

21 April 2017

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Response to questions on notice: Corporate Avoidance of the Fair Work Act Inquiry

Thank you for the opportunity to provide further information in response to questions taken on notice at the public hearing of the Senate Inquiry into Corporate Avoidance of the Fair Work Act. We hope the information below is of assistance to the Committee.

1. Stopping exploitation of international students and other temporary visa holders

1.1. Role of Australian educational providers

WEstjustice has not directly assisted international students that have been exploited through educational providers colluding with overseas 'agents' and employers in instituting unlawful work arrangements, like unlawful unpaid 'internship' programs. However, we are aware that these cases exist,¹ and would like to draw the Committee's attention to an example of a Sydney Chinatown restaurant 'internship' program that was paying a young worker around \$4 an hour (**Attachment 1**). This example has been provided by Taiwanese Working Holiday Youth and we understand that it is being investigated by the Fair Work Ombudsman (**FWO**).

We also note that further research is required into international student's exploitation at work and the best ways to deal with this. As the Committee may already be aware, research funded by the FWO is currently being undertaken by Dr Joanna Howe and Professor Alex Reilly from the University of Adelaide to examine the experience of international students in the Australian workplace. We hope that this research will generate some practical recommendations for solutions to this growing issue.

Educational services for overseas students (ESOS)

Currently, educational providers have some general obligations towards the international students studying at their institution. These obligations are set out in the ESOS Legislative Framework, based around the *Education Services for Overseas Students Act 2000* (Cth) (**ESOS Act**), and related regulations, legislative instruments and code of practice.² The Australian Government Department of Education and Training has oversight of the ESOS legislative framework, supported by designated State authorities.

¹ See e.g. <http://www.smh.com.au/business/workplace-relations/company-fined-272850-for-disguising-employees-as-unpaid-interns-20160603-gpalrx.html>.

² See e.g. <<https://internationaleducation.gov.au/Regulatory-Information/Education-Services-for-Overseas-Students-ESOS-Legislative-Framework/ESOS-Regulations/Pages/default.aspx>>.

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WEstjustice does not have specific expertise on the ESOS Act and related legislative framework. As such, we can only note that, if it hasn't been done already, it would be worth investigating whether the ESOS legislative framework is a useful mechanism for helping to ensure that educational providers are sufficiently protecting vulnerable students from exploitation at work. This may include considering whether:

- The general obligations of educational providers under the ESOS Act extend/could be extended to include providing mandatory information to international students about their rights at work, the FWO and legal services available to assist them, and
- Ensuring there is effective penalties and/or deregistration pathways under the ESOS Act for educational providers that are found to be involved in contraventions of the *Fair Work Act 2009* (Cth) (**FW Act**).

Workplace relations framework

Educational providers who are involved in unscrupulous and unlawful arrangements with overseas agents and Australian employers should be able to be held accountable under the Australian workplace relations framework.

Currently, the accessorial liability provisions in section 550 of the FW Act only attribute liability in limited circumstances, including where there is aiding, abetting, counselling or procurement or the accessory is 'knowingly concerned.' This may cover some of the more egregious cases; however, in many instances it is extremely difficult to gather sufficient evidence generally to prove this type of accessorial liability in relation to third party entities.

Although the FWO has recently used section 550 with some success,³ Hardy notes that there have only been a 'handful' of cases where section 550 has been used to argue that a separate corporation is 'involved' in a breach. Although not yet determined in a substantive proceeding, 'court decisions which have dealt with similar accessorial liability provisions arising under other statutes suggest that the courts may well take a fairly restrictive approach to these questions.'⁴

We recommend amendments to the FW Act to extend liability in specific circumstances to assist legal services like ours to hold indirectly responsible entities accountable.⁵ In this case, where educational providers are involved in a contravention and have been in any way, by act or omission, directly or indirectly concerned in the contraventions and they have influence or control of the international student's affairs or the affairs of their employer.

The expansion of the enforcement role of the FWO (discussed in section 2 below) would also assist international students to enforce their rights at work. In addition, if they are not already, the Australian Government Department of Education and Training and the International Student Ombudsman should take an active role in working with FWO to ensure that international students are not being exploited at work. To this end, perhaps the

³ For example, Joanna Howe explains how the FWO brought a claim against Coles for labour hire company Starlink's treatment of trolley collectors. The FWO secured an enforceable undertaking with Coles in which it agreed to rectify underpayments. See Joanna Howe, Submission 109 to Economic, Development, Jobs, Transport and Resources, *Inquiry into Labour Hire and Insecure Work*, 2 February 2016.

