children of 457 visa holders in New South Wales (NSW), the Australian Capital Territory (ACT) and Western Australia (WA) are required to pay international fees to attend state schools. Mr Mares drew the committee's attention to the fact that most government funded or subsidised services do not depend on the visa status of the individual. He argued that, in a democratic country, the children of temporary visa workers living in Australia should have the right to access free childhood education in a state school.<sup>30</sup>

6.35 The committee also heard evidence at the hearing in Perth in July 2015 that the Western Australian government was looking to impose education fees of \$4000 on the families of 457 visa workers. Mr Dean Keating, Vice President of Cairde Sinn Fein Australia stated that the announcement by the state government had caused great concern amongst 457 visa workers to the extent that some had re-considered their employment options. Mr Keating stated that the state government did not appear to have consulted the business community over the impacts of the proposal on those employers that sponsored and relied heavily on 457 visa workers.<sup>31</sup>

6.36 Eventus Corporate Migration group also noted that in some states 457 visa holders are required to pay school costs for school aged children. Eventus pointed out that 'this can be prohibitive for many middle income earners, particularly where

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27 Peter Mares, *Submission 2*, p. 5.

28 Peter Mares, *Submission 2*, p. 5.

29 Peter Mares, *Submission 2*, p. 5.

30 Peter Mares, *Submission 2*, p. 6.

31 Mr Dean Keating, Vice President, Cairde Sinn Fein Australia, *Committee Hansard*, 10 July 2015, pp 1–2.

multiple children are present in Australia'. Accordingly, Eventus recommended that this issue be revisited.<sup>32</sup>

### Access to justice

6.37 The committee received evidence from unions and community organisations to indicate that even though temporary visa workers are covered by Australia's workplace laws, they face greater difficulties in enforcing their workplace rights and accessing justice than permanent residents and citizens. Mr Grant Courtney, Branch Secretary of the Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) noted that visa workers only have a limited time in Australia, and that by the time matters get to court, the visa worker 'is generally back in their home country'.<sup>33</sup>

6.38 Both JobWatch and the Human Rights Council of Australia observed that 457 visa workers 'are extremely reluctant to seek recourse under workplace laws for the apparent contravention by their employer of their employment rights' because of fears about their visa status.<sup>34</sup>

6.39 Furthermore, 'migrant workers often have limited English language skills and knowledge of and access to the legal system which can make asserting their workplace rights even more difficult'.<sup>35</sup>

6.40 In addition, JobWatch pointed out that 'migration law does not guarantee the residency status of a temporary migrant worker who is seeking to challenge their dismissal or make another workplace claim in the context of their employer's revocation of their sponsorship'.<sup>36</sup>

6.41 The combination of vulnerability, limited knowledge of workplace rights and the legal system, and limited rights of residency, means that 'migrant workers suffer lower levels of access to the rights that they technically hold under law'.<sup>37</sup>

6.42 Mr Ian Scott, senior lawyer at JobWatch, noted that an unfair dismissal claim at the Fair Work Commission could take six months to resolve. However, a general protections claim (discrimination, workplace rights, union membership or non-union-

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32 Eventus, *Submission 25*, p. 17.

33 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 14; see also Ms Jessica Smith, Senior Solicitor, Employment Law Centre of Western Australia, *Committee Hansard*, 10 July 2015, p. 17.

34 JobWatch, *Submission 36*, p. 9; see also Mr Andrew Naylor, Chairperson, Human Rights Council of Australia, *Committee Hansard*, 17 July 2015, pp 23–24.

35 JobWatch, *Submission 36*, p. 9.

36 JobWatch, *Submission 36*, p. 9.

37 JobWatch, *Submission 36*, p. 9; see also Ms Jessica Smith, Senior Solicitor, Employment Law Centre of Western Australia, *Committee Hansard*, 10 July 2015, p. 17; Mr Andrew Naylor, Chairperson, Human Rights Council of Australia, *Committee Hansard*, 17 July 2015, pp 23–24.



membership) under the FW Act in the Federal Court or the Federal Circuit Court could run for up to 12 months or more.<sup>38</sup>

6.43 The committee heard that if a 457 visa worker was dismissed by their employer, the remedy for unfair dismissal was complicated by the fact that dismissal also entailed a termination of the 457 visa holders sponsorship arrangements such that the 457 visa worker would need to either find another sponsor or gain reinstatement with the original sponsor with 90 days, or face removal from the country. The Employment Law Centre of WA therefore recommended that the Fair Work Commission, the Federal Circuit Court and the Federal Court be given 'the power to order the reinstatement of an employer's visa sponsorship obligations in addition to the power to order the reinstatement of the employee's employment'.<sup>39</sup>

6.44 JobWatch argued that if an employee had to leave the country because they lost their visa status, this would cause 'an additional injustice in that they can't practically enforce their rights'. Dr Laurie Berg, a member of the Human Rights Council of Australia referred to this scenario as a 'cruel irony'.<sup>40</sup>

6.45 With respect to 457 visa workers, Jobwatch therefore proposed:

That temporary migrant workers who find themselves in a position of losing their employer's sponsorship because they have been dismissed, be entitled to an automatic bridging visa covering the period while they are challenging their dismissal.<sup>41</sup>

6.46 The committee was concerned about the potential for automatic granting of a bridging visa to be abused. Mr Scott reassured the committee that there were sufficient provisions in the system to ensure against false and spurious claims being mounted in order to rot the system:

The word 'automatic' is a strong word. Obviously checks and balances should be involved. When the submission says 'automatic', I guess it means that the rights apply for a bridging visa on the basis of a challenge to a dismissal. For example, in unfair dismissal there are a lot of jurisdictional issues. You have to tick all these boxes even to be eligible to apply, so you could not really run a false claim; you would be kicked out by the Fair Work Commission quite quickly. For other types of claim, where a claim is frivolous, vexatious or lacking in substance, has no real prospect of success et cetera, that party can be ordered to pay the other side's legal costs. So

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38 Mr Ian Scott, Senior Lawyer, JobWatch, *Committee Hansard*, 19 June 2015, p. 2.

39 Ms Jessica Smith, Senior Solicitor, Employment Law Centre of Western Australia, *Committee Hansard*, 10 July 2015, p. 17; see also JobWatch, *Submission 36*, p. 8.

40 JobWatch, *Submission 36*, p. 9; Dr Laurie Berg, member, Human Rights Council of Australia, *Committee Hansard*, 17 July 2015, p. 25; see also Mr Luke Geary, Managing Partner, Salvos Legal, The Salvation Army, *Committee Hansard*, 26 June 2015, p. 30.

41 JobWatch, *Submission 36*, p. 9; see also Ms Jessica Smith, Senior Solicitor, Employment Law Centre of Western Australia, *Committee Hansard*, 10 July 2015, p. 17; Dr Laurie Berg, member, Human Rights Council of Australia, *Committee Hansard*, 17 July 2015, p. 25.

there are already mitigating factors against running spurious claims in those jurisdictions.

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All those jurisdictions have the right for one party—in this case the respondent employer—to apply to strike out that applicant's case if it is lacking in substance.<sup>42</sup>

6.47 In cases of alleged unfair dismissal involving a 457 visa worker, the worker has 90 days to find another employer sponsor. During this period, a 457 visa worker is not entitled to Centrelink benefits and must rely on friends, community, and unions to survive. In many instances, however, community support is complicated by the fact that workers are exploited by employers from the same community. The committee heard that unions have assisted workers with food, accommodation, cash donations, finding another job, and retrieving underpaid wages and entitlements.<sup>43</sup>

6.48 Given the tight timeframes that apply to 457 visa workers seeking to find another sponsor, the Employment Law Centre of WA recommended 'expedited procedures in the relevant courts and tribunals specifically for temporary visa holders':

That would mean that, for example, if they make an unfair dismissal claim, that could be resolved relatively quickly, which would increase the chances that it may even be resolved within that 90-day time frame. That would also reduce the amount of time that temporary visa holders would need a bridging visa to pursue those proceedings.<sup>44</sup>

6.49 Both the Employment Law Centre of WA Australia and JobWatch advised the committee of reductions in government funding, which reduces the ability of these organisations to provide legal advice on employment matters to temporary visa holders. Both centres noted that it would be very difficult to continue their work if the funding were not renewed.<sup>45</sup>

### **Exploitation of 457 visa workers**

6.50 The extent of noncompliance with workplace laws relating to the employment of 457 visa workers is difficult to determine precisely. Efforts to determine the extent of noncompliance rely on the monitoring of sponsors by the Department of

42 Mr Ian Scott, Senior Lawyer, JobWatch, *Committee Hansard*, 19 June 2015, p. 2.

43 Mr Ian Scott, Senior Lawyer, JobWatch, *Committee Hansard*, 19 June 2015, pp 5–6; Mr Edwin De Castro, member of the Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, pp 6–8; Mr David Curtain, Organiser, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, pp 8–9; Mr Warren Earle, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 15; Electrical Trades Union, *Submission 12*, pp 11–12.

44 Ms Jessica Smith, Senior Solicitor, Employment Law Centre of Western Australia, *Committee Hansard*, 10 July 2015, p. 17.

45 Ms Jessica Smith, Senior Solicitor, Employment Law Centre of Western Australia, *Committee Hansard*, 10 July 2015, p. 19; Mr Ian Scott, Senior Lawyer, JobWatch, *Committee Hansard*, 19 June 2015, p. 4.

Immigration and Border Protection (DIBP), and also on reports to unions and organisations such as Employment Law Centres.

6.51 It is important to note that the basis for the information provided by the DIBP has changed over time. In the early years, the DIBP monitored almost half of all 457 visa employers. Since 2009, however, the DIBP has adopted a risk-tiering approach with a focus on 'high risk' sponsors.<sup>46</sup>

6.52 Associate Professor Tham noted that prior to 2009, there were several instances of gross exploitation of 457 visa workers, but that the incidence of such cases has decreased, probably as a result of the introduction of 'market salary rates' and greater monitoring. To this extent, therefore, it could be argued that effective regulation combined with active compliance monitoring has reduced the structural risk of non-compliance.<sup>47</sup>

6.53 However, Associate Professor Tham sounded a note of caution because the 'aggregate data does tell the complete story'.<sup>48</sup> For example, the Azarias review found significantly higher levels of non-compliance relating to employers of 457 visa workers in particular industries such as construction, hospitality and retail, and amongst small businesses with nine or less employees.<sup>49</sup>

6.54 With respect to higher levels of non-compliance being more prevalent in certain industries, Associate Professor Tham stated that the stronger risk of non-compliance in the hospitality and construction industries arose from two underlying structural factors:

- the precarious migrant status of the workers; and
- the labour market dynamics of those particular industries.<sup>50</sup>

6.55 JobWatch noted that it regularly receives calls from temporary visa workers and that in 2014, 43 callers identified themselves as 457 visa holders. JobWatch documented eight case studies from 457 visa holders identifying several areas of concern:

- underpayment and/or non-payment of entitlements;
- unfair dismissal;
- discrimination;

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46 Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, An Independent Review into Integrity in the 457 Programme, September 2014, p. 85.

47 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 13.

48 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 13.

49 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 13; Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, An Independent Review into Integrity in the 457 Programme, September 2014, p. 87.

50 Associate Professor Joo-Cheong Tham, *Submission 3*, p. 14.

- unreasonable requests of workers by employers;
- work in contravention of visa conditions;
- harassment of workers by employers;
- threats of deportation; and
- employers requiring payment for sponsorship.<sup>51</sup>

6.56 The Employment Law Centre of WA also provided a series of case studies and associated outcomes involving a similar range of issues to those documented by JobWatch.<sup>52</sup>

6.57 With the precarious status of 457 visa workers and the labour market dynamics of certain industries as context, the next two sections present two case studies of 457 visa worker exploitation: the first from the construction industry, and the second from the nursing and aged care sector.

6.58 The committee notes, however, that the two case studies below are not isolated instances. For example, the Electrical Trades Union (ETU) provided evidence about the exploitation of a group of Filipino 457 visa workers in the power industry previously employed by Thiess.<sup>53</sup>

6.59 The ETU submitted a Thiess contract signed by the Executive General Manager of Thiess Services Pty Ltd (see Figure 6.1 below). Clause 11(a)(vii) of the contract stated that if a 457 visa worker engaged in trade union activities, their contract could be terminated. As a consequence of termination, the worker would need to return to the Philippines (with their family) at their own expense.<sup>54</sup> The committee notes that the inclusion of such a clause in a contract is illegal.

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51 JobWatch, *Submission 36*, pp 6–8.

52 Employment Law Centre of Western Australia, answer to question on notice, 10 July 2015 (received 30 July 2015).

53 Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 27–36; Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 29–36.

54 Electrical Trades Union, *Submission 12*, Additional information; Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 27–36; Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 29–36.

## Figure 6.1: Thiess Services Pty Ltd, Master Employment Contract

### 11. Termination:

- a. **Termination by Employer.** The employer may terminate this contract on the following just causes: (i) serious misconduct; (ii) willful disobedience of employer's lawful orders; (iii) habitual neglect of duties; (iv) absenteeism; (v) insubordination; (vi) revealing secrets of the establishment; (vii) engaging in trade union activities; and/or, (viii) when the employee violates the customs, tradition, and laws of the AUSTRALIA and/or the terms of this contract.

|| In such an event, the employee shall shoulder the expenses for his/her own repatriation back to the Philippines.

Source: Electrical Trades Union, *Submission 12*, Additional information.

### Case study—Construction: Chia Tung

6.60 The committee heard evidence from members of the Construction, Forestry, Mining and Energy Union (CFMEU) about the exploitation of 457 visa workers in the construction industry, including the reasons why these workers are unwilling to complain about their working and living conditions.

6.61 Mr Edwin De Castro, a Filipino 457 visa worker, worked as a welder and metal fabricator for the Taiwanese company, Chia Tung Development, constructing a feed mill in Narrabri. He was recruited by a labour hire company in the Philippines. Once in Australia, Mr De Castro was required to work ten hours a day for six or seven days a week over a two month period at Narrabri.<sup>55</sup>

6.62 Mr De Castro also stated that the working conditions were unsafe:

They forced us to work unsafely because they never provided proper scaffoldings. We used an old harness. We did not have the right to refuse, although we knew it was unsafe.<sup>56</sup>

6.63 Furthermore, the accommodation was substandard, overcrowded, and expensive:

...we were six in one bedroom and another in a shipping container—while they were deducting \$250 each week for each of us for our accommodation.<sup>57</sup>

6.64 Mr De Castro explained that Chia Tung 'never provided pay slips' and that his salary was remitted in United States (US) dollars from Taiwan to his bank account in

55 Mr Edwin De Castro, member of the Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, pp 7–8.

56 Mr Edwin De Castro, member of the Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, p. 8.

57 Mr Edwin De Castro, member of the Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, p. 7.

the Philippines. Although a food allowance was in the hiring agreement, Mr De Castro stated that Chia Tung did not provide a food allowance.<sup>58</sup>

6.65 Mr De Castro also recounted the circumstances in which Chia Tung dismissed the 457 visa workers without notice and evicted them from their accommodation:

During the night they forced us to leave the premises, because we were living on the site. The police said that our contract had been terminated. They did not give any notice to us or inform us. They forced us to leave the premises, otherwise they said they would charge us with trespassing. So we moved to a motel that night. They were planning to ship us out of the country to avoid any troubles, but it was stopped by the union.<sup>59</sup>

6.66 Mr De Castro explained that the CFMEU prevented the workers from being deported and found them new jobs:

The CFMEU secretary and organiser Dave Curtain helped us. They feed us and paid for everything—our stay in the motel in Narrabri for more than a week. They brought us here to Sydney and found us new jobs. We are very lucky that we have one now.<sup>60</sup>

6.67 Chia Tung grossly underpaid the visa workers. According to Mr David Curtain, a CFMEU organiser, the CFMEU has recovered \$883 000 for 38 workers who had been employed for between six weeks and four months. Mr Curtain also noted that once the superannuation to which the workers were entitled was paid, the final figure for the underpayments would be in excess of \$1 million.<sup>61</sup>

6.68 Mr Curtain advised the committee that this sort of exploitation was widespread in the construction industry. He recounted a similar example from Bomaderry where 16 Filipino and 13 Chinese nationals were suffering similar exploitation including overwork, underpayment, safety concerns, and 'atrocious' living conditions.<sup>62</sup>

6.69 Mr Curtain also explained why migrant workers are unwilling to complain. The reasons include a justifiable fear of being sacked and deported, and also a fear of what might happen to their families back in their home countries:

They were being bullied. They had a foreman down there who had come out on, I think, a 600 class visa. It was well known that his family was involved in the Filipino military. The guys down there understood it and

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58 Mr Edwin De Castro, member of the Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, pp 7–8.

59 Mr Edwin De Castro, member of the Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, p. 7.

60 Mr Edwin De Castro, member of the Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, p. 7.

61 Mr David Curtain, Organiser, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, p. 8.

62 Mr Edwin De Castro, member of the Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, pp 8–9.

they had expressed to us that they had grave concerns that, if they spoke out and caused trouble, there might very well be trouble back home for their families.<sup>63</sup>

### ***Case study: Nursing***

6.70 The committee heard evidence from the Australian Nursing and Midwifery Federation (ANMF) about the exploitation of 457 visa workers in the nursing industry, including the improper charging of visa application fees and the underpayment of wages amounting to many tens of thousands of dollars. The committee notes that only 457 workers were underpaid, and that Australian workers were paid properly.

6.71 Mrs Dely Alferaz applied through an agent overseas for a 457 visa. She came to Australia on a student visa to do a three-month bridging course to upgrade her pre-existing nursing qualification and subsequently worked in an aged-care facility in Victoria on a 457 visa. She is now a registered nurse.<sup>64</sup>

6.72 Although the 457 visa sponsor (the employer) paid the nomination fee, the employer subsequently deducted payments from Mrs Alferaz's fortnightly wages as a means of recouping the sponsorship fee of between \$2000 and \$3000. Mrs Alferaz stated that three other migrant workers in another facility run by the same employer were also being charged for the sponsorship fee. Similarly, Mr Reni Ferreras, another registered nurse, was asked by the same employer to pay between \$3000 and \$3500 for his 457 visa. The charges were listed as 'visa deductions' on his payslip.<sup>65</sup>

6.73 According to the ANMF, the fee is a cost incurred by the sponsoring employer and the applicant is not liable for the charges under the terms of the 457 visa program. Mrs Alferaz stated that she did not complain about the deductions made by the employer because she was unaware that the employer should not be charging her. Likewise, Mr Ferreras said the visa and migration agent fees were not explained properly and that he was not given any choice in the matter: he would simply have to pay the fees if he wanted to be sponsored for a 457 visa.<sup>66</sup>

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63 Mr David Curtain, Organiser, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 26 June 2015, p. 9.

64 Mrs Dely Alferaz, Registered Nurse, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, pp 14–15.

65 Mrs Dely Alferaz, Registered Nurse, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, pp 15–16; Mr Reni Ferreras, Registered Nurse, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 19.

66 Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, pp 16 and 19; Mrs Dely Alferaz, Registered Nurse, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, pp 15–16; Mr Reni Ferreras, Registered Nurse, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, pp 18–19.

6.74 The lack of understanding amongst 457 visa workers about the responsibility for the payment of visa fees also extends to the correct pay rates for certain types of work. The consequence is that migrant nurses have been underpaid for their work.

