Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Fair Work Ombudsman Submission

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Australian Government

Fair Work OMBUDSMAN

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Executive Summary

1. The Fair Work Ombudsman (FWO) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Bill).

2. The FWO continues to achieve positive outcomes for the Australian community using the current regulatory framework. The FWO's compliance and enforcement model is based on the assumption that most people want to do the right thing, which is reflected in the fact that only 6 per cent of workplace relations matters resolved by the FWO in 2015/16 required any formal enforcement action.[1]

3. The FWO deploys its compliance powers and uses enforcement tools to address behaviour at the more serious end of the spectrum and where there is considerable public benefit in the FWO's intervention, such as matters involving the exploitation of vulnerable workers or in complex supply chains or networks where there is systemic non-compliance.

4. The FWO agrees with the Explanatory Memorandum to the Bill that there is "increasing community concern about the exploitation of vulnerable workers," however the FWO has faced a range of challenges achieving lasting behavioural change in these circumstances using the current tools available. The agency finds that the reality of what can be achieved in some limited but critically important areas, using the existing enforcement framework in the *Fair Work Act 2009* (FW Act), falls short of community expectations.

5. In light of this, the FWO has deployed a more strategic use of enforcement tools, pushed the boundaries of the law through test cases, sought to use a range of alternative levers including the media and – importantly – engaged more closely both across government and with communities, employers and employees, to bridge this gap between expectations and reality.

6. The enhancements proposed in the Bill, however, would greatly assist the FWO in this respect. Stronger powers for the FWO would ensure that unscrupulous operators that habitually ignore

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[1] In 2015/16, the FWO resolved 29,900 workplace relations matters, which includes workplace disputes, proactive compliance and education audits, inquiries and self-initiated compliance activities. Of these, 74 per cent were resolved via *Early Intervention* and *Education and Dispute Resolution*. These matters do not involve an investigation or recourse to any of the formal evidence-gathering powers available to Fair Work inspectors.

The remaining 26 per cent of workplace relations matters resolved in 2015/16 were resolved via *Compliance* and *Enforcement action*, usually via an investigation. During compliance activities, Fair Work inspectors collect evidence, assess time and wage records, conduct interviews with employers and employees and make formal findings about compliance with workplace laws.

A subset of these matters – 6 per cent of the total workplace relations matters resolved – were resolved with a formal enforcement tool. When deciding if compliance and enforcement is the appropriate response in particular circumstances, the FWO takes a proportionate approach, considering the potential impact on the community and the relative risk of exploitation that individuals face.

our requests and hinder our investigations are held to account; higher penalties would more effectively deter intentional wrong-doing and incentivise employers who are unsure of their obligations to check they are doing the right thing; and franchise and holding company liability would reinforce FWO's campaign to ensure businesses take more responsibility for their supply chains and networks, and also create an additional lever for the FWO to use when seeking engagement and collaboration.

7. This submission sets out the reality that the FWO's inspectors currently face, the strong outcomes we are achieving with the tools we have and the better outcomes that could be achieved with the responsible and proportionate implementation of the types of provisions contained in the Bill.

    - Section 1 sets out the challenges faced by the FWO pursuing serious cases of non-compliance involving systematic exploitation of vulnerable workers using the existing framework.

    - Section 2 sets out the FWO's current approach to compliance in the franchising sector, including the FWO's Compliance Partnerships and the agency's use of accessorial liability.

    - Section 3 discusses how the provisions in the Bill dealing with the FWO's investigative powers would enhance the FWO's existing regulatory tool kit, aligning it with other regulators.

    - Section 4 highlights situations where the current penalties available to the FWO have proven insufficient to deter wrong-doing and how these existing penalties measure up against other jurisdictions.

    - Section 5 discusses the importance of record-keeping as the "bed-rock" of compliance and the significant problem posed by false and misleading records and how the provisions in the Bill would address this.

    - Section 6 provides information about the FWO's experience with cash-back schemes and the agency's efforts to address this concerning behaviour in the current context.

    - Section 7 provides concluding remarks.

Section 1
Vulnerable workers: regulatory challenges and responses

8. There are around 12 million people employed in Australia in more than 2 million workplaces.[2] The vast majority of them are engaged in compliant, harmonious and productive workplaces, and are able to deal with any employment issues directly with their employer without the need for any third party intervention.

9. There are, however, employees that will need the FWO's assistance to varying degrees during the course of their employment. This can range from employees seeking the FWO's advice about their award before discussing an issue with their employer, through to needing assistance to ensure they are paid the correct rate of pay. Then at the other end of the spectrum, vulnerable employees may find themselves the victim of serious exploitation.

10. Most workplace disputes that are brought to the FWO involve some sort of underpayment. Over the past five years, underpayment of wages and failure to pay wages for time worked have consistently been the most common allegations brought to the FWO, featuring in around 45 per cent of all disputes. During this time, the FWO has recovered around $70 million for employees who have been underpaid.

11. Underpayments can arise for a range of reasons – most commonly because employers have made a mistake and not correctly understood the details of their workplace obligations under an award or agreement. In the FWO's experience, most employers want to do the right thing and resolve issues when they are made aware of them. We find that in most cases, claims for unpaid wages can be resolved through minimal intervention by the FWO and without the requirement for a formal investigation or the need to exercise our formal powers and enforcement tools.[3] This approach often enables a matter to be resolved before it escalates and while the parties are still in their employment relationship.

12. Where our less formal interventions do not resolve a dispute or are not appropriate, for example because of the seriousness of the conduct that involves provable breaches of the law, the FWO makes use of the enforcement and compliance tools available to it under the FW Act. The FWO does so in a graduated manner, in proportion to the conduct believed to have occurred, based on evidence we are able to procure and taking all the circumstances into

[2] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, p.4
[3] See footnote 1.

account. The enforcement tools available under the FW Act include enforceable undertakings[4], infringement notices[5], compliance notices[6], and in the most serious of cases, taking a matter to court.[7] The FWO's operations model is outlined in the agency's Compliance and Enforcement Policy.

13. The existing framework is well suited for businesses trying to do the right thing but perhaps grappling with the complexity of the framework and where information or contact from the FWO can lead to a resolution of the matter. For example, it is effective for dealing with business operators who are not aware they are underpaying and, if challenged by an employee with support from the regulator, correct their behaviour.

14. However, the FWO has always been concerned that vulnerable workers are over represented in complaints of underpayment that we see and that, in some cases, employers engage in deliberate and calculated behaviour to reduce their costs by underpaying workers who are unlikely to take action against them. It is through an analysis of these matters that the need for stronger statutory tools and sanctions becomes apparent.

15. This growing trend is highlighted in the proportion of disputes resolved by the FWO involving visa holders, which has increased from around 5 per cent of dispute forms lodged in 2011/12 to 13 per cent in 2015/16. However, visa workers only account for approximately 7 per cent of the total Australian workforce[8]. The FWO has noticed a similar trend with young workers, who consistently account for around 25 per cent of the dispute forms the FWO receives, although only making up 16 per cent of the workforce nationally.

16. While the FWO is already dealing with disproportionate number of disputes involving these two cohorts, we also hold concerns that these cohorts underreport issues for a range of reasons relating to their vulnerability and job insecurity. Often visa workers and young workers feature in industries that are more likely to engender systemic underpayment of wages due to a range of factors including the:

    a. low skilled nature of the work;

    b. highly competitive nature of the work and low profit margins;

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[4] An enforceable undertaking is a written agreement between the FWO and an individual or business who has not followed an Australian workplace law.

[5] An infringement notice is similar to an on-the-spot fine. It can be issued by a Fair Work Inspector to an employer who doesn't follow their record-keeping and pay slip obligations, including not making or keeping time and wage records and not including the right information on a pay slip or employee record.

[6] A compliance notice is a notice issued by a Fair Work Inspector, requiring an employer to fix a breach of an Australian workplace law.

[7] Over the past 5 years, the FWO has filed 238 matters in court, resulting in over $11 million in court imposed penalties.

[8] Fair Work Ombudsman, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program,* p.2

c. high proportion of labour hire, contracting out and 'non employment' work arrangements including and 'independent contractor' arrangements;

d. high turnover of labour and casualisation of the workforce; and

e. any labour shortages.

17. In some of these cases, the existing framework has not been sufficient to deter ongoing and systemic conduct across sectors, industries and regions, and usually with respect to these workers. Some unscrupulous employers view non-compliance as a business model and do not fear being caught out for their behaviours, or consider penalties associated with their breaches of the law an acceptable cost of doing business. These employers often do not keep proper records or payslips and are unwilling to engage with the FWO in an investigation.

