

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

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Fair Work
OMBUDSMAN

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1. Executive summary

In June 2014 the Fair Work Ombudsman (**FWO**) commenced an Inquiry into allegations that significant underpayment of wages and falsification of employment records were occurring across much of the franchisee network of Australia's leading convenience retailer, 7-Eleven Australia Pty Ltd (**7-Eleven**) [ACN 005 299 427].

The Inquiry sought to test these allegations through coordinated site inspections, and subsequent record keeping analysis, of a sample of 20 7-Eleven stores. The Inquiry also undertook a number of in-depth investigations of 7-Eleven stores that were the subject of requests for assistance from employees.

These investigations disclosed concerning levels of non-compliance with the *Fair Work Act 2009* (**FW Act**) and *Fair Work Regulations 2009* (**FW Regulations**), including instances of deliberate manipulation of records to disguise underpayment of wages.

To identify and address the drivers of non-compliance, the Inquiry examined the actions and considered the motivations of workplace participants. It sought to better understand the respective roles of 7-Eleven, its franchisees and their employees in the network's operating model and culture. In particular, the Inquiry sought to determine if 7-Eleven had a role in the alleged falsification of employment records and underpayment of wages by franchisees.

The Inquiry found 7-Eleven's approach to workplace matters, while ostensibly promoting compliance, did not adequately detect or address deliberate non-compliance and as a consequence compounded it. In particular, instances where franchisees created false and misleading records to satisfy 7-Eleven's auditing and payroll regime while continuing to underpay employees.

Investigations of stores included in the 20 store sample and of stores investigated as part of the wider Inquiry have led to a range of enforcement actions, including:

- seven matters filed before the Federal Circuit Court
- one Enforceable Undertaking made
- 20 Letters of Caution issued
- 14 Infringement Notices issued
- three Compliance Notices issued
- over \$293 500 recovered for workers.

This report examines the operating environment in which problems surfaced and considers what influence the 7-Eleven model had on franchisees and their behaviour. It discusses the drivers of non-compliance and details recent changes made by the 7-Eleven network to ensure future compliance following public scrutiny. It ends with a number of recommendations designed to:

- promote a sustainable culture of compliance across the 7-Eleven network
- enhance the FWO's effectiveness to bring to account entities and persons responsible for exploiting vulnerable workers on temporary working visas.

2. 7-Eleven background: a market leader in convenience retailing

7-Eleven is the largest petrol and convenience retailer in Australia, based on market share, and has won a number of franchising awards.¹ It operates under licence from the US-based business 7-Eleven Inc., developing and franchising 7-Eleven stores in Australia. 7-Eleven Inc., originally founded in 1927, is the world's largest operator, franchisor and licensor of convenience stores.²

The first 7-Eleven store in Australia was opened in suburban Melbourne in 1977. By 1978 more sites were opening, including the first franchised store, the first fuel site and the first 24-hour site. Franchising, fuel and 24-hour operations have all become key elements of the 7-Eleven operating model. The franchise grew to 300 stores by 2003, and in October 2010 it acquired Mobil Oil Australia Pty Ltd's (**Mobil**) retail fuel business, growing its network to over 600 stores.³ In 2014, its relationship with Mobil expanded when a partnership was formed under which all 7-Eleven fuel stores sell Mobil-branded fuel.

As at 31 December 2015, 7-Eleven had 626 stores throughout Victoria, New South Wales, Queensland and, since late 2014, Western Australia. Approximately 70% of these stores sell fuel in addition to the traditional convenience merchandise offering. There are approximately 442 franchise operators in the network, including a number of multi-franchise owners. 7-Eleven stores primarily operate as franchises, with a small varying number of stores operated by 7-Eleven.⁴

According to its website, the 7-Eleven network conducts more than 185 million transactions a year, serving an average of six customers per second and generating sales of approximately \$3.6 billion.⁵ Worldwide, 7-Eleven operates more than 50 000 stores in 18 countries, and on average is opening seven stores per day somewhere in the world.⁶

¹ <http://franchise.7eleven.com.au/why-7-eleven.html> accessed 9 February 2016

² <http://franchise.7eleven.com.au/why-7-eleven.html> accessed 9 February 2016

³ IBISWorld Company Report - 7-Eleven Stores Pty Ltd Premium Report 30 June 2015, p.3

⁴ IBISWorld Company Report - 7-Eleven Stores Pty Ltd Premium Report 30 June 2015, p.4

⁵ <http://franchise.7eleven.com.au/why-7-eleven.html> accessed 9 February 2016

⁶ <http://franchise.7eleven.com.au/why-7-eleven.html> accessed 9 February 2016

The franchise has won multiple awards, including the Franchise Council of Australia's 2012 Franchise of the Year.⁷

The franchise is currently known for several key product offerings, including 'Slurpees', \$1 coffees and Krispy Kreme donuts. These products are high volume products for the stores and are a key part of the branding and identity of the franchise.

3. FWO history with 7-Eleven: a culture of non-compliance

Concerns with the compliance posture of some 7-Eleven stores date back to 2008.

A timeline of our historical interactions with the 7-Eleven network is at **Appendix A**.

From 2008 onwards, we have received regular reports from employees alleging significant underpayment of wages. Of particular concern has been increasing evidence of underpayments linked to inaccurate records. In particular, employers reducing the number of hours recorded as worked by employees to show them being paid higher rates of pay than was actually paid.

3.1 The Workplace Ombudsman's audit - 2008

In 2008 our predecessor agency, the Workplace Ombudsman (**WO**), received allegations from Unite (an unregistered organisation representing workers in the fast food and retail sector) that 7-Eleven stores were involved in a 'double hours scam'. This purported scam involved 7-Eleven stores recording and paying for half the hours actually worked by staff. The effect being that workers received half the amount they should have been paid under award rates.

In 2008 and 2009, the WO (and then the FWO) audited dozens of convenience stores in Melbourne and Sydney.

The outcome of the audit in Melbourne saw a total of \$112 000 in wages recovered for 88 employees at five of the stores.⁸ A sixth store was instructed to credit almost 1000 hours of annual leave back to 12 permanent staff who weren't accruing the entitlement.

⁷ "Reasons to become a franchisee", 7 Eleven Pty Ltd, accessed 9 February 2016
<http://franchise.7eleven.com.au/why-7-eleven.html>

In the Sydney convenience store audit, more than \$50 000 in wages was recovered for 80 workers at 15 stores.⁹

The major issue identified in the audits was underpayment of penalty rates for weekends and night shiftwork. While the evidence did not suggest the double hours scheme was widespread, the WO noted with concern that many underpaid workers were young international students and particularly vulnerable to exploitation.

3.2 Education and audit campaign – 2009-2010

Between September 2009 and February 2010, we conducted an education and audit campaign of 56 franchisees of 7-Eleven convenience stores in metropolitan Melbourne and Geelong.

The campaign arose from allegations that young employees in the sector were being exploited and a request from 7-Eleven for advice and assistance to develop compliance systems for franchisees.

We wrote to all audited businesses about the education and compliance phases of the campaign and provided a self-audit checklist and educational information.

Of the 56 audits undertaken:

- 39 (70%) of businesses appeared to be compliant
- 17 (30%) of businesses audited were found to have contravened the FW Act.

These stores had a total of 24 types of contraventions. These were:

- seven instances of underpayment of wages (29%)
- 10 instances of weekend penalty rates not paid correctly (41%)
- three instances of public holiday penalty rates not paid correctly (13%)

⁸ “Watchdog’s random audits recoup \$112,000 for city convenience store workers”, Fair Work Ombudsman, accessed at <https://www.fairwork.gov.au/about-us/news-and-media-releases/2009-media-releases/july-2009/20090725>

⁹ “City convenience stores back-pay workers \$50,000 after watchdog investigation”, Fair Work Ombudsman, accessed at <https://www.fairwork.gov.au/about-us/news-and-media-releases/2009-media-releases/july-2009/20090708>

- one instance of overtime rates not paid correctly (4%)
- three instances of pay slips not containing required details (13%).

A total of \$32 378 was recovered for 62 affected employees.

The audit methodology involved sourcing business records for data assessment. This allowed us to review a large sample of businesses in a timely manner. It would not have identified underpayments if false records were provided, particularly if records were carefully manufactured to ensure consistency between time records (rosters and time sheets) and wage records. Without recourse to independent verification, and in light of this Inquiry's findings, we have since noted that levels of non-compliance may have been understated in our 2009-2010 campaigns.

3.3 Litigation against Bosen Pty Ltd – 2010

In January 2010, we commenced legal proceedings against Bosen Pty Ltd (**Bosen**) and the former operators of two 7-Eleven stores, Hao Chen and Xue Jing.¹⁰

In this matter, Fair Work Inspectors investigated requests for assistance from six employees who were international students working at the Geelong and South Yarra 7-Eleven stores. They were engaged on a flat rate of pay and underpaid the base hourly rates of pay and various penalty rates as defined in the applicable retail industry awards.

Our investigation found the business recorded half the hours worked by employees, to make it appear they were paid double the actual flat rate received. For example, pay records for an employee working 40 hours per week at \$12 per hour, would be recorded as 20 hours at \$24 per hour. This has subsequently been referred to in the media as the 'half pay scam'.¹¹

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.

¹⁰ "Convenience store operators fined \$150 000 for underpaying international students ", Fair Work Ombudsman, accessed at <https://www.fairwork.gov.au/about-us/news-and-media-releases/2011-media-releases/april-2011/20110427-bosen>

¹¹ "How 7 Eleven is ripping off its workers", ABC, accessed 8 March 2016 <http://www.abc.net.au/news/2015-08-29/7-eleven-half-pay-scam-exposed/6734174>

The Court found Bosen:

- underpaid six former employees' base rate of pay, casual rates of pay, weekend and public holiday rates of pay and annual leave on termination
- failed to keep adequate records of employment for all workers (all records were deliberately discarded)
- failed to keep records in a condition that allowed a workplace inspector to determine employee entitlements and if they had been received.

Both directors were found to have been involved in contraventions, with Mr Chen described as the 'directing mind and will' of the company.

In May and June 2011 they both paid their individual penalty debts in full and we distributed the funds to the employees on a pro-rata basis. The outstanding employee entitlements were never fully rectified, with \$70 068.02 outstanding.

On 29 June 2012 the Federal Court ordered Bosen be wound up insolvent as a consequence of its failure to comply with a Statutory Demand served by the FWO.¹²

In February 2016, it was reported that a former employee of Bosen recovered wages via the Fels Wage Fairness Panel.¹³

3.4 National franchise program – 2012

In February 2012, we invited a range of franchisors to participate in a pilot program aimed at assisting franchisors and franchisees to address compliance in their businesses.

On 15 February 2012, 7-Eleven registered interest in participating in the program, citing the following reasons:

- many 7-Eleven franchisees are first-time business owners
- many franchisees are new or recent migrants to Australia who may be unfamiliar with the intricacies of the Australian industrial relations system

¹² Fair Work Ombudsman v Bosen Pty Ltd, Federal Court of Australia (Proceedings NSD725/2012) Order of Registrar Hedge, 29 June 2012

¹³ "7-Eleven workers who helped expose wage fraud get paid", the Sydney Morning Herald, accessed 8 March 2016 <http://www.smh.com.au/business/workplace-relations/7eleven-workers-who-helped-expose-wage-fraud-get-paid-20160212-gmss46.html>

- as a franchisor, 7-Eleven is 'committed to ensuring that [its] franchisees receive clear guidance on their obligations as employers'.

In March 2013, 7-Eleven was formally invited to participate in the free program. However, after several attempts to obtain 7-Eleven's commitment, a HR representative advised in May 2013 that it wasn't in a position to participate in the program at that time.

3.5 Concerns mount – 2011-2015

Between 1 July 2011 and 30 June 2015, the FWO actioned and resolved 54 requests for assistance from 7-Eleven employees involving workplace disputes about their employment.

Half of these requests were from visa holders and 46% were young workers.¹⁴

Where formal allegations of non-compliance were made, some common themes and practices were identified:

- The 7-Eleven workforce comprised a large number of international students from non-English speaking backgrounds.
- While international student visas allow 40 hours' work per fortnight, many worked in excess of this with wage records falsified to show they were working in accordance with visa requirements.
- Unpaid training periods ranging from one shift to two weeks work were a common feature of the allegations.

The suggestion of an intersection between the visa framework and the workplace relations system, which appeared to be compounding the vulnerability of workers, was particularly concerning to the FWO. International students face cultural and language barriers to understanding and taking action on their workplace rights, and may be particularly vulnerable to exploitation.

In addition to formal, written requests for assistance involving allegations of underpayment during this period, we also received anonymous intelligence relating to 7-Eleven.

¹⁴ This differs from the usual profile of employees who lodge a request for assistance with us. Visa holders make up approximately 5% of Australia's working population and accounted for more than 10% of all complaints in 2014/15. Young workers under 25 years make up approximately 16% of the total workforce and around 26% of complaints received.

We acknowledge the accuracy of allegations received on an anonymous basis can't be independently verified or tested. The anonymous allegations form part of the context in which we identified a need to enquire into allegations of non-compliance within the 7-Eleven network. Some issues referred to in these allegations are discussed elsewhere in this Report.

Information received from concerned parties included:

- In early 2014, a person claiming to be a District Manager alleged 7-Eleven was complicit in falsification of records and coached franchisees in satisfying FWO audits. They further alleged 7-Eleven was motivated to encourage underpayment of wages to ensure profitability of stores and the franchise model more broadly. The correspondence alleged stores with more than one site weren't viable for 24 hours a day, 7 days a week (**24/7**) if paying award wages. In particular, the correspondence alleged: *'overseas student employees at 7-Eleven are happy that they are getting more work so they can meet with their expenses and fees for universities and colleges...'*
- In June 2014, a Melbourne employee wrote on behalf of co-workers to the Commonwealth Minister for Employment and Assistant Minister for Employment to request assistance and advise they were being underpaid, receiving less than \$13 per hour. The writer alleged employees were being asked to sign blank timesheets and their names weren't appearing on register log-ons. They alleged employees had written to '7-Eleven Support' (the 7-Eleven head office support service) several times to voice concerns but nothing had been done. They listed a number of stores where it was alleged these practices were taking place.
- In March 2015, employees on the Sunshine Coast in Queensland wrote to us alleging 'salary issues' across 10 unnamed Queensland stores, including underpayment of the hourly rate and false records showing inflated rates of pay. The anonymous letter:
 - provided an example of the wage calculation method used by stores
 - explained the practices of stores using family members' names on rosters to help disguise low payroll hours
 - alleged the issue had been raised with a 7-Eleven District Manager.

4. Why did we initiate the Inquiry?

Information and intelligence gathered by our agency since its inception identified a need to thoroughly examine the 7-Eleven network's operating model through an Inquiry.

Resolving individual requests for assistance from employees doesn't always address broader non-compliance taking place in a business, supply chain or network. An Inquiry allows us to look more broadly so to identify root causes. Enforcement action, including litigation, is just one part of our Inquiry methodology. The overall approach aims to establish drivers of non-compliance and propose recommendations aimed at sustainable compliance, on the part of the subject of the Inquiry and beyond.

4.1 The basis and rationale for our Inquiry

Under the FW Act, we are able to inquire into any act or practice that may be contrary to the Act, a fair work instrument or a safety net contractual entitlement – see section 682(1)(c) of the FW Act.

The purpose of the Inquiry was therefore to identify if there was a basis for allegations of serious non-compliance within the 7-Eleven store network. If so:

- What were the factors driving non-compliant behaviour?
- Was it being disguised, and if so, how?
- How could it be exposed?
- Who was responsible?

We sought to assess the role and involvement by 7-Eleven head office and whether the franchise operating model itself contributed to unlawful behaviour by some franchisees.

The Inquiry also aimed to discover if workers themselves were participants in non-compliance, even if reluctantly or inadvertently.