6.75 Mrs Alferaz looked after 50 residents on her own and was in charge of the facility. Under the enterprise bargaining agreement, Mrs Alferaz should have been paid at the grade 4 rate since 2009. However, Mrs Alferaz had not been paid at the correct rate and consequently was owed \$57 000 in underpaid wages.<sup>67</sup>

6.76 Mr Nicholas Blake, the Senior Industrial Officer with the ANMF, stated that four or five 457 visa workers had been underpaid across the two facilities run by the same employer, with all the workers being owed approximately the same amount. For example, Mr Reni Ferreras, another registered nurse, stated that the ANMF had calculated that he was owed approximately \$60 000 in underpayments.<sup>68</sup>

6.77 The underpayments included being paid the incorrect rate as well as not receiving any payment whatsoever (neither ordinary or overtime rates) for overtime hours worked. Mr Blake stated there were rosters and payslips to back up the claims and that the Victorian branch of the ANMF was handling the matter.<sup>69</sup>

6.78 Ms Annie Butler, Assistant National Secretary of the ANMF, pointed out that the vulnerability of migrant workers tended to prevent them coming forward with complaints. However, based on anecdotal evidence, the ANMF believed improper visa fee charges and the underpayment of wages were widespread.<sup>70</sup>

6.79 The evidence from the ANMF pointed to a relationship between the employer and the migration agent where the employer directed the 457 visa workers to use a particular migration agent who charged a large fee for the permanent residency application. Ms Angela Chan, National President of the Migration Institute of Australia, advised that all cases of potential malpractice involving a migration agent should be referred to the Fair Work Ombudsman (FWO) for investigation. Noting there are unregistered migration agents both in Australia and overseas, Ms Chan stressed that it was important for both visa applicants and employers to check that a migration agent is registered through the Migration Agents Registration Authority.<sup>71</sup>

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67 Mrs Dely Alferaz, Registered Nurse, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 17.

68 Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 17; Mr Reni Ferreras, Registered Nurse, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 18.

69 Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 18.

70 Ms Annie Butler, Assistant National Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, pp 19–20.

71 Ms Angela Chan, National President of the Migration Institute of Australia, *Committee Hansard*, 17 July 2015, p. 12.



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## Committee view

6.80 Evidence to the inquiry indicated that the high level of regulation of both the 457 visa program and the Seasonal Worker program is an important factor in helping prevent and reduce exploitation. The 457 visa program regulates minimum salary levels, is subject to an increasing amount of compliance monitoring, and 457 visa workers are generally located in higher skilled occupations.

6.81 Nevertheless, 457 visa workers are still vulnerable to exploitation. One of the key factors leading to the potential for exploitation is the structural dependence of the 457 visa worker on their sponsoring employer. This dependence was so extreme in the case of 457 visa workers employed by Thiess that Thiess felt emboldened to threaten its visa workers by inserting an illegal clause into the employment contract stating that if a 457 visa worker engaged with a trade union, then that would be sufficient grounds for terminating their employment.

6.82 Claims that only 'rogue' employers are doing the 'wrong thing' and that 'most employers are doing the right thing' are hard to substantiate because the actual extent of non-compliance with Australian labour laws is difficult to verify. While the committee acknowledges that the number of 457 visa workers being exploited may be low compared to the Working Holiday Maker (WHM) and international student visa programs, the committee received evidence of higher levels of exploitation of 457 visa holders in certain industry sectors including construction and nursing. (The higher incidence of exploitation of international student visa holders in retail is covered in chapter 8).

6.83 Furthermore, the quantum of underpayment involving 457 visa workers can be substantial. This is clear, not only from the evidence presented in this chapter, but also from the statistics published by the FWO.

6.84 The recommendations in chapter 9 around compliance monitoring have relevance to the issue of the exploitation of 457 visa workers. However, given that systemic factors contribute to the special vulnerability of temporary migrant workers, it is pertinent to consider those structural factors that could be addressed in order to alleviate the precariousness of temporary migrant work.

6.85 The ability of temporary visa workers to access the FEG was considered by the Senate Legal and Constitutional References Committee inquiry into the framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements. That report found the omission of 457 visa workers from the FEG to be, 'on its face, discriminatory, given that there is no coherent policy basis justifying the distinction between the entitlements of local and 457 visa workers in such circumstances'. That report therefore recommended that the *Fair Entitlement Guarantee Act 2012* (FEG Act) be amended to make temporary visa holders eligible for entitlements under the FEG.

6.86 This inquiry had wider terms of reference than the Senate Legal and Constitutional References Committee inquiry in that it was directed to look at all temporary visa holders. The committee received evidence that many WHM and international student visa holders effectively work full-time and that, in one case, a

large number of international students were owed thousands of dollars when their employer went broke.

6.87 In a situation where an the employer goes into receivership with unpaid liabilities to its staff, Australian citizens, permanent residents and New Zealanders (Special Category Visa Holders) can access payments under the Fair Entitlement Guarantee. But temporary visa workers are currently ineligible to access the Fair Entitlement Guarantee. The committee concurs with the position of the Senate Legal and Constitutional References Committee report on this matter and, accordingly, is of the view that under principles of fairness and equal treatment, this situation should be rectified so that temporary visa workers are afforded the same protection as Australian workers.

6.88 Evidence to the committee pointed to uncertainty around the entitlements of temporary visa workers to workers compensation in the event of a severe workplace injury. The committee notes that many temporary visa holders have contributed to Australian society and its economy over many years. However, certain provisions within various workers' compensation schemes may effectively 'carve out' temporary visa workers, particularly if the visa worker has to return to their home country.

6.89 As a first step, these matters require urgent clarification. The committee therefore recommends an audit of all workers rehabilitation and compensation schemes to determine whether temporary migrant workers who suffer a debilitating, life-long disability as the result of a workplace accident would be treated equally with Australian citizens or permanent residents in similar circumstances. Noting that workers' compensation schemes are presided over by a range of different jurisdictional authorities, the committee proposes a review of workers' compensation legislation with a view to determining the feasibility of correcting any deficiencies in the relevant legislation such that temporary visa workers are treated equally with Australian workers in similar circumstances.

6.90 In terms of broader public policy measures, evidence to the inquiry indicated that migrants are at risk of having lower immunisation rates than the broader community and that migrants may face additional barriers in accessing immunisation on the basis of their temporary visa status. The committee is of the view that sensible public policy dictates the removal of unnecessary barriers to the implementation of universal childhood vaccination. In order to facilitate this goal, the committee is of the view that universal free vaccination should be extended to the babies and children of all temporary visa holders living in Australia, regardless of their visa status.

6.91 Access to justice under the law is a fundamental principle of a liberal democracy. Yet a body of evidence to the committee found that temporary visa workers face greater difficulties in enforcing their workplace rights and accessing justice than permanent residents and citizens. This is due in large part to a fear that their visa status and, with it, any hopes of progressing through the system towards permanent residency, may be compromised if a temporary visa worker registers a complaint against their employer.

6.92 While a combination of vulnerability and limited knowledge of workplace rights and the legal system are at play here, the limited rights of residency is the key

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factor that effectively undercuts a temporary visa worker's access to pursue a legal remedy. In this regard, the committee concurs with the finding of the 2013 Senate Legal and Constitutional References Committee report that:

...the substantive impairment of 457 visa holders in respect of seeking effective remedies or maintaining entitlements under workplace and occupational health and safety laws undermines one of the clear policy aims of the 457 visa program, namely that 457 visa holders receive no less favourable conditions than local workers.

6.93 The committee is therefore of the view that, where required, access to a bridging visa to pursue a meritorious workplace claim is a necessary part of ensuring that temporary visa workers enjoy the same access to justice that an Australian worker would in similar circumstances.

6.94 In this regard, the committee is persuaded that sufficient provisions already exist within the system to prevent abuse of such a temporary bridging visa with the pursuit of false or spurious claims. As per the Senate Legal and Constitutional References Committee report, the committee notes that, in addition to amendment and harmonisation of relevant Commonwealth and state and territory legislation and schemes, addressing this substantive impairment of 457 visa workers' rights may also require changes to the immigration program to provide adequate bridging arrangements to allow 457 visa workers to pursue meritorious claims under workplace and occupational health and safety legislation.

#### **Recommendation 18**

**6.95 The committee recommends that the *Fair Entitlements Guarantee Act 2012* be amended to make temporary visa holders eligible for entitlements under the Fair Entitlements Guarantee.**

#### **Recommendation 19**

**6.96 The committee recommends that the immigration program be reviewed and, if necessary, amended to provide adequate bridging arrangements for all temporary visa holders to pursue meritorious claims under workplace and occupational health and safety legislation.**

#### **Recommendation 20**

**6.97 The committee recommends an audit of all workers rehabilitation and compensation schemes to determine whether temporary migrant workers who suffer a debilitating, life-long disability as the result of a workplace accident would be treated equally with Australian citizens or permanent residents in similar circumstances. The audit should also determine if a temporary migrant worker's entitlements would be diminished or restricted in any way if that worker were no longer to reside in Australia. Subject to the outcome of the audit, the committee recommends the government consider taking proposals to the Council of Australian Governments (COAG) for discussion.**

**Recommendation 21**

**6.98 The committee recommends that universal free vaccination be extended to the babies and children of all temporary migrants living in Australia, irrespective of their visa status.**

## CHAPTER 7

### Wages, conditions, safety and entitlements of Working Holiday Maker (417 and 462) visa holders

#### Introduction

7.1 Evidence throughout this inquiry highlighted the major role of certain labour hire companies in the exploitation of Working Holiday Maker (WHM) (417 and 462) visa holders. This chapter focuses on the wages, conditions, safety and entitlements of WHM visa holders, including the role and prevalence of labour hire companies operating in both the horticulture and meat processing industries (matters relating to compliance and recommendations around the regulation of labour hire companies are covered in chapter 9).

7.2 The chapter begins by examining the additional factors that contribute to the vulnerability of WHM visa holders, followed by a brief look at proposed changes to the tax treatment of WHMs.

7.3 The role of labour hire companies in horticulture is then considered. The bulk of the chapter examines the activities of a web of labour hire companies supplying labour to Baiada's chicken processing sites in New South Wales (NSW). This includes evidence of gross exploitation from temporary visa workers themselves as well as insights from the report of the Fair Work Ombudsman (FWO) into these matters.

#### Working Holiday Maker visa program

7.4 Evidence from a wide range of submitters and witnesses pointed to the pervasive exploitation of visa holders other than 457 visa workers. The Migration Institute of Australia (Migration Institute) noted WHM and student visa holders were 'consistently reported to suffer widespread exploitation in the Australian workforce'.<sup>1</sup>

7.5 The Migration Institute pointed to demographic differences as a potential factor in the greater exploitation of WHM and international students compared to 457 visa workers. The Migration Institute observed that WHMs and students are 'generally young, low skilled and with lower than average English language skills' and typically work in low skill, casual occupations. Furthermore, WHMs and students do not enjoy the same regulatory protections as 457 visa workers:

They are not protected by the Temporary Skilled Migration Income Threshold (TSMIT) of a minimum \$53 900pa as are 457 visa holders and they usually undertake work that is low skilled, casual or part time and in occupations or locations where there may be little choice of employment. Student and Working Holiday Visa holders are often very reliant on any income they can get for basic living costs. This makes them more willing to

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1 Migration Institute of Australia, *Submission 40*, p. 11.

accept jobs that do not meet legislative levels for Australian income, terms and conditions and safety standards.<sup>2</sup>

7.6 The Migration Institute was critical of the requirements attached to the second WHM visa:

The linking of eligibility for a second WHV to three months employment in regional areas in industries such as horticultural and hospitality, has exacerbated the problem of employer exploitation amongst this group.<sup>3</sup>

7.7 In a similar vein, the Australian Council of Trade Unions (ACTU) recommended that the option of gaining a second year WHM visa should be abandoned because the requirements for obtaining a second year WHM visa risk creating the conditions for systemic abuse of backpackers.<sup>4</sup>

7.8 By contrast, the Australian Chamber of Commerce and Industry (ACCI) stressed the economic benefits to Australia of the WHM scheme, in particular the money spent by WHMs on accommodation, transport and education.

7.9 ACCI also remarked on the reciprocal cultural exchange between Australia and partner countries, and quoted the following statement from the Joint Standing Committee on Migration inquiry into WHMs, arguing that the sentiments remain true today:

The working holiday program provides a range of cultural, social and economic benefits for participants and the broader community. Those benefits show that the program is of considerable value to Australia and should continue to be supported.

Young people from overseas benefit from a working holiday by experiencing the Australian lifestyle and interacting with Australian people in a way that is likely to leave them with a much better understanding and appreciation of Australia than would occur if they travelled here on visitor visas. This contributes to their personal development and can lead to longer term benefits for the Australian community.<sup>5</sup>

7.10 The committee notes, however, that in terms of the reciprocal arrangements between countries party to the WHM program, the FWO reported that 31 Australians

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2 Migration Institute of Australia, *Submission 40*, p. 11; see also Dr Joanna Howe and Professor Alexander Reilly, *Submission 5*, p. 5; . Dr Joanna Howe, *Committee Hansard*, 14 July 2015, p. 58.

3 Migration Institute of Australia, *Submission 40*, p. 11.

4 Australian Council of Trade Unions, *Submission 48*, p. 44.

5 Joint Standing Committee on Migration, *Working Holiday Makers: More Than Tourists*, Parliament of the Commonwealth of Australia, August 1997, p. xv, in Australian Chamber of Commerce and Industry, *Submission 10*, p. 15.

were granted a Taiwanese WHM visa in 2013 compared to 15 704 Taiwanese granted an Australian WHM visa for the same period.<sup>6</sup>

### ***Changes to the tax treatment of Working Holiday Makers***

7.11 As noted in chapter 4, the committee received a body of evidence that WHM visa holders played an important role in the agricultural sector harvesting perishable goods in regional and remote Australia.

7.12 Given WHM visa holders filled a labour supply shortage during peak season, the National Farmers' Federation (NFF) expressed concern about the impact that proposed changes to the tax treatment of WHMs would have on the future supply of WHMs to Australian agriculture.

7.13 Mr Tony Maher, Deputy Chief Executive Officer of the NFF, noted that the 2015 Commonwealth budget announced changes to the tax treatment of WHMs. WHM visa holders are currently treated as residents for tax purposes if they stay in Australia for more than six months:

This gives them access to the tax-free threshold, the low-income tax offset and a lower tax rate of 19 per cent for income above the tax-free threshold up to \$37 000.<sup>7</sup>

7.14 But from 1 July 2016, WHMs will be treated as non-residents for tax purposes and will therefore be taxed at 32.5 per cent on all income. Mr Maher remarked that about 40 000 WHMs work on Australian farms each year earning, on average, about \$15 000 a year in Australia (below the current tax-free threshold of \$18 200).<sup>8</sup>

7.15 Mr Maher was concerned that Australian agriculture could face severe labour shortages if the changed tax treatment caused a reduction in the number of WHMs visiting Australia. The NFF therefore proposed a compromise that would see WHMs taxed at of 19 per cent of their income and not be eligible for the tax-free threshold, and that the changed tax treatment of WHMs be 'deferred for later consideration as part of the federal government's broader tax reform process'.<sup>9</sup>

7.16 Noting that WHMs 'inject more than \$3.5 billion into the Australian economy each year', Mr Maher stated that there was a lot of concern from the business community that WHMs continue to work in rural and remote Australia rather than just congregating in major holiday destinations.<sup>10</sup> The NFF also confirmed that it was not

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6 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. 13.

7 Mr Tony Maher, Deputy Chief Executive Officer, National Farmers' Federation, *Committee Hansard*, 5 February 2016, p. 1.

8 Mr Tony Maher, Deputy Chief Executive Officer, National Farmers' Federation, *Committee Hansard*, 5 February 2016, p. 1.

9 Mr Tony Maher, Deputy Chief Executive Officer, National Farmers' Federation, *Committee Hansard*, 5 February 2016, p. 1.

10 Mr Tony Maher, Deputy Chief Executive Officer, National Farmers' Federation, *Committee Hansard*, 5 February 2016, pp 1 and 2.

consulted before the government announced the decision to change the tax treatment of WHMs.<sup>11</sup>

7.17 The NFF provided a comparison of the comparable earnings of WHMs (in all industries) in Australia, New Zealand and Canada, including the hourly rates and the net hourly rates after tax (see Table 7.1 below). The table shows that under the government's proposed changes, the net hourly wage of WHMs in Australia would fall below the comparable rate in New Zealand. But under the NFF's proposal, the net hourly wage of WHMs in Australia would remain above the comparable rate in New Zealand.

**Table 7.1: Comparable earnings of Working Holiday Makers**

Country	Australia (32.5%)	Australia (19%)	Canada	New Zealand
Min. hourly wage	\$17.29	\$17.29	\$10.73	\$14.75
Tax rate	32.5%	19%	15%	10.5%
Net hourly wage	\$11.67	\$14.03	\$9.13	\$13.20

Source: National Farmers' Federation, answer to question on notice, 5 February 2016 (received 15 February 2016).

### **Exploitation of Working Holiday Maker visa workers by labour hire companies in the horticulture industry**

7.18 Evidence to the inquiry illustrated the different approaches growers in the horticulture industry used to recruit workers, and the advantages and disadvantages of the various methods.

7.19 Mr David Fairweather stated that Tastensee Farms did not use labour hire companies, and instead did all their hiring directly via a web page. Mrs Laura Wells from Tastensee Farms said she used a Facebook page with about 2500 followers to recruit workers.<sup>12</sup>

7.20 Ms Donna Mogg from Growcom, the peak industry body for fruit and vegetable growers in Queensland, pointed out that difficulties arise when workers do not show up for work. Many growers were therefore tempted to use a labour hire company because the labour hire company takes responsibility for ensuring that workers arrive for their shifts.<sup>13</sup>

11 National Farmers' Federation, answer to question on notice, 5 February 2016 (received 15 February 2016).

12 Mr David Fairweather, Tastensee Farms, *Committee Hansard*, 12 June 2015, pp 22–23; Mrs Laura Wells, Tastensee Farms, *Committee Hansard*, 12 June 2015, pp 22–23.

13 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 23.



7.21 However, Ms Mogg disputed the assertion that the exploitation of temporary visa workers was as widespread as the media seemed to suggest:

I say that because we deliver a full and comprehensive industrial relations advisory service through Growcom, and I would average around 300 calls from growers every year. These are growers calling me to find out what they need to do to be in compliance, what their obligations to employees are and how they better engage with skilling, with local communities, with local employment coordinators. This is how we know that not every grower in this state, let alone in this country, behaves in this way.<sup>14</sup>

7.22 Nevertheless, Ms Mogg acknowledged that reports of underpayment, exploitation and abuse of visa workers in horticulture 'are a matter of great concern' to the industry and to many growers. She also confirmed 'there are a lot' of 'fly-by-night phoenix operators' and that they are very difficult to track down:<sup>15</sup>

And we do believe that it is the labour hire contractors, particularly recent entrants to the industry—the dodgy ones from overseas, I guess—who are causing the significant majority of these problems.<sup>16</sup>

7.23 Mr Guy Gaeta, a NSW orchardist, asserted that problems of non-payment and mistreatment of 417 visa workers in the agriculture sector were associated exclusively with labour hire companies:

...I represent the New South Wales Cherry Growers Association—I am in the committee—and I am a delegate to NSW Farmers, and the only problem I have ever, ever seen with backpackers, with people not getting paid or being mistreated, is with people that work for contractors.<sup>17</sup>

7.24 Mr George Robertson, an organiser with the National Union of Workers (NUW) stated that the conditions around the granting of a second year WHM visa render 417 visa workers vulnerable to exploitation, particularly by labour hire contractors:

But there are a variety of potential problems that can arise from relying on a particular contractor in order to apply for a second visa. We have heard stories from members about contractors saying you have to work for free for X amount of time in order to get a second visa, or you have to provide sexual favours in order to receive a second visa. That puts workers in a vulnerable position where their continued presence in the country and their

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14 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 19.

15 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 23.

16 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 19.

