

Committee Secretary

Senate Education and Employment References Committee

By email: eec.sen@aph.gov.au

16 September 2015

Dear Secretary,

Supplementary submission to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders'

In April this year, I made a submission to the Committee's inquiry (principal submission). This supplementary submission is made in response to the Committee's invitation to submit a submission to assist its inquiry into 7-Eleven.

The principal submission I made to the Committee emphatically rejected the view that non-compliance with labour protection in relation to temporary migrant workers was an aberration with blame laid at the feet of 'rogue' employers.¹ On the contrary, it argued that:

there is a structural risk of non-compliance with (temporary migrant) workers stemming from their precarious migrant status and, in many cases, from poorly regulated industries.²

The principal submission elaborated by saying that:

¹ Joo-Cheong Tham, *Submission to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders* (April 2015) (principal submission), 8.

² *Ibid* 3.

there are structural features of immigration laws and labour laws that facilitate non-compliance by those employing temporary migrant workers. In industries where there is a greater likelihood of non-compliance, these structural features bring about the reality of non-compliance. In such contexts, *non-compliance is structural*.³

Subsequent to my principal submission being completed, ABC's current affairs program, *Four Corners*, vividly revealed how this structural risk has been realized in two instances: with international student workers and workers on Working Holiday visas engaged in the food production industry;⁴ and with international student workers employed by 7-Eleven franchisees.⁵

Four elements appear to be present in both cases:

- 1) Strong pressures to reduce labour costs;
- 2) Widespread employer acceptance and practice of meeting these pressures by breaching standards of labour protection (e.g. non-payment; under-payment);
- 3) The availability of a vulnerable migrant workforce; and
- 4) Limited effectiveness of the enforcement agency, the Fair Work Ombudsman, and the relevant union/s.

With 7-Eleven, pressures to reduce labour costs on the part of the franchisees stemmed from two key aspects of the franchise contract. First, the profit breakdown provided in the franchise contract with 53% going to the 7-Eleven Stores Pty Ltd (7-Eleven Australia) and 47% going to the franchisees.⁶ Second, the responsibility of the franchisees for labour costs with Article 35(b) of the standard 7-Eleven store agreement stating that:

³ Ibid 8.

⁴ Caro Meldrum-Hanna and Ali Russell, 'Slaving Away', *Four Corners*, 4 May 2015 (available at <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>; accessed on 14 September 2015).

⁵ Adele Ferguson and Klaus Toft, '7-Eleven: The Price of Convenience', *Four Corners*, 31 August 2015 (available at <http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm>; accessed on 14 September 2015).

⁶ Standard 7-Eleven Store Agreement, Exhibit D, paragraph (i).

The FRANCHISEE shall have the sole right to employ and discharge such Employees as in the FRANCHISEE'S judgment may be necessary. Such employees shall be employees or agents of the FRANCHISEE. The FRANCHISEE shall exercise full and complete control over, and shall have full responsibility for, the conduct of the Employees, and any and all labour relations, including hiring, firing, supervision, disciplining, *compensation* (and taxes relating thereto) and work schedules of the Employees (italics added).

The second element - widespread employer acceptance and practice of meeting these pressures by breaching standards of labour protection – is evidenced by 7-Eleven Australia's internal survey taken in July and August 2015 which indicated that 69% of franchisees had payroll issues including fraud (the Four Corners episode quoted a 7-Eleven Australia insider as saying that *all* franchisees were involved in wage fraud). These two elements combined with a vulnerable migrant workforce comprising international student workers, many it would seem worked in breach of the hours-restrictions stipulated in their visas, hence, making them susceptible to employer threats of repercussions under immigration law (including deportation). Finally, enforcement efforts appear to have limited effectiveness in the case of 7-Eleven franchisees. Prior to the Four Corners episode, the Fair Work Ombudsman successfully brought proceedings against a 7-Eleven franchisee.⁷ The general deterrent value of such legal action may now be doubted in light of the Four Corners episode which revealed instances of franchisees being prepared to absorb the penalties resulting from such proceedings, adamant at continuing illegal labour practices.