It was structured to include a number of key activity components, specifically:

- investigation of requests for assistance from individual employees
- testing of anonymous allegations
- engagement with 7-Eleven
- in-depth forensic auditing of a sample of stores.

4.2 September 2014 – unannounced store visits

Between 7.00 pm and 11.00 pm on 13 September 2014, a team of Fair Work Inspectors made simultaneous, unannounced site visits to 20 7-Eleven convenience stores in Melbourne, Brisbane and Sydney.

Fair Work Inspectors attended these stores on a Saturday evening to test store compliance with weekend and night shift penalty rates. During the site visits, Fair Work Inspectors interviewed staff, took photographs of rosters, timesheets and posters, and collected records. Inspectors also served statutory Notices to Produce records or documents (**Notices to Produce**) on stores requiring them to produce time and pay records and closed circuit television (**CCTV**) footage.

In addition, Fair Work Inspectors used a specifically designed employee survey. This survey sought to test information from employees regarding:

- their pattern of work
- rates of pay
- pay slip information
- detailed information about the shift they were working that day, to be checked later for inconsistencies against records obtained under the Notice to Produce.

Significant underpayments were identified by inspectors in seven of the 20 stores visited. Of these seven, four were found:

- to be paying rates significantly below the base rate
- not to be paying penalty rates for shift, weekend and public holiday work
- to be creating false records that disguised underpayments.

Legal proceedings have been commenced against three stores and an Enforceable Undertaking entered into with the fourth.

The three other stores found to be significantly underpaying workers were paying a base rate that met minimum obligations, but failing to pay penalty rates. Two were operated by the same Director, who had previously been issued with a Letter of Caution. In view of this caution, legal proceedings have been commenced in relation to those two stores. The remaining store was issued with a Letter of Caution after rectifying the amounts identified as outstanding.

In all, we have commenced legal proceedings against five of the 20 7-Eleven stores visited on 13 September 2014.

Of the remaining 13 stores we:

- substantiated various contraventions of the FW Act in nine stores
- were unable to find sufficient evidence to prove wages or record keeping contraventions in four stores, despite unexplained inconsistencies in the records and information obtained.

Where contraventions were substantiated, issues identified included:

- unpaid training
- underpayments resulting from non-payment of penalties and incorrect rates of pay
- record keeping issues, including the making of inaccurate records.

As a result we issued:

- one Enforceable Undertaking
- nine Letters of Caution
- eight Infringement Notices
- one Compliance Notice.

The total amount of monies recovered to date from eight of the 20 stores is more than \$195 800, with a further \$83 600 being pursued through legal action.

Only one store provided records that fully accorded with information gathered on the night including the employee surveys conducted. Consequently, we have not been able to positively conclude that any of the stores visited were fully compliant with their obligations.

The infographic below summarises the outcomes of the unannounced visits.

OUTCOMES OF THE SURPRISE STORE VISITS ON 13 SEPTEMBER 2014



4.3 Testing the validity of the records

After the site visits were conducted, Fair Work Inspectors reviewed and compared the interview records, CCTV footage, pay records and time records obtained. Follow up phone calls were also made to employees interviewed on the site visits. This was done to test information provided. The thorough review and testing of the evidence identified a range of inconsistencies which raised concerns, including:

- Two employees interviewed on the night weren't recorded on the corresponding timesheet provided by the store after the visit.
- Some employees said they were paid rates of pay, and/or penalty rates, which were inconsistent with pay rates recorded on records provided after the visit.
- Employees interviewed on the Saturday night provided the names of employees working before, or after, their shift. In a number of instances, these names didn't appear on records provided by the store post-visit.
- Rosters and time records provided by some stores failed to match CCTV footage.
- 12 out of 20 stores had an insufficient number of employees officially on payroll to cover an enterprise operating 24/7. It was considered that this may reflect work franchisees' were doing themselves. However, in some instances it indicated additional staff were paid 'off the books' or that staff on payroll weren't being paid for all hours worked.
- Rosters and other records photographed on the night were inconsistent with records provided after the visit.

Depending on analysis of the preliminary evidence gathered, we took action in one of the following three ways:

- Where a store appeared to be consistently paying wages at rates significantly below the relevant minimum, we undertook a full investigation of the prior 12 month period.
- Where less significant compliance concerns were indicated, we directed the store to self-audit the prior 12 month period, provide us this audit for review and rectify any underpayments.
- Where preliminary evidence indicated inconsistencies that couldn't be reconciled through further investigation (due to insufficient corroborating evidence), the employer was notified of the inconsistencies identified. Where appropriate, we issued a Letter of Caution, Infringement Notice and/or directed the franchisee to rectify any underpayments identified.

4.4 The challenges in uncovering the truth

Seven of 20 stores were subject to comprehensive investigation. A number of these investigations posed significant challenges to Fair Work Inspectors. There were instances

where parties provided conflicting information, a number changed their accounts and some relied on records they later advised weren't accurate.

Where Inspectors established an employer hadn't been paying correct wages, the next significant challenge was to quantify the monies owed to workers. To pursue an underpayment, particularly through legal proceedings, we need to establish how much should have been paid to employees based on substantiated hours of work. This requires the Inspector to establish precisely what shifts each employee worked and what they were paid.

False, inaccurate, non-existent or withheld records meant substantial forensic work had to be carried out. This was labour intensive, involving careful comparison and analysis of alternative evidence, viewing of CCTV footage and conducting recorded interviews with employees and other witnesses.

4.4.1 Inaccurate records

In most stores where we found significant underpayments, inaccurate records disguised those underpayments or made it difficult to identify what entitlements had been met.

All stores investigated either exclusively or primarily used a specialist payroll provider to process pays, which is a service provided to stores by 7-Eleven. To use the payroll service, stores must set a rate of pay for each employee of at least the base award rate. It's understood this system forms part of 7-Eleven's approach to ensuring stores are compliant with their obligations. If the franchisee elects to pay a rate above the minimum award rate, this can be set within the payroll system.

When processing wage payments, stores manually enter the number of hours to be paid directly into the payroll system via a computer located at the store. They can enter different types of penalty hours (e.g. Saturday, Sunday or shiftwork), but don't enter the rate or see the total amount to be paid for the period.

Due to the system parameters, franchisees can't pay less than the award rate without creating an inaccurate record and must make a decision to manipulate the payroll system.

Production of false or misleading records can constitute a contravention of the FW Regulations and can significantly hamper the ability of employees and the FWO to accurately assess whether entitlements have been met (see 4.7 'Record keeping obligations and penalties'). Indeed, production of inaccurate and/or incomplete records has severely

impeded and protracted our investigations. Where alternative evidence is limited or unavailable we are restricted in our capacity to investigate compliance with the FW Act.

A range of systems for processing pays were identified across the stores investigated. None used the 'half pay scam' found in the Bosen matter in the precise same manner, although several systems shared similarities with this design. More commonly, employers were found to have:

- decided an actual rate of pay – often in the range of \$10 to \$17 per hour
- calculated the amount due for the pay period by multiplying this rate by the actual hours worked, to get the desired gross payment
- reverse-engineered the number of hours to be entered to ensure it paid the desired gross payment – by dividing the desired gross payment by the rate of pay in the payroll system, to get the reduced number of hours to be recorded.

Example of reverse engineering payroll hours

	Reality	Records
Rate of pay	\$15	\$23.15
Hours of work	20 hours	12.96 hours
Gross pay	\$300	\$300.02

Case studies¹⁵ - When things don't add up

We visited Store A on a Saturday night. During the visit an inspector spoke to an employee, 'Alex', who said Saturday night was his regular shift. He also advised he'd taken over the register from another employee 'Xi' and that 'Muhammad' would work the shift after him. Timesheets subsequently provided by the employer showed the

¹⁵ This report includes case studies based on evidence obtained by the FWO from 7-Eleven stores or employees in the course of its Inquiry. These case studies have been deidentified to protect the identities of individuals involved. Some case studies are composite examples.

directors of the business working almost all Saturday and Sunday shifts during the period records were requested for. Alex was only rostered on three Saturday shifts. The timesheets didn't match what was observed during the site visit or the information provided by Alex, leading inspectors to determine the records couldn't be relied on.

Store B produced records after being served with a Notice to Produce. An inspector analysed the payroll documents, which showed that in one week 103.74 hours were worked by employees. This is despite 168 hours minimum being required to staff the store for the 24/7 opening hours. Subsequent roster analysis revealed employees worked significantly more hours than were entered into the payroll system each week.

Store C was visited by Fair Work Inspectors on Saturday 13 September 2014 during the night shift. The employee on duty was interviewed and a timesheet for the current week was found and photographed. It showed the employee working 56 hours. Documents subsequently produced by the employer included a timesheet with the same employee recorded as working only 23 hours.

Store D intended to pay its employees a flat pay rate of between \$10 and \$17 per hour depending on their experience. Store D used the 7-Eleven payroll system, which only allowed an hourly rate at least equivalent to the minimum award rate. Employees' hours were accurately recorded in rosters kept in-store and they were paid a gross amount per week which reflected their flat rate of pay.

Payroll entries made by the employer intentionally showed reduced hours for each employee each week, at the hourly rate prescribed by the award. This system allowed the employer to arrive at the intended gross weekly amounts applying flat pay rates. It also meant employees appeared in payroll records as working unusual fractions of hours.

An example of how this worked in practice:

	Reality	Records
Base rate of pay	\$15	\$22.77
Penalty rate of pay	\$15	\$27.09
Hours of work	34 hours	12.88 hours at base rate 8 hours at penalty rate
Gross pay	\$510	\$510

4.4.2. Employee participation

Lack of employee participation significantly impeded our efforts to investigate a number of the 20 stores. For example, in one store where there were significant concerns about wage rates and record accuracy, only one of a workforce of more than 10 employees was willing to participate in a formal interview. Some employees were only willing to provide information anonymously, leaving Inspectors to find alternative forms of evidence to test allegations raised.

In some instances employees offered what appeared to be false accounts of their wages and hours. There were multiple instances of information that was inconsistent with what appeared to be occurring in the store or reported by other staff. Some employees:

- changed answers to specific questions about their employment in follow up calls
- when cautioned against providing false or misleading information, chose not to answer further questions or continued to provide information later shown to be false.

Case Study: employee participation

Fair Work Inspectors investigated a 7-Eleven store after receiving a complaint from an employee alleging underpayment of wages. During a visit to the store, they spoke with two other employees. One employee working the day shift said he'd started at 8 am, would finish at 4.00 pm, and he was being paid \$27 per hour. However, the timesheet subsequently obtained showed the employee working from 7.00 am to 2.00 pm only. This contrasted with register reports which showed specific employee log in and log out times. These showed the employee started at 7.00 am and finished at 5.00 pm. Pay records provided by the employer showed payment at \$35.00 per hour for 7 hours.

During the same site visit, a second employee told the inspector he received a rate of pay well below the award rate. She didn't respond when Fair Work Inspectors tried to contact her immediately following the visit. Some months later, she told inspectors she'd given incorrect information because she'd been confused.

The Fair Work Inspector attempted to contact other employees on the company records. A number were uncontactable. Of those spoken with, one stated they were paid \$35 per hour, another \$18 per hour and a third \$14 per hour.

One employee agreed to an interview, but later changed his mind. He explained he was an international student who had worked in excess of his visa obligations. He was scared that if his employer found out he was assisting the FWO it might ultimately jeopardise his visa and his study.

Only one employee was willing to participate in a comprehensive interview. This employee described a system of payment where payslips recorded \$35 per hour, while her actual hourly rate was \$14. This employee's actual hours were divided by 2.5 to determine the number of hours processed in payroll. She described creating timesheets at the employer's directions showing shifts that matched the hours intended to be processed in payroll.

We sought from 7-Eleven CCTV for the store for the period leading up to the site visit. After reviewing evidence, including CCTV, register reports and one recorded interview, the investigation determined the employer underpaid its workers and had provided false and misleading records.

4.5 Investigating requests for assistance

During the course of the Inquiry, we continued to investigate requests for assistance lodged by individuals who had been employed in 7-Eleven stores. We received 32 such requests. These investigations resulted in a range of outcomes, including the issuing of 11 Letters of Caution, six Infringement Notices and two Compliance Notices. They also led to commencement of legal proceedings against the operator of Haider Pty Ltd (7-Eleven Brisbane, Qld) and Amritsaria Four Pty Ltd (7-Eleven Blacktown, NSW).

Haider Pty Ltd

A request for assistance was lodged by a former employee alleging he'd been paid at the rate of \$10 per hour and sometimes waited weeks for payment. The employee, who had been on a student visa for part of his employment, worked for the business for over 6 years and was a store manager when he left. He advised he was paid through the payroll system for 16 hours at award wages with additional wages paid in cash. He provided evidence (including text messages) showing he sometimes worked up to 50 hours per week despite being on the payroll for only 16 hours.

During the course of the investigation, the employer failed to comply with a Notice to Produce records or documents. The failure to produce records prevented us from undertaking a full assessment of the employee's entitlements. The investigation assessed a 12 month employment period and identified \$21 298.86 as outstanding to the employee. A Compliance Notice was issued to the employer requiring this amount be rectified. The employer failed to comply with this notice or to provide a reasonable excuse for failing to do so.

On 5 December 2014, we commenced proceedings against the company and its Director, Mr Mubin Ul Haider. The Company entered into liquidation and consequently the litigation didn't proceed against the Company.

A statement of agreed facts was filed in this matter where the Director admitted being involved (within the meaning of section 550 of the FW Act) in each of the contraventions.

In handing down the penalty decision in this matter, the Court made strong comments about the Director's conduct. In particular, the Director's failure to comply with the

Notice to Produce was 'extremely serious' and the production of some records many months later showed 'contempt' for the FWO.

The Director was ordered to pay penalties of \$6 120 with respect to the Notice to Produce contravention and \$850 with respect to the Compliance Notice contravention. Due to the liquidation of the company, at our request, it was ordered that the penalties be paid to the employee via the FWO.

The FWO has referred Mubin UI Haider to the Australian Securities and Investments Commission (ASIC) for their consideration of any breaches of the Corporations Act 2001.

Amritsaria Four Pty Ltd

We received complaints from two former employees of 7-Eleven Blacktown. They alleged they had worked at multiple stores operated under different companies by Company Director Mr Harmandeep Singh Sarkaria. They alleged being paid \$11 per hour while payroll records showed them being paid \$25 per hour.

We commenced legal proceedings against the Company and its Director in relation to the making of false and misleading records as well as the failure to pay appropriate rates of pay and penalty rates.

We have relied upon records provided by the employees and 7-Eleven to calculate the underpayments outstanding which total \$49 426.17. This amount was rectified before we commenced proceedings in Court.

We are waiting on the Court's decision in this matter.

4.6 Evidence and assessment – forensic investigation

The Inquiry required sufficient evidence to accurately establish hours worked by employees and the wages they received, to enable it to determine whether entitlements were met. The difficulty of this exercise was compounded by:

- the prevalence of cash payment systems
- existence of multiple sets of records, some of which appeared to have been created for the purpose of disguising true hours worked and wages paid.

While some franchisees immediately acknowledged their records were false, some sought to rely on fabricated records as evidence that they weren't contravening wages provisions. As a consequence, and given employees were often unwilling to 'go on the record', Fair Work Inspectors had to obtain further evidence to test the validity of underpayment claims.

Our investigation into specific stores has involved identifying and sourcing additional documentary and testamentary evidence to test the veracity of multiple sets of information and records.

In order to demonstrate true patterns of work and wages paid, careful evaluation of the accuracy of each piece of evidence has been required. We compared the available information from varied sources and identified inconsistencies. Different methodologies were then applied by Fair Work Inspectors to try to determine a pattern of payment.