<http://economicdevelopment.vic.gov.au/_data/assets/pdf_file/0007/1314619/Submission-Dr-Howe.pdf>.

⁴ Hardy, above n 5, 10.

⁵ For more detail and drafting suggestions see the WEstjustice submission to the Senate Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, available at

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/VulnerableWorkers/Submissions>.

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International Student Ombudsman could join the Migrant Worker Taskforce if they are not already involved (we understand that the Australian Government Department of Education and Training already participate). Our support for the expansion of FWO enforcement powers, and collaboration with other government agencies, is subject to sufficient protections for international students and other migrant workers on temporary visas as set out in section 1.2 below.

1.2. Protecting migrant workers on temporary visas

We need to take immediate steps to protect vulnerable workers on temporary visas, including international students. The Australian Government's Migrant Worker Taskforce announced in February this year that where temporary visa holders with a work entitlement attached to their visa may have been exploited and they have reported their circumstances to the FWO, the Department of Immigration and Border Protection (**DIBP**) will generally not cancel a visa, detain or remove those individuals from Australia, providing: the visa holder commits to abiding by visa conditions in the future; and there is no other basis for visa cancellation (such as on national security, character, health or fraud grounds).⁶ This agreement between DIBP and FWO has now been published on FWO's website,⁷ and will hopefully be widely communicated by the government.

While this is a positive development, alone it will not be sufficient to reassure vulnerable migrant workers on temporary visas that it is safe to come forward and report exploitation to the FWO without further legislative and other reform.

The [Not Just Work Report](#)⁸ suggests 10 steps to stop the exploitation of vulnerable migrant workers on temporary visas, including the following legislative changes:

- The *Fair Work Act 2009* (Cth) should be amended to:
 - state that it applies to all workers, regardless of immigration status
 - insert a reverse onus of proof in wage claims
 - extend the unreasonable payments and deductions provision to prospective employees
 - extend liability for breaches of the FWA liability to labour hire hosts, supply chains heads and franchisor entities and all relevant indirectly responsible entities,⁹ and
 - insert a statutory definition of employee and independent contractor that contains a presumption that workers are employees and amend the 'recklessness/lack of knowledge' defence to place an obligation on employers to ensure they classify workers appropriately, and
 - strengthen the FWO's enforcement powers to ensure all parties engage with the FWO's processes (subject to protections for vulnerable workers).

⁶ Professor Allan Fels AO, *Chair's Public Statement February 2017*, Migrant Worker Taskforce, Australian Government Department of Employment, available at <<https://www.employment.gov.au/chairs-public-statement-february-2017>>.

⁷ Available at <<https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>>.

⁸ Hemingway, above n3.

⁹ For more detail and drafting suggestions see the *WEstjustice submission to the Senate Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/VulnerableWorkers/submissions>.

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- The *Migration Act 1958* (Cth) should be amended to:
 - introduce a proportionate system of penalties in relation to visa breaches
 - ensuring workers are not sent home before valid legal proceedings are concluded allow to remain in country, and
 - ensure visas have clear paths to permanent residency.

In addition to legislative reform WEstjustice supports the following changes:

- A Ministerial Directive setting out a proportionate response to visa breaches, as recommended by the Redfern Legal Service (**Attachment 2**).
- The Fair Entitlements Guarantee (**FEG**) should be expanded or a wages insurance scheme introduced, and
- Increased scrutiny and accountability by relevant Government Department's and FWO of exploitation occurring under government funded initiatives, like jobactive or government subsidised apprenticeships and traineeships.

2. Fair Work Ombudsman's enforcement of the workplace relations framework and repeat offenders

To date, WEstjustice has not seen additional clients from an employer that we have previously referred to the FWO and where enforcement action was undertaken against that employer. However, we understand anecdotally that other organisations have had this experience. The primary concern for us is that FWO lacks the resourcing to pick up all of our referrals (which we have assessed as meritorious), and where they do pick up referrals and an employer refuses to engage with the process FWO are often unable to progress the matter further. It is also worth noting that in our experience whether the FWO will investigate a matter is decided on a case by case basis. They do not appear to have a practice to always re-open a file where there is a new complaint about an employer that they have already investigated or taken enforcement action against.

