

# REMEDIES FOR MIGRANT WORKER EXPLOITATION IN AUSTRALIA: LESSONS FROM THE 7-ELEVEN WAGE REPAYMENT PROGRAM

LAURIE BERG\* AND BASSINA  
FARBENBLUM†

*Temporary migrants comprise approximately 11% of the Australian workforce and are systematically underpaid across a range of industries. The most vulnerable of these workers (including international students and backpackers) rarely successfully recover unpaid wages and entitlements. In 2015, media revealed systematic exploitation of 7-Eleven’s international student workforce, reflecting practices that have since been identified in other major Australian franchises. In an unprecedented response, 7-Eleven head office established a wage repayment program, which operated until February 2017. As of mid-2017, the program had determined claims worth over \$150 million — by far the highest rectification of unpaid wages in Australian history. Drawing on interviews with international students and a range of stakeholders across Australia, this article uses 7-Eleven as a case study to illuminate systemic barriers that prevent temporary migrants from accessing remedies for unpaid entitlements within existing legal and institutional frameworks. We identify the unique attributes of the 7-Eleven wage repayment program that have contributed to its unusual accessibility and efficacy, and which may point to conditions needed to improve temporary migrants’ access to justice through state-based institutions and business-led redress processes.*

## CONTENTS

I	Introduction.....	2
II	A History of <i>Fair Work Act</i> Contraventions by 7-Eleven Franchises .....	6
III	7-Eleven’s Establishment of Worker Remedial Mechanisms .....	10
IV	7-Eleven Employees’ Historically Limited Access to Employment Remedies ...	14
	A Unions.....	15
	B Courts .....	16
	C The FWO .....	17
	1 Unpaid Entitlements Recovered by the FWO from 7-Eleven Franchisees.....	20

\* LLB, BA (Hons) (UNSW), LLM (NYU), PhD (Syd); Senior Lecturer, Faculty of Law, University of Technology Sydney.

† BSc, LLB (UNSW), LLM (NYU); Senior Lecturer, Faculty of Law, UNSW Sydney.

Cite as:

Laurie Berg and Bassina Farbenblum, ‘Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program’

(2018) 41(3) *Melbourne University Law Review* (advance)

2	Litigation Brought by the FWO against 7-Eleven Franchisees ...	22
V	Features of the 7-Eleven WRP that Enabled Employees to Obtain Redress:	
	How Were Shortcomings of Existing Processes Overcome? .....	25
	A Mitigation of Employees' Immigration Fears.....	25
	B Mitigation of Fears of Loss of Employment or Retaliation and Disloyalty Concerns .....	29
	C Sidestepping the Potential Jurisdictional Bar to Pursuing a Claim in Court.....	31
	D Amelioration of Evidentiary Obstacles .....	32
	E Provision of Information and Assistance with Claims .....	36
	F Demonstration Effect of Swift, Successful Claims.....	39
	G Circumvention of Employer Insolvency and Accessorial Liability Challenges.....	40
VI	Generalisability of Lessons Learned from the Success of the WRP .....	42
VII	Conclusion .....	46

## I INTRODUCTION

Mohamed Rashid Ullat Thodi came to Geelong from India in 2007 to undertake a double degree in architecture and construction management.<sup>1</sup> After applying for 40 positions without success, and facing high living expenses and university fees, he accepted a job at a 7-Eleven store.<sup>2</sup> He was initially engaged as an unpaid 'trainee', and for two months he worked four to five shifts a week cleaning toilets, windows and air conditioning vents, stacking shelves and mopping floors without pay.<sup>3</sup> Eventually he began to earn \$10 per hour, working approximately 50 hours each week, although his payslip recorded only 20 hours at the award wage rate.<sup>4</sup> His employer explained that this arrangement was designed to benefit him by disguising the fact that he was exceeding the 40-hour-per-fortnight work restriction on his student visa. When, a year later, he requested a pay rise to \$11 per hour he was summarily dismissed.<sup>5</sup> As

<sup>1</sup> Mohamed Rashid Ullat Thodi, Supplementary Submission No 59.2 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (22 September 2015) 1; Interview with Former 7-Eleven Employee (Phone, 4 May 2016).

<sup>2</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 4 (Mohamed Rashid Ullat Thodi).

<sup>3</sup> Ullat Thodi, Supplementary Submission (n 1) 1–2.

<sup>4</sup> *Ibid* 2.

<sup>5</sup> Interview with Former 7-Eleven Employee (Phone, 4 May 2016).

Ullat Thodi later recalled to a Senate inquiry into exploitation of temporary migrant workers:

[T]hey will tell you: ‘We are like a family. We’ll give you a job and help you out. Work more hours than the 20-hour limit.’ ... I have been told, ‘Don’t go and speak about your pay to anybody, because if you do you’ll be in trouble because they will find out you are working more than 20 hours, then you will be deported.’<sup>6</sup>

Ullat Thodi is one of thousands of international students who, over many years, were systemically underpaid by 7-Eleven franchisees across Australia. Amidst extensive media exposure and the public scrutiny of the Senate inquiry,<sup>7</sup> 7-Eleven quickly became the crucible for public concerns about the exploitation of temporary migrant labour. In particular, it drew pointed attention to the exploitation of international students, which has been well documented within scholarly literature in Australia.<sup>8</sup>

While the scale and systemic nature of the exploitation by 7-Eleven were shocking to many, there are two striking dimensions to the story which have received far less scholarly or media attention. First, in the many years over which thousands of 7-Eleven employees were underpaid, exceptionally few had attempted to recover their unpaid wages through the Fair Work Ombudsman (‘FWO’), unions or courts.<sup>9</sup> Second, and even more remarkably, in the wake of the exposure of the exploitative practices, thousands of current and former 7-Eleven employees subsequently filed claims through the 7-Eleven wage repayment program (‘WRP’).

This became the largest wage repayment in Australian history. Established and funded by 7-Eleven’s head office, the WRP was tasked with determining

<sup>6</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 4 (Mohamed Rashid Ullat Thodi).

<sup>7</sup> The Senate Committee held three public hearings on matters related to 7-Eleven in Melbourne on 24 September and 20 November 2015, and in Canberra on 5 February 2016. Testimonies were heard from 7-Eleven head office co-owner and chairman Russell Withers, community advocate Michael Fraser, and five former employees of 7-Eleven, among others: Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016) app 2, 353–4.

<sup>8</sup> See, eg, Iain Campbell, Martina Boese and Joo-Cheong Tham, ‘Inhospitable Workplaces? International Students and Paid Work in Food Services’ (2016) 51 *Australian Journal of Social Issues* 279; Laurie Berg, *Migrant Rights at Work: Law’s Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016) 96–7; Alexander Reilly et al, *International Students and the Fair Work Ombudsman* (Report, March 2017).

<sup>9</sup> Part IV(C) considers the circumstances of the very small number of employees who sought to recover their wages, and the outcomes of those attempts.

and paying out any franchise employee's claim for unpaid wages and entitlements. Within two years, it had paid out over \$150 million to 3,667 current and former employees.<sup>10</sup> This is extraordinary compared with the previous conduct of underpaid 7-Eleven workers, and because international students and other temporary migrants in Australia very rarely seek to recover their unpaid wages.<sup>11</sup>

To address this broader phenomenon, this article seeks to understand why so many thousands of international students working at 7-Eleven did not or could not recover their unpaid wages through the FWO and existing remedial processes in Australia. We then unpack the features of the WRP that enabled thousands of vulnerable employees to achieve such vastly different outcomes. Although scholars have undertaken detailed analyses of structural factors contributing to exploitation of temporary migrants in Australia,<sup>12</sup> there has been limited data available on temporary migrants' access to remedies for unpaid wages and entitlements. This is likely attributable to the challenges in obtaining data on the magnitude of exploitation and number of potential claims on the one hand, and the number of claims made and their outcomes on the other. The 7-Eleven case study therefore presents a unique opportunity to evaluate the barriers impeding temporary migrants' access to existing remedial mechanisms and the conditions that may ameliorate them.

This article arises out of a broader empirical study on temporary migrant workers' access to justice in Australia, drawing on a range of data sources ('*National Temporary Migrant Work Survey*').<sup>13</sup> Field research was conducted between 20 January 2016 and 17 February 2017 in Sydney, Melbourne, Brisbane,

<sup>10</sup> *7-Eleven Wage Repayment Program* (Website, 11 December 2017) (at 'Claim Determination') <[www.wagerepaymentprogram.com.au](http://www.wagerepaymentprogram.com.au)>, archived at <<https://perma.cc/S42E-Q72Z>>.

<sup>11</sup> Catherine Hemingway, 'Not Just Work: Ending the Exploitation of Refugee and Migrant Workers' (WEstjustice Employment Law Project Final Report, 2016) 9. See also Reilly et al (n 8) ch 4.

<sup>12</sup> See, eg, Martina Boese et al, 'Temporary Migrant Nurses in Australia: Sites and Sources of Precariousness' (2013) 24 *Economic and Labour Relations Review* 316; Alexander Reilly, 'Low-Cost Labour or Cultural Exchange? Reforming the Working Holiday Visa Programme' (2015) 26 *Economic and Labour Relations Review* 474, 482–4; Joo-Cheong Tham, Iain Campbell and Martina Boese, 'Why Is Labour Protection for Temporary Migrant Workers So Fraught? A Perspective from Australia' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, 2016) 173, 189, 195; Yao-Tai Li, 'Constituting Co-Ethnic Exploitation: The Economic and Cultural Meanings of Cash-in-Hand Jobs for Ethnic Chinese Migrants in Australia' (2017) 43 *Critical Sociology* 919.

<sup>13</sup> Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Survey, November 2017) ('*National Temporary Migrant Work Survey*').

Adelaide and Canberra. This included six focus groups with 26 temporary migrants (including former 7-Eleven employees)<sup>14</sup> and 36 interviews with a range of stakeholders including government agencies, 7-Eleven management, legal service-providers, advocates, unions and three former 7-Eleven employees.<sup>15</sup> The *National Temporary Migrant Work Survey* yielded 4,322 responses from individuals who have worked on a temporary visa in Australia.<sup>16</sup> The study also draws upon case data and information supplied by the FWO, the Department of Immigration and Border Protection ('DIBP'), 7-Eleven head office and Michael Fraser,<sup>17</sup> as well as 7-Eleven workers' testimony before the Senate inquiry and relevant case law.

Understanding the experiences of 7-Eleven employees and the company's remedial response is especially timely and significant as some of Australia's largest franchises confront similar exploitative practices in their businesses.<sup>18</sup> It will also provide much-needed illumination of these issues for government and other actors seeking to better respond to widespread non-compliance with the *Fair Work Act 2009* (Cth) ('*FW Act*') in relation to temporary migrants.

<sup>14</sup> Focus groups were conducted in Sydney, Melbourne and Brisbane.

<sup>15</sup> Interviewees included: Angus McKay, CEO of 7-Eleven head office and other senior management officials; Allan Fels, former head of the 7-Eleven Fels Wage Fairness Panel; an organiser at worker representative body Unite; Gerard Dwyer, National Secretary of the Shop, Distributive and Allied Employees Association ('SDA'); 7-Eleven employee advocate Michael Fraser; solicitors in law firms Levitt Robinson and Maurice Blackburn; and several senior FWO officials.

<sup>16</sup> *National Temporary Migrant Work Survey* (n 13) 13, 54.

<sup>17</sup> Michael Fraser is a consumer and business relationship advocate who works closely with disaffected customers and workers to achieve fair outcomes. For Fraser's personal account of what occurred at 7-Eleven, see Michael Fraser, 'Investigating 7-Eleven: Who Are the Real Bad Guys?' (2016) 4 *Griffith Journal of Law and Human Dignity* 74.

<sup>18</sup> See, eg, ABC Radio News and Current Affairs, 'Delivery Driver Alleges Pizza Hut Puts Its Drivers in Dangerous Situations', *PM*, 23 November 2015 (Tess Brunton) <[www.abc.net.au/news/2015-11-23/delivery-driver-alleges-pizza-hut-puts-its-drivers/6967198](http://www.abc.net.au/news/2015-11-23/delivery-driver-alleges-pizza-hut-puts-its-drivers/6967198)>, archived at <<https://perma.cc/4AL3-PL4L>>; Mathew Duncley, 'Woolworths under Fire as Workplace Ombudsman Takes on Big Chains', *The Sydney Morning Herald* (Sydney, 27 May 2016) <[www.smh.com.au/business/workplace-relations/woolworths-under-fire-as-workplace-ombudsman-takes-on-big-chains-20160526-gp4xkl.html](http://www.smh.com.au/business/workplace-relations/woolworths-under-fire-as-workplace-ombudsman-takes-on-big-chains-20160526-gp4xkl.html)>, archived at <<https://perma.cc/SA7M-3SMF>>; Adele Ferguson and Mario Christodoulou, 'Caltex Doubles Down on Wage Fraud', *The Sydney Morning Herald* (Sydney, 4 November 2016) <[www.smh.com.au/business/workplace-relations/caltex-doubles-down-on-wage-fraud-20161103-gshdoz.html](http://www.smh.com.au/business/workplace-relations/caltex-doubles-down-on-wage-fraud-20161103-gshdoz.html)>, archived at <<https://perma.cc/AMF4-WK4M>>.

II A HISTORY OF FAIR WORK ACT CONTRAVENTIONS  
BY 7-ELEVEN FRANCHISES

Exploitation of international students is hardly unique to 7-Eleven and has been explored in empirical research. As far back as 2005, one major study found that 58% of working international students interviewed were earning less than the legal minimum wage.<sup>19</sup> A 2015 survey of international university students found that 60% earned less than the federal minimum wage of \$17.29 an hour.<sup>20</sup> Another detailed empirical study concluded that a higher proportion of students working in the food services industry may experience underpayments than those in other industries.<sup>21</sup> These results accord with a recent survey, the *National Temporary Migrant Work Survey*, conducted by the authors into temporary migrants' work conditions and access to employment remedies across Australia. We found pervasive and serious underpayment with half of the 2,528 international student survey participants (55%) reporting that they were paid \$15 or less per hour in their lowest paid job in Australia,<sup>22</sup> and one third (28%) reporting that they were paid \$12 or less per hour.<sup>23</sup> Over four in five respondents (86%) believed that many, most or all international students were paid less than the minimum wage.<sup>24</sup>

Although not exceptional, the mistreatment of international students working in 7-Eleven stores, uncovered in late August 2015, was striking, in part, because of the sensational nature of the media coverage.<sup>25</sup> Furthermore, far from

<sup>19</sup> Chris Nyland et al, 'International Student-Workers in Australia: A New Vulnerable Workforce' (2009) 22 *Journal of Education and Work* 1, 7. Research undertaken in Victoria in 2012 by the hospitality sector union found that around a third of international students in their study reported working unpaid hours additional to their ordinary shifts: Victorian TAFE International and United Voice, *Taken to the Cleaners: Experiences of International Students Working in the Australian Retail Cleaning Industry* (Report, November 2012) 17.

<sup>20</sup> See Stephen Clibborn, '7-Eleven: Amnesty Must Apply to All Exploited Workers', *The Sydney Morning Herald* (Sydney, 9 September 2015) <[www.smh.com.au/business/workplace-relations/7eleven-amnesty-must-apply-to-all-20150908-gjheyp.html](http://www.smh.com.au/business/workplace-relations/7eleven-amnesty-must-apply-to-all-20150908-gjheyp.html)>, archived at <<https://perma.cc/48PM-DZAU>>.

<sup>21</sup> Campbell, Boese and Tham (n 8) 289.

<sup>22</sup> The current minimum wage in Australia is \$17.70 per hour, excluding casual loadings, industry-specific awards, and penalty and overtime rates.

<sup>23</sup> *National Temporary Migrant Work Survey* (n 13) 30–1.

<sup>24</sup> *Ibid* 36.

