



Australian Government

Report of the Migrant Workers' Taskforce

March 2019

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ISBN

978-1-76051-622-2 [PDF]

978-1-76051-623-9 [DOCX]

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Chairs' overview

The Migrant Workers' Taskforce was established as part of the Government's response to the revelation of significant wage underpayments in certain industry sectors. There was much publicity concerning 7-Eleven franchisees, but demonstrably the problem was more widespread.

We had been closely involved in the 7-Eleven issue having been appointed by the company to conduct independently the wage remediation program it established following the Fairfax/Four Corners revelations. After being dismissed by the company from this role, we were asked to lead this Taskforce to monitor 7-Eleven's subsequent actions and to consider what more needed to be done generally in relation to the problem of wage underpayment.

In pursuing our terms of reference we have to be mindful of Minister Cash's comments in relation to the establishment of the Taskforce. She said at the time of its first meeting that 'the Taskforce will focus on action and results. Compliance or regulatory weaknesses that allow exploitation cases to occur will be a key focus. Exploitation of any worker in Australian workplaces will not be tolerated by this Government.'¹

Wage underpayment may be inadvertent, but the outcome is no different as to when it is deliberate. The terms wage exploitation and wage theft are more emotive, but also apt descriptions of the problem, which in essence involves employers not complying with the minimum legal entitlements of their employees.

This report provides a summary of the work of the Taskforce and makes recommendations. The Taskforce brought together senior representatives of Commonwealth departments and regulators, thus enabling a whole of government focus on the problem, which has not always been present in the past. In some cases, we have gone further than other members of the Taskforce could unanimously agree on.

We wish to acknowledge and thank the Taskforce members and the Secretariat staff from the Department of Jobs and Small Business for their significant contributions to the work of the Taskforce.

Our attention has mainly been on the employment experience of temporary migrants who have work rights under international student and working holiday maker (backpacker) visas since in large part these appeared to be the areas where problem was greatest. Despite the gaps in evidence, we have sufficient understanding to conclude that the problem of wage underpayment is widespread and has become more entrenched over time. The most comprehensive academic survey to date on the issue suggests as many as 50 per cent of temporary migrant workers may be being underpaid in their employment.²

¹ Senator the Hon Michaelia Cash, Minister for Employment, 'Migrant Workers Taskforce taking action', media release 27 October 2016.

² L Berg & B Farbenblum, Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey, UNSW Law, Sydney and University of Technology Sydney, 2017.

The number of temporary migrants admitted to the country under the international student and working holiday visas have been uncapped, and particularly in the former category, has been growing strongly in recent years. Temporary migrant workers now constitute about six per cent of the workforce, excluding New Zealand visa holders, and are having a significant effect on the operation of the labour market.

Wage exploitation of temporary migrants offends our national values of fairness. It harms not only the employees involved, but also the businesses which do the right thing. It has potential to undermine our national reputation as a place for international students to undertake their studies and may discourage working holiday makers from filling essential gaps in the agricultural workforce. This problem has persisted for too long and it needs concerted action to overcome it.

Wage underpayment is simply non-compliance with existing legal requirements. It is not a problem of having too many temporary migrants. And whilst some might suggest the problem might be reduced if minimum wages were lower, we do not consider this to be the appropriate response. We recognise the importance of our national wage setting mechanisms in determining appropriate living wages.

The Taskforce has essentially considered four key elements of compliance. First, there is ensuring market participants are well aware of their entitlements and responsibilities and of how and where to get assistance. Second, there is the role of regulators in taking action to promote compliance. Third, there is the important issue of ensuring that employees obtain redress for underpayment where this has occurred; and fourth, there are questions as to whether existing laws, functions and powers of regulators are appropriate to enforce effective compliance when necessary.

More needs to be done in each of these four areas if significant progress is to be made toward eliminating wage exploitation. The recommendations reflect this. Together they entail Government committing to introducing a package of further initiatives, additional funding and appropriate oversight of performance outcomes. In this regard, Australia can learn from the experience of the UK, which has appointed a Director of Labour Market Enforcement to provide overall coordination of regulatory effort and to assist Government to determine and monitor priorities.

A major area of consideration relates to the adequacy of the enforcement response of the relevant agencies, primarily the Fair Work Ombudsman (FWO), which has the major responsibility, but also the Australian Border Force. We are of the view, given the scale and entrenched nature of the problem, that there needs to be a much stronger enforcement response than has been evident to date. Having said this, we recognise that the FWO has responded strongly to the problem in recent times. It would, nevertheless, be useful for the Government to undertake a public capability review of the FWO to ensure it has the resources, tools and culture necessary to combat effectively the wage underpayment problem particularly affecting temporary migrant workers.

The FWO needs to have a stronger profile with migrant workers, which will in part come from a stronger enforcement response. The evidence now suggests that the organisation is not well known or understood. It is confusingly styled as an ombudsman. The term normally covers dispute resolution schemes, not regulatory schemes. Even so, the FWO does not have constitutional power to determine disputes; it provides mediation services and assists a relatively small number of employees who take their disputes to the small claims court. In our view, the FWO could more strongly support the enforcement and litigation objectives (rather than the mediation objectives) of the Act.

We would like to see the title Fair Work Ombudsman changed to something which better reflects the organisation's regulatory role. Re-naming the organisation would enhance awareness of the workplace regulator which would boost its effectiveness in preventing wage exploitation. We appreciate that this is an issue that goes beyond our immediate focus on temporary migrant workers.

Whilst the FWO has primary responsibility for ensuring compliance with wage laws, the education and agricultural sectors, which benefit greatly from the presence of international students and working holiday makers respectively, also need to play greater roles in supporting this compliance effort than they have in the past. Ultimately it is the reputation of these sectors which is at stake. Immigration law also needs to play a stronger supportive role to employment law as regards temporary migrant workers.

We are concerned not just at the incidence of wage exploitation, but also with the detriment suffered by employees as a result of this conduct. The experience of the 7-Eleven wage remediation program provides numerous lessons for businesses and governments in what can and should be done in this area. We consider the regulator could make greater use of compliance notices in seeking to obtain redress for underpayments. However, employees should not have to rely unduly on the regulator to obtain redress. Workers should have ready access to an effective low cost, informal small claims dispute mechanism so that they can take action themselves.

Professor Allan Fels AO
Chair

Professor David Cousins AM
Deputy Chair

Acronyms and abbreviations

AAT	Administrative Appeals Tribunal
ABARES	Australian Bureau of Agricultural and Resource Economics and Science
ABF	Australian Border Force
ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACIC	Australian Crime and Intelligence Commission
ACTU	Australian Council of Trade Unions
ANZSIC	Australian and New Zealand Standard Industrial Classification
ASIC	Australian Securities and Investments Commission
ATO	Australian Tax Office
CALD	Culturally and Linguistically Diverse
COAG	Council of Australian Governments
FEG	Fair Entitlements Guarantee
FWIS	Fair Work Information Statement
FWO	Fair Work Ombudsman
IWWN	Illegal Worker Warning Notice
LMT	Labour Market Testing
MLTSSL	Medium to Long-term Strategic Skills List
PLS	Pacific Labour Scheme
RCSA	Recruitment Consulting and Staffing Association
ROL	Regional Occupation List
SCV	Special Category Visa
STOL	Short-term Skilled Occupation List
TSS Visa	Temporary Skill Shortage Visa
SWP	Seasonal Worker Programme
UNSW	University of New South Wales
USyd	The University of Sydney
VEVO	Visa Entitlement Verification Service
WRP	Wage Remediation Program

Recommendations

Recommendation 1

It is recommended that the Government establish a whole of government mechanism to further the work of the Migrant Workers' Taskforce following its completion.

Recommendation 2

It is recommended that a whole of government approach to the information and education needs of migrant workers be developed. It is recommended that this approach be informed by findings of the research project, The Information Needs of Vulnerable Temporary Migrant Workers about Workplace Laws, with implementation of the following measures:

- a) improve the delivery and accessibility of personalised, relevant information to provide the right messages at the right time to migrant workers
- b) use behavioural approaches to encourage and advise migrant workers how to take action if they are not being paid correctly
- c) enhance the promotion of products and services already available from government agencies — particularly in-language information — through search engine optimisation, expanded use of social media channels, and cross-promotion of Fair Work Ombudsman material by other agencies
- d) improve messaging in government information products so they are translated, simple, clear and consistent
- e) work with industry and community stakeholders to educate employers and address misconceptions about the rights and entitlements of migrant workers in Australian workplaces.

Recommendation 3

It is recommended that legislation be amended to clarify that temporary migrant workers working in Australia are entitled at all times to workplace protections under the *Fair Work Act 2009*.

Recommendation 4

It is recommended that legislation be amended to prohibit persons from advertising jobs with pay rates that would breach the *Fair Work Act 2009*.

Recommendation 5

It is recommended that the general level of penalties for breaches of wage exploitation related provisions in the *Fair Work Act 2009* be increased to be more in line with those applicable in other business laws, especially consumer laws.

Recommendation 6

It is recommended that for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.

Recommendation 7

It is recommended that the Government give the courts specific power to make additional enforcement orders, including adverse publicity orders and banning orders, against employers who underpay migrant workers.

Recommendation 8

It is recommended that the *Fair Work Act 2009* be amended by adoption of the model provisions relating to enforceable undertakings and injunctions contained in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

Recommendation 9

It is recommended that the Fair Work Ombudsman be provided with the same information gathering powers as other business regulators such as the Australian Competition and Consumer Commission.

Recommendation 10

It is recommended that the Government consider whether the Fair Work Ombudsman requires further resourcing, tools and powers to undertake its functions under the *Fair Work Act 2009*, with specific reference to:

- a) whether vulnerable workers could be encouraged to approach the Fair Work Ombudsman more than at present for assistance
- b) the balance between the use of the Fair Work Ombudsman's enforcement and education functions
- c) whether the name of the Fair Work Ombudsman should be changed to reflect its regulatory role
- d) getting redress for exploited workers, including the use of compliance notices and whether they are fit for purpose
- e) opportunities for a wider application of infringement notices
- f) recent allocations of additional funding.

Recommendation 11

It is recommended that the Government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws, with specific reference to:

- a) extending accessorial liability provisions of the *Fair Work Act 2009* to also cover situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies

- b) amending the *Fair Work Act 2009* to provide that the Fair Work Ombudsman can enter into compliance partnership deeds and that they are transparent to the public, subject to relevant considerations such as issues of commercial in confidence.

Recommendation 12

It is recommended that the Government commission a review of the *Fair Work Act 2009* small claims process to examine how it can become a more effective avenue for wage redress for migrant workers.

Recommendation 13

It is recommended that the Government extend access to the Fair Entitlements Guarantee program, it should be done following consultation regarding the benefits, costs and risks, and it should exclude people who have deliberately avoided their taxation obligations.

Recommendation 14

It is recommended that in relation to labour hire, the Government establish a National Labour Hire Registration Scheme with the following elements:

- a) focused on labour hire operators and hosts in four high risk industry sectors — horticulture, meat processing, cleaning and security — across Australia
- b) mandatory for labour hire operators in those sectors to register with the scheme
- c) a low regulatory burden on labour hire operators in those sectors to join the scheme, with the ability to have their registration cancelled if they contravene a relevant law
- d) host employers in four industry sectors are required to use registered labour hire operators.

Recommendation 15

It is recommended that education providers, including through their education agents, give information to international students on workplace rights prior to coming to Australia and periodically during their time studying in Australia.

Recommendation 16

It is recommended that education providers, through their overseas students support services, assist international students experiencing workplace issues, including referrals to external support services that are at minimal or no additional cost to the student and that specific reference to this obligation be made in the National Code of Practice for Providers of Education and Training to Overseas Students.

Recommendation 17

It is recommended that the Council for International Education develop and disseminate best practice guidelines for use by educational institutions.

Recommendation 18

It is recommended that the Minister write to the Prime Minister requesting that accommodation issues affecting temporary migrant workers be placed on the Council of Australian Governments (COAG) agenda. Through COAG, the Australian Government should work with state and territory governments to address accommodation issues affecting temporary migrant workers — particularly working holiday makers undertaking 'specified work' in regional Australia.

Recommendation 19

It is recommended that the Government consider developing legislation so that a person who knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a condition of their visa is guilty of an offence.

Recommendation 20

It is recommended that the Government explore mechanisms to exclude employers who have been convicted by a court of underpaying temporary migrant workers from employing new temporary visa holders for a specific period.

Recommendation 21

It is recommended that the Fair Work Ombudsman and the Department of Home Affairs undertake a review of the Assurance Protocol within 12 months to assess its effectiveness and whether further changes are needed to encourage migrant workers to come forward with workplace complaints.

Recommendation 22

It is recommended that the Government give a greater priority to build an evidence base and focus its existing research capacity within the Department of Jobs and Small Business on areas affecting migrant workers. It should do this to better understand the extent, nature and causes of any underpayment and exploitation migrant workers may experience. The department should work across departments where appropriate. Separately, and in addition:

- a) the Department of Education and Training should work with the Council for International Education and peak organisations to help identify mechanisms for providers to collect data about student visa holders' experiences of working in Australia
- b) the Department of Education and Training should conduct regular surveys of overseas students that include workplace experience
- c) the Government should support work being undertaken by ABARES, the science and economics research division of the Department of Agriculture and Water Resources to increase data collection in relation to agricultural labour.

Taskforce background and overview of migrant worker exploitation in Australia

The underpayment and exploitation of a substantial number of temporary migrant workers in Australian workplaces is an unacceptable practice. It has been a feature of the Australian labour market for too long. In 2016, the Coalition government announced measures, all subsequently implemented: introduction of a vulnerable workers law making franchisors liable for breaches by their franchisees in certain circumstances; measures to strengthen law enforcement under the *Fair Work Act 2009* (Fair Work Act), and the establishment of the Migrant Workers' Taskforce (Taskforce) to undertake a whole of government review of the problem.

Wage exploitation is of great concern to the Australian community. It is damaging to Australia's reputation and may lead to negative flow-on effects to the proper functioning of the labour market and the economy. It is unfair not only to migrant workers, but also to other employees who are undercut on wages and job opportunities, and law abiding employers trying to compete on price. Australia prides itself on being a country where the principle of fairness underpins our economic and social relationships. However, migrant worker exploitation is a direct repudiation of this.

Migrant worker exploitation is a complex and multi-faceted issue where employment, migration, corporations, taxation and other laws intersect. Employers, including labour hire companies, that underpay overseas workers may also engage in other undesirable practices such as avoidance of tax obligations, sham contracting, or phoenixing to avoid employee entitlement obligations. More can be done about this — Government must use a variety of tools across numerous portfolios to prevent, detect and punish rogue employers.

Migrant workers who are in Australia on a temporary basis may have poor knowledge of their workplace rights, are young and inexperienced, may have low English language proficiency and try to fit in with cultural norms and expectations of other people from their home countries. These factors combine to make them particularly vulnerable to unscrupulous practices at work.

Survey evidence suggests that many migrant workers are well aware that they are being paid less than they should be. Many factors may explain why they allow this situation to continue. The need to obtain and retain employment in a competitive labour market is one. People are often inclined to take what is available because they need the income or maybe feel that employment is necessary for them to achieve their ultimate goal of ongoing residency in Australia. Not knowing what to do about their underpayment or who to go to for help are other influences. Fears about the consequences of approaching government agencies are common among migrants from less democratic countries than our own. These fears will be more real in the unknown number of cases where there has not been full compliance with visa work restrictions. Also in an unknown number of cases, migrant workers may feel that they benefit from underpayment arrangements by not declaring their income to the Australian Taxation Office (ATO).

The underpayment of temporary migrant workers has become more visible in recent years as the number of temporary visa holders in Australia has grown substantially over that time. As at 30 June 2018, there were over 878,912 people in Australia on a temporary visa with a work right

(excluding New Zealand citizens³), an increase of over 300,000 people since 2008. The number of temporary visa holders arriving in Australia each year is substantially larger than the permanent migration program, which is currently capped at 190,000 places. Some temporary visa holders will only stay a short time in Australia, while others may stay for years or end up permanently migrating.

The growth of temporary visa numbers presents an opportunity for more people from overseas, such as students, young people and skilled workers, to experience what Australia has to offer, and to share their culture with our citizens. Australians also benefit from reciprocal migration programs in other countries that allow our people to study, work and travel overseas.

Temporary migration benefits the Australian economy and the labour market. For example, in 2018, the international education sector was worth \$34.9 billion to the Australian economy making it Australia's fourth largest export industry and largest services export.⁴ In 2016, working holiday makers contributed almost \$3.3 billion in tourist spending in Australia, staying longer, spending more and dispersing more widely throughout the country than most other tourist groups.⁵ The Taskforce has a particular interest in working holiday makers and student visa holders, who constitute over 70 per cent of all temporary visa holders with a right to work in Australia (excluding New Zealand citizens).

While the great majority of Australian employers are likely to comply with workplace laws, the incidences of underpayment of temporary migrant workers indicates that there are unscrupulous employers in some industries who blatantly breach the law in ways discussed in this report.

Many factors drive this behaviour — consumer demand for low priced products, competitive pressures, opportunity provided by an abundant supply of temporary migrant workers and a culture of underpayment in some areas of the economy. In some cases, it may be perceptions about detection, regulatory actions and requirements to make redress, fines that are low compared to the economic benefit, and underpayment by employers which other employers feel they can and must match to remain competitive.

Australia has a relatively strong legislative framework to protect workers, whether they are Australian citizens or not. Temporary visa holders employed in Australian workplaces are entitled to the same workplace rights and protections as employees who are Australian citizens and permanent residents. This includes pay and conditions under relevant modern awards and enterprise agreements, superannuation and workplace safety.

³ New Zealand citizens usually enter Australia on a Special Category (subclass 444) visa. While New Zealand citizens in Australia on Special Category visas are temporary migrants, their visas remain valid indefinitely and they have unlimited work rights. New Zealand citizens in Australia on Special Category visas do not typically exhibit the same vulnerabilities that other temporary migrants do, and their circumstances in the labour market may be considered to be more similar to Australian residents than other temporary migrants. For these reasons, the Taskforce did not consider Special Category visa holders in its deliberations.

⁴ Australian Bureau of Statistics, International Trade in Goods and Services, Australia, cat. no. 5368.0.55.003, ABS, Canberra, 2018; Department of Foreign Affairs and Trade Key Economic Indicators Australia; and Department of Education and Training data analysis.

⁵ Tourism Australia, Industry Opportunities: 'There's nothing like Australia' working holiday maker campaign, 2016.

Visa holders who are underpaid or exploited can approach agencies such as the Fair Work Ombudsman (FWO) for assistance resolving issues at work — just as Australian citizens can. Temporary visa holders can also rely on protections in migration and anti-discrimination law.

In establishing this Taskforce, the Government has wanted it to consider whether current enforcement and compliance strategies are actually working and whether a stronger enforcement approach should be taken to send a clear message to significant high risk sectors that this is an unacceptable practice.

The FWO's enforcement powers are set out in the Fair Work Act. An important objective of the Fair Work Act is to ensure that workers receive minimum wages and conditions through industrial instruments. The FWO has prioritised services and compliance activities to address and remedy exploitation of migrant workers utilising a range of enforcement tools available to it at this time, and within its available resourcing. The report recommends some initial enhancements to the FWO's information gathering powers and adoption of model provisions related to enforceable undertakings, and that its resources consequently be examined to ensure they are adequate for the job at hand.

In 2017, the Fair Work Act was strengthened to protect vulnerable workers. The new laws introduced higher penalties for breaches of prescribed workplace laws — 10 times higher in the case of serious contraventions. New powers were also given to the FWO to investigate underpayment claims, with additional resourcing provided to support the FWO's activities to protect vulnerable workers. The report provides further detail on these initiatives.

Effectively addressing migrant exploitation is important to the integrity of the labour market, the migration and visa system and our international reputation as a good place to visit, study and work. Addressing exploitation requires a whole of government effort, with the support of industry leaders, employers, migrant workers and the broader community.

The establishment of the Migrant Workers' Taskforce

The Taskforce was established on 4 October 2016 to meet the Government's election commitment under its Protecting Vulnerable Workers Policy.

The Taskforce was chaired by Professor Allan Fels AO, with Dr David Cousins AM as Deputy Chair. It was supported by a secretariat in the Australian Government Department of Jobs and Small Business.

The establishment of the Taskforce was preceded by a significant number of high profile cases revealing exploitation of migrant workers to a concerning level. These cases were highlighted by government investigations, public inquiries and media reports. Among other things, these cases exposed unacceptable gaps in Australia's legal system designed to treat all workers equally, regardless of their visa status.

Accordingly, the Taskforce was set the specific task to identify proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify cases of migrant worker exploitation.

In April 2018, the Government announced that it would extend the term of the Taskforce to 30 September 2018. The extension was requested by the Chair of the Taskforce following some delays in the work program to allow the Taskforce to continue to explore whole of government reforms that will deliver better protections for overseas workers.

The Taskforce brought together a range of Commonwealth agencies, both policy agencies and regulators, to ensure a whole of government response to the issue. This included monitoring the progress of existing and new cross-portfolio initiatives to combat exploitation in the workplace. There are a number of policy levers that many of these areas of government can apply that could affect the degree of migrant worker exploitation.

Members of the Taskforce included:

- Department of Jobs and Small Business
- Fair Work Ombudsman
- Department of Home Affairs
- Australian Border Force
- Attorney-General's Department
- Department of Education and Training
- Australian Taxation Office
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Department of Agriculture and Water Resources.

The Terms of Reference (see Appendix A) required the Taskforce to:

1. Identify regulatory and compliance weaknesses that create the conditions that allow exploitation of vulnerable migrant workers
2. Develop strategies and make improvements to stamp out exploitation of vulnerable migrant workers in the workplace
3. Consider ways agencies can better address any areas of systemic and/or widespread exploitation of vulnerable migrant workers, including considering ways in which agencies can better collaborate to avoid such situations arising or to swiftly rectify them.

Scope of the Taskforce's work

The Taskforce primarily focused on matters that fall within civil law, including the Fair Work Act and related Commonwealth legislation. The Taskforce acknowledges the very grave matter of criminal labour exploitation in Australia, including human trafficking, slavery and slavery-like practices. Australia's strategic response to these criminal practices is outlined in the National Action Plan to Combat Human Trafficking and Slavery 2015–19, overseen by the Department of Home Affairs. The Taskforce has not focused on existing criminal offence issues, but has instead worked collaboratively with the Department of Home Affairs on human trafficking, slavery and slavery-like issues.

In considering where it could make the most impact, the Taskforce prioritised its efforts on unsponsored visas, particularly the working holiday and international student visas. The Taskforce

has not reviewed the detail of other visa categories. It notes, however, that exploitation of other categories including the 457 visa class and seasonal workers, has been raised in the media and some inquires, despite the sponsorship and supervision requirements of these visa classes. As indicated in the report, there needs to be a public response to the above claims of media and other inquiries.

The Taskforce notes that a range of work has been undertaken by the FWO and other stakeholders in these areas. The Taskforce considers that this work should continue.

In undertaking its work, the Taskforce has sought to avoid duplication of effort and policy review by considering the outcomes of a number of inquiries undertaken by both state and territory, and Commonwealth governments in recent years.

Overall, the work of the Taskforce, including the findings and recommendations made in this report, provides Government with a solid foundation for developing a robust, whole of government strategy to combat migrant worker exploitation in Australia.

Overview of the report

Chapter 1 outlines the growth in migrant workers over the past 10 years and the changes to the composition of the migrant worker population in terms of visa type and other characteristics.

Chapter 2 outlines the Taskforce's evidence on the extent of migrant worker exploitation and includes analysis of the 7-Eleven case that was influential in driving the current focus on this issue.

Chapter 3 provides detail on Taskforce initiatives introduced by member agencies and announced by the Chair, Professor Fels.

Chapter 4 provides information on legislation, policy and programs designed to protect migrant workers overseen by Taskforce member agencies.

Chapter 5 covers the issue of wage remedies for migrant workers who have been affected by wage underpayment and proposes a number of recommendations to further improve avenues for redress.

Chapter 6 provides an analysis of labour hire and proposes a new registration scheme to drive out unscrupulous labour hire operators and provide assurance to employers who rely on labour hire to support their business.

Chapter 7 outlines initiatives to better protect working holiday and student visa holders.

Taskforce consultations

Throughout the term of its work, the Taskforce consulted widely with stakeholders. Representatives from community and industry bodies attended various meetings to present on issues relevant to the Taskforce. The Taskforce also held two Stakeholder Roundtables in Melbourne and Sydney in July 2017, where the Taskforce heard directly from legal organisations, community groups, academics, industry and employee representative bodies on policy responses and possible remedies to address exploitation of migrant workers in Australian workplaces. Several participants followed up

directly with the Taskforce with further proposals for reform. Further details of the Taskforce's stakeholder consultations are at Appendix B.

This Taskforce report should provide direction in an ongoing effort from the Government. The Government should be continually reviewing and looking to where it can improve its focus and actions. To facilitate this process, the Taskforce recommends that the Government should establish a whole of government mechanism to further the work of the Migrant Workers' Taskforce following its completion.

Recommendation 1

It is recommended that the Government establish a whole of government mechanism to further the work of the Migrant Workers' Taskforce following its completion.

Chapter 1 – Overview of migrant workers in Australia

The number of temporary migrants in Australia has grown significantly over the past 10 years, particularly as the international education sector has expanded to become one of Australia's key service industries. This section provides an overview of the main categories of temporary visas and the changing nature of visa holders in Australia. It also provides information on employment and work visa conditions for temporary visa holders.

Visa holders and visa types in Australia

Australia offers a number of temporary visas with full or partial work rights that allow people to take up jobs for a period of time, including the temporary skilled, student, temporary graduate and working holiday maker programs. It is important to note that not all visa holders with a work right will exercise that right, especially partners and children of a primary visa holder.

The number of temporary visa holders with work rights (excluding New Zealand citizens on subclass 444 Special Category visas) in Australia has been increasing steadily for a number of years, from 570,607 as at 30 June 2008 to 878,912 as at 30 June 2018. These figures include secondary visa holders (i.e. family members), who typically also have work rights. International students make up just over half of this number, with working holiday maker and temporary skilled visa holders making up about 15 per cent each. The remainder are temporary graduate visa holders and other smaller categories.

The following table provides data on the number of temporary visa holders with a work right in Australia as at 30 June 2018, by visa type. It is important to note that for most visas with a work right, work is not the main purpose of the visa, key exceptions being the Temporary Skill Shortage (TSS) visa and its predecessor, the Temporary Work (Skilled) subclass 457 visa.

Apart from the TSS visa, where a worker is sponsored by an employer who has been approved by the Department of Home Affairs, most temporary visa holders with a work right are not tracked and are allowed to work anywhere in Australia, in the same way as an Australian worker is entitled to do. Some visa holders with a work right may decide not to work in Australia following issue of their visa, or others may move around from job to job while travelling. For this reason, figures on the numbers of visa holders working in Australia are a best estimate.

Figure 1.1 – List of visa categories and number of visa holders in Australia

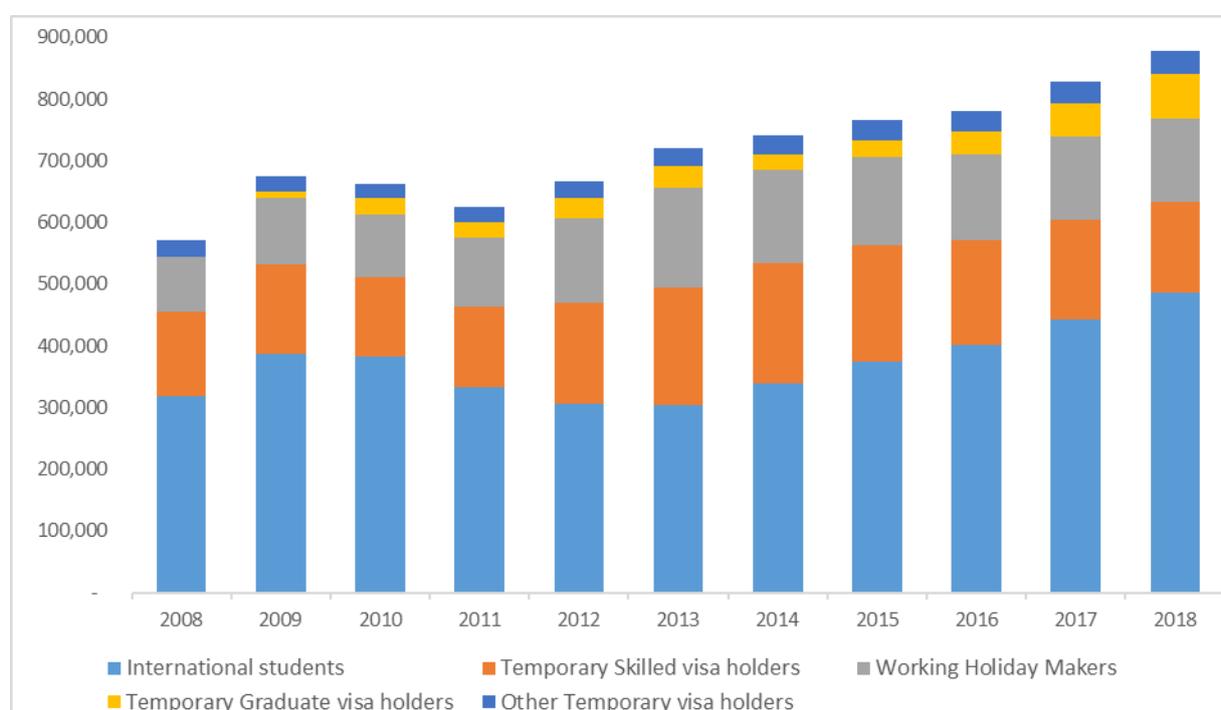
Visa category	Visa description	No. persons ⁶
Student visa holders	<ul style="list-style-type: none"> To allow full-time study at a registered education institution. Allows a stay in Australia for the duration of their studies, generally up to five years. 	486,934
Temporary Graduate (subclass 485) visa holders	<ul style="list-style-type: none"> The Temporary Graduate (subclass 485) visa is for international students who have recently graduated from an Australian educational institution with a qualification related to an occupation on the skilled occupation list (Graduate Work Stream) or completed a higher education degree (Post-Study Work stream) Allows work in Australia for up to 18 months in the Graduate Work stream, or up to four years in the Post-Study Work stream. 	71,157
Temporary Skill Shortage (subclass 482) and Temporary Work (Skilled) subclass 457 visa holders	<ul style="list-style-type: none"> Enables skilled overseas workers to take up temporary work in Australia and stay from one to four years depending on the occupation, visa stream and circumstances. Employer sponsored — the employer must be approved prior to sponsoring a visa holder. 	147,339
Working Holiday Maker (subclass 417 and 462) visa holders	<ul style="list-style-type: none"> The Working Holiday visa (subclass 417) and the Work and Holiday visa (subclass 462) are for young people who want to holiday and work in Australia for up to a year. A second year is available to 417 and 462 visa holders who work for three months in a specified field or industry in a regional area. 462 visa holders can complete the three months of work in a regional area if working in Northern Australia, and other specified regional areas if working in plant and animal cultivation. Changes announced in November 2018 will allow working holiday makers to qualify for third year visa by undertaking an additional six months of specified work. 	134,909
Other temporary visa holders	<ul style="list-style-type: none"> Includes 29 visa subclasses with work rights in Australia: subclasses 400, 401, 402, 403, 405, 406, 407, 408, 410, 411, 415, 416, 418, 419, 420, 421, 422, 423, 426, 427, 428, 430, 442, 461, 470, 471, 476, 497 and 995. 	38,573
Total		878,912

Increase in visa holders over time

The overall size of the population of temporary visa holders with work rights has grown by 54 per cent in the 10 years since 30 June 2008. This growth has been primarily driven by a substantial increase of international students (up 53 per cent over the past 10 years) and the introduction of the Temporary Graduate (subclass 485) visa in 2008.

The number of Temporary Skilled (subclasses 482 and 457) visa holders in Australia reached a peak of just over 200,000 in 2013–14, but by 30 June 2018 had returned to around 147,000 — 7 per cent more than the number of visa holders in 2008. The number of working holiday makers also peaked in 2013–14, but remains 51 per cent higher than 2008 levels. The Temporary Graduate visa category has grown to more than 70,000 in June 2018.

Figure 1.2 – Visa composition of temporary visa holders in Australia with work rights, 30 June 2008–2018



Note: Includes secondary visa holders. 'Other temporary visa holders' includes 29 visa subclasses such as Temporary Work (Short Stay Activity) and Temporary Work (Long Stay Activity), visas for visiting academics, entertainers, sportspeople, religious workers, and others.⁷

Visa holder countries of origin

As shown in the table below, at 30 June 2018, China was the largest source jurisdiction of temporary visa holders with a work right in Australia, with India close behind. China and India were also the top two source jurisdictions for international students, with China supplying 23 per cent of international students and India 14 per cent. Nepal (9 per cent), Brazil (4 per cent) and Vietnam (4 per cent) rounded out the top five source jurisdictions for international students.

⁶ Data provided by the Department of Home Affairs. The table includes primary and secondary visa holders (including persons not exercising a work right and dependent children not of working age).

⁷ Data provided by the Department of Home Affairs.