The WEstjustice employment law service has, however, seen multiple clients from the one employer: as a group, as a worker that has referred another worker or in separate instances where workers have come to us without knowing the other worker. We have also seen a client from an employer after we have already dealt with that employer in relation to a previous client matter. This highlights the extent of the problem of systemic and deliberate corporate avoidance of the FW Act.

We believe that if we implement the 10 steps to stop exploitation as set out in the [Not Just Work Report](#)¹⁰ then corporate avoidance of the FW Act will be minimized. These steps include implementing key legislative and procedural changes, along with strengthening FWO's enforcement role and community based employment services. If these steps are implemented they will assist in providing access to justice for vulnerable workers that have been exploited, incentivize proactive compliance and send a clear message to businesses that are breaking the law that they will be effectively penalized to deter future breaches.

¹⁰ Hemingway, above n3.

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2.1. FWO resourcing and enforcement powers

As set out in the [Not Just Work Report](#),¹¹ we recommend changes to make agencies like the FWO more active and accessible. These recommendations include ensuring that regulators having sufficient funding and powers to address non-compliance and promote systemic reform.

Specifically, to ensure claims are resolved efficiently and effectively without the need for Court, WEstjustice recommends that the FWO should have increased powers, including the power to determine claims:¹²

- To make it clear that there will be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO, and
- Where an employer refuses to participate in mediation, FWO issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise.

2.2. Other reforms to stop repeat offenders and encourage compliance with Fair Work Act

In addition to legislative reform, WEstjustice notes that without targeted education and assistance to understand and enforce their rights, vulnerable workers including international students often cannot access the law at all, due to a variety of barriers explained in the [Not Just Work Report](#)¹³ (including language, practical and cultural barriers).

Active and accessible government agencies are essential. However, there is a strong consensus that community based employment services are required to provide sustained direct engagement with communities and a link between communities and government agencies. Currently services are limited. There are some general employment based community legal services, however WEstjustice's Employment Project is the only community based legal service providing specialist employment education and legal services to newly arrived migrants and refugees. In addition, as far as we are aware, only two community legal centre's run specialised services just for international students: the Redfern Legal Service's International Student Service in NSW,¹⁴ and Jobwatch's International Students Works Rights Legal Service which operates out of Study Melbourne Student Centre one day a week.¹⁵

There is a lack of resources being directed towards funding targeted services that play a crucial role in providing meaningful access to justice and achieving positive systemic change. The Migrant Communities Employment Fund (or something similar) is urgently needed to address this issue. There may also be opportunities to fund services to specific subgroups through discrete funds: for examples the expansion of the Tuition Protection Service levy paid by educational providers that are established under ESOS Act to allow this levy to raise money for legal services for international students.

3. Regulating labour hire arrangements and emerging ways of working in the 'gig' economy

We understand that the Committee would like to know whether it is useful to involve Australian Competition and Consumer Commission (**ACCC**) in regulating labour hire arrangements and emerging ways of working in the 'gig' economy.

¹¹ Hemingway, above n3.

¹² WEstjustice submission to Vulnerable Workers Bill inquiry, above n9.

¹³ Hemingway, above n3, Part Five.

¹⁴ See e.g. <<http://rlc.org.au/our-services/international-students>>.

¹⁵ See e.g. <http://www.jobwatch.org.au/index.php?option=com_content&view=article&id=109&Itemid=123>.

3.1. Regulating labour hire arrangements

We support a two-pronged approach to stopping exploitation in labour hire arrangements: changes to the FW Act to help prosecute labour hire hosts,¹⁶ and a labour hire licensing regime. We continue endorse the NUW's Labour Hire licensing model:¹⁷ ideally implemented as a national model. This model proposes that a compliance unit set up within an appropriate existing structure or on a stand-alone basis. In our view the main issue is not which existing structure is most appropriate to house the compliance unit but how it would function, its powers and resourcing, and how well any compliance unit would collaborate with other government agencies to ensure that minimum standards and workplace laws are complied with.

