

SUBMISSION

TO

INDEPENDENT INQUIRY INTO INSECURE WORK IN AUSTRALIA



Centre for
Employment &
Labour
Relations
Law

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1. Introduction

- 1.1 This submission is made to the ACTU's Independent Inquiry into Insecure Work in Australia by the Centre for Employment and Labour Relations Law ('CELRL') at the University of Melbourne. CELRL is a specialist unit within Melbourne Law School devoted to teaching and research in labour and employment law.
- 1.2 Although the terms of reference of the Independent Inquiry into Insecure Work in Australia ('the Inquiry') raise a number of pertinent issues relevant to addressing insecure work in Australia, we will confine our submission to the following matters.
- 1.3 The economic insecurity faced by many people who are dependent on their labour to make a living is a major problem for the Australian economy and society. This insecurity often arises as a result of gaps in the regulatory framework of labour law, a framework that is intended to provide social protection through minimum employment conditions. Workers who fall through these gaps experience inferior working conditions and are hence vulnerable to economic insecurity.
- 1.4 These gaps take two forms. The first gap is that certain workers are not protected by legal rights and entitlements intended to provide decent working conditions because of exceptions, exclusions or because the scope of protection is too narrow. Second, even where legal rights and entitlements technically apply to vulnerable workers, some workers do not enjoy the benefits of those rights and entitlements because of lack of compliance with labour and employment laws and barriers to the effective enforcement of those laws.
- 1.5 Although there are a range of possible approaches to address these gaps in the legal protections applicable to precariously employed workers, we confine our submission to three potential options:

- a) *Extending the Reach of Existing Labour and Employment Entitlements*
(Section 5)

We argue that **universality** should be an objective of labour legislation – extending the minimum benefits of that legislation to the greatest possible number of workers. This requires strict regulation of derogation from minimum employment standards through, for example, the use of non-standard working arrangements.

We therefore consider some mechanisms by which this might be better achieved under Australian labour regulation, including

extending notice of termination, unfair dismissal and redundancy pay entitlements to seasonal workers employed for multiple seasons with the same employer.

We also argue that one way to achieve universality is by facilitating the **portability** of certain entitlements, for example so that seasonal workers are able to accrue benefits while moving between short-term engagements for multiple employers.

- b) *Strategic Enforcement of Existing Entitlements and Improved Access to Justice; Extending Supply Chain Regulation for Outworkers to other Industries* (Sections 6 and 7)

If society has chosen to provide employment rights and entitlements through law then those rights and entitlements should be complied with. We make recommendations concerning improvements to the enforcement of existing employment standards through:

- i. increasing access to justice, including by strengthening a number of existing strategies and mechanisms employed by the Fair Work Ombudsman ('FWO') – the regulatory agency responsible for ensuring compliance with and enforcement of minimum employment standards in Australia; and
- ii. extending the application of licensing regimes, model codes of conduct, statutory deeming provisions and rights of recovery to workers in supply chains or other industries with a high incidence of insecure work.

2. Gaps in the Legal and Regulatory Framework of Insecure Employment

2.1 The full-time on-going employment relationship, also described as the standard employment relationship ('the SER') has been described as the 'regulatory pivot' of Australian employment law.¹ SER employees benefit from the full suite of employment law protections, which are designed to ensure job quality and employment security.

2.2 However, an increasing number of workers are engaged under non-standard employment and work arrangements, such as fixed term and seasonal

¹ Joo-Cheong Tham, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 AJLL 123, 1 citing I Campbell and J Matthews, 'Researching the Model of Standard Working time in Australia: Theoretical Preliminaries' (Working Paper no. 59, Monash University, National Key Centre in Industrial Relations, 1998) 12-14. Paper presented to the 12th AIRAANZ conference, in Wellington, New Zealand, 3-5 Feb. 1998.

employees, casuals, and self-employed or 'independent' contractors. These non-SER workers are accorded lesser rights and entitlements than SER employees, and are therefore more likely to experience precarious or insecure employment.²

2.3 Work conducted under these forms of non-SER working arrangement does not necessarily lead to insecurity. Some workers may choose these arrangements because of the flexibility or autonomy they provide, without experiencing vulnerability or insecurity.

2.4 However, for many workers, working under these arrangements is of necessity rather than a matter of free choice. Some employers seek to exploit the availability of non-SER work arrangements to cut labour costs, whether motivated by moral failure or as a result of competitive pressures. Because certain employment protections do not apply to these categories of work, and because of employer exploitation of legal 'loopholes' present in non-SER categories of employment, worker insecurity and vulnerability is likely to be prevalent among non-SER workers.

2.5 We also note that there is evidence to suggest that there is a higher incidence of these non-SER forms of work in particular sectors and business configurations. For example, while all industries have some degree of casual work, density is highest in sectors such as accommodation and food and agriculture, forestry and fishing.³ We also note that insecure work seems to be common in areas of the economy where workers are engaged through labour-hire arrangements or home-based work.

2.6 In recognition of the concentration of non-SER and consequent worker insecurity in particular sectors, in Part 5 we suggest that measures to extend employment protections to vulnerable workers should be focused on sectors of the economy where non-SER employment is most prevalent.

3. Barriers to the Effective Enforcement of Applicable Labour Laws

3.1 Aside from the categories of work listed above, other workers in more standard employment arrangements may nevertheless experience employment insecurity. For those workers who are protected by statutory workplace entitlements governing wages, working time, and protection from unfair or unlawful dismissal, these entitlements are meaningful only in so far as they are complied with. Unfortunately, many workers do not enjoy the benefit of their

² Ibid.

³ J Burgess, I Campbell and R May, 'Pathways from Casual Employment to Economic Security: the Australian Experience' *Social Indicators Research* (2008).

legal rights and entitlements due to employer non-compliance with labour and employment laws.⁴

Limited Access to Justice

- 3.2 In Australia, any employee affected by a breach of federal labour law, awards or enterprise agreements has the right to initiate legal proceedings to seek rectification of the breach. However, this has not resulted in many individual employee legal claims against employers outside of the unfair dismissal jurisdiction.⁵
- 3.3 For a start, vulnerable employees, particularly those in low-wage industries and engaged under precarious or unlawful arrangements, may be reluctant to raise a complaint about their working conditions or pursue their rights when they are contravened.⁶ Where employees are willing to complain and to seek legal redress, the cost of access to justice in relation to court enforcement of employment rights is prohibitive.⁷
- 3.4 Others may simply be ignorant of their rights, entitlements and enforcement options or lack sufficient means.⁸ These barriers are magnified in respect of some employees, such as young or foreign workers, or in some settings, such as in rural or remote areas.
- 3.5 This means that the role of unions and the federal employment standards enforcement agency, the FWO, become all the more important in ensuring adequate enforcement of minimum employment standards on behalf of vulnerable workers.
- 3.6 We note and acknowledge the important compliance and enforcement role played by unions, particularly in the period before 2006. Since that time, and for a variety of reasons, the regulatory role of unions has been somewhat

⁴ See, for example, M Goodwin and G Machonachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategies and Outcomes 1952-1995' (2007) 49 *Journal of Industrial Relations* 523.

⁵ For in-depth consideration of a number of factors inhibiting individual prosecution of employment law breaches in the Australian context, see C. Arup and C. Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35 *Monash University Law Review* 96.

⁶ Glenda Maconachie and Miles Goodwin 'Victimisation, Inspection and Workers' Entitlements: Lessons Not Learnt?' (Paper presented at the *Proceedings Asia-Pacific Economic and Business History Conference 2008*, 13-15 February 2008, Melbourne, Australia).

⁷ Arup and Sutherland, above n 5.