Figure 1.3 – Number of temporary visa holders with work rights by selected source jurisdictions and visa categories

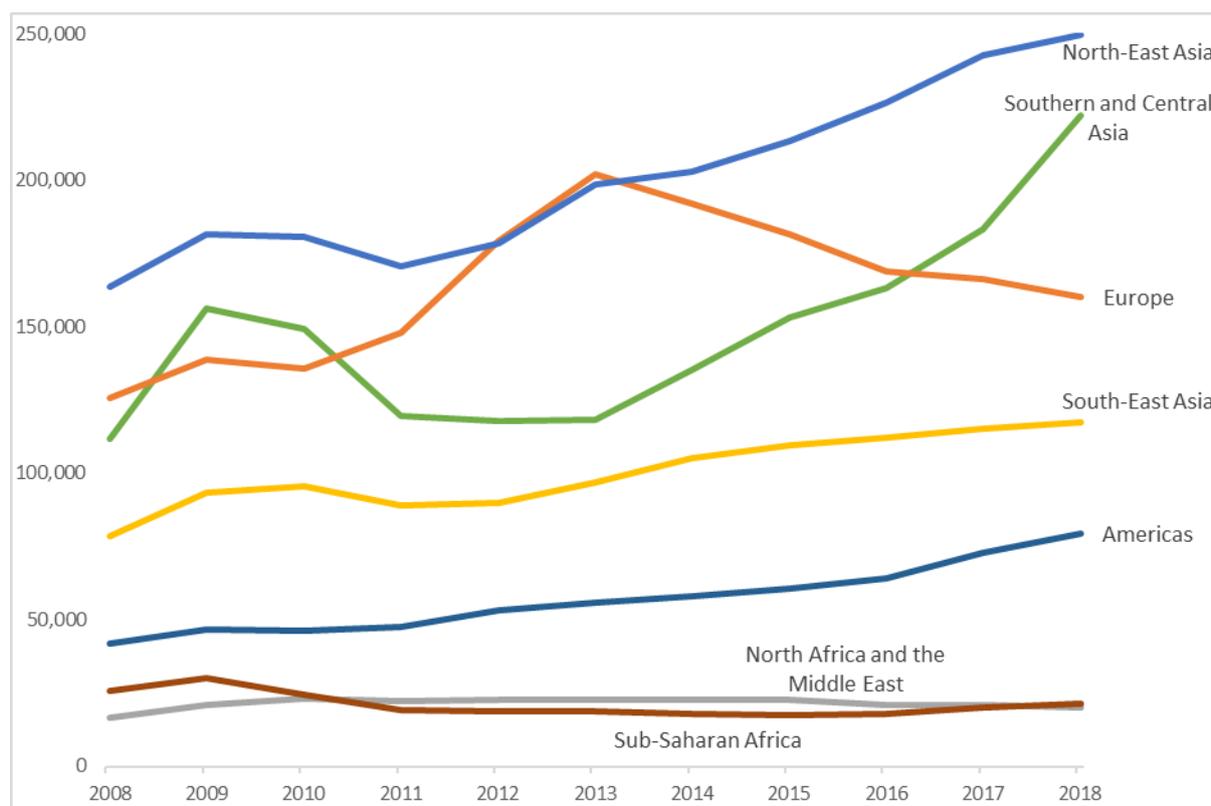
Source jurisdiction	Students	Temporary Graduate	Temporary Skilled (subclasses 482 and 457)	Working holiday makers	Other temp. visa holders	Total
China	112,297	15,250	9739	4646	3699	145,631
India	70,240	20,041	31,487	-	3661	125,429
United Kingdom	4197	334	23,152	25,078	4232	56,993
Nepal	41,696	7596	3092	-	154	52,538
South Korea	17,389	1399	4161	16,073	1049	40,071
Taiwan	9121	648	1058	16,903	341	28,071
Vietnam	19,917	2743	2564	204	434	25,862
Brazil	20,349	462	2695	-	479	23,985
Malaysia	18,156	2064	2074	91	520	22,905
Philippines	8233	2438	10,321	-	1032	22,024

As at 30 June 2018.⁸

The substantial growth in the number of temporary visa holders with work rights is accompanied by a shift in the mix of source jurisdictions (see Figure 1.4). The number of visa holders with work rights coming from (i.e. citizens of) Asia and South Asia has increased by 66 per cent since 2008, while the number coming from Europe, and North Africa and the Middle East, has grown more slowly at 28 per cent and 21 per cent growth respectively. Over the same period, there was an approximately 90 per cent increase in visa holders from the Americas, mainly students from Brazil and Colombia, and working holiday makers from the United States. However, visa holders from the Americas still make up less than 10 per cent of the overall population of temporary visa holders with work rights.

⁸ Data provided by the Department of Home Affairs. Figures for China exclude its Special Administrative Regions.

Figure 1.4 – Temporary visa holders with work rights by selected citizenship jurisdictions, 30 June, 2008–2018



Note: citizenship jurisdictions with fewer than five visa holders in Australia on 30 June in any year are recorded as zero. As such, there may be small discrepancies between the total number of migrant workers in Australia and the figures used in this chart. Source: Department of Home Affairs.⁹

Employment conditions for temporary visa holders

Temporary visa holders with a work right are entitled to the same basic rights and protections as Australian citizens and permanent residents under applicable workplace laws. For visa holders covered by the federal workplace relations system, these include minimum employment conditions, access to superannuation, workers' compensation and workplace safety laws. These are enforceable under legislation.

Certain subclasses of visas place specific work-related conditions and limitations on the visa holder that are enforceable under the *Migration Act 1958* (the Migration Act). For example:

- **Student visa holders:** are limited to working a maximum of 40 hours per fortnight during teaching periods, and unlimited hours during vacation periods. Masters by research and doctoral degree students do not have a limit on how many hours they can work.

⁹ Visas included: Students, Working Holiday Makers, Temporary Graduates, 457s, and 'Other temporary visas with a work right'. Country categorisations based on Australian Bureau of Statistics, Standard Australian Classification of Countries 2016, cat. no. 1269.0, cat. no. 1269.0, 2017.

- **Employer-sponsored visas:** place legal requirements and obligations on employers that affect the employment conditions of visa holders, including a minimum salary level and a specified occupation within the ANZSCO Skill level 1–3 band.¹⁰
- **Working Holiday visa holders:** are unrestricted in the hours they choose to work, however individuals seeking a second 12 month working holiday maker visa are required to complete three months of specified work with a regional employer during their initial 12 month visa period. Following recent changes to the program, working holiday makers who want to stay in Australia for a third year are required to complete an additional six months of specified work in a specified regional area during their second year (see below). Most are also restricted to working for an employer in a location for a maximum of six months, or 12 months with agricultural employers.

Working holiday visa changes

On 5 November 2018, the Government announced a number of changes to the working holiday visa program to address labour shortages in regional areas. These changes are outlined below.

- Expanding the regional areas where subclass 462 visa holders can work in agriculture (plant and animal cultivation) to qualify for a second year of stay in Australia. Previously, only those who worked in Northern Australia were eligible.
- Increasing the period in which subclass 417 and 462 visa holders can stay with the same agricultural (plant and animal cultivation) employer, from six to 12 months.
- Introducing the option of a third year for subclass 417 and 462 visa holders who, after 1 July 2019, undertake six months of specified work in a specified regional area during their second year.
- Offering an increase in the annual caps to a number of countries that participate in the subclass 462 visa program.

Illegal workers in Australia

An illegal worker is a non-citizen who is working without a visa or working in breach of their visa conditions. In 2011, a report prepared for the then Minister for Immigration and Citizenship estimated there to be between 50,000 and 100,000 unlawful migrant workers in Australia.¹¹ Many in this category have overstayed their original visa. Evidence was provided at the May 2017 Senate Estimates hearings that of the 64,600 non-citizens who had overstayed their visa, approximately 20,000 of those were working (they would be unlawful and therefore working illegally). This figure of around 60,000 visa overstayers remains largely static.¹² In October 2017 during Senate Estimates hearings, an updated figure was tabled that showed there to be 62,900 unlawful non-citizens in

¹⁰ ANZSCO (Australian and New Zealand Standard Classification of Occupations) is a system used to classify all occupations in the Australian and New Zealand labour markets. ANZSCO Skill Levels 1–3 include occupations which require skill levels equivalent to a Certificate IV (ANZSCO Skill Level 3), a Diploma (ANZSCO Skill Level 2) or bachelor's degree or above (ANZSCO Skill Level 1).

¹¹ S Howells, Report of the 2010 Review of the *Migration Amendment (Employer Sanctions) Act 2007*, Commonwealth of Australia, Canberra, 2011, p. 12.

¹² Senate Legal and Constitutional Affairs Legislation Committee, Senate Estimates 23 May 2017.

Australia, the majority of whom were visitors, followed by students.¹³ It was noted that the top five nationalities of overstayers in 2016–17 were: Malaysia (15 per cent), China (9.5 per cent), USA (8 per cent), United Kingdom (5.6 per cent), and India (4.1 per cent).

¹³ Senate Legal and Constitutional Affairs Legislation Committee, Senate Estimates 23 October 2017.

Figure 1.5 – Temporary visa types with work rights

Program	Employer Sponsorship	Migration Sponsorship Obligations	Occupation/ Position	Salary and Employment Conditions	Labour Market Testing (LMT)	Skill and English Assessment	Monitoring
<p>Temporary Skill Shortage (subclass 482) replaced the Temporary Work Skilled (subclass 457) from 18 March 2018</p>	Yes	<p>Yes, including obligations to:</p> <ul style="list-style-type: none"> ensure primary visa holder only works in nominated occupation ensure equivalent terms and conditions of employment as would be received by an Australian or permanent resident performing that role non-discriminatory workforce test Skilling Australians Fund contribution 	<p>Short Term Skilled Occupation List (STSOL)</p> <p>Medium to Long Term Strategic Skills List (MLTSSL)</p> <p>Regional Occupations List (ROL)</p> <p>Only ANZSCO Skill Level 1 to 3 occupations are in scope for consideration for inclusion on STSOL, MLTSSL, ROL</p>	<p>Salary must be:</p> <ul style="list-style-type: none"> no less that of an Australian performing similar duties for the sponsor in a workplace above the temporary skilled migration income threshold (\$53,900 per annum) must satisfy applicable Australian workplace law 	Yes <ul style="list-style-type: none"> Strengthened TSS labour market testing requirements came into effect from 12 August 2018, unless international obligations apply 	Yes <ul style="list-style-type: none"> Overall IELTS (or equivalent OET, TOEFL iBT, PTE, CAE) of 5, (or higher level if required for licensing) English language salary exemptions for intra-corporate transferees paid over \$96,400 	Yes <ul style="list-style-type: none"> Home Affairs monitor sponsorship obligations FWO may monitor market salary and usual duties of primary subclass 457/482 visa holders

Program	Employer Sponsorship	Migration Sponsorship Obligations	Occupation/ Position	Salary and Employment Conditions	Labour Market Testing (LMT)	Skill and English Assessment	Monitoring
		(from 12 August 2018)					
Labour Agreement Subclass 482 replaced the Subclass 457, from 18 March 2018	Yes	Yes (as above), with capacity to vary in each agreements	STSOL, MLTSSL and ROL Level 4 where evidence of a skill shortage	As for standard subclass 482. Additionally, the Immigration Minister may approve: <ul style="list-style-type: none"> • up to 10 per cent variation to TSMIT, and/or • TSMIT being met through salary package, and/or • deduction provisions 	Yes <ul style="list-style-type: none"> • LMT is required for all Work Agreements under Reg 2.76A of the Migration Regulations • Australian employers are required to show they have made recent and genuine efforts to recruit and employ Australian citizens or Australian permanent residents • The only exemption to the LMT is for 	Yes (as above) <ul style="list-style-type: none"> • Immigration Minister may approve a variation to vocational English criteria 	Yes (as above)

Program	Employer Sponsorship	Migration Sponsorship Obligations	Occupation/ Position	Salary and Employment Conditions	Labour Market Testing (LMT)	Skill and English Assessment	Monitoring
					Minister of Religion and Religious Assistants		
Temporary Graduate (subclass 485) Two streams: Graduate Work and Post Study Work	No	No	Under migration law, there is no limit on the occupation, industry or region of employment ¹⁴	Salary must satisfy applicable Australian workplace law	No <ul style="list-style-type: none"> Graduate Work Stream – study linked to the MLTSSL 	Yes <ul style="list-style-type: none"> Australian study criteria (at least 92 weeks) and the course must be completed in English. Skills Assessment required for Graduate Work Stream. English assessment required 	No
Working Holiday	No	No	Under migration law, there is no limit on the	<ul style="list-style-type: none"> Salary must satisfy applicable 	No	Varies <ul style="list-style-type: none"> Visa holders must satisfy 	No

¹⁴ There are some occupations and/or positions in the Australian labour market that are only available to Australian citizens and permanent residents. Other domestic law or policy requirements may limit the employment opportunities of temporary visa holder in some occupations.

Program	Employer Sponsorship	Migration Sponsorship Obligations	Occupation/ Position	Salary and Employment Conditions	Labour Market Testing (LMT)	Skill and English Assessment	Monitoring
(subclass 417 and 462)			occupation, industry or region of employment ¹⁵	Australian workplace law <ul style="list-style-type: none"> • Subclass 417 visa holders seeking a second visa must provide pay slips as evidence of 88 days specified work 		relevant Australian licensing and registration <ul style="list-style-type: none"> • Subclass 462 visa applicants must meet the education and English criteria noted in country specific MOUs 	
International Student (subclass 500)	No	No	<ul style="list-style-type: none"> • Under migration law, there is no limit on the occupation, industry or region of employment.¹⁶ 	Salary must satisfy applicable Australian workplace law	No	Yes <ul style="list-style-type: none"> • An academic requirement. • English language ability is also a visa requirement. There are 	No

¹⁵ Ibid

¹⁶ Ibid

Program	Employer Sponsorship	Migration Sponsorship Obligations	Occupation/ Position	Salary and Employment Conditions	Labour Market Testing (LMT)	Skill and English Assessment	Monitoring
			<ul style="list-style-type: none"> Generally student visa holders can work a maximum of 40 hours (may include voluntary and unpaid work) per fortnight during teaching periods and unlimited hours during vacation periods. There are some exceptions 			some exemptions	
Temporary Work International Relations (subclass 403) – including Seasonal Worker	Varies For SWP and PLS, which uses the subclass 403 employer (temporary activity)	Varies For SWP, the MOU and related Deeds of Agreement specify the obligations of SWP growers and	Varies For SWP, available Australia-wide for agriculture and in specified locations for accommodation	Salary must satisfy applicable Australian workplace law. For SWP, includes a minimum average of 30	Varies For SWP and PLS, employers must show evidence of LMT	Varies For SWP, some skills training provided to subclass 403 visa holders	Varies Yes for SWP and PLS

Program	Employer Sponsorship	Migration Sponsorship Obligations	Occupation/ Position	Salary and Employment Conditions	Labour Market Testing (LMT)	Skill and English Assessment	Monitoring
Programme (SWP) and Pacific Labour Scheme (PLS)	sponsorship is required	approved employers	, sugar cane farming, cotton farming or aquaculture	hours per week and payment in accordance with Horticulture Award 2010 (or other relevant award)			

Chapter 2 – Extent of migrant worker exploitation in Australia

Section overview

- Underpayment of migrant workers is a long-standing problem with significant impacts for affected individuals, the labour market and the community – but it is difficult to quantify precisely the prevalence and severity of the problem. Even so, the significance of the problem has been recognised by the Government in taking its 2016/2017 measures and in establishing this Taskforce. As was noted by Minister Cash – ‘exploitation of any worker in Australian workplaces will not be tolerated by this Government.’¹⁷
- Migrant workers can be particularly vulnerable to exploitation due to language barriers, lack of awareness of Australian workplace laws, expectations informed by their experiences in other countries and, in some cases, visa conditions or migrant workers’ migration intentions. In turn, certain employers – a minority, but still significant – exploit opportunities to gain at the expense of workers.
- Part A of this chapter discusses the forms of migrant worker exploitation and the vulnerabilities that contribute to it.
- Part B discusses the experience of the 7-Eleven underpayments case that received significant public attention following an investigation by Fairfax Media and the ABC’s Four Corners¹⁸ investigation, and the FWO report in August 2015.

Part A: Evidence of workplace exploitation

The underpayment and exploitation of temporary visa holders is a significant problem that has adverse effects on individuals, law-abiding employers and the community in general. Employers who flout the law and mistreat migrant workers are undermining Australia’s reputation as a fair country in which to live and work. This problem also has significant resource implications for Government regulators in multiple portfolios — immigration, taxation and workplace relations. Underpayment is not confined to a narrow sector of the workforce, although there are some common characteristics that heighten the risks.

Underpayment of migrant workers is certainly not a new problem. It has not recently emerged, but instead it has been a feature of some sectors of the Australian labour market for years. For example, in 2008, the Workplace Ombudsman, predecessor to the FWO, commenced a series of audits of 7-Eleven stores, which uncovered serious underpayments. The Workplace Ombudsman noted at

¹⁷ Senator the Hon Michaelia Cash, Minister for Employment, ‘Migrant Workers Taskforce taking action’, media release 27 October 2016.

¹⁸ Four Corners, 7-Eleven: The Price of Convenience, television broadcast, ABC TV, 31 August 2015; and A Ferguson & S Danckert, Revealed: How 7-Eleven is ripping off its workers, Fairfax Media, 31 August 2015.

that time that many of the underpaid workers were young international students and were particularly vulnerable to exploitation.¹⁹

However, as the number of temporary visa holders entering Australia has grown, greater numbers of workers are being exposed to the risk of underpayment with greater flow on implications for the wider labour market. The Taskforce has taken time to consider the extent of exploitation of migrant workers, but given the hidden nature of the problem it is not possible to put a firm number on it. However, given the number of case studies and other pieces of information outlined in this chapter, it is clear that a significant proportion of temporary visa holders in Australia are being exploited.

Exploitation of workers can take many forms

- wage underpayment, or ‘cash-back’ arrangements
- pressure to work beyond the restrictions of a visa — e.g. student visa work limits
- up-front payment or ‘deposit’ for a job
- failure to provide workplace entitlements such as paid leave, superannuation
- tax avoidance through the use of cash payments to workers
- unpaid training
- working conditions that are unsafe
- unfair dismissal
- misclassification of workers as independent contractors instead of employees
- unfair deductions from wages for accommodation, training, food or transport
- threats to have a person’s visa cancelled by authorities
- withholding of a visa holder’s passport
- requiring migrant workers to use and pay for sub-standard on-site accommodation.

Evidence of workplace exploitation

There can be difficulties in detecting, proving and quantifying workplace exploitation of workers generally, particularly in relation to temporary visa holders in Australia for a short time and where work is not their primary reason for being here. There is a need for more data to be collected and published on the employment characteristics of unsponsored temporary visa holders,²⁰ but this is constrained by methodological challenges and by resource constraints.

The work of the Taskforce encouraged more independent work on this important issue by academics and regulators, and has noted a number of specific research findings that provide insight into the potential magnitude of migrant worker exploitation in Australia.

While the Taskforce cautions against extrapolating its findings to the migrant worker population as a whole, and notes the methodology constraints of the study, results from the Wage Theft in Australia

¹⁹ Fair Work Ombudsman, A report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network, FWO, Melbourne, 2016, p. 7.

²⁰ Senate Education and Employment References Committee, A National Disgrace: The Exploitation of Temporary Work Visa Holders, SEERC, Canberra, 2016, p. 33.

report²¹ conducted in 2016 indicate that among the 4,322 responses received from temporary migrant workers (representing around 1 per cent of the total number of visa holders):

- almost a third (30 per cent) said they earned \$12 per hour or less and 46 per cent said they earned \$15 per hour or less in their lowest paid job²²
- one quarter of international students and one third of working holiday makers (32 per cent) were paid around half the legal minimum wage
- underpayment was especially prevalent in food services, and in fruit and vegetable picking
- 44 per cent of respondents were paid in cash and half rarely received a pay slip
- 91 participants (3 per cent) had their passport confiscated by their employer and 77 (2 per cent) by their accommodation provider. Four per cent reported that their employer asked them to pay money back in cash.²³

Findings of the research report, *Multiple Frames of Reference: Why International Student Workers in Australia Tolerate Underpayment* conducted in 2015 found that of the 19 per cent of students working at the time of the survey, 60 per cent were paid under the minimum wage and just 50 per cent reported ever receiving a pay slip.²⁴

Investigations and reviews

Media investigations have canvassed in some detail numerous instances of serious workplace breaches in Australia. In May 2015, the ABC's Four Corners program detailed allegations of mistreatment of temporary visa holders in the meat processing and horticulture industries. In August 2015, a joint investigation by Four Corners and Fairfax Media showed systemic underpayment of the wages and entitlements of international student visa holders working in many 7-Eleven convenience stores across Australia (this is discussed in part B of this chapter). A 2017 two part series by the ABC's Australian Story also raised issues of workplace safety and underpayment for working holiday makers working in remote locations as part of their requirements to undertake three months of 'specified work' to secure a second year visa.²⁵

The FWO has also undertaken a number of formal inquiries and investigations into the treatment of visa holders in Australian workplaces.²⁶ In 2017–18, the FWO audited over 4,500 workplaces using intelligence-led targeted campaigns to examine specific industries, regions and businesses across Australia. Migrant workers and temporary visa holders continue to be one of the most vulnerable worker cohorts, and are continually over-represented in disputes as well as compliance and enforcement outcomes. In 2017–18, migrant workers made up an estimated 6 per cent of the

²¹ L Berg & B Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, UNSW Law, Sydney and University of Technology Sydney, 2017.

²² At the time of the survey the national minimum wage was \$17.70 per hour, or \$22.13 for casual employees. See the [National Minimum Wage Order 2016](#).

²³ Berg & Farbenblum, pp. 5–7.

²⁴ S Clibborn, 'Multiple frames of reference: Why international student workers in Australia tolerate underpayment', *Economic and Industrial Democracy*, 2018, p. 7.

²⁵ Australian Story, *Long Way from Home* pt. 1 and pt. 2, television broadcast, Australian Broadcasting Corporation, Canberra, 6 July and 12 July 2017.

²⁶ Inquiry Reports can be accessed on the [FWO website](#).

Australian workforce,²⁷ however they accounted for 20 per cent of all formal disputes the FWO helped resolve (up from 13 per cent in 2015–16) and featured in 63 per cent of the court cases commenced by the FWO in the same year.²⁸

The FWO has undertaken a number of formal inquiries and investigations that have revealed concerning indications of serious exploitation of visa holders. Examples include:

- ***Fair Work Ombudsman - Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales (2015).***
The Inquiry found the Baiada Group (a poultry processing operator) adopted an operating model which seeks to transfer costs and risk associated with the engagement of labour to an extensive supply chain of contractors responsible for sourcing and providing labour. Poor governance arrangements by the Baiada Group of the various labour supply chain lead a range of exploitative practices, including significant underpayments, extremely long hours of work, high rents for overcrowded and unsafe worker accommodation, discrimination and misclassification of employees as contractors.
- ***Fair Work Ombudsman - Inquiry into 7-Eleven (2016)***
The Inquiry that commenced in 2014 disclosed concerning levels of non-compliance with the *Fair Work Act 2009* and *Fair Work Regulations 2009*, including instances of deliberate manipulation of records to disguise underpayment of wages, with the typical employee being male international student visa holders.
- ***Fair Work Ombudsman - Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program (2016)***
Visa holders were found to be in situations where they had no option but to agree to the conditions imposed on them by their employers. It was found that a desire by overseas workers to get a second-year visa extension can drive vulnerable workers to agree to work for below minimum wages, and in some cases, enter into potentially unsafe situations.
- ***Fair Work Ombudsman - Inquiry into trolley collection services procurement by Woolworths Ltd (2016)***
The Inquiry found that Woolworths procurement processes had contributed to a culture of non-compliance with Australian workplace laws including serious wage underpayment, inaccurate and misleading record-keeping, and active requirement of vulnerable workers including recently arrived migrants. Woolworths Ltd subsequently entered into a Proactive Compliance Deed with the FWO.
- ***Fair Work Ombudsman – Caltex Compliance Activity Report (2018)***
On 5 March 2018, the FWO released a Compliance Activity Report that revealed a workplace non-compliance rate of 76 per cent across 25 franchise sites, with 17 of those site operators being from non-English speaking backgrounds. Sixty per cent of employees involved in the audit were also visa holders. Following investigations that commenced in 2016, the FWO identified breaches concerning award rates, penalties, record keeping and pay slips. The activity recovered over \$9,000 in back-pay for 26 workers.

²⁷ This percentage has been derived by dividing the number of selected visa types with working entitlements by total persons in the labour force: Department of Home Affairs, Temporary entrants and New Zealand citizens in Australia, as at 30 June 2016, Department of Home Affairs, Canberra, 2016, p. 3. Australian Bureau of Statistics, Labour Force, Australia, cat. no. 6202.0, ABS, Canberra, 2018, 'Table 1. Labour force status by Sex, Australia - Trend, Seasonally adjusted and Original'.

²⁸ Fair Work Ombudsman, Annual Report 2017–2018, FWO, Melbourne, 2018, p. 17.

- ***Fair Work Ombudsman – Harvest Trail Inquiry Report (2018)***

In November 2018, the FWO released the findings from its four-year harvest trail inquiry, which, among other things, found that over half of the 638 employers investigated had breached workplace laws.²⁹ Almost 70 per cent of the harvest trail businesses investigated employed visa holders, predominantly working holiday makers. As a result of the inquiry, the FWO recovered more than \$1 million for over 2,500 workers.

The FWO has also undertaken a number of compliance activities involving exploited migrant workers. These include:

- ***Sushi enterprises (2018)***

The FWO commenced compliance activity examining 45 sushi business in Newcastle, Hunter/Central Coast, Coffs Harbour, North Coast, Canberra and the Gold Coast in 2018 and found an 87 per cent non-compliance rate. The activity identified the widespread use of false records, non-issue of pay slips, excessive unpaid or underpaid hours and a reliance on vulnerable workers, including young, migrant and non-English speaking workers. The activity resulted in 15 formal cautions, six compliance notices, nine infringements notices, one enforceable undertaking and legal proceedings commenced against six employers. The activity recovered \$797,063 for 406 workers.

- ***United Petroleum retail fuel outlets (2017)***

The FWO conducted an inquiry into 12 United Petroleum businesses in September 2015. The inquiry found employees were underpaid a total of \$9,186.47, and that 31 of the 43 employees working were visa holders.

Migrant worker vulnerability

There are a number of vulnerabilities to workplace exploitation that are common among migrant workers, including limited English language skills, lack of awareness of Australian workplace laws and fear of visa cancellation, detention and removal from Australia. Peer and community or family expectations, norms within cultural groups, as well as economic settings in visa workers' home countries can also influence their decisions regarding low paid work.

Research shows that even where migrant workers are aware of legal minimum wages, some will still accept much lower pay rates. A research article based on a 2015 study of international students in Sydney found that international students tolerate and accept lower than lawful wages not only because the wage rates can be high in comparison to their home countries, but also that lower than lawful wages are normalised and accepted among their international student peers.³⁰

Specific visa conditions

The FWO found that working holiday (subclasses 417 and 462) visa holders can also be vulnerable due to the remoteness of their working location and their dependence on employers to obtain eligibility for a second year visa by undertaking three months of specified work with a regional employer.

²⁹ Fair Work Ombudsman, *Harvest Trail Inquiry: A report on workplace arrangements along the Harvest Trail*, FWO, Melbourne, 2018, p. 26.

³⁰ Clibborn, pp. 13–14.

International student visa holders also face added vulnerabilities where they have worked in excess of their visa working hour limitation. The FWO's Inquiry into 7-Eleven found exploited students working in excess of their working hours limitation, with wage records falsified by the employer in an attempt to show that work was taking place in accordance with international student visa requirements.³¹

Specific industries and business models

Seasonal peaks can create an urgent need for labour. In many cases the supply of labour needs to be outsourced in order to meet the demand. The practice of outsourcing can in turn create an environment that supports exploitation of workers by unscrupulous employers. The FWO's 2015 report on the Baiada Group³² identified that poor governance arrangements by the Baiada Group of the various labour supply chains led to significant underpayments; extremely long hours of work; high rents for overcrowded and unsafe worker accommodation; discrimination; and misclassification of employees as contractors. The dominant source of labour was working holiday makers, with a significant proportion of labour supplied through labour hire operators (see chapter 6 for a detailed discussion of labour hire).

Moreover, the FWO has observed there is a correlation between multiple levels of subcontracting and non-compliance with the Fair Work Act. Even where risks of exploitation are acknowledged, mitigation measures may not be adequately enforced by businesses. For example, in its inquiry into the procurement of cleaners in Tasmanian supermarkets, the FWO found that while Woolworths had measures in place to manage the risks of non-compliance in its supply chain relating to cleaning services (for instance, auditing, visitors' books, identification and limits of contracting), the company failed to invest in ensuring compliance with these measures. The FWO observed that Woolworths failed to appreciate the dynamics of the market below the principal contract level and therefore failed to properly manage its labour supply chain at the time.³³

Particular business models can also foster exploitative behaviours and severely hinder the pursuit of the wrong doer. For example, a franchising model can be structured in such a way that it might be difficult for a franchisee to run at a profit without underpaying wages. It has for example been argued that this was the case with the 7-Eleven franchising model.³⁴

Further, a range of FWO litigations has shown a common characteristic where employers from a particular culturally and linguistically diverse background or country of origin exploit temporary visa holders of the same ethnicity/source country. In some cases, these workers can be more vulnerable in this work situation where there are family relationships involved and the workers' concern over their visa status, loyalty towards the employer or fear of reprisal at home can lead to the exploitative

³¹ Fair Work Ombudsman, A report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network, FWO, Melbourne, April 2016, p. 11.

³² Fair Work Ombudsman, A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of Baiada Group in New South Wales, FWO, Melbourne, 2015, p. 3.

³³ Fair Work Ombudsman, An inquiry into the procurement of cleaners in Tasmanian supermarkets, FWO, Melbourne, 2018, p. 24.

³⁴ A Ferguson & K Toft, '7-Eleven investigation: Business model ripping off workers, former consumer watchdog says', ABC News, 31 August 2015.

conditions persisting. There are particular examples where this has been the case in the hospitality sector and by labour hire operators in the meat processing and horticulture sectors.³⁵

See Appendix C for a list of relevant inquiries.

Part B: 7-Eleven

Background to the 7-Eleven matter

A key term of reference of the Taskforce was to monitor ‘the progress by 7-Eleven in rectifying its breaches’.³⁶

The background to this was the extensive publicity given to the exposure of substantial non-compliance with minimum award conditions of employment by franchisees of 7-Eleven Stores Pty Ltd (7-Eleven) following a Fairfax Media/Four Corners investigation and report in August 2015, which led to extensive negative publicity for 7-Eleven. This led to 7-Eleven (the franchisor) establishing an Independent Franchisee Review and Staff Claims Panel (the Panel) to investigate claims of underpayment and determine appropriate amounts of redress when claims were substantiated. The Panel members were Professor Fels and Dr Cousins. Professional services firm Deloitte Australia (Deloitte) was separately appointed by 7-Eleven to provide relevant forensic accounting and administrative support services to the Panel. The Panel liaised with the FWO to ensure there was no overlap in its work in rectifying underpayments and to provide the FWO with details of matters brought to its attention where they appeared to raise new areas of exploitation, particularly relating to cash-back payments.

In March 2016, the Senate Education and Employment References Committee released a significant report,³⁷ which included an examination of the 7-Eleven matter. Following this, in April 2016, the FWO released a report on its findings in relation to an investigation into the 7-Eleven franchise network. This confirmed that a number of franchisees had been deliberately falsifying records to disguise the underpayment of wages. This report also noted that regulators had been concerned with the compliance of some 7-Eleven stores with workplace laws since 2008.

The Panel was controversially dismissed by 7-Eleven in May 2016, well before the bulk of claims could be assessed. Shortly after this, in May 2016, the Government announced the Coalition’s Policy

³⁵ Victorian Inquiry into the Labour Hire Industry and Insecure Work, Final Report, Industrial Relations Victoria, Melbourne, 2016, p. 308; and Senate Education and Employment References Committee, A National Disgrace: The Exploitation of Temporary Work Visa Holders, SEERC, Canberra, 2016, p. 233.

³⁶ See Appendix A for the full Terms of Reference.

³⁷ Senate Education and Employment References Committee, A National Disgrace: The Exploitation of Temporary Work Visa Holders, SEERC, Canberra, 2016 (see especially Chapter 8).

to Protect Vulnerable Workers, which included establishment of a Migrant Workers' Taskforce.³⁸ Terms of reference for the Taskforce were formally announced by Minister Cash in October 2016.³⁹

In December 2016, 7-Eleven signed a Proactive Compliance Deed with the FWO. This codified a number of measures which were aimed at ensuring all employees in its network received their proper entitlements and committed to continuation of a wage remediation program covering employees who had approached the Panel, and following its demise, 7-Eleven itself. No new claims were to be considered by the secretariat after 31 January 2017. These would be dealt with by an internal 7-Eleven Investigations Unit.

The Government responded to the widespread concerns about the underpayment of employees highlighted by the 7-Eleven case by also committing to strengthening the Fair Work Act provisions covering franchisors, increasing penalties and improving the regulator's powers and resources. The amendments to the Fair Work Act took effect on 15 September 2017.⁴⁰

Significance of the 7-Eleven matter

A number of aspects regarding the 7-Eleven matter had become clear by the time the Panel was terminated by 7-Eleven. First, that wage exploitation was systemic across the 7-Eleven network. The majority of stores were involved. Further, it was the view of the Panel and others that 7-Eleven itself had a significant responsibility for what had occurred.

The Panel received 3,700 expressions of interest from employees wanting to make a claim, which was expected to translate into around 3,000 claims based on experience to that time. Many more potential claimants were expected to come forward, with the number of new cases then increasing by around 100 each week. The Panel had made determinations based on completed investigations in 421 cases amounting to \$16.7 million, an average determination of close to \$40,000. The claims dealt with earlier on by the Panel were generally smaller and less complex ones. As the size of claims increased, 7-Eleven sought to have a greater influence over the determination process.

In the Chair's Public Statement arising from the Migrant Workers' Taskforce meeting held in April 2017, he reiterated a statement he had made the previous August that around 20,000 people were employed by 7-Eleven franchisees during the period that underpayment was going on. Given the number of stores affected by claims to the Panel, the Chair and Deputy Chair considered that it was not unreasonable to assume that at least 10,000 employees were potential claimants.