The toxic combination of these elements can result in a business model based on the exploitation of temporary migrant workers. As former Australian Competition and Consumer Commission observed in relation to 7-Eleven, 'the business model will only work for the franchisee if they underpay or overwork employees'.⁸

⁷ *Fair Work Ombudsman v Haider Pty Ltd* [2015] FCCA 2113.

⁸ Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven: Allan Fels says model dooms franchisees'

Four gaps need to be addressed in order to effectively prevent the exploitation of temporary migrant workers due to the structural risk of non-compliance. Foremost is the *compliance gap* – particularly in ‘hazardous’ industries where there are high levels of non-compliance with labour protection.⁹ Direct measures in this respect should include promoting the collective organization of temporary migrant workers whether it be through trade unions or community organisations (e.g. ethnic community organisations; international student organisations). Given the well-known barriers to collectively organizing vulnerable workers, the approach should not be merely be permissive – in just *allowing* such collective organization – but on actively *promoting* such organization, including through the provision of funds.

Recommendation One

Measures should be taken by the Commonwealth Government to actively promote the collective organization of temporary migrant workers, including through the provision of funds.

Other direct measures aimed at the compliance gap include increasing both the financial penalty of offences under the *Fair Work Act 2009* (Cth) and the social sanction attached to these offences. It should also extend to reforms to ensure that commercial entities that are not the direct employers of workers which, however, benefit from service provided by the workers and have a meaningful degree of control over their performance of work are subject to more appropriate frameworks of liability and responsibility (this group of entities would include franchisors and head contractors). Possible reforms here include clarifying and broadening the scope of section 550 of the *Fair Work Act 2009* (Cth) which provides for accessory liability.

Here I strongly commend to the Committee the submission of my colleague, Dr Tess Hardy, Centre for Employment and Labour Relations Law, Melbourne Law School.

and workers’, *Sydney Morning Herald*, 31 August 2015 (available at <http://www.smh.com.au/business/workplace-relations/7eleven-allan-fels-says-model-dooms-franchisees-and-workers-20150830-gjb0pu.html>); accessed on 14 September 2015).

⁹ See industries listed at pages 7, 20-21 of the principal submission.

The submission of Dr Hardy - who is a leading Australian expert on regulatory compliance and enforcement in relation to labour protection – provides an excellent analysis of various direct measures that can be taken to tackle the compliance gap.

Connected to the compliance gap are three other gaps. There is, firstly, a profound *knowledge gap*. Current data sources do not enable the precise number of temporary migrant workers to be identified, let alone the key industries and occupations of such workers and where they are experiencing breaches of labour protection.

The statistical picture of temporary migrant work in Australia is incomplete, reflecting significant conceptual limitations in the collection of labour market data. Little is available from either the Australian Bureau of Statistics monthly Labour Force survey or the five-yearly Census. These sources may collect information on labour force status and country of birth, and in this sense, they enable the identification of the total number of migrant workers.¹⁰ However, no information is being collected on the specific migrant status of these workers – whether they are workers on temporary visas, permanent visas or citizens of Australia. Arguably, this shortcoming reflects a failure to fully come to grips with the significance of temporary labour migration in Australia, and reflects an outdated assumption of Australia as a country of permanent settlement.

The key source of statistics on temporary migrant workers is the Commonwealth Immigration Department (now called the Department of Immigration and Border Security), which publishes detailed statistics on migrants in the permanent stream. It also publishes regular statistics on temporary entrants and New Zealand citizens as well as statistics on the various programs.

The published data on the 457 visa program provides detailed information on the primary visa-holders. However, such data provides no labour market information on

¹⁰ See [http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3414.0main+features642011%20\(Edition%202\)](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3414.0main+features642011%20(Edition%202))

secondary visa-holders: What proportion is engaged in the Australian labour market? What occupations and industries are they employed in? What are the wages being earned?