⁸ David Weil and Amanda Pyles, 'Why complain? Complaints, compliance and the problem of enforcement in the US workplace' (2005) 27(1) *Comparative Labor Law and Policy Journal* 59.

overshadowed by the elevation, in terms of funding, stature and profile, of the federal labour inspectorate, now called the Fair Work Ombudsman (FWO).⁹

Challenges Faced by the Fair Work Ombudsman

- 3.7 In light of this regulatory reconfiguration, this submission will focus on the key challenges that face the FWO. While this submission focuses on the FWO, the barriers to enforcement set out below are also likely to be encountered by other actors and agencies seeking to curb employer non-compliance.¹⁰
- 3.8 In relative terms the federal labour inspectorate in Australia has been well funded in the past five years – a development which resulted from an unexpected flush of political enthusiasm for improved enforcement following Work Choices.¹¹ This influx of resources initially led to a boost in its inspectorate workforce, a shift in its enforcement strategy and a spike in prosecutions.¹²
- 3.9 Unfortunately, notwithstanding these advances, it seems that the widened mandate,¹³ combined with the current regulatory complexity associated with the introduction of modern awards and transitional provisions, ‘has resulted in reactions by some employers of confusion, ignorance and avoidance’.¹⁴
- 3.10 In addition to the issue of complexity, the agency has faced a range of compliance and enforcement challenges on other fronts, including: the resource problems associated with a heavy complaint caseload; the difficulty of identifying and assisting vulnerable workers; and the problems with obtaining

⁹ Tess Hardy and John Howe, ‘Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia’ (2009) 23(3) *Australian Journal of Labour Law* 306.

¹⁰ This part of the submission is based on data and analysis of a broader research project concerned with the activities and impact of the FWO. It draws on reviews of internal documents of the agency, such as the Operations Manual, which is used to guide and manage the work of the Fair Work Inspectors (FW Inspectors), as well as publicly available documents, such as annual reports, guidance notes, media releases and court cases. We have also undertaken approximately 40 in-depth, semi-structured interviews with FW Inspectors, managers and lawyers who are variously responsible for inspection, education, media, policy and legal activities.

¹¹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

¹² 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* (2009).

¹³ Since Work Choices, the federal labour inspectorate has increasingly assumed responsibility for the enforcement of minimum employment standards previously undertaken by state inspectorates. At the same time, the legislative mandate has also broadened. It is now responsible for enforcing all relevant provisions of the Fair Work Act and the FW Regulations, including: pay slip and record-keeping requirements; freedom of association and general protections; right of entry by unions; transfer of business; sham contracting arrangements; unlawful industrial action; and discrimination. From 1 January 2011, the FWO has also had a compliance role in respect of paid parental leave entitlements.

¹⁴ Patricia Todd, ‘Employer and Employer Association Matters in 2010’ (2011) 53(3) *Journal of Industrial Relations* 353, 359.

evidence and bringing prosecutions against rogue employers who steadfastly refuse to cooperate.

- 3.11 These problems have not gone unnoticed by senior managers with the FWO who are increasingly aware that traditional regulatory processes are failing to keep up with the changes to the labour market,¹⁵ such as the growth in small or micro businesses, the fragmentation of the traditional employment relationship, the intensification of supply chain pressures and the accompanying rise in insecure working arrangements.¹⁶
- 3.12 Indeed, these changes to work practices and employment arrangements present challenges at nearly every turn in the regulatory process. Small and geographically dispersed workplaces mean that detection is more difficult and resource-intensive. Even where contraventions can be identified, fragmented working arrangements serve to convolute chains of ownership and clouds lines of accountability.¹⁷
- 3.13 As a result, it is now much more difficult for inspectors to identify the true employer and/or the person or company which is driving and deriving benefits from the arrangement, some of whom may be located outside Australia.¹⁸ Small businesses may not have maintained adequate employment records (which can weaken the evidentiary basis on which to bring enforcement litigation) or may be bankrupt or have a limited asset base (which can reduce the likelihood of successfully recovering underpayments and penalties).
- 3.14 As noted above, another barrier to enforcement of minimum employment standards and one which is increasingly recognised by the FWO, is reliance on a complaints-based detection strategy. That is, where detection of non-compliance with minimum employment standards depends on a complaint

¹⁵ See Nicholas Wilson, (Speech delivered at the Australian Industry Group — National PIR Group Conference, Canberra, 3 May 2011) (Wilson 2011a); Nicholas Wilson, 'The Fair Work Ombudsman — two years navigation and land within sight' (Speech delivered at the Australian Labour and Employment Relations Association National Convention, Perth, 8 October 2011) (Wilson 2011b).

¹⁶ This is largely due to the fact that workplace regulation generally presumes the existence of an ongoing employment relationship and the triangular relationship (between agency workers, their agency and host employers) serves to undermine this presumption and foil regulatory oversight. See Richard Johnstone and Michael Quinlan, 'The OHS Regulatory Challenges Posed by Agency Workers: Evidence from Australia' (2006) 28(3) *Employee Relations* 273.

¹⁷ David Weil, 'Enforcing Labour Standards in Fissured Workplaces: The U.S. Experience' (2011) 22(2) *Economic and Labour Relations Review* 33.

¹⁸ For example, in October 2010, the FWO commenced legal action in the New Zealand High Court against the NZ-based parent company of a former Australian-based company (which has since been liquidated) in an attempt to recover more than \$600,000 in unpaid entitlements owing to 14 marketing employees based in Perth. See Fair Work Ombudsman, 'Regulator commences action in New Zealand in bid to recover underpayments for WA workers' (Media Release, 4 October 2010).

being made by an aggrieved worker. At one level, a complaints-based strategy is consistent with market principles which suggest that an individual has the most interest and the greatest incentive for enforcing his or her own rights.¹⁹ Further, employees are often most familiar with the practices of the individual enterprise and are therefore critical to identifying potential contraventions on the part of the employer. While addressing worker complaints is an important function of any labour inspectorate, there is concern that a focus on complaints at the expense of other detection methods fails to ensure that vulnerable workers are effectively protected.²⁰ As we observed earlier, there are a variety of reasons as to why vulnerable employees are unlikely to raise a complaint about their working conditions when they are contravened.²¹

- 3.15 This is despite the fact that employer exploitation may be extreme, as FWO inspectors have discovered on a number of occasions. For example, following a series of night-time inspections in fast food stores in a regional town in Victoria, some employees who were owed back pay were bullied by their employers not to cash their cheques.

- 3.16 Similarly, a contract cleaner and recent migrant who was receiving \$5 an hour was scared that if she complained and her identity was revealed, she would lose her job and be sent back home. Another migrant worker was too scared to speak out about poor working conditions because he feared his employer, who shared the same ethnic background, would threaten his family who remained in their country of origin.

- 3.17 The difficulties this presents for the regulatory agency responsible for enforcement are illustrated by a case brought by the FWO earlier this year. As part of these proceedings, the FWO has alleged that three companies owe more than \$120,000 in underpayments to four Filipino nationals who were working and living on oil rigs off Western Australia. The vulnerability and isolation of these workers meant that this issue would have remained hidden had it not been for the presence of MUA-AWU offshore alliance delegates who acted as the whistle-blower — by initially identifying the problem and then referring it to the FWO for further investigation.²²

¹⁹ Guy Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26(1) *The International Journal of Comparative Labour Law and Industrial Relations* 61, 63.

²⁰ See Sean Cooney, Tess Hardy and John Howe, 'Off the Radar? Detecting and Inspecting Non-Compliance with Minimum Working Conditions' (Paper presented at the Regulating for Decent Work Conference, International Labour Office, Geneva, 6-8 July 2011).