18. Employers who establish a business model that relies on underpayment of workers engage in a number of practices to evade their obligations and the consequences, such as:

- misleading workers, especially visa workers, about their lawful rights; implying they are not entitled to "Australian wages".[9]
- exploiting workers' cultural loyalties to employers of the same background.[10]
- making threats to a worker's job and/or their visa.[11]
- making it difficult to prove what workers' entitlements are by
  - not keeping records and/or providing false records to FWO[12],
  - not providing payslips to employees, or
  - paying employees correctly initially but demanding 'cash back' in a manner that is not recorded and therefore very difficult to prove absent corroborating evidence.[13]
- placing corporate entities into administration/liquidation if complaints are made and/or transferring assets out of those entities to avoid back paying workers.[14]

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[9] *Fair Work Ombudsman v Global Express Consultancy Pty Ltd & Anor* [2016] FCCA 2446
[10] *Fair Work Ombudsman v WY Pty Ltd, Chong Yew Chua and Ning Yuan Fu* [2016] FCCA 3432
[11] *Fair Work Ombudsman v Rubee Enterprises Pty Ltd & Anor* [2016] FCCA 3456
[12] *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd & Ors* [2016] FCCA 105; *Fair Work Ombudsman v ECFF Pty Ltd & Ors* [2014] FCCA 2996
[13] F*air Work Ombudsman v Mai Pty Ltd & Anor [2016] FCCA 1481*
[14] *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd & Anor* [2016] FCCA 1482; *FWO v James Nelson Pty Ltd & Anor* [2016] FCCA 531; *Potter v Fair Work Ombudsman* [2014] FCA 1171

- not cooperating with the FWO to resolve the issue, including refusing to provide a record of interview or failing to comply with a Notice to Produce Documents.[15]

19. In certain markets where the vulnerability of the workers is acute, there is the potential for below minimum wages to become embedded culture. Where these practices are adopted, it is very difficult for FWO to take enforcement action and the results of that action are often dwarfed in their impact by the quantum of wages not paid to workers over months or years.[16]

20. The current framework has not proven to be adequate to deter entities operating in these sorts of markets. While they are a minority, the dynamics are strong enough to distort labour markets or sectors. Strengthening the FW Act will help those businesses doing the right thing by levelling the playing field.

21. The FWO has sought to tackle these situations through a range of innovative approaches:

    - adopting an 'Inquiry' methodology to examine the underlying causes of systemic non-compliance, rather than merely dealing with individual complaints;[17]
    - using all the levers across government, such as harnessing corporations law, migration law, tax law and the scope of other regulators;[18]
    - seeking innovative court orders, including injunctions, freezing orders and orders against accessories;[19] and
    - using the strong community interest in worker exploitation and concern about reputational damage to encourage established and reputable entities to use the levers available to them to stamp out non-compliance in their supply chains and networks, although they are not the direct employer for those workers.[20]

22. However, as we have seen in some of our cases, a minority of employers will risk engaging in the tactics above so long as the cost of any potential consequences is lower than the savings they have made through exploiting their workers.

23. The package of measures outlined in the Bill together would make a significant difference to FWO's capacity to address this conduct where it occurs. In particular, providing higher

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[15] *Fair Work Ombudsman v Maroochy Sunshine Pty Ltd & Anor* [2017] FCCA 559
[16] *Fair Work Ombudsman v Haider Pty Ltd & Anor* [2015] FCCA 2113, where the penalty was $6,970, however the total underpayments were $21,298.
[17] Identifying and addressing the drivers of non-compliance in the 7-Eleven network (released April 2016), Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales (released June 2015)
[18] *Fair Work Ombudsman v Trek North Tours (No 2)* [2015] FCCA 1801
[19] *Fair Work Ombudsman v Golden Vision Food and Beverage Services Pty Ltd & Anor* [2017] FCCA 534; *Fair Work Ombudsman v* Mamak *Pty Ltd & Ors* [2016] FCCA 2104; *Fair Work Ombudsman v Mai Pty Ltd & Anor* [2016] FCCA 1481
[20] Coles Supermarket Australia Pty Ltd Enforceable Undertaking, October 2014.

penalties that reflect the gravity of serious contraventions of the law and ensuring there are real deterrents against not keeping records or falsifying records for the purpose of disguising underpayments. Ensuring Fair Work inspectors are taken seriously and cannot simply be ignored will make a significant difference when tackling the worst sort of conduct.

24. Enabling the FWO, as a last resort and with appropriate protections, to compel potential witnesses to provide information of high value to prove deliberate exploitation of vulnerable workers will undermine the tactics outlined above because witnesses will be protected by the processes involved in attending an examination. This will ensure there can be appropriate consequences for those individuals who are behind the worst behaviour the FWO comes across.

25. The proceeding sections address each of the Bill's measures in detail. The FWO would continue to adopt a graduated and proportionate approach to implementing changes should Parliament agree to them, and would continue to focus its compliance activities on cases of serious and deliberate conduct.

Section 2
Franchising and holding companies

The current framework

26. The FWO remains concerned by the significant workplace compliance issues uncovered in a number of franchise networks in recent years. These are well documented in the FWO's reports into 7-Eleven, United Petroleum and Pizza Hut. The FWO also has ongoing investigations into the Domino's and Caltex franchise networks. In some networks, allegations of non-compliance have persisted despite earlier compliance action against individual franchisees.

27. Workplace rights and obligations provided under the FW Act and Fair Work instruments are confined to the direct relationship between an employer and employee. In the context of franchising, the direct employer of labour is the franchisee. It is therefore the franchisee who owes obligations to its employees and who is responsible for compliance with workplace laws.

28. To the extent legal responsibility is extended to persons beyond the direct employer, the FW Act does this via accessorial liability provisions that are set out in section 550, which apply to persons 'involved' in a contravention.

> ***550 Involvement in contravention treated in same way as actual contravention***
>
> (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.

29. The FWO has increasingly relied on the accessorial liability provisions under section 550 of the FW Act in a range of situations where other individuals or entities have played a significant role, through their actions or failure to act, in serious breaches of workplace laws. In 2015/16, 46 out of 50 matters (92 per cent) initiated by the FWO included allegations against accessories. This trend has continued into the first half of 2016/17 with 92 per cent of matters alleging involvement in non-compliance by accessories.

30. Human resources advisors[21], administration and payroll managers[22], day-to-day managers[23], associated corporate entities[24] and corporate entities in supply chains[25] are examples of accessories that have been found to have been involved in contraventions of workplace laws through section 550. The most common circumstance where section 550 is used, however, is where there is sufficient evidence that a company director played a key role in the contraventions.

31. One case where the FWO has successfully used section 550 in the franchising context is the case of Yogurberry. While this matter sends a strong signal to franchisors that they can be held accountable for exploitation in their networks, it must be viewed in context.

***Case study*: YBF Australia Pty Ltd**

In November 2016, for the first time the FWO secured penalties against a master franchisor, YBF Australia Pty Ltd (**YBF**), for its involvement in the exploitative practices of one its associated companies in the matter of *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290 (**Yogurberry**).

Yogurberry involved four Korean backpackers, working pursuant to subclass 417 (Working Holiday) visas. The employees were employed by Yogurberry World Square Pty Ltd (**YWS**), a Yogurberry franchise in the World Square Shopping Centre, Sydney. A FWO investigation uncovered underpayments, unlawful deductions from wages, and various pay slip and record-keeping failures.

YBF originally ran the World Square store and employed its employees until late 2013, when YBF no longer operated the World Square store but instead created a complex set of group companies run by various members of the Oh family. Despite the interposition of YWS, YBF continued to control the activities of the World Square store through its shareholders Mr Young Seok Oh and his wife, Mrs Soon Ok Oh.

From January 2015, Mr and Mrs Oh's son, Mr Taek Oh, took over as CEO of Yogurberry and had

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[21] *FWO v Oz Staff Career Services Pty Ltd & Ors* [2016] FCCA 105 and *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors* [2010] FMCA 863

[22] *Fair Work Ombudsman v Ross Geri Pty Ltd & Ors* [2014] FCCA 959

[23] *Fair Work Ombudsman v Liquid Fuel Pty Ltd & Ors* [2015] FCCA 2694 and *Fair Work Ombudsman v Jay Group Services Pty Ltd & Ors* [2014] FCCA 2869

[24] *Fair Work Ombudsman v Jetstar Airways Ltd* [2014] FCA 33 and *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290

[25] *Fair Work Ombudsman v South Jin Pty Ltd (in liq)* [2015] FCA 145, *Fair Work Ombudsman v GRI Global Pty Ltd (in liq) & Anor* (unreported) (BRG1151/2014) and *Fair Work Ombudsman v Al Hilfi* [2015] FCA 313

control over the YWS employees through CL Group Pty Ltd (**CL**), an entity of which he was a director. Mrs Oh was a shareholder of YBF and director of CL Owner Pty Ltd (a company which owned YWS and CL). However, Mrs Oh admitted that she was a *de facto* director of YWS, YBF and CL and the person who made decisions on behalf of all three companies (notwithstanding that her husband and children were on record as directors of those companies).

The FWO commenced proceedings against YWS, YBF, CL and Mrs Oh for various contraventions. All respondents eventually admitted liability and the matter proceeded by way of the parties filing a Statement of Agreed Facts.