<sup>25</sup> Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven: A Sweatshop on Every Corner', *The Sydney Morning Herald* (Sydney, 29 August 2015) <[www.smh.com.au/business/workplace-relations/7eleven-a-sweatshop-on-every-corner-20150827-gj8vzn.html](http://www.smh.com.au/business/workplace-relations/7eleven-a-sweatshop-on-every-corner-20150827-gj8vzn.html)>, archived at <<https://perma.cc/JP7H-PAMU>>; ABC, '7-Eleven: The Price of Convenience', *Four Corners*,

isolated incidents, the exploitative and fraudulent practices, including systemic underpayment<sup>26</sup> and falsification of pay records,<sup>27</sup> appeared to be widespread across the 626 franchisee-run stores nationwide. In addition, international students predominated in this workforce: FWO's survey of 20 franchise stores found that 84% of employees encountered by the regulator were international students.<sup>28</sup> Although the centralised payroll service of 7-Eleven Stores Pty Ltd ('7-Eleven' or 'head office') ostensibly conformed to award wages, there were at least four standard underpayment practices across the franchisee network that had apparently been designed to escape detection.<sup>29</sup>

First, as experienced by Ullat Thodi, there was a common practice of non-payment for weeks or even months on the basis that an employee was a

31 August 2015 <[www.abc.net.au/4corners/stories/2015/08/30/4301164.htm](http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm)>, archived at <<https://perma.cc/7V2H-VX39>>.

<sup>26</sup> *Fair Work Ombudsman v Haider Pty Ltd* [2015] FCCA 2113, [10] ('These are matters where the allegations fair and squarely note that there had been a chronic underpayment and a changing of records or a falsifying of records'). See also *Fair Work Act 2009* (Cth), ss 45 (prohibits contravening a term of a modern award, which set out minimum hourly rates, weekend and public holiday rates and overtime rates), 323–4 (requires the employer to pay entitlements in full, in money, and only to deduct amounts which are permitted) ('*FW Act*'). The current relevant industrial instruments setting out rates of pay, penalty rates and casual loading for 7-Eleven employees are the *General Retail Industry Award 2010* and the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, although some workers would have been covered by previous awards or, in a few limited cases, by specific enterprise agreements.

<sup>27</sup> See, eg, *Fair Work Ombudsman v Amrirsaria Four Pty Ltd* [2016] FCCA 968, [23] ('Underpayments were also deliberately concealed by a failure to keep proper records and, indeed, by falsification of the records kept'); *Fair Work Ombudsman v Mai Pty Ltd* [2016] FCCA 1481, [76] ('In response to the first Notice to Produce Mai produced the weekly time sheet reports, the detail payroll reports and the time books to the Fair Work Ombudsman knowing that they were false and misleading'); FWO, 'Another 7-Eleven Store Faces Court Action' (Media Release No 6045, 7 April 2016) ('Mr Chang allegedly created false employment records when making false entries into the 7-Eleven head office payroll system. He and his company allegedly also knowingly provided false time-and-wage records to the Fair Work Ombudsman'); FWO, 'Brisbane 7-Eleven Outlet Faces Court Action' (Media Release No 6807, 18 November 2016) ('Mr Singh and the company allegedly also created false employment records when making false entries into the 7-Eleven head office payroll system'). Cf *FW Act* (n 26) ss 535 ('An employer must make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees'), 536(1) (employer must provide pay slips); *Fair Work Regulations 2009* (Cth) reg 3.44(1) (records kept by an employer must 'not [be] false or misleading to the employer's knowledge').

<sup>28</sup> FWO, *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* (Report, April 2016) 46 ('*Inquiry into 7-Eleven*').

<sup>29</sup> *Ibid* 7.

‘trainee’.<sup>30</sup> This sometimes involved extended periods of arduous work.<sup>31</sup> One employee was paid \$325 for 691 hours of work as a ‘trainee’, or 47 cents per hour.<sup>32</sup> This practice appears to be common among international students generally, with 42% of those who responded to the *National Temporary Migrant Work Survey* reporting that they had been asked to do unpaid work as ‘training’.

In the second widespread practice, dubbed the ‘half pay scam’, franchisees only recorded half the hours worked by the employee in the central payroll system, resulting in an effective pay rate of half of the award or less for double the number of hours.<sup>33</sup> Alongside this practice, many employees received pay slips showing only half their hours worked, and others never received pay slips at all.<sup>34</sup>

Third, in the ‘cash back scam’, franchisees paid employees correctly through the payroll system but then required them to return a portion of their wages in cash.<sup>35</sup> This arose in *Fair Work Ombudsman v Mai Pty Ltd*, where the franchisee paid back some of the approximately \$82,000 he owed to 12 employees following a FWO investigation, but then secretly demanded his staff return thousands of dollars to him and his wife.<sup>36</sup>

<sup>30</sup> Pranay Alawala, Supplementary Submission No 59.1 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia’s Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (22 September 2015) 1–2; Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 23 (Ussama Waseem), 24 (Nikhil Kumar Sangareddypeta); *Inquiry into 7-Eleven* (n 28) 11.

<sup>31</sup> Interview with Former 7-Eleven Employees (Focus Group, Brisbane, 16 June 2016).

<sup>32</sup> Courtney Wilson, ‘“He Made Me Scared”: 7-Eleven Worker Speaks of Intimidation, 47 Cents per Hour Wage’, *ABC News* (Online, 17 February 2016) <[www.abc.net.au/news/2016-02-16/7-eleven-worker-speaks-of-intimidation/7174896](http://www.abc.net.au/news/2016-02-16/7-eleven-worker-speaks-of-intimidation/7174896)>, archived at <<https://perma.cc/S6XX-HZ6P>>.

<sup>33</sup> *Fair Work Ombudsman v Bosen Pty Ltd* (Magistrates’ Court of Victoria, Magistrate Hawkins, 21 April 2011) [24] (‘The Defendants took advantage of the Employees’ status as international students who had recently arrived in Australia on student visas ... [and] made out that they were “doing them a favour” by only recording half the hours worked which made payslips look like the Employees were receiving double the flat rate they actually received’); *Inquiry into 7-Eleven* (n 28) 19.

<sup>34</sup> *A National Disgrace* (n 7) 227 [8.117]. Cf *FW Act* (n 26) ss 535, 536(2); *Fair Work Regulations 2009* (Cth) regs 3.44–3.46.

<sup>35</sup> See *Mai* (n 27) [142]. Cf *FW Act* (n 26) s 325 (an employer must not unreasonably require an employee to spend any part of their wages (including by repayment to the employer)). Courts have previously addressed this practice in relation to temporary migrant employees within other businesses: *Han v Mount Gambier Chinese Medical Centre* [2007] SAIRC 75, [51].

<sup>36</sup> *Mai* (n 27) [83]–[90].

Fourth, some franchisees had 7-Eleven head office pay all employees' wages into their own bank account for distribution to the employees. This gave each franchisee a free hand to control the wage rates they paid and resulted in underpayments.<sup>37</sup> For example, over a four-year period, one franchisee had \$3.6 million in wages for 90 employees paid into 20 of his own bank accounts.<sup>38</sup>

As these practices emerged in the media, so did a host of other complaints. These ranged from unpaid superannuation, to unsafe working conditions, uncompensated workplace injuries,<sup>39</sup> and employees being required to pay the franchisee if a customer shoplifted or drove off without paying for petrol.<sup>40</sup> Another pattern of fraud related to 457 visa sponsorships, with franchisees charging international students \$30,000 to \$70,000 to act as a sponsor.<sup>41</sup> FWO commenced proceedings against one franchisee who was barred by the DIBP from sponsoring 457 visas because of wage underpayments of its current 457 visa holders.<sup>42</sup>

It became clear that, for some time, 7-Eleven had been aware of underpayments and other misconduct by franchisees, and profited from them. 7-Eleven had been notified about systemic exploitative practices over a number years dating back to at least the time of Ullat Thodi's complaint in 2008, and from 2012, by community advocate Michael Fraser, who undertook a probing investigation of franchises across the country and alerted Fairfax media.<sup>43</sup> In its inquiry into 7-Eleven in 2016, the FWO found that 7-Eleven head office had 'very high levels of control across their network' and were 'more closely involved in employment related matters than [the regulator had] typically encountered with other franchise arrangements'.<sup>44</sup> At the very least, 'since the FWO's audits in 2009,

<sup>37</sup> The Fels Wage Fairness Panel identified that approximately \$77 million in wages, for approximately 1,500 workers, was paid into employers' bank accounts: Evidence to Education and Employment References Committee, Senate, Canberra, 5 February 2016, 29 (Allan Fels, Fels Wage Fairness Panel).

<sup>38</sup> Ibid.

<sup>39</sup> Alawala, Supplementary Submission (n 30) 10–11; Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 11 (Pranay Krishna Alawala).

<sup>40</sup> Alawala, Supplementary Submission (n 30) 8; Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 23 (Ussama Waseem). Cf *FW Act* (n 26) s 325 (an employer must not unreasonably require an employee to spend any part of their wages (including by repayment to the employer)); see also at ss 323–4.

<sup>41</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 1–2 (Mohamed Rashid Ullat Thodi), 21 (Ussama Waseem).

<sup>42</sup> *Haider* (n 26). Haider Enterprises Pty Ltd was subject to a two-year bar from sponsoring 457 visa holders in August 2014: 1403464 [2014] MRTA 1864, [11], [102]–[103].

<sup>43</sup> Interview with Michael Fraser (Phone, 2 May 2016).

<sup>44</sup> *Inquiry into 7-Eleven* (n 28) 32.

and reinforced by the *Bosen* litigation commenced in 2010, 7-Eleven had information that some stores within its network had engaged in deliberate attempts to underpay workers.<sup>45</sup> Moreover, under the franchise agreement at that time, in which 7-Eleven head office took 57% of each store's net profit,<sup>46</sup> 'the significant underpayment of wages has directly benefited 7-Eleven.'<sup>47</sup>

### III 7-ELEVEN'S ESTABLISHMENT OF WORKER REMEDIAL MECHANISMS

On 31 August 2015, the day the Four Corners program aired, head office Chairman Russell Withers announced his intention to establish an independent scheme to rectify underpayments from all current and former 7-Eleven employees. Allan Fels, inaugural chair of the Australian Competition and Consumer Commission ('ACCC'), was appointed as the chair of a panel which became known as the Fels Wage Fairness Panel ('Fels Panel'). Withers committed head office to settling any claims determined by the Fels Panel 'promptly and without further investigation' with no statute of limitations and no financial cap on individual or aggregate claims.<sup>48</sup> 7-Eleven engaged Deloitte Australia as secretariat to provide 'specialist investigation and forensic accounting services' to the Fels Panel.<sup>49</sup> Deloitte accountants undertook time-consuming forensic analyses, piecing together information in light of claimants' limited evidence, making reasonable inferences based on knowledge of systemic franchisee practices, and conducting further investigation as necessary.<sup>50</sup>

In May 2016, 7-Eleven announced that it would replace the Fels Panel with an internal independent unit to administer the WRP.<sup>51</sup> According to 7-Eleven head office CEO Angus McKay (who replaced Russell Withers), the reason for moving the program in-house was to enable 7-Eleven to work directly with

<sup>45</sup> Ibid 66.

<sup>46</sup> Ibid 38.

<sup>47</sup> Ibid 39.

<sup>48</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 46; see also at 51.

<sup>49</sup> *A National Disgrace* (n 7) 242 [8.177]. According to Allan Fels, the panel used a team of 30–40 Deloitte forensic accountants: Interview with Allan Fels (Melbourne, 29 March 2016). See also Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>50</sup> Interview with Allan Fels (Melbourne, 29 March 2016).

<sup>51</sup> 7-Eleven Media Centre (Media Statement No 11052016, 11 May 2016) <[www.7eleven.com.au/media-centre/article/media-statement-11052016](http://www.7eleven.com.au/media-centre/article/media-statement-11052016)>, archived at <<https://perma.cc/37K5-NS9L>>.

Deloitte to ensure consistent treatment of claims and the correct identity of claimants.<sup>52</sup> 7-Eleven treated the Fels Panel and the WRP as a single process,<sup>53</sup> and all claims pending with the panel were transferred to the WRP, which continued to accept new claims for a further eight months to 31 January 2017.

Deloitte continued administering and investigating claims, dedicating approximately 60 staff each week.<sup>54</sup> The WRP had the stated objective of providing redress to employees ‘in a fair, efficient, consistent and timely manner’,<sup>55</sup> based on a set of guidance principles and detailed claims assessment methodology which Deloitte and 7-Eleven created together.<sup>56</sup> The methodology addressed different fact scenarios (such as cash-back, half-pay, and unpaid training) and was regularly revised as novel practices of exploitation were detected.<sup>57</sup> Although the FWO rejected 7-Eleven’s offer to provide the regulator with additional funding to oversee the WRP,<sup>58</sup> the FWO played a significant role in overseeing the WRP’s principles and methodology.<sup>59</sup> The principles are publicly available; however, 7-Eleven has declined to share its assessment methodology due to concerns this could enable fraudulent claims.<sup>60</sup>

Claimants were required only to submit a ‘completed template outlining the hours’ they worked, along with a certified copy of their identity documents and proof of address.<sup>61</sup> Once an employee’s hours were established, Deloitte calculated the amount owing based on the applicable pay rates. Deloitte then provided approximately 50–100 case reports per week to the group within 7-Eleven

<sup>52</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> 7-Eleven Wage Repayment Program, ‘7-Eleven Asserts Facts around Wage Repayment Program and Encourages Claimants to Come Forward’ (Media Release, 30 August 2016) <[www.wagerepaymentprogram.com.au/7-eleven-asserts-wage-repayment-program-facts-and-encourages-claimants-to-come-forward/](http://www.wagerepaymentprogram.com.au/7-eleven-asserts-wage-repayment-program-facts-and-encourages-claimants-to-come-forward/)>, archived at <<https://perma.cc/RS38-QNRW>>.

<sup>56</sup> Proactive Compliance Deed between the Commonwealth and 7-Eleven Stores Pty Ltd, 6 December 2016, cl 2.10.

<sup>57</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>58</sup> FWO, ‘Statement on 7-Eleven’ (Media Release No 6091, 12 May 2016).

<sup>59</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>60</sup> Ibid.

<sup>61</sup> 7-Eleven Media Centre, ‘Proactive Compliance Deed Next Step in 7-Eleven’s Reform Journey’ (Media Release, 7 December 2016) <[www.7eleven.com.au/media-centre/article/proactive-compliance-deed-next-step-in-7-eleven-s-reform-journey](http://www.7eleven.com.au/media-centre/article/proactive-compliance-deed-next-step-in-7-eleven-s-reform-journey)>, archived at <<https://perma.cc/3TBT-A7HP>>.

management that made the ultimate payout determinations.<sup>62</sup> The group was provided with the facts of the claim and determination basis but not the identities of the employee or franchisee. These details were shared only with the six 7-Eleven staff responsible for paying the claims, who were bound by strict confidentiality agreements.<sup>63</sup> The WRP approved the substantial majority of claims. It rejected approximately 200 claims for being fraudulent or grossly overstated, including fraudulent claims by franchisees, and claims made by ‘ecosystems’ of employees whose only source of validation was each other’s claims.<sup>64</sup>

Those ‘who disagree[d] with the outcome of a claim [could] seek review by the WRP and further review by the [FWO].’<sup>65</sup> In most such cases, employees requested reconsideration in light of particular factors and an agreement was reached.<sup>66</sup> In ‘a handful or two’ of cases employees did not accept the final determination.<sup>67</sup> Once an employee accepted a determination, 7-Eleven withheld tax, deducted relevant state workers compensation levies and provided the employee with the remainder.<sup>68</sup> The employee’s superannuation was also paid into their nominated fund.<sup>69</sup> Based on an agreement with the Australian Taxation Office, tax was deducted at a flat rate of 32.5%. Interest was calculated at the cash rate of 1.5% — lower than the Federal Court Rate of the cash rate plus 4%.<sup>70</sup>

<sup>62</sup> The committee includes the head office CEO and the General Manager Commercial and Business Assurance: Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> FWO, ‘7-Eleven Signs On with Fair Work Ombudsman to Set the Standard for Franchising in Australia’ (Media Release No 6841, 7 December 2016).

<sup>66</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>67</sup> Ibid.

<sup>68</sup> Ibid. While unpaid superannuation may not have been the most serious complaint for these workers, hundreds of millions of dollars of superannuation remains unremitted in Australia. Through this step, the WRP demonstrated the viability of compliance with Anderson and Hardy’s recommendation that enforcement models avoid shifting the burden of recouping unpaid superannuation to employees: Helen Anderson and Tess Hardy, ‘Who Should Be the Super Police? Detection and Recovery of Unremitted Superannuation’ (2014) 37 *University of New South Wales Law Journal* 162.