The following table details and appraises the types of evidence utilised:

Time sheets	Time sheets nearly always exist as 7-Eleven has routinely checked they were being completed. However, the accuracy of time sheets varies significantly from store to store as they are manually generated. In some stores, accurate time sheets reflected true hours worked, even where employees weren't being paid for all hours worked. In other stores inaccurate timesheets were made to match the pay records. Allegations were also made that some employees were required to sign blank sheets later completed by the employer.
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Rosters	<p>Rosters often exist, sometimes made to match inaccurate payroll hours. In some stores two sets of rosters were found to have been made; one accurate and one that appeared to be altered or created to match payroll hours. Business owners and their family members sometimes appeared on the rosters, even when employees were working, resulting in reduced numbers of hours recorded as worked by employees.</p>
CCTV	<p>Where available, CCTV footage showed which employees were working at particular times and was compared to other records. There were a number of difficulties obtaining and using this evidence. In particular:</p> <ul style="list-style-type: none"> ■ multiple instances where footage was ‘unavailable’ due to reported malfunction of equipment or what appeared to be intentional destruction ■ footage is only retained for a relatively short period (generally up to four weeks) ■ logistically it’s time consuming to review and only of use where the Fair Work Inspector can visually identify employees.
Register log ins	<p>Each employee is meant to be designated a unique log in code for use during their shift, which is a highly accurate source of evidence of hours worked. However, many stores didn’t give each employee a unique code and used a few codes or ‘training’ codes across employees. In one store employees had been instructed to use a particular log in at particular times e.g. one code in the morning and a second code late in the evening. Other stores indicated that if the store was busy at shift change times, the log on may not be changed.</p>

Fuel dip records	These records are made each day, generally in the early hours of the morning, to check fuel reserve levels. The employee writes the date and time of the fuel dip, and signs the entry. Fuel dip records are useful for checking night shift workers, but they only apply to stores selling fuel. They don't assist in proving exact hours of work, only presence for that shift.
Food temperature log books	Stores are required to keep track of the temperature of fridges and freezers storing food. Employees undertook these checks on a daily basis and made records in a log book. This was a mechanism for checking if an employee was present at a particular time and date, however didn't assist with establishing shift start and finish times.
Payroll records	<p>Mostly payroll records were a useful means of checking gross payments made. However, a number of issues affected the accuracy of these records, particularly:</p> <ul style="list-style-type: none"> ■ use of cash payments to 'off the books' employees or as a supplement to usual payroll payments ■ payments into an account not belonging to the employee (eg. another employee or the employer) ■ 'cash back' arrangements where an employer required the employee to return some or all of a wage payment.
Manager's diary	Some managers used diaries instead of timesheets to make an accurate record of hours worked that wouldn't be checked by head office. We were able to obtain some of these records using Notices to Produce served at the site. Diaries weren't used at all sites.
Cash payment records	Some employers who regularly used cash payments maintained separate records of these payments. They had varying degrees of detail about the hours of work, but were sometimes useful for establishing true gross amounts paid.

Records of cash withdrawn from till	These records could be relevant to cash-in-hand employees. In some instances it's possible to correlate withdrawals from the till to rosters (if accurate rosters have been kept).
Employee evidence	This was often the most useful form of evidence when provided. Employees' statements, personal bank records, text messages showing communication with the employer, personal diaries, photographs and emails were all utilised. Some stores texted employees or used a communication application (e.g. WhatsApp) to send rosters to staff each week.
Daily takings reports	This is a cash register report that employees are required to sign at a particular time in the day. It was used to check if a particular employee was present on a particular day. These records don't assist in proving exact hours of work, only employee presence for that shift.
Employer account	Franchisees under investigation were invited to participate in a recorded interview to provide evidence. We do not have power to compel any employer or other witness to participate in an interview. Where an employer does participate under caution and elects to answer questions, it's a criminal offence to knowingly provide false or misleading information.

Case Study: looking closer

'Hussan', a former employee in a 7-Eleven franchise lodged a request for assistance alleging he had been underpaid. Hussan provided a number of photos he'd taken of the store's weekly timebook as well as his handwritten records of shifts he'd worked. In response to a Notice to Produce Records issued by the FWO, the employer produced a set of rosters and a timebook for Hussan's employment period. Hussan's timebook showed him working a number of shifts which didn't appear on the employer's timebook. With the exception of these missing shifts, the two timebooks were identical.

To determine the hours actually worked, we requested records from 7-Eleven, including reports from the payroll system, register log ins and records showing when an employee had checked the fuel levels in the store's petrol tanks. The register log in reports showed that employees didn't use individual log in codes so they couldn't be used as evidence. To gather sufficient evidence of the hours Hussan worked, an inspector cross-checked the hours shown in Hussan's photographs, his handwritten records, the employer's rosters, the employer's timesheets, the payroll reports and the fuel dip reports. Hussan's timebook record largely correlated with the fuel dip records provided by 7-Eleven. Importantly, the fuel dip records showed Hussan signing the record when the employer's timebook recorded he was not at work. This detailed cross referencing allowed the inspector to determine the most accurate evidence of hours worked.

4.7 Rectification of underpayments

To date we have been able to obtain approximately \$293 500 in underpayments across 7-Eleven stores investigated as part of this Inquiry.

A number of barriers have prevented us from achieving full rectification of amounts determined to be outstanding.

The transient nature of the workforce means we haven't been able to locate some employees to advise them of an underpayment or to transfer funds. In some cases, it's been reported employees have returned funds to the employer shortly following 'rectification' of underpayments. In these instances we have faced challenges in validating what has actually been paid to the worker.

Case study: repayment of funds

Our investigation into Store A identified underpayments of over \$80 000 for a 12 month period. The inspector issued a contravention letter requiring these amounts to be rectified. The employer provided evidence of rectification in the form of bank documents showing bank transfers to employees. Follow-up contact between the inspector and some of the employees raised concerns that these amounts may not have been paid.

The inspector issued statutory notices requiring production of bank statements to confirm these transactions. These statements showed a number of transactions of concern. A number of employees had transferred the rectification amounts back to bank accounts held by the director of Store A and/or family members of the director. In some instances this occurred the day after the employee had been paid the amount by the employer. In the case of one employee it appeared they had pre-paid the director the rectification amount they were subsequently paid as back pay.

Case study: employees left the jurisdiction

Store B took steps to rectify amounts owing to 14 employees after being advised by the FWO that it had determined underpayments in the vicinity of \$24 000. Wages were appropriately paid to 11 employees while the amounts outstanding to three employees couldn't be rectified as they couldn't be located. It's believed the employees left Australia after ending employment. Attempts to locate these individuals are ongoing.

Case study: employers entering liquidation

Following our investigation into Haider Pty Ltd we identified an underpayment to an employee of \$21 298.86. A Compliance Notice was issued to Haider Pty Ltd requiring this amount to be rectified. When the employer failed to comply with the Compliance Notice, court proceedings were commenced against both the company and its director. Among the orders sought in the litigation was rectification of the amounts outstanding. During the litigation, Haider Pty Ltd entered liquidation and the FWO was therefore unable to seek orders against the company.

4.7 Record keeping obligations and penalties

The FW Act and FW Regulations impose obligations on employers to make and keep accurate employment records. Courts have recognised that the obligation on employers to keep proper records is fundamental to enforcement of workplace rights and obligations. The failure to keep proper records and to issue payslips: disempowers employees, undermines the effectiveness of workplace inspectors, and creates a structure where breaches of workplace laws may be easily perpetrated.¹⁶

Making false records, particularly if intended to mislead a Fair Work Inspector that a business is compliant with its obligations, is of serious concern to us for several reasons:

- it frustrates an employee's capacity to know, and hold an employer accountable, for their minimum entitlements
- impedes our ability as a regulator to properly and promptly investigate whether an employer is compliant with the law
- deprives us of crucial evidence, leading to the use of significant public funds to undertake extensive investigation and analysis of multiple sources of evidence that wouldn't otherwise be required
- can prevent us from assessing underpaid entitlements and taking enforcement action when necessary.

If an employer fails to meet the record keeping obligations under the FW Regulations, we can issue an Infringement Notice or apply to a court for the imposition of a penalty.

Maximum penalties for contraventions of record-keeping provisions are generally lower than penalties for failing to comply with wages obligations. For example, failing to make or keep records under section 535 of the FW Act attracts a maximum penalty of \$5 400 per contravention for an individual, and \$27 000 per contravention for a body corporate. These are half the maximum penalties applicable for failure to pay the award rate, which attracts a maximum penalty of \$10 800 for an individual and \$54 000 for a corporation.

Knowingly making false or misleading records is serious non-compliant behaviour, both because it's intentional conduct and because it can disguise further contraventions. Yet the

¹⁶ FWO v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258 at [66]-[67]; FWO v Orwill Pty Ltd & Ors [2011] FMCA 730 at [21]; FWO v Bound for Glory Enterprises & Anor [2014] FCCA 432 at [76]; FWO v Grandcity (GW) Travel and Tour Pty Ltd & Anor [2015] FCCA 1759 at [77]

maximum penalties (\$3 600 for an individual and \$18 000 for a body corporate) are significantly lower than the penalty for failing to make records, which can arise without a deliberate intent to contravene the law or disguise underpayments.

Maximum penalties for failure to keep or provide accurate records are often significantly less than the value of relevant underpayments, particularly if the conduct is longstanding. One may consider the financial incentive to breach the law to be greater than the deterrent effect of possible action by the FWO.

5. A culture of complicity

To identify and address the chief drivers of non-compliance within the 7-Eleven network, we examined the actions and considered the motivations of workplace participants. We explored the actions of 7-Eleven and the franchisees as well as those of the employees themselves.

We found a culture in which some franchisees and employees appeared to know about legal obligations from the outset, or at least came to know them during the course of employment. Despite this, the parties continued to participate in arrangements that contravened workplace relations and immigration laws. In the case of franchisees, some showed a wholesale disregard for legal minimums. Arrangements extended not just to a failure to make accurate records, but to the production of detailed false records with fictional accounts of hours worked and amounts paid.

This pattern of behaviour, if typical to the 7-Eleven network, indicates a culture of complicity where the motivations of various parties contributed to high levels of non-compliance.

5.1 7-Eleven

For a variety of reasons it's common in franchise arrangements for franchisors to seek to control a number of aspects of their franchisee's businesses.

In this case, the Inquiry found 7-Eleven has very high levels of control across their network, including through provision of comprehensive training and support to franchisees. In a number of ways they are more closely involved in employment related matters than we have typically encountered with other franchise arrangements.

5.1.1 Employment support services

7-Eleven instructs stores on applicable award wages by providing an updated wage sheet each year, which is compiled by an employee relations specialist firm. The external employee relations service assists employers with a broad range of employment matters, including unfair dismissal and enterprise agreement bargaining. It also appears to have a particular focus on franchise arrangements. 7-Eleven refers franchisees to the employee relations firm when employment issues are identified and free initial consultations are provided under the franchise arrangement. It appears there's no obligation for franchisees to use this service, or that 7-Eleven would be made aware of any advice given to franchisees if they do.

As part of the franchise arrangement, 7-Eleven also makes a payroll service available to franchisees. The vast majority of stores in the network use this service, including all stores investigated as part of the Inquiry. Payroll is administered by a large specialist payroll firm. Franchisees are responsible for reporting the pay rate and the hours worked by employees each week. Rates of pay can be set above, but not below, the relevant award rate.

To do this, franchisees enter data via a 'portal' accessed using a computer at the store. The portal has fields for ordinary hours, time and a half hours, double time hours and 'other penalty' fields to identify various penalty codes. Once this data is entered by the store, the 7-Eleven payroll team processes pays using the payroll provider's system. 7-Eleven advised the Inquiry their payroll team didn't previously have access to rosters or timesheets to validate the penalty rates and shift types nominated by the franchisee.

5.1.2 7-Eleven manual

7-Eleven provides a manual (**the Manual**) to all franchisees covering management of employment matters. The Manual details franchisees' legal obligations including the requirement to issue a Fair Work Information Statement and pay slips, make and keep accurate records, pay relevant minimum rates (including overtime, shift penalties and weekend penalties), and superannuation. Workers compensation obligations are also covered. The Manual notes that wages form the largest operational cost incurred by franchisees and that 'penalties associated with the underpayment of wages (whether deliberate or accidental) represent one of your greatest areas of risk...'

5.1.3 Training provided by 7-Eleven

7-Eleven provides new franchisees with a five day training course which includes substantial training on employment obligations. Prior to May 2015, it appears ongoing training was not provided other than in the form of memos issued from time to time reminding them of particular obligations. One franchisee advised in November 2014, that he did training when buying his first franchise which was later sold. He received no further training when he later acquired a franchise through a private sale, even though he had not continually operated a 7-Eleven business.

In addition to the support provided to franchisees, 7-Eleven includes information about employment matters in mandatory training complete by all employees on commencement.

5.1.4. 7-Eleven's compliance monitoring

5.1.4.1. Termination for breach of agreements

7-Eleven has a range of expectations and requirements that franchisees are obliged to meet. These obligations, along with details about the nature and operation of the franchise relationship are set out in the franchise agreement between each franchisee and 7-Eleven. The parties to a franchise agreement are subject to the Franchising Code of Conduct (the Code), a mandatory industry code which is regulated by the Australian Competition and Consumer Commission (the **ACCC**).¹⁷

The ACCC describes the purpose of the Code as follows:

The Code aims to regulate the conduct of franchising participants towards one another. In particular, the Code:

- requires franchisors to disclose certain information to prospective and existing franchisees before, and after, entering into a franchise agreement
- stipulates a number of conditions relating to the rights of a franchisor and a franchisee under a franchise agreement
- provides mechanisms for franchisees and franchisors to try to resolve disputes.

The Code also requires franchisors and franchisees to act in good faith towards one another at all stages of the franchise relationship, including during pre-contractual negotiations.

¹⁷ "Franchising code of conduct", ACCC, accessed 2 February 2016 <https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct>

The 7-Eleven franchise agreements viewed by us expressly acknowledge they are subject to the Code and contain provisions providing consequences for breaches of obligations set out in the agreement. For example, one franchise agreement we looked at, requires the store be open at all times and if it's not, 7-Eleven can enter and operate the store.

Franchise agreements appear to contain common terms about termination of the agreement, including a provision allowing 7-Eleven to terminate the agreement for reasons including a 'material breach' of the agreement. A material breach includes a broad range of conduct ranging from fraudulent conduct (particularly in relation to misuse of the 7-Eleven trademark), through to failing to ensure employee attendance at mandatory training. The agreement includes procedures for 7-Eleven to issue a 'breach notice' to a franchisee detailing any breach of the agreement, and an administrative charge (determined by 7-Eleven) to cover the investigation and issuing costs.

While it is not a specific criterion in the franchise agreements viewed by the Inquiry that franchisees comply with employment obligations, it is a requirement that they comply with the Manual. Consequently, it's our view that 7-Eleven has the right to terminate the franchise agreement if employers fail to meet employment obligations. Russell Withers, 7-Eleven Chairman at the time, stated that it's a breach of the franchise agreement not to comply with any law, including labour laws.¹⁸ He also noted that if the breach is rectified, no action can be taken:

*"...if the Fair Work Ombudsman finds an adverse finding and there is pay-back to staff, or there are enforceable undertakings, that is deemed to be a cure of the breach. So, again, even where there is an adverse finding like that we still cannot actually terminate the franchise agreement, under the franchise code."*¹⁹

The ACCC recently responded to questions on notice from the Senate Visa Inquiry regarding termination of franchises where breaches occurred. It confirmed 7-Eleven's view that generally a franchise can't be terminated if a breach is rectified. It also noted that if a

¹⁸ "Hansard of Senate – Education and Employment References Committee hearing on Australia's temporary work visa programs" Thursday 24 September 2015 p.46
http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/d6f5909e-a9b2-4b68-8df4-47e49f91508b/toc_pdf/Education%20and%20Employment%20References%20Committee_2015_09_24_3826.pdf;fileType=application%2Fpdf#search=%22committees/commsen/d6f5909e-a9b2-4b68-8df4-47e49f91508b/0000%22

¹⁹ Ibid p.54

franchisee acts fraudulently in their operation of the franchise, this can be cause for a franchisor to terminate a franchise without notice, provided the franchise agreement allows for it.²⁰

5.1.4.2. Biannual store audits

A key mechanism for 7-Eleven to monitor compliance with franchise agreements is through biannual store audits undertaken by specially trained 7-Eleven employees called 'Retail Specialists'. The focus of these visits appears to be on store presentation, however some elements of employment practices are also reviewed. The checklist of requirements considered in these audits includes confirming that rosters are being posted and timesheets completed. However, prior to July 2015 the audits did not appear to involve reconciliation of time records with wages records.