The limitations of the 457 visa data, however, pale in comparison with the absence of labour market information on visa-holders under the de facto temporary labour migration schemes – the international student programs, Temporary Graduate visa scheme; the arrangement under which New Zealand citizens are admitted into Australia; and the Working Holiday maker programs. None of the regular publications provide labour market information on the visa-holders under these programs.

Recommendation Two

- The Australian Bureau of Statistics and the Immigration Department revise their methods of data collection so as to be able to regularly provide public information on:
 - The number of temporary migrant workers (broken down according to visa status, gender, age, nationality, year of arrival in Australia);
 - The main industries and occupations of temporary migrant workers.
- Measures be taken to identify the main types of breaches of labour protection being experienced by temporary migrant workers and the main industries, occupations and localities where such breaches are occurring, including:
 - Resourcing the Fair Work Ombudsman to collect and disseminate such information; and
 - Resourcing other organisations which receive workplace complaints from temporary migrant workers (e.g. ethnic community organisations, community legal centres, trade unions, statutory legal aid agencies, anti-discrimination statutory

agencies) to develop systematic and consistent systems of collecting such information.

Second, there is a *gap in fairness* in terms of the consequences under the *Migration Act 1958* (Cth) for temporary migrant workers who breach their visas in the performance of work. In such situations, the visa of temporary migrant worker may be cancelled under section 116(1)(b) of the Act and, further, the worker will be committing a strict liability criminal offence under section 235 of the Act - *any breach* of the visa in the performance of work will bring about these consequences.

These draconian penalties strengthens the hand of employers who seek to abuse temporary migrant workers and therefore, contributes to the compliance gap (as illustrated by the 7-Eleven case). They are also grossly disproportionate and unfair. Criminal offences and the prospect of visa cancellation should be reserved for situations involving serious visa breaches. For other breaches, administrative fines and/or civil penalties should apply. These reforms would strike a far better balance between protecting the integrity of the visa system and ensuring fairness to temporary migrant workers

Recommendation Three

- Sections 116(1)(b) and 235 of the *Migration Act 1958* (Cth) should be amended so as to only apply to serious breaches of visas.
- A proportionate system of administrative fines and/or civil penalties should apply to other breaches.

Finally, there is a *gap in legal protection*. This results, firstly, from the impact of visa breaches (e.g. working in a job classification different from that stated in the visa; working in excess of maximum hours stipulated in the visa) upon the enforceability of labour laws. The limited Australian case law adopts a 'non-protection' approach,¹¹

¹¹ Elaine Dewhurst, 'The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional and National Legal Systems' in Cathryn Costello and Mark Freedland, *Migrants at Work: Immigration & Vulnerability in Labour Law* (Oxford University Press, 2014) 217-219.

with authorities disturbingly finding that breaches of a visa have the consequence of voiding any contract of employment, thereby resulting in the non-application of labour protection which generally only applies to employees at law.¹² This is a perverse position which not only rewards employers who exploit migrant workers (exacerbating the compliance gap) and punishes the workers but also undermines the integrity of the labour protection regime. The *Migration Act* and the *Fair Work Act* should be amended to explicitly state that visa breaches do not necessarily void contracts of employment; and that the standards under the *Fair Work Act* apply even when there are visa breaches.