17 Mr Guy Gaeta, *Committee Hansard*, 26 June 2015, p. 36.

ability to work and receive a second visa is contingent on whether they agree with those terms that are provided by the contractors.<sup>18</sup>

7.25 Ms Sherry Huang, a former horticulture worker from Taiwan and now an organiser with the NUW, explained the mode of operation of a labour hire company. Typically, the owner of a labour hire company in Australia would set up a labour hire company in Taiwan and then source all the workers from Taiwan. The labour hire agency would charge 417 visa holders a fee of several thousand dollars to arrange flights, accommodation, transport, and a job.<sup>19</sup>

7.26 Ms Lin Pei (Winnie) Yao heard about a job vacancy at Covino Farms through a friend and was employed to work there by a labour hire company. She worked as a casual six days a week for 10 or 11 hours a day at \$14 an hour, with a break and lunch.<sup>20</sup> Mr Robertson noted the Horticulture Award contains no penalty rates for casual workers and imposes no restrictions on the hours worked by casuals. However, Ms Yao was still paid substantially less than the award rate of \$21.08 an hour.<sup>21</sup>

7.27 Ms Yao never met or spoke to the head contractor from the labour hire company and never knew the company name. The only contact was by text.<sup>22</sup> Furthermore, Ms Yao did not receive a payslip, just an envelope with cash inside. The hours and amount were written on the back of the envelope. Ms Yao paid no tax. Mr Robertson clarified that 'workers must be provided with a pay slip that indicates how much they are receiving, how many hours they have worked, their superannuation and their taxation'. He also noted that in the poultry processing sector, such cases had been referred to the Australian Tax Office (ATO).<sup>23</sup>

7.28 Ms Huang confirmed that, in her experience, many 417 visa workers had no idea about the taxation arrangements in Australia, or indeed that they were not paying tax:

I can only tell you my experience. I applied for the 417 back in 2010. I just applied online. The working conditions or working regulations are all on the Immigration website, which is all English. The backpackers especially have no idea whatsoever. In terms of talking about a tax issue, they probably come over here and just want to travel a little bit, earn some extra

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18 Mr George Robertson, union organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 17.

19 Ms Sherry Huang, previous worker and union organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, pp 16–17.

20 Ms Lin Pei (Winnie) Yao, worker, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 18.

21 Mr George Robertson, union organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, pp 18 and 27.

22 Ms Lin Pei (Winnie) Yao, worker, National Union of Workers, *Committee Hansard*, 18 May 2015, pp 19–20.

23 Ms Lin Pei (Winnie) Yao, worker, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 18; Mr George Robertson, union organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 18.

money. So they have no idea. Her friend told her, 'Hey, you can find a job this way,' so she just dialled the number and texted the labour-hire company saying, 'Hey, I need a job.' Even a worker said to me: 'It is the end of the financial year. How am I going to do the tax?' So they have no idea they are not paying tax either.<sup>24</sup>

7.29 The head contractor from the labour hire company organised the accommodation, typically a two or three bedroom house, with two or three backpackers sleeping in each room. Ms Yao stated that all the backpackers in her house paid \$105 a week in rent each.<sup>25</sup>

7.30 Empirical fieldwork research conducted in 2013 and 2014 across Victoria (Bendigo, Maffra, and Mildura), Tasmania and the Northern Territory by Dr Elsa Underhill and Professor Malcolm Rimmer, from Deakin University and La Trobe University respectively, found that WHM visa workers experience significant vulnerability in the harvesting sector in Australia and below award average hourly rates of pay. The level of vulnerability was intensified when WHM visa workers were employed by a labour hire company rather than employed directly by the grower.<sup>26</sup>

7.31 Dr Underhill and Professor Rimmer found WHM visa workers experienced 'very low rates of pay when paid piece rates' and that this situation was 'exacerbated by the Horticultural Award clause on piece rates which refers to 'the average competent worker'. As a consequence of this clause, it was found that growers and contractors are able to pay piece rates that do not allow the average competent worker to earn an amount which approximates that set out in the award. Dr Underhill and Professor Rimmer therefore recommended:

Replicating the British system of providing a specified floor, equal to the minimum hourly rate of pay, would overcome the intense exploitation experienced by piece workers in horticulture.<sup>27</sup>

7.32 Furthermore, the pressures imposed on WHM visa workers by the piece rate system led to 'a level of work intensification' that enhanced the risk of workplace injury and led to a 'low level but constant exposure to injury'. At the same time, the research found visa workers did 'not receive adequate information and training about the health and safety risks which they are likely to encounter at work'.<sup>28</sup>

### ***The role of industry associations in combatting rogue labour hire companies***

7.33 Ms Mogg suggested that dealing with a growing number of rogue labour hire contractors required collaboration between industry and the FWO in order to ensure

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24 Ms Sherry Huang, previous worker and union organiser, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 28.

25 Ms Lin Pei (Winnie) Yao, worker, National Union of Workers, *Committee Hansard*, 18 May 2015, p. 19.

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

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

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

that the regulation of the contract labour hire industry is adequately enforced (this is covered in greater depth in chapter 9). However, Ms Mogg also recognised the need for industry to work with employers in terms of advising employers about their compliance obligations, and advising employers 'not to deal with dodgy operators'.<sup>29</sup>

7.34 In this regard, Growcom had provided advice and support to employers in the Queensland horticulture sector over a number of years. This included workplace relations advice, specific resources to assist employers to meet their compliance obligations, regular training and seminars, and information on workforce development and planning.<sup>30</sup>

7.35 The South Australian Wine Industry Association played a similar role in running education and training programs for employers so that they understand their obligations in terms of workplace and migration law.<sup>31</sup>

### **Exploitation of Working Holiday Maker visa workers by labour hire companies in the meat processing industry**

7.36 Evidence to the inquiry from the FWO, the Australasian Meat Industry Employees' Union (AMIEU), and several 417 visa workers themselves, detailed the extensive exploitation of 417 visa workers at meat processing plants in Queensland, NSW and South Australia (SA). In this regard, the committee notes the *Four Corners* program in May 2015 revealed the exploitation of 417 visa workers at a Baiada poultry processing plant in SA.<sup>32</sup>

7.37 The evidence outlined a litany of activities, many of them illegal, including below-award wages, non-payment of entitlements under the law, coercion and threats against union members, substandard and illegal living conditions in accommodation provided by labour hire contractors, health and safety conditions, as well as the labour hire business model.

7.38 At the public hearing in Brisbane, Mr Warren Earle, a Branch Organiser for the AMIEU (Queensland), described what had occurred at the Primo Smallgoods (Hans Continental Smallgoods) site at Wacol near Ipswich. The site opened in late 2012 and is the largest smallgoods plant in Australia.<sup>33</sup>

7.39 Primo Smallgoods dealt with a labour hire firm called B&E Poultry Holdings that was itself a parent company to subsidiary companies. Mr Earle stated that at the

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29 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 19.

30 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, pp 19–20.

31 Mr Brian Smedley, Chief Executive, South Australian Wine Industry Association, *Committee Hansard*, 14 July 2015, pp 3–4.

32 Caro Meldrum-Hanna and Ali Russell, 'Slaving Away: The dirty secrets behind Australia's fresh food', *Four Corners*, Australian Broadcasting Corporation, broadcast 4 May 2015.

33 Mr Warren Earle, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, pp 14–15.

time, the Korean workers on 417 visas got pay slips from two different companies, Best Link Management and Bayer Management. The pay slips showed the Korean visa workers were getting between \$1 and \$3.50 less than the award rate and 'were not getting paid any overtime, shift penalties or weekend penalties'.<sup>34</sup>

7.40 During this time, approximately 140 Korean 417 visa workers joined the AMIEU. The AMIEU followed up on the underpayments and secured a six figure sum in back pay plus superannuation for the Korean workers.<sup>35</sup>

7.41 However, the labour hire company was monitoring the activities of the Korean visa workers and a representative also sent text messages to the Korean workers threatening them that they would lose their jobs if they spoke to the union. Over the next 6 to 12 months, the Korean workers were replaced with Taiwanese workers on 417 visas. The AMIEU has been informed that the Taiwanese visa workers have also been threatened that they will lose their jobs if they approach the union.<sup>36</sup>

7.42 It also appears that the subsidiary labour hire firms are circumventing the rules that prevent a 417 visa worker from working for more than six months for any one employer by simply transferring employees from the books of one labour hire company to the other one.<sup>37</sup>

### ***International labour hire networks***

7.43 At the public hearing in Sydney, the committee heard from Mr Grant Courtney, Branch Secretary of the AMIEU (Newcastle and Northern NSW Branch), Mr Hoi Ian Tam, International Liaison Officer with the AMIEU, and three 417 visa workers, Miss Chiung-Yun Chang, Miss Chi Ying Kwan, and Mr Chun Yat Wong.

7.44 Mr Wong recounted that in Hong Kong, he and Miss Kwan had seen an advertisement on Facebook for work at Baiada in Australia. Mr Wong and Ms Kwan were subsequently contracted by the labour hire company, NTD Poultry Pty Ltd (NTD Poultry), to work at the Baiada chicken processing plant in Beresfield, northwest of Newcastle. NTD Poultry is part of the multi-layered web of labour

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34 Mr Warren Earle, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 15.

35 Mr Warren Earle, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 15.

36 Mr Warren Earle, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 15.

37 Mr Warren Earle, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 15.

contracting firms that supplied workers to the Baiada processing plants in NSW (see Figure 7.1 later in this chapter).<sup>38</sup>

7.45 The AMIEU also tabled evidence documenting the role played by international labour hire agencies in the exploitation of 417 visa workers. For example, agencies in Taiwan such as Interisland and OZGOGO will help labour hire companies in Australia such as AWX Pty Ltd (AWX) and Scottwell International to recruit workers.<sup>39</sup>

7.46 Mr Tam stated that agencies in Taiwan charges workers in Taiwan up to \$3000 to organise a job in the meatworks in Australia. However, the workers often report they have to wait a long time to get a job in Australia and still have to pay rent to the Australian labour hire company:

Basically, lots of agencies from Taiwan help the labour hire company in Australia—such as AWX and Scottwell International in Australia—to recruit workers. This agency from Taiwan requests workers in Taiwan to pay up to \$3000 Australian in order to get a job in the Australian meat industry. They arrange all the things for the workers like accommodation, induction and other things. But most of the workers say they cannot get a job and they need to wait a long time, probably two to three months, until they get a chance to be inducted. In this time, the workers also need to pay rent to the labour hire agency. So before they start work, they have already paid A\$6000 for this purpose.<sup>40</sup>

7.47 Miss Chang confirmed that even after paying \$3000 in Taiwan and then having to wait before they can begin induction training, many of her friends also had to pay an agent called Tim another \$1000 to \$2000 to work in a meat factory. Mr Tam noted that Tim works for AWX, so the union believed that AWX also collects that money.<sup>41</sup>

7.48 The AMIEU provided further documents to support the evidence given by the witnesses. Tabled document 12 is a Chinese contract issued in Taiwan by a Taiwanese labour hire company with links to Scottwell International. It offers two job vacancies,

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38 Mr Chun Yat Wong, *Committee Hansard*, 26 June 2015, p. 12; Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 13; see also 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.

39 Australasian Meat Industry Employees' Union, Tabled Document 3, Sydney, 26 June 2015, available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/temporary\\_work\\_visa/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Additional_Documents); see also *Committee Hansard*, 26 June 2015, p. 20.

40 Mr Hoi Ian Tam, International Liaison Officer, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW), *Committee Hansard*, 26 June 2015, p. 20.

41 Miss Chiung-Yun Chang, *Committee Hansard*, 26 June 2015, p. 20; Mr Hoi Ian Tam, International Liaison Officer, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW), *Committee Hansard*, 26 June 2015, p. 20.

one at an Adelaide beef factory and the other at a Sydney beef factory. The fees are in New Taiwanese Dollars (NTD). The contract fee and overseas fee total NTD \$65 000, or just over AUD\$2800. In addition, there is a jobs bond of AUD\$600. The pay rates are \$18.10 to \$21.70, with overtime paid at the same rates. The period of work is one year, and accommodation is \$80 to \$100 a week with a two week bond.<sup>42</sup>

7.49 Tabled document 9 included three Chinese language documents. The first offered a seminar about working holidays by Australian labour hire company AWX and Taiwanese labour hire company Interisland. The second offered a package of meatworks jobs arranged Interisland and AWX for 417 visa workers. The package required workers to pay NTD \$15 000 and AUD\$150 a week for rent, AUD\$30 for food and AUD\$150 for transportation. The third, by Taiwanese company OZGOGO with links to Australian labour hire company Scottwell International, advertised jobs for \$18 an hour in a meatworks in Murray Bridge, SA.<sup>43</sup>

### *Illegal training wages*

7.50 The committee heard evidence that once the visa workers had arrived in Australia, the labour hire company exploited them over the conduct and payment of training prior to their being granted employment in the meat industry.

7.51 As background, Mr Courtney described the long-standing training system in the meat industry:

We have a very good training system called the Meat Industry Training Advisory Council [MINTRAC], which the union and the employer association established about 25 years ago. Most of the people who work in our industry go through a certificate II in MINTRAC for that purpose, to give them the food safety competencies and also the standard occupational health and safety requirements in the position.<sup>44</sup>

7.52 A certificate II must be designed and accredited to adhere to the specifications of the Australian Qualifications Framework and any government accreditation standards for vocational education and training. The purpose of a certificate II is to qualify individuals to undertake mainly routine work and as a pathway to further learning.<sup>45</sup>

7.53 By contrast, Mr Courtney said that what the 417 visa workers were put through had 'nothing to do with training'.<sup>46</sup> Miss Chang described the four week

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42 Australasian Meat Industry Employees' Union, Tabled Document 12, Sydney, 26 June 2015.

43 Australasian Meat Industry Employees' Union, Tabled Document 9, Sydney, 26 June 2015.

44 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 17.

45 Australian Qualifications Framework, AQF specification for the Certificate II, Second edition, January 2013, available at [http://www.aqf.edu.au/wp-content/uploads/2013/05/4AQF\\_Certificate-II.pdf](http://www.aqf.edu.au/wp-content/uploads/2013/05/4AQF_Certificate-II.pdf)

46 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 17.

'training' organised by the labour hire company, AWX. A series of standard AWX forms tabled by the AMIEU laid out the evidence on the extent of the deception involved in the AWX training program.<sup>47</sup>

7.54 One week prior to commencing training, Miss Chang had to pay a \$300 up-front fee to AWX. The AWX timesheet states that the worker will be paid for one day's work each week, which will be a total of 9.5 hours at \$21.08 an hour for a total of \$200.26 per week before tax. There is also a clause in the contract stating:

Your wage for the 4<sup>th</sup> week will be held and paid with your first week's salary after commencing employment on an AWX site.<sup>48</sup>

7.55 But the training documents only wore the appearance of legality. In reality, the visa workers worked 50 to 60 hours a week at A. & A. Reid Enterprise Pty Ltd, trading as Reid Meats in Western Sydney, not the 9.5 hours on the timesheet. Miss Chang stated that the visa workers started their training shift at 6.00am and finished at 3.00pm, but often worked overtime until 4.00pm or 5.00pm. Likewise on the evening shift, they started at 3.00pm and would finish at 1.00am or 2.00am, a ten or eleven hour shift.<sup>49</sup>

7.56 To add insult to injury, however, once the trainee commenced employment, the training wages were deducted from the employee's wages in eight weekly instalments of \$100:

After your training is complete and your employment commences with AWZ; \$100 per week will be deducted from your wages for a total of 8 weeks to cover the remaining training costs.<sup>50</sup>

7.57 Mr Tam explained that, in effect, the visa workers did four weeks of unpaid work of up 60 hours per week:

For three to five weeks. 'You will still get paid \$200 a week as a living allowance.' It is for their rent, but the pay slip shows the wrong working hours. Basically, they worked for 50 or 60 hours per week, but the pay slip only shows nine hours per week and it makes it look legal. Also, after the workers, like Amy, get a job start at an abattoir, this \$200 per week will be deducted back by AWX, so actually it is no pay.<sup>51</sup>

### ***Below award wage rates and long hours***

7.58 The wages the 417 visa workers at the Baiada site in Beresfield were getting were well below award rates. Mr Wong stated that the hourly rate was 'close to \$12' an

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47 Australasian Meat Industry Employees' Union, Tabled Document 2, Sydney, 26 June 2015; see also *Committee Hansard*, 26 June 2015, pp 16–19.

48 Australasian Meat Industry Employees' Union, Tabled Document 2, Sydney, 26 June 2015.

49 Miss Chiung-Yun Chang, *Committee Hansard*, 26 June 2015, p. 18.

50 Australasian Meat Industry Employees' Union, Tabled Document 2, Sydney, 26 June 2015.

51 Mr Hoi Ian Tam, International Liaison Officer, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW), *Committee Hansard*, 26 June 2015, p. 18.



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hour, with a maximum of \$15 an hour over the past half-year. Mr Wong said the rate cannot be given with certainty because 'it is counted by kilogram; it is not by hours'.<sup>52</sup>

7.59 Mr Tam said the workers have been unable to get the information that would allow them to work out their wage calculations:

Every time when the workers want to ask how much they can pay and how that amount is calculated, the contractor will explain that we will calculate as a team how much production by kilogram as a formula, and formulate that amount of money, which is like 0.32 per cent of the whole production, for which you can get this money. Actually they have no idea how much they produce and how to calculate the actual amount, and they cannot get the answer.<sup>53</sup>

7.60 Miss Kwan also explained that although the same formula was used for male and female employees, the women were paid less than the men because they were doing different work:

Boys can get more than a woman. Maybe \$0.50 to \$1.

...

Because the girls are only packing or labouring and the boys will move the meat or do some harder work.<sup>54</sup>

7.61 The 417 visa workers at the Baiada Beresfield site worked long hours. The minimum hours worked were 12 hours every day, with an overnight Saturday/Sunday shift of up to 18 hours:

The minimum was 12 hours every day.

...

The longest was on Saturday until Sunday. The hours were very long. One time we started at 5 pm on Saturday and worked until 11 am on Sunday. This is a long day.<sup>55</sup>

7.62 Furthermore, visa workers did not always get designated breaks. Rather, meal breaks were dependent on the urgency of the orders to be completed, with a toilet break being the only respite:

It is urgent to finish. We will maybe work seven hours with no break and when you finish the job you will be off duty. But there was no break.

...

Because I am late shift staff we must be finished all orders before we can go home. If they were urgent there may be no break for us—only toilet breaks.<sup>56</sup>

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52 Mr Chun Yat Wong, *Committee Hansard*, 26 June 2015, p. 12.

53 Mr Hoi Ian Tam, International Liaison Officer, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW), *Committee Hansard*, 26 June 2015, p. 12.

54 Miss Chi Ying Kwan, *Committee Hansard*, 26 June 2015, p. 12.

55 Mr Chun Yat Wong, *Committee Hansard*, 26 June 2015, p. 13.

7.63 In addition to the long hours, the entire shift was spent in a processing plant where the average temperature was between three to five degrees celsius with short periods of minus 20 degrees celsius in the blast room.<sup>57</sup>

7.64 Mr Wong raised concerns about workplace health and safety and the pressures placed on staff to return to work despite suffering work-related injuries:

I hurt my neck from the working hours, but they just give me two days off to rest. After that my boss needed me to go back to work, because they said there was not enough manpower. My section has only two guys to handle it. When I had a break no-one covered my job. So there was a request that I go back to work.<sup>58</sup>

7.65 Ms Chang stated that her training contract had a rate of \$21 an hour. However, when she started her employment at the Teys abattoir in Wagga Wagga, AWX told her the salary started at \$16 to \$17 an hour:

They told me there was an apprenticeship in Wagga Wagga, but the salary starts at \$16 or \$17 per hour. In our training course contract we were already on \$21 per hour. If you do not want that and you cannot accept that, you are just waiting a long time. We do not have a choice. You just start at \$16 or \$17.<sup>59</sup>

7.66 Mr Courtney clarified that \$16.86 per hour is the entry level rate under the award, but that 'no-one in the meat industry generally gets paid the entry-level rate if they have skills'.<sup>60</sup>

#### *'Voluntary overtime' agreements*

7.67 The AMIEU also tabled a standard AWX form that sets out a 'voluntary overtime' agreement between AWX and an employee. Attached to the document was a wage slip for the first week of February 2015. The wage slip showed a worker at George Weston Foods Ltd (trading as Don KRC) in Castlemaine Victoria worked 38 hours at \$16.86 per hour and worked an additional 10.25 hours (over 38 hours) at \$16.86 per hour.<sup>61</sup> Mr Courtney stated that paying \$16.86 per hour for overtime hours clearly breached the *Fair Work Act 2009* (FW Act) and the award.<sup>62</sup>

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56 Miss Chi Ying Kwan, *Committee Hansard*, 26 June 2015, p. 13.