The Inquiry found employees were often aware stores needed to have rosters and timesheets available for audits, but they understood this to be a 7-Eleven requirement, and didn't appear to know about record-keeping obligations under the FW Act and FW Regulations. During our investigations, employees and franchisees recounted a range of ways that some stores would satisfy the 7-Eleven audit. These included:

- falsified rosters put up in store on weeks visits were expected
- employees asked to sign blank timesheets, sometimes in bulk
- employees asked to complete timesheets inaccurately showing either reduced shifts or reduced hours on each shift.

The payroll component of the audit appeared to be somewhat secondary to the rest of the review, and payroll scores didn't have a major impact on the store's overall result. The aim of monitoring was to ensure stores met legal record keeping obligations. However, the way they were conducted appeared to be largely administrative and gave no meaningful insight into compliance in relation to either wages or accurate record keeping.

²⁰"Answers to written questions on notice from Senator Lines to Australian Competition and Consumer Commission", the ACCC, accessed at <http://www.apc.gov.au/DocumentStore.ashx?id=a281073c-c5ec-4bd7-9974-bb6409f5f5db>

5.1.5. 7-Eleven's handling of grievances from employees

A number of employees told us they had approached 7-Eleven with concerns, generally prior to the commencement of the Inquiry. Commonly they reported being advised by 7-Eleven personnel to take up their issue with the relevant franchisee or raise their concerns with the FWO.

Employees felt 7-Eleven was either:

- disinterested in their grievances, or
- (of greater concern) aware of high levels of non-compliance throughout the network which it ignored, because it was to their benefit that stores appear profitable.

At the start of our Inquiry, we discussed with 7-Eleven its handling of employee complaints. They advised that only when employees agreed to be identified to the relevant franchisee would 7-Eleven approach the franchisee and try to get the matter resolved. Otherwise, they would make employees aware matters could be referred to the FWO. 7-Eleven indicated that a significant portion of grievances came from individuals not willing to be identified to the relevant franchisee.

Case study: Employee “Asha”

Asha spoke with the 7-Eleven regional manager for his store about wage concerns. In response, the regional manager emailed the following:

‘Thank you for making me aware of your issue at store XXXX.

Please be aware that 7-Eleven Stores Pty Ltd is the franchisor to [the Company] and not an employer. As a representative of the franchisor, I have written directly and formally to the franchisee to request he contact you directly to resolve the issue to your satisfaction. We will provide a reasonable timeframe for this to occur, and will follow up with you and the franchisee at the conclusion of this timeframe.

Please be aware that you have the right to refer this matter to the Fair Work Ombudsman on 131394, Mon-Fri, 8.00am – 6.00pm.”

Approximately four weeks later the employee followed up with the regional manager and received an email confirming their conversation:

“Dear Asha,

Confirming our discussion that you as of [yesterday] have received no contact with [Franchisee] (franchisee of stores XXXX and XXXX) regarding the wages dispute you raised on [date of first email] which 7-Eleven in turn raised with [Franchisee].

Allow me to reiterate that 7-Eleven Stores is the franchisor to [the Company] and not an employer. As a representative of the franchisor, I have written directly and formally to the franchisee to request he contact you directly to resolve the issue to your satisfaction. It appears that this request has not been met by the franchisee within the agreed timeframe.

Please be aware that you have the right to refer this matter to the Fair Work Ombudsman on 131394, Mon-Fri, 8.00am – 6.00pm.”

5.1.6. 7-Eleven motivator for non-compliance: profitability

Relevant to the question of 7-Eleven’s involvement and choices, is the operating environment and various business needs and pressures faced by convenience stores in Australia.

7-Eleven informed us early in the Inquiry that it views itself as an ethical, family business that looks after its franchisees.

As with all businesses, profitability is a key concern to 7-Eleven and the profitability of individual stores has direct and indirect impacts on 7-Eleven. In particular:

- 7-Eleven receives a percentage of each store’s gross profit (turnover less cost of sales) and therefore gains direct financial benefit when stores are successful. At the time of the Inquiry, 7-Eleven received 57% of each store’s gross profit. While 7-Eleven does not directly benefit when a franchisee underpays their workers, an artificial net profit allows the store to continue to trade and generate gross income which 7-Eleven benefits from.

- 7-Eleven benefits financially from expansion of its network of stores. Franchisees pay a fee on entering into a franchise arrangement and new stores grow 7-Eleven's revenue stream. The marketability of new stores is impacted by public perception of 7-Eleven as a profitable business.
- When an existing franchise is sold or transferred, 7-Eleven receives fees charged as part of this process. Again the appeal of a store being sold will be impacted by its gross and (alleged) net profitability.

Store's net profitability is impacted by wages paid by the store. Systemic and substantial non-compliance with wage obligations will consequently inflate a store's profitability.

For example, one store reported a net profit (after wages) of approximately \$34 000 in one financial year, however we found wages had been underpaid by approximately \$75 000 in the same period. This means, all other factors remaining equal, the store actually would have made a loss of approximately \$40 000 had it met its employment obligations. The store was sold for a similar amount to its purchase price three years earlier and 7-Eleven received a franchisee fee of approximately \$100 000 as a result of the sale.

7-Eleven has stated publicly, '[t]he viability of the 7-Eleven system is in no way, never has been and never will be, dependent on franchisees underpaying their staff.'²¹

Notwithstanding this public statement, it's clear the significant underpayment of wages has directly benefited 7-Eleven as well as the franchisees.

5.2. Franchisees

In the 7-Eleven business model, franchisees bear the cost of wages and any reduction in this cost increases their net profits. As the legal entity responsible for complying with employment laws, the franchisees also bear the risk when they engage in practices that breach these obligations.

²¹ "Independent panel to review 7-Eleven staff payments, company proposes exit option to franchisees who want out", The Age, accessed at <http://www.theage.com.au/interactive/2015/7-eleven-revealed/documents/statement-711.pdf>.

The Inquiry specifically considered profitability of 7-Eleven stores as a factor driving engagement in non-compliant behaviours.

5.2.1 The franchise model

The Franchise Council of Australia suggests a franchise structure will generally involve:

- an upfront fee at set-up
- ongoing fees, either calculated as a monthly amount or as a percentage of turnover (usually set at between 2% and 15%)
- an additional percentage of turnover to cover marketing costs.²²

The 7-Eleven franchise model is atypical when compared with this structure. 7-Eleven exercises a high degree of control over its franchisees, taking a large share of profits generated and paying a large share of their expenses.

The upfront cost of purchasing a 7-Eleven store varies considerably depending on the size, location and nature (fuel or non-fuel) of the store. Fees that most purchasers pay include:

- an application fee to 7-Eleven
- a franchise fee to 7-Eleven (based on the size of the business)
- for the purchase of an existing store, a goodwill amount to the previous owner.

Stores sell for between \$500 000 and \$1.5 million, which is at the high end of the broader franchise sector.

Instead of an ongoing fee, at the time of the Inquiry 7-Eleven was paid 57% of the gross profit (turn over less cost of sales). This model appears to have been adopted from the US based parent company which advertises the gross profit split as a unique feature of its model.²³

Although 7-Eleven takes a greater share of profits than many other Australian franchisors, they also cover a range of costs not typically covered by franchisors. Under the terms of the

²² "Buying a franchise", Franchise Council of Australia, accessed at <http://www.franchise.org.au/buying-a-franchise.html>

²³ "Franchising 101", 7 Eleven Inc, accessed 9 February 2016 <http://franchise.7-eleven.com/franchise/franchising-101>

franchise agreement, 7-Eleven covers costs including rent and some utilities which are usually considered franchisee costs.

Our Inquiry found that outside the cost of employee entitlements and any business loan repayments, no other significant expenses are paid by franchisees from their share of store revenue. The Inquiry's sample of franchisee financial statements shows wages and related expenses (superannuation and workers compensation) made up around 85% of total expenses borne by franchisees. Other costs did not appear to significantly vary. The Inquiry therefore concluded that controlling labour costs was possibly the only lever available to franchisees to significantly reduce their costs and increase net profit.

5.2.1.2. High level of control

While franchisees are business owners, the level of control they generally have over their own business is quite low. In some ways, it resembles the relationship between a retail chain and a directly employed store manager. 7-Eleven monitors store operations closely and requires franchisees to:

- maintain specific stock levels
- participate in brand-wide promotions (and bear the cost of such promotions)
- manage the range that the stores sells (including the range of 7-Eleven key products such as Slurpees, Krispy Kreme donuts and \$1 coffees).

Franchisees are visited fortnightly by District Managers where they are issued detailed instructions on managing key aspects of their business including promotions, ranging, business performance, store appearance and customer service. Stores are also subject to twice yearly 'Retail Reviews' conducted by 'Retail Specialists' which cover topics including store image, occupation health and safety and payroll.

7-Eleven exerts this control to ensure conformity with the brand image, which is considered key to the network's success. 7-Eleven informed the Inquiry that it suggests ways franchisees can increase their profitability. These included:

- franchisees staffing the store to reduce wages costs
- ensuring a good looking store to attract customers
- ensuring good customer service to attract repeat customers.

In our view this demonstrates the limitations franchisees have to impact their profitability within the franchise model.

The Inquiry also noted that profitability of a store is likely to be influenced by its location and proximity to other stores; both 7-Eleven stores and similar businesses. 7-Eleven acknowledged that in high traffic locations, stores can be successful without high regard for presentation and customer service. Saturation of stores is an important factor for the success of a business of this nature. For example, there are currently over 30 7-Eleven stores in Melbourne CBD. In that same area, there are eight 'Ezy-Mart' branded stores, and a large number of convenience stores under other brands. In 2014 it was reported that Ezy-Mart intended to open up to 150 stores across metropolitan Melbourne the following year. This market saturation must inevitably impact the profitability of all businesses in the industry. The franchise agreements we viewed don't appear to contain provisions providing surety to franchisees that another 7-Eleven store won't be opened close by, or any 'territory' type provisions. 7-Eleven do include a guarantee of a minimum (gross) income for the store.

5.2.1.3 Profitability and wages

7-Eleven informed the Inquiry that most 7-Eleven stores were earning gross income of between \$300 000 and \$600 000 per annum, with up to one sixth (around 100 stores) below this point. In our review of financial records, limited consideration has been given to payroll figures because they generally relate to stores where contraventions of wages provisions have been identified, and can't be considered a useful reflection of operating costs.

It's difficult to accurately calculate minimum wage costs of stores because information about employment status, employee age and the owner's hours of work is unknown. Modelling suggests wages costs are likely to be around \$160 000 per annum (or the equivalent of three full time staff).

This assumes the franchisees (or unpaid family members) work around 50 hours a week, and at times that would attract penalty rates if worked by employed staff (e.g. nights and weekends). It also assumes only one staff member is rostered on at a time for the remaining operating hours. In other words, this estimate is a minimum conservative payroll cost relevant to a small store.

Financial model for a small store with owner working 50 hours per week:

Sales	\$2 200 000
Cost of sales	-\$1 540 000
Gross profit (GP)	\$660 000
7-Eleven charges	-\$376 200
Store share of GP	\$283 800
Non-retail/other costs	-\$17 000
Net income	\$300 800
Payroll	-\$160 000
Other costs	-\$28 235
Net profit	\$112 565

The above model suggests the small store made a net profit of approximately \$110 000 per year. However, it doesn't consider loan repayments. The store owners dealt with in the Inquiry generally borrowed the majority of money required to purchase their store and consequently had significant loan repayments to meet. In some instances they even borrowed the deposit funds from family and friends.

This means that of the \$110 000 described in this model as net profit; an amount would have been attributed to loan repayments. The remainder was available to franchisees as compensation for their weekly 50 hours of shift work and as a return on their investment (generally of \$500 000 plus).

The Inquiry found that stores with widely varying turnover manage to operate with similar staffing levels (between 3 to 4.5 ASL²⁴, with increases to staffing at particularly busy times). Therefore, wages can be viewed as a relatively fixed cost, rather than one that varies proportionate to turnover. This is largely due to inflexibility of store trading hours, as 7-Eleven generally requires stores operate continuously. While some costs borne by 7-Eleven are fixed (such as rent), the model's structure, whereby 7-Eleven takes its fee directly proportionate to turnover, creates more difficulty for stores with low turnover to fund wages.

²⁴ ASL (Average Staffing Level) is the average number of employees receiving salary or wages (or compensation in lieu of salary or wages) over a financial year, with adjustments for casual and part-time employees to show the full-time equivalent: <http://www.finance.gov.au/publications/annual-reports/annualreport09-10/glossary/glossary.html>

For at least 23 years prior to September 2015, 7-Eleven franchise agreements included an annual \$120 000 gross income guarantee.²⁵ The above wage modelling shows this guarantee to be less than wages costs to staff a small store. 7-Eleven has stated that it had a number of informal processes to 'top-up' this income, and that in the 2014-2015 financial year they provided \$1 million in additional financial support.²⁶ It appears that under this informal system, franchisees were expected to approach head office to seek additional assistance where required.

5.2.1.4. Working in their own business

As discussed above, the Inquiry found stores frequently operated with only one employee working, with a second employee only on at particularly busy times. To keep staffing costs down, franchisees and their family members can increase the hours they work.

The Inquiry formed the impression 7-Eleven expected franchisees to work in their stores. For example, this is often factored in by franchisees in business plans prepared when entering into franchise arrangements. This can create an unrealistic expectation of profit. A business model that's dependent on franchisees working in the business can be problematic. The Inquiry encountered multiple instances of franchisees struggling to pay wages for periods when the franchisee was unable to work due to illness or injury. The Inquiry also encountered examples where franchisees chose not to work in store.

The Inquiry found stores that paid rates of pay significantly below the award generally didn't have the franchisee working in the store in a way that enabled them to significantly reduce paid staff hours. Instead they were working alongside paid staff or at times when penalty rates didn't apply. On the Saturday evening when 20 stores were visited, only one store was staffed by a franchisee; all other stores were staffed by paid employees.

²⁵ "Hansard of Senate – Education and Employment References Committee hearing on Australia's temporary work visa programs" Thursday 24 September 2015 p.50
http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/d6f5909e-a9b2-4b68-8df4-47e49f91508b/toc_pdf/Education%20and%20Employment%20References%20Committee_2015_09_24_3826.pdf;fileType=application%2Fpdf#search=%22committees/commsen/d6f5909e-a9b2-4b68-8df4-47e49f91508b/0000%22

²⁶ Ibid

5.2.1.5 Franchisee sophistication

7-Eleven informed the Inquiry that franchise owners are predominantly of migrant backgrounds, particularly from China, Pakistan and India. The Inquiry found low awareness of and familiarity with Australian workplace relations laws and its culture of collectivism (manifested in industrial instruments such as awards or workplace agreements). Some franchisees favoured direct negotiation with individual employees and had an erroneous understanding of the principles of contract law.

We also encountered franchisees who had previously worked as cashiers in 7-Eleven stores. One Brisbane franchisee advised us that when determining a method for reverse engineering records, he used the system that had been in place at the store he had worked in as an employee. A further two franchisees subject to investigations confirmed they were former 7-Eleven employees.