²¹ Glenda Maconachie and Miles Goodwin 'Victimisation, Inspection and Workers' Entitlements: Lessons Not Learnt?' (Paper presented at the *Proceedings Asia-Pacific Economic and Business History Conference 2008*, 13-15 February 2008, Melbourne, Australia).

²² Workplace Express, 'FWO prosecutes companies over underpayment of Filipino guest workers', 28 June 2011; Workplace Express, 'Offshore oil underpayment case begins', 11 August 2011.

- 3.18 Another key problem with a heavily complaints-orientated strategy is that it can lead to investigations which are shaped by the specific concerns of the relevant individual worker and are confined to the individual employers at the level where the workplace contraventions are occurring. In other words, complaints may or may not reflect more systemic problems within particular regions or industries. Even if the complaint does raise such problems, an investigation into such a complaint may not be directed at addressing the deeper, systemic issues.²³
- 3.19 This approach may not adequately influence compliance motivations given that employer non-compliance is often driven by external forces, including those organisations situated at the higher echelons of industry structures.²⁴
- 3.20 This has recently been echoed by the Fair Work Ombudsman who stated that in order to improve compliance and enforcement, the agency needs to ‘find ways to provide better information and more effective community based deterrence so as to influence the duty-holders before errors occur.’²⁵
- 3.21 We consider how the FWO is seeking to overcome some of these challenges in Part 6 below, and recommend some possible improvements.

4. Three Potential Ways to Address Insecure Work

- 4.1 Having identified these gaps in the regulatory framework governing employment, we recommend the following reforms as mechanisms by which the problem of insecure work might be addressed:
- Extending the Reach of Existing Labour and Employment Entitlements
 - Strategic Enforcement of Existing Entitlements and Improved Access to Justice
 - Extending Supply Chain Regulation for Outworkers to Other Industries

5. Extending the Reach of Existing Labour and Employment Entitlements

- 5.1 If a legal system is to provide that workers should benefit from minimum acceptable standards of employment, then it follows that *universality* should be an objective of labour legislation – extending the minimum benefits of that

²³ David Weil, ‘Improving Workplace Conditions through Strategic Enforcement’ (A Report to the Wage and Hour Division of the US Department of Labor, 2010).

²⁴ Weil (2011), above n 17, 44.

²⁵ Wilson (2011b), above n 15, [23]

legislation to the greatest possible number of workers so that the protective purpose of labour regulation is not thwarted.²⁶

- 5.2 There are a number of ways that this might be achieved. There has been a longstanding debate in Australia concerning the legal definition of the employment relationship upon which employment protections are based. Scholars have argued for a broad redefinition of the employment relationship to better capture categories of dependent, vulnerable workers currently outside the scope of legal protection.²⁷
- 5.3 Less wholesale measures have been also been adopted to expand the coverage of employment law benefits and protections. For example, various jurisdictions have sought to avoid the vulnerability associated with labour hire employment by recognizing the doctrine of joint employment either by way of statute or at common law.²⁸
- 5.4 Other forms of legislation extend protections to those not usually considered employees. For example, various workers are deemed covered by worker's compensation legislation regardless of the fact that they would not normally be classified as employees at common law.²⁹ Occupational health and safety legislation also frequently extends coverage beyond the employment relationship, requiring employers to ensure, as far as is reasonably practicable, that 'persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.'³⁰
- 5.5 Several jurisdictions have also adopted legislation to recognize a third category of economically dependent contractors, who are neither an independent

²⁶ For example, universality has long been a goal of the Canadian system of employment regulation: see Leah F. Vosko, Mark P. Thomas and M. Gellatly, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards: the Case of Ontario, Canada*, Osgoode Hall Law School, Research Paper No. 31/2011, p 3.

²⁷ See, eg, Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 AJLL 235.

²⁸ See, eg, C.W. Dowling, *The Concept of Joint Employment in Australia and the Need for Statutory Reform* (LLM Thesis), University of Melbourne, 2008 for a discussion of the concept of joint employment in the United States; See also, Ron McCallum, *McCallum's Top Workplace Relations Cases: Labour law and the employment relationship as defined by case law*, (CCH Australia, 1st ed, 2008), 19-22 for a discussion of the Canadian Supreme Court decision of *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015, in which the Court held a labour hire company to be the worker's employer with respect to the provision of minimum labour standards, but found the host entity to also be the worker's employer with respect to statutory collective bargaining obligations.

²⁹ See, eg, *Accident Compensation Act, 1985* (Vic), div 3 ss 5F-17. For example, s 6 deems certain timber contractors and s 11 deems certain share farmers to be workers covered by the legislation.

³⁰ *Occupational Health and Safety Act, 2004* (Vic), s 23.

contractor nor an employee, but may be treated as an employee for certain purposes, such as collective bargaining.³¹

- 5.6 While a wholesale re-definition of the employment relationship may be desirable, it would also represent a substantial change to the current framework of employment regulation and is perhaps unlikely to take place in the foreseeable future. Proper consideration of such a re-definition would also merit a comprehensive submission that extends beyond our more modest aim of considering strategic, targeted and realizable initiatives in industries with a high proportion of vulnerable workers.
- 5.7 One such targeted approach is to increase the **universality** of protections by extending benefits to employees that are technically outside the scope of legal protection, but nevertheless deserving of entitlements because of their vulnerability and length of service. By way of example, we consider the extension of notice of termination, unfair dismissal and redundancy pay entitlements to seasonal workers employed for multiple seasons with the same employer. We also note the potential of increasing **universality** by recognizing the **portability** of benefits in sectors with a high proportion of seasonal workers.

Recognizing Seasonal Service for the Agricultural, Forestry and Fishing Sector Workers

- 5.8 While seasonal workers are employed in a number of industries, the agricultural, forestry and fishing sector employs a substantial proportion of workers on this basis. While this sector employs a comparative small 373,600 workers, it grew as a sector by 7.1% over the five years to November 2010, is projected to grow a further 7.3% over the next five years and accounts for a large share of the total workforce in rural and regional Australia.³²
- 5.9 Seasonal employees in agriculture are some of the lowest earning, least mobile and least secure employees in Australia. For example, farm workers (both in crop and livestock sub-sectors), are classed in the second lowest decile of earnings (\$670-749 per week).³³ Across the sector as a whole, 57% of workers

³¹ See, eg, Ontario *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, s 1 defines 'dependant contractor' as: 'person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.'

³² Department of Education, Employment and Workplace Relations, '2011 Australian Jobs' (2011) 15 <<http://www.deewr.gov.au/Employment/ResearchStatistics/Documents/AustralianJobs.pdf>> ('Australian Jobs').

³³ Ibid 38.

do not have post-secondary qualifications (compared to 39% of the workforce overall) and 89% live outside the capital cities.³⁴ Union density in the sector is currently 2%, the lowest of any sector.³⁵ 47% of agricultural workers are casuals.³⁶

- 5.10 Employers have consistently expressed difficulty in attracting and retaining trained workers.³⁷ While many employers depend upon employees who work for a single season only, many work for one employer in multiple consecutive seasons. In fact, while there are conflicting reports regarding mobility in the sector, some sources indicate that only 7% of workers in the sector reported a change of employment in the past five years (compared with 13% of employees overall).³⁸
- 5.11 As noted above, despite the fact that these workers may be party to an employment relationship with their employer that spans many years, the *FW Act* continues to rely on the concept of *continuous* or *consecutive* service as the benchmark for accrual of employment entitlements.
- 5.12 One way to address insecurity for seasonal workers while encouraging the development of ongoing employment relationships (that benefits both workers and employers) is to recognize these periods of non-continuous service under the *FW Act* for certain employee entitlements and protections, such as notice of termination, redundancy pay and unfair dismissal protections.
- 5.13 This could apply to all seasonal workers in the sector, regardless of whether or not such employees are Australian citizens/permanent residents or present in Australia on temporary work visas. It could also apply equally to fixed term (including those employed until the completion of a fixed task) and 'regular' casual employees.
- 5.14 As noted above, notice of termination under the *FW Act* is based upon *continuous* service as calculated at the end of the day when notice is given.³⁹ Redundancy pay is calculated based on the employee's *continuous* service with the employer at the date of termination. There is however no reason why the accrual of notice of termination and redundancy pay entitlements could not take into account both non-continuous service for the same

³⁴ Ibid 15.