57 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 13.

58 Mr Chun Yat Wong, *Committee Hansard*, 26 June 2015, p. 13.

59 Miss Chiung-Yun Chang, *Committee Hansard*, 26 June 2015, p. 19.

60 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 18.

61 Australasian Meat Industry Employees' Union, Tabled Document 3, Sydney, 26 June 2015; see also *Committee Hansard*, 26 June 2015, pp 17–18.

62 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 18.

7.68 Mr Courtney expressed disappointment that AWX 'were conducting themselves the way some of these other sham contracting agencies were', particularly with regard to the four weeks unpaid training at Reid Meats and the overtime hours paid at normal rates. Mr Courtney was unsure of AWX's motivation and whether it was 'a drive to the bottom' or a necessity to compete with sham contractors and illegal phoenix operators in the labour hire sphere.<sup>63</sup>

7.69 Nevertheless, Mr Courtney noted that AWX was the largest supplier of labour to Teys Cargill Australia and that 'large companies like Teys are engaging labour indirectly for the purpose of undermining enterprise agreements. We can have the best agreement in the world, but it is not worth the paper it is written on'.<sup>64</sup>

### ***Fake timesheets and no payslips***

7.70 Mr Wong also provided the committee with evidence of fake timesheets produced by the labour hire company NTD Poultry to satisfy new requirements from Baiada. Sheet 2 of Tabled Document 7 shows the signed Time and Attendance Record for the tray pack night shift on 3 June 2015. According to the Time and Attendance Record, the workers started at 5.00pm and finished at either 10.00pm or 4.00am, a maximum shift of 11 hours. However, NTD Poultry also kept an actual record of their workers hours in order to pay them. Sheet 1 of Tabled Document 7 is the true record. It shows worker 56 (Mr Wong) actually worked from 5.00pm until 8.00am, a shift of 15 hours:

The reason I needed to take this photo is it was very difficult—very important for the company—and now you can see. No. 1 is the true hours timetable. They just follow this one. How many hours they pay their staff. So this one is the real one.

...

This No. 2 document they started 8 June, because they got the order from Baiada that they needed to do this timetable for Baiada. The first time, I asked what the reason for the paperwork was, but they did not answer me. They needed our signature first, and then after you can see the start time and the finish time. The finish time is empty, and it is clean when we sign it. We sign it before. So that means that, after we sign it, they can write whatever they want. Also, after three days I asked, 'Why do we need to sign this before?' I thought maybe there was a law or something—we make mistakes; we get trouble. They answered me: 'This one is for Baiada. Also, does not write down for more than 12 hours for this paper.' So this is the fake hours.<sup>65</sup>

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63 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 18.

64 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 19.

65 Australasian Meat Industry Employees' Union, Tabled Document 7, Sydney, 26 June 2015; Mr Chun Yat Wong, *Committee Hansard*, 26 June 2015, p. 22.

7.71 Miss Kwan and Mr Wong also explained that they never got a payslip from NTD Poultry, just an envelope with cash inside. AMIEU Tabled Document 8 shows that on the back of the envelope were the employee number, the date, a kilogram figure, and a total pay amount.<sup>66</sup>

### ***Local workers unable to secure enough hours***

7.72 There were marked differences not only in the pay that 417 visa workers received compared to local workers, but also in the hours that they worked. Mr Tam explained that many of the local workers were not able to get direct employment and instead had to get work through a labour hire company. However, the local workers paid at about \$27 an hour could only get 16 to 20 hours work a week when they actually wanted full-time work of 38 hours a week. By contrast, the 417 visa workers had to work 60 or even 80 or 90 hours a week when they only wanted 45 hours work a week. The 417 visa workers are paid only \$12 to \$15 an hour, whereas the local workers are paid correctly.<sup>67</sup>

7.73 For example, page four of Tabled Document 6 shows three 417 visa workers at the Baiada plant employed by NTD Poultry worked 93 hours in the week at \$12.50 an hour when they were expecting 40 hours a week. By contrast, page one shows four local workers paid at \$26.46 an hour only getting 21 to 24 hours a week when they were expecting 38 to 40 hours a week.<sup>68</sup>

7.74 The committee was keen to understand the role that supermarkets play in this system. Mr Courtney explained that the minimum wage in the meat processing sector was low compared to other industries, with the average rate for a labourer in the industry of between \$32 000 and \$37 000 a year. And yet, employers such as Baiada have repeatedly told the union that the supermarket chains dominate the market and can therefore determine the price and they are driving down prices even further.<sup>69</sup>

### ***Substandard accommodation provided by labour hire contractors***

7.75 Mr Ian McLauchlan, a Branch Organiser for the AMIEU (Queensland), described the atrocious living conditions of 417 visa workers employed at Wallangarra Meats on the NSW-Queensland border. At the former Wallangarra hotel, now backpacker accommodation, the showers did not work and there were up to four 417 visa workers in small rooms. Elsewhere in Wallangarra, ten 417 visa workers paid the labour hire company \$120 each a week to live in an old home. They were not

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66 Australasian Meat Industry Employees' Union, Tabled Document 8, Sydney, 26 June 2015; Mr Chun Yat Wong, *Committee Hansard*, 26 June 2015, pp 22–23; Miss Chi Ying Kwan, *Committee Hansard*, 26 June 2015, pp 22–23.

67 Mr Hoi Ian Tam, International Liaison Officer, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW), *Committee Hansard*, 26 June 2015, p. 22.

68 Australasian Meat Industry Employees' Union, Tabled Document 6, Sydney, 26 June 2015.

69 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 20.

allowed to use the heating in winter, the bedding was on the floor, there was no kitchen table, and they had to set up a rice cooker on boxes.<sup>70</sup>

7.76 The 417 visa workers in NSW experienced similar conditions in their accommodation. Miss Chang also had to pay \$120 rent per week for a room she shared with two other people. Another flatmate had to sleep in the living room. The property owner dealt with AWX.<sup>71</sup> The AMIEU tabled photographs of the crowded slum-like conditions of visa worker accommodation provided by labour hire contractors.<sup>72</sup>

**Picture 7.1: Accommodation for 417 visa holders employed in NSW meatworks**



Source: Australasian Meat Industry Employees' Union, Tabled Document 4, Sydney, 26 June 2015.

7.77 Evidence gathered by the FWO during their investigation of Baiada supported the accounts provided by 417 workers and the unions regarding the benefits that labour hire contractors derived from exploiting temporary visa workers over their accommodation. The FWO calculated that the potential annual rental income accruing to a labour hire contractor from temporary visa worker accommodation is substantial. For example, one overcrowded Beresfield property was found to have sleeping

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70 Mr Ian McLauchlan, Branch Organiser, Australasian Meat Industry Employees' Union (Queensland), *Committee Hansard*, 12 June 2015, p. 17.

71 Miss Chiung-Yun Chang, *Committee Hansard*, 26 June 2015, p. 19.

72 Australasian Meat Industry Employees' Union, Tabled Document 9 and tabled document 12, Sydney, 26 June 2015.

accommodation for 21 visa workers employed at the Beresfield plant. The FWO observed:

Based on 20 people paying \$100 per week, the potential rental income for this property is over \$100,000 per year.<sup>73</sup>

7.78 The FWO also documented another case of overcrowded accommodation that benefitted the labour hire contractor at the Baiada Beresfield site:

Thirty workers engaged within the Pham Poultry supply chain were housed in a six bedroom house with two bathrooms, with the supervisor having one bedroom for her exclusive use. Each worker was required to pay \$100 per week, deducted from their wages.<sup>74</sup>

7.79 In addition, the FWO found there were no written agreements in relation to the deductions for rent from the wages of the visa workers. The FWO noted that deductions for rent are not permitted under the FW Act if the requirement is deemed unreasonable:

Subsection 325(1) of the FW Act provides that 'an employer must not directly or indirectly require an employee to spend any part of an amount payable to the employee in relation to the performance of work if the requirement is unreasonable in the circumstances'.

Subsection 326(1) provides that a term of a contract permitting a deduction has no effect to the extent that the deduction is 'directly or indirectly for the benefit of the employer' and 'unreasonable in the circumstances'.<sup>75</sup>

### ***Visa manipulation***

7.80 The AMIEU also tabled a document they said indicated the manipulation of the visa system by labour hire agencies both in overseas countries and within Australia. The alleged scam involved charging 417 visa workers a large fee to access a protection visa application in order for the worker to gain another 18 months' work in a meatworks in Australia, all the while knowing that the application would eventually fail:

...one of the main concerns that we have at the moment with the visa system is the manipulation of the visas across the refugee visa, the 417 visa and, in turn, the bridging visa and student visas. Clearly the ability for foreign visitors to apply for a protection visa when they arrive in Australia is a bit of a scam at the moment, the way I see it, because they are being

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73 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. 13.

74 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. 20.

75 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. 20.

advised by certain people within Australia and also within their home countries on how to access continuous work in Australia unlawfully. One of our main concerns with that is that holders of 417 visas in particular have to pay, and are being requested to pay, up to \$7000 to buy another right to stay in Australia, and that is about applying for a protection visa or refugee visa. Of course, once they apply for that visa, they are then given a window of up to 18 months for that visa to be accepted, knowing that that visa will not be accepted. We have had a range of members that have contacted us—in particular from the Baiada Beresfield site—that have highlighted what they have paid, and in some cases it is up to \$7000. In turn, if they want to make an application for a protection visa, it is a \$35 application. So they are clearly being exploited (1) by the advisers in Australia that are providing this information and (2) by certain labour agents in their home countries milking the system and making sure they take as much money off these workers as they can.<sup>76</sup>

### ***Approach taken by the AMIEU to resolving complaints***

7.81 The committee questioned the AMIEU over the approach it has taken to resolving complaints from workers and about the relationship that it has with employers in the industry.<sup>77</sup>

7.82 Mr Courtney was very clear that the AMIEU looked to work cooperatively with employers and certainly would not 'name and shame' an employer, firstly, because the union had a good agreement with the employer and, secondly, because damage to a company's reputation would be counter-productive in terms of the ongoing employment and welfare of the workers that they represent. Mr Courtney stated the issue was not the agreement that the union had negotiated with the company, but the inequitable treatment of the contracted labour at Baiada:

But, in the discussions that we have had with all of the employers, particularly Baiada, where we represent over 1000 people in New South Wales, we have been very up-front with them. We provided the company with the evidence that we have provided to the Fair Work Ombudsman. We have been very open with them. We have not tried to hoodwink them. We have not attacked them publicly. What we have done is expressed our concerns about the contracting companies they are engaging, especially when we have the best enterprise agreement rate and the highest union rates in Australia at the Beresfield site. We can have the highest rates, at \$26.50 entry level, but then you have cases like Skye's and Gypsy's, where they are getting paid \$11.50 and \$12.50 on the same site. It is the inequity issue that we have major concerns about.

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76 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 11; Australasian Meat Industry Employees' Union, Tabled Document 13, Sydney, 26 June 2015.

77 Senator McKenzie, *Proof Committee Hansard*, 26 June 2015, pp 14–15.

We have been pressing that point with the employers directly, because the last thing we want to do is put fear into the community about buying the product. We have the welfare of our 600-strong workforce to think of, as well as the good name of the company, we believe—because we have a good agreement with the company. The problem that we have is those contracted service arrangements that we are not privy to, and the only time that we can express an opinion with the company is when we provide them with the information. They know what the issues are. We do not just pull them out of the sky. There are 700 at one particular site at the moment that I say are all being grossly underpaid and treated inequitably.<sup>78</sup>

7.83 In terms of the scale of exploitation, since 2012 Mr Courtney noted that the AMIEU estimated 417 visa workers were owed \$1.26 million in underpayments. With one labour hire company, Pham Poultry, the AMIEU provided evidence to the FWO that 32 workers were owed \$434 000.<sup>79</sup>

7.84 Since 2011, Mr Courtney indicated that the AMIEU notified the FWO about visa worker exploitation on most occasions (about 70 per cent). The AMIEU pursued the rest of the cases directly through the courts.<sup>80</sup>

7.85 However, Mr Courtney also set out two major difficulties in pursuing court proceedings. First, visa workers only have a limited time in Australia, and second, companies liquidate as soon as they become aware of any proceedings against them:

Because of the time constraints in relation to pursuing legal proceedings and dealing with 417 backpackers—most of the claims are from backpackers—by the time the matters get before the courts the person is generally back in their home country. To provide evidence in chief is very difficult when you are 3,000 or 4,000 kilometres away. We have actually pursued our own matters as well. The process that we usually follow is: we notify the circuit court—that is, the application—and then we get in the queue. It is usually nine months before the matter is mediated. As soon as we notify the circuit court, the company in question makes an application to liquidate.<sup>81</sup>

7.86 The issue of companies being repeatedly liquidated, and then reappearing as different companies, has been documented by both the AMIEU and the FWO. While this phenomenon is covered in greater depth in subsequent sections, the question of how to regulate illegal phoenix activity is considered in chapter 9.

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

79 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 14.

80 Australasian Meat Industry Employees' Union, answer to question on notice, 26 June 2015 (received 30 August 2015).

81 Mr Grant Courtney, Branch Secretary, Australasian Meat Industry Employees' Union (Newcastle and Northern NSW) *Committee Hansard*, 26 June 2015, p. 14.



## **The Fair Work Ombudsman investigation into the labour hire arrangements of the Baiada Group**

7.87 Following media reports in October 2013 alleging visa worker exploitation at the Baiada Beresfield plant in NSW, the FWO began an investigation into the labour procurement arrangements of Baiada at its three NSW sites, Beresfield, Hanwood and Tamworth. The FWO inquiry began in November 2013 and reported in June 2015.<sup>82</sup>

7.88 The FWO investigation and report are covered at length here because the findings corroborate the evidence the committee received from both the AMIEU and 417 visa workers.

7.89 The FWO report was scathing of the failure by Baiada to fully cooperate with the inquiry, noting that:

- the inquiry encountered a failure by Baiada to provide any significant or meaningful documentation as to the nature and terms of its contracting arrangements with businesses involved in sourcing its labour; and
- Baiada denied Fair Work Inspectors access to its three sites in NSW which would have provided the inquiry with an opportunity to observe work practices as well as talk to workers about work conditions, policies and procedures.<sup>83</sup>

### ***Baiada's contractor operating model***

7.90 The FWO report noted that the Baiada Group (Baiada) and Ingham Enterprises dominated the poultry processing industry in Australia, supplying 70 per cent of the national poultry meat market. Both companies were vertically integrated entities that owned or controlled all aspects of the production chain. Baiada included both Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd (the latter purchased in 2009).<sup>84</sup>

7.91 The FWO found Baiada directly employed 2200 employees.<sup>85</sup> The rest of the processing labour force was procured through a network of contractors. The FWO found Baiada had agreements to source labour from six principal contractors: B & E Poultry Holdings Pty Ltd; Mushland Pty Ltd; JL Poultry Pty Ltd; VNJ Foods Pty Ltd;

82 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. 5.

83 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. 2.

84 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.

85 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. 6.

Evergreenlee Pty Ltd; and Pham Poultry (AUS) Pty Ltd. Furthermore, 'there was no documentation establishing or governing' the arrangements between Baiada and the contractors and 'all of these agreements were verbal agreements'.<sup>86</sup>

7.92 Beyond the principal contractors, the FWO uncovered a web of subcontractors that in turn engaged further subcontractors. The FWO found the following:

- the principals contracted to at least seven entities acting as second tier contractors;
- the second tier contractors, often contracted down a further two or three tiers;
- the principal and second tier contractors were not generally engaged in the direct sourcing of labour; and
- the operating model relied upon verbal agreements and operated on high levels of trust.<sup>87</sup>

7.93 The web of contractors and subcontractors led the FWO to conclude that Baiada had adopted an operating model which sought 'to transfer costs and risk associated with the engagement of labour to an extensive supply chain of contractors responsible for sourcing and providing labour'.<sup>88</sup>

7.94 Figure 7.1 (below) shows the labour procurement arrangements identified by the FWO during its investigation of the Baiada Beresfield site.

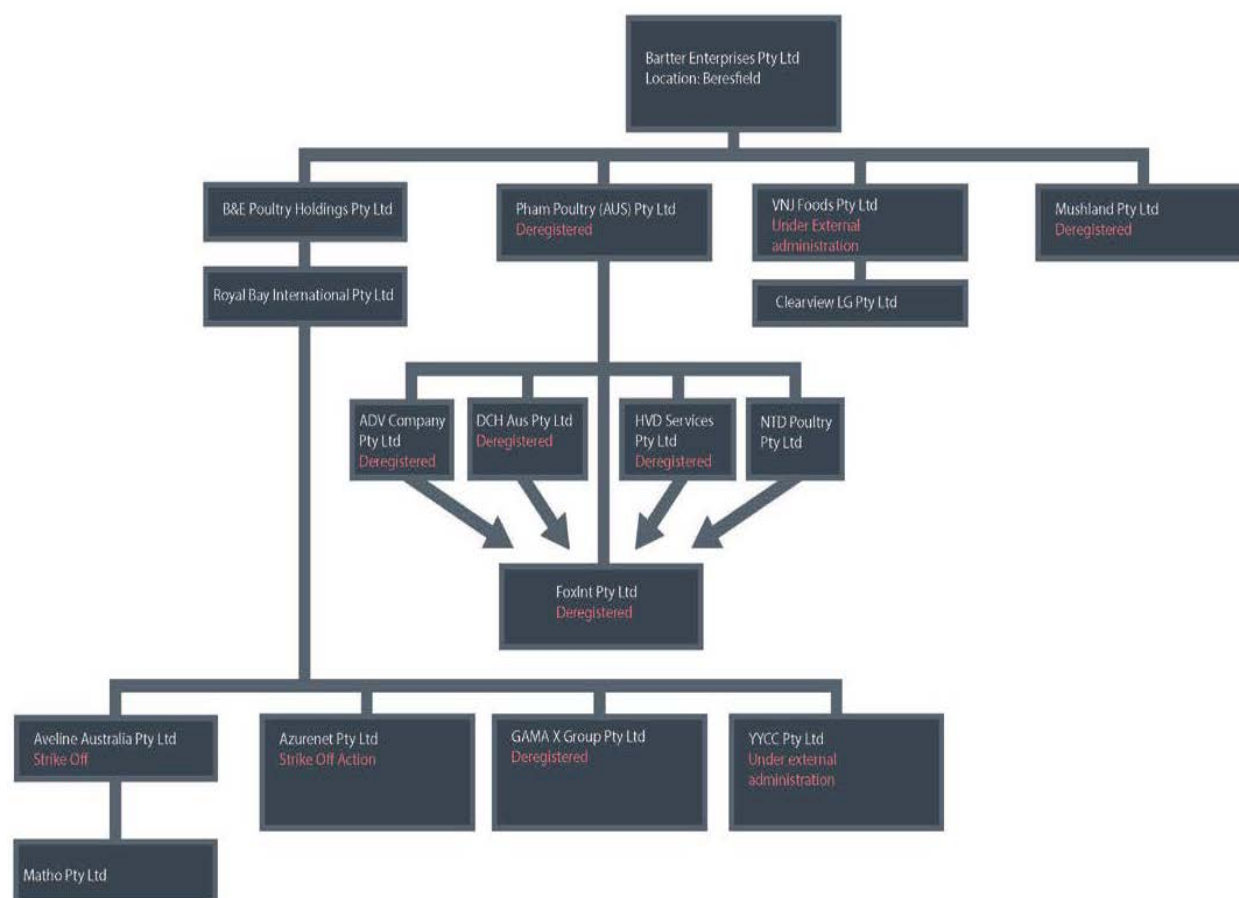
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86 Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, Commonwealth of Australia, June 2015, p. 10.