<sup>69</sup> Alternatively, superannuation would be placed with the Retail Employees Superannuation Trust (‘REST’): Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>70</sup> Adele Ferguson and Sarah Danckert, ‘7-Eleven Opting for Lower Interest Rate for Repayments to Some Workers’, *The Sydney Morning Herald* (Sydney, 7 November 2016) <[www.smh.com.au/business/retail/7eleven-opting-for-lower-interest-rate-for-repayments-](http://www.smh.com.au/business/retail/7eleven-opting-for-lower-interest-rate-for-repayments-)

As of January 2018, the cumulative total payouts of the Fels Panel and the WRP were \$151.07 million across approximately 3,667 approved claims. Within the first 1,994 approved claims (to 28 February 2017), the median value of approved claims was \$26,824 as compared to the average value which was \$39,368,<sup>71</sup> suggesting that the majority of claims were in fact clustered around this lower figure, with a smaller number of substantially larger claims.

Although 7-Eleven accepted responsibility for paying the claims, it had a separate agreement with its franchisees under which it reserved the right to recoup from them a portion of the payout above the first \$25 million.<sup>72</sup> However, 7-Eleven noted that it would not address this issue until the payouts were concluded, so as not to interfere with the administration of employees' claims.<sup>73</sup> Therefore, at the time of writing it remains unclear whether, how and to what extent 7-Eleven would seek reimbursement from franchisees.

The FWO entered into an extensive Proactive Compliance Deed with 7-Eleven on 7 December 2016, which the regulator characterised as 'set[ting] a new Australian standard'.<sup>74</sup> The deed confirmed that 7-Eleven would continue to rectify underpayments on an uncapped basis for all claims lodged prior to 31 January 2017.<sup>75</sup> Employee claims lodged since 1 February 2017 have been handled by an Internal Investigations Unit within 7-Eleven, rather than at arm's length by Deloitte.<sup>76</sup> The Proactive Compliance deed also incorporated a range of preventative measures, including reforms to 7-Eleven's payroll, employee record and payment systems.<sup>77</sup> Under the Deed, 7-Eleven acknowledged its 'moral and ethical responsibility' to ensure that all franchisees comply

to-some-workers-20161103-gsgzid.html>, archived at <<https://perma.cc/TKV4-EP2N>>. This discrepancy was criticised by lawyers acting for claimants on the basis that it was unfair and constituted further wage theft; however, 7-Eleven maintained that it was a fair rate under the circumstances.

<sup>71</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>72</sup> *A National Disgrace* (n 7) 234–5 [8.157].

<sup>73</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>74</sup> FWO, '7-Eleven Signs On with Fair Work Ombudsman to Set the Standard for Franchising in Australia' (n 65). A Proactive Compliance Deed, signed by both FWO and a business, sets out an agreement by both parties to work together to ensure compliance with workplace laws, outlining the steps both parties will take to ensure future compliance and rectify previous breaches.

<sup>75</sup> Proactive Compliance Deed (n 56) cls 7.1–7.2.

<sup>76</sup> *Ibid* cl 7.14.

<sup>77</sup> *Ibid* cl 5.

with workplace laws,<sup>78</sup> and agreed to establish a range of auditing, risk analysis, reporting and other accountability measures.<sup>79</sup> A revised franchise agreement<sup>80</sup> incorporated some of these reforms in addition to other measures<sup>81</sup> that eased financial pressure on franchisees which likely contributed to systemic employee underpayment.

#### IV 7-ELEVEN EMPLOYEES' HISTORICALLY LIMITED ACCESS TO EMPLOYMENT REMEDIES

Given that exploitative underpayment practices were so widespread and well known within 7-Eleven over many years,<sup>82</sup> one might expect that a significant number of employees would have sought to recoup their unpaid wages before the intense media attention in 2015. However, as examined in this section, 7-Eleven employees overall sought to recover their entitlements to only a very limited extent. Furthermore, those who did experienced very poor outcomes on the whole. In Australia, employees have three avenues for claiming unpaid entitlements: the FWO; unions or other advocates who can support direct approaches to employers; and the courts, either with assistance from legal service-providers or self-represented through the small claims division of the Federal Circuit Court ('FCCA') or local courts.<sup>83</sup> Given the especially limited role of courts and unions, this section mainly focuses on the role of the FWO.

<sup>78</sup> Ibid cl 3.1.

<sup>79</sup> Ibid cl 6.

<sup>80</sup> The agreement was concluded in October 2015 and 98.7% of stores had signed the new agreement as at 31 December 2015: Evidence to Education and Employment References Committee, Senate, Canberra, 5 February 2016, 8, 10 (Robert Francis Baily, CEO, 7-Eleven Stores Pty Ltd).

<sup>81</sup> These include a profit-sharing arrangement that is more favourable to franchisees and an increased minimum income guarantee to stores: *A National Disgrace* (n 7) 235 [8.160]. A description of other elements of the new agreement can be found in *A National Disgrace*: at 237 [8.164].

<sup>82</sup> *Inquiry into 7-Eleven* (n 28) 49; Interview with Levitt Robinson Lawyer (Melbourne, 26 April 2016); Interview with Former 7-Eleven Employees (Focus Group, Brisbane, 16 June 2016).

<sup>83</sup> Workers may also approach their employer directly demanding their unpaid wages, or may do so with assistance from legal service-providers or other organisations.

### A Unions

There could have been a significant role for unions in recovering 7-Eleven employees' wages and counterbalancing the substantial power discrepancy between the employees and their employers.<sup>84</sup> Indeed, early in 2008, Ullat Thodi and a small number of 7-Eleven employees were assisted by Unite, an unregistered organisation representing employees in the fast food and retail sector. Unite assisted the 7-Eleven employees to approach the FWO collectively, which resulted in litigation.<sup>85</sup> But aside from this early role played by Unite, 7-Eleven employees were not members of the Shop, Distributive and Allied Employees Association ('SDA') and there was a marked absence of union involvement. SDA attributed lack of union membership to a perception amongst international students that unions were markers of officialdom that they should avoid.<sup>86</sup> The SDA acknowledged that although it assisted anyone who came forward, it had almost no members among 7-Eleven employees.<sup>87</sup> The union appeared to focus their organising efforts on larger workplaces, which were likely to yield a greater number of members.<sup>88</sup>

By contrast, unions in some industries (such as meat-packing, horticulture and commercial cleaning) have proactively sought to recruit and represent temporary migrants.<sup>89</sup> The noticeable successes in some of these campaigns

<sup>84</sup> On the role of unions in wage recovery generally, see Margaret Lee, 'Regulating Enforcement of Workers' Entitlements in Australia: The New Dimension of Individualisation' (2006) 17(1) *Labour and Industry* 41, 57; Sean Cooney, John Howe and Jill Murray, 'Time and Money under WorkChoices: Understanding the New *Workplace Relations Act* as a Scheme of Regulation' (2006) 29 *University of New South Wales Law Journal* 215.

<sup>85</sup> See Part IV(C)(2).

<sup>86</sup> 'They were seeing a union official in the same frame as an immigration inspector': Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 22 (Gerard Dwyer, SDA). Other unions have reported that international students often 'come from countries where membership of a trade union is risky (or illegal)': National Tertiary Education Union, Submission No 7 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* 5.

<sup>87</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 22, 26 (Gerard Dwyer, SDA).

<sup>88</sup> Robert Gottlieb, 'Uncertainty Casts a Shadow over Major Supermarkets', *The Australian* (Sydney, 23 August 2016) <[www.theaustralian.com.au/business/opinion/robert-gottlieb/uncertainty-casts-a-shadow-over-major-supermarkets/news-story/0a8dfc2e5dc9b17c7c4e8560fb3e941e](http://www.theaustralian.com.au/business/opinion/robert-gottlieb/uncertainty-casts-a-shadow-over-major-supermarkets/news-story/0a8dfc2e5dc9b17c7c4e8560fb3e941e)>.

<sup>89</sup> See, eg, Richard Baker, Nick McKenzie and Ben Schneiders, 'Another Supermarket Fruit Supplier Caught Allegedly Underpaying Migrants', *The Sydney Morning Herald* (Sydney, 15 November 2016) <[www.smh.com.au/business/workplace-relations/another-supermarket-](http://www.smh.com.au/business/workplace-relations/another-supermarket-)

demonstrate the potential for unions to organise and empower these workers, even despite the fact that temporary migrants are particularly unlikely to be union members,<sup>90</sup> and awareness of unions among international students appears to be low.<sup>91</sup> These examples suggest that under different circumstances there may have been a greater role for the union to play in enabling 7-Eleven employees to claim their unpaid wages, or even in triggering the public response that led to the establishment of the WRP.

### B Courts

Not a single 7-Eleven employee sought to recoup their unpaid wages by filing a case in court. This includes not only the ordinary divisions of the courts, which generally require legal representation, but also the small claims jurisdiction. The federal small claims jurisdiction was introduced by the *FW Act* in 2009 to provide a more accessible forum for an individual plaintiff to commence certain civil remedy proceedings. In a small claims procedure in the FCCA, the Court may act ‘in an informal manner’, ‘is not bound by [formal] rules of evidence’, and may act ‘without regard to legal forms and technicalities.’<sup>92</sup> However, in addition to calculating and substantiating a claim, the complexity of applications presents prohibitive barriers for most temporary migrants who would likely be unable to correctly identify the legal employer as well as the instrument the employer has breached, and prepare necessary affidavits which must be served on respondents.<sup>93</sup> Affordable legal assistance for employment claims is limited.<sup>94</sup>

In the context of an acute power imbalance in court between most international students and their employers, even those few employees in a position to

fruit-supplier-caught-allegedly-underpaying-migrants-20161115-gspu0v.html>, archived at <<https://perma.cc/HH3G-RYKM>>.

<sup>90</sup> In the *Temporary Migrants’ Access to Justice for Wage Theft in Australia* report, union membership was at 3% among respondents who were international students in their lowest paid job: Bassina Farbenblum and Laurie Berg, *Temporary Migrants’ Access to Justice for Wage Theft in Australia* (Report, forthcoming). One large-scale survey of 457 visa holders found only 7% of respondents to be union members (although those who were had higher satisfaction levels at work): Migration Council Australia, *More than Temporary: Australia’s 457 Visa Program* (Report) 18.

<sup>91</sup> Interview with International Students (Focus Group, Sydney, 13 October 2016).

<sup>92</sup> *FW Act* (n 26) s 548(3). The small claims process can also apply in any Magistrates Court.

<sup>93</sup> Chris Arup and Carolyn Sutherland, ‘The Recovery of Wages: Legal Services and Access to Justice’ (2009) 35 *Monash University Law Review* 96, 105, 108–11; Hemingway (n 11) 156.

<sup>94</sup> Arup and Sutherland (n 93) 109; Interview with Legal Aid NSW Lawyers (Sydney, 8 February 2016).

put together a claim have an understandably bleak view of the risks and likelihood of success. One 7-Eleven employee explained that after his employment was terminated when he protested his \$5 per hour wage, he contemplated a judicial remedy but was told by a friend: ‘Look you’re an international student here and they’re a company. People have their own lawyers and things. If you go against them, you know what’s going to happen. You’re going to get kicked out of the country and you’re not going to win.’<sup>95</sup>

### C *The FWO*

The FWO and its predecessor, the Workplace Ombudsman, have been involved in addressing workplace contraventions at 7-Eleven since 2008. Nevertheless, prior to 2015 these interventions had limited impact on the recovery of unpaid wages by individual 7-Eleven employees.

The FWO is the national labour inspectorate, which is tasked with promoting ‘harmonious, productive and cooperative workplace relations’<sup>96</sup> and ‘compliance with [the *FW Act*] ... including by providing education, assistance and advice.’<sup>97</sup> The agency has been reinvigorated over recent years and, compared with its predecessors, has greater power, staffing, resources and political support to fulfil its enforcement role.<sup>98</sup>

The FWO’s functions ‘emphasise preventative compliance (eg through education and advice) and co-operative and voluntary compliance (eg through enforceable undertakings)’ over the pursuit of court proceedings or punitive administrative remedies.<sup>99</sup> In a major study of the FWO, Hardy, Howe and Cooney observed that its approach to enforcement eschews ‘command-and-control models’, which ‘have fallen out of favour in much of the current literature on regulatory compliance.’<sup>100</sup> Instead, the FWO’s statutory objects are

<sup>95</sup> Interview with Former 7-Eleven Employee (Phone, 4 May 2016).

<sup>96</sup> *FW Act* (n 26) s 682(1)(a)(i).

<sup>97</sup> *Ibid* s 682(1)(a)(ii). See generally Tess Hardy and John Howe, ‘Accountability and the Fair Work Ombudsman’ (2011) 18 *Australian Journal of Administrative Law* 127.

<sup>98</sup> Tess Hardy, ‘A Changing of the Guard: Enforcement of Workplace Relations Laws since Work Choices and Beyond’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 75.

<sup>99</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) 386 [2554]; see also at 400 [2665]; FWO, ‘Litigation Policy of the Office of the Fair Work Ombudsman’ (Guidance Note No 1, 4<sup>th</sup> ed, 3 December 2013).

<sup>100</sup> Tess Hardy, John Howe and Sean Cooney, ‘Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman’s Use of Litigation in Regulatory Enforcement’ (2013) 35 *Sydney Law Review* 565, 567 (citations omitted).

broadly geared towards ‘responsive regulation’ and ‘strategic enforcement’.<sup>101</sup> They adopt a mix of persuasive, reforming and deterrent sanctions to address drivers of noncompliance,<sup>102</sup> often proactively pursuing high risk industries to maximise limited resources rather than sanctioning individual employers or responding reactively to workers’ complaints.

The FWO identifies temporary migrant employees as a vulnerable population and in recent years their working conditions have been a high-profile priority and the subject of several major FWO campaigns and inquiries.<sup>103</sup> The *FW Act* provides the agency with wide investigatory powers to visit workplaces, interview people or require the production of documents to determine if there have been breaches of Commonwealth workplace laws.<sup>104</sup> The FWO can utilise a range of administrative sanctions when pursuing a party for a contravention.<sup>105</sup> These include infringement notices,<sup>106</sup> compliance notices<sup>107</sup> and enforceable undertakings.<sup>108</sup> Fair Work inspectors also have standing to seek civil penalties through the courts for breaches of the Act.<sup>109</sup>

When an employee contacts the FWO, the regulator has discretion as to how to respond. In the vast majority of cases, individuals are referred to the FWO’s

<sup>101</sup> ‘Strategic enforcement’ is a sophisticated approach to regulatory enforcement developed by David Weil: David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division* (Report, May 2010). ‘Responsive regulation’ was coined by Ayres and Braithwaite: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>102</sup> See Neil Gunningham, ‘Strategizing Compliance and Enforcement: Responsive Regulation and beyond’ in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing, 2011) 199, 201.

<sup>103</sup> See, eg, the FWO’s inquiry reports: *Inquiry into 7-Eleven* (n 28); FWO, *Inquiry into Trolley Collection Services Procurement by Woolworths Limited* (Report, June 2016); FWO, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (October 2016).

<sup>104</sup> *FW Act* (n 26) ss 708–9, 711–12, 714–16.

<sup>105</sup> FWO, *Compliance and Enforcement Policy* (Policy, August 2017) 21–6.

<sup>106</sup> *Fair Work Regulations 2009* (Cth) regs 4.04–4.05. Similar to an on-the-spot fine, this penalty can be applied to breaches related to employment records and pay slips.

<sup>107</sup> *FW Act* (n 26) s 716. This is a written notice that legally requires an employer to fix breaches of the *FW Act*, generally issued when the employer will not voluntarily rectify the breach.

<sup>108</sup> *Ibid* s 715. This is a legally enforceable agreement that generally commits a firm to remedy past contraventions and take steps to ensure future compliance, acknowledging that failure to comply will likely lead to court action.