3.2. Regulating emerging ways of working

The types of work arising in the 'gig economy' (particularly app driven) is varied, but generally workers in Australia in these industries are currently being classified as independent contractors. There has been extensive discussion about whether this is the correct classification, particularly in relation to the Uber decision in the UK that Uber drivers are employees not independent contractors.¹⁸ The Young Workers Centre's submission to this Inquiry also contains a useful discussion and examples of the issue of sham contracting in the gig economy.

Sham contracting

The [Not Just Work Report](#)¹⁹ sets out multiple recommendations in relation to sham contracting. These include the following changes to the FW Act (as outlined in section one):

- Insert a statutory definition of employee and independent contractor that contains a presumption that workers are employees (for clarity a mirror definition could be inserted into the *Independent Contractors Act 2006* (Cth)), and
- Amend the 'recklessness/lack of knowledge' defence to place an obligation on employers to ensure they classify workers appropriately.

In addition to changes to the FW Act we also recommend:

- More rigorous tests should be applied before an Australian Business Number (**ABN**) is given to an individual and on the spot ABN inspection and assessment should also be increased, and
- Measures to limit phoenix activity. We draw the Committee's attention to the detailed recommendations contained in joint report by Melbourne and Monash University into this issue released in February this year.²⁰

¹⁶ Ibid.

¹⁷ WEstjustice (Western Community Legal Centre) submission into the Victorian Government inquiry into the Labour Hire Industry and Insecure Work 2015, available at < <http://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry/submissions> >.

¹⁸ See e.g. <<http://www.abc.net.au/news/2016-10-29/uk-tribunal-rules-uber-drivers-deserve-workers-rights/7977208>>; <<http://www.afr.com/news/policy/industrial-relations/uber-landmark-uk-ruling-on-driver-rights-leaves-australian-arm-vulnerable-20161101-gsfby>>; <<https://www.ashurst.com/en/news-and-insights/legal-updates/the-next-big-gig---are-workers-in-the-sharing-economy-employees/>>.

¹⁹ Hemingway, above n3, Part Five.

²⁰ Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, Research Fellow, *Phoenix Activity: Recommendations on detection, disruption and enforcement*, February 2017, Melbourne University and Monash University, available at < <http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity> >.

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Independent contractors

For genuine independent contractors their minimum rights at work are governed largely by the unfair contract provisions in Australian Consumer Law, with some opportunity for legal review of harsh or unfair contractual terms under the *Independent Contractors Act 2006* (Cth)). There has been some discussion about improving worker rights in the 'gig economy' by bolstering the rights of independent contractors by the insertion of effective minimum entitlements into the *Independent Contractors Act 2006* (Cth)), potentially regulated by the ACCC.

However, our concern is that if a worker is unable to genuinely negotiate a contractual terms then this is an indicator that they should be classified as an employee. We note that if workers are defined as 'independent contractors' in these 'Uber' type situations then are excluded not only from various protections that employees have under the FW Act; but currently they are also unable to organise to protect their rights and interests and unable to collectively bargain to negotiate contracts due to the anti-trust laws.²¹

Due to this, it is our view that to improve workers rights and stop exploitation in the gig economy the primary focus should be on dealing with sham contracting and amending the FW Act to insert a statutory definition of employee which clearly includes workers in an 'Uber' type situation.

Summary

We suggest a range of measure to stop the exploitation of migrant workers and corporate avoidance of the FW Act, as set out in the [Not Just Work Report](#).²² Ideally, and where possible, these measures would be implemented as a cohesive policy plan to tackle this insidious and entrenched problem.

Please let me know if you would like any further information.

Kind regards



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²¹ See e.g. <<http://theconversation.com/explainer-what-rights-do-workers-have-to-getting-paid-in-the-gig-economy-70281>>.

²² Hemingway, above n3.

Sydney Chinatown restaurant used 'internship' program paid young worker \$4 per hour

A famous Chinese food restaurant operating in Sydney, Melbourne and Adelaide is using an "internship" program to attract overseas young students coming to Australia under the 417 visa program.

A group of university students approached T-WHY (Taiwanese Working Holiday Youth) with claims that for 38 hours per week working hours, they only received AU\$185.6.