87 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. 10.

88 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. 2.

**Figure 7.1: The labour procurement arrangements at the Baiada Beresfield site as at 31 October 2013.**



Source: 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. 19.

7.95 The FWO identified four principal contractors at the Beresfield site. One of these contractors, B&E Poultry Holdings (B & E), operated its own processing factories in Ormeau in Queensland and Blacktown in NSW. B & E had already been the subject of FWO action:

In the last three years 14 requests for assistance have been received from direct employees of B & E working at the Ormeau site resulting in recoveries of over \$100 000 in underpayments. On 1 August 2014 B & E entered into a three year Enforceable Undertaking with the FWO in respect of admitted contraventions by B & E in relation to its direct employees. The admitted contraventions concerned: underpayment of base hourly rates, underpayment of casual loadings, overtime rates, weekend penalties and shift penalties.<sup>89</sup>

89 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. 17.

7.96 There were substantial differences in the payments made from Baiada to the principal contractors and those paid by the contractors to the employees. For example, in October 2013, Baiada paid Mushland Pty Ltd (Mushland) \$255 415 and Mushland paid \$52 460 in wages to 18 employees during the same period. This gave Mushland a margin of \$202 954. Mushland was deregistered on 16 July 2014 with no back payment to the underpaid workers.<sup>90</sup>

7.97 Similarly, Baiada paid Pham Poultry (AUS) Pty Ltd (Pham Poultry) \$1 078 155 for services provided at the Beresfield site during October 2013. Yet the FWO found substantial underpayment of the visa workers at the bottom of the supply chain:

The Pham Poultry arm of the labour supply chain involved four companies at a tier below the principal, these four companies subsequently contracted a further tier to a company called FoxInt Pty Ltd (FoxInt). The director, Quoc Hung Pham, was also a director of the principal Pham Poultry.

Although Pham Poultry directly engaged some workers who were supervisors at the site, all process workers were engaged by FoxInt. Workers were paid between \$11.50 and \$13.50 per hour for shifts of up to 19 hours and were not paid any leave entitlements or provided payslips. The wages paid to the process workers at the bottom of this supply chain did not meet the required minimum entitlements.<sup>91</sup>

7.98 Almost all of the subcontracting companies were deregistered or went into voluntary liquidation upon investigation by the FWO. Following Pham Poultry's deregistration, NTD Poultry Pty Ltd (NTD Poultry) replaced Pham Poultry as the principal contractor. However, the same labour supply chain (with the same uncontactable director) remained in place:

The labour supply chain operated by NTD Poultry contained the same entities as those in the Pham Poultry labour supply chain. That is, a three tier supply model remained in place and the final contractor of labour FoxInt Pty Ltd, remained, whose Director, Mr Quoc Hung Pham, had been the Director of Pham Poultry and who could not be located by Fair Work Inspectors.<sup>92</sup>

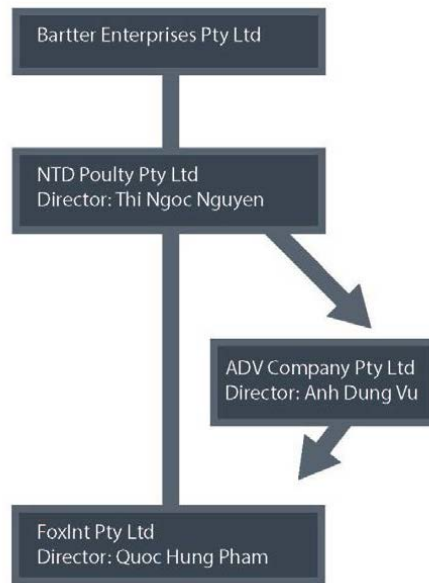
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90 Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, Commonwealth of Australia, June 2015, p. 18.

91 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, pp 18–19.

92 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. 22.

**Figure 7.1: The NTD Poultry supply chain as at January 2014**



Source: 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. 22.

7.99 Even after NTD Poultry replaced Pham Poultry, the FWO still received reports of the continuing underpayment of workers getting \$11.50 to \$12.50 an hour. In this regard, the FWO made the point that when a contractor or subcontractor ceased to operate, it was 'very quickly replaced with new 'price takers', resulting in suppliers of labour being forced into accepting market prices with no power to negotiate a higher price'.<sup>93</sup>

7.100 Although the FWO endeavoured to investigate NTD Poultry further, it found that 'workers were reluctant to be witnesses in any ongoing investigation' and no documentary evidence had been recorded or maintained by the employing entity.<sup>94</sup> (The committee therefore notes the evidence in the preceding section from Miss Chi Ying Kwan and Mr Chun Yat Wong who were both employed by NTD Poultry).

7.101 The FWO was unable to locate the director of Pham Poultry and FoxInt Pty Ltd, Mr Quoc Hung Pham. The FWO noted that 'the second director of Pham Poultry,

93 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. 27.

94 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. 22.

Mr Binh Hai Nguyen, made voluntary payments of \$20 250 to 10 workers to partially rectify the underpayment of entitlements'.<sup>95</sup>

7.102 In terms of the labour hire contractors supplying workers to Baiada, the FWO found:

- employees not being paid their lawful entitlements;
- a large amount of work performed 'off the books';
- contractors unwilling to engage with Fair Work inspectors;
- production of inadequate, inaccurate and/or fabricated records to inspectors;
- a number of entities throughout extensive supply chain networks did not engage any workers or have any direct involvement in work undertaken within Baiada's NSW processing plants or the sourcing or management of labour undertaking the work;
- a large number of the entities identified in the supply chains ceased trading; at times ceasing to exist the day before scheduled meetings with the FWO;
- invoices from contractors that were either no longer registered as businesses or claimed not to be involved in the industry; and
- workers too scared to talk.<sup>96</sup>

7.103 Related to the above, the FWO uncovered a raft of other issues and possible contraventions including entities failing to update their details with ASIC, entities operating when deregistered, sham contracting, subcontracted entities operating as clothing manufacturers with no apparent connection to the poultry processing industry, a principal contractor that did not engage any employees directly, and another principal contractor that only directly engaged one employee to perform processing work.<sup>97</sup>

7.104 The FWO also found that Baiada paid the 'principal contractors by the kilogram of poultry processed rather than by hours worked or the times processing work was performed'. That is, Baiada took no account of whether the work was undertaken on weekends, public holidays or during a night shift.<sup>98</sup>

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95 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. 21.

96 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, pp 2–3.

97 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.

98 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. 10.

7.105 The FWO noted that from 1 July 2014, the Poultry Processing Award 2010 [MA000074] (Modern Award) applied in full across all three Baiada NSW sites for workers engaged through contractors undertaking poultry processing work. The FWO also noted the provisions related to piece rates:

Although contractors within the supply chain reported paying piece rates, the industrial instruments that covered the work undertaken did not provide for payment of piece rates. In circumstances where piece rates are provided for in a Modern Award or enterprise agreement, there remains a requirement to ensure workers receive wages that equate to award minimums.<sup>99</sup>

7.106 In sum, the inquiry found:

- non-compliance with a range of Commonwealth workplace laws;
- very poor or no governance arrangements relating to the various labour supply chains; and
- exploitation of a labour pool that is comprised predominantly of overseas workers in Australia on 417 working holiday visas, involving:
  - significant underpayments;
  - extremely long hours of work;
  - high rents for overcrowded and unsafe worker accommodation;
  - discrimination; and
  - misclassification of employees as contractors.<sup>100</sup>

7.107 The FWO recommended a series of actions for Baiada to take in order to address the issues arising from the investigation. These actions are covered in the next section.

### ***Baiada's response and the Proactive Compliance Deed between the Fair Work Ombudsman and Baiada***

7.108 Before examining the response from Baiada, the committee notes that the FWO report emphasised the point that Baiada was the chief beneficiary of the labour contractor model that it used to source labour and that Baiada had the power to improve its internal processes and rectify the non-compliance with workplace laws:

The Inquiry also identified that this operating model transfers the cost and risk associated with the engagement of labour from the Baiada Group to labour supply chains of contractors. When contractors are asked to demonstrate to the Baiada Group that they are complying with minimum

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99 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. 9.

100 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. 3.

entitlements, they provide very minimal evidence, which appears to be accepted.

...

It is important to note the actual work and subsequent non-compliance with Commonwealth workplace laws is taking place on premises owned and operated by the Baiada Group. Baiada Group is therefore the chief beneficiary of work carried out by this labour force. The Baiada Group has the ability to take steps to ensure that workplace laws are complied with on their sites.<sup>101</sup>

7.109 In September 2015, Baiada advised the committee that it had instituted 'some of the most stringent contractor-oversight measures in the industry'. The following specific measures had been implemented since May 2015:

- Baiada terminated agreements with three contractors that could not demonstrate they had sufficient measures in place to ensure compliance with workplace laws. The termination affected 600 workers (50 per cent of the contract processing workforce). Those workers agreed to move to an agency employment provider and nearly all are still working at Baiada sites;
- Baiada prohibited labour subcontracting such that only entities in a contractual relationship with Baiada may engage workers at Baiada sites. Baiada's contractors were prohibited from further subcontracting unless they receive express written permission to do so from Baiada's Managing Director;
- Baiada introduced electronic time keeping for contractors' process workers at Baiada processing sites;
- Baiada required all remaining contractors to appoint Baiada to deposit wages directly into contractors' workers' bank accounts. Baiada also pays all workers' superannuation directly into their superannuation accounts and ensures all pay-as-you-earn (PAYE) tax is paid directly to the ATO;
- Baiada entered into new contracts requiring contractors to improve record keeping, increase transparency, provide detailed reporting, obtain certificates of compliance from external accounting professionals and allow third parties to conduct audits of their books;
- Baiada introduced multilingual (including Mandarin, Vietnamese and Korean) workplace policies, procedures and information, including complaints processes, at processing sites. In addition, Baiada established an onsite translation service and now provides newly inducted workers with the FWO work rights pamphlets when they commence work at a site;
- Baiada now confirms that contractors' process workers have the correct visa status before they are able to commence work at Baiada processing sites.

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101 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. 27.



Once the Visa Entitlement Verification Online (VEVO) checks are completed, the workers are issued with a Photographic ID Card showing their name, employer and work rights status. Baiada recently conducted additional checks of the contractors' workforce to confirm compliance with visa restrictions relating to hours of work or length of engagement and will conduct another such check before the end of 2015;

- Baiada now requires all contractors to provide Baiada with bi-annual third party compliance audits of their workers' payroll records; and
- Baiada took advice from specialist workplace consultants, and corporate law firm Minter Ellison.<sup>102</sup>

7.110 Baiada now has seven contractors at its eight processing plants covered by ten separate agreements:

- Adelaide: J & T Trade Pty Ltd;
- Beresfield: J & T Trade Pty Ltd; and VNJ Holdings Pty Limited;
- Ipswich: PHV Poultry Pty Limited;
- Laverton: GGPB Power Pty Ltd;
- Hanwood: GGPB Power Pty Ltd;
- Tamworth: GGPB Power Pty Ltd; and HP Food Pty Limited;
- Osborne Park: Calacash Inwa Enterprises Pty Limited; and
- Mareeba: Springtime Poultry Pty Limited.<sup>103</sup>

7.111 Mr Grant Onley, Human Resources Manager at Baiada, noted that Baiada charged the contracting agencies a fee for service for the new payroll services whereby Baiada deposits wages directly into contractors' workers' bank accounts. However, Mr Onley stated that 'Baiada is actually losing money on that, but it is part of our commitment to ensure that workers are paid right. That is part of our business model going forward'.<sup>104</sup>

7.112 Indeed, Baiada estimated 'the new payroll services arrangements cost the business in the vicinity of \$500 000 per annum' and that this did 'not include the other non-payroll oversight measures we have introduced at our sites'.<sup>105</sup>

7.113 Mr Onley noted that Baiada had also invested in other parts of the business to ensure ethical and lawful business practices were occurring throughout the organisation:

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102 Baiada, *Submission 57*, pp 1–3; Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 33.

103 Baiada, answer to question on notice, 20 November 2015 (received 17 December 2015).

104 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 43.

105 Baiada, answer to question on notice, 20 November 2015 (received 17 December 2015).

We have invested heavily in biometrics. Rather than an ID card that has a photo on it, we are using fingerprint biometric technology in some of our processing plants. We have certainly engaged consultants to do the review of the audits. The management time that we have thrown into this is quite considerable. We have some training requirements with regard to management and supervisor training going forward that we have committed to.<sup>106</sup>

7.114 On 23 October 2015, Baiada signed a three year Proactive Compliance Deed (Deed) with the FWO. In the Deed, Baiada acknowledged its responsibilities as a business to all workers at its sites:

Baiada believes it has a moral and ethical responsibility to require standards of conduct from all entities and individuals involved in the conduct of its enterprise, that:

- a) comply with the law in relation to all workers at all of its sites, and
- b) meet Australian community and social expectations, to provide equal, fair and safe work opportunities for all workers at all of its sites.<sup>107</sup>

7.115 The Deed also stated that Baiada 'has and will continue to implement fundamental, permanent and sustainable changes to its enterprise' to ensure compliance with the FW Act.<sup>108</sup> As part of these commitments, Baiada agreed to ensure:

- a dedicated hotline is established for employees to call and make a complaint if they believe they have been underpaid;
- workers carry photo identification cards which record the name of their direct employer;
- an electronic time-keeping system that records all working hours of each employee;
- employee wages can be verified by an independent third party, and are preferably paid via electronic funds transfer;
- contractors must be independently audited to ensure their compliance with workplace laws, with audit results to be provided to the FWO and published;
- the company's own compliance with the FW Act is independently assessed regularly over the next three years;

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106 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 43.

107 Commonwealth of Australia and Baiada Poultry and Bartter Enterprises, Proactive Compliance Deed, 23 October 2015, Item J, p. 4.

108 Commonwealth of Australia and Baiada Poultry and Bartter Enterprises, Proactive Compliance Deed, 23 October 2015, Item L, p. 5.

- a workplace relations training program is put in place to educate employees about their workplace rights, including language-specific induction documents;
- qualified human resources staff are on-site at each processing plant to respond to inquiries, complaints and reports of potential non-compliance;
- contact details of all labour-supply contractors are provided to the FWO, including copies of passports of company directors;
- Fair Work inspectors have access to any worksites and any documents at any time; and
- arrangements with contractors are formalised in written contracts requiring contractors to comply with workplace relations laws.<sup>109</sup>

7.116 Under the Deed, Baiada also agreed to rectify any underpayment of wages by its labour hire contractors that occurred from 1 January 2015 and set aside \$500 000 for this purpose. Claims could be lodged via a dedicated hotline or email established by Baiada under the terms the Deed. However, the agreement only applied to workers who lodged claims before 31 December 2015.<sup>110</sup> In effect, therefore, workers had about two months to lodge a claim following the official notification of the offer.

7.117 At the hearing in Melbourne on 20 November 2015, the committee noted that the AMIEU had provided evidence to the FWO that indicated Pham Poultry and NTD Poultry, both of which provided workers to Baiada, owed \$434 000 to 32 visa workers and \$134 000 to 20 visa workers respectively. The committee was therefore keen to understand why Baiada had limited claims to the period beginning 1 January 2015 and whether \$500 000 was sufficient to cover those claims. Mr Onley stated that the figure of \$500 000 was achieved in consultation with the FWO and that the FWO had 'agreed with Baiada that \$500 000 for claims post-January 1 is a sufficient amount to cover those claims'. In response to the evidence of visa worker exploitation going back two or more years, Mr Onley defended the company by stating that 'Baiada has not been party to any exploitation of workers'.<sup>111</sup>

7.118 The committee then drew Mr Onley's attention to section C on page one of the Deed that stated:

Prior to November 2013, the Fair Work Ombudsman (FWO) received requests for assistance from contract workers at Baiada's Beresfield plant alleging that they were being underpaid by their contractor employer,

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109 Commonwealth of Australia and Baiada Poultry and Bartter Enterprises, Proactive Compliance Deed, 23 October 2015; Fair Work Ombudsman, Baiada declares 'moral and ethical' responsibility to stamp out contractors' unlawful opractices at its worksites, Media Release, 26 October 2015.

110 Commonwealth of Australia and Baiada Poultry and Bartter Enterprises, Proactive Compliance Deed, 23 October 2015, Item 7, p. 13.

111 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 43.

forced to work extremely long hours, and required to pay high rents for overcrowded and unsafe employee accommodation.<sup>112</sup>

7.119 Mr Onley therefore undertook to investigate any information regarding claims prior to 1 January 2015, to work through it with the FWO, and to take any such matters to the Baiada board.<sup>113</sup>

7.120 With regard to union engagement, Mr Onley said Baiada had 'an open dialogue with the NUW and the AMIEU':

I am holding meetings at both a national and a state level directly with those organisations—Grant Courtney from the AMIEU, Chris Clark from AMIEU's southern division, and NUW's Alex Snowball; I have met with Alex again this week. We have given information on the hotline and the process we are going through, and I have encouraged them to use that process to give us the information on any claims that they may have or their members may have.<sup>114</sup>

7.121 Baiada advised that as at 20 November 2015, Baiada was investigating 16 claims that met the criteria under the Deed with regard to underpayment.<sup>115</sup> Mr Onley also pointed out that Baiada had 'taken unlimited responsibility for any underpayment to contract workers', should it occur in the future.<sup>116</sup>

7.122 On 9 February 2016, Baiada advised the committee that it had reviewed and processed the claims it received under the terms of its Deed with the FWO. However, Baiada provided no specific details on the numbers of claims received or determined:

In the spirit of the proactive compliance partnership, we have provided the FWO with our proposed response to each claim and believe it is appropriate to receive the FWO's final concurrence before confirming any specific information in relation to the claims.

Once consultation with the FWO has been finalised we will contact the claimants with the outcome of their inquiry along with an explanation of how the claim was determined.

In the meantime, we are writing to claimants informing them that we have reviewed their claim, that we are working with the FWO on finalising the claim and that they will be notified of the outcome as soon as possible.<sup>117</sup>

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112 See Senator Deborah O'Neill, *Committee Hansard*, 20 November 2015, p. 44.

113 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 44.

114 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 45.

115 Baiada, answer to question on notice, 20 November 2015 (received 17 December 2015).

116 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 34.

117 Baiada, answer to question on notice, 20 November 2015 (received 15 February 2016).

7.123 In terms of its internal compliance processes prior to May 2015, Mr Onley advised that Baiada conducted checks on all its principal contractors and received 'assurances' from the company directors and 'information from their accountants in some cases'.<sup>118</sup> Based on the FWO report, Baiada had agreements at that time to source labour from six principal contractors for its NSW operations: B & E Poultry Holdings Pty Ltd; Mushland Pty Ltd; JL Poultry Pty Ltd; VNJ Foods Pty Ltd; Evergreenlee Pty Ltd; and Pham Poultry (AUS) Pty Ltd.<sup>119</sup>

7.124 In response to a question on notice about the information Baiada had requested from the directors of the principal contractors and the responses that Baiada had received from those directors, Baiada undertook to provide the committee with the information. Baiada provided the committee with:

- two letters, one it had sent to Mr Xu Chun Dong of B & E Poultry Holdings Pty Ltd on 19 April 2013, and one it had sent to Mr Binh Nguyen of Pham Poultry (AUS) Pty Ltd on 19 April 2013;
- an unsigned letter on Pham Poultry company letterhead stating:
 

This is to confirm that the company is paying its employees and other persons engaged in performing the work under our agreement as a minimum and amount equivalent to the appropriate and current rate as defined by namely MA000074 – Poultry Processing Award 2010.