<sup>109</sup> *Ibid* s 682(1)(d).

website to clarify their legal position and are encouraged to pursue further action themselves.<sup>110</sup> For example, the FWO may provide a template letter of demand and/or a guide on the small claims process.<sup>111</sup> Alternatively, the FWO may address the matter directly with the employer, or facilitate a voluntary phone mediation between employer and employee(s),<sup>112</sup> although the agency has no obligation to achieve or enforce any particular outcome. In only a smaller number of cases, an individual request for assistance will trigger a formal investigation.<sup>113</sup>

Each enforcement measure is used sparingly and the chances of contraventions being investigated and sanctioned remain low. Although the FWO has recently made greater use of litigation as both deterrent and punishment,<sup>114</sup> the agency reserves legal action ‘for the most serious of matters.’<sup>115</sup> In the 2015–16 financial year, out of more than 13,877 complaints made to the FWO, it issued approximately 570 infringement notices and 180 compliance notices, entered into more than 40 enforceable undertakings, and initiated 50 civil penalty proceedings.<sup>116</sup> Contraventions involving visa holders are significantly overrepresented in each of these enforcement activities, relative to the size of this workforce.<sup>117</sup> While high by historical standards and targeted towards vulnerable workforces, these figures indicate that even the FWO’s focus on noncompliance involving temporary workers remains on future voluntary compliance rather than accountability for previous misconduct. In part, this trend may be due to difficulties in detecting noncompliance as a result of complex changes to the labour market over the last two decades,<sup>118</sup> as well as limited resources

<sup>110</sup> See generally FWO, *Compliance and Enforcement Policy* (n 105) 9–13.

<sup>111</sup> See FWO, *Small Claims Guide* (Guide).

<sup>112</sup> FWO, *Compliance and Enforcement Policy* (n 105) 11–12.

<sup>113</sup> FWO, *2015–16 Fair Work Ombudsman Annual Report* (Annual Report, 28 September 2016) 17.

<sup>114</sup> See Hardy, ‘A Changing of the Guard’ (n 98) 86; FWO, *Compliance and Enforcement Policy* (n 105) 25–6.

<sup>115</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 18 May 2015, 30 (Natalie James, Fair Work Ombudsman).

<sup>116</sup> FWO, *2015–16 Fair Work Ombudsman Annual Report* (n 113) 17, 21–2.

<sup>117</sup> In 2015–16, contraventions involving visa holders accounted for 13% of dispute forms, 43% of enforceable undertakings, and 76% of the FWO’s court actions: *ibid* 1, 22.

<sup>118</sup> More fragmented employment relationships and the proliferation of small workplaces have made detection of contraventions more difficult and legal accountability harder to establish in individual cases: Richard Johnstone and Michael Quinlan, ‘The OHS Regulatory Challenges Posed by Agency Workers: Evidence from Australia’ (2006) 28 *Employee Relations* 273; David Weil, ‘Enforcing Labour Standards in Fissured Workplaces: The US Experience’ (2011) 22 *Economic and Labour Relations Review* 33.

and the expense of formal litigation. However, the high evidentiary standards adopted by the FWO also likely impede the agency's pursuit of alleged contraventions, particularly when employees lack documentary evidence of noncompliance. As the Fair Work Ombudsman, Natalie James, has observed, '[u]nless workers have meticulously kept their own records of their hours of work, it becomes very difficult to assess whether underpayments have arisen'.<sup>119</sup> Another important factor is the FWO's approach to complaints which focuses on 'education and self-help'<sup>120</sup> — an approach that can create significant barriers to obtaining redress for vulnerable employees who may require substantial assistance.

The FWO's functions therefore do not include systematically ensuring that large numbers of individual employees can recover their unpaid wages. In the absence of more tailored worker-focused assistance by the FWO or greater powers to resolve allegations of *FW Act* contraventions, the FWO is unable to provide significant numbers of temporary migrant workers with a clear path to remedies, as is evident from an analysis of the history of the FWO's investigations into, and sanctions against, 7-Eleven and its franchisees.

### 1 *Unpaid Entitlements Recovered by the FWO from 7-Eleven Franchisees*

The former Workplace Ombudsman began investigating 7-Eleven franchises in 2008. Following allegations of the 'half pay scam' brought by Ullat Thodi and his co-employees that year,<sup>121</sup> the Ombudsman and its successor, the FWO, conducted two campaigns which involved dozens of audits between 2008 and 2010. The two agencies recovered voluntarily from employers \$162,000 for 168 employees at 20 stores (approximately \$960 per employee).<sup>122</sup> In a further education and audit campaign of 56 franchisees, the FWO found that 30% of franchises had contravened the *FW Act*, and the agency recovered \$32,378 for 62

<sup>119</sup> Natalie James, 'Current Issues in the Regulation of Australian Workplaces' (Speech, Australian Industry Group 2017 Annual National Policy-Influence-Reform Conference, 1 May 2017) 2. For discussion of evidentiary standards in relation to the FWO's implementation of other administrative sanctions such as enforceable undertakings, see John Howe, Tess Hardy and Sean Cooney, *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006–2012* (Report, Centre for Employment and Labour Relations Law, University of Melbourne) 196–7.

<sup>120</sup> FWO, *Compliance and Enforcement Policy* (n 105) 9. In the 2015–16 financial year, 98% of calls to the FWO infoline were resolved at the first point of contact: FWO, *2015–16 Fair Work Ombudsman Annual Report* (n 113) 9.

<sup>121</sup> Interview with Unite Organiser (Phone, 5 May 2016).

<sup>122</sup> *Inquiry into 7-Eleven* (n 28) 7–8.

employees (approximately \$500 per employee).<sup>123</sup> The FWO has since acknowledged that these outcomes likely understated levels of noncompliance since its audit methodology at that time 'would not have identified underpayments if false records were provided'.<sup>124</sup>

These earlier audits and enforcement actions appear to have had little impact on the entrenched underpayment practices within 7-Eleven franchises. Between 2011 and 2015, the FWO received 54 further requests for assistance from 7-Eleven employees.<sup>125</sup> Despite the high proportion of the 7-Eleven workforce who were visa holders, only half of the 54 requests for FWO assistance were from visa holders,<sup>126</sup> suggesting that this group was significantly underrepresented among those willing to approach the FWO with complaints. Moreover, data supplied by the FWO reveals relatively poor outcomes for these 27 visa holders. Eleven cases (39%) involved investigations with no outcome.<sup>127</sup> Nine (32%) were resolved through voluntary compliance measures, all yielding small amounts of money. In five cases (19%), the FWO completed an investigation. Three of these resulted in recovery of money for the employee, one was resolved by litigation with no money recovered, and another resulted in a compliance notice with \$668 recovered.<sup>128</sup>

In 2014, the FWO then commenced its large-scale inquiry into the 7-Eleven network and published its report in 2016. The inquiry involved unannounced site inspections and record-keeping analysis of 20 stores as well as closer investigations of specific stores that had been the subject of employee complaints.<sup>129</sup> This time, the FWO uncovered 'deliberate manipulation of records to disguise underpayment[s]'.<sup>130</sup> The findings prompted the FWO to file 7 matters in the FCCA,<sup>131</sup> enter into 1 enforceable undertaking; issue 20 letters of caution, 14

<sup>123</sup> Ibid 8–9.

<sup>124</sup> Ibid 9.

<sup>125</sup> Ibid 11.

<sup>126</sup> Ibid.

<sup>127</sup> These were either not completed, had complaints withdrawn by the complainant, or had no outcome because of insufficient evidence.

<sup>128</sup> FWO, 'FWO Compliance History with "7 Eleven" Stores, 1 Jul 2011 to 30 Jun 2015' (Analysis, FWO Strategic Research Analysis and Reporting Team) (provided directly to the authors on 4 April 2016).

<sup>129</sup> *Inquiry into 7-Eleven* (n 28) 4.

<sup>130</sup> Ibid.

<sup>131</sup> See Part IV(C)(2).

infringement notices and 3 compliance notices; and led to the recovery of over \$293,500 for an unknown number of employees.<sup>132</sup>

## 2 *Litigation Brought by the FWO against 7-Eleven Franchisees*

The first legal proceedings against 7-Eleven franchisees were commenced by the FWO in early 2010. These cases arose from the first ‘half pay scam’ complaints against the owners and operators of two 7-Eleven stores, brought by Ullat Thodi and his co-employees. In April 2011, the Magistrates’ Court of Victoria awarded penalties of \$120,000 against Bosen Pty Ltd and \$20,000 and \$10,000 respectively against directors Hao Chen and Xue Jing.<sup>133</sup> The \$30,000 in penalties paid by the directors was distributed amongst the six international student employees but a further \$70,068.02 in outstanding entitlements was never recouped against Bosen, which was wound up as insolvent in Federal Court proceedings in June 2012.<sup>134</sup>

The FWO has filed eight cases in total against 7-Eleven franchise owner corporations and their directors and managers.<sup>135</sup> Together, these cases illuminate the FWO’s approach to litigation, and several trends in the impact and outcomes of litigation for employees. First, it appears that none of the cases arose

<sup>132</sup> Ibid.

<sup>133</sup> *Bosen* (n 33) [68]–[70].

<sup>134</sup> *Inquiry into 7-Eleven* (n 28) 10.

<sup>135</sup> At the time of writing, a decision has been handed down in seven cases: *Bosen* (n 33); *Haider* (n 26) (a former employee was underpaid \$21,298.86 but because of the involuntary liquidation of the company there was ‘little to no chance’ he would ever be paid (at [29])); the Court imposed penalty of \$6,120 for Notice to Produce contravention and \$850 for the Compliance Notice contravention on the director, and ordered the total amount of \$6,790 be paid to the former employee); *Amritsaria Four* (n 27) (two employees claimed underpayments of \$49,000 and \$5,682 respectively, which were rectified prior to hearing; the Court imposed penalties of \$178,500 on the company and \$35,750 on the director and ordered a full independent audit and employment law training); *Mai* (n 27) (12 employees were underpaid a total of \$82,661, which the employer purported to rectify in response to the Contravention Notice but then required employees to pay a portion of these wages back; the Court imposed record penalties of \$340,290 on the company and \$68,058 on the director); *Fair Work Ombudsman v Hiyi Pty Ltd* [2016] FCCA 1634 (12 employees were underpaid a total of \$84,047.32, which was rectified prior to the decision; the Court imposed penalties of \$110,000 on the company and \$20,000 on each of the two directors); *Fair Work Ombudsman v JS Top Pty Ltd* [2017] FCCA 1689 (eight staff underpaid a total of \$19,397.15, rectified before trial; the Court imposed penalties of \$28,000 on owner and \$140,000 on company); *Fair Work Ombudsman v Viplus Pty Ltd* [2017] FCCA 1669 (Jason Yuan and his two companies Vipper Pty Ltd and Viplus Pty Ltd underpaid 21 employees more than \$31,000). A further case remains pending: FWO, ‘Brisbane 7-Eleven Outlet Faces Court Action’ (n 27) (facing legal proceedings is Avinash Pratap Singh and his company S & A Enterprises (Qld) Pty Ltd for allegedly underpaying two international students \$5,593).

because international students currently employed at 7-Eleven approached the FWO. Second, in four cases, the employees' underpayments had already been rectified,<sup>136</sup> and the purpose of the litigation was to pursue penalties against the owner corporations and their directors for *FW Act* contraventions.<sup>137</sup> Third, in two of the three cases in which the court ordered the owner corporation to rectify underpayments to employees, the corporation was declared insolvent and never repaid the employees. Fourth, the FWO pursued litigation in response to employee-initiated complaints only in cases in which there was substantial physical evidence of wrongdoing, such as the case of Ullat Thodi, who maintained copious records of his own, given, as he described, his compulsive 'habit of writing everything down'.<sup>138</sup> It is questionable whether the FWO would have acted on a complaint by an employee who either had no pay slips or only had fraudulent pay slips with no further evidence of underpayment. Finally, litigation was always a lengthy process, with a wait of approximately one year between when the misconduct came to the FWO's attention and the instigation of litigation, and approximately another year from the commencement of litigation until judgment.<sup>139</sup> It appears from these cases that litigation by the FWO is generally a blunt, slow tool for wage recovery by individuals. It is not possible to evaluate the deterrence impact of the far higher penalties obtained in more recent cases as these occurred after 7-Eleven had already begun overhauling its franchise practices. Still, the fact remains that, in many of the 50-odd cases that the FWO brings to court each year, the penalties are small relative to the financial rewards of significant underpayment.<sup>140</sup>

<sup>136</sup> *Amritsaria Four* (n 27) [22]; *Hiyi* (n 135) [8]; *JS Top* (n 135) [18]–[19]; FWO, 'Brisbane 7-Eleven Outlet Faces Court Action' (n 27).

<sup>137</sup> These included orders requiring future independent auditing, employment law training and placement of signs in the workplace advising employees of their rights: see, eg, *Amritsaria Four* (n 27); *Mai* (n 27).

<sup>138</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 3 (Mohamed Rashid Ullat Thodi).

<sup>139</sup> See, eg, *Haidar* (n 26); *Amritsaria Four* (n 27); *Mai* (n 27); *Hiyi* (n 135); *JS Top* (n 135).

<sup>140</sup> Introduced on 1 March 2017, the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) proposes increasing the maximum civil penalty to 600 penalty units for certain serious contraventions of the *FW Act*: at pt 1. The Bill also proposes making franchisors and holding companies responsible for certain contraventions committed by their franchisees or subsidiaries where they knew or ought reasonably to have known and failed to take reasonable steps to prevent them: at pt 2. In addition, it increases the power of Fair Work inspectors to gather evidence, and prohibits the obstruction of Fair Work inspectors or the provision of false or misleading information or documents: at pts 4–6.

After the media revelations emerged in August 2015, the FWO engaged more actively with 7-Eleven by supporting the businesses' efforts to address exploitative franchisee practices and repay employees, most notably through the Proactive Compliance Deed discussed in Part III. Nevertheless, it is striking to compare the wage rectifications obtained by the FWO prior to these developments (through its audits, voluntary resolutions or full investigations), with the wage recovery under the WRP. This includes the WRP's overall recovery amount (\$151.07 million as of January 2018), the WRP's total number of approved employee claims (3,667) and the median value of the first 1,994 approved claims (\$26,824).<sup>141</sup>

The FWO's limited enforcement outcomes undoubtedly reflect the agency's preference for voluntary and forward-looking dispute resolution over punitive sanctions. They are also partly attributable to 7-Eleven employees' unwillingness to assist the FWO's investigations.<sup>142</sup> In the regulator's investigation of one 7-Eleven franchise in September 2014, only 1 out of 10 employees were willing to participate in a formal interview.<sup>143</sup> Other international students who spoke to the FWO during its broader inquiry lied that they had received proper payments or disclosed their underpayments but later recanted this testimony.<sup>144</sup>

This is consistent with international students' general reluctance to recover their entitlements or engage with the FWO. In the *National Temporary Migrant Work Survey*, of the 1,296 international student survey participants who recognised they were underpaid, only 6% had sought to recover unpaid wages and only 1% (19 respondents) had tried to contact the FWO.<sup>145</sup> These low figures are similarly reflected in the regulator's complaints data: of the 2,163 workplace dispute forms that the FWO received from temporary migrants in financial year 2014–15, just 8% were from international students, compared with 43% from working holiday makers, although international students comprised 45% of the temporary visa workforce.<sup>146</sup> In the next section, we explore in more detail the barriers inhibiting international students lodging complaints or claims, and the features of the WRP which facilitated such dramatically improved outcomes for this same group of vulnerable workers.

<sup>141</sup> See *7-Eleven Wage Repayment Program* (n 10) (at 'Claim Determination').

<sup>142</sup> *Inquiry into 7-Eleven* (n 28) 25, 56, 72.

<sup>143</sup> *Ibid* 21.

<sup>144</sup> See *ibid* 47.

<sup>145</sup> Farbenblum and Berg (n 90).

<sup>146</sup> FWO, *Fair Work Ombudsman Annual Report 2014–15* (Annual Report, 28 September 2015) 39. As at 30 September 2016, there were 470,810 student visa holders in Australia out of 1,151,030 temporary visa holders (excluding New Zealand citizens): DIBP, *Temporary Entrants and New Zealand Citizens in Australia: As at 30 September 2016* (Report, 2016) 1.

V FEATURES OF THE 7-ELEVEN WRP THAT ENABLED EMPLOYEES  
TO OBTAIN REDRESS: HOW WERE SHORTCOMINGS  
OF EXISTING PROCESSES OVERCOME?