The Inquiry found that the majority of franchisees investigated were relatively unsophisticated as business owners and employers. 7-Eleven's model which provides comprehensive instruction and training in all aspects of business is likely to appeal to individuals with limited business experience.

As unsophisticated business operators, franchisees have shown a tendency to adopt practices from other stores. Several advised they paid rates that they knew to be the 'going rate' for working in a 7-Eleven store and demonstrated a common knowledge of these rates across stores. There was a general acceptance that this was well below lawful minimum wages. One franchisee advised us most franchisees in Brisbane, and across Australia, knew that stores were paying rates of between \$11 and \$14 per hour and felt this was acceptable: "... that's how it works and that's how it worked before."

It's not surprising that when a recent migrant who has worked in a 7-Eleven looks to buy a small business they choose what is familiar. It's also perhaps not surprising that observed record keeping and wage practices are copied. Breaking the cycle of acceptance within some parts of 7-Eleven culture, that 'this is the way things are', is a key challenge for 7-Eleven.

The Inquiry also encountered store owners who deliberately underpaid workers despite no suggestion of financial difficulty or limited business experience.

5.3. Employees

5.3.1. Typical employee characteristics: visa holders

The Inquiry sought to better understand the demographics of employees typically engaged in 7-Eleven stores. Prior investigations and intelligence suggested significant numbers of visa holders, particularly international students, were employed in these businesses.

Data analysis from the 20 store visits showed:

- 95% of employees who responded to visa status questions were visa holders and 84% of these were on student visas
- all were aged between 21-30 years, with the majority in the 21-25 year age bracket
- 70% who gave information about their length of service had been employed for 12 months or less.

7-Eleven also informed us that while they don't record employee demographics, typically employees are male international students.

In 2014-2015, temporary visa holders accounted for 11.7% of all requests for assistance received by the FWO. Temporary visa holders comprise around 5% of the Australian workforce, suggesting they are significantly over represented amongst those coming to us for help, despite being generally reluctant to seek assistance from the Commonwealth regulator.

Of greater significance, is the fact that in 2014-2015 35% of the contraventions identified by the FWO involved visa holder workers and 42% of matters we took to federal courts related to allegations of serious non-compliance involving the exploitation of visa holder employees. In the financial year to 29 February 2016 we have commenced 16 litigations involving visa holders which represents 73% of all litigations commenced in that period.

In this regard, we note the formation of the Ministerial Working Group Protecting Vulnerable Visa Holders by the Commonwealth Government, which aims to address exploitation of visa holders.²⁷

²⁷ "Ministerial Working Group to help protect vulnerable foreign workers, Senator the Hon Michaelia Cash, accessed at <https://ministers.employment.gov.au/cash/ministerial-working-group-help-protect-vulnerable-foreign-workers>

According to the Department of Immigration and Border Protection (**DIBP**) website (www.border.gov.au), a range of visas are available to international students that contain various conditions.

The DIBP publication *Student visa and temporary graduate visa programme trends* notes that student visas offer holders the ability to work.

*'Student visas include a visa condition that, once the course has commenced, allows most students to work for up to 40 hours per fortnight while their course is in session and for unlimited hours during course breaks. The limitation imposed by this visa condition reflects the purpose of a student visa; that it is to allow entry to Australia in order to study, not to work. Secondary visa holders are subject to a visa condition that limits them to 40 hours work per fortnight at any time.'*²⁸

When applying for a visa, students are required to demonstrate they have sufficient funds to cover tuition fees, travel and living costs for the full study period.²⁹ Students are monitored to ensure they achieve required attendance and performance standards within their courses.

Notwithstanding declarations made to obtain their visa, conversations with a number of student workers revealed they required income for basic necessities such as food and housing. Without ability to receive income support payments, this necessitates employment. Visa holders expressed concerns to the Inquiry about obtaining and maintaining employment if they questioned pay rates offered by franchisees.

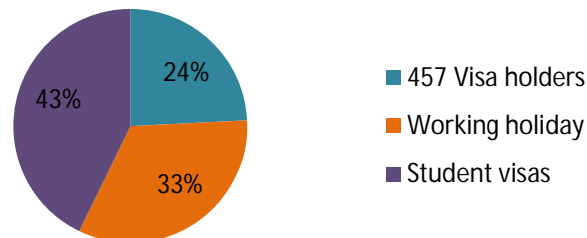
Student visa holders working in 7-Eleven stores confirmed a reluctance to report underpayments or cooperate with FWO investigations for fear of being investigated by another government regulator. Some appeared to be breaching visa conditions and not paying correct tax which adds to their reluctance.

This may explain why they are underrepresented as a proportion of all visa holders who request our assistance, as reflected in the below tables.

²⁸ "Student visa and temporary graduate visa programme trends" DIBP, p.4 accessed at <https://www.border.gov.au/ReportsandPublications/Documents/statistics/student-visa-trends-2014-15.pdf>

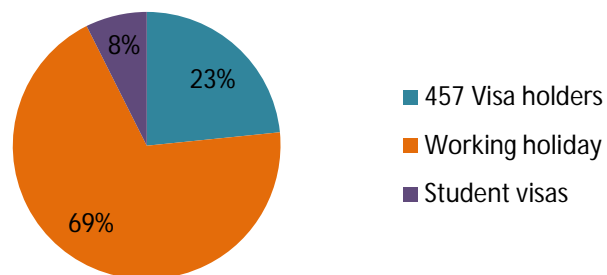
²⁹ *ibid*

Visa holders participating in workforce



Note: assumes 50% of student visa holders participate in the workforce.

Visa holder requests for assistance



While some students may breach the work hours limit even if paid correctly, payment at very low rates increases the likelihood employees will need to work more to meet expenses. For example, a student visa holder working 20 hours per week casually in a 7-Eleven store would be entitled to \$450-\$650 gross per week (depending store type and shifts worked). The Inquiry has found many students work 40 to 50 hours a week to earn similar amounts.

On occasion employers have threatened to contact Immigration when they became aware employees were cooperating with our investigations or when employees indicated they would seek assistance from us.

We have encountered a common misconception among franchisees and employees that the obligation to comply with visa terms falls solely to the employee. DIBP make it clear that employers are obliged to check and confirm that any foreign national working for them has a

valid visa with conditions that provide permission to work. Employers found to have employed a foreign national in breach of their visa face penalties of between \$3 240 and \$108 000 per worker.³⁰

5.3.2. Culture of acceptance

The Inquiry identified a culture of acceptance that working at 7-Eleven means a lower rate of pay and conditions than are lawful. Many employees spoke to us about it being common knowledge what employees are paid. It's also understood that they can work hours in excess of visa requirements without it being reported because it will be disguised by the franchisee. It appears to be standard practice that long hours are worked, training is unpaid, and leave is not taken. Many employees are resigned to this being the 'way it is' if you wish to work at a 7-Eleven store.

One Brisbane employee told us he was introduced to a store by a friend on arriving in Australia. He was asked by the employer to do seven nights of training in store. During the training he spoke to his colleague and recalled:

'And when I asked, like, the guy who used to train me at night and daytime where do I write my hours while training, they said there's no pay for training. Nobody gets a pay for training. This is how it is here. I was almost, like, you know, halfway through the training. I said okay, alright, like I'm in desperate need of a job so I'll take it anyway so I will have a job.'

Case study: An employee's story – 'surviving'

'I'm a skilled immigrant to Australia as an accountant. When I came here I had no formal you know reference or any kind of help here. And, I was jobless and I tried to find job in accounts profession and there I sent a lot of CVs but I couldn't find job.

Then I started working in a chicken factory. After some time when they didn't need me, they said sorry you are casually employed, we don't need you anymore. So meanwhile, a few friends of mine they told me ok why don't you do training at 7-

³⁰ "Information for 7 Eleven workers", DIBP, accessed 3 February 2016

<https://www.border.gov.au/WorkinginAustralia/Pages/information-for-7-eleven-workers.aspx>

Eleven, because they were working there. I did this training and after that my friend told me to come and work for this 7-Eleven store.'

He explained how he started work, and discovered he was being paid just \$12 per hour:

'I was hesitant to ask them many questions, because I was afraid that if I asked so many questions they're going to remove, fire me ok. So I put my head down and continue. At least I'm surviving, not starving or dying with hunger, because I'm not allowed to take any benefit from Centrelink, so I had to do anything. I wasn't finding job in my accounting profession, I was helpless and I need to do something. So I continued working and many times we asked them for the payslips. But we were never provided payslips ok. I was hesitant or afraid to stand up, because I was afraid if I stood up they're going to fire me straight away.'

He also spoke about the other employees in the business:

'There are many international students who are working more than 20 hours, not one, two, even the managers. There are many people, especially students who have been exploiting, who are being exploited by these people and they don't dare to come and report, because they're afraid. They're, these people blackmail them that you're not allowed more than 20 hours, we are giving you, giving you jobs for more than 20 hours, so if you complain against us we're going to report immigration that you are working above 20 hours. I had no idea that in a modern society like Australia, anybody can play with, with law and be these workers. If you make a surprise audit to, not to this 7-Eleven, any 7-Eleven and ask them to produce timesheets you'll find almost the same.'

Another story demonstrates the complexity of a market place of international students struggling to find employment where prevailing pay rates are well below legal minimums. This international student referenced a previous 7-Eleven experience when explaining why he accepted employment for \$15 an hour:

'I used to work at another 7 Eleven. My boss he is such a cruel man that he did not pay me money for three months and then for one month I didn't have a job. Then I went to this store and asked if they can hire me. He said I will give you around 20

hours and I will pay you \$15. I hadn't had a job for four months and I needed some money so I said that was OK for me. He explained to me that in the payroll he will put the standard rate and explained how he would put less hours in. I said yes because I needed money and a job.

The first store paid \$10 per hour cash in hand off the books.

I did not have anything, no job, no support from India, I had a loan but that was only for education. My parents send me \$2000 once and \$6000 but that was not enough and was a big burden for them as that is a lot of money in India and they have a whole family to support.'

5.3.3.2. Sense of loyalty

A perceived sense of loyalty, or friendship, with the employer is sometimes cited by employees as being a motivation for not complaining about their boss.

One employee when asked about his experiences working in a store that had been found to underpay workers advised:

'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.

He is a nice guy. This is not the only place that this happens, if you go into most 7-Eleven's you will see that there are Indians etc working in there, the reason for that is that they are all getting underpaid.'

Another employee from the same store told the FWO:

'He's a good guy, sometimes if the store had a good week he would say here you go guys, I'll pay you an extra \$1.00 per hour. I'm on good terms with him. I know him personally really nice guy.

He was a student before, so he understands and tries to help out he will give you \$50.00. If he did bad I would say so.'

5.3.3.5. Knowledge of entitlements

We found franchisees and employees were generally aware of the lawful rates that should be applied in stores. This is evident in the number of employees who came forward with payslips showing inaccurate hours and rates of pay. The employees know information in the payslip is false, and know or suspect why it has been produced. Often employees are able to clearly articulate the 'system' under which they were paid. Some actively participated in production of inaccurate records, entering information into timesheets under direction from a manager or the franchisee.

The Inquiry found a lack of knowledge of workplace laws was not usually a feature of these employment arrangements. Any education effort to raise employee understanding of their entitlements and how to obtain them would have limited impact.

6. Response to public scrutiny

Public awareness about workplace concerns in 7-Eleven stores significantly increased after widespread media coverage in late August 2015, particularly a Four Corners expose on 31 August 2015.

7-Eleven made changes to its practices and operating model during the Inquiry – some prior to the Four Corners episode and more following.

In considering changes still required to build a culture of compliance across the franchise network, we acknowledge those already implemented by the new 7-Eleven executive management team.

6.1 Initial engagement with FWO

The FWO first met with 7-Eleven General Operations Manager Natalie Dalbo in October 2014. We advised an Inquiry would be undertaken in response to allegations of false record keeping and underpayment of wages.

Ms Dalbo expressed some awareness of record keeping practices and informed us of a 7-Eleven additional review of wages data to identify stores that may be under recording payroll hours. The review was looking at the number of hours paid compared with the number of hours needed to staff the store for all opening hours. Where the hours appeared to be insufficient to meet required staffing levels, 7-Eleven sought explanation from the franchisee.

Ms Dalbo indicated some franchisees had responded by explaining they had made cash payments or family members had worked for no remuneration.

She also said 7-Eleven was seeking to increase information provided to employees to give greater guidance on employee entitlements.

In May 2015, the FWO met again with 7-Eleven (Natalie Dalbo and National Retail Manager, Sue Owen) to advise of the progress of the Inquiry and to seek further information about operational processes and protocols. We informed them of the preliminary findings from the 20 store visits on 13 September 2015, and our concerns about the nature and extent of underpayments as well as falsification of records. We advised that we couldn't be 100% confident of the compliance of any of the stores visited.

7-Eleven showed concern about the Inquiry findings and maintained a view that the majority of stores were earning enough gross profit to cover wages. During this meeting 7-Eleven agreed to assist the Inquiry by conducting a joint visit to a store under ongoing investigation.

In July and August of 2015, 7-Eleven commenced a far more detailed compliance audit than had previously been conducted, including cross referencing employment records, fuel dip records and CCTV footage. Breach notices were issued to employers where inconsistencies were found. In September 2015, 7-Eleven gave evidence to a Senate visa inquiry that it had issued 159 breach notices in the previous 12 months in relation to payroll compliance.³¹

These notices covered issues ranging from employers' failure to keep records of employees working who appeared in fuel dip records or on CCTV, to failure to have time sheets signed or dated. It's important to note that these breaches don't necessarily constitute contraventions of the FW Act.

³¹ "Hansard of Senate – Education and Employment References Committee hearing on Australia's temporary work visa programs Thursday 24 September 2015", p.59 accessed at http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/d6f5909e-a9b2-4b68-8df4-47e49f91508b/toc_pdf/Education%20and%20Employment%20References%20Committee_2015_09_24_3826.pdf;fileType=application%2Fpdf#search=%22committees/commsen/d6f5909e-a9b2-4b68-8df4-47e49f91508b/0000%22

6.2 Media coverage and immediate response

From 29 August 2015 Fairfax published a series of articles over several days with headlines including, 'Revealed: How 7-Eleven is ripping off its workers' and '7-Eleven: A sweatshop on every corner'.

On 31 August 2015, the ABC Four Corners program screened '*7-Eleven: The Price of Convenience*'. The Four Corners episode and series of media articles were both the result of an investigation led by journalist Adele Ferguson.

This media coverage alleged widespread underpayments of wages across the 7-Eleven network, combined with falsification of records. It also suggested, based upon 'insider' information from a 7-Eleven employee, that many franchises were unprofitable and 7-Eleven was aware of issues across the network.

On 29 August 2015, 7-Eleven issued the following statement:

'7-Eleven Stores Pty Ltd (7-Eleven) is Australia's largest petrol and convenience retailer, managing a successful franchise model across approximately 620 stores for 38 years.

We are an industry leader in franchising and retailing, providing operational, administrative and business support to more than 450 franchisees.

We take our responsibility as a franchisor seriously. We ensure we provide education and support to assist our franchisees to meet all their legal obligations, including their obligations as the employers of store staff.

7-Eleven is extremely disappointed that a number of franchisees have chosen not to meet their obligations as employers.

We are deeply concerned about the personal impact on affected employees or former employees, and the damage such actions cause to franchisees who are trusted, reliable and responsible small business owners, meeting their obligations as employers.

Our business does not condone the action of any franchisee who does not meet their employer obligations, and we do not and will not hesitate to take any appropriate action, under law and within the franchise agreement, where a franchisee is found to be in contravention of the law.'

On the same day, 7-Eleven issued a statement directed to employees of franchisees, reiterating its concern about the allegations and encouraging staff with concerns to contact the FWO for advice and support.³²

Later that week, on 31 August 2015, 7-Eleven announced its intention to establish an independent panel to address claims from staff of franchisees, and to rectify underpayments.