7-Eleven had an awareness of the problems that existed across its network. In 2008, an unregistered union representing fast food and retail workers named Unite had advised management at the highest level of the company about the problems across its stores and had presented proposals for rectification.⁴¹ Media outlets also extensively reported on store protests organised by the union at

³⁸ The Hon Malcolm Turnbull MP, Prime Minister and Senator the Hon Michaelia Cash, Minister for Employment, The Coalition's Policy to Protect Vulnerable Workers, media release, Parliament House, Canberra, 19 May 2016.

³⁹ Senator the Hon Michaelia Cash, Minister for Employment, 'Coalition delivers on election commitment to protect migrant workers, media release, Parliament House, Canberra, 4 October 2016.

⁴⁰ *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

⁴¹ The Fair Work Ombudsman, in its 2016 report on 7-Eleven, also noted that its predecessor agency (the Workplace Ombudsman) had received allegations from Unite that 7-Eleven stores were involved in a 'double

the time. Internal surveys conducted by 7-Eleven also highlighted the problems evident in its franchise network. It was highly unlikely that directors of 7-Eleven did not have an awareness of these developments.

It was clear that 7-Eleven benefited from endemic wage underpayment by its franchisees. To the extent franchisees' costs were reduced by this underpayment, the scope for payments to the franchisor increased. As Professor Fels pointed out:

...the original profit sharing model was less generous to franchisees in Australia, than in the United States. In my view, the original model meant that many franchisees could not run a business unless they systematically underpaid employees.⁴²

In September 2015, the company moved to amend this model to improve outcomes for its franchisees.

The FWO suggested that:

...while not legally responsible for the entitlements payable to employees of its franchisees, it is our view that 7-Eleven has a moral and ethical responsibility for what has occurred within its network and is capable of taking steps to prevent this occurring again.⁴³

It commented on the difficulties of obtaining evidence and of satisfying the requirements of the accessory liability provisions then in the Fair Work Act.

7-Eleven is the largest convenience and independent petrol retailer in Australia, generating approximately \$3.6 billion in sales through a network of around 650 corporate and franchised stores. The company is the third largest private company in Australia. It had a significant reputation to defend and the steps it took after public exposure to ensure employees received redress for past underpayment, to alter its franchise model, and to prevent further unlawful activity must be seen in this context.

The redress arrangements agreed to by the company were almost unique in that they established an independent panel supported by an independent forensic accounting firm working to the Panel; the names of claimants would not be disclosed publicly, including to 7-Eleven itself (with very narrow but necessary exception for people making payments following determinations) and, importantly, to franchisee employers; the Panel would be independent of 7-Eleven in making its determinations, and 7-Eleven would pay employees promptly and without further investigation of the amounts determined by the Panel. 7-Eleven reserved the right to recover these payments from franchisees who had been directly involved in the underpayment and, indeed, indicated that beyond a specified total payment cap that it would do so.

The Taskforce notes that 7-Eleven is unlikely to be alone in being associated with significant wage exploitation of its franchisee employers. Indeed, other high profile franchises that have attracted

hours scam'. Fair Work Ombudsman, A report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network, FWO, Melbourne, 2016 p. 7.

⁴² Professor Allan Fels, Chair of the Independent Wages Panel, 2015.

⁴³ Fair Work Ombudsman, Statement on 7-Eleven, media release, FWO, Melbourne, 9 April 2016.

adverse media attention since the establishment of the Taskforce include Domino's, Caltex, and Retail Food Group, which includes Donut King, Michel's Patisserie and Brumby's Bakery. The FWO has ongoing investigations into a number of franchise networks including 7-Eleven, Domino's and Red Rooster.

Franchising is a significant component of the Australian business sector. A 2016 industry-led survey reported that there was an estimated 79,000 franchising participants in Australia, employing more than 470,000 people, with a sales turnover estimated at \$146 billion for the entire franchising sector.⁴⁴ The Taskforce considers that this scale highlights why it is important that franchising and its associated employment arrangements be properly regulated.

Monitoring 7-Eleven's progress in rectifying breaches

The Taskforce sought regular updates from 7-Eleven regarding the progress of its wage remediation program and received advice from the FWO on related compliance and enforcement activities. The Taskforce invited the CEO of 7-Eleven, Mr Angus McKay, to attend a Taskforce meeting to discuss relevant matters.

The Taskforce was constrained in its monitoring by the fact that it had no resources of its own to establish direct links with affected employees to assess their experiences. The Panel's experience was that it took significant time to gain the awareness and confidence of employees in its processes and this involved experimentation with different communications channels. Ultimately, the most effective means of communication was through the sophisticated use of social media. While the FWO has worked hard to establish good channels of communications for its complainants, these differ from those adopted by the Panel in significant ways. In addition, the FWO is a government regulator, unlike the Panel, which was independent of government.

For a number of reasons, many employees on temporary visas, such as the international students who dominated the 7-Eleven franchisee workforce, were reluctant to contact government agencies about wage exploitation concerns. This was the case even after the then Department of Immigration and Border Protection responded to calls from the Panel for the Government not to take adverse action, for example in response to a breach of visa work hours restrictions, against employees who highlighted genuine claims of abuse.⁴⁵

A further constraint on the Taskforce's monitoring was its inability to assess the revised methodology for wage repayment adopted by 7-Eleven after it dismissed the Panel. The Panel's methodology covered such things as the standard of evidence required to support a claim, the nature of claims to be allowed, for example the time period over which claims could be made, and the parameters of claims calculation, for example whether interest on historical claims would be allowed and if so what interest rate to apply.

⁴⁴ L Frazer et. al., *Franchising Australia 2016*, Griffith University, Gold Coast and Franchise Council of Australia, Melbourne, 2016, p. 5.

⁴⁵ The Department advised that it would generally not take action in relation to individual breaches of visa work conditions identified during FWO investigations, provided there were no other grounds for visa cancellation and that individuals committed to abide by visa conditions in future.

The company refused the Taskforce's request to provide it with a copy of the new methodology it introduced. Under the terms of the Proactive Compliance Deed the company signed with the FWO, the company was required to provide this document to the FWO, but the Ombudsman was bound by the terms of the Deed not to make this methodology public, including by providing it to other Taskforce members. The Ombudsman advised the Taskforce that, as the responsible regulator, it was satisfied that the methodology was sound. The Chair and Deputy Chair of the Taskforce had no way of assessing this claim in the absence of being provided with details of the new methodology.

Wage remediation

7-Eleven reported to the Taskforce that by the time of the closure of its Wage Repayment Program, it (including the Panel) had received 5,348 expressions of interest from potential claimants, and 3,628 claims had been paid amounting to \$160,146,668 'in wages, superannuation and interest'. The average payment, therefore, was \$44,142. While this is a substantial amount, the Taskforce does not have sufficient information to determine how close it comes to fully remediating all affected employees for their underpayments. The Chair and Deputy Chair consider there are a number of reasons for suggesting it may not do so. First, the number of expressions of interest at the end was just over one-half of what had been expected by the Panel. The communications program established by the Panel was closed down when the Panel was terminated and this no doubt affected the number of expressions of interest ultimately received. Second, only two-thirds of the expressions of interest received actually resulted in a determination, no information is available about the other one-third.⁴⁶

Third, the Chair and Deputy Chair consider that the different methodology adopted by 7-Eleven after the termination of the Panel would have resulted in a lower average determination figure than would otherwise have been the case. For example, the company confirmed that it had applied a significantly lower interest rate to historical claims than had the Panel. The Panel had applied rates used by the Federal Court in underpayment cases. 7-Eleven advised the Taskforce that the change to the interest rates it applied to repayments reflected the voluntary nature of the repayment scheme for underpayments by franchisees. It chose to use the Reserve Bank of Australia cash rate, which was 4 to 6 per cent below the Federal Court pre-judgement and post-judgement rates respectively. The Deputy Chair of the Taskforce advised that he was aware that this difference affected one large claim by nearly \$100,000. Further, his view was that whether the wage remediation was voluntary or otherwise should not affect the methodology used for determining the wage remediation amount.

Franchisee compliance

7-Eleven has taken significant steps since the Fairfax Media/Four Corners exposé to ensure its franchisees in future comply with the requirements of the Fair Work Act and minimum wage legislation. It established an Internal Investigations Unit following the emergence of the cash-back arrangements that were used by unscrupulous franchisees to undermine moves to ensure full award payments were made through the 7-Eleven payroll system. 7-Eleven also sought to engage the FWO in its compliance efforts by passing on complaints and details of non-compliance by franchisees to the regulator.

⁴⁶ These figures are post-adjustment for multiple expressions of interest that were incorrectly recorded against the same individuals.

Many of the initiatives taken to identify and deal with non-compliance by franchisees were codified in a Proactive Compliance Deed with the regulator. 7-Eleven has also ceased its involvement with a number of franchisees and taken court action to do so. It has raised with the Taskforce its concerns about the difficulties of taking such actions given the protections given to franchisees under statutory codes covering franchisees in general and in the oil industry in particular.

7-Eleven summarised for the Taskforce the steps it had taken to prevent wage fraud by its franchisees.⁴⁷ These included:

- a multi-million dollar investment in innovative store level technology to centrally record and capture time and attendance records for all employees through biometric (thumbprint) sign-on and sign-off
- centralised payroll and implementing oversight and other monitoring measures to ensure payroll non-compliance is able to be identified more easily
- establishing a hotline so any employee or person can make an enquiry or lodge a complaint about non-compliance with workplace laws
- investing in a significant increase in field level investigation and compliance activity
- creating a sophisticated data analytics, monitoring and reporting platform to further help identify unusual instances or patterns of behaviour
- aggressively investigating and, where required, acting upon any allegations of unlawful franchisee activity, including termination of the Franchise Agreement if current laws permit
- increasing franchisees' profit share and minimum profit guarantees under the Franchise Agreement, positioning 7-Eleven's model as among the most competitive and attractive in the franchise industry.

A number of these measures were included in the Proactive Compliance Deed signed with the FWO (discussed in greater detail below). In addition, under this Deed, 7-Eleven committed to a range of other reforms, including:

- enhancing in-store identification of staff and their hours worked through photographic identification and 7-Eleven owned and operated CCTV systems
- establishing a staff consultative forum with employees from across the franchise network, operated directly by 7-Eleven and excluding franchisees
- review, develop and deliver workplace relations training for all employees, including in the franchise network
- regular communication to all employees regarding their workplace rights, where to find further information, and how to make enquiries or lodge a complaint; external audits assessing compliance with Commonwealth workplace laws and applicable Fair Work instruments, including statistically relevant samples of time and wage records
- regular reporting to the FWO on progress in relation to commitments outlined in the Deed.

7-Eleven indicated that it had terminated Franchise Agreements for reasons of wage fraud. It was successful in recent court action (*Chahal Group Pty Ltd v 7-Eleven*) in the Supreme Court of NSW,

⁴⁷ A McKay, letter to Professor Allan Fels, 22 December 2016.

and on appeal the NSW Court of Appeal, in terminating a franchisee involved in a cash-back scheme. Notwithstanding this, it suggested that the barriers to achieving termination (cost, time and the provisions of the statutory codes) made such actions extremely problematic.

7-Eleven has lobbied for amendments to be made to the Franchising Code of Conduct and Oil Code of Conduct to give franchisors the right to terminate a franchise agreement in cases of serious non-compliance with Commonwealth workplace laws or Fair Work instruments, such as deliberate wage underpayments. 7-Eleven suggests that currently it is necessary to prove under the Codes that underpayment involves fraudulent conduct.

The Australian Competition and Consumer Commission (ACCC) advised the Taskforce that the Codes do not prevent action being taken by franchisors against franchisees who do not comply with their workplace law obligations and that the Codes set out processes for the franchisor to follow if it intends to terminate an agreement (which includes providing notice to the franchisee).

The Franchise Agreement that the company has with its franchisees needs to clearly outline the consequences for franchisees of deliberately underpaying employees. The franchisor can act to terminate an agreement if the necessary warnings and steps provided for under the Codes are taken. Active monitoring by the franchisor can ensure that this occurs in a timely manner. Court action should be seen as a last resort. While there are inevitably significant costs involved, there can also be important precedents established which help to clarify the statutory provisions where it is necessary to do so.

The FWO has also been active in taking action against 7-Eleven franchisees. Eleven legal actions against 7-Eleven franchisees have been commenced since 2009 of which eight successful cases have been reported with penalties in each case in excess of \$100,000. Total penalties are approximately \$1.5 million. Redress for underpaid workers has been obtained in conjunction with these litigations.

The 7-Eleven and FWO Proactive Compliance Deed

The Taskforce's monitoring of 7-Eleven brought into focus the Proactive Compliance Deed which 7-Eleven entered into with the FWO.

The FWO advises that a Compliance Partnership is a collaborative relationship between the regulator and a business who wishes to publicly demonstrate its commitment to creating compliant and productive workplaces. A Compliance Partnership is formalised through a Proactive Compliance Deed that is a document signed by both the FWO and the business, and outlines the steps both parties will take to ensure compliance with workplace laws. The content and level of obligations and requirements in Proactive Compliance Deeds vary depending on the company and its compliance history.

Proactive Compliance Deeds have no legislative basis, but are an initiative of the regulator. They allow the regulator and an employer to work together in a tailored way to ensure correct pay and entitlements.⁴⁸ The FWO has been using Proactive Compliance Deeds extensively in recent years. A list of Compliance Deeds, involving 18 employers, is available on the FWO's website.

⁴⁸ A McKay, letter to Professor Allan Fels, 22 December 2016.

Given the legislative constraints, Proactive Compliance Deeds are voluntary, and must be negotiated between the FWO and the head company. Head companies do not enter into a Proactive Compliance Deed unless they perceive the benefits to be greater than any associated costs. Some of the benefits for 7-Eleven were that it could show that it was dealing with the significant underpayment issues in its supply chain raised by ongoing media exposures, and the demands for accountability from the community. Entering a Proactive Compliance Deed with the FWO also enabled 7-Eleven to be involved in the investigation of complaints relating to its franchisees.

Proactive Compliance Deeds can enhance compliance with wage laws, which may be a significant benefit in many cases. However, such deeds could also give rise to costs for the community. Care needs to be taken that the use of Proactive Compliance Deeds does not replace the use of other appropriate enforcement action. Costs of compliance could also be significant on the employer, depending on what is necessary to satisfy the regulator.

An important issue raised by the 7-Eleven Deed concerned the confidentiality provided to claimants. The Panel had a strict policy of not disclosing the personal details of claimants where they had concerns about the potential for victimisation by franchisees. In line with 7-Eleven's wishes, however, the Deed gave approval for the company's Internal Investigations Unit to disclose to franchisees the names of employees complaining about underpayment in the course of its investigations.⁴⁹ The impact this change may have had on complainants and claims is not known. However, informal feedback to the Chair and Deputy Chair from a number of claimants was that this delayed payments and caused significant concern. The Chair and Deputy Chair have concerns also that this may have discouraged some employees from pursuing their claims.

7-Eleven itself claimed in correspondence to the Taskforce that 'confidentiality of the methodology must be maintained to ensure the ongoing integrity of the WRP (Wage Remediation Program) and IIU (Internal Investigations Unit) claims processes. Releasing the details as to how claims are verified and calculated may risk some applicants trying to 'game' the claims process'.⁵⁰ 7-Eleven's concerns about fraudulent claims were raised with the Panel, considered and found to lack substance. It is, nevertheless, possible that attempts were made by a small number of complainants to make fraudulent claims. Despite this, it is difficult to accept that claimants generally should not be able to obtain full information about the basis on which their claims would be determined.

General policy considerations in relation to Proactive Compliance Deeds

The Taskforce considers, in the absence of more comprehensive legislative enforcement provisions, that Proactive Compliance Deeds have been a useful innovation by the regulator. They allow head companies to publicly acknowledge their role in addressing underpayments going on in their supply chains. They have contributed to the goal of achieving greater compliance with workplace laws, especially where supply chain links enable main suppliers or franchisors to exercise influence on downstream firms. There has been a growing use of this regulatory tool in recent years.

While Proactive Compliance Deeds have been useful, currently the FWO does not have a specific legislative basis for these deeds. The Taskforce considers that the FWO should be supported by

⁴⁹ Clause 7.16 of the Proactive Compliance Deed between the FWO and 7-Eleven.

⁵⁰ A McKay, letter to Professor Allan Fels, 22 December 2016.

having a clear public interest objective specified for this work. Promotion of the private interest of a firm through a Proactive Compliance Deed need not be inconsistent with the public interest, but the possibility of inconsistency cannot be dismissed. Public transparency is the ultimate form of accountability to ensure that the public interest is advanced by a Proactive Compliance Deed.

General assessment

7-Eleven's response to systemic wage exploitation within its network has been unprecedented. More than 3,000 employees have been able to recover a substantial portion of what they were legally entitled to, but had not received. It is unlikely that they would have been able to achieve this outcome by relying on existing mechanisms for obtaining redress, for example those associated with FWO mediation, investigation and litigation in the Courts, including the small claims mechanism.

For many reasons, individual employees are unable or unwilling to access these mechanisms. Class actions, while untested, are a potential means of pursuing claims where there are many people involved, but these inevitably involve significant legal expenses which reduce what can be obtained by those who have been exploited.

In addition, the Courts require a high standard of proof to support an award relating to claimed underpayment of wages. In many cases of genuine underpayment, this proof may be hard to obtain and the cost and difficulty of the process will make it impossible for a person to do so. In seeking redress for individuals by administrative remedies such as enforceable undertakings, compliance notices and mediation, the FWO is not bound to apply the same standards of proof. Timely and cost effective resolution of underpayment may also necessitate elements of judgement. Where underpayment has been shown to have occurred, the regulator should support the employee in obtaining adequate redress.

The 7-Eleven scheme acknowledged at the outset that it would not be realistic to apply the court standard of proof to the determination of claims of underpayment. In many cases payroll and employment records had been falsified or did not exist at all. Personal records may or may not have been kept for some part of the time a person claimed to have been working.

The complexity of the award systems means that a detailed knowledge of claimed employment status and the specific hours and days worked needs to be determined to calculate an underpayment. Other employees may have been able to verify at least in part the employment of another person. Banking records may have supported the claims made by a person. Evidence could be obtained to verify the identity of a claimant etc. These and many other considerations formed part of the detailed investigations undertaken by the Panel and by 7-Eleven.

Ultimately the standard applied by the Panel was what was considered fair in light of the evidence and of all of the circumstances, including 7-Eleven's acknowledgement of what had happened and its desire to 'make good'. The Chair and Deputy Chair consider that 7-Eleven's view of what was fair was ultimately tempered by the size of the payments it had to meet.

The approach was sympathetic to the claimant in that it was easy to access the scheme, people were not necessarily dismissed because their evidence was incomplete, they were assisted to complete time records, and they were not required to perform detailed calculations of amounts owing based

on the complex awards operating at the time of their employment. These are features that need to be considered in the design of other redress mechanisms available to deal with wage exploitation.

The cost of the measures taken by 7-Eleven has been extremely high, likely reflecting the perceived reputational damage it needed to repair. Aside from making good on underpaid wages (including an agreed portion payable to the ATO) and superannuation for employees, the company had to meet the costs of the forensic accountants, its own staff and additional staff added to assist it with investigations, among other things. Senior management and Board members' time have had to be devoted to the issues over a long period of time. In addition, considerable one-off and ongoing costs associated with new systems and processes for ensuring the underlying systemic causes of the problems experienced are fixed have been incurred. The Taskforce has not attempted to estimate the total costs involved, but they have certainly been very substantial. This should be a major deterrent for any company valuing its reputation to fall into a culture of non-compliance with employment and wage laws. Unfortunately, it may also be taken by some as a reason not to emulate the 7-Eleven approach.

Another important lesson is that the cost of redress greatly exceeds the cost of penalties even under the new vulnerable workers legislation. As such, redress obligations can have a powerful deterrent effect. This points to the need for a strong redress mechanism to be part of the enforcement arsenal.

Caltex – an alternative response to underpayment

As indicated earlier in chapter 2, Caltex also recently attracted public attention for its approach to managing workers in its franchisee network; however, its approach contrasted considerably from that adopted by 7-Eleven. Following the publicity around underpayment and non-compliance issues across its franchise network, Caltex commenced audits across its entire franchise network. The audit uncovered significant instances of franchisees in the network underpaying employees.⁵¹

The FWO also commenced an investigation, uncovering non-compliance throughout the Caltex network.⁵²

Following the audits, in instances where Caltex considered that the breaches were incapable of being remedied by the franchisee due to the systemic nature of the underpayments, or following notice from Caltex a franchisee failed to remedy breaches, Caltex terminated the franchise agreement. Caltex has terminated 77 franchise agreements on these grounds.

In May 2017, Caltex announced it was setting up a \$20 million 'assistance fund' to repay underpaid workers engaged by its terminated franchisees. The fund allows franchisee employees to claim wage underpayments for the period from 1 January 2015 to date.⁵³

⁵¹ Caltex Australia, Submission to the Parliamentary Inquiry into the operation and effectiveness of the Franchising Code of Conduct (Submission 63), 2018, p. 2.

⁵² The Fair Work Ombudsman found that out of the 25 Caltex outlets audited, 76 per cent were non-compliant with workplace laws.

⁵³ Caltex Australia, Assistance Fund for Franchisee Employees, media release, Caltex Australia, Sydney, 1 May 2017.

Unlike 7-Eleven, Caltex has not entered into a Proactive Compliance Deed with the FWO. There is little transparency around the nature of Caltex's scheme and the decision-making process it is engaging with in rectifying breaches across its franchise network.

Caltex announced on 27 February 2018 its decision to exit franchising and move to a company-owned and operated retail model, following a two-year review of the business.⁵⁴ The company denies this move is related to the underpayment issues in their network.⁵⁵

New legislation – holding franchisors accountable

The 7-Eleven experience demonstrates, however, that without franchisor ownership of underpayment and non-compliance in their networks, the same redress cannot be guaranteed to other underpaid franchisee employees.

A number of changes have now been implemented through the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (the Protecting Vulnerable Workers Act) to specifically address the treatment of vulnerable workers in franchise operations. The intent of the legislation is to ensure that franchisors and holding companies that exercise significant control over their franchisees and subsidiaries are held responsible where they do not take reasonable steps to try to prevent breaches of workplace laws.

⁵⁴ Caltex Australia, 2017 Full Year Results, media release, Caltex Australia, Sydney, 27 February 2018.

⁵⁵ G Korporaal, 'Caltex queries franchise model as servos go in-house', *The Australian*, 20 April 2018, p. 17.

Chapter 3 – Early initiatives of the Taskforce

Section overview

- Throughout its term, the Taskforce encouraged member agencies to improve and build upon existing measures, as well as develop new initiatives to support the needs of temporary visa holders working in Australia.
- This section includes a summary of the initiatives that were driven and announced by the Taskforce during its operation.

Since its inception in October 2016, the Taskforce has encouraged the development of initiatives and actions that have been taken by member agencies and that have had a direct impact on temporary visa holders working in Australia, including:

- A. an Assurance Protocol to support migrant workers and encourage reporting of workplace issues and reduce the fear of visa cancellation or removal from Australia
- B. a new tool to enable non-English speakers to report potential workplace issues in their own language, without being identified
- C. improved cross agency data sharing, particularly through a Data Analytics Working Group focused on improving the data-sharing and intelligence-gathering capabilities of Taskforce agencies
- D. improved migrant worker engagement and communication, including a Taskforce-sponsored research project about communication preferences of migrant workers.

Part A: New inter-agency Assurance Protocol to support vulnerable migrant workers

Vulnerable migrant workers can be reluctant to contact government agencies for help, fearing negative consequences such as visa cancellation, detention or removal from Australia, or loss of their job.

As a principle, migrant workers need to be able to know where to go, and feel comfortable coming forward, to report concerns around underpayment and exploitation. Where this is shown not be the case, Government needs to consider strategies to deal with this issue. Government needs to look at mechanisms that can be put in place to address these issues where they exist.

In January 2017, the Taskforce announced a new inter-agency Assurance Protocol to support and encourage migrant workers to come forward with their workplace complaints.

Under the Assurance Protocol, the Department of Home Affairs agreed that an individual who has breached the work-related conditions of their temporary visa will generally not have their visa cancelled if they:

- believe they have been exploited at their work
- have reported their circumstances to the FWO

- are actively assisting the FWO in an investigation
- commit to adhere to visa conditions in the future
- there are no other grounds for visa cancellation (such as on national security, character, fraud or health grounds).

For any temporary visa holder who does not have a work entitlement attached to their visa, the Department of Home Affairs will make no commitment other than to consider the case on its merits.

This measured approach sought to balance risks to the integrity of visa programs with protecting exploited migrant workers.

The Assurance Protocol was designed to support and encourage visa holders to ask for help, and provide information about their exploitation. The agreement is considered to have had a positive impact, with the FWO requesting the Department of Home Affairs apply the Assurance Protocol to more than 46 visa holders (as at 31 October 2018) who have reported their circumstances to the FWO and met the requirements of the Assurance Protocol.

Review of the Assurance Protocol

In June and July 2018, the Department of Home Affairs and the FWO undertook a review of the effectiveness of the Assurance Protocol.

The review focused on the 35 visa holders to whom the Department of Home Affairs had applied the Assurance Protocol as at 30 June 2018, and also considered a range of materials including:

- analysis of data held by the FWO in relation to visa holders who have accessed the Assurance Protocol
- telephone interviews with visa holders who have accessed the Assurance Protocol and Fair Work Inspectors who have interacted with these visa holders
- analysis of queries received by the FWO in relation to the operation of the Assurance Protocol
- review of previous activities to communicate the Assurance Protocol to migrant workers
- review of processes for referring and reporting between the Department of Home Affairs and the FWO review of external stakeholders' published views of the Assurance Protocol.

Of the 35 visa holders, almost 60 per cent advised they were on a form of international student visa, and almost 23 per cent advised they were a 457 visa holder. No migrant worker referred under the Assurance Protocol has had their visa cancelled for breaching work-related visa conditions.

The review found that the Assurance Protocol is largely a positive initiative, although the relatively small number of international student and working holiday visa holders accessing the protocol suggests there is scope for more visa holders to be assisted. The Assurance Protocol provides support to encourage migrant workers to report their exploitation, while also hindering the ability of employers to use threats of visa cancellation as a means to exploit workers. However, the FWO and the Department of Home Affairs found a number of opportunities for improvements in the design, practical operation and promotion of the Assurance Protocol.

Improving the Assurance Protocol

The FWO and the Department of Home Affairs found that there is a need for improved clarity on the operation of the Assurance Protocol. To address this, the agencies will:

- update website content to ensure the Assurance Protocol information is simple, easy to understand, and translated into key languages
- develop procedural instructions in regard to how the agencies communicate with visa holders who have sought access to the Assurance Protocol
- undertake a suite of communication activities to increase awareness of the Assurance Protocol among migrant workers, their employers and the community.

In undertaking the review, the FWO and the Department of Home Affairs also found that there are opportunities for working holiday visa holders to be better targeted for the application of the Assurance Protocol. To address this, the FWO and the Department of Home Affairs will tailor communication efforts on the Assurance Protocol specifically to working holiday makers to encourage reporting of exploitation, while maintaining visa integrity and lawful decision-making.

The review also found that the requirement for visa holders to report their circumstances to the FWO and to be actively assisting the FWO in an investigation is unnecessarily limiting access to the Assurance Protocol. The initial intention of the requirement to report to the FWO and to assist in an investigation was to prevent unmeritorious claims from visa holders who were potentially seeking to abuse the visa system. However, the FWO and the Department of Home Affairs found that this requirement also prevents exploited visa holders who are participating in other FWO services, such as mediation or dispute resolution, from accessing the Assurance Protocol. At the same time, the Department of Home Affairs interacts with exploited visa holders during the course of business as usual, including as part of Taskforce Cadena operations, and is well placed to identify workers who meet the criteria for the Assurance Protocol.

To broaden access to the Assurance Protocol, the Department of Home Affairs and the FWO will:

- jointly develop procedural instructions to assist Australian Government officials to identify potential exploitation, promote awareness of the Assurance Protocol among the target audience, and appropriately refer to the FWO individuals who seek access to the Assurance Protocol
- conduct further analysis to consider whether visa holders participating in a broader range of FWO services can access the Assurance Protocol.

These changes should continue to be monitored and further changes should be made if it is found that migrant workers remain reluctant to come forward to the FWO.

Consideration of a firewall

The FWO and the Department of Home Affairs are responsible for separate, but intersecting, parts of the regulatory framework that impact the experiences of migrant workers in Australia. To achieve whole of government outcomes, the FWO and the Department of Home Affairs work collaboratively within the regulatory framework to assist vulnerable workers and to take effective action against those who exploit them. Agencies also work across other forums, networks and inquiries that bring

together key government and non-government organisations to combat exploitation of vulnerable workers.

Interactions between the FWO, the Department of Home Affairs and the Australian Border Force (ABF) may involve sharing information, which in some instances will include referring allegations for joint agency responses and targeting. Some interactions are in relation to, and in accordance with, the Memorandum of Understanding between the agencies. The FWO, Department of Home Affairs and ABF teams have a joint role in monitoring employer compliance with sponsorship obligations and employment conditions for particular visa subclasses. Taskforce Cadena is a joint agency initiative between the Department of Home Affairs, led by the ABF and the FWO. Information sharing in this context may occur in response to operational requirements. Furthermore, when offences are identified by Taskforce Cadena, they may be referred to agencies, including the FWO, for further action.

The Department of Home Affairs and the FWO acknowledge that some stakeholders favour the creation of an information ‘firewall’ between the agencies, to address the reluctance of migrant workers to report exploitation.⁵⁶ The key benefit would be that migrant workers may more willingly report exploitation to the FWO if they know their details would not be shared with the Department of Home Affairs. This approach however may have some costs if it was to hinder joint compliance operations, including Taskforce Cadena, and generally limit the effectiveness of investigations and enforcement.

The FWO and the Department of Home Affairs consider that the Assurance Protocol is an effective way to encourage visa holders to report workplace exploitation. Primarily, this is because the Assurance Protocol provides support to visa holders where they have worked in breach of their visa’s work conditions and an employer or a third party threatens to have their visa cancelled. Threats of this nature are a driver of migrant worker exploitation, which the Assurance Protocol addresses.

Part B: New Anonymous Report tool to assist migrant workers

In 2016, the FWO launched its online Anonymous Report tool, and then expanded the function in July 2017 to be available in 16 languages other than English.⁵⁷ This was supported by a digital and traditional media campaign to raise awareness of the resource among migrant workers.

The tool enables members of the community — workers, consumers, concerned citizens, businesses, anyone — to notify the FWO of potential non-compliance with workplace laws, without identifying themselves. Members of the community from culturally and linguistically diverse (CALD) backgrounds are often new to the Australian labour market, do not have baseline knowledge about workplace rights and entitlements, and experience language and cultural barriers to reporting workplace issues. In addition, some migrant workers may be reluctant to speak with public officials due to concerns about their visa status. The in-language Anonymous Report tool seeks to encourage

⁵⁶ For example, recommendations in the Senate Education and Employment Committee’s report ‘[A National Disgrace: The Exploitation of Temporary Work Visa Holders](#)’ and in the Joint Standing Committee on Foreign Affairs, Defence and Trade’s report ‘[Hidden in Plain Sight](#)’.

⁵⁷ The FWO Anonymous Report tool can be accessed via the [FWO website](#).

and support people from CALD backgrounds to report workplace issues by addressing some of these barriers.

The tool is available in the following languages:

- Simplified Chinese
- Traditional Chinese
- Korean
- Hindi
- Arabic
- French
- German
- Italian
- Japanese
- Spanish
- Vietnamese
- Indonesian
- Filipino
- Portuguese
- Thai
- Nepali

The information collected is analysed for trends and patterns, which in turn generates leads for the FWO's education and compliance areas to review. The FWO treats this intelligence in accordance with its publicly available compliance and enforcement policy.

As at 30 June 2018, the FWO had received 15,138 anonymous reports. Of these reports, 1294 were in languages other than English.

Of all reports received in 2017–18, hospitality was by far the most reported industry, amounting to 37 per cent of all reports. The next highest industries were retail (13 per cent), and building and construction (5 per cent).

Simplified Chinese (22 per cent), Korean (22 per cent), Traditional Chinese (21 per cent) and Japanese (13 per cent) were the languages most used to make in-language reports. Hospitality was the industry most reported on, totalling 39 per cent of all in-language reports. The next highest industries were food manufacturing and processing (14 per cent), and retail (8 per cent).

Used in combination with other operational data and research, anonymous reports have helped the FWO to improve its targeting for compliance activities, allowing the agency to focus on a particular precinct, location, sector or type of conduct where there may be a systemic problem. For example, the FWO relied on intelligence from anonymous reports as part of a hospitality campaign that targeted specific food precincts in Melbourne, Sydney and Brisbane.

The Anonymous Report tool can be accessed on the [FWO website](#).

Part C: Cross agency information sharing

As discussed in previous chapters, there are difficulties detecting, proving and quantifying workplace exploitation as there is no definitive data on the proportion of people (much less visa holders) who are exploited in the workplace.

The ability for government agencies to share information provides an important avenue to help identify potential non-compliance. It could also support successful prosecutions where patterns of non-compliance can be shown. Information sharing also supports agencies' education and

compliance strategies to focus their priorities and direct their resources to those areas where they will have the greatest impact.

Government agencies already share a range of information to help address migrant worker exploitation. For example, the ATO obtains data from other government departments, employers, and financial institutions, and matches this to its clients to risk assess if a client is meeting their tax and super obligations. One of these data sources is from the Department of Home Affairs containing information on visa holders that have spent time in Australia.⁵⁸

Information and intelligence is also shared by certain government agencies to support compliance and enforcement actions for particular purposes, such as Taskforce Cadena and the Phoenix Taskforce.⁵⁹

Taskforce agencies noted that data sharing efforts have been constrained by agency specific legislative restrictions, inhibiting the sharing of data across government and between agencies. Within these constraints, agencies have continued to work to find ways to share and use data more effectively to the extent the law allows.