32. The arrangement between YBF and the other respondents was not typical of most franchise arrangements encountered by the FWO, largely because of the extent of direct control exerted by the franchisor over the outlet and common directors. In the FWO's experience, most franchise arrangements involve a legal and commercial relationship between the franchisor and the franchisee where compliance with workplace relations is solely the responsibility of the franchisee and any liability is excluded.

33. Part of the FWO's role is to test if the delineation of responsibilities between the franchisee and franchisor is borne out in practice through an investigation or inquiry. Investigating allegations of franchisor knowledge of contraventions in their network can be difficult in the franchise context, as was demonstrated by the FWO's Inquiry into 7-Eleven, which considered the role of head office in the behaviour of franchisees. The challenges in this matter are well documented in the FWO's Inquiry Report.

34. The FWO continues to test the boundaries of section 550, however there a number of challenges when applying this approach to franchise systems. Whilst section 550 does not require proof that a person knew the law, or that the conduct in question breached the law, it does require evidence of actual knowledge of particular factual matters that make up each contravention and intentional participation in those matters (by some act or conduct such as an intentional omission or assenting to or concurring in the conduct). Negligence or recklessness about those matters is not sufficient.

Using the current framework

35. Relying solely on liability under the FW Act to drive behaviour change in franchise systems has its limitations, because it requires proof of a standard of knowledge on the part of the franchisor (or any potential accessory). Therefore the FWO has increasingly used reputational leverage to encourage franchisors to take responsibility for compliance in their networks. FWO has been saying for some time that major brands need to consider their 'moral and ethical

responsibility'[26] for their networks and supply chains, especially in highly competitive markets where the incentives for contractors or franchisees to unlawfully reduce their labour costs to enhance their profit margins is high.

36. Relying on social licence and using the media to raise public awareness about the agency's activities and findings has been a critical part of the FWO's operating model. We also use a range of methods to highlight options open to businesses that want to take this responsibility on through a formal partnership with the FWO – specifically a Compliance Partnership.

37. Compliance Partnerships are a non-statutory tool, created by the FWO, to assist the development of sustainable self-monitoring arrangements within major brands, such as:

    - resolving workplace issues directly with its employees;
    - self-auditing of pay and record-keeping;
    - reviewing and monitoring supply chain and franchise relationships;
    - providing appropriate workplace relations training for key staff; and
    - resolving technical workplace issues as they arise.

38. Compliance Partnerships are underpinned by a common law deed. They are designed to enable the FWO to engage with a brand where the enforcement tools in the FW Act are not available to achieve changes in behaviour and promote lasting compliance. Unlike an enforceable undertaking, which requires a reasonable belief that a contravention of the FW Act has occurred, this mechanism can be used where there is not clear evidence or admissions on the part of the entity that it has breached the law. Compliance Partnerships are also available to businesses wanting to be proactive about putting in place systems to prevent contraventions from arising in their networks and labour supply chains, beyond their own employees.

39. The FWO has so far entered into Compliance Partnerships with 16 businesses and brands. McDonald's was the first major brand to enter into a Compliance Partnership with the FWO in April 2011. There are over 900 McDonald's restaurants in Australia, which employ around 90,000 employees.[27] During the operation of McDonald's second Compliance Partnership (March 2014 – March 2016), the FWO received 22 requests for assistance from McDonald's employees, all rectified without the need for formal compliance and enforcement action. For a large workforce such as McDonald's, this is a very low number of requests for assistance and

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[26] Coles, Baiada, 7-Eleven, Chemist Warehouse and Oaks Hotels have signed Enforceable Undertakings or deeds with the FWO, stating that they have an ethical and moral responsibility to ensure all entities directly involved in the conduct of their business comply with the law.

[27] https://mcdonalds.com.au/about-maccas/maccas-story accessed 3 April 2017

is a result of the arrangements put in place by McDonald's as a requirement of the Compliance Partnership.

40. Compliance Partnerships are, however, an evolving tool. On 6 December 2016, convenience store franchise 7-Eleven agreed to enter into a Compliance Partnership with the FWO following a lengthy Inquiry by the agency and extensive media scrutiny. The deed underpinning this arrangement is the most robust the agency has ever entered into in terms of its measures and the extent of the obligations imposed beyond direct employees. It contains extensive monitoring and reporting arrangements absent from some previous Compliance Partnerships, including biometric record keeping systems. The deed also commits 7-Eleven to ensuring sufficient funds are available for the purpose of rectifying underpayments on an uncapped basis and to providing wage and cost modelling, based on actual stores, for prospective franchisees and current franchisees, so that businesses in the network have a clear picture of their potential costs.

41. The FWO's approach of encouraging brands to enter into Compliance Partnerships and accept obligations beyond their own directly employed workers using both reputational leverage and legal pressure through section 550 has achieved some success. In the FWO's experience, however, franchisors can be reluctant to proactively engage with the FWO before issues are uncovered, either by the FWO or through the media. Reputational leverage works as a 'push' factor for franchisors to act, but has had limited effect as a general deterrence measure to encourage other franchisors to take reasonable steps to detect non-compliance and support franchisees to be compliant.

Proposed amendments to the Fair Work Act

42. The proposal to include specific provisions to impose liability on the key class of franchisors and holding companies, who have knowledge of issues in their network or subsidiary companies and fail to take reasonable steps to address them, will facilitate compliance in franchise networks by those who have a real capacity to influence or control. It reinforces the 'moral and ethical responsibility' that FWO has been emphasising established brands should be taking. The provisions would provide the FWO with an additional lever to pursue non-compliance and recover underpayments.

43. The capacity of the FWO to fully utilise this lever will operate in conjunction with the proposed additional evidence gathering powers (discussed in the following section). This is because successful use of the proposed franchise and holding company provisions will require the FWO to obtain evidence on, for example, the degree of influence or control that occurs in practice (as compared to what may be written by parties in contracts, policies or other documents) and

what a franchisor or holding company knew or could reasonably be expected to have known, which are legal elements of the proposed new liability provisions in the Bill.

44. The FWO would educate franchisors, franchisees and their employees about any new obligations introduced by the Bill. The Explanatory Memorandum notes that the proposed requirement in the Bill provides flexibility to franchisors and holding companies in deciding what steps to take to support compliance. This is consistent with the tailored advice that the FWO already provides for franchisors[28], which can be scaled up or down depending on the type and sophistication of the franchise network. The FWO recognises that a one-size-fits-all approach to compliance is not appropriate and is contrary to the intention of the Bill.

45. The FWO provides a wide range of tools and resources tailored for small business operators, such as franchisees. Franchisees can call the Small Business Helpline to speak with an adviser or create an online MyAccount portal at www.fairwork.gov.au where the business can save information and direct written enquiries to the FWO. Franchisees requiring assistance with modern award obligations, including pay rates, can use the FWO's Pay and Conditions Tool (PACT) or access templates to assist with compliance, such as record-keeping and payslips, through the FWO's website.

46. The FWO has already been working with the Franchise Council of Australia to develop resources to assist franchisors and franchisees with their current obligations, as a result of increased awareness and engagement from across the sector in the wake of the FWO's 7-Eleven inquiry. There is a still a tendency, however, for some franchising systems to take a narrow view of their responsibilities.

[28] Including a dedicated webpage that includes strategies that franchisors can use to help their franchisees with compliance: https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/franchise-assistance/information-for-franchisors

Section 3
Powers – evidence gathering, hindering and obstructing

The current framework

47. Fair Work inspectors have a range of powers under the FW Act to gather evidence when assessing or investigating workplace compliance. Specifically:

- s.708, which provides that a Fair Work inspector may enter premises, without force, in certain circumstances;
- s.709, which provides a Fair Work inspector with a range of powers that they can exercise while on premises;
- s.711, which provides that a Fair Work inspector may require a person to tell the Fair Work inspector their name and address in certain circumstances;
- s.712, which provides that a Fair Work inspector may require a person to produce a record or document to the Fair Work inspector (a Notice to Produce); and
- s.714, which provides that a Fair Work inspector may inspect, copy and keep a record or document produced to the Fair Work inspector.

Using the current framework

48. Formal evidence gathering powers are only used in around 6 per cent of workplace disputes handled by the FWO each year.[29] They are, however, critically important in the FWO's compliance and enforcement work - particularly investigations involving serious and complex allegations of non-compliance. One of the most significant powers currently afforded to Fair Work inspectors is the power to request documents.

49. Under s. 712 of the FW Act, a Fair Work inspector can require a person to produce to them any record or document relevant to determining if there has been a contravention of Commonwealth workplace laws. This occurs by issuing a written Notice to Produce (NTP).

50. In the last financial year (2015/16) the FWO issued over one thousand NTPs to assist with gathering evidence. In most cases respondents complied with these notices. Compliance with NTPs issued by the FWO is fundamental to the FWO's ability to carry out its function of investigating whether the FW Act is being or has been complied with. Failure to comply can delay or impede the FWO's investigations, has the effect of preventing the FWO from assessing whether a contravention has occurred and frustrates the agency's attempts to enforce the law.

[29] See footnote 1.