The WRP achieved a historic feat in enabling the recovery of more than \$150 million by thousands of temporary migrant workers. The WRP had clear advantages over existing mechanisms, not least because it operated in a non-adversarial context, was underpinned by 7-Eleven's acceptance of full responsibility for the underpayments and its commitment to accepting the determinations of the WRP in repaying its franchisees' employees.<sup>147</sup> In addition to its remedial purpose, 7-Eleven was invested in the WRP as both a way to understand and address problems in its business, and to build trust with current franchise employees so they would alert management to misconduct in the future.<sup>148</sup> However, these factors alone do not account for the WRP's efficacy in overcoming the vulnerabilities and structural barriers that ordinarily inhibit temporary migrant workers' access to remedies.<sup>149</sup> This section seeks to unpack the features of the WRP that made employee claims possible where existing mechanisms had for the most part failed.

*A Mitigation of Employees' Immigration Fears*

The WRP addressed two key fears that inhibit international students' willingness to engage with the FWO or bring claims against their employer. First, the WRP addressed international students' fear of jeopardising their immigration status and authorisation to remain in Australia. As one former 7-Eleven employee put it, 'there's this notion among students that Fair Works and Immigration work together, so as soon as you get some information to the Fair Works, it's already gone to the Immigration'.<sup>150</sup> Most student visas contain visa condition 8105 permitting up to 40 hours work per fortnight while the visa holder's course is in session, breach of which constitutes a discretionary ground

<sup>147</sup> Head office CEO Angus McKay confirmed that franchisee employees 'were, under our watch, not paid the correct amount of money and we have then sought to get them back to where they would have been, had they been paid correctly on day one': Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>148</sup> According to head office CEO Angus McKay, the remedial process was not a generous gesture, but rather a way for the company to demonstrate that 'we intend to do the right thing [and] deliver on that every time we deal with either an ex- or a current employee': *ibid.*

<sup>149</sup> Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181, 187–8; Berg (n 8) 124–5.

<sup>150</sup> Interview with Former 7-Eleven Employee (Melbourne, 29 April 2016).

for visa cancellation and removal from Australia in the middle of the student's studies.<sup>151</sup> At 7-Eleven, many international students routinely worked over this limit to compensate for being paid approximately half the hourly rate.<sup>152</sup> While the actual likelihood of visa cancellation was small, even a possibility of this outcome profoundly shaped international students' behaviour. Several witnesses before the Senate committee inquiry emphasised the critical importance of a complete visa amnesty for international students to report exploitation while working at 7-Eleven.<sup>153</sup> Ullat Thodi observed:

They are all scared to stand up because of the [previous] 20 hour [per week] work limit. I believe that if Immigration say in the newspaper that the 20 hour limit does not apply, people will just run in behind it, and you could get thousands of people right now saying, 'Yes, I have been underpaid'.<sup>154</sup>

An advocate similarly reported being told by an informant close to Indian and Pakistani communities that 'these 7-Eleven workers want to come forward, but they want the piece of paper. You bring that piece of paper that says they won't get in trouble, and you will be blown away by how many thousands come forward.'<sup>155</sup> Students who have not violated visa condition 8105 themselves may also stay silent in order to protect co-workers. As one former 7-Eleven employee reported, 'if I have to go forward and tell them what's happening, I'm going to put everyone into trouble.'<sup>156</sup>

<sup>151</sup> *Migration Regulations 1994* (Cth) sch 8, visa condition 8105(1). Visa condition 8104 prohibits family members of the primary visa holder from working more than 40 hours per fortnight at any time. For visa cancellation powers, see *Migration Act 1958* (Cth) s 116; *Migration Regulations 1994* (Cth) reg 2.43. Until 2012, visa condition 8105 stipulated a 20-hour-per-week limitation on work, until the Act was amended by *Migration Legislation Amendment Regulation 2012 (No 5)* (Cth) sch 5.

<sup>152</sup> Alison Branley, '7-Eleven Staff Work Twice as Long at Half Pay Rate, Investigation Reveals', *ABC News* (Online, 29 August 2015) <[www.abc.net.au/news/2015-08-29/7-eleven-half-pay-scam-exposed/6734174](http://www.abc.net.au/news/2015-08-29/7-eleven-half-pay-scam-exposed/6734174)>, archived at <<https://perma.cc/QYJ7-MM9A>>.

<sup>153</sup> Mohamed Rashid Ullat Thodi and Pranay Alawala, Submission No 59 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (22 September 2015) 8 [81].

<sup>154</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 6.

<sup>155</sup> *Ibid* 16 (Michael Fraser).

<sup>156</sup> Interview with Former 7-Eleven Employee (Melbourne, 29 April 2016).

Employers' threats to report unauthorised work to the DIBP have been well documented in policy and academic literature as a key driver of exploitation.<sup>157</sup> However, in the case of 7-Eleven, even absent such explicit threats, international students were fearful of reporting noncompliance.<sup>158</sup> Although employers could also be subject to penalty under the *Migration Act* for their role in the breach of student visa conditions, international students knew it was more likely that penalties for noncompliance would be imposed on them than their employer, and the consequences would be far more severe.<sup>159</sup> At the same time, some students erroneously perceived that they had no legitimate ground for complaint because they had acquiesced to poor working conditions,<sup>160</sup> and were therefore 'complicit' in 'arrangements that contravened workplace relations and immigration laws'.<sup>161</sup>

The WRP addressed employees' immigration-related fear in two fundamental ways. First, the WRP had the benefit of an assurance by the DIBP that the DIBP would not cancel 7-Eleven employees' visas 'for breaches of visa work conditions if the employee made a claim or [was] assisting the [WRP] or the FWO and ha[d] committed no further breaches'.<sup>162</sup> In mid-2017, this was expanded into a general assurance applicable to all international students and

<sup>157</sup> Reilly, 'Protecting Vulnerable Migrant Workers' (n 149) 191, quoting Michael Knight, *Strategic Review of the Student Visa Program 2011* (Report, Commonwealth of Australia, 30 June 2011) 85. Cf the notorious case of *Jones v Hanssen Pty Ltd* [2008] FMCA 291, where the employer acknowledged that 457 visa holders 'would sign anything' because they "are frightened of ... being sent back": at [8] (citations omitted).

<sup>158</sup> On the important role paid by workers' perceptions of their insecurity, even if not realistic or likely, see Boese et al (n 12) 330. See generally Claudia Tazreiter et al, *Fluid Security in the Asia Pacific: Transnational Lives, Human Rights and State Control* (Palgrave Macmillan, 2016).

<sup>159</sup> Although employers found to have employed a non-citizen in breach of their visa face civil and criminal sanctions under s 245AB of the *Migration Act 1958* (Cth), employers' lack of concern about such consequences appears reasonable given that the DIBP has shown no inclination to pursue penalties against franchisees and, in any event, the financial penalties are small compared with the financial gains from breaches of workplace laws: Interview with Former 7-Eleven Employees (Focus Group, Brisbane, 16 June 2016).

<sup>160</sup> Of the underpaid international students in the *Temporary Migrants' Access to Justice for Wage Theft in Australia* report who had not made a claim, 26% said that a reason for not pursuing a claim is that they had agreed to the pay rate: Farbenblum and Berg (n 90).

<sup>161</sup> In its inquiry report on 7-Eleven, the FWO described a 'culture of complicity' between franchisees and employees: *Inquiry into 7-Eleven* (n 28) 32.

<sup>162</sup> *Ibid* 58 (citations omitted). This followed more informal assurances, less directly communicated to 7-Eleven employees. For instance, in October 2015, the Deputy Secretary, Visa and Cancellation Services, of the DIBP stated at Senate Estimates that in respect of 7-Eleven Employees 'who have come forward to assist the Fair Work Ombudsman with their inquiries ... there will be no action taken against them from a visa cancellation point of view': Evidence to

other visa holders with work rights, as discussed in Part VII. Second, the WRP issued its own assurance that it would not require or obtain information on claimants' visa status, and would disclose claimants' names only to head office for the sole purpose of the final rectification payment. 7-Eleven management officials observed that they had deliberately tried to differentiate the company from immigration authorities, with the message that 'if you don't feel comfortable ringing the authorities, you should be ringing us, and we will look after you'.<sup>163</sup> This distinguished the process from court proceedings, which are always public, and from the unpredictability of the FWO's discretion at that time to request an assurance against visa cancellation from the DIBP<sup>164</sup> (and the exercise of the DIBP's discretionary visa cancellation power).<sup>165</sup>

Even with the WRP's safeguards, some employees remained scared of immigration consequences and were 'watching and waiting' to see the outcome of claims filed by other employees before filing their own.<sup>166</sup> Many informants (employees, unions, other advocates and Fels himself) maintained that the fire-wall between the WRP and DIBP and the fact that no claimant's visa was cancelled were the most potent factors in encouraging hesitant students to come forward. However, all also observed that potentially thousands more claims would have been made if the assurance had been stronger and communicated more forcefully from the outset.<sup>167</sup>

Legal and Constitutional Affairs Legislation Committee, Senate, 19 October 2015, 194 (Michael Manthorpe).

<sup>163</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>164</sup> Natalie James notes that as a matter of practice, FWO does not refer employee visa breaches to the DIBP: Evidence to Education and Employment Legislation Committee, Senate, Canberra, 2 March 2017, 79. Indeed, when approached by the unregistered union, Unite, the FWO requested immigration assurances in relation to Ullat Thodi and the other workers to assuage their concerns about engaging with the regulator: Interview with Unite Organiser (Phone, 5 May 2016).

<sup>165</sup> See *Migration Act 1958* (Cth) s 116.

<sup>166</sup> Interview with Michael Fraser (Phone, 2 May 2016).

<sup>167</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 6 (Mohamed Rashid Ullat Thodi), 22 (Gerard Dwyer, SDA); Interview with Allan Fels (Melbourne, 29 March 2016); Interview with Michael Fraser (Phone, 2 May 2016).

B *Mitigation of Fears of Loss of Employment or  
Retaliation and Disloyalty Concerns*

The guarantee of confidentiality also ameliorated employees' second significant fear: loss of employment if their franchise employer learned about their complaint.<sup>168</sup> Unlike adversarial FWO or judicial processes, the WRP was able to assure claimants that their names would not be made public nor disclosed to franchisees.<sup>169</sup> Despite some early reports of leaks from 7-Eleven head office to certain franchisees, claimants generally trusted the anonymity of the WRP process, which was often essential to their willingness to make a claim.<sup>170</sup>

Loss of employment is deeply feared by many international students because it can jeopardise substantial financial, social and other investments they have made to complete their studies in Australia. Without entitlement to social security benefits, unemployment may be devastating for international students, particularly those who depend on their employment income and believe that they will be unable to find another job.<sup>171</sup> As one employee put it, 'first thing you'll do, you're going to think about your food. You have to stay here, you have studies, you have to make money. You're not going to believe anything else.'<sup>172</sup> Maurice Blackburn reports that one 7-Eleven employee who approached them for assistance 'worked across three separate 7-Eleven stores simultaneously to pay back [their] education loan, sometimes working 110 hours per week at half the appropriate Award rates.'<sup>173</sup>

Discrimination at the point of entry into the labour market may further contribute to international students' 'willingness to accept inferior working

<sup>168</sup> Interview with Michael Fraser (Phone, 2 May 2016).

<sup>169</sup> *7-Eleven Wage Repayment Program* (n 10) (at 'Frequently Asked Questions', 'Claims Process').

<sup>170</sup> Interview with Former 7-Eleven Employee (29 April 2016); Interview with Former 7-Eleven Employees (Focus Group, Brisbane, 16 June 2016).

<sup>171</sup> See Berg (n 8) 125; UNSW Human Rights Clinic, *Temporary Migrant Workers in Australia* (Issues Paper, 15 October 2015) 9.

<sup>172</sup> Interview with Former 7-Eleven Employee (Melbourne, 4 May 2016). See also Nyland et al (n 19) 6.

<sup>173</sup> Ullat Thodi and Alawala, Submission (n 153) 5 [51]. For discussion of the paralysing impact of students' considerable debts to finance their studies, see Michiel Baas, 'Students of Migration: Indian Overseas Students and the Question of Permanent Residency' (2006) 14(1) *People and Place* 9, 13, 15; Reilly, 'Protecting Vulnerable Migrant Workers' (n 149) 186–7.

conditions.<sup>174</sup> This was certainly the perception of many 7-Eleven student employees.<sup>175</sup> Ullat Thodi cited the visa restriction as the key factor confining international students to employers like 7-Eleven: ‘You do not want to hire someone if you are going to call them to come in for work and they will say, “I’m over 20 hours.” You have to be someone who is reliable or can work unlimited.’<sup>176</sup> Moreover, the fact that many franchisees from South Asia and China tended to recruit from within those same ethnic communities led employees to fear not only losing their job if they reported noncompliance, but also being portrayed negatively within their community and narrowing future job options.<sup>177</sup> Where students work in close geographic proximity to their place of study, intense competition for casual work can drive down conditions further, and exacerbate job loss fears.<sup>178</sup>

In addition to these fears of job loss, a reluctance to complain was sometimes fuelled by feelings of loyalty to the employer, or more serious fears of retaliation. In many cases, the franchisee was the employee’s friend or relative.<sup>179</sup> This is consistent with trends for international students in general, with more than one in five (23%) international student respondents to the *National Temporary Migrant Work Survey* reporting that they found their lowest paid job through a friend or family member.<sup>180</sup> A lawyer working with claimants observed that some employees were only willing to make claims to the WRP if they knew that the franchisee would not be responsible for paying.<sup>181</sup> Reflecting the complex interplay between these feelings of loyalty and fear, one 7-Eleven employee observed:

<sup>174</sup> Joo-Cheong Tham, Supplementary Submission No 3.1 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia’s Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (16 September 2015) 10 (citations omitted).

<sup>175</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 27 (Rahul Patil) (‘When I came in I applied at almost every place I could work for’); Interview with Former 7-Eleven Employee (Melbourne, 4 May 2016) (‘Basically, immigration need to take that twenty hours of work limit out of the condition so that people come in straight away apply for a job, nobody even dare to ask, “Do you have twenty hours work limit?”’).

<sup>176</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 5.

<sup>177</sup> See also Nyland et al (n 19) 8.

<sup>178</sup> See Jacqui Mills and Lily Zhang, United Voice, Submission No 163 to Department of Immigration and Citizenship, *Strategic Review of the Student Visa Program* (2011) 6, 8.

<sup>179</sup> Interview with Levitt Robinson Lawyer (Melbourne, 26 April 2016).

<sup>180</sup> *National Temporary Migrant Work Survey* (n 13) 6, 33.

<sup>181</sup> Interview with Levitt Robinson Lawyer (Melbourne, 26 April 2016).

I'm really grateful to the person who employed me as I had a large student debt from studying in Brisbane. It's hard to speak against them, they gave me a job. I'm not looking for back payment or anything like that. I would like to see this not happening to other international students. He gave me certain terms and I accepted them. I am worried that he will call me and harass me.<sup>182</sup>

7-Eleven management noted the difficulties of establishing employees' trust in the program and that the WRP's confidentiality safeguards had not overcome all employees' fears.<sup>183</sup> Ultimately, however, for the many employees who had not previously made claims before but filed claims with the WRP, the WRP's confidentiality safeguards provided them with sufficient comfort that no negative repercussions would flow from their direct franchise employer as a result of their coming forward. This could not be replicated in FWO or court claims for due process and other reasons, and was a clear advantage of the WRP model over those forums.

### C Sidestepping the Potential Jurisdictional Bar to Pursuing a Claim in Court

Many of the 7-Eleven employees who had breached their visa restrictions may have faced a further, and potentially insurmountable, jurisdictional barrier to pursuing their claim in court. Some case law suggests that visa holders who have engaged in unauthorised work<sup>184</sup> are excluded from the rights under their employment contract and the *FW Act*.<sup>185</sup> In several decisions, courts and the Fair Work Commission have held that where work undertaken pursuant to an employment contract is prohibited by the *Migration Act 1958* (Cth), that contract is invalid and unenforceable.<sup>186</sup> Although decided in the context of workers compensation and unfair dismissal provisions, this precedent seems to suggest that international students working in excess of 40 hours per fortnight

<sup>182</sup> *Inquiry into 7-Eleven* (n 28) 51.

<sup>183</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>184</sup> *Migration Act 1958* (Cth) s 235 (offence of working contrary to visa conditions).