Recommendation Four

The *Migration Act 1958* (Cth) and the *Fair Work Act 2009* (Cth) should be amended to explicitly state that:

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

The other gap in legal protection concerns the principle of equality in relation to working conditions of migrant workers. This is a key principle of human rights and labour rights according to the following international conventions:

- Articles 23-24 of the *Universal Declaration of Human Rights*;
- Article 7 of the *International Covenant of Economic, Social and Cultural Rights*;
- Article 6(1)(a) of the International Labor Organisation's *Migration for Employment Convention (Revised), 1949 (No 97)*;
- Article 10 of the International Labor Organisation's *Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143)*;

¹² *Australian Meat Holdings v Kazi* [2004] QCA 147; *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964. See further discussion in Graeme Orr, 'Unauthorised Workers: Labouring Beneath the Law' in Christopher Arup et al, *Labour Law and Labour Market Regulation* (Federation Press, 2006) Chapter 35; Alex Reilly, 'Protecting vulnerable migrant workers: The case of international students' (2012) 25 *Australian Journal of Labour Law* 181; Submission of Dr Stephen Clibborn to this inquiry.

- Articles 25-26 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.¹³

For this principle of equality to be fully realized, discrimination against temporary migrant workers on the basis of the migrant status should be prohibited.

Such a prohibition is, however, absent from Australia's anti-discrimination laws. In all jurisdictions except for Tasmania and Northern Territory, the prohibitions under anti-discrimination laws do not explicitly cover migrant status. The Tasmanian and Northern Territory anti-discrimination statutes prohibit discrimination based on immigrant status in Tasmania and Northern Territory.¹⁴ Whether these prohibitions extend to *temporary* migrant status is moot given that an immigrant is usually understood as a person who migrates to live permanently in the host country.¹⁵

The absence of an explicit prohibition against discrimination based on migrant status is particularly disturbing given that such discrimination is often identified as a source of ill-treatment experienced by migrant workers.¹⁶ In the case of international student workers, for example, studies suggest that these workers face discrimination in the labour market and that such discrimination tends to occur at the point of entry to the workplace – securing a job – rather than through inferior working conditions within the workplace. In the Marginson et al study, a small number of respondents said that they experienced overt discrimination within the labour market, with most references to discrimination relating to the inability to find decent

¹³ See further Joo-Cheong Tham and Iain Campbell, 'Equal treatment for temporary migrant workers and the challenge of their precariousness', 16th World Congress of International Labour and Employment Relations Association, Philadelphia, 2-5 July 2012.

¹⁴ *Anti-Discrimination Act 1998* (Tas) s 3(e); *Anti-Discrimination Act* (NT) s 4(a).

¹⁵ Oxford University Press, *Oxford Dictionaries* (2015)
www.oxforddictionaries.com/us/definition/american_english/immigrant

¹⁶ International Labour Organization, *Towards a Fair Deal for Migrant Workers in the Global Economy* (2004) 46-48; Bridget Anderson and Martin Ruhs, 'Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration, and Public Policy' in Martin Ruhs and Bridget Anderson (eds), *Who Needs Migrant Workers? Labour Shortages, Immigration and Public Policy* (Oxford University Press, 2010) 27-28.

work.¹⁷ That discrimination against international students tends to occur in relation securing a job does not mean that it is not a source of vulnerability. On the contrary, such discrimination can produce vulnerability by channeling international student workers into precarious jobs, including those with illegal working conditions, through their willingness to accept inferior working conditions.¹⁸

Recommendation Five

Commonwealth, State and Territory anti-discrimination laws should be amended to explicitly prohibit discrimination based on migrant status (including temporary migrant status).

Australians tend to regard their country as law-abiding and fair. It is clear that these principles of legality and fairness have failed to take root in key sectors of the labour market, where it is the rule of employers and businesses that prevails rather than the rule of law.

I hope this supplementary submission has been of assistance to the inquiry.

Thank you.

Yours sincerely,

Associate Professor Joo-Cheong Tham

Melbourne Law School

¹⁷ Simon Marginson, Christopher Nyland, Erlenawati Sawir and Helen Forbes-Mewett, *International Student Security* (Cambridge, Cambridge University Press, 2010) 138-142.

¹⁸ Iain Campbell, Martina Boese and Joo-Cheong Tham 'International students and precarious work: Exploring labour agency' (2015) unpublished paper available from the authors.