51. Where an NTP is not complied with without reasonable excuse, there is a civil remedy available under s. 712(3) of the FW Act.[30] The FWO has pursued three cases involving non-compliance with an NTP so far in this financial year and eight in 2015/16. In decisions handed down in 2016/17 where the Court has set out the distinct penalty for non-compliance with an NTP, penalties have ranged from $500 to $45,000.[31] It's critical that respondents know that they cannot thwart an investigation by the FWO by simply failing to provide information.

52. The powers currently afforded to Fair Work inspectors are sufficient in the majority of cases, as the FWO finds for the most part that individuals are willing to engage with Fair Work inspectors. However, where cooperation isn't forthcoming, the FWO considers whether formal compliance powers are necessary. There are cases where employers or individuals deliberately frustrate investigations by refusing to comply with formal requests.

53. Consistent with other breaches of the FW Act, the FWO responds to non-compliance with NTPs in accordance with our Compliance and Enforcement Policy and Litigation Policy. In some cases, if an investigation cannot be conducted and there is no justification for further enforcement action, the matter is closed.

***Case study*: Kleen Group Pty Ltd**

In the matter of *Fair Work Ombudsman v Kleen Group Pty ltd & Anor [2016] FCCA 278*, the employer deliberately did not comply with an NTP and, as a result, the FWO was unable to determine the extent of any alleged loss suffered by the former employee.

Kleen Group was issued with a NTP in early August 2014, with a response due in 28 days. The Director failed to comply with the NTP despite several attempts at contact by the Fair Work inspector. A second NTP was issued in September 2014 with a requirement to comply within 14 days. The Director again failed to comply with the NTP. Despite several reminders and attempts at contact by the Fair Work inspector, the Director did not comply.

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[30] Non-compliance with an NTP attracts 60 penalty units ($10,800) for an individual and 300 penalty units ($54,000) for a body corporate.

[31] *FWO v Sheth & Anor* [2016] FCCA 3433 - separate penalties of $9,000, $10,000 and $10,200 against First Respondent for three NTP breaches; *FWO v Maroochy Sunshine Pty Ltd & Anor* [2017] FCCA 559 - penalty of $45,900 on First Respondent and $9,200 on Second Respondent for one NTP breach; *FWO v Golden Vision Food and Beverage Services Pty Ltd & Anor* [2016] FCCA 1721 - penalty of $2,500 against First Respondent and $500 against Second Respondent for one NTP breach; and *FWO v Sonisolar Pty Ltd & Anor* [2016] FCCA 2027 - aggregate penalty of $12,000 on Second Respondent but proposed a penalty $7,000 for NTP breach before aggregation (see para 189 – 192).

In late October, the Director was informed that the FWO was considering enforcement options. The Director emailed the Fair Work inspector, indicating that the documents would be provided within one week. The documents were never provided.

Penalties of $24,990 were imposed against Kleen Group and its director for failing to comply with the NTP (40% of the maximum penalty against Kleen Group and 45% of the maximum penalty against its director). In this decision, Judge Emmett acknowledged that the power under the FW Act for a Fair Work inspector to issue an NTP to obtain documents and records is a very important regulatory power.

54. While the ability to issue an NTP is an important power, it can only be used to gather documentary evidence. In the course of an investigation, Fair Work inspectors will also seek evidence from witnesses. It is common for parties to refuse records of interview with the FWO when they are under investigation because under the FW Act there is nothing to compel a person to engage with the FWO. Nor are there civil penalties applicable in the FW Act if a person intentionally hinders or obstructs a Fair Work inspector in the exercise of their compliance powers.

55. Furthermore, vulnerable workers themselves may be hesitant to engage with FWO on the record. This arises for a range of reasons. In the case of visas holders:

    - they are transient and may only be in their employment for a few months, or in Australia for one to two years;
    - they encounter cultural and language barriers, and often have limited understanding of their workplace entitlements; and
    - they may be primarily concerned about their visa status and think engaging with FWO will risk their visa (or their job).

56. Seeking to prove accessorial liability can be particularly frustrated by a lack of cooperation from a witness. In the absence of direct documentary evidence that proves the accessory had the requisite involvement and knowledge, it is extremely difficult to investigate or establish accessorial liability where potential witnesses are uncooperative. The difficulties compound where the alleged accessory is a company other than the employing entity and an insight into the 'mind' of the company through its officers is required. Challenges related to section 550 were discussed in Section 2.

Case study: Baiada

Over a number of years the FWO received intelligence that site managers employed by Baiada were actively involved in employing migrants to work excessively long hours, paying them below minimum entitlement rates in cash, and threatening workers with termination when they complained.

The Baiada Inquiry was principally concerned with identifying the nature and terms of labour procurement through the Baiada Group's contracting networks. Understanding in detail the characteristics of the labour arrangements was critical to identifying whether the arrangements comply with the FW Act and who may be responsible for non-compliance with workplace laws.

The FWO found that principal contractors in the labour supply chain were related to the directors of Baiada and were using the supply chain to avoid regulatory obligations. False records had been created and produced by the contractors in response to a NTP issued by the FWO, and little significant or meaningful documentation was provided regarding the nature and terms of its contracting arrangements. Baiada also denied inspectors access to its three sites in NSW during the course of the Inquiry which prevented inspectors an opportunity to observe work practices or to talk to workers about work conditions, policies and procedures.

The lack of cooperation from the Baiada Group, including failure to provide accurate contact details for contractors, lengthy delays in providing requested records and not consenting to Fair Work inspectors entering worksites, along with the failure of contractors to update business registration records in contravention of the *Corporations Act 2001*, presented challenges in contacting directors and serving notices issued by the Fair Work inspectors under the FW Act.

Due to the negligible records produced and the FWO's reliance on voluntary participation in interviews, the FWO was unable to effectively account for the hundreds of thousands of dollars that moved down the supply chain, conduct proper interviews with employees or compel those with information to speak with inspectors.

Despite volumes of intelligence received by the FWO regarding Baiada's alleged involvement, no evidence sufficient to put before the court was recovered, due to the limitations on the FWO's investigative powers.

57. Unlike other comparable regulators, the FWO does not have the power to require a person to answer questions in connection to an alleged contravention. The Australian Competition and Consumer Commission (ACCC), for example, and Australia Securities and Investment Commission (ASIC) both have the power to require someone to attend an examination under oath. Both ASIC and the ACCC use their compulsory evidence gathering powers to facilitate

timely and detailed investigations and, where appropriate, the imposition of enforcement outcomes. The table below sets out the provisions that currently assist other regulators in compelling persons to speak with them:

Provision / Legislation	Regulator/agency	Power	Penalties
S.19, Ss.29 – 33 and S.39 *Australian Securities and Investments Commission Act 2001*	Australian Securities and Investments Commission (ASIC)	Power to compel a person to appear for examination; produce information, documents, books or things for inspection; and to identify the property of a body corporate.	Non-compliance for sections 19, 30 (including 30A and 30B), 31, 32A, 33 and 39 incurs 100 penalty units ($18,000) or imprisonment for 2 years, or both. Failure to comply with subsection 29(2) incurs 10 penalty units ($1,800) or imprisonment for 3 months, or both.
S.155 *Competition and Consumer Act 2010*	Australian Competition and Consumer Commission (ACCC)	Power to require a person to provide information, documents and evidence.	Fine not exceeding 20 penalty units ($3,600) or imprisonment for 12 months.
Ss.62 – 71 and S.140 *National Vocational Education and Training Regulator Act 2011*	Australian Skills Quality Authority	Power to require a person to produce information, documents or things or give all reasonable assistance in connection with an application for a civil penalty order, as well as exercise search and seizure powers	30 penalty units = $5,400
S.156 of the *Paid Parental Leave Act 2010*	Secretary of the Department of Social Services	Power to require a person to give all reasonable assistance in connection with an application for a civil penalty order (please note: the FWO also has an enforcement role in relation to this legislation)	10 penalty units = $1,800
Ss.268CA – 268CZH, 486Y and Part E *Migration Act*	DIBP	Power to require a person to provide information and/or documents and/or give all reasonable assistance in connection	Failing to comply with a notice (268BH) incurs imprisonment for 6 months. Giving false or misleading

1958		with an application for a civil penalty order, as well as exercise search and seizure powers	information (268BI) or documents (268BJ) incurs imprisonment for 12 months Failure to answer question (268CL) incurs imprisonment for 6 months. Giving false or misleading information or documentation in relation to requests made under s.268CJ or a requirement under s.286CK incurs imprisonment for 12 months (268CM & 286CN) Failure to assist in applications for civil penalty orders incurs 10 penalty units ($1,800)
Ss 353-15 *Taxation Administration Act 1953*	ATO	Power to, at all reasonable times, enter and remain in a premise with full and free access to any documents, goods or other property. Powers allow an authorised individual to inspect, examine, and take copies and extracts from any document.	30 penalty units = $5,400

58. The provisions set out above contain a range of protections to ensure that the power is used appropriately, proportionately and only where necessary. For example, use and/or derivative use immunities generally apply to information gathered by compulsion in respect of civil or criminal proceedings against that person (subject to limited exceptions such as false or misleading information).