<sup>185</sup> Robert Guthrie, 'Illegal Contracts: Impropriety, Immigrants and Impairment in Employment Law' (2002) 27 *Alternative Law Journal* 116, 116–18; Stephen Clibborn, 'Why Undocumented Immigrant Workers Should Have Workplace Rights' (2015) 26 *Economic and Labour Relations Review* 465; Berg (n 8) ch 6. See generally Stephen Howells, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007* (Report, 2 March 2011).

<sup>186</sup> For case law holding that breach of s 235 of the *Migration Act 1958* (Cth) voids an otherwise valid contract of employment, see *Australia Meat Holdings Pty Ltd v Kazi* [2004] 2 Qd R 458, 466 [32]–[34]; *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964.

would not be covered by *FW Act* entitlements, including minimum wage, modern awards and the basic safeguards in the National Employment Standards.

However, other decisions have adopted a different approach, reasoning that it is not necessarily contrary to public policy, nor contrary to the intent of the relevant legislative scheme, to uphold employment entitlements to an employee working in breach of visa conditions.<sup>187</sup> Indeed, the FWO itself takes the view that the *FW Act* applies to all employees and has successfully brought enforcement proceedings where migrant workers have breached visa conditions, including cases brought against 7-Eleven franchisees (although the contrary case law was not raised as a defence by employers in those cases).<sup>188</sup>

As an extra-legal remedial mechanism, the WRP was able to sidestep these issues. Instead, the WRP simply assumed that employees maintained their entitlements, regardless of compliance with their visa conditions. Claimants therefore avoided the dilemma they would have faced in court: having to choose between claiming wages only for the number of work hours permitted on their visa, or risking the failure of their entire claim if they claim wages for the hours they actually worked.<sup>189</sup>

#### D *Amelioration of Evidentiary Obstacles*

One of the most formidable barriers preventing temporary migrants from instituting wage claims is the form of evidence and standard of proof required by

<sup>187</sup> *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312, 316 (Cole JA), 323 (Stein JA). See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) 177–8 [7.35]–[7.37]. The legal position is further complicated by the fact that this entire jurisprudence predates the introduction of specific criminal offences for employers who facilitate work in breach of visa conditions, which may be interpreted to signal parliamentary intent to enhance employer responsibility for worker exploitation: *Migration Act 1958* (Cth) ss 245AB–245AD, introduced by *Migration Amendment (Employer Sanctions) Act 2007* (Cth), the former amended by *Migration Amendment (Reform of Employer Sanctions) Act 2013* (Cth). High Court dicta in 2015 urges caution before construing a statutory prohibition as denying all effect to a contract before considering the adverse consequences for the ‘innocent party’ to a bargain and ‘the general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing’: *Gnych v Polish Club Ltd* (2015) 255 CLR 414, 426–7 [45] (citations omitted). For further discussion of this case in this context, see Andrew Stewart, Shae McCrystal and Joanna Howe, Submission No DR271 to Productivity Commission, *Inquiry into the Workplace Relations Framework* (11 September 2015) 24–5.

<sup>188</sup> *Bosen* (n 33); *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012] FMCA 258; *Fair Work Ombudsman v Shafi Investments Pty Ltd* [2012] FMCA 1150; *Haider* (n 26).

<sup>189</sup> *Hemingway* (n 11) 226.

the FWO and the courts.<sup>190</sup> 7-Eleven employees often did not have the requisite evidence of the number of hours they had actually worked or the wages they received.<sup>191</sup> International student employees are often paid in cash,<sup>192</sup> do not have access to their employer's records and are not furnished with pay slips.<sup>193</sup> In many cases, employers subsequently fabricate records and/or employee pay slips.<sup>194</sup> This was particularly problematic for 7-Eleven employees because of the systemic franchisee practice of either fraudulently recording only half of an employee's hours, or keeping accurate records but then requiring employees to return half their pay in cash.<sup>195</sup> As one advocate described, 'the whole program is set up to make sure the worker doesn't have access to evidence, apart from maybe what he's secretly kept himself.'<sup>196</sup>

The WRP enabled employees to access necessary corroborating evidence such as rosters that would not otherwise have been available to them.<sup>197</sup> Once a claim was submitted, the first stage of the process was for Deloitte staff to consider whether data from head office records could support the claim, or to help identify the hours that the claimant worked, taking into account that an employee's memory and personal records may be limited.<sup>198</sup> Fels saw this as critical to the WRP's ability to successfully process claims.<sup>199</sup> Underpinned by

<sup>190</sup> Productivity Commission, *Workplace Relations Framework* (Inquiry Report No 76, 30 November 2015) vol 2, 927; Interview with Legal Aid NSW Lawyers (Sydney, 8 February 2016) (sometimes temporary migrants do not have any evidence and 'very often it's incomplete').

<sup>191</sup> Interview with Allan Fels (Melbourne, 29 March 2016).

<sup>192</sup> In the *National Temporary Migrant Work Survey*, '[h]alf (49%) of international students were paid in cash in their lowest paid job': *National Temporary Migrant Work Survey* (n 13) 38.

<sup>193</sup> In the *National Temporary Migrant Work Survey*, half (50%) of migrant workers never or rarely received pay slips in their lowest paid job: *ibid* 40. Cf *FW Act* (n 26) ss 535–6; *Fair Work Regulations 2009* (Cth) reg 3.46. These requirements are civil remedy provisions, meaning that an employer can be fined up to 60 penalty units (and, for serious contraventions, 600 penalty units), or \$63,000 (for a company) or \$12,600 (for an individual) per breach: *FW Act* (n 26) s 539 item 29.

<sup>194</sup> Interview with Legal Aid NSW Lawyers (Sydney, 8 February 2016); Productivity Commission, *Workplace Relations Framework Inquiry* (n 190) 927.

<sup>195</sup> *Inquiry into 7-Eleven* (n 28) 7, 59. Other employees spoke about working without being on the books at all: see, eg, Interview with Former 7-Eleven Employee (Melbourne, 29 April 2016).

<sup>196</sup> Interview with Michael Fraser (Phone, 2 May 2016).

<sup>197</sup> Adele Ferguson and Sarah Danckert, '7-Eleven Stores Raided in Wage Scam Probe', *The Sydney Morning Herald* (Sydney, 17 December 2015) <[www.smh.com.au/business/workplace-relations/7eleven-stores-raided-in-wage-scam-probe-20151216-glpiei.html](http://www.smh.com.au/business/workplace-relations/7eleven-stores-raided-in-wage-scam-probe-20151216-glpiei.html)>, archived at <<https://perma.cc/VEP2-P9ZP>>.

<sup>198</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>199</sup> Interview with Allan Fels (Melbourne, 29 March 2016).

a commitment to ‘stand[ing] in the affected workers’ shoes in processing their claims’,<sup>200</sup> 7-Eleven considered the WRP to be tasked with marshalling internal data to validate the employee’s claim, rather than identifying ways to negate or minimise it.<sup>201</sup>

The majority of claims were addressed solely through Deloitte’s advisory and support role.<sup>202</sup> Indeed, Deloitte initially prioritised the more straightforward claims that could be verified against existing 7-Eleven payroll system records.<sup>203</sup> In some cases, Deloitte identified extra hours that the claimant had worked beyond what they identified, resulting in a greater payout than the claimant had expected.<sup>204</sup> Where Deloitte had concerns about a claim or believed further work was necessary to understand the claim, it proceeded to a second stage in which it deployed its forensic investigation team to obtain further evidence,<sup>205</sup> taking into account data submitted by the employee, data from 7-Eleven, and relevant information on the public record.<sup>206</sup>

Even for employees who had some evidence of their hours and pay, the standard of proof that they would have had to meet in court would have often still been unattainable. A high evidentiary standard was also an obstacle to assistance from the FWO. The FWO performs an evidence-gathering role in only a very small number of cases alleging contraventions of the *FW Act*.<sup>207</sup> And when it undertakes this role, such as during its inquiry into 7-Eleven, the FWO

<sup>200</sup> *7-Eleven Wage Repayment Program* (n 10) (at ‘Claims Process: Program Objectives and Principles’).

<sup>201</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>202</sup> *Ibid.*

<sup>203</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 20 November 2015, 10–11 (Siobhan Armagh Hennessy, Partner, Deloitte).

<sup>204</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>205</sup> For example, the Fels Panel seized franchisee documents unavailable from head office through unannounced raids of 50 stores: Ferguson and Danckert, ‘7-Eleven Stores Raided in Wage Scam Probe’ (n 197). However Fels noted that ‘[o]nce the word spread, the evidence gathering became less fruitful than the earlier ones’: Adele Ferguson, ‘Regulator Tips Off Caltex before Raids’, *The Age* (Melbourne, 3 November 2016) <[www.theage.com.au/business/workplace-relations/regulator-tips-off-caltex-before-raids-20161102-gsgipe.html](http://www.theage.com.au/business/workplace-relations/regulator-tips-off-caltex-before-raids-20161102-gsgipe.html)>.

<sup>206</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>207</sup> ‘Where alternative evidence is limited or unavailable we are restricted in our capacity to investigate compliance with the *FW Act*’: *Inquiry into 7-Eleven* (n 28) 19. In the absence of sufficient evidence, the FWO is more likely to suggest mediation or to encourage employees to resolve their complaint themselves through a small claims procedure: see FWO, *Compliance and Enforcement Policy* (n 105) 14.

requires a high evidentiary threshold to pursue compliance measures. Like the WRP, the FWO was given access by 7-Eleven to a range of internal payroll and franchisee records,<sup>208</sup> but the FWO found much of this too partial or unreliable to be used to substantiate wage underpayment to its thresholds of proof.<sup>209</sup> The agency appeared unwilling to draw inferences in employees' favour when they lacked documentary corroboration, even in the face of clear patterns of employer misconduct.<sup>210</sup> The high scepticism the FWO brought to uncorroborated employee testimony produced a presumption in favour of employers, especially in the absence of pay slips. For instance, after a series of unannounced visits and audits of 7-Eleven stores over one day in 2014, FWO found record-keeping inconsistencies in 19 out of 20 stores and it was not 'able to positively conclude that any of the stores visited were fully compliant with their obligations.'<sup>211</sup> Nevertheless, because FWO was 'unable to find sufficient evidence to prove wages or record keeping contraventions in four stores, despite unexplained inconsistencies in the records and information obtained', it took no further action in relation to these stores.<sup>212</sup>

In contrast to the high evidentiary standards in court and adopted by the FWO, a central feature of the WRP was its lower evidentiary threshold. The structural and homogeneous nature of the fraudulent and exploitative practices across franchises enabled the WRP to apply basic presumptions in favour of employees. For example, because of the pervasive 'half pay' practice among franchisees, in some cases the WRP was willing to assume that employees had worked significantly more hours than were recorded by the franchisee, even when this could not conclusively be proven because of fabricated records.<sup>213</sup> Most fundamentally, the secretariat proceeded on the assumption that the employee's account was true, and in case of doubt, would err on the side of the employee.<sup>214</sup> Although there is no publicly available formulation of the standard of proof adopted by the WRP, lawyers who brought claims before the Fels

<sup>208</sup> *Inquiry into 7-Eleven* (n 28) 29.

<sup>209</sup> *Ibid* 25–8.

<sup>210</sup> The FWO noted that '[w]here preliminary evidence indicated inconsistencies that couldn't be reconciled through further investigation (due to insufficient corroborating evidence), the employer was notified of the inconsistencies [sic] identified. Where appropriate, we issued a Letter of Caution, Infringement Notice and/or directed the franchisee to rectify any underpayments identified': *ibid* 17.

<sup>211</sup> *Ibid* 15; see also at 14, 16.

<sup>212</sup> *Ibid* 15.

<sup>213</sup> Interview with Allan Fels (Melbourne, 29 March 2016).

<sup>214</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

Panel described it as akin to ‘reasonably likely to be true under the circumstances.’<sup>215</sup> Deloitte testified before the Senate inquiry that it received the information submitted by the employee and then used pay slips and verbal evidence to extrapolate ‘and say, by and large, their claim holds.’<sup>216</sup>

### E *Provision of Information and Assistance with Claims*

Many temporary migrant workers lack a detailed understanding of their entitlements.<sup>217</sup> Moreover, very few are aware of the existence and functions of the FWO, unions or other pathways to remedies. The WRP helped overcome these barriers in a number of respects.

For a start, the Fels Panel conducted significant outreach to raise awareness among current and former employees.<sup>218</sup> The WRP also recognised the strong need for technical expertise to support 7-Eleven employees to calculate the amount owing to them and present claims in an organised, coherent and consistent manner.<sup>219</sup> This assistance overcame much of the resource intensiveness of lodging an application in court or submitting a ‘Request for Assistance’ with the FWO.<sup>220</sup> In particular, calculating an employee’s wages and entitlements is time-consuming and requires mathematical skills,<sup>221</sup> as well as knowledge of

<sup>215</sup> Interview with Maurice Blackburn Lawyer (Brisbane, 14 June 2016).

<sup>216</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 20 November 2015, 11 (Siobhan Armagh Hennessy, Partner, Deloitte).

<sup>217</sup> Nyland et al (n 19) 2, 11; Hemingway (n 11) 88.

<sup>218</sup> A communications company, Bastion Se&GO, set up a dedicated phone line and website and developed strategies to engage with claimants and potential claimants through social media, local and international print media (including Chinese and Indian publications) and public meetings in major centres: see Evidence to Education and Employment References Committee, Senate, Melbourne, 20 November 2015, 9 (David Charles Cousins, Panel Member, Independent Franchisee Review and Staff Claims Panel). 7-Eleven also directly contacted more than 15,000 former and current employees at least 13 times each via email and SMS: 7-Eleven Media Centre, ‘Proactive Compliance Deed Next Step in 7-Eleven’s Reform Journey’ (n 61).

<sup>219</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>220</sup> Many have noted the necessity of legal services for workers to recover repayments in Australia: see, eg, Arup and Sutherland (n 93) 108. However, even more involved assistance is required for newly arrived migrant clients to assert their workplace rights: Footscray Community Legal Centre, Submission No 143 to Productivity Commission, *Inquiry into the Workplace Relations Framework* (March 2015) 7–9. ‘Even if workers learn enough to know that something is wrong, and manage to contact an agency, without ongoing assistance, they are often unable to achieve justice’: Hemingway (n 11) 129.

<sup>221</sup> See Federation of Community Legal Centres Victoria, *Putting the Law To Work: Meeting the Demand for Employment Law Assistance in Victoria* (Report, August 2014) 9; see also at 9 n 19.

the appropriate award classification, base rate of pay and other rates applicable at different times.<sup>222</sup> The WRP devoted substantial resources to calculating the amounts owing to employees based on application of standard, weekend, holiday and overtime rates of pay, as well as superannuation entitlements and interest,<sup>223</sup> including identifying and applying historical award rates in the years prior to modern awards.<sup>224</sup> Although the Pay and Conditions Tool ('PACT') on the FWO website is intended to enable employees to determine their rate of pay (including penalty rates), this tool does not assist clients to determine the actual amount owing, and may be difficult to use for employees who are unable to identify their precise job classification. For numerous community-based legal service-providers and private firms, the resource intensiveness of the calculations process is one of the greatest obstacles to their ability to represent temporary migrants to recover unpaid entitlements.<sup>225</sup>

The extent of the need for this assistance among 7-Eleven employees is clear from the fact that between 25 September 2014 and 7 July 2016, 1,546 employees used a private online wage calculator platform developed by Michael Fraser to calculate the amount owing to 7-Eleven workers. Unlike the FWO PACT tool, Fraser's platform asked employees to enter days and times they had worked, and then algorithmically applied relevant award rates and applicable penalty rates and loadings to calculate the approximate amount owing to the employee. This demonstrates that despite the significant barriers to making complaints and the limited extent to which employees approached the FWO, it is possible to reach large numbers of international students, equip them with necessary information and have them come forward with breaches of their workplace rights when they trust the recipient of the information. Moreover, Fraser engaged in this outreach with exceptionally limited resources, establishing trust

<sup>222</sup> Arup and Sutherland (n 93) 102.

<sup>223</sup> Interview with Allan Fels (Melbourne, 29 March 2016).