³⁵ Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership* (6 May 2011) cat 6310.0, 5.

³⁶ Australian Council of Trade Unions, 'Campaign: Secure Jobs, Better Future' <<http://www.actu.org.au/Campaigns/SecureJobsBetterFuture/default.aspx>>.

³⁷ See National Farmers Federation, *Workplace Relations*, <<http://www.nff.org.au/policy/workplace.html>>.

³⁸ *Australian Jobs*, above n 94, 15.

³⁹ *FW Act* s 117(3)(a).

employer and the employer's legitimate business need to hire seasonal workers.

- 5.15 In Canada, the Manitoban *Employment Standards Code*⁴⁰ requires employers to provide statutory notice of termination only where employees are terminated prior to the end of the harvest season (so long as employees are told at the time of hiring that the work is seasonal in nature). If an employee is terminated at the end of a season, no notice of termination is due and the employer is under no obligation to re-hire the employee for the subsequent season.
- 5.16 However, if an early termination occurs, entitlements to notice of termination pay are calculated based on the number of consecutive seasons served with the same employer.⁴¹ While there is no statutorily mandated redundancy pay in Manitoba, this same practice could equally apply to that benefit.
- 5.17 By way of example, if an employee is dismissed during his or her fourth consecutive season, under s. 117 of the *FW Act* he or she could be entitled to three weeks of notice (in accordance with three years of completed service), rather than one week under the current provision, which recognizes only continuous service.
- 5.18 Under s. 119 *FW Act*, a seasonal employee can never achieve a period of *continuous* service of more than one year and therefore can never become eligible for redundancy pay. However, if non-continuous seasonal service was recognized, a worker in his or her fourth consecutive season would be eligible for seven weeks of redundancy pay (in accordance with three years of completed service).
- 5.19 While seven weeks of redundancy pay may seem excessive for a seasonal worker, the payment of this entitlement would be relatively rare in practice. As the purpose of redundancy pay is to compensate a worker for the elimination of a position that is no longer performed by anyone, it does not logically apply to an expressly seasonal engagement that has reached its conclusion but will continue to be performed in subsequent years.
- 5.20 This reasoning is supported by the wording of the current provision, which states that redundancy pay is not due and owing where the elimination of

⁴⁰ *Employment Standards Code, The*, CCSM, c E111.

⁴¹ Manitoba Employment Standards, 'A Guide to Employment Standards in Agriculture' <<http://www.gov.mb.ca/labour/standards/doc.guide-agriculture,factsheet.html#a852>>.

the position is 'due to the ordinary and customary turnover of labour'.⁴² Therefore, as with notice of termination, no redundancy payments would be due to a worker who had completed the term, season or task for which they were engaged.

- 5.21 With respect to the requirement for the position to be eliminated, much agricultural, forestry and fishing work continues to involve manual labour that cannot be substituted or eliminated by technological change. However, in the rare circumstances where a manual worker's position was eliminated prior to the end of the term, season or task, there is no reason why the worker should not be provided with redundancy pay.
- 5.22 This ought particularly to be the case given that workers in this sector are especially vulnerable to unemployment because of their low levels of formal education, training and employment mobility, low earnings and rural location. The effect of the elimination of a position would therefore have a particularly detrimental impact on this group of workers.
- 5.23 The purpose of notice of termination or pay in lieu thereof is also equally applicable to seasonal workers. Notice of termination provides the employee with a degree of financial support while he or she seeks alternative employment. It also provides the employee with an opportunity to make practical arrangements prior to the termination of their employment. The rationale for this entitlement therefore applies equally to ongoing and seasonal workers.
- 5.24 Similarly, unfair dismissal protections could also be extended to recognize the unique nature of seasonal employment. As noted above, fixed term, seasonal or specified task employees are not covered by unfair dismissal protection if they are terminated at the end of the period, season or task.⁴³ However, such employees are eligible to obtain compensation at FWA in the event of the early termination of their contract, so long as they have met the six or 12 month eligibility requirement.
- 5.25 Again, there is no reason why this eligibility period should not be able to be satisfied once, over the course of two or more consecutive seasons. As noted above, the Victorian *LSLA* already follows this model by expressly permitting accrual of entitlements over the course of multiple seasons.

⁴² *FW Act*, s 119.

⁴³ *FW Act*, s 386(2)(a).

- 5.26 Critics of this approach may note that employers could evade payment of these entitlements in one of two ways. First, they may refuse to engage the same employees in multiple consecutive seasons. Second, they may engage employees as casuals, which may allow them to evade notice of termination requirements (as notice of termination provisions currently does not apply to casuals, seasonal or otherwise).
- 5.27 With respect to the first criticism, if employers are truly interested in attracting and retained trained employees, they may be willing to take the risk of additional payments to a minority of returning employees.
- 5.28 Also, it would be possible to word the provision in such a way as to avoid this problem by recognizing service over: a) consecutive seasons or b) two seasons during three calendar years or c) three seasons over four calendar years, etc. With respect to the second criticism, while casualization in the sector is widespread, this potential problem could be dealt with by extending the definition of regular casuals that currently applies under the unfair dismissal provisions.
- 5.29 In particular, casual seasonal employees could be provided with unfair dismissal protection only where they were employed on a 'regular and systemic basis during the defined term, season or task'. It would not be a disadvantage to employers if the term, season or task in question was short in duration, as the overall waiting period for all employees would continue to be six or 12 months. The definition of a 'season' could also be limited to a defined number of days in order to exclude true casuals.
- 5.30 While a number of entitlements under the *FW Act* could potentially be extended to all seasonal employees, we believe that the extension of unfair dismissal protections, notice of termination and redundancy entitlements would be particularly beneficial in reducing the insecure status of seasonal work. Extending these protections would be compatible with the principle of ***universality*** advocated by this submission.

Providing for Portability of Employment Benefits

- 5.31 One further possibility to advance the concept of ***universality*** is to recognize the ***portability*** of benefits between various employers, either within the same sector or outside of it. Allowing benefits to 'travel' with workers between jobs is one way of 'loosening the grip of "continuous service" with a particular employer as a gateway to minimum entitlements'.⁴⁴

⁴⁴ Tham, above n 1.

- 5.32 While one of the goals of the above section was to promote an ongoing and secure employment relationship between seasonal workers who work for the same employer over the course of multiple seasons, it should also be noted that many workers in the agricultural, forestry and fishing sector work for numerous employers.
- 5.33 This is partly the result of the seasonal nature of the work. A seasonal agricultural worker will likely have to find other (often also seasonal) work in the off-season. For such workers, the portability of various benefits offers increased security and recognition of service to multiple employers. It extends the benefits and protections commonly enjoyed by SER employees to those outside of the scope of SER forms of employment.
- 5.34 Portability is already recognized in number of sectors with respect to various benefits. Portable redundancy pay, sick leave, income support and trauma schemes currently exist in the Victorian building and construction industry.⁴⁵
- 5.35 The schemes are administered by a company known as 'Incolink', which is a joint enterprise between unions and employer associations in the industry. Workers in this industry, including workers employed by labour hire firms, receive employer contributions based on each week they work onsite. The benefits are portable and are designed to create a safety net for workers between periods of employment.
- 5.36 Schemes such as this provide a model which could be extended by legislation to other sectors of the economy with a high prevalence of seasonal or short-term work, such as the agriculture, forestry and fishing sector.