Proposed amendments to the Fair Work Act

59. The proposed introduction of a new civil remedy provision prohibiting a person from intentionally hindering or obstructing, in the course of their duties, the FWO, a FWO inspector, a person assisting an inspector or a FWO staff member who has issued a FWO notice (s 707A(1)), will have a deterrent impact and require individuals to engage with the FWO.

60. Proposed section 712A will enable the FWO or specified senior officers of the Agency to issue a FWO notice to a person where the FWO reasonably believes the person has information or

documents relevant to an investigation, or is capable of giving evidence that is relevant to such an investigation. The notice can require the person to produce documents or attend before the FWO to answers questions.

61. The new powers would be critical in enabling the FWO to obtain evidence required to pursue action under other new provisions in the Bill which, unlike 'underpayment' provisions of the Act, require proof of a range of things that are within the mind of the person or entity – such as intention. Without such powers, and absent clear documentary 'smoking guns' it would be particularly challenging to establish:

    - that conduct was deliberate for serious contraventions;
    - the degree of influence or control exercised by a franchisor and what they knew or ought reasonably to have known and when; and
    - whether a person knew that records, payslips or information provided in an investigation was false or misleading.

Case Study: Deliberate non-cooperation with the FWO

In August 2016, the FWO received a request for assistance from a retail worker in Victoria, alleging he had been underpaid, required to work under an ABN and was terminated after raising his concerns with his manager.

Based on the initial evidence from the complainant, the FWO had real concerns that the employer had a practice of deliberate exploitation and underpayment of a significant number of vulnerable migrant workers and was hiding behind complex company structures.

Over the course of the investigation, the FWO attempted to contact the director of the company and other persons of authority at the business over 10 times by telephone, and two times in person over a 5 month period. In addition, FWO attempted to contact other higher ranking members of the business, such as the general managers.

The FWO made more than 10 attempts to contact the business	
13 September 2016	Telephone call to director. Message left, no response.
19 September 2016	Telephone call to director. Message left, no response.
19 September 2016	Telephone call to company number. Message left, no response.
20 September 2016	Telephone call to director. Message left, no response.

20 September 2016	Telephone call to associate of Director. Message left, no response.
20 September 2016	Telephone call to the company number. Message left, no response.
20 September 2016	Site visit to serve NTP. Spoke with general manager as director unavailable.
21 September 2016	Telephone call to company number. Message left, no response.
20 October 2016	Site visit to business. Director not available.
1 March 2017	Telephone call to company number. Message left, no response.
1 March 2017	Telephone call to alternate company number. Message left, no response.

The FWO issued a NTP in September 2016 for records relating to the employee. The company failed to comply with the NTP and did not engage with the Fair Work inspector during this time. As a result of the company's resistance to engage, the Fair Work inspector visited the business to discuss the failure to comply with the NTP. The directors refused to engage, leaving the Fair Work inspector to speak with the General Manager instead.

The company eventually provided the documents requested by the NTP and through conversations with the general manager it was revealed that the employee was actually engaged by an associated entity of the primary business which was in administration.

Shortly after this visit in December 2016, the FWO received notice from ASIC that the company was attempting to deregister. ASIC deferred deregistration and following assessment of the NTP documents, the FWO decided to expand the investigation to include other workers.

A second NTP was issued on the business, and an assessment of the records produced demonstrated that a random sample of 6 out of 37 workers engaged by the business had been underpaid a total of $20,000 over a three month period. All of these workers had been engaged under the associated entity of the primary company.

In March 2017, the FWO received an alert from ASIC outlining that the company was now attempting to wind-up the primary entity. The potential winding up of the company means that a FWO litigation would need to seek recovery of entitlements from an accessory using section 550. Due to the lack of engagement there is currently insufficient evidence to assess the director's involvement in the alleged contraventions.

The matter remains ongoing. If the company is wound up, the FWO may be able to pursue orders against individuals as accessories, but would require sufficient proof of their knowledge

and involvement. Lower penalties apply to individuals than to corporate entities.

Stronger powers would increase the likelihood that FWO can investigate and potentially secure back payments owed to workers in circumstances such as these. Similarly, higher penalties would operate as a stronger deterrent to this type of evasion especially insofar as they may be applied to individuals.

62. The notice provisions in the Bill contain controls (such as the requirement for a notice to be issued by an SES employee) due to the serious nature of the requests and the significant penalties that apply for failing or refusing to comply.

63. The proposed provisions are also subject to two indemnities / immunities that apply to information or evidence obtained from an individual who complies with a FWO notice, in new s 712D and amended s 713.[32] Provisions such as this are a common feature of Commonwealth regulation providing for compulsive powers that enable regulators such as the FWO to carry out their enforcement functions, where the privilege against self-incrimination or self-exposure to a penalty or liability is abrogated by the statute.

64. Specifically with respect to FWO notices, s 713(3) prevents information, answers to questions or documents or records being admissible against individuals in any proceedings (criminal or civil penalty proceedings) other than proceedings arising out of a failure to comply with the notice or providing false or misleading information. The indemnities in s 713 applying to records or documents obtained via s 709(d) (requiring records to be produced while on premises) and s 712 (issuing an NTP) are limited to use in criminal proceedings, meaning it is likely these powers would continue to be used first or in most cases as they enable the FWO to use such records or documents in civil remedy cases.

65. As with existing compliance tools that are used in serious cases, the FWO notice power would be reserved for use in matters where there are no records or documents capable of production or a suspicion they have not been produced, or to obtain information from persons who are unwilling to assist the FWO unless compelled and who can provide crucial information about contravening conduct, persons involved and what was known by whom in relation to such matters.

[32] The immunities deal with when evidence will not be admissible. Any such evidence would still be subject to the *Evidence Act 1995* and admissibility rules contained therein. This includes the general discretion to exclude evidence if the probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party.

Section 4
Serious contravention penalties

The current framework

66. Section 539 of the FW Act sets out the pecuniary penalties that can be awarded against individuals and body corporates for breaches of civil remedy provisions. The current maximum civil penalties available under the FW Act are $10,800 for an individual and $54,000 for a body corporate.

67. The current maximum penalties for employers contravening their record-keeping and payslip obligations under the FW Act are half of the maximums for most contraventions, and one-third for false or misleading employment records. For more detail, see the Record keeping and false or misleading documentation section below.

68. Under section 557 (1) of the FW Act, two or more contraventions of certain civil remedy provisions are taken to constitute a single contravention, if the contraventions are committed by the same person and arose out of a single course of conduct by the person.

69. In practice, this means that if multiple employees are underpaid, a Court can, and generally will, group the contraventions under each civil remedy provision relating to the underpayments against each employee together– reducing the total quantum of penalties to the grouped contraventions only (see *Case Study: Maroochy Sunshine* below for comments made by the Court regarding grouping).

70. Depending on the facts of the matter this can result in a limitation of the penalties to a quantum which may not objectively allow sufficient scope to reflect the seriousness of the conduct and to achieve a deterrent outcome.

Using the current framework

71. In imposing penalties the court takes into consideration a number of factors in determining what level of penalty is appropriate to have a deterrent impact on the parties and the public. The courts have shown that they are willing to award up to 80-90% of the maximum penalties in serious cases involving systematic exploitation of vulnerable workers, having expressly stated that maximum penalties should be reserved for the most serious cases.

Case study: **Maroochy Sunshine**

In *Fair Work Ombudsman v Maroochy Sunshine Pty Ltd & Anor* (**Maroochy Sunshine**), the matter involved the underpayment and exploitation of 22 workers from Vanuatu employed as part of the Seasonal Worker Program. The court imposed total penalties of $186,000 on Maroochy Sunshine Pty Ltd (around 80% of the maximum penalties) and $41,300 on the sole director Mr Emmanuel Bani (90% of the maximum penalties), for six grouped contraventions of the FW Act. The court also ordered Maroochy Sunshine repays the unpaid wages and entitlements.

Judge Jarrett stated in his decision that "*it is difficult to imagine more egregious conduct than that exhibited…in this matter. Whilst I am cognisant of the admonition that the maximum penalty should be reserved for the worst case and it is likely that there will be worse cases of offending than that at hand, it is difficult to envisage that in this case.*"

It is noted that Judge Jarrett specifically stated at paragraph [59]:

> '*the remaining seven contraventions that are the subject of the Court's declarations made on 15 March 2016 belie the extent of the contraventions. I have set out the facts above. The Applicant has adopted an approach which has reduced multiple contraventions, both in respect of each employee and across all of the employees, to one contravention. Thus the failure to pay one of the employees his basic hourly rate over the employment period (which constitutes multiple contraventions) has been reduced to one, which in turn has been considered with similar contraventions across all employees, to be one single contravention to pay the minimum hourly rate. I am not critical of that approach – it is an approach mandated by s.557(1) of the Act given the circumstances of this case. But it is important to understand that behind these six contraventions lays extensive conduct which has adversely affected the lives of the 22 employees and their families*.'