<sup>224</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>225</sup> Interview with Legal Aid NSW Lawyers (Sydney, 8 February 2016); Interview with Pro Bono Partner, Private Firm (Sydney, 29 February 2016). In 2012, a comprehensive Law and Justice Foundation study identified that 6.2% of 20,716 respondents across Australia had an employment-related legal problem in the past year: Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Report, Law and Justice Foundation of New South Wales, August 2012) 60, 62. Similarly, a smaller study by The Australia Institute found that 7% of respondents had employment law problems Australia-wide: Richard Denniss, Josh Fear and Emily Millane, 'Justice for All: Giving Australians Greater Access to the Legal System' (Institute Paper No 8, The Australia Institute, March 2012) 1.

and sharing information within employee communities primarily through social media, word of mouth, phone calls and SMS.<sup>226</sup>

The WRP expressed a strong commitment to the principle that employees did not require legal representation. One advocate observed that the ability to make a claim without legal representation reduced opportunities for unscrupulous private lawyers to take advantage of employees requiring assistance.<sup>227</sup> Law firm Maurice Blackburn did provide free legal advice and representation to over a 100 claimants before the WRP. Lawyers at the firm observed that their representation substantially increased employees' prospects of success and made the process more accessible for employees, especially those with poor English or other vulnerabilities.<sup>228</sup> This was disputed by Alan Fels and 7-Eleven, who maintained that the substantial assistance provided by the WRP ensured that represented and unrepresented employees fared the same.<sup>229</sup>

Finally, the WRP made inroads into employees' inability to bring claims once they had returned home, where they no longer have immigration-related and job-loss fears.<sup>230</sup> This is significant because legal service-providers generally consider the fact that the employee is no longer in Australia to be a further practical hurdle to running their case.<sup>231</sup> In contrast, it appears to have been easier for former employees to lodge a claim with the WRP from abroad, since no hearings were required and all communications with the WRP secretariat were over the phone. Indeed, where the WRP received an expression of interest from abroad, Deloitte's office in a claimant's country attempted to contact the

<sup>226</sup> Interview with Michael Fraser (Phone, 2 May 2016).

<sup>227</sup> Interview with Unite Organiser (Phone, 5 May 2016).

<sup>228</sup> Interview with Maurice Blackburn Lawyer (Brisbane, 14 June 2016). One advocate observed that employees trusted Maurice Blackburn more than the WRP, and obtained somewhat better outcomes when they had an opportunity to sit down in person with a lawyer and tell their story or consult with a lawyer regarding the WRP's determination, rather than only speaking with the WRP's secretariat over the phone: Interview with Michael Fraser (Phone, 2 May 2016).

<sup>229</sup> Interview with Allan Fels (Melbourne, 29 March 2016); Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>230</sup> ACTU has noted that temporary workers are frequently required to abandon their claims when leaving the country: ACTU, Submission No 48 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (1 May 2015) 76.

<sup>231</sup> Interview with Kingsford Legal Centre Lawyers (Sydney, 5 February 2016); Interview with Legal Aid NSW Lawyers (Sydney, 8 February 2016).

employee to provide assistance.<sup>232</sup> Nevertheless, it appears that few former employees who were overseas were aware of the WRP.<sup>233</sup> Indeed, among the seven employees who were involved in the FWO's litigation against Bosen, only Ullat Thodi remained in Australia by the time the WRP was established. Although Ullat Thodi submitted a claim, he observed that the six workers who returned to India would not have known about the WRP and to his knowledge had not made claims.<sup>234</sup>

### F *Demonstration Effect of Swift, Successful Claims*

The professionalisation of the claims handling process under the WRP alleviated the hesitations of employees who were 'watching and waiting' before filing their own claim. Claims were paid out relatively swiftly, including a quick initial tranche of determinations.<sup>235</sup> In February 2016, 7-Eleven made the first remedial payments for claims submitted to the WRP.<sup>236</sup> By May, 'the [P]anel had ... paid about 400 claims at an average of about \$35,000 each', totalling approximately \$14 million.<sup>237</sup> This included two claims of approximately \$350,000 each, with several more in the pipeline that at the time were projected to be \$200,000 to \$300,000 each.<sup>238</sup> This was an early demonstration to other employees that, if they made a claim, they were likely to receive a positive, and substantial, outcome. The WRP remained open to new claims for a further year after it began making payments, ensuring that many employees would have adequate time to submit a claim after they had satisfied themselves as to the merits and limited risks of doing so.

<sup>232</sup> Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>233</sup> However, it is possible that these numbers were greater because some claimants may have provided an Australian address and bank account despite having returned home: *ibid*.

<sup>234</sup> Interview with Former 7-Eleven Employee (Phone, 4 May 2016).

<sup>235</sup> Interview with Allan Fels (Melbourne, 29 March 2016).

<sup>236</sup> Interview with Michael Fraser (Phone, 2 May 2016).

<sup>237</sup> Andrew Dickson, '7-Eleven: Former ACCC Chairman Allan Fels Hits Out after Wages Panel Dropped', *ABC News* (Online, 12 May 2016) <[www.abc.net.au/news/2016-05-11/7eleven-underpaid-workers-alan-fels/7405968](http://www.abc.net.au/news/2016-05-11/7eleven-underpaid-workers-alan-fels/7405968)>, archived at <<https://perma.cc/9D9M-DWAB>>.

<sup>238</sup> Interview with Allan Fels (Melbourne, 29 March 2016).

### G Circumvention of Employer Insolvency and Accessorial Liability Challenges

A final significant barrier that the WRP circumvented was the prospect that even if 7-Eleven employees received a judgment against their franchisee employer through litigation, the franchisee would simply liquidate and avoid paying the employee. This happens routinely in cases brought by temporary migrants against labour hire companies and other small business employers.<sup>239</sup> Indeed, in the first two cases the FWO brought against 7-Eleven stores in 2011 and 2015, employees recouped only a fraction of their legal entitlements after many years of proceedings.<sup>240</sup> Although the 2015 decision found that an international student had been underpaid more than \$21,000, the corporate employer escaped penalty because it had been wound up prior to final determination of the matter.<sup>241</sup> The owner was fined (a much-reduced amount of) \$6,970.<sup>242</sup> The financial and emotional impact of these experiences on employees can be devastating. As Ullat Thodi stated, 'I took this matter of underpayment and unfair dismissal to the Fair Work Ombudsman, and later to the court. I won the case but I lost my job, my pay and my emotional strength.'<sup>243</sup> Unlike citizens and certain residents, temporary migrant workers are not covered by the Fair Entitlements Guarantee, a legislative safety net to cover unpaid employment entitlements which are outstanding when an employer enters into liquidation or bankruptcy.<sup>244</sup>

In addition to franchisee insolvency, employees faced considerable legal obstacles in establishing accessorial liability. Notably, employees in the 2011 *Bosen* litigation originally approached 7-Eleven head office to rectify the underpayments but, according to their union representative, '7 Eleven head office basically brushed us off at that point in time and said, "This has got nothing to do

<sup>239</sup> See generally Helen Anderson, 'Phoenix Activity and the Recovery of Unpaid Employee Entitlements: 10 Years on' (2011) 24 *Australian Journal of Labour Law* 141; FWO and PwC, *Phoenix Activity: Sizing the Problem and Matching Solutions* (Report, June 2012); Helen Anderson, 'Sunlight as the Disinfectant for Phoenix Activity' (2016) 34 *Company and Securities Law Journal* 257.

<sup>240</sup> *Bosen* (n 33); *Haider* (n 26).

<sup>241</sup> *Bosen* (n 33) [15], [19].

<sup>242</sup> *Ibid.* Under the *FW Act* (n 26) s 798, natural persons are liable for a maximum penalty which is one-fifth of the penalty set for corporations.

<sup>243</sup> Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 1.

<sup>244</sup> *Fair Entitlements Guarantee Act 2012* (Cth) s 10(1)(g); Department of Employment, Australian Government, Submission No 41 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (15 July 2015) 12.

with us. This is a franchise. You've got to deal with the employer direct."<sup>245</sup> Years later the FWO concluded that it lacked a sufficient legal basis to pursue 7-Eleven head office for accessorial liability under the *FW Act* for franchisees' conduct. Under s 550, persons other than the direct employer may be found liable under a civil remedy provision where they were 'involved in' a contravention of the Act. This element is made out where a person has aided or abetted the contravention; procured or 'induced the contravention, whether by threats or promises or otherwise'; or 'has been in any way, by act or omission, directly or indirectly, knowingly concerned in' the contravention.<sup>246</sup> While contraventions of minimum employment standards normally give rise to strict liability in respect of the employer, this is not the case for accessories, who must be intentionally and knowingly concerned in the contravention.<sup>247</sup> The FWO frequently uses these provisions to hold directors and senior managers liable for contraventions committed by the employer corporations for which they were responsible.<sup>248</sup> However, there have only been a handful of cases in which the FWO has sought to use s 550 against a separate corporation which is said to be 'involved in' a contravention of the direct employer.<sup>249</sup>

In relation to 7-Eleven, the FWO concluded that 7-Eleven head office benefited from the underpayments, 'had a reasonable basis on which to inquire and to act' and 'could have done more, and acted earlier' to curb noncompliance within its franchise network.<sup>250</sup> Others, like Allan Fels, formed the impression that the profitability of the 7-Eleven franchise business model relied on underpaying employees.<sup>251</sup> The FWO also found that head office knew in some cases

<sup>245</sup> Interview with Unite Organiser (Phone, 5 May 2016).

<sup>246</sup> *FW Act* (n 26) s 550.

<sup>247</sup> *Fair Work Ombudsman v McGrath* [2010] FMCA 315, [23], quoting *Yorke v Lucas* (1985) 158 CLR 661, 670.

<sup>248</sup> Helen Anderson and John Howe, 'Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the *Fair Work Act*' (2012) 36 *Melbourne University Law Review* 335; Natalie James, 'Risk, Reputation and Responsibility' (Speech, ALERA 2014 National Conference, Gold Coast, 29 August 2014) 4.

<sup>249</sup> In one rare example, the FWO successfully brought an action in 2015 against a national security company for its involvement in underpaying a guard employed by one of the company's contractors on the basis that the security company must have known that the hourly rate it was paying to the contractor was not sufficient to allow the contractor to meet its legal obligations arising under the *FW Act* and modern award: FWO, 'Security Company Fined over \$60,000' (Media Release No 5633, 20 November 2015).

<sup>250</sup> *Inquiry into 7-Eleven* (n 28) 67.

<sup>251</sup> Adele Ferguson and Sarah Danckert, 'Revealed: How 7-Eleven Is Ripping Off Its Workers', *The Sydney Morning Herald* (Sydney) <[www.smh.com.au/interactive/2015/7-eleven-revealed/](http://www.smh.com.au/interactive/2015/7-eleven-revealed/)>, archived at <<https://perma.cc/R8QR-MPRU>>.

about franchisee misconduct and ‘did not adequately ... address deliberate non-compliance and as a consequence compounded it’<sup>252</sup> in circumstances where it ‘had a reasonable basis on which to inquire and to act.’<sup>253</sup> Nevertheless, the FWO determined that it lacked sufficient probative evidence to find that head office was knowingly concerned in the underpayments and falsification of records.<sup>254</sup> Meeting the standard of accessorial liability in this case was challenging because no cases to date have considered the s 550 liability of a head franchisor for franchisee contraventions of civil remedy provisions of the *FW Act* concerning underpayments.<sup>255</sup>

By contrast, under the WRP, 7-Eleven accepted unlimited responsibility for repaying unpaid entitlements for any current and former employee in any store in Australia, neutering the effect of any individual franchisee’s incapacity to pay. Moreover, the WRP had no limitations period for bringing claims or a cap on the amount that could be claimed. This helped circumvent challenges in pursuing franchisees that were no longer in business, who may liquidate, or were not financially capable of servicing a substantial wage repayment debt.

## VI GENERALISABILITY OF LESSONS LEARNED FROM THE SUCCESS OF THE WRP

Attempts to generalise lessons learned from the WRP must be undertaken with caution. For a start, the WRP had a relatively short duration and was conceived

<sup>252</sup> *Inquiry into 7-Eleven* (n 28) 4.

<sup>253</sup> *Ibid* 67. See also Adele Ferguson and Sarah Danckert, ‘7-Eleven: Fair Work Ombudsman Says Admit Exploitation Complicity’, *The Sydney Morning Herald* (Sydney, 9 April 2016) <[www.smh.com.au/business/workplace-relations/fair-work-ombudsman-calls-on-7eleven-to-admit-exploitation-complicity-20160406-go077o.html](http://www.smh.com.au/business/workplace-relations/fair-work-ombudsman-calls-on-7eleven-to-admit-exploitation-complicity-20160406-go077o.html)>, archived at <<https://perma.cc/KZN2-77PM>>.

<sup>254</sup> In the FWO’s view, ‘[t]o establish that a person was “knowingly concerned in or party to” a contravention, they must be proved through sufficiently probative evidence to have knowledge of the essential facts that make up the contravention’. This includes knowledge that a specific award ‘applies to the specific employer and its employees and sets out minimum rates or other entitlements’, that ‘the employee(s) performed work of a particular kind which entitled them to minimum payments (which may require knowledge of duties, the age of the employee(s) or hours worked)’ and that ‘the employer did not meet those entitlements’. This is exceedingly difficult to make out where the accessory is not involved in the daily operation of a business: *Inquiry into 7-Eleven* (n 28) 71.

<sup>255</sup> Tess Hardy, ‘Who Should Be Held Liable for Workplace Contraventions and on What Basis?’ (2016) 29 *Australian Journal of Labour Law* 78, 87–8. See also *United Voice v MDBR123 Pty Ltd* [2014] FCA 1344; *United Voice v MDBR123 Pty Ltd [No 2]* [2015] FCA 76, which considered the extent to which a director of the head franchisor was liable under s 550 for contraventions of the adverse action provisions by one of its franchisees.

by a company whose brand was a household name, at risk of considerable reputational damage.<sup>256</sup> Moreover, because 7-Eleven is a privately held company, there were no public shareholders to contest the establishment of the WRP or its approach. The nature of the franchise relationship (as opposed to, say, entities in a product supply chain) meant that employees did not have to establish the head office's particular relationship with the franchisee.

Another unusual dimension to the Fels Panel's genesis was the media portrayal of international students. Students were not depicted as opportunistic law-breakers, but rather as brave whistleblowers and victims of exploitation and blackmail; their unauthorised work was characterised as coerced by unscrupulous franchisees.<sup>257</sup> The resulting public sympathy for the employees drove the public and specific DIBP conditional assurance against visa cancellation which was unprecedented at the time. The WRP also benefited from 7-Eleven's ongoing media promotion of its proactive response to the revelations, which may have increased the program's visibility among potential claimants.

It is similarly dangerous to conclude from the 7-Eleven example that business-led redress mechanisms generally present an effective model for addressing systemic employee underpayment. The WRP was certainly not perfect. Although it significantly ameliorated barriers such as immigration-related fears, it did not do so entirely.<sup>258</sup> Fels observed that the process had been undermined by 'deception, fearmongering, intimidation and even some physical actions of intimidation by franchisees' against employees and their families overseas, to dissuade employees from making claims.<sup>259</sup> More than 2,000 employees contacted the WRP but, at the time the WRP concluded, had not yet gone forward and submitted a claim, and many thousands of potential claimants did not contact the WRP at all.<sup>260</sup> A substantial number of the latter were likely unaware of

<sup>256</sup> Hardy observes that the 7-Eleven story 'demonstrates the power of informal sanctions, such as disapproval, adverse publicity and ostracisation': Tess Hardy, Submission No 62 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 7.

<sup>257</sup> See, eg, ABC, '7-Eleven: The Price of Convenience' (n 25).

<sup>258</sup> See Part V(B).

<sup>259</sup> Evidence to Education and Employment References Committee, Senate, Canberra, 5 February 2016, 30 (Allan Fels, Fels Wage Fairness Panel); see also at 31; Paul Karp, '7-Eleven Workers Beaten and Forced to Pay Back Wages, Senate Inquiry Hears', *The Guardian* (Sydney, 5 February 2016) <[www.theguardian.com/australia-news/2016/feb/05/7-eleven-workers-beaten-and-forced-to-pay-back-wages-senate-inquiry-hears](http://www.theguardian.com/australia-news/2016/feb/05/7-eleven-workers-beaten-and-forced-to-pay-back-wages-senate-inquiry-hears)>, archived at <<https://perma.cc/F74W-BMWS>>.