6. Strategic Enforcement and Improved Access to Justice

- 6.1 We also recommend the below initiatives to improve enforcement of existing employment regulation in order to address barriers, benefit vulnerable workers and improve employment security. The FWO continues to experiment with a variety of new and novel approaches in a bid to strengthen its compliance and enforcement strategies.

Targeted Enforcement

- 6.2 First, the FWO has recognised that complaints regarding contraventions affecting certain vulnerable groups are particularly difficult to detect and new strategies are needed. In particular, there has been an increased focus on

⁴⁵*Incolink: a joint enterprise of employer associations and unions in the building and construction industry,* <<http://www.incolink.org.au/AboutIncolink.aspx>>.

ensuring that targeted campaigns are 'strategic' so as to capture those contraventions that are generally hidden or obscured.

- 6.3 This includes more detailed analysis of complaints data and other ABS statistics in order to identify those industries or regions which may not exhibit a high number of complaints, but are in need of closer attention. It has also started to engage in more detailed evaluation of its campaigns so as to constantly review and improve its systems.
- 6.4 We endorse this greater emphasis on targeted enforcement.

Regulatory Enrolment

- 6.5 A second way in which the FWO has sought to strengthen its compliance and enforcement functions and enhance its strategic enforcement initiatives is through an increased focus on stakeholder engagement or 'regulatory enrolment'.
- 6.6 For the past year in particular, the federal labour inspectorate has actively sought to build strong and sustainable relationships with employer groups, unions and other stakeholders. It has also begun to appreciate the importance of engaging top-level companies and critical individuals within firms with the power to positively shape compliance behaviour beyond the individual workplace.
- 6.7 One of the most striking examples of regulatory enrolment is the participation of unions, employer groups and community organisations in targeted campaigns. In particular, the relevant 'industry partners' have not only helped identify employers of concern, but are often a rich source of information about how the industry operates and how the FWO should approach the compliance and enforcement problem for maximum effect.
- 6.8 For instance, the recent National Cleaning Services Campaign was initiated not only because of the number of susceptible workers in the sector, but also because of concerted and persistent pressure from employer associations and unions. United Voices suggested that education efforts should be geared towards international students who make up a significant proportion of the cleaning workforce.
- 6.9 Armed with this knowledge, the FWO actively sought to address the exploitation of international students by translating information about workplace rights and disseminating it through 22 university cafes. It also

sought to enrol the assistance of university student associations, private colleges and English schools through an associated email campaign.⁴⁶ A feature which was particularly useful given the low levels of unionisation amongst international students generally.

- 6.10 Indeed, one of the core compliance and enforcement challenges is to address the fact that vulnerable workers are often concentrated in industries with weak unionisation levels. In order to reach the darkest regulatory corners, it would be beneficial to secure and expand not only the relationships between the FWO and unions, but other labour market intermediaries, such as migrant/ethnic support groups, pro bono legal services and other community organisations.
- 6.11 These relationships can be strengthened in a variety of ways from formalisation of the relationship, by expanding information-sharing arrangements, by designating staff within the FWO and stakeholders to act as liaison points or by providing additional resources, including technical, financial or media assistance.⁴⁷
- 6.12 That said, collaboration is not something that can be done alone. Unions, employer associations, community organisations and other regulatory agencies must be willing to cooperate in the first place. While these intermediaries and agencies have a distinct mandate and agenda, it is arguable that they all have an interest in ensuring that unscrupulous work practices are identified and curtailed.
- 6.13 In light of this, it is disappointing that some unions, and government agencies, remain unwilling to cooperate or participate in any joint efforts to crack down on insecure work for various reasons.
- 6.14 Another innovative way that the FWO has sought to enhance its detection functions and strengthen its sanctioning ability is by enrolling powerful corporate entities and well-known franchises, such as McDonalds, in systematic pay packet audits. For instance, the 'proactive compliance deed' struck between the FWO and McDonalds requires the company to conduct a self-audit to confirm, among other matters, that employee payments are in order.
- 6.15 In essence, the enrolment of the head franchisor under the auspices of the compliance deed has permitted significant monitoring costs to be shifted to a

⁴⁶ Fair Work Ombudsman, Annual Report 2010–11, 28.

⁴⁷ A review of community-based employment advice services made a number of specific recommendations in this respect. See Anne Booth, *Report of a Review of Community-Based Employment Advice Services* (2009) Fair Work Ombudsman, <<http://www.fairwork.gov.au/DisclosureLog/Report-of-a-Review-of-Community-Based-Employment-Advice-Services.pdf>> at 5 January 2012.

company which is not only well-resourced, but also in a powerful position of influence in terms of triggering motivations to comply.

- 6.16 Enrolling principal franchisors and supply chain heads in this way is therefore critical to ensuring compliance throughout the broader business network. The success of these initiatives has no doubt been supported by the FWO's strategic use of media to better engage with other sources of influence, including consumers and prospective employees.⁴⁸
- 6.17 In this respect, we also applaud the efforts of unions, such as United Voice, in introducing various initiatives, such as the First Star rating system which enlists consumers in encouraging compliance amongst hotel chains.⁴⁹ We believe similar consumer-based initiatives could be used to great effect in other problem industries, such as security, hospitality and horticulture, which are often dominated by brand-name companies.

Litigation Initiatives

- 6.18 In addition, litigation and sanctions have been used more creatively by the FWO in recent years. In particular, the FWO has increasingly relied on the accessory liability provisions in the FW Act, which allow for enforcement proceedings to be brought against a person 'involved' in a contravention in order to target directors, as well as 'gatekeepers'⁵⁰ within the firm, such as senior managers, lawyers, consultants and human resources professionals.⁵¹
- 6.19 This approach is important insofar that aligning the personal or professional concerns of key individuals with those of the regulator can have the effect of positively influencing the internal practices of the firm.
- 6.20 That said, it appears that the full reach of these provisions has not yet been explored in relation to supply chain regulation. For example, on the face of the relevant provisions, it seems arguable that firms which engage in sham or bogus contracting practices or procure labour at a price below the relevant minimum standards may be said to be a person who has 'has aided, abetted, counselled or procured the contravention' or 'has been in any way, by act or

⁴⁸ In the 2010–11 financial year, the FWO issued 341 media releases, which resulted in 1290 print articles, more than 65 hours of radio, and over 20 hours of television coverage. See FWO Annual Report 2010–11, above n 84, vi.

⁴⁹ See Workplace Express, 'Union rates hotels' treatment of employees', 13 October 2011.

⁵⁰ Robert Kraakman, 'Gatekeepers: The anatomy of third party enforcement strategy' (1986) 2(1) *Journal of Law, Economics and Organisation* 53.