72. Despite the outcomes the FWO has achieved, the maximum penalties under the FW Act are still less than penalties available for breaches of similar provisions in other jurisdictions. As the below table demonstrates, other Commonwealth legislation frequently contains higher maximum civil penalties than the Fair Work legislation, and/or criminal offences.

Legislation / Provision	Civil penalties – individual	Civil penalties - body corporate	Criminal penalties
Competition and Consumer Act 2010 s. 76	$500,000	Over $10 million	$360,000 or 10 years' imprisonment for an individual
Corporations Act 2001 Ss. 180-180, 596 and 596AB.	$200,000	$5 million	$360,000 or Imprisonment for up to 5 years for an individual for an individual
Migration Act 1958 s.234	$180,000 (1,000 penalty units)	$900,000 (5000 penalty units)	Imprisonment for 10 years

73. The community expects there to be clear consequences to deter companies and persons who fail to meet their legal obligations under workplace laws.

74. However, in the FWO's experience under the current system there is evidence to suggest that unscrupulous employers consider the financial incentive of breaching the law to be greater than the deterrent effect of possible action by the FWO or possible penalties by the courts.

75. There are numerous examples of cases where the FWO has sought court ordered penalties for FW Act contraventions and where the same employer has subsequently committed further contraventions after being penalised.[33] Arguably, in these cases, the penalties ordered in the first instance were not sufficient to deter the employer from reoffending and were also unlikely to deter other similar operators from breaching workplace laws.

***Case study: Fair Work Ombudsman v Sona Peaks & David Anderson* [2015] FCCA 137 and *Fair Work Ombudsman v Sona Peaks & David Anderson (No. 2)* [2015] FCCA 2030**

In the matter of *Fair Work Ombudsman v Sona Peaks & David Anderson*, Mr David Anderson was penalised $3000 and his company Sona Peaks Pty Ltd a further $12,500 for failing to comply with a compliance notice and underpaying a casual employee a total of $5000 (rectified during proceedings). Judge Riethmuller said that while Mr Anderson and Sona Peaks had made admissions which indicated an acceptance of wrongdoing, it seemed the admissions were "*more an acceptance of liability rather than an acknowledgement of the*

[33] See for example: *Fair Work Ombudsman v Wedderburn Petroleum Pty Ltd* [2014] FCCA 2645 and *Fair Work Ombudsman v Wedderburn Petroleum Pty Ltd* (No.2) [2015] FCCA 2750; *Fair Work Ombudsman v Invivo Group Pty Ltd (in liq)* and *Claudio Locaso* [2015] FCCA 1914; *Fair Work Ombudsman v The Syndicate Group Pty Ltd & Claudio Locaso* [2015] FCCA 2847; *Fair Work Ombudsman v Australian Sales and Promotions Pty Ltd* [2013] FCCA 1502; and *Fair Work Ombudsman v Australian Sales and Promotions and Paul Ainsworth* [2016] FCCA 2804.

inappropriateness of the conduct".

While this matter was before the courts, the FWO audited the business and revealed further employee underpayments. As attempts to educate the business and secure voluntary compliance were unsuccessful, further proceedings were considered necessary.

In the second matter *Fair Work Ombudsman v Sona Peaks & David Anderson (No. 2)*, handed down six months after the first matter, the Federal Circuit Cout imposed penalties of $118,650 against Sona Peaks and $23,175 against Mr Anderson for underpaying a further 9 employees over $10,800.

On application by the FWO, on 2 September 2015 the court made orders that Sona Peaks be wound up and a liquidator be appointed.[34]

The penalties, other than the penalties imposed against Mr Anderson personally in the second proceedings as the company's former director and sole operator, have been paid in full. The FWO has now successfully obtained orders for $500 to be deducted from the director's earnings on a fortnightly basis until the outstanding personal penalties of $26,715 ordered by the court in respect of two FWO litigations is satisfied.

76. As highlighted in the example above, in response to this conduct the FWO seeks a range of orders to deter future conduct where we suspect a pecuniary penalty under the current provisions may not be sufficient to achieve this outcome. The courts have shown a propensity to grant a broader range of orders in some cases, particularly where contraventions are very serious or where employers have not taken steps change their non-compliant behaviour, despite having penalties previously imposed against them. Where an injunction prohibiting future breaches is granted, the employer could face contempt of court proceedings for non-compliance with the court's order, which may arise if the person is found to have contravened the FW Act again.[35]

77. In cases where a business has, or might, go into liquidation, for example, it is not always possible for the FWO to seek repayments from the company. This is not an uncommon scenario that the FWO encounters. While the FWO does not have express powers to pursue

[34] The FWO seeks to wind up companies for the following reasons: in order to enforce the penalty orders; to obtain any payment towards penalty; and/or to enable an independent person to assess the financial transactions of both of the defendants following the appointment of a liquidator that can lead to action being referred to ASIC under the Corporations Act. All three applied in this matter.

[35] This will depend in each case on the terms of the injunction. A person may be found to be in contempt of Court if their words or actions interfere with the administration of justice. Contempt includes interference with the authority of the Court through deliberate non-compliance with its judgments and orders. Applications for contempt in the context of failure to comply with an injunctive order would generally be started by filing a new application with the court. If a breach of an injunctive order occurred whilst a proceeding was still before the court this can be done via an interlocutory application.

businesses who liquidate to avoid paying their debts, our enforcement actions to recover wages from employers and accessories 'address the consequences or symptoms of this behaviour more broadly'.[36]

78. Through the use of s. 550 of the FW Act, the FWO proactively seeks orders to ensure that, where possible, employees are re-paid any outstanding wages or entitlements such as ordering accessories to personally repay employees[37] (or seeking freezing orders to prevent an employer stripping the company assets to avoid paying penalties).[38] However, these penalties are not always sufficient to cover the full underpayment amount and are not available in all instances, as in the examples below.

***Case study: Fair Work Ombudsman v Haider Pty Ltd & Anor* [2015] FCCA 2113**

In the matter of *Fair Work Ombudsman v Haider Pty Ltd & Anor* the FWO obtained a penalty of $6,970 against former 7-Eleven franchisee Mubin Ul Haider, who previously operated a Brisbane 7-Eleven store through his company Haider Enterprises Pty Ltd (since liquidated).

The employer underpaid an international student (who was employed at the store for six years and became a permanent resident during that time) a total of $21,298 between January 2013 and February 2014. The respondents also tried to conceal the underpayments by entering false information into the 7-Eleven payroll system, and failed to comply with both a NTP and a Compliance Notice issued by the FWO.

Specifically, the student was often working in excess of 45 hours per week, but was only being paid for the 16 hours per week that were put through the 7-Eleven payroll system. In addition to being highly exploitative, these weekly hours of work were likely to have significantly exceeded the hours of work initially permitted by the student's student visa.

The failure to comply with the NTP prevented the FWO from assessing the true extent of the underpayments, and therefore the substantial underpayments identified in the proceeding represented only a portion of the total actual underpayments.

Haider Enterprises was placed into liquidation after the FWO filed court proceedings, meaning that the proceedings against the company were stayed and the FWO could only pursue Mr Haider as an accessory in respect of one of the NTP contraventions and the Compliance

[36] Anderson, H, O'Connell, A, Ramsay, I, Welsh, M, and Withers, H, *Quantifying Phoenix Activity: Incidence, Cost, Enforcement* (October 2015), Page 49.
[37] The case of *F air Work Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482 set out the guiding principles for the circumstances in which a court may order that an accessory be liable to pay underpayment amounts, either individually or on a joint and several basis.
[38] *Fair Work Ombudsman v Trek North* [2015] FCCA 1801

Notice contravention. Whilst the FWO was able to direct the penalties to the employee in partial satisfaction of his outstanding wage entitlement, he remained significantly out of pocket.

Case study: **Trek North and Leigh Alan Jorgensen**

Trek North Tours, a tour company based in Cairns, and its owner/director Leigh Alan Jorgensen, underpaid five 417 working holiday maker visa holders almost $30,000 in underpaid wages and entitlements in 2013 and 2014.

The FWO attempted to resolve the matter without having to commence formal legal action by first issuing Mr Jorgensen and his company with three Compliance Notices requiring him to back-pay the workers and a Notice to Produce documents. However, Mr Jorgensen told Fair Work inspectors investigating the underpayments that the backpackers 'would not get a cent' in back-pay and further communications with the FWO suggested he was prepared to bankrupt his company to avoid paying the Court-ordered penalties and back-pay order.

With this in mind, the FWO sought freezing orders to prevent any dispersion of assets up to the value of the fine and back-pay order against the company until they are paid. The orders were imposed by the Federal Circuit Court in July 2015. Mr Jorgensen has paid the personal fine of $12,000, but to date has not paid the fine imposed against the business, or rectified the underpaid wages. These proceedings are still on foot and as non-compliance with freezing orders is a criminal offence, Mr Jorgensen faces possible punishments including imprisonment and confiscation of property.