Should you have any question regarding this please do not hesitate to contact us.
- A letter from Pham Poultry's accountant stating:
 

Based on records and information supplied, we confirm that this company is compliant with its obligation in relation to the direct employees' entitlements in accordance with Poultry Processing Award 2010 [MA000074].
- One week of payslips for 12 employees.<sup>120</sup>

7.125 With respect to the above documents, the committee notes the following. Firstly, Baiada only provided the committee with a response from the director of one principal contractor and their accountant. Secondly, these are the same documents examined by the FWO in its investigation of Baiada's labour supply arrangements in NSW. Thirdly, the FWO reported that payslips showing one week of wages for 12 employees (one being the Pham Poultry company director) revealed wage payments totalling \$6828.63 compared to payment made by Bartter Enterprises Pty Ltd to Pham

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118 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 41.

119 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. 10.

120 Baiada, answer to question on notice from Senator Lines (received 17 December 2015).

Poultry of \$196 307.01 for that week.<sup>121</sup> Fourthly, on the basis of the above documents, Baiada advised the FWO 'they were satisfied that Pham Poultry was compliant with Commonwealth workplace laws'.<sup>122</sup> Fifthly, the FWO was of the view that the above documentation was not able to support Baiada's conclusion that Pham Poultry was compliant with Commonwealth workplace laws.<sup>123</sup>

7.126 Given Baiada has stated it was unaware of the level of subcontracting until after it conducted its own review in May 2015,<sup>124</sup> a question arises as to why Baiada was satisfied that a principal contractor to which it paid \$196 307.01 for a week's worth of wages in October 2013 was compliant with all workplace laws when the FWO found that contractor was only making total wage payments of \$6828.63 for that same week.

### **Committee view**

7.127 A substantial body of evidence to this inquiry demonstrated blatant and pervasive abuse of the WHM visa program by a network of labour hire companies supplying 417 visa workers to businesses in the horticulture sector and the meat processing industry.

7.128 It was clear from the evidence that these labour hire companies have a particular business model. There are a number of labour hire companies in Australia with close links to labour hire agencies in certain south-east Asian countries. Workers on 417 visas are recruited from countries such as Taiwan and South Korea and brought to Australia specifically to work in meat processing plants. The scale of the abuse is extraordinary, both in terms of the numbers of young temporary visa workers involved, and also in terms of the exploitative conditions that they endure.

7.129 Work in a meat processing plant is hard, fast, and potentially dangerous. The committee heard evidence from the 417 visa workers themselves that when they arrived in Australia, they often had to wait before they could begin work, but still had to pay rent to the labour hire company. Work as such began at a meat processing facility where the temporary visa workers had to undergo a four to six week 'training' program. The visa workers worked about 60 hours a week and got paid \$200 for 9.5 hours work. However, the labour hire company recouped its \$200 a week outlay, because the four weeks at \$200 a week was deducted from the visa workers' wages

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121 See 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. 21.

122 See 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. 21.

123 See 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. 21.

124 Mr Grant Onley, Human Resources Manager, Baiada Poultry Pty Ltd, *Committee Hansard*, 20 November 2015, p. 41.

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once the visa worker was placed in a 'real' job. In practice, therefore, 417 visa workers work 60 hours a week for four weeks in a meat processing plant and get paid nothing.

7.130 On completion of their 'training', the 417 visa workers were given a job where they were required to work regular 12 to 18 hour shifts 6 days a week. They were frequently denied proper breaks and often had to keep working or return to work early after suffering workplace injuries. The pay rates were appalling. Most received around a flat \$11 or \$12 an hour irrespective of whether this was the night shift, the weekend, or overtime hours. These wage rates are illegal and clearly breach award minimums.

7.131 Poor or non-existent record-keeping was endemic across the labour hire companies mentioned in this inquiry. This has serious implications for ensuring compliance with legal minimum conditions of employment. The 417 visa workers never met the head labour hire contractor and only had a mobile number to receive texts about the start time for their next shift. The committee received many documents including fake timesheets and envelopes with a figure scrawled on it instead of a proper timesheet. The workers were paid in cash with no deductions for tax.

7.132 When the shift was over, these workers returned to squalid and overcrowded accommodation with no proper facilities, for which they were charged exorbitant levels of rent by the labour hire contractor. The rent payments were deducted straight from the workers' pay packets, most of the time in clear contravention of the law.

7.133 This raft of exploitative and illegal activity has been corroborated by the FWO in various investigations conducted over recent years. The committee is particularly concerned that, in light of the evidence it has received during the inquiry, that the levels of exploitation that have been documented in this chapter are not isolated instances, but appear to be pervasive, particularly amongst a group of labour hire contractors supplying temporary visa workers to particular sectors of the economy.

7.134 The committee notes that the AMIEU has had a cooperative approach to the major industry employers in the meat processing sector and has not sought to name and shame employers, but has instead sought to work with the respective businesses in order to help the employer address issues such as underpayments.

7.135 In this regard, the committee notes that the AMIEU had, over a considerable period of time, been raising these matters with Baiada. The committee also notes that Baiada was paying substantial sums of money to principal contractors, one of whom did not engage any employees directly, another that only directly engaged one chicken processing worker, and another that only paid a wage bill that was a tiny fraction of the money received from Baiada. This last point is confirmed, in part, by documents Baiada gave the committee. Given the above, therefore, the committee can only conclude that, at best, Baiada was turning a 'blind eye' to the exploitation that was actually occurring at its sites and within its labour supply arrangements.

7.136 In light of the above, the committee makes a number of points. First the committee did not receive evidence about the widespread exploitation of 417 visa workers directly employed by growers and producers. Indeed, the committee heard from growers about how much they value the visa workers that work for them.

7.137 Nevertheless, the committee received evidence that points to a potential loophole in the Horticulture Award as opposed to the Poultry Award. Piece rates are allowed under the Poultry Award so long as there remains a requirement to ensure workers receive wages that equate to award minimums. By contrast, evidence to the committee indicated that no such safety net exists within the Horticulture Award. While the piece rate may provide an incentive that allows people to earn much more than the award, the committee is concerned that the piece rate may also mean that people working in the horticulture sector may earn much less than the award.

7.138 Evidence to the inquiry from both growers and unions indicated a preference for the direct employment of labour where possible. This is a preference that the committee endorses. The committee recognises, however, that labour market dynamics vary considerably and that the seasonal fluctuation in the number of workers required, particularly in horticulture and fruit production, means that the direct employment of workers is not always possible or preferable. Further, as noted in chapter 4, it appears that the government has not addressed in a considered and holistic way the particular labour market needs of certain sectors in rural Australia. This has led, in part, to the current over-reliance on the poorly regulated WHM visa program.

7.139 Given that certain sectors of the economy have a requirement for temporary visa workers, the committee endorses the work of industry organisations such as Growcom that has developed an education and training program for employers on matters such as compliance with workplace laws.

7.140 Indeed, there is a lot that employers can do. This is demonstrated, in part, by the recent response of Baiada, particularly in terms of measures such as stipulating that a labour hire company is not allowed to subcontract to another labour hire company for the provision of labour, implementing electronic timekeeping, ensuring that all wage payments are made by electronic bank transfer and not in cash, and enforcing compliance monitoring and auditing.

7.141 However, these measures may not be enough to stamp out the exploitative practices of a group of unscrupulous labour hire contractors across a range of industry sectors. The committee therefore has more to say on the regulation of labour hire companies in chapter 9.

7.142 The vulnerability of WHM visa holders stands in stark contrast to the rights and protections accorded to workers employed under the Seasonal Worker program. Indeed, the optimistic view of the WHM program espoused in previous inquiries has been tarnished by the illegal and disturbing treatment of WHMs recounted in this chapter.

7.143 Finally, the committee notes that, given the temporary nature of their visa, many 417 visa workers have left the country without having had the opportunity to pursue a legal remedy for their underpayments. The committee therefore reiterates the view expressed in chapter 6, namely that, where required, access to a bridging visa to pursue a meritorious workplace claim is a necessary part of ensuring that temporary visa workers enjoy the same access to the law that an Australian worker would in similar circumstances.



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7.144 Finally, the committee also received evidence about proposed changes to the tax treatments of WHMs. A consistent theme throughout this inquiry has been that the keeping of accurate employment records is essential for ensuring compliance with workplace laws. The committee is therefore concerned that an overly onerous tax regime applied to WHMs could give rise to unintended consequences. The consequences could include a perverse incentive for WHMs to seek cash in hand work to avoid a high tax regime, and for employers to offer a below the award cash rate to WHMs. This would risk entrenching illegal rates of pay in certain sectors and place further downward pressure on wages. In addition, it is by no means certain that the measure, as currently conceived, would raise the predicted tax revenue.

7.145 The committee is therefore of the view that the government should re-examine its proposed tax changes to WHM visa holders, including giving consideration to other proposals such as that put forward by the NFF.



# CHAPTER 8

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

### Introduction

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

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

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

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

### International student visa program

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Undocumented migrant labour**

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

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

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

8.17 Australia is host to a potentially large pool of undocumented labour. For example, according to estimates from the DIBP, the number of visa overstayers alone had increased to 62 700 by June 2013.<sup>14</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

### ***Undocumented workers and employment law***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Coercion of temporary visa workers into breaching their visa**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 116

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

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

Section 235

(1) If:

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

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

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

the non-citizen commits an offence against this section.<sup>55</sup>

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

- whether the non-compliance/contravention occurred with knowledge of its unlawfulness on the part of the visa-holder;
- the frequency of the non-compliance/contravention;
- the gravity of the non-compliance/contravention;
- whether the non-compliance/contravention was brought about by conduct of others, including employers; and/or
- whether the visa-holder had been previously warned by the Immigration Department in relation to the non-compliance/contravention.<sup>56</sup>

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

### **The exploitation of international student visa workers at 7-Eleven**

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

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

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

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

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

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

### ***7-Eleven history and the business model***

8.66 The hearing in Melbourne on 24 September 2015 was attended by Mr Russell Withers, a joint shareholder in 7-Eleven Stores Pty Ltd (7-Eleven) and Chairman of 7-Eleven until his resignation from the board on 1 October 2015.<sup>63</sup>

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

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

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

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

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

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

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

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

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

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

- expenses such as telephone, janitorial costs and supply items such as paper bags.<sup>67</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

### ***Recruiting international students to work as 7-Eleven employees***

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

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

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

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

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

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

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

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

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



consequences of being exploited at work, Mr Ullat Thodi began failing his subjects at university. Further, having failed several subjects, Mr Ullat Thodi calculated that he had already paid almost \$100 000 for his degree, and he still had one subject to take in 2016.<sup>85</sup>

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

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

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

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

8.97 The committee heard that many franchisees from the Indian subcontinent (India, Pakistan, and Bangladesh) and southern China tended to recruit international students from those same ethnic backgrounds. Mr Ullat Thodi noted that many franchisees were former international students themselves and so they understood, and were able to exploit, the particular vulnerabilities of international students<sup>88</sup>

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

### ***Underpaying the employees at 7-Eleven***

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

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

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

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

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

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

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

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

#### *Unpaid training*

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

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

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

#### *Half pay scam*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### *Cash back scam*

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

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

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

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

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

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

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

8.121 Mr Gerard Dwyer, National Secretary and Treasurer of the SDA provided the committee with documents<sup>110</sup> that confirmed the SDA had received consistent evidence on the half pay scam and the cash back scam:

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

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

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

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

#### *Common bank account*

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

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

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

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

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

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

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

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

### ***Unpaid superannuation***

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

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

### ***Workplace health and safety***

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

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

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

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

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

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

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

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

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

#### ***Staff required to pay for goods stolen by customers***

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

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

#### ***Visa rorting by 7-Eleven franchisees***

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

### ***The response from 7-Eleven***

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

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

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

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

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

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

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

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

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

*Independent review panel*

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

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

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

*Audit activity*

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

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

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

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

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

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

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

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

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

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

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

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

8.151 For the financial year 2014–15, the average profit in stores which traded for that period (subject to temporary closures for maintenance) was \$167 332, with the range being a loss of \$48 815 to a profit of \$1 212 243. For the financial year 2014–15, the average profit of those stores in the lowest income band was \$73 464 with the median being \$80 680. The range of earnings in this band was a loss of \$48 815 to a profit of \$116 081.<sup>143</sup>

#### *Training for franchisees*

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

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

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

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

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

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

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

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

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

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

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

#### *Variation of the franchise agreement*

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

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

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

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

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

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

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

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

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

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

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

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

150 See 7-Eleven, answer to question on notice, 5 February 2016 (received 16 February 2016), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/temporary\\_work\\_visa/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Additional_Documents).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

**Buy Back Offer (A stores only)**

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

- Any franchisee who purchased a store directly from 7-Eleven Stores Pty Ltd, will be able to elect to return (sell back) that store to 7-Eleven.
- 7-Eleven will refund the original Franchise Fee paid in full (excluding any application or training fees).
- The date of transfer shall be mutually agreed but will not be, in any event, later than 2 months after signing the agreement to hand back the Store.
- For franchisees of multisites, the offer must extend to all stores, as a dissatisfaction with the system cannot occur in one location only, but rather in all.
- This offer will remain open until 31 January 2016.<sup>160</sup>

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

**Franchise Fee Refund (B and onwards stores only)**

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

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

- Any franchisee who believes its operation of a store is not viable, where full and proper wages are paid, can immediately enlist 7-Eleven's assistance to procure a sale of the goodwill of that franchise.
- 7-Eleven Stores Pty Ltd will refund to the outgoing franchisee, an amount that equates to no more than the original franchisee fee paid (excluding any application or trading fees). This refund amount will be capped at the difference between the goodwill being received upon sale and the sum of the original goodwill and franchise fee paid (excluding any application or training fees).
- For the avoidance of any doubt, 7-Eleven retains the right to charge the incoming Franchisee the currently applicable Franchise Fee.
- 7-Eleven, at its discretion, may reduce the fee charged to the incoming franchisee, with regard to the stores gross income or the overall circumstances where doing so would assist the franchisee to achieve a comparable return of goodwill.
- The offer will remain open until 30 June 2016.<sup>161</sup>

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

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

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

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

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

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

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

### *Independent Claims Pty Ltd*

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

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

...

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

### *Fels Wage Fairness Panel*

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

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

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

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

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<sup>164</sup> See *Committee Hansard*, 5 February 2016, pp 14–21.

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

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

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

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

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

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

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

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### *Contacting potential claimants*

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

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

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

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

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

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

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

### *Processing claims*

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

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

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

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

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

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

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

- Letter to claimant;
- Determination amount form;
- Declaration; and
- Frequently asked questions.<sup>175</sup>

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

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

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

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

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

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

175 See Fels Wage Fairness Panel, answer to question on notice, 20 November 2015 (received 17 December 2015), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/temporary\\_work\\_visa/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Additional_Documents)

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

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

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

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

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

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

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

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

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

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

178 Fels Wage Fairness Panel, Frequently asked questions.

179 Fels Wage Fairness Panel, Letter to claimant.

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

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

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

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

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

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

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

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

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

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

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

182 Fels Wage Fairness Panel, Letter to claimant.

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

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

185 Fels Wage Fairness Panel, Frequently asked questions.



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

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

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

*Barriers to claimants coming forward—fear of deportation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Barriers to claimants coming forward—threats and intimidation from franchisees*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Ongoing underpayments*

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

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

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

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

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

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

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

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

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

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

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

## **Franchising Code of Conduct**

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

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

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

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

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

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

### *Termination of a 7-Eleven franchise agreement*

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

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

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

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

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

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

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

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

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

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

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

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

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

### *The 7-Eleven franchise model*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### ***Potential amendments to the Franchising Code of Conduct***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

8.238 However, Dr Hardy did point out that:

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

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

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

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

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

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

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

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

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

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

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

### **Committee view**

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

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

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

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

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

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

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

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

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

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

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

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

### **Recommendation 22**

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

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

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

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

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

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

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

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

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

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

### **Recommendation 23**

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

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

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

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

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

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

#### **Recommendation 24**

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

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

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

#### **Recommendation 25**

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

### **7-Eleven**

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

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

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

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

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

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

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



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

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

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

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

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

**Recommendation 26**

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

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

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

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

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

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

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

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

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

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



## **PART V**

### **Information, education, regulation and compliance**



# 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'.<sup>1</sup> 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

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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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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

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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).



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

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.<sup>7</sup>

#### *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'.<sup>8</sup>

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.<sup>9</sup>

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

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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.<sup>10</sup>

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'.<sup>11</sup> 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.<sup>12</sup>

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'.<sup>13</sup>

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'.<sup>14</sup>

### **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.<sup>15</sup> However, other submitters and witnesses also pointed to the critical importance of employers having

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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.<sup>16</sup> This was of particular concern to a number of witnesses from regional and rural Australia.<sup>17</sup>

***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.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

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.<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup>

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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](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.

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*Public funding to assist the collective organisation of migrant workers*

9.29 Based on his experience convening the Migrant Workers Campaign Steering Group,<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup>

***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.<sup>29</sup>

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

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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.<sup>30</sup>

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.<sup>31</sup>

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.<sup>32</sup>

### **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

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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.<sup>33</sup>

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 dob-in line for reporting matters of concern, and call centres for enquiries and reports from visa holders, employers and members of the public.<sup>34</sup>

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.<sup>35</sup>

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.<sup>36</sup>

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.<sup>37</sup>

9.41 The Migration Council also recommended further integrity measures including:

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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.<sup>38</sup>

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.<sup>39</sup>

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.<sup>40</sup> The FWO welcomed the changes to ensure that proper employment records were being kept.<sup>41</sup>

#### ***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.<sup>42</sup>

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

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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'.<sup>43</sup>

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'.<sup>44</sup>

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.<sup>45</sup>

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'.<sup>46</sup>

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.<sup>47</sup>

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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.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup>

#### *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.<sup>52</sup>

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.<sup>53</sup>

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

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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.<sup>54</sup>

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.'<sup>55</sup>

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.<sup>56</sup>

9.60 The FWO met growers, labour-hire contractors, hostel operators, harvest workers, industry bodies, local councils, and unions during field trips across Australia.<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup>

*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.<sup>60</sup> (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.<sup>61</sup>

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:

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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.<sup>62</sup>

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.<sup>63</sup>

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.<sup>64</sup>

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.<sup>65</sup>

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.

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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.<sup>66</sup>

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.<sup>67</sup>

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.<sup>68</sup>

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.<sup>69</sup>

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

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

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.<sup>72</sup>

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.<sup>73</sup>

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'.<sup>74</sup>

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.<sup>75</sup>

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

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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.<sup>76</sup>

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.<sup>77</sup>

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.<sup>78</sup>

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.<sup>79</sup>

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

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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.<sup>80</sup>

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.<sup>81</sup>

#### *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).<sup>82</sup>

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.<sup>83</sup>

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.<sup>84</sup>

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

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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'.<sup>85</sup>

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.<sup>86</sup>

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.<sup>87</sup>

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;

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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.<sup>88</sup>

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.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup>

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:

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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 network<sup>92</sup>

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.<sup>93</sup>

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.<sup>94</sup>

### **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.<sup>95</sup>

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:

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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.<sup>96</sup>

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'.<sup>97</sup>

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.<sup>98</sup>

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.<sup>99</sup>

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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.<sup>100</sup>

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.<sup>101</sup>

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.<sup>102</sup>

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

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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.<sup>103</sup>

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 courts<sup>104</sup>

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:<sup>105</sup>

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.<sup>106</sup>

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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.<sup>107</sup>

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.<sup>108</sup>

### *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'.<sup>109</sup>

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.<sup>110</sup>

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

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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.<sup>111</sup>

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.<sup>112</sup>

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.<sup>113</sup>

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.<sup>114</sup>

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'.<sup>115</sup>

### *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

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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'.<sup>116</sup>

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.<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup>

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.<sup>120</sup> 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.<sup>121</sup>

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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).<sup>122</sup>

### **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.<sup>123</sup>

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.<sup>124</sup>

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.<sup>125</sup>

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

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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'.<sup>126</sup>

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.<sup>127</sup>

### **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.<sup>128</sup>

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

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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.