⁵¹ FW Act, s 550. Earlier this year, the FWO successfully prosecuted a HR manager who received a personal fine of approximately \$4000 for his involvement in sham contracting practices: *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Others* [2011] FMCA 459.

omission, directly or indirectly, knowingly concerned in or party to the contravention.’⁵²

- 6.21 We also note with encouragement the way in which the FWO has sought to test the waters in respect of ‘joint employment’ by running this argument in a recent case.⁵³
- 6.22 While litigation is a critical element of any regulatory regime, it remains an expensive and time-consuming process. The FWO has recently acknowledged that litigation matters have now stabilised at around 50 to 60 matters per year and, with the current resources available, the agency is operating at maximum capacity in this respect.
- 6.23 Even if one includes those enforceable undertakings that have been agreed under the Fair Work regime, it ultimately means that only a tiny proportion of matters ultimately result in any sanction being imposed. It is arguable that deterrence is therefore limited.
- 6.24 One way in which the FWO has sought to address this litigation deficit is by encouraging claimants to commence a small claims action – either with the direct or indirect support of the FWO. While this new approach is showing signs of promise, it is somewhat concerning that vulnerable workers, particularly those who speak English as a second language or are unfamiliar with the Australian legal system, will face a difficult decision of whether to try to wade through the process alone or engage a lawyer at their own expense where there is little prospect of recovering costs.
- 6.25 To improve this situation, we suggest that the no costs rule – which generally applies in respect of matters brought under the FW Act⁵⁴ – should be reversed in relation to matters involving underpayment or other contraventions of minimum employment standards. This would allow successful applicants to seek recovery of their legal costs from employers in breach of the FW Act. This would encourage greater private enforcement and ease the compliance burden of public agencies, unions and community groups.

⁵² FW Act, s 550(a), (c).

⁵³ We note that a number of scholars in the United States have put forward various policy proposals to address some of the more entrenched compliance and enforcement problems. See, eg, Timothy Glynn, ‘Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation’ (2011) 15 *Employee Rights and Employment Policy Journal* 101; Brishen Rogers, ‘Toward Third Party Liability for Wage Theft’ (2010) 31(1) *Berkeley Journal of Employment and Labour Law* 1; David Weil, ‘Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters’ (2007) 28 *Comparative Labour Law and Policy Journal* 125; Katherine Stone ‘Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers’ (2006) 27 *Berkeley Journal of Employment and Labour Law* 251.

⁵⁴ FW Act, s 570.

7. The Regulatory Challenge of Supply Chains: Extending Model Codes of Conduct and Legislative Protections for Outworkers to Other Industries

- 7.1 In Part 2 of this submission, we observed that self-employed contractors, casual and fixed term employees are excluded from various employment law protections. One of the many causes of the growth of these forms of precarious employment is the ‘outsourcing’ of work previously performed by in-house employees to external firms, such as contractors and sub-contractors in a supply chain.⁵⁵ This and other forms of ‘fragmenting’ or ‘fissuring’ of business and work arrangements have been associated with high proportions of vulnerable work.⁵⁶
- 7.2 Regulation to address insecure and vulnerable work must take account of industry and work structures and organisation if they are to be effective.
- 7.3 Supply chains typically have more than three levels and allow each contractor or sub-contractor to provide goods or services at a profit to the client firm higher up in the chain.⁵⁷ The firm at the top of the chain, known as the ‘lead client’ or ‘principal contractor’, provides the goods or services to the consumer.⁵⁸
- 7.4 The workers producing the goods and services are therefore not employed by the lead client firm but rather by (less visible) contractors, sub-contractors or labour hire firms further down the chain. These firms are often operating in very competitive markets that create incentives for the use of insecure forms of work or worse, non-compliance with minimum employment standards.⁵⁹
- 7.5 In certain industries, such as the textile and footwear (‘TCF’) industry, workers are also frequently employed on an ‘outworker’ basis, meaning that they work from residential premises rather than in a traditional commercial work site.⁶⁰ Such workers may be characterized as independent contractors, despite the

⁵⁵ Michael Rawling and John Howe, ‘The Regulation of Private Sector and Public Sector Supply Chains: An Australian Contribution to Cross-National Learning’ (‘Rawling and Howe’) in H. Arthurs and K. Stone (eds.) *After the Standard Contract of Employment* (Sage Publishing, New York, forthcoming 2012) citing Katherine Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004) 27-50; Michael Rawling, ‘Supply Chain Regulation: Work and Regulation beyond the Employment Relationship’ (PhD Dissertation, University of Sydney, 2010) 280.

⁵⁶ J Fudge, ‘Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation’ (2006) 44 *Osgoode Hall Law Journal* 609-648; Weil 2011, above n 17.

⁵⁷ Rawling and Howe, above note 55, 2.

⁵⁸ Ibid 2.

⁵⁹ Weil 2011, above n 17.

⁶⁰ Rawling and Howe, above n 55, 3.

high degree of control exercised by their principal. Workers may also be characterized as employees. If such is the case, they are frequently engaged on a casual or fixed term basis.

- 7.6 Employment regulation is to some degree out of step with these business and work arrangements. It is important to fashion regulatory responses which are tailored to the way business and work is being structured in order to ensure compliance with labour and employment laws.
- 7.7 For example, while lead clients are not the employers of the workers, they often maintain a high degree of control or potential control over the terms and conditions of workers lower in the chain⁶¹ by virtue of their bargaining power as lead client. Various jurisdictions in Australia have developed innovative policy and legislative measures designed to leverage this power and regulate the conduct of all firms within the chain.
- 7.8 We describe various examples of supply chain regulation and argue that these examples can be better enforced and also extended to more sectors and industries where insecure work is prevalent.

Fair Work Principles

- 7.9 The first example of supply chain regulation is the use of government purchasing power to leverage employment standard compliance by lead contractors and their supply chains. The Australian Government's Fair Work Principles ('FWP') generally apply to firms either providing or seeking to provide property or services with a value in excess of \$80,000 to Commonwealth government departments or agencies, excluding construction work.⁶²
- 7.10 The *FWP* regulate supply chain firm conduct pertaining to employment standards compliance at three levels: 'qualification or eligibility to tender for a government contract; the tender assessment process; and the contractual requirements imposed on the successful tenderer.'⁶³
- 7.11 In order to be eligible to obtain a government contract, the applicant firm must demonstrate that it has complied with all 'materially relevant laws' within the past two years, including industrial laws, occupational health and safety and

⁶¹ Ibid, 2.

⁶² John Howe, 'Government as Industrial Relations Model: The Promotion of Collective Bargaining and Workplace Cooperation by Non-Legislative Mechanisms' in WB Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, New York, forthcoming in 2012 ('Howe')).

⁶³ Ibid.

workers' compensation legislation.⁶⁴ Where the applicant firm has not complied with these materially relevant laws, it must disclose the nature of any tribunal or court order made against it in the previous two years and demonstrate that it has complied with such orders.⁶⁵

- 7.12 Failure to satisfy these requirements will result in the termination of the firm's application. If the applicant satisfies these criteria and is successful in its bid, any contract concluded with the relevant Commonwealth entity imposes ongoing obligations to comply with materially relevant laws and to ensure that the firm's subcontractors also comply with such laws 'as far as practicable'.⁶⁶
- 7.13 Breach of such contractual provisions may result in cancellation of the contract and publication of the employer's name and the nature of the breach.⁶⁷ In addition to the general requirements, cleaning service providers and TCF industry firms employing homeworkers must meet additional criteria.⁶⁸
- 7.14 Although there is great potential for the *FWP* to promote compliance by a large number of Australian businesses and their subcontractors, it is unclear to what extent the Government is ensuring that the *FWP* are properly enforced.
- 7.15 All Commonwealth entities conducting procurement to which the *FWP* apply are required to implement and comply with the *FWP* and monitor compliance with the *FWP* by their suppliers. In addition, the Government established two new entities under the *FWP*, the Procurement Coordinator ('PC') and the Procurement Consultation Committee ('PCC'). The Department of Education, Employment and Workplace Relations ('DEEWR') has overall responsibility for the *FWP*, while the Department of Finance and Deregulation has overall responsibility for procurement, and provides administrative support to the PC and the PCC.
- 7.16 It is unclear what resources are being devoted to monitoring and enforcement of the *FWP* in both the assessment and award of tenders, and the observance of relevant contractual conditions. Tenderers are expected to volunteer information as part of the tender process, verifying the information they have provided by signing a statutory declaration.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid citing Department of Education, Employment and Workplace Relations, '*Fair Work Principles User Guide*' (January 2010) cl 2.3.