The FWO also referred Mr Jorgensen and his conduct to ASIC. In February 2017, ASIC announced it has commenced criminal proceedings against Mr Jorgensen for allegedly providing a false statement in the course of applying to have the company deregistered. In summary, the allegation is that Mr Jorgensen suggested that the company did not have any outstanding liabilities, notwithstanding the outcome of the FWO proceeding. This matter is currently before the Court.

Proposed amendments to the Fair Work Act

79. Penalties need to send a message that anyone involved in deliberately operating a business model that involves the exploitation of workers can face serious consequences. Achieving the best results under the current penalty arrangements, the quantum of penalties even when close to the maximum has not proven sufficient to deter deliberate schemes to underpay workers by some operators.

80. A court could utilise the higher serious contravention penalties when it has been proved that the contravening conduct was deliberate and part of a systematic pattern of conduct relating to one or more other persons.

81. This two-tier penalty regime, where courts can order more severe penalties for serious contraventions, would act as a more effective deterrent to employers engaged in systematic exploitation of workers, while also ensuring the penalty regime does not become disproportionately harsh where other less serious contraventions occur.

82. The higher maximums would also allow for greater penalties to be imposed to grouped contraventions as per s 557 (1). As highlighted above in the Maroochy Sunshine decision, while the grouping of contraventions is part of the current system, it doesn't always reflect the wide-ranging conduct and the number of employees affected.

83. The changes proposed by the Bill would also bring the penalties available for serious contraventions closer to the penalties available under other jurisdictions and would assist with general deterrence.

Section 5
Record keeping and false or misleading information

The Current Framework

84. Under s. 535 of the FW Act, employers are required to make employee records and to keep these records for 7 years. The *Fair Work Regulations 2009* (FW Regulations) specify requirements for the form and content of these records. Records must include, for example, employee details, hours of work, rates of remuneration and leave balances. The FW Regulations specify that employers have an obligation to ensure these records are accurate.

85. Under s. 536 of the FW Act, employers are required to give a pay slip to each of their employees within one working day of paying an amount to the employee in relation to the performance of work. The FW Regulations also specify the form and content requirements of pay slips. Pay slips must include, for example, the employee's name, gross and net payments to the employee and any deductions made.

86. Contraventions of s. 535 and s. 536 of the FW Act attract a maximum penalty of up to 30 penalty units. Contraventions of civil remedy provisions in the FW Regulations, such as false or misleading employment records, attract maximum penalties of up to 20 penalty units. The existing false and misleading provisions do not apply to payslips or information provided to Fair Work inspectors in investigations, only records an employer is required to keep under the FW Regulations.

87. Poor or inaccurate record keeping can present a significant barrier to the FWO in investigating and/or proving non-compliance with other workplace laws. Despite the centrality of record keeping to the effective operation of the Fair Work framework and the work of the FWO, the maximum penalties that a court can award for breaches of record keeping and pay slip provisions in the FW Act and FW Regulations are significantly lower than the penalties available for similar breaches in other jurisdictions.

88. As can be seen in the below table, for example, penalties for knowingly making false or misleading employee records provided for in the FW Act are significantly lower than the penalties for the making of false or misleading records in other jurisdictions.

Comparison of penalties for false and misleading conduct – various jurisdictions

Legislation	Section	Civil penalties – individ	Civil penalties – body corp	Criminal penalties?
Fair Work Regulations 2009	Reg 3.44 – knowingly making false or misleading employee records	**$3,600 / 20** penalty units	**$18,000 / 100** penalty units	No
Fair Work (Registered Organisations) Act 2009	S.337AA(2) – additional power to require information etc – civil penalty provisions (providing information or producing documents that is/are false or misleading)	**$5,400 / 30** penalty units	**$27,000** for a body corporate / **150** penalty units	No
Water Efficiency Labelling and Standards Act 2005	S.32A – false or misleading information or documents	**$10,800 / 60** penalty units	Same as for individuals	No, but refers to Pt 7.4 Criminal Code offences for false/misleading statements
Water Act 2007	S.126 (5) – giving of information to the Bureau (of Meteorology) (in purported compliance, that is false or misleading in a material particular)	**$10,800 / 60** penalty units	Same as for individuals	No
National Greenhouse and Energy Reporting Act 2007	S.71 (4) – power to request information (in purported compliance, giving information to the regulator that is false or misleading in a material particular)	**$10,800 / 60** penalty units	Same as for individuals	No
Tax Agent Services Act 2009	S.50.20 – making false or misleading statements	**$45,000 / 250** penalty units	**$225,000 / 1250** penalty units	No
Therapeutic Goods Act 1989	S.31AAA - false or misleading information or documents in relation to therapeutic goods	**$900,000 / 5000** penalty units	**$9M / 50,000** penalty units	No
Navigation Act 2012	S.34 - false representations about seafarer certificates	**$540,000 / 3000** penalty units	**2.7M / 15,000** penalty units	Where fault proven – imprisonment for **5 years** and/or **$54,000 / 300** penalty units
Migration Act 1958	S.234 – false documents and false information etc. relating to non-citizens	No	No	Yes – imprisonment for **10 years** and/or **$180,000 / 1000** penalty units

89. The comparatively low penalties for record keeping provisions under the current framework arguably create a perverse incentive not to keep accurate records, thus thwarting the FWO's ability to prove underpayments. This means the maximum financial imposition is the minor penalties for breaches of the record keeping provisions. Additionally, the narrow drafting of reg 3.44 imposes limitations on the FWO's ability to use these provisions where the false information or documents provided do not fall within the narrow definition of 'records' under the FW Regulations.

Using the current framework

90. Accurate record keeping is the bedrock of compliance.[39] For employers to ensure they are paying their employees correctly, for example, they must keep accurate records of the number of hours their employees are working and at what times those hours are being worked.

91. Many and indeed most record keeping oversights that FWO finds are accidental and minor in their impact. The nature of employment records that need to be retained do involve some complexity, so FWO Inspectors make a distinction between an administrative error and a deliberate attempt to cover up systemic underpayment of wages. Consistent with our

[39] See Judge Altobelli's comments in *Fair Work Ombudsman v Dosanjh* [2016] FCCA 923

graduated approach to enforcement, most record-keeping issues are resolved without the need to resort to enforcement action.

92. In 2015/16 the FWO carried out 4,539 audits over the course of 18 campaigns conducted across a range of industries and regions. One in five of campaign audits identified record keeping contraventions.[40] The most common contravention was failure by the business to provide payslips in the prescribed form – such as not having all required information on the payslip, which would not necessarily inhibit an assessment of pay rates. A FW inspectors' first response in such cases is to educate the employer about what information needs to be recorded.

93. In a small proportion of audits, businesses were issued with infringement notices – 13 per cent in 2015/16. These were cases where the record keeping failings were more serious and payslips were clearly deficient or were not issued. The FWO has been increasingly utilising infringement notices to respond to non-compliance with record keeping and pay slip provisions. In 2015/16 the FWO issued 573 infringement notices, up from 348 in 2014/15 and 116 in 2013/14. Only a minority of record keeping contraventions uncovered required the use of an enforcement tool.

94. In a very small number of cases of record keeping failings, their seriousness warrants court action. These are generally the most serious of cases where record keeping failings appear to be part of a strategy to cover up systemic and deliberate underpayment of vulnerable workers. The FWO is finding that vulnerable workers are featuring more regularly in these matters. In 2015/16, 48 per cent of matters litigated by the FWO involved some form of record keeping contravention[41], and 76 per cent of these related to visa holders and 44 per cent related to young workers.

***Case study: Fair Work Ombudsman v Dosanjh* [2016] FCCA 923**

The employer had failed to create any employee records, with the exception of a diary that contained the first name and number of buckets picked by each employee. The Court noted that the records kept by the employer were "*minimalistic in the extreme*" and that "*it is hard to imagine a more superficial or half-hearted attempt to comply with any standard of record keeping, let alone the statutory standard"*

[40] Two thirds of these contraventions related only to record keeping and/or payslip contraventions. The remaining third identified record keeping and/or payslip contraventions and wage related contraventions. The most common industries in which record keeping and/or payslip contraventions were identified is heavily influenced by the nature of the campaigns being conducted, however Accommodation and Food Services, Retail Trade, and Manufacturing rank in the top 5 industries (although in different rankings) .

[41] Including record keeping, payslips and/or false and misleading record contraventions.

The court awarded 75% of the maximum penalties available against the company for record-keeping contraventions, totalling $13,005; however, due to a lack of evidence, the FWO was unable to reasonably establish that the employer had underpaid 60 casual employees (the majority of whom were 417 visa-workers). The judge in this case noted that the lack of records made it "*impossible to calculate the precise quantum of the underpayments and, thus, to investigate the Respondent's compliance with minimum entitlements under the Award*."

Proposed Amendments to the FW Act

95. The Bill proposes a number of amendments to the FW Act that would increase penalties for record keeping breaches and expressly prohibit the making, keeping or giving of false information.

96. The Bill proposes to:

- Double the maximum standard penalties that can be awarded against employers who fail to keep records or issue pay slips.
- Triple existing maximum penalties for knowingly making or keeping false or misleading employee records, and creating new civil remedy provisions for false or misleading pay slips or provision of information or documents to the FWO or inspectors.
- Enable deliberate and systematic contraventions of record keeping, payslips or false and misleading employment records to be treated as serious contraventions that attract maximum penalties up to ten times the new standard maximum.