One example which highlighted the difficulties agencies can experience with the sharing of data concerned the Working Holiday Maker Employer Registration Scheme. This scheme was introduced when new taxation arrangements for working holiday makers were determined in 2016. Employers of working holiday makers had to register with the Commissioner of Taxation in order to withhold tax at the new rate of 15 per cent. The legislation which introduced the scheme⁶⁰ required the Commissioner to report annually on these arrangements and allowed the Commissioner to provide relevant information to the FWO. Another significant aspect of the legislation was that information about the registered employers would be available to the public. However, a later amendment⁶¹ to this legislation changed this so that the information on employers would not be made publicly available and also provided that the Commissioner would only be able to disclose protected information to the FWO for an entity that is actually or reasonably suspected of non-compliance with a taxation law. The amendment to the legislation arose from debate in the Senate where concerns about the impact of the new legislation on privacy issues had been raised.

Through the *A New Tax System (Australian Business Number) Act 1999* government agencies are able to access some information on the register: employer name, employer Australian Business Number (ABN) and the most recent start and finish date of the employer's registration. However, there is a strong public interest in working holiday makers also being able to access directly information on potential employers to help them establish what sort of reputation they may have. The amendment to the legislation prevented the development of market-based information services of this kind by interested persons.

⁵⁸Australian Taxation Office, 'Home Affairs visa holders 2017–18 to 2019–20 FY', ATO, Canberra, 2017.

⁵⁹ The Phoenix Taskforce brings together 34 Commonwealth, state and territory government agencies to identify, manage and monitor suspected illegal phoenix operators and take action against illegal phoenix behaviour.

⁶⁰ Treasury Laws Amendment (Holiday Maker Reform) Act 2016.

⁶¹ Treasury Laws Amendment (Working Holiday Maker Employer Register) Act 2017.

The Chair and Deputy Chair of the Taskforce question the validity of the privacy arguments used to support the amendment to the legislation and suggest that at an appropriate time this matter be reconsidered by the Parliament.

Cross agency data analytics working group

The Taskforce considered a number of options for increased data sharing between agencies in Australia to better support policy development, education and awareness activities and to inform compliance strategies. The Taskforce particularly considered opportunities for better use of data analytics to target communications and compliance strategies.

In March 2018, the Taskforce agreed to establish a cross agency Migrant Worker Data and Analytics Working Group, led by the ATO. The aim of the working group is to improve targeted communication and compliance activities for migrant workers. Membership of the Migrant Worker Data and Analytics Working Group comprises the Department of Jobs and Small Business, the Department of Home Affairs and the FWO.

The working group focused on three key areas:

- improving the operational ability of Taskforce agencies to discover, access and use each other's data and intelligence, both jointly and for specific agency purposes
- identifying early opportunities to share and exploit existing de-identified data and intelligence
- developing an agreeable pathway through legal and other considerations affecting the sharing of identifiable data.

The working group undertook a range of activities focused on improving the discoverability of data held across agencies, and how data and intelligence held by agencies can be improved and implemented in acceptable ways to advance the use of data and intelligence across member agencies.

Part D: Migrant worker engagement and communication

On commencement of the Taskforce, agencies undertook a stocktake of existing communications strategies across government to inform workers, including visa holders with a work right, about their work rights and obligations.

From this stocktake, it became clear that government agencies are investing a great deal in disseminating information about workplace laws and conditions. This includes website content, information included in the visa grant letter, fact sheets, social media, innovative digital solutions including the VEVO system and myVEVO app⁶², paid advertising and direct community engagement efforts. The FWO, in particular, has focused on addressing migrants' vulnerability due to lack of English language proficiency through the design of in-language digital solutions.

⁶² Visa Entitlement Verification Online (VEVO) is a system run by the Department of Home Affairs that allows visa holders, employers, education providers and other organisations to check visa conditions. The system can be accessed via a smartphone app called myVEVO.

However, the stocktake also demonstrated that agencies often take a siloed approach to their communications work, and that there is an overall lack of a cohesive messaging and delivery strategies being used across federal government agencies. The stocktake further highlighted that Taskforce agencies could benefit from greater insight into how useful migrant workers found the formats and messages and whether they could be improved. The Taskforce asked the Department of Jobs and Small Business and the FWO to conduct research into the information needs of migrant workers which could inform future whole of government communication strategies with migrant workers.

The scope of the research project

The central questions the Taskforce commissioned research was asked to investigate were:

- the extent to which migrant workers are aware of where they can go to get help with workplace matters consistent with Australian law
- which channels and formats best suit migrant workers in Australia and what types of content they need most
- migrant workers' feedback on existing communications materials provided by government agencies.

The research sought to provide an evidence base to direct improvements to the Taskforce agencies' communications products, with the goal of giving migrant workers the information and knowledge to protect themselves from potential exploitation in the workplace.

The research consisted of an online survey that received 2010 responses, as well as three forms of qualitative research: eight-person focus groups, one-on-one in-depth interviews, and five-person group evaluations of existing government communications materials. The researchers also conducted a workshop with staff of relevant government agencies, and interviewed representatives of key employee, employer, education and community stakeholders. There were four groups of visa holders in scope for the research: international students, working holiday makers, temporary graduate visa holders, and 457 visa holders.⁶³ These are the four key groups of people in Australia on temporary visas with the right to engage in paid work (excluding New Zealanders who have access to the Special Category Visa).

The survey, and all forms of the qualitative research, were conducted in 11 languages as well as English. These languages were selected based on data on source jurisdictions for immigration, and the incidence of complaints made to the FWO. The full research report and findings are attached to this report at Appendix D.

Key findings from the research

Many migrant workers do not have a good knowledge of workplace rights in Australia

The research found that migrant workers' knowledge of their workplace rights is low. Almost 80 per cent of respondents in the survey did not receive or recall receiving information on workplace rights before coming to Australia. For those who did receive or recall receiving information, the

⁶³ At the time the research fieldwork was conducted, the TSS visa had not yet commenced.

information related to how many hours per fortnight they could work on their visa, how to get a tax file number and how to find work, rather than workplace protections.

The research also found that some migrant workers considered Australian workplace laws and conditions to be similar, if not better than their home country. They therefore did not feel a need to find out information about Australian workplace laws and conditions. Some participants said they would not seek out information because they felt that work opportunities were rare and were worried about losing their job if they asked too many questions.

Before their arrival in Australia, migrant workers are relatively unreceptive to detailed information about workplace laws and conditions.

Migrant workers indicated that before coming to Australia, they were more concerned with the practicalities of arrival in Australia. These included study arrangements, finding accommodation, exchange rates or the conditions of their visa. They were not concerned at that stage about reading information about workplace laws and conditions.

After arrival in Australia, migrant workers are somewhat more receptive to workplace rights information

After arrival in Australia, the proportion of migrant workers seeking information about their workplace rights increased: 32 per cent of survey respondents indicated that they had sought information about pay after arriving in Australia, compared with 21 per cent who received/remembered receiving workplace information before arrival in Australia. This is likely because they were starting to look for or find work. At this stage, migrant workers usually apply for a tax file number. This is a useful touchpoint for the ATO to provide relevant information to visa holders about workplace laws and conditions.

For those who did not seek out information about workplace laws and conditions, they generally either felt there was no need (35 per cent), or had a belief that their employer was doing the right thing (21 per cent). Of concern, 15 per cent did not do so because they were fearful they would get into trouble, while an additional 10 per cent did not want to get their employer into trouble. This was also reflected in the qualitative research, where a number of participants said they were fearful of losing their job, getting fewer hours or causing cultural offence.

Government agencies' efforts to contact visa holders directly after arrival can be complicated by a lack of up-to-date contact information. For example, when visa applicants use migration agents to help lodge their applications, the Department of Home Affairs may have the agent's contact information rather than the applicant's. Many migrant workers also obtain a new mobile phone number upon arrival in Australia, with contact information obtained through the visa application or educational application processes often reflecting migrant's contact details prior to their arrival in Australia.

With personal email addresses and up-to-date mobile phone numbers, government can provide more timely and well-targeted information, increasing the likelihood that the recipients will engage with the information.

The timing of communications about workplace rights is important

Together, the information above indicates the timing of communication about workplace rights is important. The survey results indicated that 26 per cent of respondents believed that the best time to receive information about workplace laws and conditions was when looking for or applying for jobs. This was followed by when they started a job (17 per cent), when the visa is granted (16 per cent) and when arriving in Australia (12 per cent).

Employers, family and friends, and educational institutions are important sources of information on workplace rights

The main source of information for migrant workers comes from family and friends in Australia and social media sites in English and other languages. Education providers are also an important source of information about workplace laws and conditions — 20 per cent of survey respondents indicated they had sought out information from their education provider.

Employers also have a major role to play. The quantitative data indicated that 16 per cent of respondents had selected 'my employer' as the source of information about Australian workplace laws and conditions (apart from information on pay).

Migrant workers' misconceptions influence whether, and how, they engage with workplace rights information and government agencies

Migrant workers' experiences in Australian workplaces can sometimes reinforce common misconceptions about the rights of migrant workers in Australia. The most prevalent misconception is that Australian workplace laws and conditions do not cover migrant workers. As a result, many migrant workers do not seek out information from official sources, as they believe that the information does not apply to them.

There can also be a language barrier if the material is presented only in English: the research found that while those with better (self-rated) English proficiency were no more likely to seek information than those with poorer English, they were significantly more likely to seek this information from government sources. A number of participants with poorer English proficiency said they would not seek information or assistance from government agencies because they thought they would have to interact in English. This underlines the importance of providing easily accessible in-language content, and promoting its availability.

Employers' knowledge of workplace rights also affect employees' access and knowledge

Stakeholder consultations were undertaken with various peak bodies for industries with a high concentration of migrant workers. Stakeholder feedback was that there were both employees and employers who did not always understand Australian workplace laws and conditions. This is the case particularly for employers who do not speak English as a first language and small businesses who do not have HR expertise. Therefore, relevant agencies should work with stakeholders to ensure that both employers and employees understand their rights and obligations under the Fair Work Act.

Government communications materials, and efforts to disseminate them, can be improved

A major finding of this research is that although respondents found the current in-language information easy to understand and helpful, it was clear that it needed to be promoted more widely. Suggestions from the qualitative component included advertisements daily on radio, YouTube videos

and in-language and in-English social media, specifically community social media groups rather than official government sites.

Awareness of the myVEVO app (which enables visa holders and other authorised individuals to check visa details and conditions) was low, and feedback after using the app was mixed with some participants suggesting the app could be expanded to include more detailed information on workplace laws and conditions.

The FWO's in-language information and resources were considered high quality, but migrant workers suggested that more could be done to promote the products and resources and the fact that in-language tools, information and assistance are available.

Recommendation 2

It is recommended that a whole of government approach to the information and education needs of migrant workers be developed. It is recommended that this approach be informed by findings of the research project, The Information Needs of Vulnerable Temporary Migrant Workers about Workplace Laws, with implementation of the following measures:

- a) improve the delivery and accessibility of personalised, relevant information to provide the right messages at the right time to migrant workers
- b) use behavioural approaches to encourage and advise migrant workers how to take action if they are not being paid correctly
- c) enhance the promotion of products and services already available from government agencies — particularly in-language information — through search engine optimisation, expanded use of social media channels, and cross-promotion of Fair Work Ombudsman material by other agencies
- d) improve messaging in government information products so they are translated, simple, clear and consistent
- e) work with industry and community stakeholders to educate employers and address misconceptions about the rights and entitlements of migrant workers in Australian workplaces.

Chapter 4 – Government measures to support migrant workers

Section overview

- Programs and compliance activities undertaken by government agencies can also have a significant impact on the experience of temporary visa holders in Australia, from the visa application stage, throughout their stay in Australia, and in some instances, after their departure.
- Since the commencement of the Taskforce, member agencies have introduced new initiatives, programs and progressed legislative change, building on existing policies and programs to protect and assist migrant workers. These measures are outlined below.

Australia's regulatory framework

A number of Commonwealth agencies have responsibilities that extend to migrant workers.

Government policy and legislation aims to protect the integrity of the visa system, be responsive to the changing demands of the labour market and Australian job seekers, measure the impact of migrants on the Australian economy, adhere to relevant international protocols and ensure the fair treatment of visa holders living and working in Australia.

The Taskforce includes Australian Government agencies with policy and administrative responsibility for a range of legislation related to migrant workers, outlined in the table below.

Figure 4.1 – List of Migrant Workers' Taskforce agencies and legislation administered

Agency	Legislation administered
Department of Home Affairs	<ul style="list-style-type: none"> • <i>Migration Act 1958</i>
Australian Border Force	<ul style="list-style-type: none"> • <i>Migration Act 1958</i> • <i>Australian Border Force Act 2015</i>
Department of Jobs and Small Business	<ul style="list-style-type: none"> • <i>Fair Work Act 2009</i> • <i>Fair Entitlements Guarantee Act 2012</i> • <i>Work Health and Safety Act 2011</i>
Fair Work Ombudsman	<ul style="list-style-type: none"> • <i>Fair Work Act 2009</i>
Attorney-General's Department	<ul style="list-style-type: none"> • <i>Criminal Code, Divisions 270 and 271</i>
Department of Education and Training	<ul style="list-style-type: none"> • <i>Education Services for Overseas Students Act 2000</i>
Australian Taxation Office	<ul style="list-style-type: none"> • <i>Tax Administration Act 1953</i> • <i>Superannuation Guarantee (Administration) Act 1992</i> • <i>A New Tax System (Australian Business Number) Act 1999</i>
Australian Competition and Consumer Commission	<ul style="list-style-type: none"> • <i>Competition and Consumer Act 2010</i> (which provides for the Franchising Code of Conduct).
Australian Securities and Investment Commission	<ul style="list-style-type: none"> • <i>Corporations Act 2001</i>

Since the commencement of the Taskforce, member agencies have introduced new initiatives and progressed legislative change, building on existing policies and programs to protect and assist migrant workers, including:

- A. workplace relations protections
- B. compliance and enforcement tools for managing Australia's migration program
- C. communication activities to promote workplace rights and available assistance to migrant workers
- D. legislative framework for international students
- E. complementary government actions to support vulnerable workers.

Part A: Workplace relations protections

The Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Protecting Vulnerable Workers Act) came into effect on 15 September 2017, with certain amendments (relating to

franchisors and holding companies) commencing on 27 October 2017. The Chair and Deputy Chair of the Taskforce provided direct policy input to the development of the legislation in 2017.

These legislative changes gave effect to a key element of the Government's Policy to Protect Vulnerable Workers. The Protecting Vulnerable Workers Act strengthened protections in the Fair Work Act for vulnerable workers by:

- increasing penalties for breaches of record-keeping and pay slip obligations and introducing a new category of 'serious contraventions' (with penalties 10 times higher) for deliberate and systematic breaches of specified laws
- providing stronger provisions to make franchisors and holding companies responsible for breaches of the Fair Work Act by their franchisees and subsidiaries in certain circumstances
- expressly prohibiting employers from unreasonably requiring employees to make payments (i.e. 'cash-back' arrangements)
- strengthening the evidence gathering powers of the FWO.

Increased penalties for employers

The Protecting Vulnerable Workers Act amended the Fair Work Act to increase existing penalties for record-keeping failures and introduced a new category of 'serious contraventions' with significantly higher penalties for breaches of specified workplace laws. A 'serious contravention' happens when:

- the person or business knew they were contravening an obligation under workplace law
- the contravention was part of a systematic pattern of conduct affecting one or more people

These penalties are 10 times higher than previously applied.

Increasing penalties for record-keeping failures acknowledges the important role employment records and pay slips play in proving and recovering underpayments for employees, and deterring would-be wrongdoers.

In addition, where an employer does not meet record-keeping or pay slip obligations, and does not have a reasonable excuse, the employer will need to disprove allegations made in court that they did not pay the employee correctly or give the right entitlements.

Franchisor and holding company liability

The Protecting Vulnerable Workers Act introduced provisions whereby franchisors and holding companies can be held liable in situations where their franchisees or subsidiaries have breached certain provisions of the Fair Work Act. These provisions apply to franchisors and holding companies who knew (or could reasonably be expected to have known) that a contravention by the franchisee or subsidiary would occur. For franchisors, they must also have a significant degree of influence or control over the business affairs of the franchisee. Both franchisors and holding companies will not be liable if they can show that they took reasonable steps to prevent the contraventions.

A franchisor or holding company that is required to rectify underpayments by a franchisee or subsidiary due to the operation of these provisions will be able to commence proceedings to recover any amounts paid from the franchisee or subsidiary, ensuring that the direct employer continues to be liable for the breach.

Stamping out 'cash-back' arrangements

The Protecting Vulnerable Workers Act also clarifies the law in relation to 'cash-back' arrangements. This practice was highlighted when the widespread exploitation by 7-Eleven franchisees was uncovered. A typical 'cash-back' arrangement occurs where employees are paid the lawful rate but are then forced to hand back part of their wages in cash to the employer or a third party. In the most severe cases, employers have threatened to revoke migrant workers' visas and have them removed from Australia if they did not make the payment. 'Cash-back' arrangements facilitate underpayments while appearing to comply with workplace laws, making it very difficult to prove the underpayment has occurred. The Protecting Vulnerable Workers Act clarifies the law around 'cash-back' arrangements by expressly prohibiting an employer from unreasonably requiring employees to make payments.

Strengthening FWO investigation powers

Finally, the Protecting Vulnerable Workers Act significantly strengthened the evidence-gathering powers of the FWO to ensure that the exploitation of vulnerable workers can be effectively investigated, particularly where there are no employee records or other relevant documents, or where records have been deliberately falsified to disguise the underpayments.

The new powers enable the FWO to apply to the Administrative Appeals Tribunal for a 'FWO Notice' to compel a person to provide information, documents or attend an examination to answer questions, particularly where no relevant documents appear to be available and an investigation has stalled. In addition, there is a new offence of hindering or obstructing a Fair Work Inspector, and increased penalties for providing false or misleading information to the FWO.

Implementing the Protecting Vulnerable Workers Act

Since the Protecting Vulnerable Workers Act came into effect, the FWO has applied for and issued a number of FWO Notices to obtain information to help in investigations, and has undertaken a number of activities to support employer compliance with new legislative provisions, including:

- publishing information and resources on its website aimed at assisting workplace participants to understand and comply with their obligations
- launching a new Record Keeping and Pay Slip Online Learning Course to educate employers and make record-keeping practical and easy
- hosting a roundtable with key franchise sector stakeholders to discuss how the new laws affect franchisors, and published new information on their website
- considering how, and to whom, it will apply the new franchising and serious contravention provisions.

In addition, the FWO has commenced its first legal action involving the new provisions that prohibit a person from providing false or misleading information or documents to a Fair Work Inspector. The matter involves a former Crust Gourmet Pizza Bar franchisee in Melbourne. The FWO is alleging it underpaid seven employees, some on student visas, a total of \$35,725 and that the employer provided Fair Work Inspectors with false and misleading records that showed employees had been paid higher rates than was actually the case. The allegations concern the employer's production of records to a Fair Work Inspector where those records did not accord with information separately obtained from a third party IT company used by the employer to record business information

(including the clock-on and off times of its employees). The alleged false employer records attempted to inflate the hourly rate actually paid.⁶⁴

In January 2019, the FWO also commenced its first legal action utilising new reverse onus of proof laws that require employers to disprove underpayment allegations in court when they have failed to keep adequate time and wages records or issue pay slips. The FWO alleges that the owner of two 'Sushi 79' fast food outlets failed to keep proper time and wage records, issue payslips and that workers were underpaid minimum ordinary hourly rates, weekend penalty rates and overtime rates. The workers were all South Korean nationals, aged in their 20s and early 30s, who were in Australia on working holiday, student and vocational education visas.

Measuring the impact of legislative changes

The amendments contained in the Protecting Vulnerable Workers Act apply prospectively (i.e. to breaches that occur after the commencement of the amendments on 15 September 2017 (and 27 October 2017 in relation to the provisions relating to franchisors and holding companies). It may take some time to see the full impact of the amendments.

FWO supporting migrant workers in Australian workplaces

The FWO was established by the Fair Work Act to promote harmonious, productive and cooperative workplace relations and ensure compliance with Australian workplace laws. The FWO serves more than 12 million workers in more than 2.2 million workplaces.

The FWO's services are available to all individuals who are employed in an Australian workplace — including temporary visa holders.

The FWO provides information and education on work rights and obligations, assists people to resolve workplace disputes, investigates suspected contraventions and undertakes litigation and other actions to enforce workplace laws. The FWO also monitors certain skilled visa arrangements (e.g. the relatively new TSS visa, which includes strengthened integrity measures to the subclass 457 it replaced, and the legacy cohort of visa subclass 457 holders).

In 2017–18, the FWO recovered over \$29.6 million in unpaid wages for more than 13,000 workers through requests for assistance involving a workplace dispute and FWO-initiated activities. Of the 28,275 requests for assistance the FWO handled involving a workplace dispute:

- 96 per cent (27,074) were resolved through education and dispute resolution activities in an average of seven days, with more than \$20.8 million recovered
- 4 per cent (1,201) were resolved through compliance activities in an average of 167 days, with more than \$2.7 million recovered.

Small claims jurisdiction

Where disputes are not able to be settled through early intervention or mediation, the FWO may assist workers to take action using the small claims procedure in the Fair Work Act.

⁶⁴ Fair Work Ombudsman, FWO takes Crust pizza franchise to Court, media release, FWO, Melbourne, 4 October 2018.

The small claims procedure was established to deal specifically with underpayments of \$20,000 or under, with less formal procedural rules to enable the courts to deal with monetary claims more efficiently and expeditiously than regular court proceedings. The process should be straightforward enough to encourage underpaid employees to bring their own claims, without lawyers or other legal assistance.

In some states, the FWO provides a dedicated small claims service tailored to meet the needs of individual workers, assisting parties to navigate through the court procedure. The FWO also makes itself available as a friend of the court to assist the court on points of law and the application of industrial instruments.

Starting proceedings in the small claims jurisdiction can provide employers with a powerful incentive to negotiate settlement to avoid litigation and its associated costs and inconvenience. In 2017–18, the FWO assisted over 800 people through the small claims assistance process. The majority of cases were resolved through agreement or confidential settlements, with less than a quarter (198) of cases resulting in court orders.

The Taskforce has examined further opportunities to make this process quicker and easier for migrant workers (see chapter 5).

FWO compliance and enforcement tools

The FWO uses a range of enforcement tools where it sees deliberate or repeated exploitation of highly vulnerable workers by operators, and when other forms of resolution are not appropriate to resolve the matter. These tools include:

- **Compliance notices:** which formally require a person to do certain things to fix alleged entitlement-based breaches of the Fair Work Act. Notices are usually issued where an employer has not agreed to, or is unlikely to, rectify the matter.
In 2017–18, FWO recovered more than \$950,000 in unpaid wages through 220 compliance notices.
- **Enforceable undertakings:** legally binding arrangements in which an employer agrees to address contraventions and prevent future breaches. This is often through back-payment, training sessions for managers and independent wage audits. Non-compliance with an enforceable undertaking can result in court action to enforce its terms.
In 2017–18, FWO used enforceable undertakings seven times, recovering over \$2.1 million in back-payments.
- **Infringement notices:** on-the-spot penalties for record-keeping or pay slip contraventions. In the first instance, the FWO provides those who made errors with the correct advice and requires them to implement compliant record-keeping practices.
In 2017–18, FWO issued 615 infringement notices for a total amount of \$397,341.
- **Court action:** In the most serious instances of non-compliance (such as the deliberate exploitation of vulnerable workers, refusal of an employer to cooperate with the FWO or a significant history of non-compliance) the FWO takes cases to court to enforce the law or seek a penalty. Where the FWO takes proceedings for a civil remedy, it can also seek ancillary court orders.

In 2017–18, FWO initiated 35 litigations and achieved over \$7.2 million court-ordered penalties (\$5.8 million against companies and \$1.4 million against individuals). This is the highest amount of penalties FWO has ever secured in a financial year (a 46 per cent increase from the previous highest amount of \$4.9 million in 2016–17).

Guidance on the exercise of FWO’s powers and enforcement tools is set out in its Compliance and Enforcement Policy.⁶⁵ Inspectors apply these tools after an investigation that gathers and examines evidence and makes findings supported by the availability of the evidence to quantify underpayments or, where that is not possible, deploys tools for record keeping failings.

Investigations that lead to these outcomes are more resource intensive, taking on average 136 days to resolve. Matters that are taken to court take on average 1,712 days to resolve.

The purpose of applying these tools is to recover underpayments and deter the employer from future contraventions, but also to convey strong messages to the community that there are consequences for breaches of work laws.

Representation of visa holders in FWO enforcement matters

From July 2011 until December 2018, the FWO dealt with over 14,000 requests for assistance from visa holders and recovered over \$13 million in outstanding wages and entitlements for these workers.

In 2017–18, visa holders were represented in:

- 22 (63 per cent) of the court cases initiated by the FWO
- 100 (16 per cent) of the infringement notices issued by the FWO
- 32 (15 per cent) of the compliance notices issued by the FWO
- 5 (71 per cent) of the enforceable undertakings entered into with the FWO.

FWO-initiated activities

The FWO uses intelligence gathering and analysis to inform the direction of its activities to better understand the reasons for systemic non-compliance with workplace laws and to tackle worker exploitation. This work has led the agency to focus on businesses, industries, regions, supply chains and labour markets where there is a high proportion of migrant workers.

Strengthened engagement with government, academia, industry and community sector

The FWO also works with a broad range of stakeholders to understand and find solutions to workplace issues. Its stakeholder and community engagement activities have sought to extend the channels through which information and support is delivered to migrant workers and their employers, impede the drivers of exploitation and remove barriers to migrant workers coming forward. These initiatives include:

- partnering with academics from the University of Adelaide to conduct research and build intelligence about the experience of international students in Australian workplaces
- the FWO International Student Engagement Strategy

⁶⁵ [FWO Compliance and Enforcement Policy](#).

- engaging with the Korean community, including Korean business leaders, media and the Consulate General, to develop a tailored strategy to educate this community about workplace rights and responsibilities
- administering the Community Engagement Grants Program which funds community organisations to deliver services, projects and programs of work which are targeted at assisting vulnerable workers
- engaging with a wide range of intermediaries that deal with migrant workers (for example, community legal centres, jobactive networks, migrant centres and libraries) and encouraging these groups to share FWO resources through their networks and to provide the agency with intelligence.

Seasonal Worker Programme

The Seasonal Worker Programme (SWP) is a key part of Australia’s economic aid commitment to the Pacific region and Timor-Leste and contributes to the economic development of participating countries through employment experience, skills transfer and earnings to families and communities. A 2017 World Bank Report found that since 2012, the earnings of workers under the SWP have delivered approximately AUD\$144 million in net income gains for the region, directly contributing to their economic growth.⁶⁶

The World Bank also found that SWP participants reported a high level of satisfaction with their experience in Australia, with 91 per cent saying they would recommend it to others in their village.⁶⁷ Furthermore, 91 per cent felt that they had learned skills that would improve their employment prospects upon returning home.⁶⁸ Female participants highlighted positive changes from participating — gaining new skills and knowledge, including increased levels of financial literacy, English language proficiency, leadership and entrepreneurial skills.⁶⁹

The SWP also assists Australian employers, primarily in the agriculture sector, by allowing them to employ workers on a temporary basis during peak seasons where there are not enough Australian workers. Since 1 July 2012, over 28,000 visas have been granted to seasonal workers, including 8,459 for the period 1 July 2017 to 30 June 2018.

Workers on the SWP have the same rights as Australian workers. They are entitled to the same pay, safety at work and superannuation contributions. In addition, the SWP has strong safeguards against mistreatment. This includes a detailed vetting process for employers, including undertaking workplace relations and immigration compliance checks with the FWO and the Department of Home Affairs respectively, before being approved to recruit workers. The Department of Jobs and Small Business has a monitoring and compliance framework in place to assure the integrity of the program. The SWP has been subject to a small number of media allegations of exploitation — all

⁶⁶ JG Doyle & M Sharma, *Maximizing the Development Impacts from Temporary Migration: Recommendations for Australia’s Seasonal Worker Programme*, World Bank, Washington DC, 2017, p. 66.

⁶⁷ JG Doyle & M Sharma, *Maximizing the Development Impacts from Temporary Migration: Recommendations for Australia’s Seasonal Worker Programme*, World Bank, Washington DC, 2017, p. 44.

⁶⁸ JG Doyle & M Sharma, *Maximizing the Development Impacts from Temporary Migration: Recommendations for Australia’s Seasonal Worker Programme*, World Bank, Washington DC, 2017, p. 41.

⁶⁹ P Chatter, A Utz, M Sharma & JG Doyle, *The Social Impacts of Seasonal Migration: Lessons from Australia’s Seasonal Worker Programme for Pacific Islanders*, World Bank, Washington DC, 2018, p. ix.

allegations of mistreatment are thoroughly investigated by the Department of Jobs and Small Business and if appropriate referred to the relevant regulator. The Department has the power to remove or suspend employers from the program if they do not meet their obligations to workers.

Part B: Home Affairs' compliance and enforcement tools

The Department of Home Affairs is responsible for developing and managing Australia's migration program, including a range of temporary and permanent visa programs that support Australia's economic needs. The Home Affairs portfolio deploys an end-to-end approach to deterring, detecting and responding to migrant worker exploitation. This includes responsibility for:

- policy settings that inform visa decision making
- communications targeted at both workers and employers
- monitoring of sponsors/employers
- enforcement, such as applying a range of sanctions to employers and labour suppliers under the Migration Act.

There are no existing powers under the Migration Act to take action against employers who are exploiting non-sponsored migrant workers (such as international students or working holiday makers) who are legally able to work, and are meeting their visa requirements. Nor is there currently authority to sanction employers who extract additional benefits from non-sponsored migrant workers, such as a one-off lump sum payment, wage deductions or free labour.

Applying sanctions to employers of non-sponsored migrant workers is not a course of action available to the Home Affairs portfolio as there is no legal 'link' between the unsponsored migrant worker and the employer to bring the employer within coverage of the Migration Act.

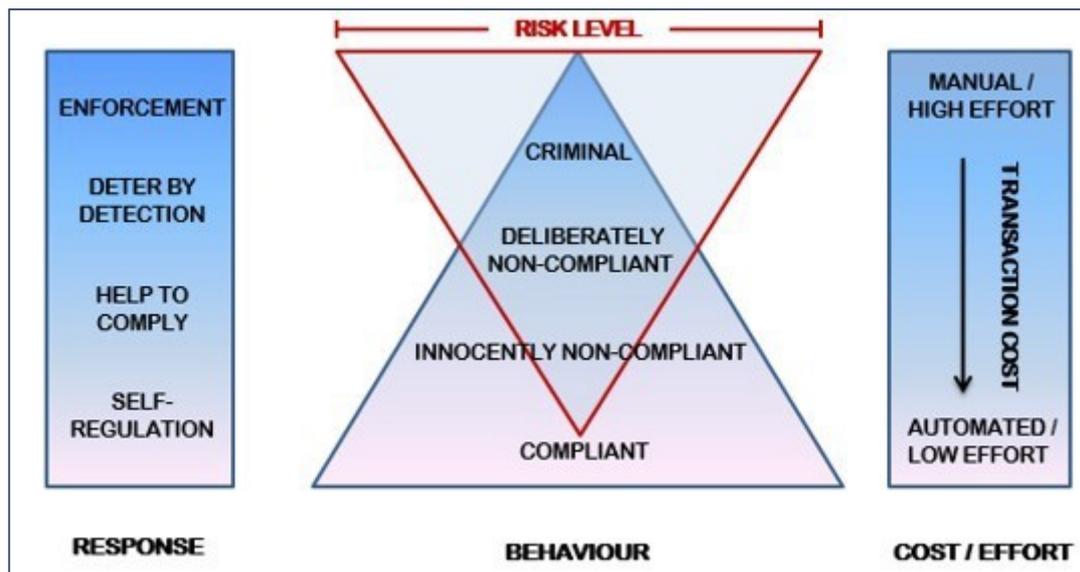
Legislative provisions to address migrant worker exploitation under the *Migration Act 1958*

The Migration Act includes a number of employer sanction provisions that have been developed to deter and respond to illegal work. The provisions allow for a range of penalties to be applied to non-compliant employers and labour suppliers who allow illegal work, or refer a person for illegal work. Illegal work includes unlawful non-citizens working and lawful non-citizens working in breach of conditions attached to their visas. Employers must take reasonable steps to ensure that they are not allowing illegal work, or referring a person for illegal work.

Compliance framework of the Migration Act

The Department of Home Affairs and the ABF Compliance Framework is designed to foster a high level of voluntary compliance, supported by tiered, risk-based responses to non-compliance.

Figure 4.2 – Home Affairs compliance framework



As shown in the diagram above, the Department of Home Affairs and ABF responses to non-compliance are differentiated and incrementally applied in accordance with the level of risk posed to the Australian community or the integrity of departmental programs. Where the levels of risk are greatest and actions are criminal in nature, an enforcement response is likely to be required. Compliance activities and responses initially focus on providing guidance, education and information to enable employers to make informed decisions on who to employ and to self-regulate. The ABF applies a tiered framework of compliance and enforcement tools according to the frequency and seriousness of breaches, including:

- administrative penalties (such as illegal worker warning notices intended to warn businesses of the consequences of continued breaches)
- infringement notices
- civil penalties
- criminal penalties.

The relevant provisions in the Migration Act that address migrant worker exploitation are set out below.