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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.<sup>129</sup>

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.<sup>130</sup>

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.<sup>131</sup>

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.<sup>132</sup>

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

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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'.<sup>133</sup>

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.<sup>134</sup>

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.<sup>135</sup>

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.<sup>136</sup> 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

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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.<sup>137</sup>

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.<sup>138</sup>

### ***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.<sup>139</sup>

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.<sup>140</sup>

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

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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.<sup>141</sup>

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'.<sup>142</sup>

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;

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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.<sup>143</sup>

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'.<sup>144</sup>

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.<sup>145</sup>

#### ***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.<sup>146</sup>

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

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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.<sup>147</sup>

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'<sup>148</sup>

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.<sup>149</sup>

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.<sup>150</sup>

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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.<sup>151</sup>

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'.<sup>152</sup>

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'.<sup>153</sup>

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.<sup>154</sup>

### *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'.<sup>155</sup> 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.<sup>156</sup>

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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'.<sup>157</sup>

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.<sup>158</sup>

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.<sup>159</sup>

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.<sup>160</sup>

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'.<sup>161</sup>

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.<sup>162</sup>

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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.<sup>163</sup>

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'.<sup>164</sup>

### ***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.<sup>165</sup>

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.<sup>166</sup>

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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.<sup>167</sup>

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.<sup>168</sup>

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.<sup>169</sup> The vast majority of accessories joined to FWO proceedings were directors and or managers.<sup>170</sup>

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.<sup>171</sup>

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

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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.<sup>172</sup>

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.<sup>173</sup>

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'.<sup>174</sup>

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

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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).<sup>175</sup>

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.<sup>176</sup>

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.<sup>177</sup>

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.<sup>178</sup>

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.<sup>179</sup>

### ***'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.<sup>180</sup>

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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.<sup>181</sup>

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'.<sup>182</sup>

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.<sup>183</sup>

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.<sup>184</sup>

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

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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.<sup>185</sup>

### ***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.<sup>186</sup>

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.<sup>187</sup>

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

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

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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.

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

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'.<sup>191</sup>

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.<sup>192</sup>

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.<sup>193</sup>

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;

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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.<sup>194</sup>

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.<sup>195</sup>

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'.<sup>196</sup>

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.<sup>197</sup>

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'.<sup>198</sup>

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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.<sup>199</sup>

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.<sup>200</sup>

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'.<sup>201</sup>

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.<sup>202</sup>

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).<sup>203</sup>

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

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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.<sup>204</sup>

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.<sup>205</sup>

### **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

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

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

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

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'.<sup>207</sup>

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.<sup>208</sup>

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.<sup>209</sup>

### **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

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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



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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.**

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***'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**

# Coalition Senators' Additional Comments

1.1 Throughout the course of this inquiry Coalition Senators have been very concerned about the examples of unscrupulous employers who have exploited temporary work visa holders in Australia, which must be condemned. Coalition Senators have no tolerance for those who do the wrong thing, and believe the case has been made for stronger laws to deter wrongdoing and better enable wrongdoers to be held to account.

1.2 Coalition Senators note that the Minister for Employment has established a Ministerial Working Group, which includes the Minister for Immigration and Border Protection, Assistant Treasurer, and Minister for Justice.<sup>1</sup> The benefit of such a group is that it can address issues concerning vulnerable visa holders which transcend the silos of government, over multiple portfolios.

1.3 While Coalition Senators are broadly supportive of the Chair's Report they note that many of the recommendations have been made before the Ministerial Working Group established by the Government has had adequate time to respond to these issues in the labour market.

1.4 Additional comments have been provided below against some of the recommendations of the Chair's Report as follows:

## **Recommendation 2**

1.5 Coalition Senators do not agree with this proposal as it could create an additional incentive for temporary residents to remain onshore long-term and lead to perverse market, social and demographic outcomes. For example, the existence of streamlined pathways to permanent residence for international students prior to 2010 lead to poor social, demographic and labour market outcomes.

1.6 Skilled migration visa settings are based on national need, and aim to target high quality migrants who will use their skills and attributes to contribute directly to Australia's economic well-being, and who are less likely to compete with Australian workers in the labour market.

1.7 Australian workers should have priority in the labour market, and this proposal adds additional supply to the labour market without appropriate reference to labour market need, impacts on Australian workers or the skill level of the temporary visa holder.

1.8 Temporary visa holders can apply for permanent residence at any time providing that they meet the requirements for a permanent visa.

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<sup>1</sup> Senator the Hon Michaelia Cash, Minister for Employment, Minister for Women, and Minister Assisting the Prime Minister for the Public Service, 'Ministerial Working Group to help protect vulnerable foreign workers', Media Release, 15 October 2015, <https://ministers.employment.gov.au/cash/ministerial-working-group-help-protect-vulnerable-foreign-workers>

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**Recommendation 4**

1.9 Coalition Senators do not support this recommendation.

1.10 Transparent and accountable consultation with stakeholders is a key part of the labour agreement programme to ensure that employment and training opportunities for Australians are not undermined and that the risk of exploitation of overseas workers is mitigated. Prior to requesting a labour agreement, applicants must consult with relevant industrial stakeholders. Relevant stakeholders include the industry body which best represents their interests, the union which best represents the interest of the applicant's employees, and any other agency or community group that may be impacted by the proposed labour agreement, such as schools and health services. The feedback from stakeholders is taken into account in the determination of the labour agreement application.

1.11 The requirement for consultation adds a significant impost on the applicant for a labour agreement. A requirement to further consult stakeholders on the outcome of the labour agreement would be of no value, but would add additional, unnecessary impost on the applicant. The outcome of the labour agreement application may also be of commercial sensitivity, and there may be privacy implications.

**Recommendation 5**

1.12 Coalition Senators do not support this recommendation.

1.13 The 2014 independent review of the temporary work Subclass 457 visa programme (the Azarias Review) recommended that the Temporary Skilled Migration Income Threshold (TSMIT) be reviewed within two years. On 23 December 2015 the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, announced that Mr John Azarias had been appointed to undertake an evidence-based review of the TSMIT, and this Review has commenced. The Terms of Reference for this review require consideration of a range of issues, including factors that should determine the settings, the appropriate base level, indexation and regional concessions for TSMIT.

1.14 Any decision to amend or index the TSMIT should only be taken following consideration of the evidence and recommendations made by this independent review.

**Recommendation 8**

1.15 Coalition Senators do not support this recommendation however would support a review of the current exemption settings.

1.16 The *Migration Amendment (Temporary Sponsored Visas) Act 2013*, which was introduced and passed under the former Labor government, provides exemptions from labour market testing in circumstances where the skill level of the nominated occupation is equivalent to Skill level 1 or Skill Level 2 as provided for in the Australian and New Zealand Standard Classification of Occupations (ANZSCO) (except for protected qualifications or protected experience).

1.17 Exemptions to the labour market testing apply to specific occupations within skill levels 1 or 2 are prescribed by legislative instrument. The legislative instrument of exemption for occupations in skill levels 1 and 2 is disallowable by either house of the parliament.

1.18 In introducing this legislation, former Labor Minister O'Connor provided for these exemptions from labour market testing for higher skilled occupations in recognition that labour market testing of these higher skilled occupations is not always appropriate and may be impractical. Former Minister O'Connor also noted in his second reading speech that he intended to exempt most highly skilled occupations.

1.19 Further, the 2014 Azarias Review of the integrity of the 457 programme noted that labour market testing adds unnecessary regulatory cost.

### **Recommendation 9**

1.20 Coalition Senators note that this recommendation would be incompatible with Australia's obligations under the World Trade Organization General Agreement on Trade in Services (WTO GATS) Commitments, and free trade agreements.

1.21 Australia's international trade obligations fall under two categories: World Trade Organization General Agreement on Trade in Services (WTO GATS) Commitments, and free trade agreements. Australia is bound under these international trade obligations to provide exemptions to certain categories of workers, and the adoption of this recommendation as currently worded would be incompatible with these obligations

1.22 The recommendation should be amended to include the following words "unless Labour Market Testing would be inconsistent with Australia's Free Trade Agreement obligations".

### **Recommendation 13**

1.23 Coalition Senators believe this recommendation is problematic and would create an additional regulatory burden for employer sponsors of 457 visa workers, limiting the ability of businesses to respond to labour shortages in a timely and flexible way. It is impractical and would add unnecessary costs to small businesses and regional employers.

### **Recommendation 14**

1.24 Coalition Senators do not agree with this recommendation as it would create an additional regulatory burden for employer sponsors of 457 visa workers and be difficult for Government to monitor and enforce. It is impractical and would add unnecessary costs to small businesses and regional employers.

### **Recommendation 15**

1.25 Coalition Senators note that the \$4000 value of this proposed levy amount is not based on any evidence or underpinning. The 2014 Azarias Review of the integrity of the 457 programme recommended that the current training benchmarks be replaced with a training levy of \$400-800. This recommendation was accepted by the Government and is under development by the Department of Immigration and Border Protection and the Department of Education. Most Subclass 457 visa holders are employed in professional occupations, so a focus on apprenticeships would not address skill shortages experienced by Subclass 457 sponsors.

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**Recommendation 18**

1.26 Coalition Senators note that there would be significant practical hurdles with implementing this recommendation.

1.27 Temporary visa holders, by definition, are only in Australia temporarily; a Fair Entitlements Guarantee (FEG) recovery process is likely to take some time, and the amount of entitlements which could be recovered may not be justified.

1.28 As the FEG is underwritten by the taxpayer, it should be a programme reserved for the protection of Australian citizens, who may have decades of entitlements payable after years of working.

**Recommendations 23**

1.29 The Coalition Senators believe this recommendation is unnecessary, as a visa breach does not currently invalidate employment, nor would it stop the remedies available to an employee under the Fair Work Act.

1.30 It is also very important that there are no incentives for workers, especially those from overseas, to work in contravention of the Migration Act or their visa requirements. Similarly we must make sure there is no benefit for employers to engage those in breach of their visa obligations.

**Recommendation 24**

1.31 Coalition Senators do not support this recommendation as it provides tacit endorsement for visa holders to breach their visa conditions without recourse or penalty and is inappropriate. Decision makers already have discretion, so visas are not cancelled for minor or less serious non-compliance therefore the recommendation is redundant.

**Recommendation 25**

1.32 It is beyond the scope of this review to impose restrictions on future Free Trade Agreements. Coalition Senators reiterate the significant benefits that flow from entering into Free Trade Agreements.

**Recommendation 28**

1.33 Coalition Senators note that the Department of Immigration and Border Protection is not funded to provide visa holders with workplace entitlement training.

1.34 The government proactively makes available information on employee entitlements and protections. Unions and other groups are not prevented from supplementing this information, but their actions in doing so should not be funded by public monies.

**Recommendation 29**

1.35 Coalition Senators do not support this recommendation. Migration regulations provide discretion for delegates to not cancel a visa, and it is appropriate that these discretions are exercised on a case by case basis. The cooperation of visa holders with regulatory agencies in investigations and prosecutions, including the Fair Work Ombudsman, is given strong weight by delegates in their considerations to refrain



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from cancelling a visa. Furthermore, it would be inappropriate for a government agency to withhold important information of unlawful activity from another agency.

1.36 Coalition Senators reiterate the importance of not providing incentives for workers to work in contravention of the Migration Act or their visa requirements.

**Recommendation 31**

1.37 The Coalition Senators do not agree with this recommendation. This is a review recommending another review.

1.38 The matters referred to in this recommendation are matters of policy for the incumbent government, not an 'independent tripartite panel'.

**Recommendation 32**

1.39 Coalition Senators do not agree with this recommendation as it would punish those labour hire firms which are already complying with relevant laws.

1.40 While there are undoubtedly a minority of labour hire firms which are doing the wrong thing, what they are doing, in most cases, is already illegal. Coalition Senators support the prosecution of these illegal operations.

1.41 Coalition Senators also note that there are other inquiries underway at present into labour hire companies and look forward to the resolutions.

**Recommendation 33**

1.42 The Coalition Senators do not agree with this recommendation. The scope of this inquiry did extend to the consideration of the ratification of international treaties. Furthermore, the mere ratification of a treaty does not itself alter any domestic laws.

**Senator Bridget McKenzie**  
**Deputy Chair**



## **Australian Greens' Additional Comments**

1.1 The Australian Greens consider that the issues raised in this inquiry are of great significance to Australian society and economy. The Inquiry has uncovered disturbing evidence of the level of exploitation of temporary work visa holders, and the impacts that this has on other workers in Australia.

1.2 We believe the committee report is an extremely thorough assessment of the issues raised through the Inquiry process.

1.3 The evidence and case studies that the Inquiry heard included the exploitation of workers employed by 7-Eleven, Baiada, and of workers employed in the construction, engineering, nursing, maritime and aviation industries. These case studies were extremely disturbing and taken together showed the level of exploitation that occurs across Australian workplaces.

1.4 Worker exploitation across these fields included:

- underpayment and/or non-payment of entitlements;
- unfair dismissal;
- discrimination;
- unreasonable requests of workers by employers;
- work in contravention of visa conditions; and
- harassment of workers by employers.

1.5 We concur with the concluding remarks of the inquiry that 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.

**We consider that the recommendations related to the following issues are of considerable importance:**

- the need for quality accessible data on employment and visa issues;
- the establishment of a Ministerial Advisory Council on Skilled Migration which is independent from government; genuinely tripartite; evidence-based; and transparent and publicly accountable;

- the ability to address exploitation of workers on temporary visas across a very wide range of industries, including retail, nursing, maritime industries, meatworking, engineering, and aviation;
- the powers and resources of the Fair Work Ombudsman to investigate and prosecute breaches of employment legislation; and
- franchising arrangements.

**1.6** Overall we support the recommendations in the committee report, with minor additions and changes.

### **Recommendations**

**1.7** Replace **Recommendation 2** with:

The committee recommends that the Department of Immigration and Border Protection give greater weight to time spent living in Australia in consideration of applications for permanent residency. The Department should conduct a review to consider the evidence in this regard and consider the merits of setting a limit on the period of time after which it would be considered reasonable for a temporary visa holder to qualify for permanent residency.

**1.8** Add **Recommendation 9a**:

That the reconstituted MACSM advise on labour market testing mechanisms to strengthen their efficacy and ensure that local workers still get the first opportunity to apply for jobs and that 457 visa holders are only employed in occupations subject to genuine skills shortages.

**1.9** Replace **Recommendation 10** with:

The committee recommends that the reconstituted MACSM review the Working Holiday Maker (417 and 462) visa program. The review should include, but not be limited to, an examination of the costs and benefits of the continued operation of the optional second year extension to the visa, the costs and benefits of providing government with the ability to set a cap on the numbers of Working Holiday Maker program visas issued in any given year and whether volunteer work should contribute to eligibility for a second year visa.

**1.10** Replace **Recommendation 19** with:

The committee recommends that the immigration program be amended to provide adequate bridging arrangements for all temporary visa holders to

pursue meritorious claims under workplace and occupational health and safety legislation.

**1.11** Replace **Recommendation 27** with:

The committee recommends that tertiary institutions with students studying on temporary visas develop proactive information campaigns for temporary visa workers around workplace rights.

**Senator Janet Rice**



# **APPENDIX 1**

## **Submissions and additional information received by the Committee**

### **Submissions**

- 1 Mr Derek Walter
- 2 Mr Peter Mares
- 3 Associate Professor Joo-Cheong Tham
- 4 Engineers Australia
- 5 Dr Joanna Howe and Associate Professor Alexander Reilly
- 6 Isolated Children's Parents' Association of Australia
- 7 National Tertiary Education Union
- 8 Australian Dairy Industry Council
- 9 Australian Pork
- 10 The Australian Chamber of Commerce and Industry
- 11 Dr Stephen Clibborn
- 12 Electrical Trades Union of Australia
- 13 South Australian Wine Industry Association
- 14 National Farmers' Federation
- 15 Australian Federation of Air Pilots
- 16 The Salvation Army
- 17 Australian Institute of Marine and Power Engineers
- 18 Australian Maritime Officers Union
- 19 United Voice
- 20 Australian Higher Education Industrial Association
- 21 Fragomen
- 22 Maritime Union of Australia
- 23 Dr Chris Wright and Dr Andreea Constantin
- 24 Ernst and Young
- 25 Eventus Immigration
- 26 Business Council of Australia

- 27 Migration Council Australia
- 28 Ausfilm
- 29 Justice and International Mission Unit, Synod of Victoria and Tasmania,  
Uniting Church in Australia
- 30 Consult Australia
- 31 Australian Labour Party, Castlemaine Branch
- 32 Construction, Forestry, Mining and Energy Union - National Branch
- 33 AI Group
- 34 Australian Mines and Metal Association
- 35 Unions NSW
- 36 JobWatch Inc
- 37 Australian Nursing and Midwifery Federation
- 38 Confidential
- 39 Department of Business, Northern Territory Government
- 40 Migration Institute of Australia
- 41 Australian Government joint submission
- 42 Ms Elsa Underhill PhD
- 43 Human Rights Council of Australia
- 44 The Australian Workers Union
- 45 Ms Lisa Chesters MP
- 46 Mr Joji Abraham
- 47 UnionsWA
- 48 ACTU
- 49 Law Council of Australia
- 50 Screen Producers Australia
- 51 Bowen Gumlu Growers
- 52 Australasian Meat Industry Employees' Union - Queensland Branch
- 53 Growcom
- 54 Confidential
- 55 Murray Free Range
- 56 Windridge Farms
- 57 Baiada
- 58 Shop, Distributive & Allied Employees' Association



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- 59 Mr Mohammed Rashid Ullat Thodi and Mr Pranay Alawala  
60 Mr Michael Fraser  
61 Mr Stewart Levitt, Levitt Robinson Solicitors  
62 Dr Tess Hardy  
63 Franchise Council of Australia  
64 United WHY

### **Additional information**

- 1 Letter provided by Woolworths Limited following Melbourne public hearing 18 May 2015
- 2 Howe, 2013, 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', Federal Law Review
- 3 Howe, 2014, 'Does Australia need an expert commission to assist with managing its labour migration program?', Australian Journal of Labour Law
- 4 Letter provided by Department of Immigration and Border Protection following Canberra public hearing, 17 July 2015
- 5 Letter provided by Mr Russell Withers following Melbourne public hearing, 24 September 2015 (see Hansard page 52 - 53)
- 6 Submission to the Productivity Commission Inquiry into the Workplace Relations Framework provided by the Salvation Army
- 7 Additional information from Willing Workers on Organic Farms (WWOOF), 'Issues Paper', provided at public hearing Melbourne, 20 November 2015
- 8 Additional information from Willing Workers on Organic Farms (WWOOF), Letter to Minister for Immigration and Border Protection, provided at public hearing Melbourne, 20 November 2015
- 9 Additional information from the Franchise Council of Australia, provided following public hearing Melbourne, 20 November 2015

### **Answers to Questions taken on Notice**

- 1 Answers to questions on notice at public hearing Melbourne, 18 May 2015
- Woolworths
  - National Union of Workers
  - Fair Work Ombudsman
- 2 Answers to questions on notice at public hearing Brisbane, 12 June 2015
- Queensland Council of Unions
  - Australasian Meat Industry Employees Union