97. The proposed increases to maximum penalties will align the FW Act more closely with other jurisdictions and would serve to reflect the importance of record-keeping provisions to the effective operation of the FW Act. High penalties can act as a powerful deterrent and would reduce the incentive for some employers to hide employee underpayments by not keeping records.

98. In particular, the proposed introduction of provisions relating to false and misleading information into the FW Act, and the increase in penalties associated with these provisions, reflects the serious nature of actions taken by employers to deliberately falsify employee records.

99. Treating record keeping and payslip contraventions in the same way as other contraventions of the FW Act and with equivalent maximum penalties for conduct such as underpayments will recognise the seriousness of these contraventions. The proposed introduction of a serious contravention category of penalties is discussed in detail elsewhere in this submission.

100. In addition to amendments to record keeping provisions and penalties, the Bill proposes to introduce new evidence-gathering powers, which are discussed in detail elsewhere in this submission. In serious cases of exploitation, these new powers will provide the capacity to look behind records in cases where it is reasonably believed or suspected they are not accurate or omit information, or contradict evidence of workers, in order to determine whether a person knew or created documents or records with the intention to mislead.

Case study: 7-Eleven Inquiry

The FWO's Inquiry into the 7–Eleven franchise uncovered significant instances of falsified records throughout the franchise network. Fair Work inspectors were challenged by the inaccurate and conflicting employment records created to disguise the true nature of non-compliance with regard to hours worked and wages paid. FWO believed these actions were deliberate and intended to conceal the true hours worked and wages paid from Fair Work inspectors where NTPs were issued for documents and records. Several franchisees admitted that the records provided to the FWO during the Inquiry were fabricated. The Inquiry uncovered different methods used by franchisees to disguise underpayments in the fabricated records produced.

In spite of this fact, the FWO has taken nine matters to court involving underpayment of 7-Eleven workers. To prove the underpayments the FWO relied on sourcing additional documentary and testimonial evidence during site visits to various 7-Eleven outlets to assist in determining the true hours worked amongst multiple sets of fabricated records. The FWO relied on:

- Time sheets
- Rosters
- CCTV footage
- Register log ins
- Fuel dip records
- Food temperature log books
- Payroll records
- Manager's diary
- Cash payment records
- Records of cash withdrawn from the till
- Employee evidence
- Daily takings reports

Careful evaluation of the accuracy of each piece of evidence was required and ultimately led to the discovery of inconsistencies within 7-Eleven's records.

101. The FWO is committed to assisting employers keep and maintain accurate records and provides extensive support via tools and templates on its website.[42] The FWO is also committed to taking a balanced and proportionate approach to how record keeping and pay

[42] These include the Pay slip template; Leave record template; Timesheet template; Record keeping and pay slips factsheet; Pay slips & record keeping webpage; and Rosters template.

slip provisions are enforced. Should the proposed increase in civil penalties become law, the FWO's approach and posture towards record keeping breaches will not change. The FWO would continue to seek resolutions through education or, where necessary, infringement notices for contraventions that are not deliberate or designed to frustrate the capacity to inquire into suspected contraventions.

Section 6
Unreasonable requirements to spend

The current framework

102. Over the course of the FWO's investigations into the 7-Eleven franchise network, the FWO received reports that some employers were using a "cash-back" arrangement to underpay employees. This would involve the employer paying correct wages to the employee but then requiring the employee to withdraw a portion of those wages to be returned to the employer in cash[43].

103. Fair Work Inspectors have observed increased cash-back behaviour in the last few years, usually in matters involving vulnerable workers. In the FWO's experience, cash-back arrangements have been a particular concern in matters involving visa holders. In these cases, cash-back arrangements are often being used as a way of creating the perception that visa requirements are being met and that employees are being paid lawful their wages. Visa holders often comply with unreasonable requests to repay their wages for fear of losing sponsorship or residency rights under other visas.

104. This conduct is deliberate and insidious and often very challenging to detect and take action against under the current framework. The existing provisions in s. 325 of the FW Act impose an obligation on employers not to 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.

Using the current framework

105. This current provision in the FW Act precludes employers from unreasonably requiring employees to spend amounts of their wages, including where the intention of the cash repayments is simply to return some of the employee's wages to the employer. In practice, however, it can be difficult for the FWO to satisfy all of the necessary elements of this provision, such that a court would find that the provision has been breached.

106. In order to satisfy all elements of this provision, the FWO must be able to show that:

- A cash-back amount has been paid.
- The employer required the employee to make the cash payment.

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[43] 'Report of the Fair Work Ombudman's Inquiry into 7-Eleven*', Fair Work Ombudsman,* p.59.

- The cash payment was made out of the wages paid to the employee for work undertaken.
- The cash payment was unreasonable.

107. Given that cash-back arrangements are 'off the books' it can be extremely difficult for the FWO to obtain the evidence necessary for all of the above elements to be satisfied, particularly as the FWO is unable to compel employers, employees or other parties to talk to FWO inspectors.

108. The FWO currently has three matters before the court involving an allegation of a contravention of section 325, namely that a requirement was being imposed on an employee to pay back a part of the amounts they were entitled to be paid in relation to the performance of work[44]. An additional two matters were finalised by the Court in the past twelve months[45] and we anticipate further matters alleging contraventions of s 325. The FWO relies on evidence such as:

- documentary evidence, such as an alleged log of the repayments signed and witnessed by the employees;
- admissions to inspectors; and
- employee testimony and bank records for the employee and employer's accounts.

109. In the absence of this evidence – common in cases where employers decline to engage and employees are too scared to cooperate – it is very difficult to prove this conduct.

Proposed amendments to the Fair Work Act

110. The Bill proposes an amendment to the wording of s. 325, which would have the effect of prohibiting an employer from requiring cash-payments to be made by an employee from any of the employee's money. As worded currently, cash-back payments are only expressly prohibited where the monies paid back to the employer are directly linked to the employee's wages. The broadened scope of "an employee's money" can apply to any amounts possessed by the employee that are required to be spent in an unreasonable way and for the benefit of the employer; removing the need to prove a link between the cash payments and the employee's wages.

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[44] *FWO v Ausinko (in liq), Richard Kim and Tommy Liu, FWO v Robit Nominee and Tibor Vertes, FWO v Gaura Nitai Pty Ltd and Saandeep Chokhani*

[45] One of those did not involve a "cash back scheme" but related to the employee paying the employer insurance and fees (*Fair Work Ombudsman v Australian Sales and Promotions & Paul Ainsworth* [2016] FCCA 2804)

111. Other proposed amendments would also significantly enhance the FWO's capacity to prove this most devious and calculated exploitative behaviour.

Case study: Cash back.

Mai Pty Ltd

In the matter of *Fair Work Ombudsman v Mai Pty Ltd*, for example, the FWO found that employees had deposited money into the bank accounts of the employer and his wife after the employer represented to Fair Work inspectors that the amounts found to be underpaid had been rectified. The FWO's case relied upon employee bank records, which showed that employees had received amounts representing their back pay only to make similar payments back to the employer (or his wife).

While this evidence was sufficient to prove that the employer had provided false and misleading records (the records provided to FWO represented back payment of employees' full entitlements had been paid) the evidence was not sufficient to prove that the employer had required the employees to make these payments because the employees declined to cooperate in relation to the circumstances of the payments. As such, the FWO was unable to pursue a contravention of s. 325.

In conjunction with the proposed amendments to s. 325, the new powers and 'serious contravention' provisions would be powerful in detecting and taking effective action against this conduct.

112. The new evidence-gathering powers proposed in the Bill, discussed in detail elsewhere in this submission, would also make a critical difference. Given cash-back schemes invariably involve a deliberate fabrication of records, current NTP powers and formal records are of little assistance. And given that such matters often involve vulnerable workers who may be reluctant to report such conduct or provide a statement to the FWO, corroborating evidence is often not forthcoming.

Section 7
Conclusion

113. The FWO supports the proposed amendments in the Bill and is ready to implement the provisions proposed if passed by the Parliament. As the FWO has noted, the regulatory framework is fit for purpose in most circumstances but is not sufficient to deal with the most egregious behaviour in matters involving the exploitation of vulnerable workers. The proposed amendments would enhance the FWO's ability to deal with serious and concerning conduct within the jurisdiction of the FW Act and contribute to efforts across government and within communities to address the drivers of workplace exploitation.

114. The FWO considers that education and advice is central to compliance. In line with the agency's statutory responsibility to educate workplace participants, the FWO will aim to ensure that those impacted by any changes to the law are aware of those changes and – importantly in the current circumstances – the consequences of not complying.

115. The FWO appreciates the opportunity to provide a submission about the Bill to this inquiry detailing the agency's experiences about the challenges we face in achieving workplace compliance in some critical aspects of our work. The FWO is available to discuss this submission at a hearing of the Committee.