Figure 4.3 – Legislative provisions to address migrant workers exploitation (Migration Act 1958)

Offences		Maximum penalties			
		Criminal	Civil	Infringement	Admin
Employer sanctions*	s245AB—Allowing an unlawful non-citizen to work	<u>Individual employers:</u> \$25,200 (120 penalty units) and/or 2 years imprisonment <u>Bodies corporate:</u> \$126,000 (600 penalty units)	<u>Individual employers:</u> \$18,900 (90 penalty units) <u>Bodies corporate:</u> \$94,500 (450 penalty units)	<u>Individual employers:</u> \$3,780 (18 penalty units) <u>Bodies corporate:</u> \$18,900 (90 penalty units)	Illegal worker warning notice (IWWN)
	s245AC—Allowing a lawful non-citizen to work in breach of a work condition				
	s245AE—Referring an unlawful non-citizen for work				
	s245AEA—Referring a lawful non-citizen for work in breach of a work-related condition				
	s245AD—Aggravated offences if a person allows, or continues to allow, another person to work (and the person is being exploited)	<u>Individual employers:</u> \$63,000 (300 penalty units) and/or 5 years imprisonment <u>Bodies corporate:</u> \$315,000 (1500 penalty units)	—	—	
	s245AEB—Aggravated offences if a person refers another person to a 3rd person for work (and the person will be exploited in that work)				
Paying for visa sponsorship	s245AR—Asking for or receiving a benefit in return for the occurrence of a sponsorship related event	Individuals: 2 years imprisonment and/or \$75,600 Bodies corporate: \$378,000	Individuals: \$50,400 Bodies corporate: \$252,000	Individuals: \$10,080 Bodies corporate: \$50,400	Visa cancellation if offender holds a visa or sponsorship cancellation/barring for the sponsor
	s245AS—Offering to provide or providing a benefit in return for the occurrence of a sponsorship related event	—			

Offences		Maximum penalties			
		Criminal	Civil	Infringement	Admin
Sponsorship Obligations*	s140K—Sanctions for failing to satisfy sponsorship obligations (Sponsors only)	—	Individuals: \$12,600 Bodies corporate: \$63,000	Individuals [^] : \$2,520 Bodies corporate [^] : \$12,600 [^] excl. r2.78 & r2.85	Barring (up to 5 years) or cancelling the sponsorship

One Commonwealth penalty unit = \$210 (this increased from \$180 on 1 July 2017).

In the period 2017–2018, with the strong encouragement of the Taskforce, the ABF has increased its focus on non-compliant sponsors and employers. Employer sanctions and enforcement activities and outcomes in this period included:

- 1230 employer awareness activities
- 2389 illegal workers located
- 310 illegal worker warning notices issued to employers
- 19 infringement notices issued, totalling \$214,920 (most of which have been paid, or are being paid via approved payment plans)
- 2 briefs of evidence accepted by the Commonwealth Director of Public Prosecutions.

Employer sponsors

The Migration Act also includes specific provisions that apply only to employers who are approved sponsors under the skilled migration program (existing subclass 457 visas and the new TSS visas) and other temporary activity visas. Approved subclass 457 and TSS visa sponsors are required to meet a number of obligations including:

- ensuring equivalent terms and conditions of employment
- cooperating with inspectors
- keeping records and producing records and information as required
- ensuring the primary sponsored person works or participated in the nominated occupation
- payment at the time of nomination to the Skilling Australians Fund levy (TSS visa)
- not engaging in discriminatory recruitment practices.

The Department of Home Affairs has a number of compliance and enforcement tools to enforce sponsorship-related obligations. In addition to court action (civil penalties only) and infringement notices, the Department can seek to impose administrative sanctions which can include possible visa cancellation if the offender holds a visa and sponsors can have their sponsorship cancelled or be barred from sponsoring in the future, as well as enter into enforceable undertakings with sponsors.

Paying for visa sponsorship provisions

In 2015, the Migration Act was amended to include civil and criminal infringement and administrative penalties against persons that either request, receive, provide or offer a benefit in return for a sponsorship-related event occurring. A benefit can include a one-off lump sum, wage deductions or free labour. A sponsorship-related event can include the offer of sponsorship, the

threat of termination resulting in removal of sponsorship, or applying to be a standard business sponsor. The following penalties apply:

- criminal penalties
- civil penalties
- infringement notices
- administrative penalties (note that this can include possible visa cancellation if the offender holds a visa and sponsors can have their sponsorship cancelled or be barred from sponsoring in the future).

Illegal work

All Australian employers have a legal obligation to make sure they are not allowing illegal work, or referring people for illegal work. Illegal work includes visa holders working in breach of work-related visa conditions, and unlawful non-citizens working. Employers are required to take reasonable steps to ensure they are not using illegal workers. For example, using the Visa Entitlement Verification Online (VEVO) service, managed by the Department of Home Affairs, to check the visa status of migrant workers, including details of their visa conditions.

As discussed above, the Migration Act includes a number of sanctions that can be imposed on employers who allow illegal work, or refer non-citizens for illegal work; these are intended to deter, detect and respond to non-compliance with work permits, as follows:

- issue warning notices
- issue infringement notices
- refer to courts for civil or criminal proceedings.

In addition, there are aggravated criminal offence provisions that apply where an employer allows or refers a person for illegal work, and the worker is being (or will be) exploited. The definition of exploitation aligns with the *Criminal Code Act 1995*.

The employer sanctions framework allows the Department of Home Affairs to impose sanctions, including infringement penalties as an alternative to pursuing penalty proceedings in a court. The employer sanctions framework operates on a 'non-fault' system for civil penalties, which means that penalties can apply if a business engages workers illegally, regardless of whether the business was actually aware of this. It is not necessary for the Department of Home Affairs to prove the person's state of mind to establish a breach of a civil penalty provision. The framework puts the burden of proof on the business to show that it has taken reasonable steps to check the visa conditions of its workers. If an entity can provide evidence that reasonable steps were taken to verify that a foreign worker could legally work in Australia, such as evidence of undertaking a VEVO check, then this may be used in defence of a civil penalty or criminal charge.

Both civil and criminal liability, in certain circumstances, extends to executive officers of bodies corporate, partners in a partnership and members of an unincorporated association's committee of management for businesses who employ foreign workers or supply labour to other businesses.

This approach enables the Department's response to allegations of illegal work to vary in accordance with the seriousness of allegations and the person's cooperation.

The term 'allows to work' extends liability for contravention of the work-related offences and work-related provisions to a wide range of persons; specifically, a person who participates in an arrangement, or a series of arrangements, for the performance of work by the worker for either themselves or another participant in the arrangement or any such arrangement.

Support for Working Holiday (subclass 417) and Work and Holiday (subclass 462) visa

A number of policy changes have been implemented by the Department of Home Affairs since 2015 to improve the functionality of temporary work visas to provide better support for working holiday makers. These policy changes are outlined below.

Changed application requirements from December 2015 mean that employers are no longer required to sign off on the three months specified work requirement for second year Working Holiday subclass 417 or subclass 462 visa applications, reducing the power imbalance between worker and employer. In December 2015, the Government amended the requirements for specified work to require that visa holders must only undertake work that is paid in accordance with Australian workplace laws and awards (volunteer work was no longer permitted) and include pay slips (or payment summaries) as evidence that the work was undertaken. New information about workplace rights has been included on the Department of Home Affairs' website, including being displayed prominently on visa grant letters.

The Department of Home Affairs seeks to strike a balance in delivering the working holiday maker program in maintaining sustainable long-term growth of the program, recognising the important contribution of working holiday makers to Australia's economy, while minimising risk to Australia's visa programs and border protection policies. The Department has undertaken a number of activities to strengthen the integrity of the program:

- removing the requirement for the employer to sign/endorse the proof of employment forms (1263 and 1464)
- accepting more diverse items of evidence to validate specified work, such as pay slips, payment summaries, bank statements, tax returns, signed piece-rate agreements and written agreements to deductions (e.g. accommodation)
- engaging with the FWO to discuss trends and investigations since September 2016
- a referral process to the FWO for cases with indicators of possible exploitation or other concerns, including periodic review as to its effectiveness
- revising information to clients who are required to provide evidence of specified work
- consolidating the processing of the working holiday maker visa processing into a single location
- improving risk profiling systems, including targeting Australian Business Numbers of concern
- increasing verification of employment
- delivering improved information to working holiday makers and employers about the three months' specified work requirement, hours of work, rest days and piece-work agreements.

The visa grant rate for first Working Holiday (subclass 417) visas for 2017–18 was 99.2 per cent. The grant rate for second Working Holiday visas was 97.3 per cent. The grant rate for first Work and Holiday (subclass 462) visas was 97.5 per cent and the grant rate for second Work and Holiday visas was 97.6 per cent.

The Department of Home Affairs has also worked with the FWO to incorporate the 'Record My Hours' App data as one form of evidence of specified work. This may provide working holiday makers more options and greater control over the record keeping for their work. Addressing the power imbalance with employers and assisting the FWO to investigate disputes is a focus.

Visa holders with work rights and conditions in Australia

Under the existing visa framework, Australia offers a number of temporary visas with full or partial work rights that allow people to take up jobs for a period of time. In addition, certain subclasses of visas are restricted by specific work conditions and are subject to compliance under the Migration Act. Visa holders must comply with all Australian laws, including the Migration Act, and with any conditions that apply to their visa while in Australia.

- **Student visa holders:** can work a maximum of 40 hours per fortnight during teaching periods, and unlimited hours during vacation periods (see further discussion in chapter 1 of this report).
- **Working holiday maker visa holders:** seeking a second 12 month working holiday maker visa are required to complete three months of specified work with a regional employer during their initial 12 month visa period (see further discussion in chapter 1 of this report).
- **Employer-sponsored visas:** (including the subclass 457 and TSS visas) place legal requirements and obligations on employers that impact the employment conditions of visa holders. For example, temporary work skilled visas place a number of obligations on the sponsoring employer including ensuring that the visa holder receives the same salary and conditions as Australians performing similar duties and salary at or above an income threshold, as well as contributing to training Australians and testing the local labour market.

Sham contracting

The Taskforce recognised the ongoing issues around sham contracting and noted the work being undertaken through other reviews, such as the Black Economy Taskforce, to address this matter. For this reason, the Taskforce did not fully consider the subject of sham contracting. The ATO and the Department of Home Affairs are implementing strong integrity measures for visa holders obtaining ABNs to address cases of misuse of ABNs and sham contracting. This includes providing more information to prospective ABN holders and employers, better identifying visa holders when they are applying for an ABN, and taking action with employers who incorrectly treat their employees as contractors by making them wrongly apply for an ABN. The FWO's website also provides a detailed explanation of the differences between employees and contractors, and advice about the factors to consider when determining the correct category for a worker.

Part C: Communication activities – Promoting workplace rights and available assistance to migrant workers

Information failure is a significant barrier to accessing justice and preventing exploitation.

In its 2015 inquiry into the workplace relations framework, the Productivity Commission recommended that increasing the amount and quality of information available to migrant workers

on their workplace rights and entitlements should be part of a broader strategy to reduce the prevalence of exploitation.⁷⁰

FWO support for migrant workers

Since the inception of the Taskforce in October 2016, the FWO has invested in strategies for addressing migrant worker exploitation, including the development of new tools and resources to enable migrant workers to understand and act on their workplace rights.

The FWO regularly invests in new digital solutions to help people get the information and support they need. Many solutions are designed specifically with migrant workers in mind.

- **In-language Anonymous Report tool:** enabling non-English speakers to report potential workplaces issues in their own language, without being identified.
- **'Record My Hours' smartphone app:** that can automatically record an individual's work hours, providing employees with a back-up record if their employer has not met their obligations to maintain accurate or complete employment records.
- **Dedicated Infoline option:** a dedicated 'visa' option for callers to the Fair Work Infoline.
- **Online enquiries system:** a dynamic online form providing real-time responses to customer enquiries, which expedites processing and triaging of enquiries.
- **Website translator:** a customised machine translation system provides real-time translations of the FWO website into 40 languages.
- **In-language resources:** in-language hard copy materials, social media, videos and animated storyboards – many of which have been developed in consultation with culturally and linguistically diverse participants and community organisations, covering key messages such as 'The Fair Work Ombudsman is here to help', 'Employers need to comply with workplace laws' and 'You have workplace rights'.
- **Targeted online resources:** updated Language Help pages containing professional translations of workplace information in 30 languages; dedicated help pages providing links to the most relevant information for visa holders, migrant workers and international students.

Improved information requirements: the Fair Work Information Statement

There is a significant amount of information already available to migrant workers on the Department of Home Affairs and the FWO's websites, and this is being revised continually. For example, the FWO has made it easier for migrant workers to report workplace concerns by launching its Anonymous Report function in 16 languages other than English.

Under existing workplace laws, employers have to give every new employee a copy of the Fair Work Information Statement (FWIS) before, or as soon as possible after, they start their new job. The Fair Work Act requires the FWO to prepare and publish a FWIS and sets out the information that it is required to include. The FWIS provides new employees with information about their conditions of employment.

⁷⁰ Productivity Commission, Inquiry Report: Workplace Relations Framework, vol. 2, PC, Canberra, 2015, p. 926.

At the suggestion of the Taskforce, the FWO has recently revised the FWIS (with effect from 1 July 2018). The revised FWIS is available in English and 30 other languages and contains information about the current national minimum wage rates for adult permanent and casual employees. This ensures that employers and employees are aware of their minimum obligations and entitlements, noting that most workers are entitled to remuneration in excess of the national minimum wage.

However, that information is generic and high level, and of limited utility in identifying an employee's specific remuneration rights. There may be scope to further enhance the pre-employment information an employer is required to provide to prospective employees in general, and migrant workers in particular. The FWO is currently considering whether further enhancements can be made to the FWIS.

Dissemination of workplace rights information by the Home Affairs portfolio

Separate from the workplace relations communications described above, the Department of Home Affairs undertakes a range of employer awareness activities to encourage voluntary compliance with employer obligations. In 2016–17 the Department undertook 979 employer awareness activities with business, industry and stakeholder groups.

A key strategy is the promotion of VEVO checks as a reasonable step for employers to assess whether a non-citizen is allowed to work. In 2016–17 there were 10,627 new registrations to the VEVO system, and over 8 million VEVO checks were conducted, an increase of 31 per cent from the previous year.

From June 2018, a new workplace rights field has been included in the Department of Home Affairs' smartphone app, myVEVO, which is being promoted to all visa holders in Australia including working holiday makers and student visa holders.

The Department of Home Affairs is considering a range of communication approaches to increase awareness of Australia's workplace laws among migrant workers, as well as further educating employers about their obligations.

The Department's Detering Foreign Worker Exploitation Communication Plan is being implemented, with work underway on the following:

- developing high-level messages to be communicated at strategic points in a migrant worker's journey
- using alternative ways of informing migrant workers about their rights
- improving the myVEVO (work rights checking) app and website.

Through the Government's holistic visa reform agenda, the Department of Home Affairs is exploring options for a next generation of service delivery – including mobile-friendly, multi-lingual, and interactive technology solutions for visa services and enhanced assistance for visa holders.

There is opportunity to increase communication with temporary visa holders in a way that will directly engage them and provide information when they are either looking for work, or currently employed. Technology developed by the Department of Home Affairs to proactively engage with individuals whose visa is about to cease, could be expanded to directly communicate with certain types of visa holders, such as student visa holders and working holiday makers. This could involve,

for example, establishing proactive SMS messages sent to student visa holders' mobile phones containing tailored information on workplace rights and how to seek assistance, developed in conjunction with the FWO.

However as discussed in chapter 3, part D, research findings suggest that government agencies' efforts to contact visa holders directly after arrival can be complicated by a lack of up-to-date contact information. Maintaining visa holders' correct contact details will require further exploration.

Improving interagency engagement to support migrant workers

Early in its term, the Taskforce agreed to the establishment of a Working Holiday Maker Cross Agency Committee to progress the recommendations in the FWO's Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program. The Committee was established in 2017 and led by the FWO. Composed of representatives from the Department of Jobs and Small Business, the Department of Home Affairs, the ATO, and the Department of Agriculture and Water Resources, the Working Holiday Maker Cross Agency Committee has focused on three key areas:

- enhancing information, education, compliance and support for working holiday makers and employers
- enhancing regulation and sanction frameworks, and diversifying sources of evidence for visa requirements
- reviewing and enhancing information sharing between regulators.

To date, the Working Holiday Maker Cross Agency Committee has:

- enabled intelligence sharing opportunities between member agencies and departments, so that working holiday makers can be reached and educated via extended and targeted methods, and exploitative conduct can be identified in a more sophisticated way
- facilitated the development of compliance activities by member agencies and departments in relation to working holiday makers, including consideration of the potential for joint operations
- provided a forum whereby members can demonstrate products, resources and website content created to assist working holiday makers for comment and feedback, calling upon each other's knowledge of the working holiday maker experience to refine and develop educational material available for this cohort
- provided a forum where members can present research relating to working holiday makers for discussion
- allowed an improved understanding of the role of each member agency and department in the framework that exists to support working holiday makers in Australia.

Part D: Legislative framework for international students

Australia has a strong legislative framework governing education providers who deliver education services to international students. The *Education Services for Overseas Students Act 2000* (ESOS Act)

supports the objectives of the National Strategy for International Education 2025 (the National Strategy) to advance Australia's role as a global leader in education, training and research.

The ESOS Act sets out the legal framework governing the delivery of education to international students on a student visa in Australia, and is supported by quality standards and consumer protections, including:

- **National Code of Practice for Providers of Education and Training to Overseas Students 2018 (the National Code):** sets nationally consistent standards that govern the protection of international students and delivery of courses by education providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students
- **Tuition Protection Service:** Australia's key consumer protection for overseas students to assist international students whose education providers are unable to fully deliver their course of study
- **ESOS Regulations:** give practical effect to provisions of the ESOS Act
- **English Language Intensive Courses for Overseas Students Standards and Foundation Program Standards:** sets quality standards for these program sectors.

National Code of Practice for Providers of Education and Training to Overseas Students

The National Code balances the Government's interests in consumer protection and the high quality of Australia's education and migration policy, with the need to minimise the regulatory burden on registered providers and persons who deliver educational services on behalf of registered providers. The current version of the National Code commenced on 1 January 2018.

The National Code sets minimum standards and does not set precise or detailed implementation requirements to the level of individual education providers. Within the National Code, education providers are required to meet standards that encompass student welfare and workplace exploitation matters. These include:

- education providers to give international students, as part of an orientation program, information on their employment rights and conditions, and how to resolve workplace issues, such as through the FWO
- education providers to monitor the course progress of international students. This can help identify those students who may be exploited and working excessively
- education providers to offer reasonable support to international students to enable them to achieve expected learning outcomes at no additional cost to the international student
- education providers to designate a member or members of its staff to be the official point of contact for international students. The student contact officers must have access to up-to-date details of the registered provider's support services
- education providers to have sufficient support personnel to meet the needs of enrolled international students
- education providers to implement a policy and process for managing critical incidents that could affect an international student's ability to undertake or complete a course, such as incidents that may cause physical or psychological harm.

Part E: Complementary Government actions to support vulnerable workers

The Government has announced and implemented a number of measures that specifically help to detect, deter and disrupt unscrupulous business practices which either directly or indirectly contribute worker exploitation.

Taskforce Cadena

The Government established Taskforce Cadena in June 2015 as a joint agency initiative between the Department of Home Affairs, led by the ABF, and the FWO.

Taskforce Cadena uses collaborative working relationships to maximise the options available to disrupt the most significant criminal threats exploiting foreign workers and Australia's migration system. This includes working closely with federal and state police, the Australian Criminal Intelligence Commission (ACIC), the ATO, the Australian Securities and Investments Commission (ASIC), the Commonwealth Director of Public Prosecutions, and federal and state regulators.

Taskforce Cadena investigations have identified that criminal syndicates:

- are involved in other serious criminal offending, including the use of the labour hire market to enable and facilitate exploitation of overseas workers, illegal sex work, illicit drug and tobacco importations and money laundering
- use complex financial structures to facilitate and conceal illegal activity, avoid payment of taxes, creditors and employee entitlements.

In December 2017, a business was successfully prosecuted for allowing a non-citizen to work in breach of a visa condition and employing an unlawful non-citizen resulting in a pecuniary penalty of \$100,000.

As a direct result of Taskforce Cadena operations, the FWO has issued eight Letters of Caution, five Compliance Notices and 12 Infringement Notices to employers.

The overarching purpose of Taskforce Cadena is closely aligned with this Taskforce's focus on reducing migrant worker exploitation, and an update on Taskforce Cadena activities has been a standing agenda item for the Taskforce throughout its tenure.

Phoenix Taskforce

The Phoenix Taskforce brings together 34 Commonwealth, state and territory government agencies to identify, manage and monitor suspected illegal phoenix operators and take action against illegal phoenix behaviour. The Chair and Deputy Chair of this Taskforce met with the Chair of the Phoenix Taskforce to discuss areas of mutual interest. The Phoenix Taskforce also works in collaboration with Taskforce Cadena to combat visa fraud, illegal work and the exploitation of foreign workers.

In 2017–18, the Phoenix Taskforce raised liabilities of \$199 million and collected \$168 million in cash.⁷¹ The ATO also had three successful prosecutions from ATO-related matters, with criminal convictions recorded in all three.⁷²

Black Economy Taskforce

The Black Economy Taskforce was established in December 2016 to develop an innovative, forward-looking whole of government policy response to combat the black economy in Australia, recognising that these issues cannot be tackled by traditional tax enforcement measures alone. The Chair of the Black Economy Taskforce, Mr Michael Andrew AO, attended a Taskforce meeting to enhance collaborative discussions.

The Black Economy Taskforce released an interim report in 2017 and a final report in 2018. The Black Economy Taskforce made a number of recommendations relevant to this Taskforce including the establishment of certification schemes for labour hire firms, strategies to counter the exploitation of vulnerable workers and stamping out black economy activities by visa holders.

Backpacker tax and working holiday maker employer register

From 1 January 2017, working holiday makers (subclass 417 and 462 visa holders) earning below \$37,000 are taxed at 15 per cent from the first dollar earned. Ordinary marginal tax rates apply after that. Working holiday makers are also entitled to superannuation if they are eligible and contributions must be made by their employer. When leaving Australia, working holiday makers can claim their superannuation as a Departing Australia Superannuation Payment. Payments made after 1 July 2017 are taxed at 65 per cent.

Employers of working holiday makers are required to register with the Commissioner of Taxation in order to withhold tax at the lower rate (failure to register carries a civil penalty).

Employers who do not register are required to withhold tax at foreign resident withholding rates, including 32.5 per cent for income earned up to \$87,000. Approximately 39,000 employers have registered, giving the ATO visibility over the compliance of employers of this vulnerable cohort of workers.

The legislation implementing these changes also broadened the circumstances in which the ATO could disclose tax information to the FWO to assist with compliance with the Fair Work Act.

In response to privacy concerns regarding the public disclosure intent of the Working Holiday Maker Employer Register and the additional disclosure provisions between the ATO and the FWO, the *Treasury Laws Amendment (Working Holiday Maker Employer Register) Act 2018*⁷³ received royal assent on 3 October 2018. This legislation removes the ability for the register to be made publicly available and also limits the circumstances in which the ATO can disclose tax information to the FWO. Information relating to registered employers of working holiday makers is available as a part of the non-public data held in the Australian Business Register (ABR). Government agencies registered as ABR partners can access this information.

⁷¹ Australian Taxation Office, *Annual Report 2017–18*, ATO, Canberra, 2017, p. 20.

⁷² Australian Taxation Office, *Annual Report 2017–18*, ATO, Canberra, 2017, p. 20.

⁷³ *Treasury Laws Amendment (Working Holiday Maker Employer Register) Act 2018*

Taxation and superannuation reporting

A number of recent initiatives announced by the Government that are designed to support and detect payroll and superannuation non-compliance will support anti-exploitation initiatives across the workforce, including for migrant workers. They include:

- **Frequent reporting of Superannuation Guarantee charges:** superannuation funds will be required to report to the ATO within 10 days of receiving a superannuation payment, which will enable the ATO to more quickly identify non-compliance⁷⁴
- **Real-time reporting of wages through Single Touch Payroll:** from 1 July 2018, employers with 20 or more employees will report payments such as salaries and wages, pay as you go withholding and superannuation information to the ATO from their payroll solution at the same time they pay their employees⁷⁵
- **Taxable payments reporting system (TPRS) extended to:**
 - the cleaning and courier industries — in October 2018, legislation⁷⁶ was passed by the Australian Parliament which, from 1 July 2018, requires businesses that supply courier or cleaning services to report the payments they make to contractors if the payments are for courier or cleaning services to the ATO
 - the road freight, security, investigation, surveillance and IT industries — in November 2018, legislation received royal assent to require, from 1 July 2019, businesses that supply road freight, security, investigation, surveillance or IT services to report payments made to contractors if the payments are for road freight, security, investigation, or IT services to the ATO.⁷⁷

Human trafficking and slavery

Migrant workers can be particularly vulnerable to slavery and exploitation by either those who facilitate their journey to Australia, or by employers once they arrive. Many suspected victims of trafficking and slavery have entered Australia on legitimate visas.⁷⁸

The Australian Government has a comprehensive, whole of government approach to tackling human trafficking, slavery and slavery-like offences through the National Action Plan to Combat Human Trafficking and Slavery 2015–19.

Taskforce Cadena is working closely with the AFP to locate and remove victims of suspected human trafficking. This involves identifying Australian based syndicates and their offshore supply chains in order to develop appropriate disruption strategies.

Labour Exploitation Working Group

In 2016, the Government's National Roundtable on Human Trafficking and Slavery established the Labour Exploitation Working Group to develop recommendations for Government on measures to

⁷⁴ The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Turnbull Government backs workers on superannuation, media release, Parliament House, Canberra, 29 August 2017.

⁷⁵ The Hon Kelly O'Dwyer MP, Minister for Small Business and Assistant Treasurer, Streamlining business reporting with a single touch payroll, media release, Parliament House, Canberra, 21 December 2015.

⁷⁶ *Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Act 2018*.

⁷⁷ *Treasury Laws Amendment (Black Economy Taskforce Measures No. 2) Act 2018*.

⁷⁸ Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response*, 1 July 2015 – 30 June 2016, Australian Government, Canberra, 2016, p. 23.

address serious forms of labour exploitation in Australia. The Government is considering the recommendations of the Working Group's Final Report, which was delivered to Government in August 2018.

Modern slavery in supply chains reporting requirement for big business

The Modern Slavery Bill 2018 was passed by the Australian Parliament on 29 November 2018 and will commence in early 2019. The legislation requires Australian entities and foreign entities operating in Australia with annual consolidated revenue of \$100 million or more, to report annually on their actions to address modern slavery in their operations and supply chains.

Chapter 5 – Supporting migrant workers – wages and entitlements

Section overview

- Preventing migrant worker exploitation, and providing effective sanctions and remedies where exploitation occurs, is critically important to the efficacy and integrity of both the migration program and the Australian workplace relations system.
- This section examines potential improvements to existing law, including additional penalties to deter underpayment of migrant workers and strengthened regulator powers to ensure compliance.
- The Taskforce also considered making existing mechanisms for the recovery of underpayments more accessible to migrant workers.

As discussed earlier in this Report, the level of underpayment and exploitation of temporary visa holders is unacceptable. As the number of temporary visa holders entering Australia continues to increase, and as the systematic spread of underpayment seemingly increases so does the risk of exploitation. It is imperative that actions are taken now to address this serious issue and clearly demonstrate that exploitation is not acceptable in the community.

While prevention is always preferable to enforcement, it is important that there are strong mechanisms in place to provide remedies to migrant workers who have not received their full wages and entitlements. In any case, repayments can have a powerful deterrent effect, as noted in the discussion of 7-Eleven in this report. The Taskforce Terms of Reference require it to 'identify further proposals for improvements in law, law enforcement and investigation' relating to the underpayment and exploitation of migrant workers.

Chapter 4 discussed the significant improvements in legislative protections for vulnerable workers, including temporary migrant workers, made by the Protecting Vulnerable Workers Act. While it is still too early to assess in detail the impact of these amendments, there is clearly further opportunity to do more to deter unscrupulous businesses that profit by underpaying migrant workers and to improve avenues for migrant workers to recover underpayments.

This section explores possibilities for further action in this regard, including:

- clarifying that migrant workers are entitled to workplace protections under the Fair Work Act and prohibiting job advertisements that specify rates of pay below the lawful minimum wage
- strengthening the penalty regime and introducing criminal sanctions for the most serious forms of exploitative conduct
- supplementing the current penalty framework by providing for additional employer sanctions
- expanding the law enforcement, investigation tools and resources available to the FWO

- building on existing provisions that deal with secondary liability for breaches of employment standards and formalising proactive compliance partnerships
- improving the mechanisms available to claimants to recover underpayments.

Part A: Amendments to the Fair Work Act to better protect migrant workers

Legislative coverage of migrant workers

The FWO can enforce minimum entitlements and protections in the Fair Work Act for workers who perform work in breach of the Migration Act. Indeed, it has brought some successful court proceedings and secured penalties and back-pay orders against employers in cases where migrant workers have been underpaid, even when the work may have been performed in contravention of visa conditions.⁷⁹

However, there is a degree of confusion among stakeholders, including academics, unions, employers and temporary visa holders themselves, about the extent of coverage under the Fair Work Act. This confusion was reinforced to the Taskforce by several participants who attended the Stakeholder Roundtables held by the Taskforce in 2017. It was also reinforced through the research project commissioned by the Taskforce, *The Information Needs of Vulnerable Temporary Migrant Workers about Workplace Laws*. The research found that migrant workers' experiences in Australian workplaces can sometimes reinforce common misconceptions about the rights of migrant workers, the most prevalent misconception being that Australian workplace laws and conditions do not cover migrant workers. As a result, many migrant workers do not seek out information from official sources such as the FWO.⁸⁰

A 2016 Senate Inquiry heard from academics who questioned the enforceability of existing workplace protections in relation to foreign citizens who perform work illegally in Australia.⁸¹ Some witnesses to the same inquiry warned that the belief that migrant workers have limited workplace protections increases their vulnerability and potentially benefits dishonest employers.

Similarly, a 2017 Senate Inquiry heard from the Australian Council of Trade Unions (ACTU) that there is evidence that certain employers exert pressure on temporary visa holders to breach a condition of their visa in order to gain leverage over the employee because the Fair Work Act does not apply when a person has breached their visa conditions.⁸²

In the light of ongoing uncertainty in the community, it would be desirable to clarify the workplace rights of migrant workers.

⁷⁹ Fair Work Ombudsman, \$70,000 in penalties after overseas workers' vulnerability deliberately exploited, media release, FWO, Melbourne, 23 October 2017.

⁸⁰ Department of Jobs and Small Business & Fair Work Ombudsman, *The Information Needs of Vulnerable Temporary Migrant Workers about Workplace Laws*, Australian Government, Canberra, 2018, pp. 40–41.

⁸¹ Senate Education and Employment References Committee 2016, pp. 208–211.

⁸² Australian Council of Trade Unions, *Submission to the Senate inquiry into the incidence of, and trends in, corporate avoidance of the Fair Work Act 2009*, p. 21.

Job advertisements that specify rates of pay below the lawful minimum wage

Stakeholders have raised concerns about the practice of advertising positions targeted at migrant workers that specify rates of pay below the lawful minimum wage rates. Advertisements with below minimum wages are sometimes found on websites in foreign languages and/or that target migrants. Such advertisements appear more commonly in low-skilled, lower wage industry sectors.

Although the subsequent employment and underpayment of a person on the terms advertised would breach the Fair Work Act, the initial advertisement itself is not prohibited. A specific prohibition on advertising jobs with pay rates below the lawful minimum wage pertaining to that job would send a signal that breaches of minimum wages will not be tolerated. It may also provide an incentive for employers to ascertain the appropriate minimum wage rates before advertising a vacancy.

Recommendation 3

It is recommended that legislation be amended to clarify that temporary migrant workers working in Australia are entitled at all times to workplace protections under the *Fair Work Act 2009*.

Recommendation 4

It is recommended that legislation be amended to prohibit persons from advertising jobs with pay rates that would breach the *Fair Work Act 2009*.

Part B: Penalties for underpayments and additional employer sanctions

The Fair Work Act has a predominantly civil penalties framework. The purpose of civil penalties is to ensure compliance with the law, deter further breaches, either by the wrongdoer (specific deterrence) or by others (general deterrence) and ensure redress. Penalties can also operate as an incentive for wrongdoers to consider alternatives to court proceedings, such as entering into enforceable undertakings or complying with administrative sanctions.

The Fair Work Act treats underpayments as contraventions of the applicable industrial instruments that specify rates of remuneration payable to employees, for example, a modern award. Contraventions attract a maximum civil penalty of 60 penalty units (currently \$12,600) per contravention for a natural person, or, in the case of a serious contravention, 600 penalty units (currently \$126,000) per contravention. The maximum penalty that can be imposed on a body corporate is five times higher than the penalty that can be imposed on a natural person. The courts have discretion as to the amount of penalty that can be imposed in each particular case, subject to some well-established principles.⁸³

Courts determine the penalty for an underpayment by reference to the number of breaches, rather than the number of affected employees or the amount of the underpayment (although courts have regard to these matters when determining the penalty to be applied in a particular case). In

⁸³ See *Kearns & Schmidt v Atkins Freight Services Pty Ltd* [2016] SAIRC 19 (1 July 2016) for a summary of the relevant principles.

2017–18, the FWO initiated 35 litigations and achieved over \$7.2 million court-ordered penalties (\$5.8 million against companies and \$1.4 million against individuals). This is the highest amount of penalties the FWO has ever secured in a financial year (a 46 per cent increase from the previous highest amount of \$4.9 million in 2016–17). This rise in court-ordered penalties reflects the increasing complexity and significance of matters the FWO is filing, as well as the court’s growing intolerance for exploitative conduct against vulnerable workers. As at 30 June 2018, the FWO had 85 matters before the courts.

Despite this, the prevalence of underpayments, particularly in the case of vulnerable workers such as temporary migrant workers, might suggest that penalty levels for underpayments are insufficient to deter wrongdoing or drive behavioural change.