<sup>260</sup> Fels estimated that over half of the more than 20,000 individuals who had worked for 7-Eleven franchises over the past 10 years would likely have valid claims for underpayment: Interview

the WRP. It is impossible to determine how many others did not come forward because of fear or other reasons.

More broadly, the WRP raises the significant public policy concern that 7-Eleven escaped full legal accountability for its actions. Although the company incurred the substantial financial burden of administering the WRP and repaying up to \$150 million in wages owed by its franchisees, it was not subjected to any legal sanction for its role in the systemic breaches of workplace laws in its franchises over many years that resulted in the exploitation of thousands of employees. It also escaped repayment of the likely thousands of other employees who did not come forward and make claims. Moreover, while the FWO achieved record-breaking penalties in the FCCA against a handful of franchisees, there are another 440 franchisees who may pay only a fraction of their debts to employees (if head office opts to recoup these)<sup>261</sup> and will suffer no other sanction.

At a structural level, the extra-legal character of the WRP and lack of transparency around its claims-determination methodology may have resulted in positive outcomes for employees in this case (for example, through swift determinations and flexible worker-oriented presumptions in the absence of evidence), but this could act to the serious detriment of employees under different circumstances.<sup>262</sup> Indeed, the WRP was heavily dependent on the goodwill of 7-Eleven's head office. If the company's sole concerns had been public image, they might have sought to achieve a similar result through a cheaper, less robust redress mechanism awarding lower payouts.<sup>263</sup>

with Allan Fels (Melbourne, 29 March 2016). This compares with the 5,347 expressions of interest that the WRP received from workers. As of February 2017, only 3,256 of these had been converted into claims through employees providing the minimum required information even though 7-Eleven committed the secretariat to 'continue to follow up a number of claimants that are yet to provide the minimum required information, despite repeated communication attempts': Interview with 7-Eleven Management and Deloitte Representative (Melbourne, 21 February 2017).

<sup>261</sup> See Part III.

<sup>262</sup> It is also arguably unfair to franchisees if they would be required to reimburse head office for payments to workers without an opportunity to interrogate the evidence and reasoning applied and the quantum calculated in a particular case.

<sup>263</sup> The existing regulatory enforcement literature suggests that to induce or compel lead firms and franchisors to commit to these types of voluntary initiatives, particularly in the longer term, it is necessary to have sufficient positive and/or negative incentives: see generally Ayres and Braithwaite (n 101).

This is in fact what happened in the case of the poultry producer Baiada in 2015, which also set up a fund in response to findings of exploitation of employees by a subordinate entity.<sup>264</sup> In that case, Baiada's labour hire contractors were found to be significantly underpaying 'Working Holiday Makers'. Unlike the WRP, Baiada's fund was established as part of a Proactive Compliance Deed with the FWO following an inquiry by the regulator.<sup>265</sup> Despite an estimated \$10 million in underpayments outstanding to temporary migrant workers on Baiada plants,<sup>266</sup> the fund was capped at \$500,000 and covered only a 10-month period of underpayments, with a strict claims filing deadline. Although the fund operated consistently with the requirements of the Proactive Compliance Deed, the company only investigated 153 claims.<sup>267</sup> A National Union of Workers ('NUW') representative attributed the low number of claims to several factors. Many employees were unaware of the fund because of the transience of Working Holiday Makers and, in contrast to the WRP, the Baiada fund was not well publicised.<sup>268</sup> Further, Baiada's fund did not provide claimants with the kind of assistance that was provided by the WRP's Deloitte-operated secretariat. Consequently, even if employees became aware of the fund, they needed representation or assistance to lodge a claim,<sup>269</sup> which many lacked.

Baiada determined that there had been underpayment in 91 of the 153 claims submitted. It made payments totalling \$218,768.79 — less than half of the allotted fund. The company recouped \$168,709.27 of the payout from its labour hire contractors, and in the end paid employees \$50,059.52 in ex gratia payments.<sup>270</sup> Unions representing the claimants indicated that even among the claims brought by employees with union assistance, a significant number were rejected in whole or in part. Of the 22 'successful' claims filed by NUW, 17 re-

<sup>264</sup> FWO, *Outcomes of the Compliance Partnership between the Fair Work Ombudsman and the Baiada Group* (Interim Report, November 2016) 4–5 ('*Baiada Group Interim Report*').

<sup>265</sup> *Ibid* 4–5, 7. The report also found limited oversight and governance arrangements by Baiada concerning its labour supply chains, and made a series of recommendations to Baiada concerning its labour sourcing arrangements going forward: FWO, *A Report on the Fair Work Ombudsman's Inquiry into the Labour Procurement Arrangements of the Baiada Group in New South Wales* (Report, June 2015) 16–26, 30.

<sup>266</sup> Interview with National Union of Workers Representative (Adelaide, 31 May 2016).

<sup>267</sup> This was comprised of '17 requests for assistance referred by the FWO'; '120 claims submitted via the employee's union which was either the AMIEU or the National Union of Workers'; and '16 claims directly made to the Baiada Hotline': *Baiada Group Interim Report* (n 264) 23–4.

<sup>268</sup> Interview with NUW Representative (Adelaide, 31 May 2016).

<sup>269</sup> *Ibid*.

<sup>270</sup> *Baiada Group Interim Report* (n 264) 23–4.

ceived less than half of what they calculated they were owed. A number of employees received far less, including one who was paid only \$755 of the \$17,990 underpayment he had claimed. Union representatives attributed the high rejection rate to the narrow 10-month eligibility window,<sup>271</sup> and the requirement to provide specific forms of information which workers lacked (such as their ABN).<sup>272</sup> A significant number of claims were rejected in part based on workers' lack of evidence of the hours they had worked and/or the amount they had been paid, as many were paid in cash.

The Baiada case illustrates the potential for exposed companies to respond to negative media attention by establishing redress mechanisms that are limited in scope and outcomes and do little to effectively remedy substantial employee underpayment. It is therefore not the fact of the WRP's existence, but rather the details of its operation, from which lessons must be drawn for state-based redress processes and any future business-led mechanisms.

## VII CONCLUSION

For the vast numbers of temporary migrant workers who are deprived of entitlements they are owed under the *FW Act*, there is no reliable and accessible mechanism through which they can obtain a remedy.<sup>273</sup> The experience of underpaid 7-Eleven employees prior to August 2015 reveals a clear need for reform of existing remedial mechanisms. The small claims jurisdiction in the FCCA was not utilised by a single 7-Eleven employee. The relevant union did not bring claims on behalf of 7-Eleven employees, and virtually none were members. The FWO did not recover meaningful quantum of unpaid wages for substantial numbers of 7-Eleven employees.<sup>274</sup> It received only 27 requests for assistance from 7-Eleven migrant employees between 2011 and 2015, of which

<sup>271</sup> Interview with NUW Representative (Adelaide, 31 May 2016). The Baiada fund applied to underpayments that occurred between 1 January and 23 October 2015. Baiada rejected 20 claims on this basis: *Baiada Group Interim Report* (n 264) 24, 24 n 21.

<sup>272</sup> Interview with AMIEU Newcastle Branch Representative (Sydney, 27 January 2016).

<sup>273</sup> One survey reported that, of 35 Working Holiday Makers who tried to recover unpaid wages, only three were successful: Elsa Underhill and Malcolm Rimmer, 'Layered Vulnerability: Temporary Migrants in Australian Horticulture' (2016) 58 *Journal of Industrial Relations* 608, 619. This suggests that temporary migrant workers face specific and acute difficulties in recovering unpaid wages, although the history of underpayment indicates this is not unique to this group of workers: Miles Goodwin and Glenda Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952–95' (2007) 49 *Journal of Industrial Relations* 523, 523.

<sup>274</sup> See Part IV(C).

only four resulted in recovery of a substantial amount of money. A series of audits conducted between 2008 and 2010 recovered less than \$1,000 each for several hundred employees.<sup>275</sup>

Recognising the particular vulnerabilities of temporary migrants, the FWO has recently devoted considerable resources to better understanding the work experiences of international students and Working Holiday Makers through a series of inquiries, detailed investigations<sup>276</sup> and commissioned research.<sup>277</sup> Following the events related to 7-Eleven in 2015, the FWO ‘established the Migrant Worker Strategy & Engagement Branch to coordinate effective compliance, education and engagement activities for visa workers.’<sup>278</sup> Of the FWO’s 50 court actions commenced in 2015–16, 76% involved a visa holder.<sup>279</sup> The FWO has filed a further eight cases against 7-Eleven franchisees since 2015, several of which have resulted in fuller recovery of unpaid wages.<sup>280</sup> The FWO’s Proactive Compliance Deed with 7-Eleven has set a new standard for franchisor accountability in Australia, requiring the retailer to institute extensive costly measures to prevent, detect and remedy noncompliance in the future.

In the midst of these significant improvements, however, it remains clear that the FWO’s core functions do not include systematically ensuring that large numbers of individual employees recover their unpaid wages. This would require an allocation of substantially increased resources and reformulated institutional structures capable of responding to these employees’ significant need for targeted assistance. As a result, courts and the FWO mechanisms remain insufficiently accessible to individual underpaid migrant workers and are not yielding satisfactory outcomes in relation to individual remedies.

Yet the fact that so many employees received significant financial remedies through the WRP demonstrates that, even in the absence of larger institutional reforms, it may be possible to address a number of these systemic barriers that impede migrant workers’ access to justice. As the newly established cross-agency Migrant Workers’ Taskforce<sup>281</sup> and other stakeholders seek to address exploitation of migrant workers, they should consider opportunities for systematically improving access to employment remedies. It cannot be denied

<sup>275</sup> FWO, ‘FWO Compliance History with “7 Eleven” Stores, 1 Jul 2011 to 30 Jun 2015’ (n 128).

<sup>276</sup> See n 103.

<sup>277</sup> Reilly et al (n 8).

<sup>278</sup> FWO, *2015–16 Fair Work Ombudsman Annual Report* (n 113) 15.

<sup>279</sup> *Ibid* 1, 22.

<sup>280</sup> See Part IV(C)(2).

<sup>281</sup> See ‘Migrant Workers’ Taskforce’, *Department of Jobs and Small Business, Australian Government* (Web Page, 23 January 2018) <[www.employment.gov.au/migrant-workers-taskforce](http://www.employment.gov.au/migrant-workers-taskforce)>, archived at <<https://perma.cc/86GR-MZDM>>.

that the WRP evolved within a unique confluence of circumstances. It is also clear that business-led redress mechanisms have a degree of flexibility and re-sourcing that may not be replicable within government institutions. This can make them an attractive compliance strategy for the FWO. However, as the Baiada example demonstrates, if they are not worker-centred they are unlikely to genuinely remedy large-scale wage underpayment. Nevertheless, when contemplating reforms to the FWO and judicial processes or establishing future business-led redress mechanisms, integral features of the WRP should be drawn upon.

First, stronger safeguards should be explored to enable migrant workers to bring wage claims without risking visa cancellation and removal. In mid-2017, for the first time, a new protocol between the FWO and DIBP was publicised, stating that a worker's temporary visa will not be cancelled if they report exploitation and are actively assisting the FWO in an investigation.<sup>282</sup> It applies as long as the worker holds a temporary visa with work rights, they commit to abide by visa conditions in the future and there is no other basis for visa cancellation. This certainly reflects a significant step towards protecting temporary migrants with work rights and the FWO has made great efforts to promote this initiative to service-providers and workers themselves. However, the protection remains partial: it leaves visa-overstayers and tourist visa holders unprotected. Indeed, it is unclear whether it will offer sufficient comfort to enable even those visa holders with work rights to come forward and report exploitation. It does not appear to give rise to any right on the part of a visa holder to appeal a visa cancellation on the basis of unauthorised work. Nor does it establish a firewall between the FWO and the DIBP such that the FWO can guarantee the confidentiality of information provided by migrant workers requesting assistance. To the contrary, it *requires* that the FWO notify DIBP of the migrant worker's visa status to obtain the visa cancellation dispensation. The dispensation is also conditional on the FWO's assessment as to whether the individual is actively assisting the FWO and it is unclear whether the dispensation could be withheld or revoked if the migrant worker does not wish to participate or continue participating in an investigation, or if the FWO declines to pursue the matter further. For these reasons, government reviews and scholars have called for workers' immigration status to be more strongly insulated from their

<sup>282</sup> 'Visa Holders and Migrants', *Fair Work Ombudsman, Australian Government* (Web Page) <[www.fairwork.gov.au/find-help-for/visa-holders-and-migrants](http://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants)>, archived at <<https://perma.cc/EH58-J7DZ>>.

labour claims via a firewall between the FWO and DIBP<sup>283</sup> and for entitlement to a bridging visa if necessary to regularise stay while a labour claim is under determination.<sup>284</sup> Law reform measures should also be considered to ensure the validity of employment contracts where work has been undertaken in breach of visa conditions.<sup>285</sup>

Second, while there are many structural contributors to the vulnerable position of temporary migrants in the labour market, there may be opportunities to reduce some of the obstacles to pursuing a claim for unpaid entitlements, although these would require a significantly increased allocation of resources. Most fundamentally, avenues should be explored for increasing the availability and resourcing of the provision of assistance to migrant workers, recognising the high level of support that most need in order to formulate and file a claim.<sup>286</sup> This includes assistance to calculate wage claims, and representation of employees in direct negotiations with employers. This support could take the form of greater assistance by the FWO, expanded service-provision by legal service-providers,<sup>287</sup> a greater role for unions, and/or innovative use of technology and wage calculator platforms.<sup>288</sup> It may also include simplified processes for initiating a claim or a request for the FWO's assistance, with greater support from the FWO to obtain further necessary information.

Third, a fairer burden of proof should be considered, to account for evidentiary hurdles posed by missing or falsified employment records and pay slips that are the result of exploitation in the first place.<sup>289</sup> This could incorporate a reverse onus of proof under the *FW Act* where the employer has failed to pro-

<sup>283</sup> Productivity Commission, *Workplace Relations Framework* (n 190) vol 2, 915; Berg (n 8) 277; Chris F Wright et al, *Economic Migration and Australia in the 21<sup>st</sup> Century* (Lowy Institute Analysis, October 2016) 21.

<sup>284</sup> Berg (n 8) 277; *A National Disgrace* (n 7) xii [6.96].

<sup>285</sup> Productivity Commission, *Workplace Relations Framework* (n 190) vol 2, 931. See also Stephen Clibborn, Submission No DR353 to Productivity Commission, *Inquiry into the Workplace Relations Framework* (September 2015); Berg (n 8) 218–19, 285.

<sup>286</sup> Tham has argued for better Commonwealth-funded coordination between services and agencies working with and for migrant workers: Tham, Supplementary Submission (n 174) 4.

<sup>287</sup> Hemingway (n 11) 156–7.

<sup>288</sup> See, eg, NUW's online underpayment calculator tool: NUW, *Fair Pay Campaign* (Website, 14 October 2016) (at 'Underpaid?') <<https://fairpay.org.au>>, archived at <<https://perma.cc/DZM3-2Q27>>.

<sup>289</sup> In this respect, the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), which increases penalties for employers that fail to keep proper records, does not go far enough, although this implemented a recommendation of the Productivity Commission: see Productivity Commission, *Workplace Relations Framework* (n 190) vol 2, 928.

vide pay slips, such that the employer bears the burden of demonstrating compliance under those circumstances.<sup>290</sup> There may also be scope for the FWO to adopt more generous evidentiary standards when deciding whether to pursue a migrant worker's claim in the absence of pay slips.

Finally, avenues for ensuring that employees can obtain remedies when their employer is unwilling or unable to pay should be considered. This includes strengthening franchisors' responsibility for the conduct of franchisees in certain circumstances,<sup>291</sup> as well as extending access to government safety nets when an employer liquidates.<sup>292</sup> Ultimately, the state should adopt measures that ensure that the debt for unpaid wages is not left with a low-wage migrant worker, the party least able to absorb it.

<sup>290</sup> Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (n 255); Hemingway (n 11) 155.

<sup>291</sup> Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) sch 1 pt 2.

<sup>292</sup> The General Employees Entitlements and Redundancy Scheme compensates workers for outstanding entitlements after employer's bankruptcy or liquidation; however, temporary residents are currently ineligible: *Fair Entitlements Guarantee Act 2012* (Cth) s 10(1)(g).