The statement quoted 7-Eleven CEO Warren Wilmot as saying:

‘The viability of the 7-Eleven business does not, has not and never will, rely on the underpayment of staff.’

This doesn’t let off the hook any franchisees doing the wrong thing, because we will pursue them to repay any money owed to former or present staff.’

In addition, this statement:

- noted 7-Eleven’s intention to ‘weed out’ franchisees doing the wrong thing
- disputed there was insufficient financial viability in stores
- offered to refund the franchise fee to any franchisee who wished to exit the network.

It concluded:

‘What has happened, has happened on our watch and we are a company with a proud heritage and a strong reputation, we cannot allow the few to taint the achievements of the many.’

6.3 Establishing the Fels Wage Fairness Panel

On 3 September 2015, 7-Eleven announced Professor Allan Fels, inaugural chair of the ACCC, had been appointed as head of a two-person independent panel now known as the Fels Wage Fairness Panel (**the Panel**). It would consider underpayment claims from staff of 7-Eleven franchisees.

Professor Fels was interviewed as part of the Four Corner’s program and expressed a view that the franchise operating model was problematic:

³² “A message for our franchise store staff about media coverage”, 7 Eleven Pty Ltd, accessed 9 February 2016 <http://www.7eleven.com.au/media-centre/article/a-message-for-our-franchisees-store-staff-about-media-coverage>

'It seems to me that the business model will only work for the franchisee if they underpay or overwork employees.'³³

The Panel's terms of reference outlined a process through which:

- aggrieved workers could forward a claim and any available evidence to the Panel
- the Panel, supported by Deloitte, would use 7-Eleven payroll records and relevant material from franchisees to determine what amount was due to the employee
- the Panel would pass the determination to 7-Eleven.

7-Eleven publicly stated there would be no statute of limitations on claims and no financial cap on what would be paid. It would pay the amounts assessed by the Panel without further investigation.³⁴

The Panel took steps to raise awareness among current and former employees of its objectives and the process to submit a claim. They established a dedicated phone line, website and Facebook page and advertised the claims process via direct mail to known employee addresses, social media and Chinese and Indian publications.

As at 7 March 2016, the Panel had reported receipt of over 2 724 claims.

Confidentiality of claims was considered extremely important. Media attention highlighted the high number of student visa holders working hours above visa limits who were unwilling to come forward. The Panel gave assurances that it would not require or obtain information on visa status and the names of claimants would not be made public. Nor would it provide details of claimants to franchisees.³⁵

³³ "7-Eleven: Allan Fels says model dooms franchisees and workers", the Sydney Morning Herald, accessed 22 February 2016, <http://www.smh.com.au/business/workplace-relations/7eleven-allan-fels-says-model-dooms-franchisees-and-workers-20150830-gjb0pu.html>

³⁴ Warren Wilmot 24 September 2016, Statement to Senate Committee, "Australia's temporary work visa programs".
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2Fd6f5909e-a9b2-4b68-8df4-47e49f91508b%2F0006%22>

³⁵ "Fels Panel Ups the Stakes on 7-Eleven Underpayments", FELS Wage Fairness Panel, accessed at https://deloitteau.au1.qualtrics.com/SE/?SID=SV_czJh1gHxq8bGHu5&Q_JFE=0

In February 2016 it was reported that a number of former employees had received payment from 7-Eleven after their claims were processed by the Panel. This included Mohamed Rashid Ullat Thodi whose employment was a subject of the 2011 Bosen case.³⁶

6.4 Recent FWO engagement with 7-Eleven

On the eve of ABC's Four Corners program, then Chief Executive Officer (CEO) of 7-Eleven Warren Wilmot wrote to the Fair Work Ombudsman Natalie James. The correspondence discussed cooperation between the FWO and 7-Eleven and provided a press release to be issued by 7-Eleven.

A meeting was scheduled between Natalie James and Warren Wilmot for mid-September 2015 and subsequently cancelled by Warren Wilmot who resigned as 7-Eleven CEO on 30 September 2015.

Between November 2015 and March 2016 we have been in communication with 7-Eleven management regarding the ongoing compliance situation within the 7-Eleven network and efforts by 7-Eleven to implement new systems and processes.

Natalie James and Deputy Fair Work Ombudsman Michael Campbell met with recently appointed 7-Eleven Chairman Michael Smith and interim CEO Mr Bob Baily in November 2015 to discuss a possible compliance partnership between the FWO and 7-Eleven.

The FWO also met with 7-Eleven's Chief Acquisitions Officer Braeden Lord and others from 7-Eleven management in January 2016 and March 2016. The focus of these meetings was 7-Eleven initiatives in development or underway as the result of an Ernst and Young commissioned internal audit.

³⁶ "7-Eleven workers who helped expose wage fraud get paid", The Sydney Morning Herald, accessed 10 March 2016 <http://www.smh.com.au/business/workplace-relations/7eleven-workers-who-helped-expose-wage-fraud-get-paid-20160212-gmss46.html>

6.5 Visa amnesty and Department of Immigration and Border Protection (DIBP)

In the weeks following the Four Corners expose, media reports featured calls for an amnesty to be granted to current and former employees of 7-Eleven stores who had breached visa conditions whilst being underpaid.³⁷

The initial response from the DIBP in September 2015 was that matters would be looked at on a case-by-case basis. The DIBP and the FWO agreed on a protocol whereby DIBP would not take action against individuals assisting us with investigations or legal action during the course of such activity. As of February 2016, we have referred 11 7-Eleven employees to DIBP for consideration.

In October 2015 this approach was confirmed by DIBP at Senate Estimates:

‘Those students who have come forward to assist the Fair Work Ombudsman with their inquiries that—so long as they comply with their visa conditions prospectively—if they are assisting FWO with their inquiries there will be no action taken against them from a visa cancellation point of view.’³⁸

In January 2016, the Fels Panel published updated content on the DIBP website titled ‘Information for 7-Eleven workers’. This content specifies that DIBP will not take action for breaches of visa work conditions if the employee made a claim or is assisting the Panel or the FWO and has committed no further breaches.³⁹

³⁷ Senator Deborah O'Neill quoted ABC online, “7-Eleven: Labor urges Government to give amnesty to students forced to breach visa rules”, <http://www.abc.net.au/news/2015-09-02/labor-says-7-eleven-student-workers-should-be-given-amnesty/6742374>, accessed 10 March 2016; Giri Sivaraman from Maurice Blackburn, “7-Eleven workers need visa protection for speaking out over exploitation: Maurice Blackburn Lawyers”, ABC news online, <http://www.abc.net.au/news/2015-09-21/7-eleven-workers-need-visa-protection-for-speaking-out/6792200>, accessed 10 March 2016; MP Adam Bandt quoted in “7-Eleven: Federal government considers worker visa amnesty”, Sydney Morning Herald, published 7 September 2015, accessed 10 March 2016.

³⁸ “Hansard of Senate – Legal and Constitutional Affairs Legislative Committee 19 October 2015”, p.194 accessed at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/c952e672-02c0-4a05-9274-643291cd067d/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2015_10_19_3916_Official.pdf;fileType=application%2Fpdf#search=%22mr%20manthorpe%2019/10/2015%22

³⁹ “Information for 7 Eleven workers”, DIBP, accessed 3 February 2016 <https://www.border.gov.au/WorkinginAustralia/Pages/information-for-7-eleven-workers.aspx>

This protocol has assisted us in reassuring people about engaging with us about contraventions by 7-Eleven franchisees.

6.6 Evolution of non-compliance

By 8 September 2015, allegations of a new 'scam' in the 7-Eleven network were reported in the media. Reportedly, employees were being paid correctly through the payroll system but required to withdraw a portion of their wages to be returned to the employer in cash (the **cash-back system**).

While we had encountered this during the Inquiry it had not been a common allegation. Interestingly, in the previous week, we were contacted about this behaviour from an employee who alleged their employer had previously used the 'half-pay scam' seen in the Bosen case.

Employee case study: cash back

An employee visited our office and told an inspector he'd been working in a 7-Eleven store for some time and paid \$12 per hour. Records were being manipulated by this employer to show lower hours worked at a higher rate of pay. He explained he'd been on a student visa for some time, but was now waiting on approval of a bridging visa.

He told the inspector his employer had recently told all staff the pay system was changing because 7-Eleven were monitoring stores to make sure all hours were being paid. Staff would now be paid for all hours at the award rate but they must repay in cash everything exceeding their usual \$12 per hour.

The employee said he told the employer that he wouldn't agree to this system, that he wanted to be paid properly now. The employer responded by telling him he wouldn't be given any shifts while this system was in place unless he agreed to the repayments.

The employee told us all other staff agreed to the system because they were student visa holders and needed the work.

We have received intelligence, mainly from anonymous sources, suggesting this practice is being used in a number of stores. We have a number of ongoing investigations in relation to cash back allegations.

7-Eleven have confirmed that it received similar allegations and conducted its own investigations, which resulted in the termination of four franchise agreements between September 2015 and March 2016.

It has become evident that this new 'sham' is not isolated. The practice highlights the lengths some franchisees are willing to go to maintain underpayments and the extent to which some employees are complicit, reluctantly or otherwise.

A number of contraventions of the FW Act may flow from employees being required to repay wages to employers (see table below), and we continue to investigate allegations of this nature. This type of behaviour creates a new set of investigative challenges for us as a regulator, including:

- The need for evidence from employee or witnesses showing specific amounts repaid. Cash back arrangements are often 'off the books', away from the business and witnesses, or through third parties.
- The need for employee evidence about the circumstances in which wages were repaid, including:
 - any 'requirement' imposed by the employer to repay wages
 - any coercion, influence or pressure exerted by the employer to repay wages
 - any 'misrepresentation' made by the employer regarding repayment of wages.
- The need to establish a causal link between any alleged adverse action and the employee's workplace rights.
- Employee reluctance to give evidence out of friendship or loyalty to their employer, fear about visa status, or threats from the employer.

Provision	Summarised requirement	Maximum penalty
Section 323 – pay in full <i>(encompasses section 324 permitted deductions)</i>	Requires employer to pay entitlements in full, in money, and only to deduct amounts which are permitted (e.g. by law or agreement with the employee).	60 penalty units (\$54 000 corporate/\$10 800 individual)
Section 325 – unreasonable requirement to spend	Employer must not unreasonably require an employee to spend any part of their wages (including by repayment to the employer). Section 327 provides that an amount required to be spent under section 325 will be taken never to have been paid to the employee.	60 penalty units (\$54 000 corporate/\$10 800 individual)
Underpayment contraventions (various)	These may apply if an amount is not paid or is paid back, and therefore taken to be unpaid.	Usually (for s.45 – Modern Award) 60 penalty units (\$54 000 corporate/\$10 800 individual)
Regulations 3.44 (1), (2), (3), (6) – Records – accuracy	Records kept by an employer, or used by the employer, must not be false or misleading to the employer's knowledge.	20 penalty units (\$18 000 corporate/\$3 600 individual)
Section 340 – Adverse action	Employer must not take adverse action against an employee because of the employee's workplace right. May arise, for example, where an employer takes adverse action because an employee exercises their right not to participate in a cash back arrangement.	60 penalty units (\$54 000 corporate/\$10 800 individual)

Section 344 – Undue influence or pressure	An employer must not exert undue influence or pressure on an employee to agree to a deduction.	60 penalty units (\$54 000 corporate/\$10 800 individual)
Section 348 – Coercion	A person must not take or threaten to take action against another person with intent to coerce the other person in relation to their workplace rights.	60 penalty units (\$54 000 corporate/\$10 800 individual)
Section 349 – Misrepresentation	A person must not knowingly or recklessly make a false or misleading representation about another person’s workplace rights (e.g. as to their right to keep and not repay wages).	60 penalty units (\$54 000 corporate/\$10 800 individual)
Section 550 – Accessorial liability	A person who is involved in a contravention is taken to have contravened that provision.	Penalties as per above

6.7 Changes to franchise arrangements

Media coverage following the Four Corners program reported allegations about the profitability of the franchise model and a proposed class action against 7-Eleven by franchisees.

On 10 September 2015, 7-Eleven Chairman Russell Withers issued a statement identifying the franchise model as one of two ‘fundamental issues’ facing the network (wages underpayments being the other). Mr Withers stated it was time for the franchise model to take an ‘evolutionary step’.

The statement made references to possible changes to profit share arrangements, requiring all franchisees to utilise the corporate payroll system and introducing external auditing processes.

During an appearance before a Senate Inquiry Committee on 24 September 2015, 7-Eleven General Operations Manager, Natalie Dalbo advised 7-Eleven had implemented changes to its income support for franchisees. They were now providing a minimum gross income

guarantee to stores of \$310 000 per annum (a significant increase on the \$120 000 guarantee that had previously been supplemented in 'hardship cases' under an informal process).⁴⁰

On 30 September 2015, 7-Eleven announced Chairman Russell Withers was moving to a role of Non-Executive Director and CEO Warren Wilmot was standing down. Deputy Chair Michael Smith assumed the role of Chairman and Bob Baily was appointed interim CEO. Russell Withers did not remain on the Board of 7-Eleven and resigned as a Director shortly after stepping down from his role as Chairman. He remains a major shareholder of 7-Eleven.

On 10 December 2015, 7-Eleven announced 90% of stores were now trading under a new franchise agreement. The new agreement included a number of significant changes, including:

- requirement to utilise the payroll service
- requirement to abide by payroll service requirements
- breaches of payroll services included as a material breach of the agreement
- details of a new, tiered gross profit split
- movement of responsibility for some operating expenses to 7-Eleven
- changes to fuel commissions.

The payroll changes included or foreshadowed in the new franchise agreement allow for the development by 7-Eleven of systems to closely monitor wages payments. They address many of the systems gaps that enabled stores to underpay wages and create false records. These changes include:

- provision for the introduction of biometric attendance records
- requiring franchisees to record their own hours of work
- obliging franchisees to obtain and report to 7-Eleven information about employee visa work restrictions.

⁴⁰ "Hansard of Senate – Education and Employment References Committee hearing on Australia's temporary work visa programs Thursday 24 September 2015", p.50 accessed at http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/d6f5909e-a9b2-4b68-8df4-47e49f91508b/toc_pdf/Education%20and%20Employment%20References%20Committee_2015_09_24_3826.pdf;fileType=application%2Fpdf#search=%22committees/commsen/d6f5909e-a9b2-4b68-8df4-47e49f91508b/0000%22

The new profit sharing system represents a significant shift from a long-standing model. Under the new arrangement, 7-Eleven takes 50% of gross profit for the first \$500 000 made in a year, 53% of gross profit for the next \$500 000 and 56% of each dollar made over a million dollars.

Annual gross profit (\$)	Applicable 7-Eleven charge (%)	7-Eleven charge on gross profit
0 – 500 000	50	\$0.50 for every \$1.00 of gross profit
500 001 – 1 million	53	\$250 000 plus \$0.53 for every \$1.00 of gross profit
Over 1 million	56	\$515 000 plus \$0.56 for every \$1.00 of gross profit

This system appears to address the relatively fixed cost of wages, which we found did not vary in direct proportion to gross profit.

7-Eleven has two guarantees in place for those franchisees who have signed the variation to the agreement - \$310 000 in the case of fuel stores and \$340 000 in the case of non-fuel stores. The \$310 000 guarantee applies to franchisees who have not signed the agreement variation.

Under this system, it appears stores earning a gross profit less than approximately \$600 000 would earn a gross income of under \$310 000 (i.e. below the 7-Eleven minimum guarantee). Based on information previously provided to FWO by 7-Eleven, around 100 stores would fall into this category. Where a store receives income support of this nature, but then performs strongly in the following year, 7-Eleven has scope under the agreement to recover support finance.

As detailed elsewhere in this report, if an employer works 50 hours per week in store, a minimum wages bill of approximately \$160 000 could be expected. This leave \$150 000 under the minimum income guarantee of \$310 000 (for fuel stores) for other operating costs, loan repayments, franchisee income and return on investment.