Penalties for ‘serious contraventions’ (that is, deliberate and systematic contraventions) were recently increased under the Protecting Vulnerable Workers Act. These provisions are yet to be tested in court proceedings, but even if they were and courts determined higher penalty levels it would be difficult to assess their deterrence effect on this ground alone. It could be argued they will be effective when there are no cases to take to court.

However, there are also good reasons to further increase the penalties now that there has been this opportunity for analysis and review of the evidence of the severity and magnitude of underpayments that the Taskforce has highlighted, and the limited availability of other policy levers to affect the situation.

A key point is that this law applies to business, but the current penalties and sanctions are out of line with those applicable in comparable areas of business law such as consumer, competition and corporation law. The gravity of offences is often as serious as those in other areas of business law. For example, the 7-Eleven underpayments exceeded \$160 million. An option is for penalties to be brought more into line with those of consumer law.⁸⁴

The role of the civil law as a means of achieving proper redress for the underpaid is very important. The 7-Eleven example is again relevant. The amount of underpayment involved dwarfs the amount of the penalties that might have been available under the then provisions of the Fair Work Act and still greatly exceeds the amount 7-Eleven could have been liable for under the new provisions. Not only is redress an important element of the law in itself, but it is also a powerful deterrent, generally more sizeable and powerful than the penalties themselves.

In practice, the amounts of redress obtained under the current avenues are relatively modest in relation to the amount of underpayment that seems to be occurring. This suggests the need for a close look at how the available redress mechanisms under the law would be strengthened.

Criminal penalties for underpayments

A series of serious underpayment cases involving Australian businesses have created a growing perception that the current regulatory model is unable to tackle serious and systemic

⁸⁴ Penalties under the Australian Consumer Law were increased significantly from 1 September 2018. For an individual, penalties are now up to \$500,000 per offence; for a corporation, they are up to \$10 million or three times the value of the benefit obtained from the offence or 10% of the annual turnover of the corporation and related corporations.

underpayments of workers. Commentators are increasingly referring to wage underpayment matters as ‘wage theft’, arguing that wage underpayments are as serious and unacceptable as established theft offences attracting criminal penalties.

To address this, some stakeholders have proposed that the Fair Work Act should impose criminal penalties for underpayment of wages. Proponents argue that criminal penalties would serve to highlight the severity of underpayments and act as an additional deterrent for employers. Adding criminal sanctions to the current suite of enforcement tools for very serious contraventions, such as deliberate recidivists, may have some additional deterrence effect beyond that expected from increasing civil penalties. Criminal offences can be punished by imprisonment and community service, as well as fines, but there can be other serious consequences, such as loss of reputation and income if disqualified from running a business.

Historically, the federal workplace relations system has relied on civil remedies for breaches of employment standards and there has been a long-standing bipartisan approach at the Commonwealth level of not criminalising workplace relations matters. However, there are a small number of criminal offences in the Fair Work Act, including standard ‘contempt’ offences in relation to Fair Work Commission proceedings, and the relatively new ‘corrupting benefits’ offences.

At this stage, no Australian jurisdiction, Commonwealth or state, has a criminalisation model in place for breaches of employment standards. While the workplace relations framework typically relies on civil penalties in relation to breaches of employment standards, some jurisdictions have demonstrated a willingness to consider criminal penalties for wage underpayment offences.

Clearly, the criminalisation of wage underpayment is gaining increasing support, particularly in cases of deliberate, serious and intentional contraventions. However, there are complexities in adopting such an approach. The Taskforce considers that criminal sanctions can form an important part of a suite of enforcement tools available to address migrant worker exploitation. The introduction of criminal sanctions would provide a clear signal to unscrupulous employers that exploitation of migrant workers is unacceptable, and the consequences of doing so can be severe.

Given that there are currently widespread levels of non-compliance with relevant laws, criminal sanctions to tackle serious and systematic underpayments of workers, would usefully form part of the regulatory toolkit. However, careful design will be required to ensure these are an effective addition to regulators existing powers. For example, these powers should aimed at dealing with exploitation that is clear, deliberate and systemic. Consideration should also be given to the most appropriate legislative vehicle for these offences, noting that the Fair Work Act is underpinned by a predominantly civil penalty regime and may not be suitable.

Additional court orders

The Fair Work Act provides Federal courts with a general power to make any order they consider appropriate to remedy a contravention of a civil remedy provision.⁸⁵ Federal courts have issued a range of orders under this general power, including adverse publicity orders. For example, on application by the FWO, the courts have made the orders requiring an employer to:

⁸⁵ Section 545(1) of the *Fair Work Act 2009*

- engage a suitably qualified third party to undertake an audit of the employer’s compliance with workplace laws and provide a copy of the audit report to the FWO
- engage a suitably qualified person or organisation to provide workplace relations training to management personnel
- undertake FWO education courses designed for employers
- provide the FWO with evidence of compliance with workplace laws
- display a workplace notice containing information on the minimum rates of pay, casual loading and penalty rates under the applicable award
- deal with any future employee complaints notified to the employer by the FWO.

In granting injunctions against an employer, courts have also been prepared to make orders restraining officers and agents of the employer from further contraventions of workplace laws.

The FWO publicises details of successful proceedings brought under the Fair Work Act. However, this is not the same as a court issuing an adverse publicity order. In the right circumstances there is no doubt that the courts would be willing to agree to an adverse publicity order.⁸⁶

Courts have not made disqualification orders in respect of breaches of the Fair Work Act. However, the former Fair Work Ombudsman has indicated in public forums that such a power would be of assistance to the FWO. Both the *Corporations Act 2001* and the *Competition and Consumer Act 2010* provide for disqualification orders.

While there is a general order making power, there is a case to also have specific reference to particular kinds of orders the courts might apply. This would reduce uncertainty in the court process and further strengthen the enforcement regime.

Recommendation 5

It is recommended that the general level of penalties for breaches of wage exploitation related provisions in the *Fair Work Act 2009* be increased to be more in line with those applicable in other business laws, especially consumer laws.

Recommendation 6

It is recommended that for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.

Recommendation 7

It is recommended that the Government give the courts specific power to make additional enforcement orders, including adverse publicity orders and banning orders, against employers who underpay migrant workers.

⁸⁶ See *Australian Building and Construction Commissioner v Parker* (No 2) FCA 1082 (13 September 2017)

Part C: The FWO's powers

The FWO has regulatory responsibilities in relation to the employment of temporary migrant workers in Australia. While noting that its powers have been recently strengthened under the Protecting Vulnerable Workers Act, the Taskforce has considered whether the existing powers available to the regulator are consistent with those of other regulators.

Adoption of model provisions

The Fair Work Act pre-dates the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (the Standard Provisions Act) which standardises regulatory powers exercised by Commonwealth agencies, including the use of enforceable undertakings and injunctions. The standard provisions may be broader than the current Fair Work Act provisions in some respects.

Adoption of the standard provisions relating to enforceable undertakings would clarify that the FWO may accept an undertaking that a person will take specified action directed towards preventing future contraventions and may unilaterally cancel an undertaking. Under the Fair Work Act, the FWO can accept an undertaking 'in relation to' a contravention if the FWO reasonably believes that a person has contravened a civil remedy provision. The model provisions do not explicitly require reasonable belief that a contravention has occurred before an undertaking may be accepted. They enable an authorised person such as the FWO to accept an undertaking that a person will take, or refrain from taking, specified action in order to comply with a civil remedy provision. The model provisions also enable an authorised person to accept an undertaking that a person will take specified action directed towards ensuring that the person is unlikely to contravene a civil remedy provision in the future and to cancel an undertaking by written notice

Adoption of the standard provisions relating to injunctions would spell out more clearly the types of injunctions that could be obtained by the FWO. Under the Fair Work Act, a court may currently make any order the court considers appropriate. This is a broad power that authorises the different types of injunctions set out in the model provisions. However, the FWO has indicated that adoption of the model provisions relating to injunctions would be a useful clarification of the current powers under the Fair Work Act.

Adoption of the model provisions could help the FWO to be proactive in targeting potential offenders and could be useful in cases where there are known reoffenders. The court would retain discretion as to the orders that it would make.

Compliance notices

The Fair Work Act enables a Fair Work Inspector to issue a compliance notice to a person if there is a reasonable belief that the person has contravened minimum employment terms. A compliance notice can require actions be taken to remedy the direct effects of an alleged contravention. Compliance notices cannot be issued if a person has entered an enforceable undertaking. If issued, the notice precludes civil court enforcement action being taken by the inspector. Compliance notices are limited to contraventions of 'entitlement provisions'. They do not extend to breaches of employee record and pay slip obligations.

Compliance notices are particularly relevant in cases where court action is not considered appropriate or feasible for any particular reason. They can be used effectively to stop illegal activity

and to ensure redress is paid for the consequences of that activity. They do not ensure future compliance and they do not penalise a person for their non-compliance.

Compliance notices are not used extensively by the FWO. Some potential constraints on their use have been noted. In particular, it has been suggested that, the requirement that the specified action remedy the direct effects of the contravention effectively requires the FWO to prove the contravention and quantify the underpayment before it can issue a compliance notice requiring an employer to repay the underpayment. If correct, this might mean that the legal threshold to issuing a compliance notice is not significantly different from that required to commence legal proceedings for the recovery of the underpayment.

This cautious approach seems to go against the notion that the inspector is just required to have a reasonable belief that a contravention has occurred. If this belief is present it is not clear that the inspector should have the onus of determining the amount of redress. Rather, it is up to the employer concerned to provide reasonable evidence of compliance with the notice. The obligation placed on employers to maintain employee records and provide employees pay slips under the Fair Work Act mean that there can be no excuse for not being able to do so.

The Taskforce considers that a review of the compliance notice power could usefully be undertaken to ensure that there are no unnecessary legislative or administrative barriers to its effective use.

Infringement notices

The Fair Work Act enables the FWO to issue infringement notices as an alternative to taking court proceedings in respect of a breach of a civil penalty provision. A person is given the option to pay the fine specified in the notice (one-tenth of the maximum penalty that a court could have ordered), or elect to have the matter heard by a court. Currently, Fair Work Act infringement notices are limited to breaches of record keeping and pay slip obligations, contraventions that are straightforward and easy to determine.

The purpose of an infringement notice is to penalise a person for a breach, not necessarily to rectify the breach. However, whether a breach has been rectified will no doubt be a consideration in the regulator's decision to issue an infringement notice rather than go to court on the matter.

It is not clear why the FWO does not have the power to issue infringement notices in relation to matters other than record keeping and pay slip breaches. There will be many cases where the circumstances would warrant the issuing of an infringement notice rather than having to pursue other weaker or stronger enforcement remedies. Again, the regulator could be expected to take into account in determining whether to issue an infringement notice, whether or not the employer had made good on any underpayments.

The FWO's information gathering powers

The FWO's information gathering powers were recently strengthened by the Protecting Vulnerable Workers Act.

The provisions contained in the Bill originally introduced into the Parliament were modelled on provisions conferring similar powers on ASIC and the ACCC, including section 155 of the *Competition and Consumer Act 2010*. These included safeguards framed consistently with A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Attorney-General's

Department, September 2011) and the Administrative Review Council Report 48, The Coercive Information-gathering Powers of Government Agencies. Those provisions attracted considerable scrutiny from both the Parliamentary Joint Committee on Human Rights and the Senate Scrutiny of Bills Committee and were subsequently amended in the Senate.

The amended provisions in so far as they apply to the FWO's work in dealing with wage exploitation issues are unduly complex and burdensome, particularly the requirement to apply to an Administrative Appeals Tribunal Presidential member to issue a FWO notice and subsequent review by the Commonwealth Ombudsman. The Taskforce recommends that the provisions as originally proposed by the Government, which are aligned with the provisions governing other business including consumer regulators, should replace the current provisions.

Further action by the FWO

The Protecting Vulnerable Workers Act strengthened the Fair Work Act to more effectively deter worker underpayments and other unlawful workplace practices. The changes include:

- higher penalties (up to 10 times the previous amount) for 'serious contraventions' of prescribed workplace laws
- strengthening the FWO's evidence gathering powers
- franchisors and holding companies responsible for breaches of the Fair Work Act in certain circumstances.

These new laws build on other steps taken to address unlawful workplace practices, including a \$20.1 million funding increase to the FWO and establishing this Taskforce.

The Taskforce considers that this strong enforcement response should be continued. Migrant worker exploitation remains a serious and concerning problem in Australia. Recent reports from the FWO and others, discussed elsewhere in this report, demonstrate this. To enable this work to continue, the FWO must be adequately resourced and have the right mix of tools and powers to undertake its functions under the Fair Work Act.

Recommendation 8

It is recommended that the *Fair Work Act 2009* be amended by adoption of the model provisions relating to enforceable undertakings and injunctions contained in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

Recommendation 9

It is recommended that the Fair Work Ombudsman be provided with the same information gathering powers as other business regulators such as the Australian Competition and Consumer Commission.

Recommendation 10

It is recommended that the Government consider whether the Fair Work Ombudsman requires further resourcing, tools and powers to undertake its functions under the *Fair Work Act 2009*, with specific reference to:

- a) whether vulnerable workers could be encouraged to approach the Fair Work Ombudsman more than at present for assistance
- b) the balance between the use of the Fair Work Ombudsman's enforcement and education functions
- c) whether the name of the Fair Work Ombudsman should be changed to reflect its regulatory role
- d) getting redress for exploited workers, including the use of compliance notices and whether they are fit for purpose
- e) opportunities for a wider application of infringement notices
- f) recent allocations of additional funding.

Part D: Secondary liability for wage underpayments

Arrangements such as subcontracting, outsourcing, labour hire or franchising arrangements create challenges for the enforcement of employment standards set out in the Fair Work Act which presuppose a direct employment relationship. Attempts have been made to strengthen the regulator's ability to enforce employment standards throughout the supply chain. The Fair Work Act was amended in 2012 to enable contract outworkers in the textile, clothing and footwear industry to recover unpaid amounts from contractors along the supply chain.⁸⁷ In 2017, as already discussed, the Protecting Vulnerable Workers amendments to the Fair Work Act made franchisors and holding companies responsible for underpayments by their franchisees or subsidiaries in certain circumstances.⁸⁸

The Taskforce considered a range of other options to deal with issues raised by the increasing fragmentation of labour markets, including the introduction of a national labour hire registration scheme (see chapter 6) and providing a legislative basis for compliance partnerships.

⁸⁷ *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*.

⁸⁸ *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

Compliance partnerships

Compliance partnerships, formalised by Proactive Compliance Deeds, are collaborative arrangements negotiated by the FWO with businesses that are often not primary 'duty holders' under the Fair Work Act, and who may not have breached the Fair Work Act, but who want to publicly demonstrate their commitment to creating compliant and productive workplaces within their business structures. The use of these deeds in part may also reflect the challenges faced by the regulator in obtaining evidence of involvement in proven contraventions by firms at the head of supply chains that would satisfy the accessorial liability provisions of the Fair Work Act.

Compliance partnerships do not have a specific legislative basis. The example of the 7-Eleven Proactive Compliance Deed was discussed in chapter 2, part B.

The Taskforce supports the use of compliance partnerships, in the absence of more comprehensive accessorial liability provisions, to promote voluntary compliance with employment standards in complex business structures where a 'lead business' who is not the direct employer ultimately benefits from the labour of the relevant employees. However, the Taskforce considers that, to the extent possible, there should be full public transparency of Proactive Compliance Deeds and their operation.

Recommendation 11

It is recommended that the Government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws, with specific reference to:

- a) extending accessorial liability provisions of the *Fair Work Act 2009* to also cover situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies
- b) amending the *Fair Work Act 2009* to provide that the Fair Work Ombudsman can enter into compliance partnership deeds and that they are transparent to the public, subject to relevant considerations such as issues of commercial in confidence.

Part E: Recovery of underpayments of wages and entitlements

The small claims process

The Fair Work Act contains a purpose-built small claims procedure to deal specifically with underpayments of \$20,000 or less. Its purpose is to provide a quicker, cheaper and more informal process to settle underpayment claims than regular court proceedings.

Despite the advantages offered by the small claims process, only a small number of affected temporary migrant workers avail themselves of this redress mechanism. There are a number of reasons for this:

- First, there is an inherent problem of excessive legalism of process and procedure associated with the adversarial court and judge-based framework within which small claims procedure currently works. The relaxed procedural and evidentiary rules do not overcome the basic

problems. For many people, accessing the court system — even using the small claims procedure — is a difficult and overwhelming prospect.

- Second, the complexity of the legal regime governing employment in Australia and the small claims application process highlights the critical need for legal advice and representation in what is supposed to be a lawyer-less jurisdiction.
- Third, the requirement to pay filing fees — while this varies between jurisdictions, in the federal courts this can be \$210 for claims less than \$10,000 and \$245 for claims between \$10,000–\$20,000 — also serves as a disincentive to commencing a small claim.
- Finally, the time it takes for matters to be finalised mitigates the effectiveness of the small claims process. In 2016–17 the average time between filing a claim and finalisation was 4.3 months. During the same period it took on average 80 days for a matter to proceed to the first court date.

The processes needed to progress a small claim are generally unknown to most people, and claimants might require an explanation of each step of their case. The FWO has sought to address these impediments/barriers by taking the following initiatives:

- providing a pre-lodgement small claims service to assist workers in bringing proceedings in the small claims jurisdiction
- providing detailed small claims resources, including a series of videos which explain the steps in the small claims process, on its website
- making itself available as a ‘friend of the court’ in small claims matters in Sydney, Melbourne and Brisbane. The FWO’s legal officers do not act for either party, but assist the court on points of law, the application of industrial instruments and by appearing for parties to progress matters on the list.

Any improvements to the small claims process therefore need to address both access and throughput issues.

The FWO provides a small claims service through a dedicated team of FWO advisors and by the FWO’s legal officers. As noted above, this assistance covers a range of services, including making itself available as a friend of the court to assist the court and/or the parties to matters when a small claims matter involving workplace law is before a court in Sydney, Melbourne or Brisbane.

Consideration could be given to expanding this function within the FWO. With additional resourcing, the FWO could assist more workers through the small claims process.

The Taskforce considers that a separate policy review of the small claims process is warranted. Any review should examine the following issues:

- changes to court rules and procedures, such as the waiver of filing fees for migrant workers, the simplification of service of process rules for small claims matters, simpler pre-hearing processes involving Registry staff rather than magistrates or judges, prioritisation of small claims matters and providing strict time frames for dealing with small claims
- whether costs can or should be awarded in small claims matters and, if necessary, increasing the current threshold of \$20,000

- whether the FWC’s processes for general protections, unfair dismissal and bullying claims could be applied to small claims. This could involve either the courts adopting similar non-adversarial processes or the FWC becoming involved in the non-judicial aspects of a small claim. For example, the FWC could provide registry functions to the Federal Circuit Court for small claims matters or could be given functions in relation to small claims similar to those that currently apply to general protections — see sections 372–375 of the Fair Work Act relating to non-dismissal dispute conferences
- increased funding to the FWO and/or community legal services to support improved personalised assistance to potential claimants to help them make a small claim and providing the courts with additional resources to expedite matters within the small claims jurisdiction
- increased funding to the FWO to expand on its role as a ‘friend of the court’ in small claims matters.

Fair Entitlements Guarantee

The Fair Entitlements Guarantee (FEG) is established under the *Fair Entitlements Guarantee Act 2012* (FEG Act) to provide financial assistance to cover certain unpaid employment entitlements when an employee loses their job through the liquidation or bankruptcy of their employer. The FEG is a legislative safety net scheme that is intended to be an avenue of last resort that assists employees when their employer’s business fails and the employee has outstanding unpaid entitlements.

The FEG covers five unpaid employment entitlements for eligible employees:

- unpaid wages (up to 13 weeks)
- annual leave
- long service leave
- payment in lieu of notice (up to five weeks)
- redundancy pay (up to four weeks for each year of service).

The FEG came into effect on 5 December 2012 and is administered by the Department of Jobs and Small Business. The FEG replaces the administrative General Employee Entitlements Redundancy Scheme.

Once entitlements have been paid to employees under the FEG, the FEG Act allows the Commonwealth to ‘stand in the shoes’ of the employee as a creditor with standing to recover FEG amounts through the winding up or bankruptcy process of the employer.

FEG eligibility

Assistance under the FEG scheme is currently limited to workers who are employees. There are a range of eligibility criteria against which persons seeking assistance are assessed, including:

- they have lost their job due to, or less than six months before, their employer’s liquidation or bankruptcy
- they are owed at least one unpaid employee entitlement covered by the scheme
- they have lodged an effective claim within 12 months of either the date their employment ends, or the liquidation or bankruptcy of their former employer, whichever is the later.

There are also a number of exclusions from eligibility. The FEG is limited to workers who are Australian citizens or holders of permanent resident visas or special category visas under Australian immigration laws. To be eligible, a person must be an Australian citizen or, under the Migration Act, the holder of a permanent visa (i.e. the visa allows the person to live in Australia indefinitely) or Special Category visa (i.e. the current visa allows the person to stay and work in Australia as long as they remain a New Zealand citizen).

Contractors and subcontractors are also not covered by the scheme. This recognises the particular vulnerabilities faced by employees, particularly long-term employees, who are the least diversified of creditors in insolvency.

The FEG and migrant workers

One perspective of this issue is that the eligibility conditions under the FEG are consistent with the general policy approach of the Australian Government in relation to the provision of social security and government-funded health insurance benefits. As the FEG provides a safety net for individuals, it is analogous to social security legislation and it has been considered appropriate that eligibility should be somewhat consistent across these domains.

The residency eligibility requirements were carefully considered during the development of the FEG Act. The Parliamentary Joint Committee on Human Rights accepted that the residency eligibility requirements were unlikely to be incompatible with Australia's human rights obligations under Article 26 of the International Covenant on Civil and Political Rights because they were necessary to maintain consistency with broader social security legislation, and the restriction was appropriate and proportionate to that objective.

Expanding the FEG to include temporary visa holders has been raised in a number of forums. The Taskforce notes that national system employees who are temporary visa holders in Australia have the same workplace entitlements and protections under the Fair Work Act as Australian citizens. In general, visa holders contribute to the income tax revenue pool on the same basis as Australian citizens (with the exception of working holiday makers under the arrangements discussed in chapter 4, part E), which in turn funds the FEG scheme. An alternative perspective is that it is inequitable for migrant workers who are paying tax to be treated differently to Australian citizens in situations where their employer becomes insolvent and leaves them with unpaid entitlements.

Taskforce view

The Taskforce recommends that access to FEG be extended to eligible migrant workers with work rights, following cross agency consultation, including with agencies not represented on the Taskforce, to assess the benefits, costs and risks. The Taskforce also recommends that FEG provisions should not be considered for extension to those workers without work rights. Doing so may create incentives for people who do not have work rights to work illegally, undermining the integrity of the migration systems and potentially displacing Australian workers. It is intended that people who have deliberately and consciously avoided their taxation obligations should also be excluded, subject to the practicalities.

Extending FEG access to migrant workers could be achieved either through an extension to the FEG scheme, or through the establishment of an alternative scheme.

Both options pose some issues, including a likely increase of costs of over the forward estimates, an increased complexity in administration of the scheme, and an exacerbation of moral hazard in the scheme — including the risk that the scheme may be opportunistically used by labour traffickers as inducement for migrant workers to accept lower wages. However, the Taskforce notes there are already some safeguards in the legislation against opportunistic behaviour by employers. The Taskforce received evidence that suggested the likely additional costs of extending the scheme to cover migrants would be in the order of \$20 million per year. These costs, and other related costs such as IT support costs, would need to be further examined and confirmed with the Department of Finance. These costs would be reduced, however, the more successful the Government is in dealing with phoenix traders.

The principle that only Australian residents should qualify for social security payments is fundamental to the Australian income support system.⁸⁹ However, there are circumstances relating to underpayments that make them differentiable from social security payments. First, the underpayments are the result of unlawful behaviour, of exploitation, by particular employers. Second, the payments are legally obligatory by employers and could normally be recovered in a court of law, but for employer bankruptcy. Third, employees are taxed on their income (including payment under the FEG scheme): this bolstering their case for entitlement. Also, as tax payers, they contribute to the cost of the FEG. Notwithstanding this, the FEG scheme provides for the recovery of entitlements previously earned by the worker but not paid, the Taskforce notes that expanding the FEG eligibility arrangements may be considered by some a significant policy change, impacting more broadly across other aspects of government financial assistance programs. Such expansion might also pose a range of legal, administrative, cost, equity and market impact issues. For this reason, further consultation across government is essential.

Notwithstanding this, payments made under the FEG Act only become necessary in a very small percentage of liquidations and bankruptcies. In the five years to 30 June 2017, on average 9,815 companies entered liquidation each year and on average 1,510 liquidated companies resulted in FEG paying employee entitlements. In the vast majority of cases, employees are able to get their entitlements through the assets of their former employer.

Ineligibility for FEG assistance does not affect the legal right of temporary visa holders to try to recover unpaid entitlements from a former employer in the liquidation or bankruptcy process, but in practical terms like the likelihood of any recovery in this situation is minimal.

⁸⁹ Department of Social Services, *Social Security Payments – Residence Criteria*, DSS, Canberra, 2018, viewed June 2018.

Recommendation 12

It is recommended that the Government commission a review of the *Fair Work Act 2009* small claims process to examine how it can become a more effective avenue for wage redress for migrant workers.

Recommendation 13

It is recommended that the Government extend access to the Fair Entitlements Guarantee program, it should be done following consultation regarding the benefits, costs and risks, and it should exclude people who have deliberately avoided their taxation obligations.

Chapter 6 – Labour Hire

Section overview

- Many businesses in Australia rely on labour hire operators to access a flexible workforce that can meet the seasonal demands for increased labour.
- Labour hire operators are subject to the same laws governing all Australian employers, however, evidence shows that unscrupulous labour hire practices exist to help take advantage of vulnerable workers, particularly in the horticulture, cleaning, meat processing and security industries.
- As per the Terms of Reference, the Taskforce has examined the problem of exploitation of migrant workers in the labour hire industry with respect to those sectors where both the employment of temporary migrant workers is prevalent, and where the use of labour hire arrangements is high.
- The Taskforce has found that labour hire operators that exploit migrant workers often create complex operating environments that make it harder to ensure compliance with the law.
- The Taskforce considered a range of policy solutions put forward by stakeholders, as well as initiatives implemented by some state governments and the Commonwealth to address non-compliance by businesses.

Many businesses across all sectors rely on labour hire services to access a flexible workforce. Labour hire operators⁹⁰ are employers that are subject to existing Australian laws, including workplace relations, taxation, superannuation and migration law — just as for any employing business. However, there is some confusion in the community about the operation of labour hire operators which may allow them to more easily avoid their legal obligations and take advantage of vulnerable workers in the process. Evidence suggests that the horticulture, cleaning, meat processing and security industries are particularly high risk for unscrupulous labour hire practices.

The Terms of Reference directed the Taskforce to examine labour hire practices for companies that employ migrant workers and to consider particular industries or groups of vulnerable workers where there are systemic problems with exploitation. The Taskforce has examined the labour hire industry with respect to those sectors where both the employment of temporary migrant workers is prevalent and the use of labour hire arrangements is high.

The Taskforce found that labour hire operators that exploit migrant workers often create complex operating environments that make it harder to ensure compliance with the law. This can include involvement in the black economy, the use of intermediaries (e.g. accommodation providers and migration agents) and potential acts of money laundering, human trafficking and modern slavery.

⁹⁰ Note that the term 'labour hire operator' is preferred for the purpose of this report. It captures all manner of entities performing a labour hire service, from businesses that are just individual persons (sole traders) to larger companies that may work across multiple locations, as well as labour hire contractors.

The Taskforce considered a range of policy solutions put forward by stakeholders, as well as initiatives implemented by some state governments and the Commonwealth to address non-compliance by businesses (e.g. addressing illegal phoenixing and the black economy).

The labour hire industry in Australia

Labour hire arrangements

Labour hire has been a feature of the Australian labour market since the 1950s when it was mainly in the form of agencies providing temporary staffing solutions to businesses. Today, the labour hire industry is a source of flexible, often short-term employees for a range of different types of businesses. While labour hire represents a small proportion of employers across Australia, it covers a wide range of sectors from high-end professionals to various forms of unskilled or semi-skilled labour.

Labour hire arrangements are diverse. The typical arrangement is where a labour hire operator supplies a worker (employee or independent contractor) to perform work for a third party (the host) for an agreed fee. While the worker is under the direction of the host, the employment/contractual relationship is between the worker and the labour hire operator. Exploitative labour hire practices can often involve sophisticated pyramid structures, multiple sub-contracting arrangements and the involvement of related business, such as accommodation providers. Operators may have links to businesses based overseas to help source and place workers. Group training companies that place apprentices and trainees with employers may also use a labour hire model.

Labour hire arrangements are most commonly used by a host to source workers when they do not wish or are unable to engage the workers directly. The labour hire operator take on the administrative burden and employer obligations on behalf of the host (particularly small operators). This differs to recruitment services where for an agreed fee, the recruitment firm recruits and places a worker with a business that directly engages them.

As well as the traditional triangular labour hire relationship, the Taskforce has also considered alternative types of arrangements that involve businesses delivering services to clients on a contractual basis (e.g. a 'labour hire contractor'). For example, a grower that pays a business to harvest a crop of grapes for a set fee, or a business that supplies and supervises trolley collectors on behalf of another business that is contracted by a major supermarket. In these cases, the workers continue to work for their own employer to deliver a service for the benefit of the client.

Labour hire industry profile

Estimates of the number of labour hire workers in Australia varies depending on the data source. ABS data indicates that the percentage of labour hire workers in the Australian labour market has remained largely unchanged over the past 20 years at around 2 per cent. In 2015, the Productivity Commission estimated that labour hire accounts for around 1.8 per cent of the labour market or 212,400 employed persons.⁹¹ There is no data to determine how many migrant workers are engaged by labour hire operators.

⁹¹ Productivity Commission, Workplace Relations Framework: Productivity Commission Inquiry Report, vol. 2, PC, Melbourne, 2015, p. 1092.

Based on existing data, it is unclear how many labour hire businesses are currently operating in Australia. This is because of the way labour hire is captured in government datasets, how businesses record their labour hire activities (where it might not be the primary service they deliver) and the increased likelihood that unscrupulous labour hire operators will operate within the black economy.⁹²

According to the ABS, as at June 2017, there were around 14,780 actively trading businesses across the two main labour hire Australian and New Zealand Standard Industrial Classification (ANZSIC) codes (*Labour Supply Services* and *Employment Placement and Recruitment Services*).⁹³ This represented less than 1 per cent of the total 2.2 million actively trading businesses across Australia. Over 80 per cent of these actively trading businesses were operating in New South Wales (around 5,500 businesses), Victoria (around 3,670 businesses) and Queensland (around 3,100 businesses).

Unscrupulous labour hire operators

Cases of serious exploitation by unscrupulous labour hire operators have recently been found in the horticulture, meat processing, cleaning, and security sectors. Some of the FWO's largest penalties have been secured against labour hire operators in these sectors.⁹⁴

The main driver of unscrupulous labour hire operators is to lower labour costs and associated charges and gain a competitive advantage. In high risk sectors, the work is intensive and low-skilled, and labour costs are a significant part of the overall business costs. Reducing labour and operating costs is a way of increasing the labour hire operator's profit margin. These sectors also often have competitive supply chains, which can mean that price pressure is driven from the top of the chain.

Other factors that drive unscrupulous labour hire practices can include:

- a desire to avoid the regulatory requirements associated with operating an employing business in Australia
- believing that the monetary gains from non-compliance outweigh the risk of being caught and penalised
- low/no barrier to entry to become a labour hire operator
- high demand for labour to be available at short notice and a limited supply of labour in some locations, occupations or industries
- lack of visibility from host businesses regarding the behaviour of labour hire operators, especially when there is a stronger economic imperative to have the work done (e.g. have the crop picked on time)
- the lack of accountability in a supply chain for unscrupulous practices at the bottom end
- low profit margins in some labour-intensive industry sectors
- the relative large supply of vulnerable workers

⁹² Black Economy Taskforce, *Black Economy Taskforce: Final Report*, The Treasury, Canberra, 2018, p. 247.

⁹³ Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits, June 2013 to June 2017*, cat. no. 8165.0, ABS, Canberra, 2018.

⁹⁴ Fair Work Ombudsman, *Penalties of \$447,300 and \$233,000 back-pay ordered after workers treated as 'slaves'*, media release, FWO, Melbourne, 8 June 2017.

- in some industry sectors, unscrupulous labour hire operators are accepted as a standard part of the market (business as usual).

The non-compliance of these labour hire practices range from a lack of knowledge of obligations and unintentional non-compliance, through to intentionally operating solely in the black market. Evidence suggests there are a number of common practices employed by non-compliant labour hire operators, including:

- underpayment of wages and non-payment of the superannuation guarantee
- not remitting PAYG tax and paying workers' compensation premiums
- the use of vulnerable workers (including illegal and trafficked workers)
- poor record keeping
- sham contracting arrangements
- sub-contracting arrangements that add little value to the supply or service
- practice of liquidating businesses to avoid accrued employee obligations (known as 'illegal phoenixing')
- provision of over-priced, sub-standard accommodation
- involvement in criminal activity (e.g. money laundering, illegal tobacco).

Labour hire operators may use overseas migration agents in source countries to recruit workers and facilitate their visa for travel, work, accommodation and local transport (often with high charges, which may lead to debt bondage). In some cases, the Australian arm of the business is run by a visa holder who then employs and underpays other visa holders of the same nationality.

Other than accessorial liability provisions in some laws and the threat of reputational damage, there may be little to connect the host organisation to the labour hire operators' practices. This can lead to a culture in certain supply chains of encouraging lower labour costs to meet the overall downward cost pressure in the entire supply chain. Having a complex supply chain structure with multiple layers of contracting can worsen the situation, making it hard to determine which entity is responsible for wage underpayments. As a result, unscrupulous labour hire operators may be less likely to be held accountable. Meanwhile, law-abiding operators find it difficult to compete on an uneven playing field in those supply chains.