One worker, aged 22 says, has reported he had only been paid AU\$185.50, or \$4 per hour, for 11 weeks of work.

T-WHY found the operator under the name Moni hospitality group, now deregistered as CAN, has been using 'internship program' to lobby universities to send out their current students to work in the Chinese restaurants in Australia. So far, we have found at least 4 universities allegedly to this international scam.

Last year, Taiwan congressman Lin, Su-Feng through the media conference revealed the dodgy internship program operating cross Taiwan and Australia. Students have claimed that after they undertook the course, the school invited the so call "contractor" to give them a speech in the class and forced them to sign the contract afterwards. The contract indicates the "internship" program will run for whole year, and students have to pay upfront fees AU\$8,000 which includes visa and airfare expenses also contractual fees.

Mr. Jian says, according to the contract the accommodation and food expenses will be deducted from their weekly payment, which is \$210 per week rent and \$215 per week for food. However, he has been cramped into a single room with 7 other people.

However, when Mr. Jian reported back to school about the slavery-like working conditions, the school responded that if he needed the bachelor degree, he had to finish this one-year internship program.

The students are studying a degree in applied foreign language.

They have worked at this Sydney restaurant since the 18th July 2016. We are uncertain if or when employment ceased.

Each student worked between four and six days each week, averaging more than 38 hours of work per week. The hourly rate \$4 is significantly below the Restaurant Industry Award, food and beverage attendant casual level 1 rate of \$22.76 per hour.

The case is under investigation by the FWO, which has investigated similar internship scams. The FWO indicates that the unlawful arrangement and unscrupulous labour contractor operation is wide spread in Australia hospitality industry.



Redfern Legal Centre

Exploitation of International Students in the Workforce

Proposal for a new Ministerial Direction under s499 of the *Migration Act 1958*

Redfern Legal Centre

1. Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.
2. RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and a dedicated international student legal service. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free legal advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

RLC's work with International Students

3. RLC has been providing advice to international students through its international student advice service since October 2011.
4. We launched this service following an increase in the number of international students seeking advice over the previous few years. International students appear to be particularly targeted and vulnerable to exploitation in a number of areas including housing, employment, consumer scams and issues with their education providers.

5. A key feature of the service is access to both legal and migration advice. In our experience international students frequently have a visa issue associated with their legal problem and fears about their visa status can prevent international students from seeking advice or asserting their rights.

Combatting Exploitation of International Students in the Workforce

6. Redfern Legal Centre (RLC) wants to ensure the workplace rights of international students are implemented, complied with and enforced by facilitating safe and secure reporting of breaches of Australian law.
7. The RLC International Students and Employment Law practices regularly deal with international students who face serious exploitation at work but are constrained from taking action if they have worked over their 40 hour per fortnight visa condition, the breach of which is a clear threat to their visa status.
8. The focus of our proposal is to address unscrupulous employment practices and exploitation of vulnerable employees who are very unlikely to report breaches of workplace laws as they risk their visa status.
9. The Senate Report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* ('the Senate Report'), released in March 2016, addressed this issue in detail at Chapter 8. The Report noted, at [8.45]:

... one of the key points emphasised by several submitters and witnesses were the draconian consequences under the Migration Act that flowed from a temporary visa worker breaching a condition of their visa. The severity of the consequences was seen as a structural incentive for an employer to entice or coerce a temporary visa worker into breaching a condition of their visa in order to gain leverage over the worker.
10. See also the Productivity Commission 2015 report *Workplace Relations Framework* regarding threats by employers to report migrants who have breached visa conditions, even where there has been coercion, as deterring complaints of exploitative work conditions. (Productivity Commission Inquiry Report No. 76, 30 November 2015, at 921.
11. We propose a decision making protocol which, in most cases, provides for a first and final warning so, if no further breach, a visa holder can continue with their studies and the integrity of workplace laws and conditions are maintained. This will also allow relevant agencies, including the DIBP, FWO and AFP, to be apprised of unscrupulous employers and labour hire companies and so buttress current

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and ongoing workplace investigations. We propose that this decision making protocol be in the form of a Ministerial Direction as made under s499 of the Act.