6.8 Further changes to 7-Eleven compliance monitoring

7-Eleven has had regular communication with the FWO since September 2015 and has provided information about its efforts to address issues in the network. The changes made to date include:

- ensuring franchisee hours of work are recorded (whether paid or unpaid)
- advising franchisees that cash payments can no longer be paid to employees
- implementing systems that deliver payslips to employees via email (in addition to hard copies)
- providing training to employees to assist them in interpreting payslips
- creating a hotline for employee queries
- distributing a number of communications to franchisees and employees regarding process changes and franchisee obligations
- ensuring monitoring cross checks of all available records, including CCTV footage
- altering reporting lines for staff undertaking store audits so that they're independent from the operational area
- monitoring payroll data through the use of various exception reports to identify anomalous wage payments
- mandating payment of entitlements on termination automatically
- ensuring wages are remitted to employee bank accounts, not the account of the franchisee
- proposing to amend employment forms to ensure employee visa restrictions are recorded to enable monitoring against hours worked.

7. Conclusions: who is responsible for the non-compliance?

Australian workplace laws impose responsibility for employee entitlements on employers. In the case of this Inquiry, this means 7-Eleven franchisees. Persons outside the employment relationship, such as a franchisor, have no direct legal responsibility with respect to other businesses' employees.

This Inquiry has demonstrated that 7-Eleven exercised influence and a high degree of control over its franchisees in many aspects of its operations. 7-Eleven performed regular reviews of its store network, processed payroll for the majority of stores, and provided access to training and support to franchisees and their employees. It had access to the profit and loss statements of its stores as well as detailed information about payroll and business expenditure.

Since 2008 we have received regular reports alleging widespread compliance issues across the 7-Eleven network. Requests for assistance received from employees over a number of years have suggested a troubling pattern of allegations around falsification of records to disguise the underpayment of wages. Where there are inaccurate records, it is particularly difficult for us to investigate underpayments, as shown by the efforts required to test and assess records during this Inquiry's audit of 20 7-Eleven stores.

The full extent of information that 7-Eleven received about problems within its network is unknown. Some parties who approached us alleged they had first approached someone from 7-Eleven with their concerns, such as a district manager. 7-Eleven confirmed employees who approached them with pay concerns were offered assistance if they were prepared to reveal their identity to their employer, or provided with our contact details.

What is clear is that at least since the FWO's audits in 2009, 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. This included relying on inaccurate records and/or inputting false information about working hours into the 7-Eleven payroll system. Despite these signs, 7-Eleven did not appear to have made major changes to their payroll system or store review process to target the risk of false record keeping. Based on information known to this Inquiry, the payroll aspect of store reviews did not sufficiently interrogate store practices or records to uncover signs of non-compliance where a franchisee sought to hide it.

It is our opinion that 7-Eleven had a reasonable basis on which to inquire and to act. To the extent that 7-Eleven contends that issues were limited to the few rather than the many, the FWO provided evidence of widespread compliance risks across the network in October 2014 at the commencement of the Inquiry, and again in May 2015 when presented with the preliminary findings of the 20 stores audited in September 2014.

7-Eleven controlled the settings of the system in which franchisee employers operated. Moreover, 7-Eleven had the resources and tools to inquire into and direct the behaviour of franchisees. They did not do so in any significant way until exposed to public scrutiny.

Recent changes to the 7-Eleven model and planned changes to the payroll system, welcomed by us, demonstrate 7-Eleven's capacity to:

- use the control they exercise over their network to actively identify deliberate non-compliance
- limit opportunities for their systems to be exploited, making it harder for franchisees not to comply with the law.

At various points 7-Eleven has taken action, however it is the view of this Inquiry that it could have done more, and acted earlier.

While we acknowledge the real and significant steps taken by 7-Eleven to begin to rectify the situation, there is still much to do. Creating a culture of compliance from the top down will require a sustained and committed effort throughout the organisation, and resource allocation over a long period of time. Sustained change in behaviour is most likely to be achieved if driven by the franchisor.

Deliberate contravening behaviour, particularly around false record keeping, appears to be ingrained within aspects of the network. If some 7-Eleven franchisees have built into their business model the underpayment of employees, particularly vulnerable workers, this culture will be difficult to address notwithstanding 7-Eleven's recent efforts to implement record keeping systems which greatly enhance record compliance.

The reported outbreak of demands to employees to pay back wages illustrates the lengths some franchisees will go to and the degree of leverage they have over employees. Difficulties in obtaining corroborative evidence of threats or coercion relating to this behaviour highlight the limits of what a regulator can achieve in terms of enforcement and rectification outcomes.

It may be that chronic underpayments and associated behaviour will not be entirely eradicated as long as these operators continue to be part of the 7-Eleven network.

Any business encountering deliberate and longstanding non-compliance of the nature observed in the 7-Eleven network will face challenges in overcoming entrenched behaviours, especially in a large and complex business. Sustainable compliance will only be achieved through persistent, resourced and ongoing accountability measures that root out non-compliance and ensure serious consequences for stores that continue to engage in this behaviour.

The balance of risk and rewards for non-compliance should be considered by both 7-Eleven and Government. The consequences of this type of behaviour must be more serious than the benefits that flow from underpaying employees if we are to impact behaviour. Financial penalties that are significantly lower than the savings to be made from underpaying wages have minimal deterrence impact. The real threat to a franchisee of losing their business due to breaches of the franchise agreement is a strong deterrent.

As detailed elsewhere in this report, there is a view expressed by 7-Eleven that the operation of the Franchising Code limits 7-Eleven's capacity to take action against franchisees who are found to have underpaid workers and/or kept inaccurate records particularly when a franchisee rectifies an underpayment. Whether that is indeed the effect of the Code is not an area on which the FWO is an authority and is likely to vary depending on the facts of each case. We would, however, hold serious concerns if another piece of Commonwealth regulation inhibited the capacity of a business to address serious non-compliance with workplace laws. The intersection between the two frameworks would benefit from closer review to properly assess whether changes or clarification (including adjustments to the Code) are needed.

The Inquiry has encountered examples of 7-Eleven franchisees doing the right thing and, in other cases, responding to our education and enforcement efforts by fixing practices. These stores are an asset to 7-Eleven and have an important role in setting the standard for stores new to the network.

While 7-Eleven is not legally responsible for entitlements payable to employees of franchisees, it has a moral and ethical responsibility for what has occurred within its network and is capable of preventing it occurring again. This conclusion informs our recommendations on what steps 7-Eleven should take, which are set out below.

7.1 Responsibility beyond the employers (franchisees)

7.1.1 Accessorial liability

The FW Act continues the customary approach of centuries of labour law, which is that the legal rights and obligations of an employment relationship lie with the employer and employee.

However, the FW Act does enable the extension of liability for contraventions of workplace laws to persons who are an accessory to those contraventions.

Specifically, section 550 of the FW Act provides that a person who is ‘knowingly involved in’ a contravention of a civil remedy provision is taken to have contravened that provision and is exposed to penalties and other orders flowing from that contravention. A person is ‘involved in’ a contravention if they:

- aided, abetted, counselled, procured or induced the contravention
- conspired with others to effect the contravention
- were in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.

The FWO frequently uses section 550 to commence court proceedings against alleged ‘accessories’ to contraventions. Most commonly, accessories are individuals involved in running the employing entity that committed the contravention (the ‘primary contravenor’). This includes company directors, company officers, and—albeit less commonly—human resources officers or professional advisors.

Section 550 is a critical tool for us to use to bring culpable individuals to account, especially in circumstances where the employing entity has been deregistered or liquidated, as often occurs during our investigations or after we have commenced court proceedings.

Accessories can also be other businesses in a position of power within the same supply chain as the employing entity, such as a head contractor or franchisor.

We have used section 550 to bring parties other than the direct employer to account. For example, a company receiving the benefit of labour provided by contractors, when the price paid under the contract was insufficient to pay worker wages.

In one such case, the matters of *FWO v Al Hilfi* (SAD 27/2012) and *FWO v Al Basry* (SAD 108/2012)⁴¹ concerned a trolley collecting supply chain:

- Coles Supermarkets Australia Pty Ltd sat at the top of the supply chain in which the contract price paid was not sufficient to cover workers' minimum entitlements and workers were significantly underpaid.
- Mr Ahmad Al Hilfi and Mr Ayam Al Basry sat at the bottom of the supply chain as the employing entity.
- Mr Nidal Albarouki and Mr Clency Ferriere, respectively the former owner and general manager of the trolley collecting companies Starlink International Group Pty Ltd and Starlink Operations Group Pty Ltd (in liquidation), sat in the middle of the chain as the intermediary.

In this matter, we obtained penalties of \$94 050 against each of Mr Albarouki and Mr Ferriere in respect of their involvement in the underpayments. Coles Supermarkets also entered into an Enforceable Undertaking with us, where it admitted it had an 'ethical and moral responsibility' for the conduct of all persons involved in its business. This was the first time a major supermarket chain had accepted responsibility for compliance with workplace laws in its supply chain.

We recently commenced proceedings against an accounting firm and its operations manager in respect of their alleged involvement in underpayment of two Taiwanese backpackers working for one of their clients.

In 2014–15, we initiated 50 civil penalty litigations, 36 of which (72%) included an alleged accessory. In the current year to date, 94% of matters commenced have included at least one alleged accessory, in some instances two or more. In 2014-15, 33 matters commenced by us were determined by a court, including 31 commenced in prior years. This resulted in court-ordered penalties of more than \$2.3 million. Twenty six of these matters involved an accessory. In these matters, penalties of \$1 909 093 were ordered, including \$571 889 against accessories.

Despite our frequent, and successful, use of section 550, the threshold required to prove accessorial liability is a high one.

⁴¹ See joint penalty decision: *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193

Firstly, we must prove the contraventions against the primary contravenor with respect to a particular employee. Then, we must prove accessorial liability against the alleged accessory.

To 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.

Actual knowledge encapsulates the concept of being 'wilfully blind' or deliberately shutting their eyes to those facts. However, negligence or recklessness is not enough.

Recent decisions relating to the type of knowledge required in respect of alleged contraventions of section 45 of the FW Act have pushed this threshold still higher. Section 45 deals with contravening a term of a modern award and is a commonly litigated contravention for us. Recent decisions suggest we must prove knowledge of the *specific award or application of an award, even if not named*, rather than knowledge only of the *facts that comprise the particular contravention*.

Mere knowledge of general non-compliance or suspicions about compliance will not be sufficient to meet the test of section 550. A person or company must have been involved in (i.e. had knowledge of or participated in) the specific conduct which constitutes the primary contravention. For underpayments this will generally involve establishing that the accessory had knowledge that:

- an award applies to the specific employer and its employees and sets out minimum rates or other entitlements
- 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)
- the employer did not meet those entitlements i.e. the employee(s) were not paid.

This may be established where an accessory is:

- involved in setting wage rates below the award minimum on behalf of a business
- aware that the employee(s) work particular hours and are paid those set rates (often because they process payments and/or create or access employee records).

Where an accessory is not involved in the daily operation of a business, the likelihood that they have this knowledge becomes more remote, and more difficult to establish to the requisite standard. Generally establishing accessorial liability in these contexts relies on us being able to obtain direct evidence. This can be in the form of records, correspondence, or

corroborating witnesses who attest to the accessory's role in or knowledge of the business and the facts comprising the contravention.

7.1.2 Accessories in the 7-Eleven context

There are a number of parties beyond the employer franchisees who may have known or had the means to find out about underpayments in the network.

Individuals employed by 7-Eleven and various providers contracted to provide HR or payroll support may have had access to information relevant to establishing accessorial liability. However, knowledge of or capacity to access some facts alone is not sufficient. The individuals must have been 'involved in' the conduct, or had the requisite knowledge of the essential facts of the identified contraventions of the FW Act alleged against a specific franchisee.

The Inquiry has been characterised by a large number of relevant witnesses being unwilling to talk to us on the record or provide evidence of the conduct of others. Anecdotal material and hearsay about what 'people' within 7-Eleven may have known at particular points in time may support a broad inference that 7-Eleven, or some of its people, knew or suspected that underpayments were occurring. However, an inference based on hearsay or speculation is not evidence. It does not demonstrate knowledge of specific contraventions by a specific franchisee, as required by section 550 of the FW Act.

We have closely investigated many individual underpayments as part of this Inquiry. A number of these investigations resulted in litigations, each of which includes an alleged accessory, usually in the form of a franchisee/director. At the time of settling this report, there has not been evidence arising out of any FWO investigation into a 7-Eleven franchise of involvement in a proven contravention by the franchisor or any other person other than directors of franchisees that would satisfy section 550 of the FW Act.

Unlike some regulators, we do not have the capacity to require any person to answer questions on the record in relation to alleged contraventions of workplace laws. If we had that capacity, with the accompanying immunity that generally flows to the witness, we would be better equipped to seek evidence from individuals about people and entities who may be involved in identified contraventions by a franchisee.

Absent that power, we rely on information gathered through other means. Investigations in this Inquiry have been characterised by widespread lack of cooperation and creation of records that concealed rather than established contravening conduct. In this context

evidence obtained can limit our capacity to investigate and establish accessorial liability beyond the direct employer/franchisee level.

8. Recommendations

Serious non-compliance has occurred in a way that is difficult for the FWO to detect and remedy. We have observed a range of drivers contributing to non-compliance. We have also seen how systems of non-compliance have evolved in response to increased scrutiny.

Some of the drivers of non-compliance are outside the workplace relations framework. Conduct observed by this Inquiry touches on a number of other regulatory frameworks including corporations, immigration, competition and taxation law.

Addressing workplace relations non-compliance with respect to visa holders is a priority for FWO. Under the current settings, we are unlikely to eradicate serious and deliberate breaches, which traverse multiple regulatory frameworks, if working alone.

These other frameworks provide opportunities and remedies that, if harnessed by Government and other stakeholders, could more effectively inhibit deliberate manipulation of regulatory frameworks to exploit vulnerable workers. These remedies could collectively address employment of visa holders in breach of visa conditions, phoenixing by corporate entities and breaches of taxation laws.

The recommendations in this report therefore target 7-Eleven specifically, the FWO, as well as the settings of other regulatory frameworks. They would allow us to specifically address non-compliance in 7-Eleven, as well as enhance our capacity to address conduct outside the subject of this report.

In making recommendations that go to broader impact, the FWO recognises the need to balance the range of policy and regulatory settings each of the frameworks are seeking to address.

With this in mind the Inquiry makes the following recommendations:

That 7-Eleven:

1. Enters into a compliance partnership with the FWO wherein 7-Eleven would publicly accept it has a moral and ethical responsibility to require standards of conduct from all franchisees and individuals involved in its enterprise, that:
 - a. comply with the law in relation to all workers at all of its stores

- b. meet Australian community and social expectations, to provide equal, fair and safe work opportunities for all workers at all of its stores
 - c. establish sustainable self-monitoring arrangements
 - d. facilitate cultural and behavioural change, throughout its company and broader network
 - e. lead to continuous improvement.
- 2. Implements effective governance arrangements that ensure compliance with all relevant Commonwealth laws, specifically addressing:
 - a. line management accountabilities
 - b. mechanisms for identifying, escalating and addressing potential non-compliance
 - c. development of transparent and verifiable payroll systems
 - d. business and financial training of franchisees
 - e. awareness and understanding by franchisees, employees and third party providers such as payroll and human resources providers of workplace and migration laws, specifically addressing issues of accessorial liability.
- 3. Reviews its operating model to ensure:
 - a. compliance with all workplace laws is achievable, practicable and fair
 - b. regular review of the financial viability and legal exposure of franchise agreements.