The Taskforce has focused on the main sectors where both the employment of temporary migrant workers is prevalent and the use of labour hire arrangements is proportionally high.

Horticulture

The horticulture industry involves the picking, planting, processing and packaging of fresh fruit and vegetables. Cases of unscrupulous labour hire operators exploiting migrant workers have been widely publicised in the horticulture industry, and were covered in the FWO's 2018 Harvest Trail Inquiry (discussed further in chapter 7).⁹⁵ Due to the nature of the work, its location, the high prevalence of working holiday visa holders and unlawful non-citizens, and the complex interplay

⁹⁵ Fair Work Ombudsman, Harvest Trail Inquiry: A report on workplace arrangements along the Harvest Trail, FWO, Melbourne, 2018.

with supply chains, many of the characteristics of unscrupulous labour hire business models can be found in this sector.

The industry is characterised by small labour hire operators that are often located in regional areas. The operators fulfil an important role in the labour market by supplying a critical workforce to growers at short notice. They often arrange transport and accommodation for the workers.

Meat processing

The meat processing sector includes the processing of red meat, poultry and seafood. In this sector, labour hire operators generally have the role of sourcing groups of workers and supplying them to larger firms to work in processing factories. In its inquiry into the Baiada Group operations in NSW, the FWO found the presence of large and complex subcontracting arrangements to supply workers to the factory. The FWO found a number of other common themes: a tendency to ‘phoenix’ — many of the labour hire operators were deregistered or went into voluntary liquidation during the investigation, the provision of accommodation with work, and work visas facilitated through contacts based overseas.⁹⁶

Cleaning

This sector includes cleaning for homes, hotels, offices, retail chains and events, and trolley collecting. In some cases, labour hire operators act as cleaning companies to supply workers to major hotels, while in other cases labour hire operators may oversee groups of trolley collectors for the benefit of a major supermarket.⁹⁷ Common characteristics of unscrupulous business models appear in this sector. In June 2017, the FWO secured large penalties against two labour hire operators in the cleaning sector.⁹⁸

Security

The security industry includes the patrolling of offices, large premises and crowd control for events. The FWO’s caseload data and evidence presented to the Victorian labour hire inquiry suggests that the composition of the industry sector is similar to the cleaning industry — that is, work which is low to semi-skilled, employee costs make up the primary cost of doing business, work is subject to competitive tendering, there is high use of sub-contracting and independent contracting arrangements and a prevalence of vulnerable migrant workers.⁹⁹

Developing solutions to the problem

A key objective of the Taskforce has been to explore measures that remove or reduce incentives to engage in unlawful or illegal practices. The measures aim to remove unscrupulous employers from

⁹⁶ Fair Work Ombudsman, A report on the Fair Work Ombudsman’s Inquiry into the labour procurement arrangements of Baiada Group in New South Wales, FWO, Melbourne, 2015, p. 27.

⁹⁷ Fair Work Ombudsman, Inquiry into trolley collection services procurement by Woolworth Limited, FWO, Melbourne, 2016.

⁹⁸ Fair Work Ombudsman, Penalties of \$447,300 and \$233,000 back-pay ordered after workers treated as ‘slaves’, media release, 8 June 2017.

⁹⁹ For example, Fair Work Ombudsman, An inquiry into the procurement of security services by local governments, FWO, Melbourne, 2018.

the market while maintaining labour hire as a legitimate form of labour supply and minimising the impact on the majority of law-abiding labour hire operators.

The Taskforce heard from a range of stakeholders about possible solutions to address unscrupulous labour hire practices. The three main approaches advocated by stakeholders were greater enforcement of existing laws, industry-led certification and licensing. While each of these approaches has advantages, they will also have disadvantages that need to be taken into account.

Many stakeholders have indicated that the laws applying to labour hire operators are adequate, yet they need to be better enforced. Labour hire operators are required to comply with the wide range of laws that apply to any employing business. However, enforcement of these laws is a challenge when labour hire operators are numerous, hard to identify and readily able to 'illegally phoenix'.

The Taskforce considers that government regulators should as far as possible within their existing resources enhance their monitoring and enforcement of labour hire operators through existing regulatory and enforcement frameworks, including through the effective use of data-sharing and joint investigations. A critical objective of compliance activity should be to increase labour hire operators' (and their host organisations') perception of risk of detection and penalties for non-compliance, where they no longer see that the gains from non-compliance outweigh the risks of being caught and penalised. This objective is supported by the increased penalties implemented by the Protecting Vulnerable Workers Act.

Industry-led certification

The Taskforce commends industry's efforts to improve standards in the labour hire industry, notably the Recruitment, Consulting and Staffing Association (RCSA) voluntary Workforce Services Provider Certification scheme (known as 'StaffSure'). StaffSure was developed to help inform users of labour hire by making 'reputable' labour hire operators distinct from those less so. The certification process allows labour hire operators to submit to a rigorous audit, and this in turn gives labour users assurance that they are dealing with reputable providers. In time, the goal is a market preference for certified labour hire operators.

However, there are concerns that StaffSure will have limited impact in correcting poor behaviour in high-risk sectors. The many small labour hire operators that operate in these sectors would have little incentive or ability to invest in meeting the rigorous certification standard while the drivers for potential unscrupulous practice remain. As such, certification alone will be unlikely to capture unscrupulous labour hire operators, including those operating in the black market, in any meaningful way.

Labour hire licensing schemes

The Taskforce notes the commencement of labour hire licensing schemes in Queensland in April 2018 and South Australia¹⁰⁰, and the Victorian scheme which is due to commence in 2019. The universal scope of the schemes capture labour hire arrangements across the entire industry in a state, beyond those sectors where cases of maltreatment of vulnerable workers has been found. The schemes have high fees, extensive application processes for labour hire operators and ongoing

¹⁰⁰ On 28 November 2018, the South Australian Government introduced a Bill in Parliament to repeal the South Australian *Labour Hire Licensing Act 2017*.

obligations through periodic reporting and compliance with licence conditions. The Taskforce is of the view that the schemes impose a significant regulatory burden on the entire labour hire industry and the host employers using them.

While the scope of the laws are still to be tested, it appears that there is a risk that some laws will only capture traditional triangular supply type labour hire arrangements and not workforce contracting arrangements that form a critical source of labour in some sectors. As a result, it is unclear to what extent the laws as drafted will achieve their objective of protecting vulnerable workers.

The separate state-based licensing schemes, while sharing some common elements, have key differences. Having multiple schemes in operation imposes a further regulatory and cost impost on the labour hire operators and host businesses that operate across state borders. The Taskforce is of the view that a single national regulatory scheme is preferable over different and overlapping state-based schemes.

A National Labour Hire Registration Scheme

The Taskforce considers that a new tool is required in order to address the three significant factors that provide the environment for unscrupulous labour hire operators to exist and that current mechanisms will continue to be insufficient. The three factors are:

- the lack of entry barrier to operating as a labour hire operator
- the lack of visibility for host businesses regarding the behaviour of labour hire operators
- the lack of supply chain accountability for unscrupulous practices of labour hire operators.

The Taskforce considers the proposed regulatory model for the labour hire industry should take account of:

- the complex and diverse nature of the industry
- the need to capture rogue labour hire operators that deliberately conceal non-compliance and wage underpayment practices
- the importance of drawing in the supply chain that relies on labour hire operators
- not imposing an unnecessary regulatory burden on the entire labour hire industry.

For these reasons, the Taskforce recommends the Government consider establishing a targeted and evidence-based mandatory National Labour Hire Registration Scheme (the Scheme). The Scheme would be an industry-specific, 'light touch' regulatory model to provide government with an important tool to better direct the enforcement of current laws by the existing regulators of labour hire operators. It would act as a form of negative licensing to prohibit labour hire businesses that contravene relevant laws from operating. Critically, it would complement other new and existing government measures that address the drivers of workplace exploitation.

The objectives of the Scheme should be to:

- gain visibility and accountability of labour hire operators operating in high-risk sectors
- extend accountability to hosts

- provide a means for government to encourage compliance and behavioural change
- reduce exploitation of vulnerable workers by labour hire operators and in supply chains.

The Taskforce recommends that the Government agree to the principles of the proposed Scheme and then consults stakeholders on the details of the Scheme to ensure it is fit for purpose and will address the problems it seeks to address. This includes consultation on the relevant sectors, policy settings and interactions with other industry or state-based schemes.

Recommendation 14

It is recommended that in relation to labour hire, the Government establish a National Labour Hire Registration Scheme with the following elements:

- a) focused on labour hire operators and hosts in four high risk industry sectors — horticulture, meat processing, cleaning and security — across Australia
- b) mandatory for labour hire operators in those sectors to register with the scheme
- c) a low regulatory burden on labour hire operators in those sectors to join the scheme, with the ability to have their registration cancelled if they contravene a relevant law
- d) host employers in four industry sectors are required to use registered labour hire operators.

Figure 6.1 – Proposed elements of the Scheme

Element	Description
Scope and coverage	<ul style="list-style-type: none"> The Scheme operates nationally and applies to labour hire operators and hosts that operate in horticulture, meat processing, cleaning and/or security.
Definition of labour hire operators	<ul style="list-style-type: none"> Definition of labour hire operators captures a broad range of activities by labour hire operators while minimising unintended consequences. A labour hire operator may be involved in the supply of a worker to a host; a party in a supply chain of entities between the host and the workers; or act as a 'workforce contractor' where the labour hire operator maintains control and supervision of the workers (e.g. harvesting a crop for a fee).
Requirements for labour hire operators	<ul style="list-style-type: none"> Mandatory for labour hire operators to register with the Scheme. A civil penalty contravention could apply if operating unregistered. Labour hire operators to pay a fee at the time of registration and annually. Labour hire operators register via a once-off process, supplying prescribed information about the owners/operators and the business. If a labour hire operator has previously seriously breached a relevant law, the labour hire operator cannot register until they are compliant with relevant laws. 'Relevant laws' could include workplace, tax, migration, WHS and workers' compensation laws, obligations for operating a corporation (including liquidation processes) and criminal history of owners/operators. Labour hire operators must review, update and confirm details annually. Registered labour hire operators undergo periodic audits undertaken by the administering authority to check compliance with their employer obligations. The audit could involve sharing of government-held data, request for information or on-site visits. Periodic audits could be set according to the operator's risk rating or in response to complaints. Registered labour hire operators that seriously breach a relevant law, fail to engage in audits or fail to pay the annual fee could be de-registered.
Public register of labour hire operators	<ul style="list-style-type: none"> The Government maintains a public register of registered labour hire operators to allow hosts to find a registered labour hire operator.
Requirements on host employers	<ul style="list-style-type: none"> Host employers must use registered labour hire operators with a penalty for not using a registered labour hire operator.
Administration	<ul style="list-style-type: none"> A separate administrative entity to be established and funded to administer the Scheme (this could be within an existing government agency). The entity would maintain the online registration process; grant and suspend registrations; de-register labour hire operators; undertake audits; make referrals to regulators; and administer the host penalty regime. The Scheme would carry an establishment and ongoing cost. The proposed annual fees paid by labour hire companies could contribute to this, but other funding will also be required to support the Scheme.

Chapter 7 – Improving protections for international students and working holiday makers

Section overview

- Non-sponsored visa holders such as international students and working holiday makers are often vulnerable to workplace exploitation.
- This section explores options to improve support for international students, including greater provision of workplace information, assistance from education providers and best practice guidelines for education institutions.
- The Taskforce has also considered the role of industry and community organisations in providing assistance and services to working holiday makers. The Taskforce notes new industry-led approaches to enhance protections and supports exploitation free supply chains and addressing the practices of rogue accommodation providers.
- The Taskforce has also considered how existing employer sanctions and sponsorship obligation provisions, enhanced data collection and continued collaboration between Taskforce agencies can provide better support and protections for international students and working holiday makers.

Some industries have a heavier reliance on temporary visa holders than others. With the exception of sponsored skilled migrants, temporary visa holders often work in industries that do not require specialised skills and offer opportunities for short-term or transient work, which often suits visa holders' availability and preferences. These sectors include cleaning, health and beauty, hospitality, retail, horticulture, food manufacturing and construction.

Exploitation of temporary visa holders is understood to be more prevalent in industry sectors where labour costs are a significant part of the overall business costs. Many temporary visa holders work in low-skilled jobs, which are generally low paid and physically demanding.

Two cohorts of migrant workers tend to work in low-skill and low-pay sectors:

- **International students:** student visa applicants must declare they have sufficient funds to support themselves for the duration of their studies. Once they arrive in Australia many students supplement their income through part time or casual work.
- **Working holiday makers:** many take up paid work to supplement their funds while travelling around Australia. A large number also try to meet the requirement to work at least three months of 'specified work' in regional Australia to obtain a second year visa. Working holiday makers commonly work at least part of their time in Australia in the horticulture, hospitality and/or retail sectors.

Options for enhanced information and support for international students

The workplace exploitation of student visa holders could reduce Australia's attractiveness and competitiveness as a destination of choice for international students, diminishing the success of the international education sector in the process. A reduction in international student workplace exploitation will require action through multiple avenues by government agencies and the sector more broadly.

The Taskforce welcomes the work undertaken by the Council for International Education (the Council) to support international students affected by workplace exploitation. These actions will complement measures recommended by the Taskforce to directly address employers who exploit their workers.

The Council brings together a whole of government approach to strengthen and grow Australian international education and oversees the implementation of the National Strategy for International Education 2025 (the National Strategy). The Council identified workplace exploitation of international students as an early priority. The Expert Members of the Council established the Student Services Delivery Working Group, which included Taskforce Deputy Chair Dr Cousins as a member. At its 29 November 2018 meeting, the Council, chaired by the Hon Dan Tehan, Minister for Education and Training, endorsed a package of actions to address student workplace exploitation.

Expert Members condemned the exploitation of international students in the workplace. They recognised that international students are a cohort particularly vulnerable to workplace exploitation, and have agreed to an approach that recognises the shared responsibility between employers, the policy and regulatory arms of Commonwealth and state and territory governments, education institutions and their education agents, education peak bodies, and student organisations. The package outlines actions that the sector and education providers should take to support students to avoid exploitation or seek redress. It identifies opportunities to better promote the international education sector's work, build on existing initiatives, and extend examples of good practice to ensure a comprehensive, sector-wide response.

In 2019, Expert Members will guide the implementation of actions and best-practice guidance across the international education sector. This includes the development of communication materials and best-practice guidance materials through collaboration with various stakeholders, government and peak bodies. The package of actions complements the work of the Taskforce, and has been designed to help prevent students from experiencing workplace exploitation and help students resolve workplace issues. A copy of the package of actions is at Appendix E.

Providing more regular information for international students

Recent changes to the National Code of Practice for Providers of Education and Training to Overseas Students 2018 (the National Code), introduced from 1 January 2018, require education providers to provide international students information on their employment rights and how to resolve workplace issues as part of their orientation programs. This sends a strong message to education providers that the Australian Government considers provision of information on workplace rights of such importance that it has mandated its distribution.

However, timing of information provision is important. While orientation programs are a critical component of supporting international students upon arrival, students may have more immediate needs such as navigating a new country, finding accommodation, establishing networks and commencing their studies (as identified in research explained in chapter 3). Information may need to be provided more than once, in different formats, to international students.

Based on the findings of the communications research, *The Information Needs of Vulnerable Temporary Migrant Workers About Workplace Laws*, undertaken by the Taskforce, education providers should give information on workplace rights to student visa holders both prior to arriving in Australia and after orientation to maximise the exposure of these messages to international students. Regular provision of information increases the probability that students will receive this at the time it is needed, such as when they are looking for work, or commencing a new job.

Education agents also play an important role in Australia's international education sector and in providing prospective international students with advice both before and after arrival in Australia. International students use the services of an education agent due to their geographic distance from Australia, ease of language communication, and understanding of cultural requirements. Students will often seek support of an education agent rather than their education provider or government agencies.

Support for international students

Under the National Code, education providers must have a designated member or members of its staff to be the official point of contact for international students. The National Code also mandates that there must be sufficient student support personnel to meet the needs of international students.

Education providers are also required to have and implement documented policies and processes for managing critical incidents that could affect an international student's ability to undertake or complete a course, such as those that may cause physical or psychological harm. This could include issues such as student workplace exploitation. The National Code sets out that education providers must report students who do not meet course progress or, if applicable, attendance requirements.

Education providers are trusted intermediaries to provide support to international students. International students already engage with these services on a range of issues. Expanding the responsibilities of education providers' support staff to provide information on workplace matters, including how to resolve workplace matters, reinforces to international students that their provider is available to assist and support them in pursuing matters. For example, the student support personnel could provide information to international students on the suite of tools available to resolve workplace issues, for example the FWO's resources on pay rates and the Record My Hours app. Support staff could also help students access assistance from the FWO or other support services, such as study hubs or Redfern Legal Centre.

Initiatives to enhance student understanding of workplace laws can be further enhanced by measures that improve accessibility and delivery of information by government agencies (outlined in Recommendation 2).

Best practice guidelines

While the National Code sets minimum standards, some education providers have implemented strategies to address workplace exploitation that demonstrate best practice, including:

- legal aid services available on campus
- development of key indicators of financial stress (including, but not limited to, non-payment of fees) and budgeting workshops and other support to help students ease financial stress
- only approving jobs to be advertised on an education provider's website if they appear to be compliant with the Fair Work Act
- regular sessions specifically designed for international students about finding jobs, job skills, legal rights and exploitation.

As well as the support offered by education providers, some state and territory governments offer international students other support, such as:

- free legal advice and support, such as through the Redfern Legal Centre
- international student hubs located in areas with large student populations, offering free support and advice in a trusted environment.

While many education providers are well placed to meet the new National Code provisions, others, especially smaller providers, would benefit from further guidance and examples of best practice.

The initiatives coming from the education sector to support the wider labour market reforms and initiatives aimed at dealing with the wage exploitation problem affecting many temporary migrant workers are welcome. However, even more could be done by the sector. Educational providers are major beneficiaries of the substantial growth in international student visa holders in recent years. They are also strong advocates of the work right restriction attached to this visa. They have a role in ensuring international students have sufficient resources to support themselves during their study and they are required to have regard to student welfare and performance.

In these circumstances it is considered that educational providers should be required to provide more welfare support to students to help them avoid and where necessary deal with instances of wage exploitation. Some of the larger and perhaps more reputable providers already do this. But it is the ones that don't which need to step up to the mark.

This points to the need to further amend the National Code of Practice of Education and Training to Overseas Students to require providers to give assistance to overseas students exercising their work rights, in order to help prevent and deal with workplace exploitation. This should include appropriate liaison between student contact officers and the FWO. It is necessary to include this in the National Code so that the regulators, the Australian Skills Quality Authority and the Tertiary Education Quality and Standards Agency, can have some basis to monitor and if necessary enforce this requirement on all providers.

Recommendation 15

It is recommended that education providers, including through their education agents, give information to international students on workplace rights prior to coming to Australia and periodically during their time studying in Australia.

Recommendation 16

It is recommended that education providers, through their overseas students support services, assist international students experiencing workplace issues, including referrals to external support services that are at minimal or no additional cost to the student and that specific reference to this obligation be made in the National Code of Practice for Providers of Education and Training to Overseas Students.

Recommendation 17

It is recommended that the Council for International Education develop and disseminate best practice guidelines for use by educational institutions.

Options for improving conditions for working holiday makers

Working holiday makers are likely to work in low skilled occupations in the hospitality, retail and fast food industries. Many also undertake work in regional Australia, including in horticulture, agriculture, forestry and fishing to satisfy the three months of 'specified work' requirement for a second year visa. The FWO's experience with these sectors indicate that employers' compliance with workplace laws is relatively low and disputes involve a disproportionately significant number of temporary visa holders. As an unsponsored visa, there is limited data on the types of work and locations working holiday makers undertake.

In 2017–18, despite the hospitality industry employing around 7 per cent of Australia's workforce, it accounted for the highest proportion (18 per cent) of disputes the FWO helped resolve. It was also the industry with the highest volume of anonymous reports received (37 per cent), infringement notices issued (36 per cent) and court actions commenced (66 per cent).

In the same period, the hospitality industry also accounted for the highest proportion of disputes the FWO helped resolve involving visa holders (33 per cent). This was followed by the administrative and support services industry (12 per cent), the construction industry (8 per cent), the retail industry (7 per cent) and the agriculture industry (6 per cent).

In 2017–18, workplace disputes from visa holders in the café and restaurants sector accounted for 21 per cent of all disputes lodged with the FWO by visa holders. The building and other industrial cleaning services sector and the take away food services sector each saw 6 per cent of all visa holder disputes recorded in the sectors.

FWO Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program

In its 2016 inquiry into working holiday makers, the FWO examined the nature and operation of the three months specified work requirement, and the impact that this has on the work experiences of 417 visa holders, the employment market and Australian workplace laws. The findings include:

- underpayment or non-payment of wages
- visa holders offering or being induced to offer payments to third parties for assistance to gain a second year work rights visa
- sexual harassment
- workplace health and safety issues
- the provision of sub-standard accommodation.¹⁰¹

The Inquiry found a series of tensions between:

- the public policy intention of the 417 visa program as a 'cultural exchange' and the use of the visa program as source of labour
- various restrictions under migration law associated with the 'work rights' and the labour imperatives in regional areas
- 'unpaid work' and employment relationships
- the power imbalance of the worker and cost pressures to business.¹⁰²

As a consequence, the Inquiry found the 417 visa program created an environment where:

- unreasonable and unlawful requirements are being imposed on visa holders by unscrupulous businesses
- exploitative workforce cultures/behaviours are occurring in isolated and remote workplaces
- employers are making unlawful deductions from visa holders' wages, or are unlawfully requiring employees to spend part or all of their wages in an unreasonable manner.¹⁰³

The FWO submitted the Inquiry's recommendations to the Taskforce for consideration. The Taskforce agreed to the establishment of the Working Holiday Maker Cross Agency Committee to lead a whole of government implementation of the Inquiry's recommendations. The Taskforce notes that significant progress has been made on the recommendations made in the FWO's report and, importantly, that the Committee will continue to facilitate collaboration between government agencies.

¹⁰¹ Fair Work Ombudsman, Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program, FWO, Melbourne, 2016, p. 3.

¹⁰² Fair Work Ombudsman, Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program, FWO, Melbourne, 2016, p. 4.

¹⁰³ Fair Work Ombudsman, Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program, FWO, Melbourne, 2016, p. 25.

FWO Harvest Trail Inquiry

On 22 November 2018, the FWO released the findings from its four-year inquiry on the workplace arrangements along the Harvest Trail.¹⁰⁴ Throughout the inquiry, the FWO found widespread non-compliance among employers (growers and labour hire contractors), with inspectors recovering more than \$1 million in unpaid wages for over 2,500 workers.¹⁰⁵ The FWO undertook nearly 1,300 education and compliance activities across the main horticulture regions across Australia and audited growers of varying size and sophistication.¹⁰⁶ Breaches of the Fair Work Act were mainly due to underpayment of the hourly rate and non-payment for time worked, failure to keep records and issue pay slips.¹⁰⁷ Legal action was commenced against eight employers.¹⁰⁸

The inquiry found Harvest Trail growers rely heavily on overseas labour, with almost 70 per cent of the 638 businesses investigated employing visa holders, predominantly working holiday makers (subclass 417 visa holders). The Harvest Trail Inquiry supported the FWO's earlier inquiry into the working condition of subclass 417 visa workers that found, in the FWO's experience, these workers are more vulnerable to exploitation in the workplace due to language, cultural barriers and a lack of understanding of workplace rights, coupled with the requirement to work for three months in specified work in regional Australia to obtain a second-year visa.

The FWO will establish a stakeholder reference group to consider the crucial next steps to implement the recommendations outlined in the inquiry to build a culture of compliance. This includes working with employers, industry bodies and community groups to enhance compliance with workplace laws, prioritising operational activities in collaboration with other government regulators, and take forward the findings of the consumer research.

A case study: Migrant workers in Australian horticulture

The agriculture industry accounted for 6 per cent of the total visa holder disputes the FWO helped resolve in 2017–18 and 13 per cent of the disputes involving working holiday makers (subclass 417 visa holders) in the same period. By this measure, despite agriculture employers being the subject of a low proportion of disputes, working holiday makers are currently more than twice as likely to raise one of these disputes as the entire visa holder population.

The agriculture and horticulture sectors recognise the importance of migrant labour to their ongoing productivity. To ensure that all horticulture workers, including migrant workers, are treated fairly, the horticulture industry established the Fair Farms Initiative. This case study sets out the

¹⁰⁴ Fair Work Ombudsman, *Harvest Trail Inquiry: A report on workplace arrangements along the Harvest Trail*, FWO, Melbourne, 2018.

¹⁰⁵ Fair Work Ombudsman, *Harvest Trail Inquiry: A report on workplace arrangements along the Harvest Trail*, FWO, Melbourne, 2018, p. 26.

¹⁰⁶ Fair Work Ombudsman, *Harvest Trail Inquiry: A report on workplace arrangements along the Harvest Trail*, FWO, Melbourne, 2018, p. 11.

¹⁰⁷ Fair Work Ombudsman, *Harvest Trail Inquiry: A report on workplace arrangements along the Harvest Trail*, FWO, Melbourne, 2018, p. 26.

¹⁰⁸ Fair Work Ombudsman, *Harvest Trail Inquiry: A report on workplace arrangements along the Harvest Trail*, FWO, Melbourne, 2018, pp. 27–28.

importance of migrant workers to Australian agriculture and outlines the ways the Fair Farms Initiative is working to reduce exploitation of the horticulture workforce.

Agriculture is an important contributor to the Australian economy. In 2017–18, the industry's \$65.9 billion gross value of production in 2016–17 accounted for approximately 3 per cent of Australia's GDP.¹⁰⁹ Australian agriculture is highly diverse, and farm businesses make an important contribution to the Australian economy. There are around more than 88,000 farm businesses in Australia¹¹⁰, ranging from small berry farms in Tasmania to large cattle grazing properties in the Northern Territory. Farm businesses directly employ around 304,000 people.¹¹¹

Australian agriculture is a strong performer in international markets. Approximately 80 per cent of agricultural production was exported in 2017–18, and agriculture made up around 13 per cent of the total value of Australia's goods and services exports.¹¹²

Temporary migrant workers make up a significant proportion of Australian agriculture's seasonal workforce, with at least 35,000 to 40,000 migrant workers, working across Australia in agriculture, fisheries and forestry, each year.¹¹³ The vast majority of these are working holiday makers, predominantly employed in sectors with peaks in labour demand around seasonal harvest times, such as horticulture.

A number of sectors in agriculture are labour intensive and will continue to be so even with increasing mechanisation and innovation in production and supply chains. This is particularly the case with some horticultural sectors, where crops must be harvested by hand. As a result, the horticulture sector¹¹⁴ is highly dependent on seasonal migrant labour, especially in times of peak production such as planting, pruning, picking and packing.

The long-standing view of horticulture stakeholders is that reliable access to migrant labour is essential to the productivity and profitability of Australian horticulture industries. In the 2016 Senate inquiry, horticultural growers and their representative associations warned that without labour supplied by the working holiday program, many rural industries were at risk of a contraction in production, and some businesses could not continue to operate.¹¹⁵

¹⁰⁹ Department of Agriculture and Water Resources ABARES, Agricultural commodities June Quarter, DAWR, Canberra, 2018, p. 18.

¹¹⁰ Australian Bureau of Statistics, Land Management and Farming in Australia, 2016–17, cat. no. 4627.0, ABS, Canberra.

¹¹¹ Department of Agriculture and Water Resources ABARES, Agricultural commodities June Quarter, DAWR, Canberra, 2018, p. 18.

¹¹² Department of Agriculture and Water Resources ABARES, Agricultural commodities June Quarter, DAWR, Canberra, 2018,

¹¹³ In 2016–17 there were 32,191 working holiday maker visas holders who worked in agriculture, forestry and fishing to meet their second year requirement and 6,166 visas granted through the Seasonal Worker Programme.

¹¹⁴ ABARES labour survey defines horticulture according to the ANZSIC codes. Horticulture covers farms that grow tree and vine crops such as pome fruit, stone fruit, citrus, wine and table grapes, and vegetables.

¹¹⁵ Senate Education and Employment References Committee, A National Disgrace: The Exploitation of Temporary Work Visa Holders, SEERC, Canberra, 2016, p. 53.

Changing industry behaviour

Educating industry on workplace obligations

Experience has shown that community organisations can play an important role in providing assistance and services to vulnerable or disadvantaged members of the community. For example, the FWO's Community Engagement Grants Program provides important funding support for organisations across the country for this purpose.¹¹⁶ In most cases these organisations work directly with employees providing advice and assistance and if necessary support to deal with underpayment matters, but in the case of Growcom, discussed below, funding has been directed to an industry body.

Academic research has also highlighted how community support workers can help to ensure greater compliance with workplace laws. In some cases, funding individuals who liaise with industry, accommodation providers, police and local governments to provide support for working holiday makers may be an effective strategy to pursue.¹¹⁷

In general, whatever approach is taken, it is highly desirable that there is careful, independent evaluation of the effectiveness of the use of funds provided under grant programs.

Growcom¹¹⁸ is assisting employers in the horticultural sector to comply with workplace laws, thereby improving the employment experiences of vulnerable workers in that sector.

Through the program, in May 2017, Growcom launched the Fair Farms Initiative. The Fair Farms Initiative is an industry-led initiative, comprising a package of measures targeting employment practices in the Australian horticulture industry.

¹¹⁶ Through the Community Engagement Grants Program (the CEG Program) organisations were funded for a range of services, projects or programs of work that supplement FWO's functions under the Fair Work Act. The CEG Program supports these organisations and assists them with providing advice and help to vulnerable people about workplace issues.

¹¹⁷ Stephen Clibborn, It takes a village: civil society regulation of employment standards for temporary migrant workers in Australian horticulture, *University of New South Wales Law Journal* (2009) Issue 42 (1).

¹¹⁸ Growcom is the peak representative body for Queensland horticulture and strives for the long-term growth and profitability of horticultural farms and the industry.

Growcom Fair Farms Initiative

The Fair Farms Initiative aims to foster fair employment practices within Australian horticultural farms and packhouses, with a particular emphasis on addressing exploitation of vulnerable workers. The initiative has funding support from the FWO and commenced in 2017.

Measures in the initiative include:

- establishment of an industry-owned Fair Farms Training and Certification Scheme based on a standard benchmarked against Australian workplace law
- support and information for grower-employers across the Australian horticulture sector regarding their obligations under Fair Work laws and practical ways to maintain compliant employment procedures and record keeping. This is delivered through regional seminars and articles in industry magazines.¹¹⁹
- a practical risk assessment process, using the workplace relations modules in Growcom's [Hort360](#) program, which steps through relevant legal requirements and industry standards and identifies risks and priorities for improvement.
- an Employment Excellence Award 'to recognise and celebrate employers who champion fair and ethical employment practices and innovative workplace strategies'¹²⁰, to be introduced in 2019¹²¹ and presented at national industry conferences, and
- development of a cost effective pathway to formal human resources qualifications for horticulture employers.

The Fair Farms Training and Certification Program will be available nationally from early 2019. It is a voluntary certification scheme for employers in the horticulture industry. The scheme is based on a Fair Farms Standard which provides clear guidance on compliance with federal and state workplace relations laws and retailers requirements. To achieve certification, a farm business must pass a third-party audit. In the first year of the scheme, audits will be conducted by AUS-QUAL.

Growcom has reported that the initiative has been very well received by farmers who have participated to date. There is strong interest in the development of an industry-based certification scheme, with demand across the horticulture sector driven by adoption of responsible/ethical sourcing policies by Australian retailers and the roll-out of the Modern Slavery Reporting Requirement. There is also interest for the Fair Farms Training and Certification Scheme in horticulture to offer a model for similar initiatives in other industries within and outside agriculture.

Fair Farms (or similar) certification would allow agricultural producers to demonstrate to retailers (and in turn to the retailers' customers) that goods they are purchasing have been produced under fair work conditions. These certification schemes would provide assurance of fair work conditions in agricultural supply chains relevant to Australian conditions and laws. Certification would also

¹¹⁹ Apple & Pear Australia Ltd (APAL), [Fair farms initiative supports growers and farm workers](#), 27 March 2018.

¹²⁰ Growcom, Freshcare and the Fair Work Ombudsman, [Fair Farms Initiative](#), 2017, viewed November 2018.

¹²¹ Apple & Pear Australia Ltd (APAL), [Fair farms initiative supports growers and farm workers](#), 27 March 2018.

demonstrate to potential farm workers that certified growers are complying with all workplace laws and obligations and have met a standard of fairness in their workplace practices.

To this end, Growcom has been working closely with major retailers to seek their acceptance and support of the training and certification scheme as a means for suppliers to demonstrate their compliance with retailers' ethical sourcing policy requirements. Piloting of the scheme has commenced, and this process will enable retailers to evaluate the scheme in practice. Growcom hopes to secure the commitment of retailers to the scheme by mid-2019 as an alternative to other internationally-based schemes such as SEDEX¹²² and GLOBALG.A.P.¹²³

The Taskforce recognises that expansion of the program or the development of similar programs, to include other high-risk sectors in the agriculture industry, could assist the industry to develop a minimum tolerance for worker exploitation, and ensure that businesses that want to do the right thing by their employees do not unintentionally breach workplace laws. Establishing a minimum tolerance of worker exploitation will make working in the agriculture industry a more attractive career option, ensuring that the industry has a sustainable pipeline of employees in the future.

The Taskforce notes that on 5 November 2018, the Prime Minister, the Hon Scott Morrison MP, announced the national roll out of the Fair Farms Initiative, through a funding grant of \$1.5 million. The Taskforce notes that the Fair Farms expansion proposal was developed as part of its considerations of how to better protect working holiday visa holders in the sector.