<<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkPrinciples/Pages/FWPUserGuide.aspx>>.

⁶⁷ *FWP* cl 6.2.

⁶⁸ Rawling and Howe, above n 55, 9.

- 7.17 It is also unclear whether the tenderers have to provide any evidence of their compliance with relevant laws, or evidence of their cooperative and productive workplace relations practices and respect for freedom of association and right to representation, beyond these undertakings.
- 7.18 Other procurement schemes which seek to link the award of government contracts with labour standards and practices have a mechanism for independent verification of employment conditions. For example, the Victorian Government Schools Cleaning Program requires contractors to submit documentary evidence such as employee pay slips to approved accountants for verification.⁶⁹
- 7.19 Similarly, the Construction Code and Guidelines have required submission of extensive workplace relations documentation for assessment of Code compliance by DEEWR.
- 7.20 We therefore suggest that the federal government could play a greater role in promoting decent work through its own supply chain by reviewing compliance with the *FWP*, and if necessary, ensuring proper enforcement of its requirements. In particular, the FWO could be empowered to monitor and enforce compliance with the *FWP*.

Extension of *FWP* to other sectors

- 7.21 While the *FWP* apply generally only to the public sector procurement and its successful operation requires the administrative support of employees of a government department, the model may be extended to other sectors as well. One recent example of the potential of the *FWP* to apply outside of government procurement is the Pacific Island Seasonal Worker Pilot Scheme ('Pilot Scheme').
- 7.22 Under this temporary migrant labour scheme, workers are hired by approved Australian employers and placed with growers in the horticultural industry to perform seasonal harvesting work for a minimum of four, five or six months per calendar year.⁷⁰ Approved employers (often labour hire companies) must demonstrate compliance with the *FWP* both in their application to participate in the program and as part of an ongoing obligation.⁷¹ The Pilot Scheme will become a permanent program as of 1 July 2012. The rebranded Seasonal

⁶⁹ Howe, J. and Landau, I., 'Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design' (2009) 54(4) *Journal of Industrial Relations* 575-589, 580.

⁷⁰ See Department of Education, Employment and Workplace Relations, 'About Pacific Seasonal Workers' <<http://www.deewr.gov.au/Employment/Programs/PSWPS/Pages/AboutPSW.aspx>>.

⁷¹ See Department of Education, Employment and Workplace Relations, 'Request for Expression of Interest Form' cl 4.9 <<http://www.deewr.gov.au/Employment/Programs/PSWPS/Documents/EOISeptember2011.pdf>>.

Worker Program will continue its focus on the horticultural sector, but will also include a three year trial program in the cane growing, aquaculture and tourist accommodation industries.⁷²

- 7.23 The extension of the *FWP* to the Pilot Scheme demonstrates the potential of applying the *FWP* or similar model codes of conduct beyond the realm of government procurement. We submit that the Seasonal Worker Program ought to continue with this practice due to the vulnerability of the workers participating in the program. We further submit that this model could be applied to other temporary visa programs that require sponsoring employers to be approved by the government, such as the 457 visa scheme.

Licensing of Labour Hire Companies – the Gangmasters Licensing Authority Model

- 7.24 The approval process of applicant labour hire employers under the Pilot Scheme is similar to the process adopted by Gangmaster’s Licensing Authority (‘GLA’) in the United Kingdom. We noted earlier that one area of concentration of non-SER working arrangements and insecure work is in the labour hire industry. The GLA model of a licensing scheme for labour hire agencies is one which could be adopted in the Australian context to address exploitation of workers in this industry.
- 7.25 The GLA was created as a result of several extreme cases of temporary migrant worker exploitation by labour hire agencies operating in various sectors.⁷³ Since 2006, labour providers (known as ‘gangmasters’) operating in the agricultural, horticultural, dairy farming, forestry, shellfish gathering, food processing and packaging industries are required to obtain a license from the GLA.⁷⁴
- 7.26 Gangmasters must demonstrate compliance with workplace laws⁷⁵ in order both to receive and maintain their licenses.⁷⁶ The GLA keeps a public register of all gangmasters, which provides useful information for trade unions seeking to locate a gangmaster or determine whether a particular gangmaster is operating lawfully.⁷⁷ All workers engaged by gangmasters are covered by the scheme,

⁷² Department of Education, Employment and Workplace Relations, ‘*Pacific Seasonal Worker Pilot Scheme*’ (18 December 2011) <<http://www.deewr.gov.au/Employment/Programs/PSWPS/Pages/default.aspx>>.

⁷³ Trades Union Congress (TUC), ‘*Enforcing basic workplace rights: a guide for unions and their members to the statutory enforcement agencies*’ (2011), 51; See also M Wynn, ‘Regulating rogues? Employment agency enforcement and sections 15-18 of the Employment Act 2008’ (2009) 38(1) *Industrial Law Journal* 64;

⁷⁴ TUC, *ibid*, 51-52.

⁷⁵ *Ibid* 52.

⁷⁶ *Ibid* 53.

⁷⁷ *Ibid* 53.

regardless of whether they are considered employees or independent contractors.⁷⁸

- 7.27 Regarding the content of the licensing requirements, gangmasters must demonstrate that they provide adequate accommodation to workers and comply with employment, tax and national insurance requirements.⁷⁹ Gangmasters are required to maintain status as a 'fit and proper' provider, which takes into account whether the gangmaster has tried to obstruct the GLA in the exercise of its functions, any relevant criminal convictions against the gangmaster and any connection with any person or entity deemed to not be fit and proper in the previous two years.
- 7.28 Gangmasters must also demonstrate proper workplace management documents and processes are in place, including: worker contracts, itemised pay slips that list deductions, tenancy agreements with worker notice periods not in excess of 10 days, an example of a worker's file, compliance with gas and electricity safety standards and an understanding of occupational health and safety laws.
- 7.29 Gangmasters must pay the minimum wage or agricultural minimum wage and keep adequate records to demonstrate payment of such wages.⁸⁰ There are a number of additional specific requirements in relation to minimum employment rights and entitlements.⁸¹
- 7.30 The example of the GLA is important because it demonstrates that a licensing scheme can be effectively operated with respect to specific sectors (such as agriculture), groups of workers (such as temporary migrants) and particular business configurations (such as labour hire companies) where a high degree of demonstrable vulnerability exists.
- 7.31 It demonstrates also that such a scheme is possible on a large scale. In June 2009, there were 1230 gangmasters and over 180,000 workers registered by the GLA.⁸² At that time, the GLA had an operating budget of a modest GBP 3.4 million.⁸³ It is estimated that in addition to raising workplace standards, an additional GBP 2 million of annual tax revenue has been recouped from gangmasters and that the operating profits of labour providers in the sector has

⁷⁸ Ibid, 53-54.

⁷⁹ Ibid 55.

⁸⁰ Ibid 56-57.

⁸¹ Ibid 58-64.

⁸² Oxfam Briefing Paper, *'Turning the Tide: How to best protect workers employed by gangmasters, five years after Morecambe Bay'* (31 July 2009) 9.