That the FWO:

- 1. Refers to the DIBP, ASIC and the ATO for investigation any relevant matters relating to the respective jurisdictions highlighted in this report, including matters relevant to taskforces established between them.⁴²
- 2. Seeks to enhance the existing engagement with the DIBP to share information that promotes compliance with the *Fair Work Act 2009* and relevant migration laws, and facilitate protection of vulnerable workers by:

⁴² Department of Immigration and Border Protection (DIBP), The Australian Securities & Investments Commission (ASIC), Australian Taxation Office (ATO).

- a. exploring a broader protocol with respect to visa holders who may have breached their visa obligations while subject to exploitative employment arrangements
 - b. enhancing the referral of information from FWO to DIBP for investigation in relation to possible breaches of the *Migration Act 1958*, particularly cases involving allegations that visa status is being used to pressure, coerce or threaten employees to accept less than their statutory entitlements and/or to withhold concerns from any person including the FWO with respect to their statutory entitlements.
3. Engages with the ACCC to share information and intelligence relevant to promoting compliance with all applicable laws and codes, and to assess and clarify the intersection between the Franchising Code and the workplace relations framework to ensure appropriate balance between protections for franchisees and employees.
4. Continues to pursue parties that deliberately falsify records in order to disguise underpayment of wages although the maximum penalties under the current framework may be significantly lower than the value of the underpayments involved.
5. Continues to maximise use of accessorial liability to ensure those involved in serious breaches of workplace laws are held accountable, noting the evidentiary requirements and our lack of capacity to require any person to answer questions on the record in relation to alleged contraventions of workplace laws.
6. Undertake a dedicated engagement and awareness campaign aimed at international students. Actively work with intermediaries such as students associations, educative institutions, employer groups and other government agencies to develop new policies, initiatives and improved educative resources with the aim of ensuring international students have an increased awareness of Australian workplace rights and responsibilities, appropriate in-language materials to assist them working in Australia and clear and accessible pathways for requesting the assistance of the FWO.

8.1 Detailed recommendations specific to 7-Eleven

The FWO recommends that 7-Eleven:

1. Enter into a compliance partnership with the FWO wherein 7-Eleven would publicly accept it has a moral and ethical responsibility to require standards of conduct from all franchisees and individuals involved in its enterprise, that:
 - a. comply with the law in relation to all workers at all of its stores
 - b. meet Australian community and social expectations, to provide equal, fair and safe work opportunities for all workers at all of its stores.
2. The terms of the compliance partnership would be contained in the form of a Proactive Compliance Deed designed to facilitate sustainable compliance. Some of these terms would include 7-Eleven:
 - a. Acknowledging that its franchise model and administrative processes, including the requirements of its payroll systems and internal audits, have in some instances contributed to an environment where employees have been highly vulnerable to exploitation, including by way of underpayment.
 - b. Taking steps to improve the employment practices of its franchisees by implementing fundamental, permanent and sustainable changes to its franchise model to ensure workplace relations laws, including the Fair Work Act 2009 and related instruments, are fully complied with for all employees in each of its franchises.

Some proposed 'steps' should include:

Identifying employees and maintaining employee records

1. 7-Eleven should implement systems to ensure the hours worked by all people, including franchisees, can be readily ascertained, including by:
 - a. Implementing a biometric time recording system for all employees and franchisees to allow 7-Eleven to maintain and monitor accurate records of working hours, including start and finish times, and which requires periodical verification at regular intervals throughout an employee's shift.
 - b. Requiring weekly store rosters to be provided to 7-Eleven on a weekly basis and/or captured in the biometric system.
 - c. Maintaining photographic identification of all employees.

- d. Owning and operating all CCTV systems in 7-Eleven franchises, ensuring they have capacity to store footage, and preventing franchisees from accessing them to alter recording or storage of footage.
- e. Ensuring ongoing integrity of electronic systems through appropriate oversight and maintenance.

Self-auditing and reporting to the FWO

- 2. 7-Eleven should engage an external party to conduct annual audits of compliance with the Fair Work Act 2009 and applicable Fair Work Instruments in all its franchises. The requirements of the audit, and the requirement to report to the FWO, would be outlined in the proposed Proactive Compliance Deed.
- 3. 7-Eleven should appoint specific senior personnel to have responsibility for internal auditing of time and payroll data. They will oversee identification and investigation of irregularities which may indicate non-compliance e.g. inconsistencies with wage modelling, low turnover, recording of fractions of hours, payment of flat rates of pay above award, and payment of 'high' hourly rates of pay.
- 4. 7-Eleven should identify 'high risk' stores as part of the payroll auditing process outlined above. An internal investigator should then conduct 'forensic' investigations of this store by gathering and testing evidence to identify underpayments.

Employee hotline/Intelligence gathering

- 5. 7 Eleven should promote the 7-Eleven employee telephone and email hotline service to all new and existing 7-Eleven staff. The hotline must have the capacity to respond to and manage complaints made anonymously and to capture information provided by employees, franchisees and members of the public. 7-Eleven should monitor allegations, trends, and concerns from calls to this line and identify stores, areas and regions for further investigation. Additional requirements for the hotline service would be outlined in the proposed Proactive Compliance Deed.
- 6. 7-Eleven will engage an external, suitably qualified, dedicated human resources specialist with responsibility for overseeing the hotline, managing responses to all enquiries and investigating complaints and grievances from employees of 7-Eleven franchises. The human resources specialist must provide written reports to 7-Eleven management informing them of complaints, enquiries and grievances and

the responses. 7-Eleven must also report to the FWO on action taken to respond to employee complaints, enquiries and grievances.

Rectification of underpayments

7. 7-Eleven should establish a 'guarantee' reserve fund which will be maintained by 7-Eleven to cover payments to 7-Eleven workers found to be underpaid and where the relevant employing entity fails to rectify the underpayment. Additional requirements for the reserve fund would be outlined in the proposed Proactive Compliance Deed.
8. Where an allegation is made that an employee has been underpaid, and that underpayment has been substantiated to the reasonable satisfaction of 7-Eleven or the FWO, 7-Eleven will:
 - a. require the franchisee to rectify the underpayment
 - b. if the franchisee fails to rectify the underpayment within 30 days, make an ex gratia payment to the employee to rectify the underpayment.

Wage costs of franchises

9. Prior to the sale of any new or existing 7-Eleven franchise, 7-Eleven should provide the following information to each prospective franchisee:
 - a. information outlining the applicable minimum wages, loadings, penalty rates and overtime rates of pay for full-time, part-time and casual employees of each classification under the relevant award or Enterprise Agreement
 - b. detailed wage modelling, verified by 7-Eleven senior management, outlining the minimum wage costs required to operate the relevant 7-Eleven store
 - c. details of the specific store's income and expenditure data for a period of two years.
10. 7-Eleven should provide to its existing franchisees, detailed financial statements signed and verified by senior management of 7-Eleven, outlining the franchisee's profit and loss over the previous two financial years, including amounts spent on wages. Where the profit and loss statement indicates wage costs below award wage modelling, 7-Eleven must notify the franchisee and refer the store to the external human relations specialist for investigation.

Engagement of employees

11. 7-Eleven should insert into its online employee training material information regarding:

- a. the hotline service
- b. how to provide information to 7-Eleven anonymously
- c. information about training and the requirement that all training is paid
- d. information about cash back and unreasonable requirement to spend money
- e. information to address the 'cultural of acceptance', in particular employer responsibilities in respect of compliance with visa requirements and workplace laws and ensuring the commercial viability of a business.

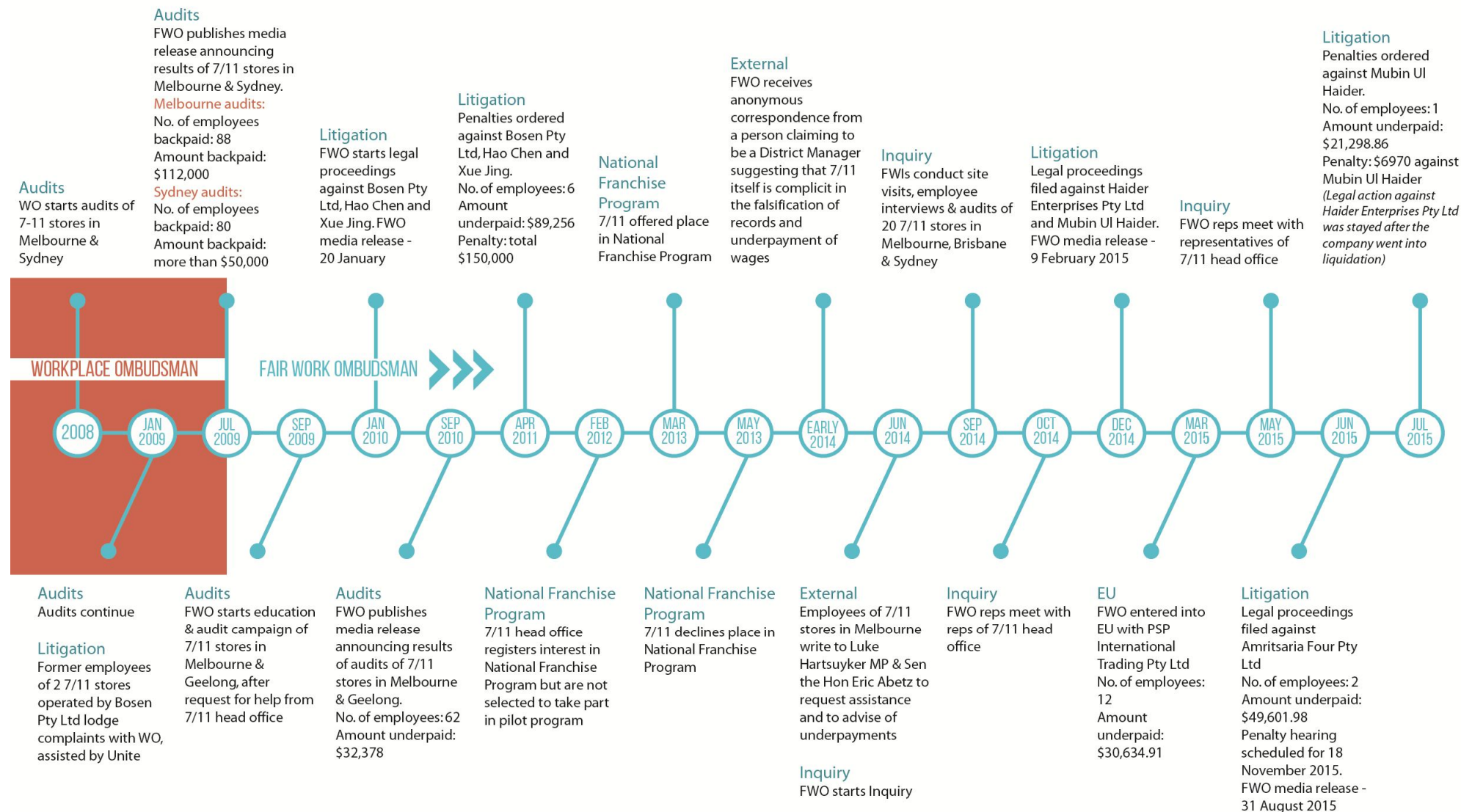
12. 7-Eleven should create a staff consultative forum with employee representatives from across the network. This forum should remain separate from the franchisees and have direct contact with 7-Eleven management to share information and updates.

Engagement of franchisees

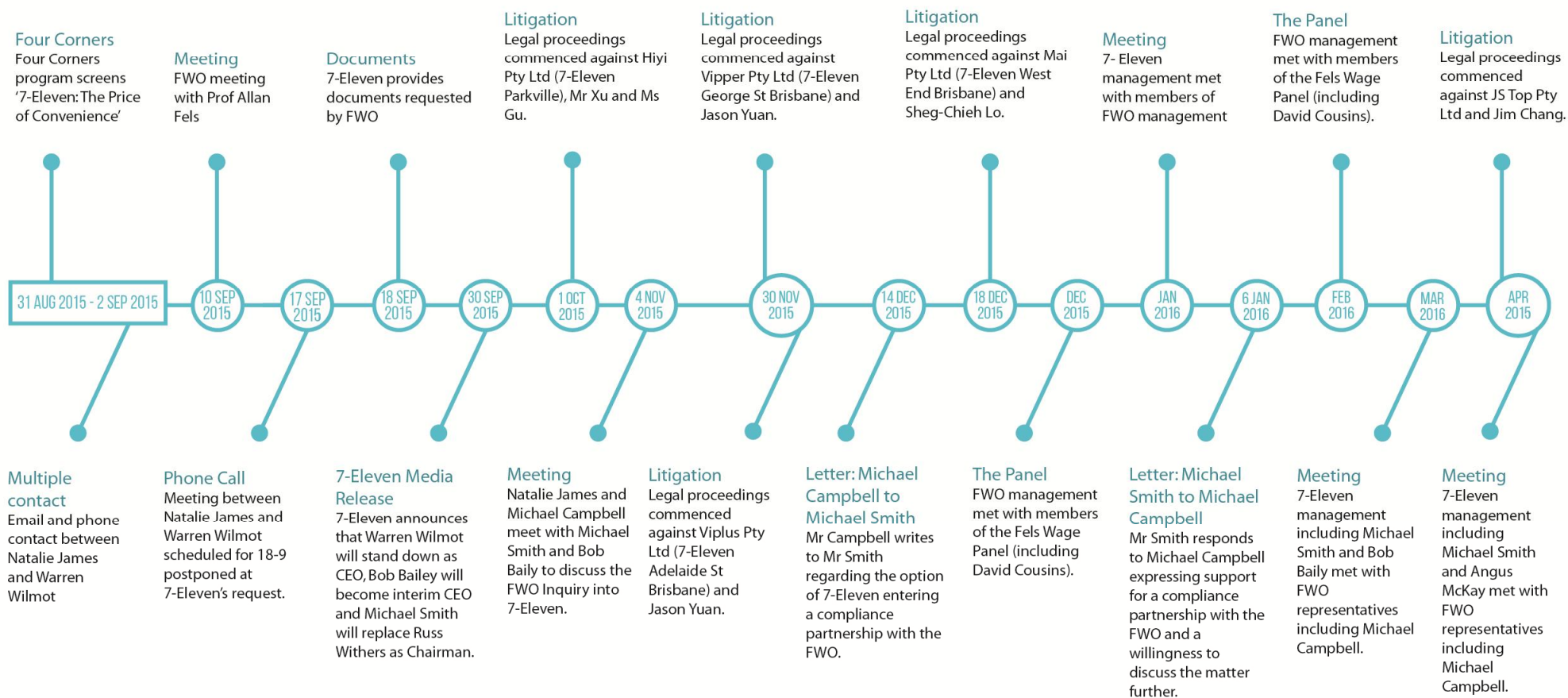
13. 7-Eleven should take steps to ensure that each franchisee enters into a compliance commitment document, in which they:

- a. certify that its directors, officers and managers understand their obligations to comply with Commonwealth workplace laws
- b. agree to report to 7-Eleven every six months on the details of the terms and conditions upon which each employee is engaged
- c. certify that its director, franchisees, officers and managers will not require or accept payments from employees in respect of wages paid, and acknowledge that such conduct is unlawful.

Appendix A – Timeline: FWO and 7-Eleven 2008 – April 2016



Appendix A – Timeline: FWO and 7-Eleven 2008 – April 2016 (Continued)



About the Fair Work Ombudsman

The Fair Work Ombudsman (FWO) is an independent statutory agency, created by the *Fair Work Act 2009* on 1 July 2009.

We support compliant, productive and inclusive Australian workplaces.

For further information and media enquiries please contact FWO media (media@fwo.gov.au).

Our Strategic Intent as well as our Compliance and Enforcement Policy can be located at <http://www.fairwork.gov.au/about-us/policies-and-guides/internal-policies-and-plans#strategic>

If you would like further information about the FWO's Compliance and Enforcement policy please contact Steve Ronson, Executive Director – Dispute Resolution and Compliance (steven.ronson@fwo.gov.au).