Industry Engagement

The integrity of supply chains is becoming an increasingly important issue, including for market access. For example, the supplier code of practice for exporters to Europe places a strong emphasis on the health, safety and welfare of workers. This was a central consideration in the implementation of New Zealand's Recognised Seasonal Employer Program, part of a broader labour market strategy for the horticulture and viticulture industries, whereby employers wanted to remove any threats to export trade through poor publicity regarding worker exploitation and the use of illegal workers.¹²⁴

Preventing worker exploitation in the long term also needs commitment from industry. A key finding of the National Farmers' Federation's Talking 2030 Discussion Paper was that 'the Australian farm sector must publicly commit to ethical labour practices, coupled with greater oversight'.

In the FWO's experience, the most serious examples of exploitation often involve vulnerable migrant workers employed by an operator who is part of a much bigger supply chain or network. These workers are typically employed to perform low-skill and labour-intensive work such as collecting supermarket trolleys or picking fruit on the Harvest Trail.

The FWO encourages businesses to take responsibility for labour procurement practices throughout their supply chain. It has worked with a range of industries including security, trolley collection and

¹²² Sedex is a global membership organisation that hosts a platform for sharing responsible sourcing data on supply chains.

¹²³ GLOBALG.A.P. (formerly known as EUREPGAP) sets voluntary standards for the certification of agricultural products around the world. G.A.P. stands for Good Agricultural Practice.

¹²⁴ R Curtain, [NZ's seasonal worker success: lessons for Australia](#), Devpolicy Blog, Australian National University Development Policy Centre, 23 March 2016.

horticulture to produce new labour supply chain resources to support compliant outsourcing of labour and contracting arrangements.¹²⁵

The Taskforce considers there is a role for industry-led arrangements that promote an exploitation free supply chain and considers that the Government should continue to work with relevant industries to develop targeted initiatives to encourage behavioural change in supply chains and address worker exploitation. Initiatives could involve relevant industries establishing quality assurance programs to reduce worker exploitation, involving stakeholders across the supply chain.

Accommodation issues faced by working holiday makers

Working holiday makers utilise a variety of private and commercial accommodation arrangements during their stay in Australia, including standard-form residential properties, share houses, caravan parks, and backpacker hostels.

As a principle, information on accommodation options is useful to migrant workers. As an example, the Seasonal Worker Programme requires employers to liaise with community based organisations. Where there are sensible options for improving transparency and information in regard to accommodation options these should be explored. For example, mechanisms such as web based review forums can help facilitate the spread of effective information.

The employer often provides the accommodation for working holiday makers working in regional or remote areas. They do this either directly or through an intermediary (such as a labour hire contractor or an accommodation proprietor). This is the case for many working holiday makers wanting to obtain a second-year visa, as many working holiday makers utilise 'working hostels' for both employment and accommodation. Reports suggest that there is a higher risk of exploitation when the employer provides accommodation, as some employers are using the provision of accommodation as another avenue to increase their own revenue. It can be an incentive to provide low-cost, sub-standard accommodation where crowding and safety is sometimes a concern.

One commonly reported form of fraudulent behaviour occurs when accommodation providers disguise the cost of accommodation as 'free' but charge a weekly 'job finding fee' (constituting rent). Working holiday makers might also be required to reside in accommodation of the employer's choice as a pre-requisite to employment, and sign contracts that require upfront payment of (above-market) rent and bond.

It has also been reported that some proprietors lure working holiday makers to a regional or remote location on the premise of a non-existent (or insecure) job, and then undertake to provide accommodation that might be overcrowded, of poor condition or overpriced. Such situations can lead to intimidation, including confiscation of passports and valuables in lieu of unpaid accommodation debts. Employers or accommodation providers may also charge fees for additional goods and services such as food and transport, at a cost exceeding their market value. Workers do not formally agree to these deductions, and may be coerced into accepting these costs as part of their employment conditions.

¹²⁵ Fair Work Ombudsman, 2016–2017 Annual Report, FWO, Melbourne, 2017, p. 3.

Common forms of unscrupulous accommodation practices

- residing in accommodation of the employer's choice is a pre-requisite for a job
- accommodation is provided at above-market rates and workers must pay this
- workers do not consent to deductions for accommodation, but it is taken out of their pay
- contracts require unreasonable upfront payment of rent and bonds
- proprietors lure migrant workers to a location on the premise of a non-existent job
- accommodation rates and standards are misrepresented
- accommodation is overcrowded, of poor condition and presents a health and safety risk
- accommodation does not comply with building, tenancy and safety laws
- there is intimidation, including confiscation of passports and personal items in lieu of unpaid debts for rent or bonds.

The provision of accommodation is governed by a wide range of regulation at the Commonwealth, state, territory and local government levels, and relate to employment, work health and safety, consumer law, residential tenancy, local planning and development, building codes, criminal law and anti-discrimination laws.

Although there appears to be sufficient coverage of legislation, the effectiveness and enforcement of existing laws is an issue of concern. For example, during public hearings for the recent Inquiry into establishing a Modern Slavery Act in Australia, witnesses suggested that in the Mildura region, the majority of accommodation available to working holiday makers is never inspected and may be operating 'under the radar'.¹²⁶ The inquiry also heard that state legislation around accommodation could be improved and tightened.¹²⁷

Under existing accommodation laws, the path to recourse is not always easy to navigate, particularly for non-English speakers. Much of the existing legislation does not provide opportunities for individuals to recover their losses, instead only providing penalties for non-compliance by accommodation providers. The myriad of regulatory bodies with responsibility for different compliance issues is also difficult to navigate.

Recommendation 18

It is recommended that the Minister write to the Prime Minister requesting that accommodation issues affecting temporary migrant workers be placed on the Council of Australian Governments (COAG) agenda. Through COAG, the Australian Government should work with state and territory governments to address accommodation issues affecting temporary migrant workers — particularly working holiday makers undertaking 'specified work' in regional Australia.

¹²⁶ R Ayliffe, Public Hearings: Adopting a modern slavery act in Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade: Committee Hansard, Mildura, 30 October 2017.

¹²⁷ M Segrave, Public Hearings: Adopting a modern slavery act in Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade: Committee Hansard, Mildura, 30 October 2017.

Employer sanctions in migration programs

The Taskforce considered a number of options to further increase the application of the existing employer sanctions and sponsorship obligation provisions in the migration system, to better protect international students and working holiday makers, that is non-sponsored visa categories. As discussed in chapter 4, the current provisions of the Migration Act do not establish a legal 'link' between the unsponsored migrant worker and the employer, and therefore does not provide the authority to sanction non-sponsor employers. The section below details the measures being taken to enhance the sanctions for employer sponsors in Australia and New Zealand.

Public disclosure provisions for sanctioned employer sponsors

The Migration and other Legislation Amendment (Enhanced Integrity) Bill 2018 passed Parliament on 23 August 2018 and came into effect on 13 December 2018. The new legislation allows for public disclosure of sanctions against employer sponsors and for the Department of Home Affairs to enter into an enforceable undertaking with a sponsor who has breached their sponsor obligations. The publication of detailed sanction information is intended to deter businesses from breaching their obligations, and enable greater transparency, so that Australian and migrant workers can be better informed about employer behaviours.

Prohibiting employer sponsor approvals – reviewing the New Zealand model

New Zealand has a number of complementary policy measures that take a strong position in sanctioning unscrupulous employers of migrant workers. In April 2017, the New Zealand Government implemented new immigration instructions to stop employers who do not comply with or have breached employment laws from recruiting migrant workers. Under the new measures, the New Zealand Labour Inspectorate can provide the Immigration New Zealand agency with a list of non-compliant employers who have been issued a penalty for breach of employment standards. These employers then face a set stand-down period, preventing them from recruiting migrant workers in a sponsored arrangement for a specified period, depending on the severity of the breach. The immigration instructions complement other legislative provisions that prohibit underpayment of unlawful employees and temporary workers which can result in a court making a banning order against the employer.

These measures relate to employers intending to recruit migrant labour in a sponsored arrangement. In other words, those employers who are supporting visa applications and approvals in principle, seeking accredited employer status or supporting New Zealand residence class visa applications based on employment, and employers who are part of the Recognised Season Employer Scheme.

Australia's existing employer sponsorship framework for temporary or permanent skilled work visas already provides for breaches of law (and other adverse information) to be considered as part of the assessment criteria at employer sponsorship, nomination and visa application stages. Employers may be precluded from sponsoring where serious or repeated breaches have occurred.

Impact of restrictions on work rights attached to temporary visas

Both the international student and the working holiday visas have restrictions on the work rights attached to them. This reflects the fact that these visas are primarily issued for other purposes,

notably education and cultural/travel experiences respectively. These restrictions have a strong rationale and are strongly supported by the education sector and employers in the agricultural sector which particularly benefits from the presence of working holiday makers. The visas are more attractive to temporary migrants because they allow them to work to help support their activities while in Australia and provide additional experience for them.

The Taskforce has been concerned, however, to hear about alleged cases of employers being able to abuse these restrictions in ways that have been detrimental to temporary migrant workers. In the case of international students, there have been cases where employers have persuaded students to work longer hours than permitted under their visa restrictions. Underpayment of wages can have this effect if the student needs to earn a certain income. However, some employers have coerced students into accepting lower wages on the threat of referring them to the immigration authorities for breaching their hours' restriction. The evidence tends to suggest the number of students breaching their visa conditions in this way is not high, but more research is needed to ascertain the significance of the issue.

The three month qualifying period working holiday makers need to meet in order to be able to obtain a second year on their visa is also alleged to have had unintended consequences. It is suggested this has allowed unscrupulous employers to exploit temporary migrant workers. An employer can use the power this restriction provides by rationing work and seeking other benefits before signing off on its completion. Changes to the evidence backpackers can provide to support their claim to have worked the required period are likely to have eased this problem, but concerns are still being raised by backpackers about these issues.

There are arguments that can be made to support removal of these types of restrictions. In the case of international students, it is clear that the 40 hour restriction is not monitored in any positive way by the Department of Home Affairs. Indeed, it would be difficult to do so without entailing significant administrative effort. This is made more difficult by the fact that students can work multiple jobs if they want to, as the 7-Eleven wage remediation program showed. Instead, it seems to be enforced selectively on the basis of fear of immigration authorities finding out in some way.

The restriction does reflect to some degree evidence that student education performance tends to drop off if they work more than 40 hours per fortnight, but if this is the case it could be asked, why does the restriction just apply to international students? In the case of working holiday makers, it has been pointed out that other countries with similar schemes do not apply this kind of restriction to qualify for a second year of the visa.

Conversely, this is a complex issue and there are arguments to support the existing arrangements. For example, the Department of Home Affairs emphasis that the existing arrangements strike an appropriate balance between providing students the opportunity to enhance their stay in Australia with limited work experience, without affecting the purpose of their stay, which is to study. The current limit on work hours protects vulnerable students from the pressures of excessive work commitments that could adversely affect their educational success. Evidence indicates students working more than 40 hours per fortnight (20 hours per week) are less likely to complete their course (e.g. studies indicate students working 16-24 hours a week are 8 per cent less likely to

complete their course, while students working more than 24 hours a week are 14 per cent less likely to complete their course) .¹²⁸

The Australian Government supports international students having the choice to work limited hours to gain professional and cultural experience and to improve their English language skills. The student visa work settings are also part of Australia's global competitiveness.

If these visa restrictions are to be retained it is important that additional steps are taken to prevent their abuse by unscrupulous employers. There appear to be gaps in the law in this respect. For example, the Migration Act visa sponsorship laws, which seek to prevent employers extracting inappropriate advantage for obtaining a visa, do not apply to the working holiday maker visa so that no action can be taken under the Migration Act against an employer for using the restrictions attached to the visa to exploit temporary migrants.

Further, it would seem desirable that there be a strong law applying to all visa categories, sponsored and non-sponsored, that an employer who unduly influences, pressures or coerces a person to breach a condition of a visa is guilty of an offence.

The Chair and Deputy Chair of the Taskforce are of the view that migration legislation could play a greater role in supporting fair work legislation in the fight against wage exploitation. Under the Migration Act, there has been little use of employer sanctions against employers who have been involved in wage exploitation.

Action should be able to be taken against any employer who coerces an employee into breaching a condition of their visa, whether the employee is on a sponsored visa arrangement or not. And more consideration needs to be given to the possibility of a New Zealand style banning scheme covering the employment of temporary migrant workers. This would impose sanctions on employers engaging migrant workers if the employers were found to have engaged in wage exploitation practices against migrant workers. It should desirably go beyond the New Zealand scheme in covering employers of non-sponsored as well as of sponsored migrant workers.

While the Assurance Protocol (discussed in chapter 3) has supported temporary migrant workers to come forward to the FWO with workplace complaints, the numbers to date are small and care must be taken to ensure the Assurance Protocol is responsive to the needs of migrant workers into the future. There should be a further review of the Assurance Protocol within 12 months to assess if the recent changes resulting from the initial review undertaken in June 2018 have been successful in encouraging migrant workers to come forward. Further changes should be made if it is found that migrant workers remain reluctant to come forward to the FWO.

¹²⁸ Polidano, C and Zakirova, R 2011, Outcomes from combining work and tertiary student, NCVET, Adelaide.

Recommendation 19

It is recommended that the Government consider developing legislation so that a person who knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a condition of their visa is guilty of an offence.

Recommendation 20

It is recommended that the Government explore mechanisms to exclude employers who have been convicted by a court of underpaying temporary migrant workers from employing new temporary visa holders for a specific period.

Recommendation 21

It is recommended that the Fair Work Ombudsman and the Department of Home Affairs undertake a review of the Assurance Protocol within 12 months to assess its effectiveness and whether further changes are needed to encourage migrant workers to come forward with workplace complaints.

Improved data collection

As identified in chapter 2, the Taskforce has identified that there is a need for more detailed data both international students and on working holiday makers, particularly those undertaking work in the agriculture sector.

The Taskforce considers that there is a lack of reliable data available to quantify and qualify student visa holders work experience in Australia, including instances of workplace exploitation. To support the development of evidence based initiatives moving forward, the Taskforce considers there is a need for increased data collection of student visa holders work experiences in Australia.

To gain a stronger understanding of the agricultural labour force, the Taskforce understands that the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) is seeking to collect more data on the demand for, and supply of, agricultural labour. The May 2018 Budget provided \$4.7 million over four years for ABARES to improve the collection and analysis of agricultural labour force data. This involves ABARES expanding its farm survey coverage and questions and conducting a longitudinal study examining how the Australian agricultural labour force has changed over time. It would be useful if this data collection could cover issues directly relevant to understanding the extent and causes of wage exploitation in the sector.

Establishing a more robust evidence base should benefit the whole-of-government approach supported by the Taskforce, enabling policy-makers to better understand the extent as well as the drivers of migrant worker exploitation in Australia.

Similarly, the Council for International Education endorsed a package of actions on workplace exploitation, including for the Commonwealth Department of Education and Training to work with education providers and peak bodies to identify ways to better collate data about international students' experiences of working in Australia.

Recommendation 22

It is recommended that the Government give a greater priority to build an evidence base and focus its existing research capacity within the Department of Jobs and Small Business on areas affecting migrant workers. It should do this to better understand the extent, nature and causes of any underpayment and exploitation migrant workers may experience. The department should work across departments where appropriate. Separately, and in addition:

- a) the Department of Education and Training should work with the Council for International Education and peak organisations to help identify mechanisms for providers to collect data about student visa holders' experiences of working in Australia
- b) the Department of Education and Training should conduct regular surveys of overseas students that include workplace experience
- c) the Government should support work being undertaken by ABARES, the science and economics research division of the Department of Agriculture and Water Resources to increase data collection in relation to agricultural labour.

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Appendix A – Terms of Reference

Migrant Workers' Taskforce

There have been a number of high profile cases where vulnerable migrant workers have been underpaid and exploited at work. The Government will not tolerate any exploitation of migrant workers in Australian workplaces. On 19 May 2016, the Government announced its Policy to Protect Vulnerable Workers. The policy included establishing a Migrant Workers' Taskforce (the Taskforce).

The Taskforce will be chaired by Professor Allan Fels AO with Dr David Cousins AM as Deputy Chair and will be supported by the Department of Jobs and Small Business.

Terms of Reference

These Terms of Reference set out the Taskforce's roles, responsibilities and reporting arrangements.

Role and responsibilities

The Taskforce will identify further proposals for improvements in law, law enforcement and investigation, or other practical measures to more quickly identify and rectify any cases of migrant worker exploitation. This includes monitoring the progress of existing and new cross-portfolio initiatives to combat exploitation in the workplace. The Taskforce will support the effective ongoing collaboration between agencies to ensure that activities have a whole of government focus.

The Taskforce will:

- Identify regulatory and compliance weaknesses that create the conditions that allow exploitation of vulnerable migrant workers
- Develop strategies and make improvements to stamp out exploitation of vulnerable migrant workers in the workplace
- Consider ways agencies can better address any areas of systemic and/or widespread exploitation of vulnerable migrant workers, including considering ways in which agencies can better collaborate to avoid such situations arising or to swiftly rectify them.

The Taskforce will do this by:

- Monitoring progress by 7-Eleven in rectifying its breaches
- Receiving updates on implementation of the Government's Protecting Vulnerable Workers policy
- Engaging with Taskforce Cadena and other relevant compliance operations
- Considering particular industries or groups of vulnerable migrant workers where there are systemic problems with exploitation and underpayment
- Assessing labour hire practices for companies that employ migrant workers
- Taking into consideration other relevant inquiries and activities in relation to vulnerable migrant workers (for example, Senate Inquiry reports and cross-government action on human trafficking)
- Monitoring emerging issues that relate to exploitation of migrant workers in the workplace

- Any other appropriate means identified by the Taskforce

The Taskforce operates under the sponsorship of the Minister for Small and Family Business, the Workplace, and Deregulation.

Administrative Arrangements

Composition and tenure

The Taskforce will be chaired by Professor Allan Fels AO, with Dr David Cousins as Deputy Chair.

Members will include:

- Department of Jobs and Small Business
- Fair Work Ombudsman
- Department of Home Affairs
- Australian Border Force
- Attorney-General's Department
- Department of Education and Training
- Australian Taxation Office
- Australian Competition and Consumer Commission
- Australian Securities and Investment Commission
- Department of Agriculture and Water Resources
- Other relevant agencies with responsibilities that impact on exploitation of migrant workers, as required.

Members of the Taskforce will be at the Deputy Secretary or Senior Executive Service Band 2 level.

Where a member cannot attend a meeting, either in person or by teleconference, the member may nominate an appropriate proxy to attend on their behalf.

Membership will be reviewed from time to time to ensure appropriate representation.

The Taskforce will meet no less than four times a year.

The Taskforce was initially established for a term of 18 months. The Taskforce has been extended for a further six (6) months and will conclude on 30 September 2018.

Reporting

The Chair of the Taskforce will report to the Minister for Small and Family Business, the Workplace, and Deregulation on a regular basis and, through the Minister, to other Ministers as required.

The Chair will also distribute a Communique, agreed by Taskforce members, at the conclusion of each meeting.

Meetings

The Taskforce will meet no less than four times per year unless otherwise agreed by the Taskforce members. The initial meeting will occur as soon as possible, with subsequent meetings to be scheduled no more than 12 weeks apart.

A report on 7-Eleven activities and progress; an update on Taskforce Cadena activities and the Communique will be standing agenda items for each Taskforce meeting. Working group members may submit items for a future meeting agenda to the Secretariat. Members will provide the agenda item and supporting papers to the Secretariat prior to the relevant meeting, to allow sufficient time for circulation to members.

Taskforce meetings will generally either be conducted by teleconference or be held at:

Department of Jobs and Small Business
10–12 Mort St
Canberra ACT 2600

Where outcomes of the meetings are required, they will be drafted by the Secretariat and circulated within two (2) weeks of the meeting.

All issues raised are to be considered openly on an in-confidence basis.

Secretariat

The Department of Jobs and Small Business is responsible for ensuring the Taskforce has adequately resourced secretariat support. The Secretariat will endeavour to circulate the agenda and meeting papers one (1) week prior to each meeting.

Appendix B – Stakeholder consultations and roundtable meetings

Stakeholder consultations

In undertaking its work, the Taskforce has consulted widely to date and will continue to do so over the period of its extension. Representatives from community and industry bodies were invited to meetings to present on issues relevant to the Taskforce. Those representatives included:

- Professor Anthony Forsyth, Chair of the Victorian Inquiry into the Labour Hire Industry and Insecure Work
- Mr Charles Cameron, Chief Executive Officer of the Recruitment and Consulting Services Association (RCSA)
- Ms Fiona McLeod SC, Chair of the National Roundtable on Human Trafficking and Slavery's Labour Exploitation Working Group.
- Mr Michael Andrew AO, Chair of the Black Economy Taskforce
- the Australian Council of Trade Unions
- the Australian Industry Group
- the National Farmers' Federation
- the Australian Chamber of Commerce and Industry

To enhance the Government's efforts in protecting temporary migrant workers, the Chair and Deputy Chair also conducted a wide range of stakeholder meetings with government, community and industry groups. These included Universities Australia, International Education Association of Australia, the Department of Foreign Affairs and Trade and the Chairs of the Black Economy Taskforce and the Phoenix Taskforce respectively.

In June 2017, Professor Fels met with Sir David Metcalf, Director of Labour Market Enforcement, to gain insight into the Authority's recently introduced regulatory and enforcement measures in the United Kingdom.

In January 2018, Dr Cousins continued discussions with UK counterparts, meeting with Mr Darryl Dixon, Director of Strategy at the Gangmasters and Labour Abuse Authority and Mr Tim Harrison, Head of the Secretariat for Labour Market Enforcement.

In February 2018, Dr Cousins attended a meeting of the Council for International Education's Student Delivery Services Working Group to discuss the common goal of the Taskforce and the Working Group to improve student service delivery and address exploitation of international students.

Throughout their tenure with the Taskforce, Professor Fels and Dr Cousins have actively shared the work of the Taskforce through presentations at a number of industry and academic seminars including the Immigration Law Conference, the Council of Small Business Australia, Unions NSW Wage Theft Seminar and the International Franchising Committee.

Taskforce correspondence

The Taskforce received correspondence from a range of organisations interested in its work, including community legal organisations, unions, peak bodies and state government. The Taskforce also received correspondence from a number of academics and interested individuals.

Much of the correspondence received focused on suggested reforms and initiatives to improve the treatment of migrant workers in Australian workplaces, particularly student visa holders and working holiday maker visa holders. Other correspondence has suggested areas for increased collaboration between government agencies at all levels, and ways to better communicate with migrant workers.

Taskforce monitoring of 7-Eleven

As part of its requirement to monitor the progress of 7-Eleven in rectifying its breaches, the Chief Executive Officer of 7-Eleven, Mr Angus McKay, was invited to speak at a Taskforce meeting. He outlined the steps that 7-Eleven has taken to address serious non-compliance within its network as well as the progress of the 7-Eleven wage repayment program. Monitoring 7-Eleven was a standing agenda item at Taskforce meetings. Regular reports were provided by 7-Eleven based on either correspondence received directly from 7-Eleven or from the FWO, with whom they have entered a Proactive Compliance Deed.

Stakeholder roundtable meetings

The Taskforce held two stakeholder roundtables in Melbourne and Sydney in late July 2017, where the Taskforce heard directly from legal organisations, community groups, academics, industry and representative bodies on policy responses and possible remedies for the exploitation of migrant workers in Australian workplaces. Several participants followed up directly with the Taskforce with further proposals for reform.

Attendee list – Migrant Workers’ Taskforce Stakeholder Roundtables

Melbourne – 26 July 2017

Ms Tarni Perkal	WEstjustice Community Legal Centre
Mr Mark Zirnsak	Uniting Church
Ms Gabrielle Marchetti	JobWatch
Mr Damien Kylah	Australian Council of Trade Unions (ACTU)
Ms Caterina Cinanni	National Union of Workers (NUW)
Mr Dougal Hollis	Australian Hotels Association - ACCI nominated member
Mr Jordan Brooke-Barnett	AUSVEG
Ms Judith Damiani	Voice of Horticulture
Mr Zaheer Qazi	Council of International Students Australia
Dr Joo-Cheong Tham	University of Melbourne
Dr Tess Hardy	University of Melbourne
Dr Marie Segrave	Monash University
Professor John Howe	University of Melbourne
Professor Alex Reilly	University of Adelaide
Mr Peter Mares	Independent Writer and Researcher
Dr Elsa Underhill	Deakin University
Ms Julie Toth	Australian Industry Group (Ai Group)
Professor Allan Fels AO	Chair of the Migrant Workers’ Taskforce
Dr David Cousins AM	Deputy Chair of the Migrant Workers’ Taskforce
Ms Alicia Weiderman	Ingersoll Consulting
Mr Tom O’Shea	Fair Work Ombudsman
Mr Peter Richards	Department of Home Affairs
Mr Anthony Cuthbert	Department of Agriculture and Water Resources
Mr Peter Cully	Department of Jobs and Small Business
Ms Helen Innes	Department of Jobs and Small Business

Sydney – 27 July 2017

Ms Anastasia Polities	Legal Aid NSW
Mr Sean Stimson	Redfern Legal Centre
Ms Linda Tucker	Redfern Legal Centre
Ms Alison Rahill	Salvation Army
Mr Jules Pedrosa	Restaurant & Catering Industry Association
Ms Jennifer Shillabeer	NSW Farmers
Mr Matthew Waring	NSW Farmers
Ms Dominique Lamb	National Retail Association
Mr Julian Ledger	YHA Australia
Mr Ken McKell	Australian Meat Industry Council
Ms Rachel Mackenzie	Growcom
Ms Bassina Farbenblum	University of New South Wales
Dr Stephen Clibborn	The University of Sydney Business School
Dr Emma Campbell	Federation of Ethnic Communities' Councils of Australia
Ms Tory Kakoschke	Chandler Macleod
Mr Jonathan Granger	Migration Institute of Australia
Mr Misha Zelinsky	Australian Workers' Union
Professor Allan Fels AO	Chair of the Migrant Workers' Taskforce
Dr David Cousins AM	Deputy Chair of the Migrant Workers' Taskforce
Ms Alicia Weiderman	Ingersoll Consulting
Mr Tom O'Shea	Fair Work Ombudsman
Mr Peter Richards	Department of Home Affairs
Mr Anthony Cuthbert	Department of Agriculture and Water Resources
Mr Peter Cully	Department of Jobs and Small Business
Ms Helen Innes	Department of Jobs and Small Business

Appendix C – List of relevant inquiries and reports considered by the Taskforce

#	Name of report/inquiry	Author of the report	Publication date
1	Migrant Intake into Australia	Productivity Commission	September 2016
2	Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Programme – An Independent Review into Integrity in the Subclass 457 Programme	John Azarias, Jenny Lambert, Prof. Peter McDonald and Katie Malyon for DIBP	September 2014
3	Workplace Relations Framework Inquiry Report	Productivity Commission	December 2015
4	The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders	Senate Education and Employment References Committee	March 2016
5	Inquiry into the Seasonal Worker Programme	Joint Standing Committee on Migration	May 2016
6	Identifying and addressing the drivers of non-compliance in the 7-Eleven network	FWO	April 2016
7	Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program	FWO	October 2016
8	Inquiry into Labour Hire and Insecure Work (Victoria)	Victorian Inquiry into the Labour Hire Industry and Insecure Work	October 2016
9	Inquiry into the Labour Hire Industry (South Australia)	South Australian Parliament – Economic and Finance Committee	October 2016
10	Inquiry into the practices of the labour hire industry in Queensland	Queensland Parliament – Finance and Administration Committee	June 2016
11	Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales	FWO	June 2015
12	Review of the <i>Migration Amendment (Employer Sanctions) Act 2007</i>	DIBP	2010
13	A sociological investigation of illegal work in Australia	DIBP	November 2012
14	The Visa Subclass 457 Integrity Review	DIBP	October 2008

#	Name of report/inquiry	Author of the report	Publication date
15	The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012	University of Melbourne: Centre for Employment & Labour Relations Law	July 2014
16	An inquiry into Procurement of housekeepers by four and five-star hotel groups	FWO	May 2016
17	Inquiry into Woolworths trolley collection services procurement by Woolworths Ltd	FWO	June 2016
18	Trading lives: modern day human trafficking	Joint Standing Committee on Foreign Affairs, Defence and Trade	June 2013
19	Report of the Interdepartmental Committee on Human Trafficking and Slavery: Trafficking in Persons: The Australian Government Response	Interdepartmental Committee on Human Trafficking and Slavery	December 2016
20	Migrating for work and study: The role of the migration broker in facilitating workplace exploitation, human trafficking and slavery	Australian Institute of Criminology	December 2016
21	Migration: The Economic Debate	CEDA	November 2016
22	Economic Migration and Australia in the 21 st Century	Lowy Institute	October 2016
23	Temporary Migrant Workers in Australia	Human Rights Clinic, UNSW Law	October 2015
24	Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia	University of Adelaide Law School for FWO	January 2013
25	Why undocumented immigrant workers should have workplace rights	Stephen Clibborn (USyd)	2015
26	Not Just Work: Ending the exploitation of refugee and migrant workers	WEstjustice Western Community Legal Centre	November 2016
27	Improving Protections for Migrant Domestic Workers in Australia – Policy Brief	The Freedom Partnership/The Salvation Army	June 2015

Appendix D – Research project: The information needs of Vulnerable Temporary Migrant Workers

This Appendix is provided in a separate document.

Appendix E – Package of actions on student workplace exploitation

To complement the high quality education international students obtain in Australia, it is important to Australian education's global reputation that students have a positive experience while living in Australia.

International students may choose to work while they study in Australia, within their visa conditions. Work rights are an important component of Australia's education offering and align with work rights in our competitor student destination countries including Canada and New Zealand. Working while studying is a good way for students to gain Australian work experience, build their English language skills, engage with the community and supplement their income. From highly publicised cases, we know that international students unfortunately are vulnerable to exploitation in the workplace.

Expert Members of the Council for International Education condemn the exploitation of international students in the workplace. While workplace exploitation issues are first and foremost issues for employers, ensuring international students have a high quality and enriching student experience is a shared responsibility between the policy and regulatory arms of Commonwealth and state and territory governments, education institutions and their education agents, education peak bodies, and student organisations.

Expert Members reiterated their ongoing support for international students' existing work rights and access to a designated post-study temporary work visa. To help address the vulnerability to exploitation, Expert Members have developed this package of actions on student workplace exploitation to help prevent students from experiencing workplace exploitation and help students to resolve workplace issues. Expert Members commit to guide the implementation of these actions in the education sector.

Education providers, as trusted partners with international students, have a role in reducing students' vulnerability to exploitation. Identifying existing support staff at education institutions who are able to provide information on workplace rights and responsibilities, including how to resolve workplace matters, reinforces to international students that their provider is available to assist and support them.

Actions for Awareness and Prevention

- 1) Education providers to provide international students with access to the right information at the right time to reduce the likelihood of students' experiencing workplace exploitation. This includes providing information before students come to Australia, as part of orientation programs and at regular intervals during their studies.
- 2) Australian Government and state and territory agencies, including the Fair Work Ombudsman (FWO) will work with education providers and education peak bodies to develop and distribute information and resources for international students. The information will emphasise that international students have the same workplace rights and protections as all Australian workers and outline redress mechanisms students should use if they find they have been exploited.
- 3) Workplace rights and conditions will be included in new pre-departure information materials being developed through the 2017 *Enabling Growth and Innovation Program* project.

- 4) Education providers will, over time, revise contracts with their education agents ensuring agents are providing accurate information to prospective students about workplace conditions and rights in Australia.
- 5) The Australian Government will enhance existing training materials for education agents to include information on Australian workplace and visa laws, and increase education agents' awareness of government initiatives to support students to reduce workplace exploitation.
- 6) The Australian Government, state and territory agencies, and international education peak bodies will work with the Council of International Students Australia to:
 - a. develop and test culturally-appropriate communication materials for all stages of awareness-raising (prevention, intervention, redress)
 - b. gather intelligence about how education providers and agents are representing work opportunities in Australia and provide this information to regulators for compliance action
 - c. better understand and identify ways to disrupt the cycle of intra-cultural exploitation.
- 7) Australian Government and state and territory agencies will enhance the *Study in Australia* website to include specific information about working during and after study, including information on issues such as working on a student visa, employment rights, wages, workplace health and safety and information on the FWO and Home Affairs 'Assurance Protocol'.
- 8) Education providers will commit to eliminating workplace exploitation and underpayment on campus requiring on-campus businesses, including franchisees and contractors, to comply with state and federal workplace laws.

Actions for Early Intervention and Redress

- 9) Education providers and peak bodies will work with Australian Government agencies to develop best-practice guidance materials on supporting international students on employment matters and how to access support if they have experienced workplace exploitation. The best-practice guidance will recommend ways to:
 - a. advise students regularly of their workplace entitlements and how to access existing redress mechanisms to resolve issues
 - b. provide direction and support in reporting cases of exploitation to the FWO or other support mechanisms such as legal aid
 - c. make available or promote access to free legal and workplace support services.
- 10) Education providers will provide opportunities for FWO staff to communicate regularly with education providers' support staff and international students on workplace exploitation and entitlements in Australian workplaces, including avenues for student support.
 - a. Examples could include messages around work rights, on digital sites such as websites and through social media.

- 11) Australian Government agencies, in collaboration with peak bodies and local education providers, will work with state and territory governments to build capacity for student Study Hubs as a central and safe space for students to learn about their workplace rights, receive support in workplace matters and be guided on their options for redress.
 - a. This could include physical Study Hub sites, and workplace exploitation clinics or drop in sessions, providing students with an opportunity for direct interaction with the FWO in a safe environment.
- 12) The Commonwealth Department of Education and Training to work with education providers and peak bodies to identify ways to better collate data about international students' experiences of working in Australia.