⁸³ Ibid.

declined by less than 1% as a result of the modest licensing fees and other additional costs required of labour providers in the sector.⁸⁴

- 7.32 Initially, over 70% of gangmasters applying for a license were reported to have raised standards in one way or another.⁸⁵ Various worker support agencies have noted a significant reduction in reported cases in exploitation.⁸⁶ While noting various limitations to the GLA's effectiveness, Oxfam has advocated for the extension of this largely successful model to labour hire companies in other sectors with a prevalence of vulnerable workers, including construction, hospitality and social care.⁸⁷
- 7.33 We submit that the GLA model demonstrates the feasibility of an expansion of licensing, approval and monitoring schemes, such as currently exists under the Pilot Scheme.

Extending TCF Supply Chain Regulation

- 7.34 Another example of targeted sector specific regulation is the legislation adopted in New South Wales ('NSW'), Victoria, South Australia ('SA') and Queensland ('QLD') to protect outworkers in private sector supply chains operating in the TCF industry. The Commonwealth government has also recently introduced legislation into Parliament (the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (Cth) ('the Bill')) to extend most of the protections offered to employees under the *Fair Work Act, 2009* (Cth) to outworkers in the TCF industry, regardless of whether they are employees or independent contractors.
- 7.35 The state-based protections take four forms:
- a) First, in NSW and SA, the definition of 'industrial matter' is extended specifically to cover outworkers, thus permitting legislative regulation of outworkers under the applicable industrial statute.⁸⁸
 - b) Second, outworkers are deemed to be entitled to the terms and conditions of employees in the same industry, even where the employment relationship between the outworker and his or her principal would not be recognized at common law as a contract of employment.⁸⁹ The effect of these provisions is to that '[u]sually the

⁸⁴ Ibid 9-10.

⁸⁵ Ibid 11.

⁸⁶ Ibid.

⁸⁷ Ibid 1.

⁸⁸ Rawling and Howe, above n 55, 4 citing *Fair Work Act* (SA) s 4(1)(ka) ('FW Act (SA)').

⁸⁹ *FW Act (SA)* s 4(1), definition of 'contract of employment'.

person who is deemed to be the employer of the outworker is the person who engages the outworker or the person for whom the outworker performs work'.⁹⁰

- c) Third, outworkers have a statutory right to recover entitlements (including award entitlements) from principal contractors, despite the potential absence of a direct employment relationship.⁹¹ It is important to note that this liability extends beyond the deemed employer of the outworker under the statute to, for example, responsible contractors who are not necessarily the direct employer of the outworker.⁹²
- d) Fourth, as the lead client firm exercises or could exercise significant control over the terms and conditions of employment for firms lower down the supply chain, the statutes in NSW, SA and Queensland import mandatory terms into all contracts between retailers and suppliers to employ outworkers on terms and conditions no less favourable than those provided under the relevant award.⁹³ In SA and NSW, a retailer cannot enter into a contract with a supplier who does not provide such an undertaking.⁹⁴

7.36 Retailers are also obligated to inform the supplier that a breach of this provision by the supplier or one of its contractors would permit the retailer to terminate the contract.⁹⁵ While the retailer is not obliged to terminate the contract on such grounds, it must report the breach to the relevant government regulator and trade union.⁹⁶

7.37 Retailers must also keep records and obtain information with respect all firms in the chain, including the goods supplied and price of such goods. It must provide this information to the relevant government regulator and trade union every six months or upon request.⁹⁷

⁹⁰ Rawling and Howe, above n 55, 4 citing *Outworkers (Improved Protection) Act 2003* (Vic) s 4; *FW Act* (SA) s 5(1)(b); *Industrial Relations Act 1999* (Qld) s. 6(2)(f);

⁹¹ Rawling and Howe, above n 55, 4 citing *FW Act* (SA) s. 99D(1).

⁹² Rawling and Howe, above n 55, 5 citing *FW Act* (SA) s. 99E, 99F.

⁹³ *Ethical Clothing Extended Responsibility Scheme* (NSW) cl 10(2)(a) ('Mandatory Code (NSW)'); *South Australian Clothing Outworker Code of Practice* (SA) cl 10(2)(a) ('Mandatory Code (SA)'); *Mandatory Code of Practice for Outworkers in the Clothing Industry (Qld)* cl 10(1)(b) ('Mandatory Code (Qld)').

⁹⁴ *Mandatory Code* (NSW) cl 10(3) ; *Mandatory Code* (SA) cl 10(3).

⁹⁵ *Mandatory Code* (NSW) cl 10(2)(b); *Mandatory Code* (SA) cl 10(2)(b); *Mandatory Code* (Qld) cl 10(1)(b)(c).

⁹⁶ *Mandatory Code* (NSW, cl 11; *Mandatory Code* (SA) cl 11; *Mandatory Code* (Qld) cl 13.

⁹⁷ *Mandatory Code* (NSW) cls 5, 12, 17, 20; *Mandatory Code* (SA) cls. 5, 12, 17, 20; *Mandatory Code* (Qld) cls 6, 14, 22, 23, Forms 2, 3, 4, 8.

- 7.38 These codes of conduct are therefore mandatory for TCF retailers, unless the firm has also signed or operates in compliance with the Homeworkers Code of Practice which contains similar provisions. They may also be enforced under the applicable industrial legislation. This model code therefore provides powerful incentives for lead clients to employ their bargaining power so as to ensure compliance with workplace laws.
- 7.39 There has been significant debate regarding the challenge of extending codes of conduct and the above legislative protections beyond industries where lead clients with significant market share⁹⁸ sell goods to consumers.⁹⁹
- 7.40 However, we believe there is significant scope for the extension of this model to other industries, including industries for the provision of services rather than goods. For example, the *FW Act (SA)* legislative right of recovery applies where 'a provision of an award or enterprise agreement relates to outworkers'.¹⁰⁰ Therefore, rights of recovery could be extended by including outworker provisions in enterprise agreements or varying awards accordingly.¹⁰¹
- 7.41 The protections could also be extended to outworkers beyond the TCF industry by way of amendment to statutory regulations, which could extend the application of the deeming provisions to any person covered by the legislative definition of 'outworker'.¹⁰² One example of the extension of similar protections outside of the TCF industry is found in the *OHS Amendment (Long Haul Truck Driver Fatigue) Regulation 2005* (NSW), whereby 'consignees' requiring delivery of goods (such as retail supermarkets) must not enter into contracts 'with operators who have not assessed, controlled or eliminated the risk of fatigue of long-haul drivers.'¹⁰³
- 7.42 The extension of supply chain regulation to the transport industry – a service industry removed from the production of consumer products suggests that a far broader range of supply chains might be appropriate for the application of this new regulatory strategy: those operating in private industry sectors other than TCF; and those in sectors where suppliers deliver not only goods but services.

⁹⁸ Rawling and Howe, above n 55, 7 citing, eg, Shelley Marshall, 'An Exploration of Control in the Context of Vertical Disintegration' in Chris Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 544-45.

⁹⁹ Rawling and Howe, above n 55, 7.

¹⁰⁰ Rawling and Howe, above n 55, 6 citing *FW Act (SA)* s 5(4)(a).

¹⁰¹ Michael Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' in *Labour Law and Labour Market Regulation* (Federation Press, 2006) 536.

¹⁰² Ibid 536.

¹⁰³ Phil James et al., 'Regulating Supply Chains to Improve Health and Safety' (2007) 36(2) *Industrial Law Journal* 163-187; Sarah Kaine and Michael Rawling, 'Comprehensive Campaigning in the NSW Transport Industry: Bridging the Divide between Regulation and Union Organizing' (2010) 52(2) *Journal of Industrial Relations* 183-200.

Industries in which a small number of branded companies have a significant concentration of market power, such as cleaning, security and accommodation, would be particularly suitable to the extension of supply chain regulation.

8. Conclusion

We thank the Independent Inquiry for the opportunity to provide this submission. We would be pleased to elaborate upon our comments in person if requested.