- 3 Answer to questions on notice at public hearing Melbourne, 19 June 2015
  - Australian Pork
  - Australian Nurses and Midwifery Federation
  - Electrical Trades Union
  - Hazeldenes
- 4 Answers to questions on notice at public hearing Sydney, 26 June 2015
  - Australian Council of Trades Unions
  - Australasian Meat Industry Employees Union
  - National Farmers Federation
- 5 Answers to questions on notice at public hearing Perth, 10 July 2015
  - Australian Catholic Religious Against Trafficking in Humans
  - Employment Law Centre of Western Australia
- 6 Answers to questions on notice a public hearing Adelaide, 14 July 2015
  - South Australian Wine Industry Association
  - Coles
  - Fair Work Ombudsman
- 7 Answers to questions on notice at public hearing Canberra, 17 July 2015
  - Migration Council of Australia
  - Department of Immigration and Border Protection
  - Department of Employment
- 8 Answers to questions on notice to the Maritime Union of Australia, received 6 August 2015
  - Maritime Union of Australia
- 9 Answers to written questions on notice from Senator McKenzie to all unions that attended public hearings
- 10 Answers to written questions on notice from Senator Lines to the ACTU
- 11 Answers to written questions on notice from Senator Lines to the AMIEU
- 12 Answers to written questions on notice from Senator Lines to the Fair Work Ombudsman
- 13 Answers to questions on notice at public hearing Melbourne, 24 September 2015
  - Shopkeepers and Distributors and Allied Union
  - Dr Tess Hardy

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- 7-Eleven
  - Fair Work Ombudsman
- 14 Answers to written questions on notice, following public hearing Melbourne, 24 September 2015
- Department of Immigration and Border Protection
  - Minister Birmingham
  - Department of Education and Training
  - Professor Than
  - Dr Tess Hardy
  - 7-Eleven
  - Fair Work Ombudsman
- 15 Answers to written questions on notice from Senator Lines to the Australian Competition and Consumer Commission
- 16 Answers to written questions on notice from Senator Lines to the Department of Immigration and Border Protection
- 17 Answers to questions on notice at a public hearing Melbourne, 20 November 2015
- Independent Franchise Review and Staff Claims Panel
  - Franchise Council of Australia
  - Baida
- 18 Answer to written questions on notice from Senator Lines to Baiada
- 19 Answers to questions taken on notice at a public hearing Canberra, 5 February 2016
- 7-Eleven
  - Fels Wage Fairness Panel
  - Fair Work Ombudsman
  - National Farmers' Federation

### **Tabled documents**

- 1 Fair Work Ombudsman, Tabled Document 1, Melbourne public hearing 18 May 2015
- 2 National Union of Workers, Tabled Document 1, Melbourne public hearing 18 May 2015
- 3 QCU, Tabled Document 1, Brisbane public hearing. 12 June 2015
- 4 AMIEU, Tabled Document 1, Brisbane public hearing 12 June 2015

- 5 AMIEU, Tabled Document 2, Brisbane public hearing 12 June 2015
- 6 Salvation Army, Tabled Document 1, Improving Protections for Migrant Domestic Workers in Australia, Sydney public hearing 26 June 2015
- 7 National Farmers Federation, Tabled Documents, Sydney public hearing 26 June 2015
- 8 AMIEU, Tabled Document 1, Opening statements for Mr Chun Yat Wong (Sky) and Ms Chiung-Yun Chang (Amy), Sydney public hearing 26 June 2015.
- 9 AMIEU, Tabled Document 2, AWX training document and pay advice, Hansard page 16 -19, Sydney public hearing 26 June 2015
- 10 AMIEU, Tabled Document 3, Voluntary overtime, Hansard pages 17-18, Sydney public hearing 26 June 2015
- 11 AMIEU, Tabled Document 4, Photos of visa workers accommodation, Hansard page 19, Sydney public hearing 26 June 2015
- 12 AMIEU, Tabled Document 5, Reid Meats in Western Sydney training facility, Hansard page 19, Sydney public hearing 26 June 2015
- 13 AMIEU, Tabled Document 6, Petition on working hours indicating the difference in rates and hours for local and visa workers, Sydney public hearing 26 June 2015
- 14 AMIEU, Tabled Document 7, Time and Attendance records - real and fake, Hansard page 22, Sydney public hearing 26 June 2015
- 15 AMIEU, Tabled Document 8, Visa worker cash in hand payslips, Hansard pages 22-23, Sydney public hearing 26 June 2015
- 16 AMIEU, Tabled document 9, Three Chinese language documents offering (1) a seminar of working holiday by Australian labour hire company AWX and Taiwanese labour hire company Interisland (2) advertisement for \$18 in Murray Bridge South Australia by Taiwanese company OZGOGO with links to Australian labour hire company Scottwell Internation (3) Package of overseas meatwork arrangement by Interisland and AWX for 417 visa workers. The package requires workers to pay NTD \$15000 and AUD\$150 for weekly rent, AUD\$30 for food and AUD\$150 for transportation. Sydney public hearing 26 June 2015
- 17 AMIEU, Tabled document 10, Compulsary body check fee for \$275 with receipt from AWX (not the clinic), Sydney public hearing 26 June 2015
- 18 AMIEU, Tabled document 11, Contractor piece rate system in Baiada Beresfield. It shows workers are not paid by the minimum award rate. Sydney public hearing 26 June 2015
- 19 AMIEU, Tabled document 12, Chinese contract issues in Taiwan by Taiwanese labour hire company with links to Australian labour hire company Scottwell International. Key details as follows: i. Main job vacancy: Adelaide Beef factory. Second job vacancy: Sydney Beef factory. ii. Service for job vacancies: 2 iii. Contract fee: NTD \$5,000. Oversea fee: NTD \$60,000. Total:

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- NTD \$65,000. iv. Job Bonds: \$600 v. Pay rate: \$18.10 - \$21.70. Over pay rate: \$18.10 - \$21.70 vi. Work period: 1 year vii. Pay system: ABN viii. Accommodation: \$80 - \$100. Bonds 2 weeks. Sydney public hearing 26 June 2015.
- 20 AMIEU, Tabled document 13, Protection visa claim from a worker at Baiada Beresfield. Sydney public hearing, 26 June 2015
- 21 AMIEU, Tabled document 14, Tabled submission, Sydney public hearing 26 June 2015
- 22 AMIEU, Tabled document 1, SA Report, Adelaide public hearing 14 July 2015
- 23 Fair Work Ombudsman, Tabled Document 1, Opening Statement, Melbourne public hearing 24 September 2015
- 24 Fair Work Ombudsman, Tabled Document 2, Correspondence from the Fair Work Ombudsman to Mr Peter Harris AO, Chairman of the Productivity Commission, Melbourne public hearing 24 September 2015
- 25 Mr Ullat Thodi, Tabled Document 1, Letter from Department of Employment to Mr Ullat Thodi regarding the General Employee Entitlements and Redundancy Scheme (GEERS), (see Hansard page 9), Melbourne public hearing 24 September 2015
- 26 Shop, Distributive and Allied Employees Association, Tabled Document 1, Redacted sample of comments made by 7 Eleven employees when they registered on the SDA's 'www.24sevenhelpline.com.au' (see page 22), Melbourne public hearing 24 September 2015
- 27 Baiada Poultry, Tabled Document 1, Proactive Compliance Deed, Hansard page 33, Melbourne public hearing 20 November 2015



## **APPENDIX 2**

### **Public Hearings**

*Melbourne, Monday 18 May 2015*

**Committee Members in attendance:** Senators Lines, McKenzie, O'Neill, Rice

#### **Witnesses**

CAMPBELL, Mr Michael, Deputy Fair Work Ombudsman, Operations, Fair Work Ombudsman

DUNN, Mr Ian, Head of Trade Relations, Woolworths Limited

HUANG, Ms Sherry, Previous Worker and Current Union Organiser, National Union of Workers

JAMES, Ms Natalie, Fair Work Ombudsman, Fair Work Ombudsman

MARDIROSSIAN, Ms Armineh, Group Manager, Corporate Responsibility, Community and Sustainability, Woolworths Limited

O'SHEA, Mr Tom, Executive Director, Policy, Media and Communications, Fair Work Ombudsman

ROBERTSON, Mr George, Union Organiser, National Union of Workers YAO, Ms Lin Pei (Winnie), Worker, National Union of Workers

*Brisbane, 12 June 2015*

**Committee Members in attendance:** Senators Lines, McKenzie, O'Neill

#### **Witnesses**

BRUNJES, Mr Frederick, Shed Secretary, Australasian Meat Industry Employees Union

EARLE, Mr Warren, Branch Organiser, Australasian Meat Industry Employees Union

FAIRWEATHER, Mr David, Tastensee Farms

JOURNEAUX, Mr Matthew, Assistant Branch Secretary, Australasian Meat Industry Employees Union

McLAUHLAN, Mr Ian, Branch Organiser, Australasian Meat Industry Employees Union

McLENNAN, Ms Ros, Assistant General Secretary, Queensland Council of Unions

MOGG, Ms Donna, Commercial Services Manager, Growcom

MONAGHAN, Mr Ron, General Secretary, Queensland Council of Unions

MORTON, Mrs Jane, Isolated Children's Parents' Association

WELLS, Mrs Laura, Tastensee Farms

***Melbourne, 19 June 2015***

**Committee Members in attendance:** Senators Lines, McKenzie, Peris, Rice, Sinodinos

**Witnesses**

ALFERAZ, Mrs Dely, Registered Nurse, Australian Nursing and Midwifery Federation

BLAKE, Mr Nicholas, Senior Industrial Officer, Australian Nursing and Midwifery Federation

BOYD, Mr Matthew Gregory, Branch Organiser, Electrical Trades Union

BUTLER, Ms Annie, Assistant National Secretary, Australian Nursing and Midwifery Federation

CONWAY, Mrs Ann, People and Performance Manager, Hazeldene's Chicken Farm

FERRERAS, Mr Reni, Registered Nurse, Australian Nursing and Midwifery Federation

GRIMA, Mrs Pauline, Industrial Relations Specialist, Hazeldene's Chicken Farm

KERR, Ms Deborah, General Manager, Policy, Australian Pork Limited

KERSHAW, Ms Ruth, Research Consultant, Victorian Branch, Electrical Trades Union

MARES, Mr Peter, Private capacity

SCOTT, Mr Ian, Senior Lawyer, Job Watch

***Sydney, 26 June 2015***

**Committee Members in attendance:** Senators Lines, McKenzie, O'Neill, Peris, Rhiannon

**Witnesses**

BRITNELL, Mrs Roma, Chair, Markets Trade and Value Chain Policy Advisory Group, Australian Dairy Farmers Ltd.

CHANG, Miss Chiung-Yun, Private capacity

COURTNEY, Mr Grant, Branch Secretary, Newcastle and Northern NSW Branch, Australasian Meat Industry Employees Union

CURTAIN, Mr Dave, Organiser, Construction, Forestry, Mining and Energy Union

DE CASTRO, Mr Edwin, Member, Construction, Forestry, Mining and Energy Union

GAETA, Mr Guy, Private capacity



GEARY, Mr Luke, Managing Partner, Salvos Legal, The Salvation Army

KEARNEY, Ms Gerardine, President, Australian Council of Trade Unions

KWAN, Miss Chi Ying, Private capacity

LOEVE, Mr Benjamin, Private capacity

McKINNON, Ms Sarah, Manager Workplace Relations and Legal Affairs, National Farmers' Federation

MOORE, Ms Heather, Advocacy Coordinator, The Freedom Partnership to End Modern Slavery, The Salvation Army

ROACH, Mr Justin, Private capacity

SHIPSTONE, Mr Tim, Industrial Officer, Australian Council of Trade Unions

TAM, Mr Hoi Ian, International Liaison Officer, Newcastle and Northern NSW Branch, Australasian Meat Industry Employees Union

WONG, Mr Chun Yat, Private capacity

### *Perth, 10 July 2015*

**Committee Members in attendance:** Senators Johnston, Lines, Rice

#### **Witnesses**

HEFFERNAN, Mrs Felicity, Humanitarian Lawyer, Australian Catholic Religious Against Trafficking in Humans

KEATING, Mr Dean, Vice President, Cairde Sinn Fein Australia

ROBINSON, Mr Paul, Branch Secretary, Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch

SMITH, Ms Jessica Caroline, Senior Solicitor, Employment Law Centre of Western Australia (Inc)

VANKESSEL, Sister Lucy Susan, Coordinator, Australian Catholic Religious Against Trafficking in Humans

WHITTLE, Mr Owen, Assistant Secretary, UnionsWA

### *Adelaide, 14 July 2015*

**Committee Members in attendance:** Senators Lines, McKenzie, O'Neill, Rice, Sinodinos

#### **Witnesses**

ANDERSON, Miss Sharra, Branch Secretary, AMIEU South and Western Australia Branch

BON, Ms Vicki, Government and Industry Relations Manager, Coles

CAMPBELL, Mr Michael, Deputy Fair Work Ombudsman, Operations, Fair Work Ombudsman

CURRIE, Ms Andrea, Policy and Brand Standards Manager, Coles HOWE, Dr Joanna, Private capacity

JAMES, Ms Natalie, Fair Work Ombudsman, Fair Work Ombudsman

MITCHEL, Mr Greg, Member, AMIEU South and Western Australia Branch  
O'SHEA, Mr Tom, Executive Director, Policy, Media and Communications, Fair Work Ombudsman

SMEDLEY, Mr Brian, Chief Executive, South Australian Wine Industry Association

### *Canberra, 17 July 2015*

**Committee Members in attendance:** Senators Lines, McKenzie, Rice

#### **Witnesses**

BERG, Dr Laurie, Member, Human Rights Council of Australia

CHAN, Ms Angela, National President, Migration Institute of Australia

CHOWDHURY, Mrs Rita, Vice-Chair, Migration Law Committee, Law Council of Australia

DUNN, Mr Matthew, Director, Policy, Law Council of Australia

FURNELL, Ms Peta, Acting Deputy Secretary, Department of Education and Training

INNES, Ms Helen, Acting Group Manager, Economic Strategy Group, Department of Employment

LAMBERT, Ms Jenny, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry

MURRAY, Mr Bernard, Owner, Murray Free Range

MURRAY, Mrs Kerry, Owner, Murray Free Range

NAYLOR, Mr Andrew, Chairperson, Human Rights Council of Australia

NOCKELS, Mr David, Commander, Immigration and Customs Enforcement Branch, Investigations Division, Border Operations Group, Australian Border Force

PARCELL, Mr Wayne, Director, Migration Institute of Australia

PARKER, Ms Sandra, Acting Secretary, Department of Employment

SHERRELL, Mr Henry, Policy Analyst, Migration Council of Australia

WALLACE, Mrs Elizabeth Mary, Human Resources, Compliance and Feed Purchasing, Windridge Farms

WILDEN, Mr David, Acting Deputy Secretary, Department of Immigration and Border Protection

WILSHIRE, Ms Carla, Chief Executive Officer, Migration Council of Australia

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***Melbourne, 24 September 2015***

**Committee Members in attendance:** Senators Lines, McKenzie, O'Neill, Peris, Rice

**Witnesses**

ALAWALA, Mr Pranay Krishna, Private capacity

CAMPBELL, Mr Michael, Deputy Fair Work Ombudsman, Fair Work Ombudsman

DALBO, Ms Natalie, General Manager Operations, 7-Eleven Stores Pty Ltd

DWYER, Mr Gerard, National Secretary and Treasurer, Shop, Distributive and Allied Employees Association

FRASER, Mr Michael, Private capacity

HARDY, Dr Tess, Private capacity

JAMES, Ms Natalie, Fair Work Ombudsman, Fair Work Ombudsman

O'SHEA, Mr Tom, Executive Director, Policy, Media and Communications, Fair Work Ombudsman

PATIL, Mr Rahul, Private capacity

SANGAREDDYPETA, Mr Nikhil Kumar, Private Capacity

THAM, Associate Professor Joo-Cheong, Private capacity

ULLAT THODI, Mr Mohamed Rashid, Private capacity

WASEEM, Mr Ussama, Private capacity

WEBSTER, Ms Janine, Chief Counsel, Fair Work Ombudsman

WILMOT, Mr Warren, Chief Executive Officer, 7-Eleven Stores Pty Ltd

WITHERS, Mr Russell, Chairman, 7-Eleven Stores Pty Ltd

***Melbourne, 20 November 2015***

**Committee Members in attendance:** Senators Lines, McKenzie, O'Neill, Rice

**Witnesses**

COUSINS, Dr David Charles, Panel Member, Independent Franchisee Review and Staff Claims

Panel

DE BRITT, Mr Kym Anthony, General Manager, Franchise Council of Australia

HENNESSY, Ms Siobhan Armagh, Partner, Deloitte

McKENNA, Miss Emmaline Rose, Private capacity

O'DONNELL, Mr Sean, Director and Franchising Legal Professional, Franchise Council of Australia

ONLEY, Mr Grant Charles, Human Resources Manager, Baiada Poultry Pty Ltd

PAUL, Mr Michael, Chairman and Franchisor, Franchise Council of Australia

WILSON-BROWN, Mrs Traci Michele, Office Manager, Willing Workers on Organic Farms Pty Ltd

***Canberra, 5 February 2016***

**Committee Members in attendance:** Senators Lines, McKenzie, O'Neill, Peris, Rice

**Witnesses**

BAILY, Mr Robert Francis, Chief Executive Officer, 7-Eleven Stores Pty Ltd

CAMPBELL, Mr Michael, Deputy Fair Work Ombudsman, Operations, Fair Work Ombudsman

COUSINS, Professor David, Fels Wage Fairness Panel

FELS, Professor Allan, Chair, Fels Wage Fairness Panel

HENNESSY, Ms Siobhan, Fels Wage Fairness Panel

JAMES, Ms Natalie, Fair Work Ombudsman, Fair Work Ombudsman

MAHAR, Mr Tony, Deputy Chief Executive Officer, National Farmers' Federation

O'SHEA, Mr Tom, Executive Director, Policy, Media and Communications, Fair Work Ombudsman

SMITH, Mr Michael John, Chairman, 7-Eleven Australia PL

WEBSTER, Ms Janine, Chief Counsel, Fair Work Ombudsman

WITHERS, Mr Russell George, Shareholder, 7-Eleven Stores Pty Ltd

## **Appendix 3**

### **Review of the Fair Work Ombudsman and the penalty regime under the *Fair Work Act 2009***

#### **Objectives**

The Review is charged with examining and making 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*.

#### **Terms of reference**

1. The Review will examine the:
  - a. adequacy of the resources of the Fair Work Ombudsman with respect to fulfilling its role under the *Fair Work Act 2009*;
  - b. appropriateness of the powers of the Fair Work Ombudsman, including with reference to its ability to make full use of the accessory liability provisions in the *Fair Work Act 2009*;
  - c. appropriateness of the penalty provisions under the *Fair Work Act 2009*, including with reference to the ability of a company to avoid a portion of court-imposed penalties by measures such as liquidating the company;
  - d. utility of the accessory liability provisions, including with reference to the ability of the Fair Work Ombudsman to:
    - i. pursue a lead firm or head franchisor for accessory liability; and
    - ii. directly recover underpayments against an accessory (as well as seeking penalties);
  - e. sham contracting provisions to the extent that they can be readily circumvented by certain types of third party contracting arrangements;
  - f. any related matter
2. The Review will report to the Minister for Employment by 30 October 2016.

#### **Resourcing**

1. The Government to appoint, by 30 June 2016, an independent tripartite panel to conduct the Review.
2. The Department of Employment to provide the secretariat for the Review.

#### **Tabling in Parliament**

1. The review is to be tabled in both Houses of Parliament by 30 November 2016.