12. We have drawn on the submission of Associate Professor Joo-Cheong Tham to the Senate Inquiry, in which he proposed an amendment to the *Migration Act 1958* (the Act) at section 116 and 235 (see the Senate Report at [8.56]ff). We propose that such provisions could be incorporated into a Ministerial Direction.
13. Section 499(1) of the Act empowers the Minister for Immigration and Border Protection (the Minister) to give written directions to a person or body having functions or powers under the Act, if the directions are about the performance of those functions or the exercise of those powers. These directions must be consistent with the Act and the Migration Regulations 1994, and they must be tabled in Parliament after they are given by the Minister. A Ministerial direction made under s499 is binding on a DIBP delegate as:
 - a. s499(2A) provides that a person or body having functions or powers under the Act must comply with directions made under s499(1); and
 - b. s496(1A) provides that persons to whom the Minister's powers under the Act have been delegated (under s496(1)) are subject to the directions of the Minister.
14. Given their nature, section 499 Directions are generally used where the performance of a function (or the exercise of a power) under the Act is of critical importance to the integrity of Government policy to ensure that all ministerial delegates consistently weigh or take into account relevant matters and/or that specified procedures are followed consistently by ministerial delegates.
15. While there are current DIBP instructions (referred to as PAM3 instructions) which delegates may use in visa decision making (including specific visa cancellation instructions) these PAM3 instructions do not hold the same weight as a Ministerial Direction, nor are they as transparent as a Direction, which is required to be tabled in Parliament. For this reason, we propose that a new Ministerial Direction be issued to provide guidance as to appropriate matters to be taken into consideration in the exercise of the discretion whether to cancel a student visas for non-compliance with conditions 8104 or 8105. We would see great benefit in such a Direction on the basis that it:
 - a. Would provide greater transparency as to the visa cancellation process and the factors that a delegate will take into account within the context of exercising the legislative discretion whether to cancel the student's visa under s116(1)(b) of the Act; and
 - b. Would be binding at both primary decision and merits review decision level.

Basis of direction

16. Where the DIBP is apprised of a student's details in which there has been a breach of visa condition 8105, this will not trigger cancellation of the visa unless there has been serious non-compliance. In determining whether this is the case, the decision maker could have regard to factors such as:

- whether the non-compliance/contravention occurred with knowledge of its unlawfulness on the part of the visa-holder;
- the frequency of the non-compliance/contravention;
- the gravity of the non-compliance/contravention;
- whether the non-compliance/contravention was brought about by conduct of others, including employers; and/or
- whether visa-holder previously warned by the Immigration Department in relation to the non-compliance/contravention. (Senate Report at [8.57])

17. Further, we propose the reference to 'conduct of others' would take into account the relative bargaining position of the parties, including importing accepted contractual considerations such as duress, legality, consent. This would allow for relevant considerations to incorporate socio-economic, cultural, educational and other factors influencing the capacity of the visa holder to have consented to the employment contract.

18. To effect this decision making process, we also refer to Associate Professor Tham's proposal for a warning system whereby a system of civil penalties modeled upon section 140Q(1) of the *Migration Act* is introduced. This provides for civil penalties when there is a failure to satisfy a sponsorship obligation by sponsoring employers. As the Senate Report notes, given a maximum of 60 penalty units applies to section 140Q(1), Associate Professor suggested a proportionate penalty for a breach by a visa-holder would be 5 penalty units.

Proposed decision making protocol structure

- a. Decision at first instance: presumption is in favour of the visa holder maintaining visa status and a warning will be issued.
 - (i) The presumption will be rebutted at first instance only in cases of extreme non-compliance
 - (ii) A single breach does not amount to serious non-compliance.
 - (iii) Multiple breaches occurring in a continuing course of conduct will be deemed as a single breach.

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- b. If a subsequent breach: cancellation where there has been serious non-compliance. The first warning is a relevant consideration – as per conditions set out above. See Senate Rec 23, ref [8.263], Senate Rec 22, ref [8.253], Senate Rec 24 [8.269]

Opening the Floodgates?

19. We have taken this proposal to many individuals and organisations working in this field and have had unanimous support. In addition we have submitted the proposal to the Federal Government's Migration Review Taskforce and discussed the proposal with the Taskforce chair, Allan Fels.

We understand that there may be concerns on the part of government because of a perceived loosening up of the regime's objective to ensure students attend the requisite hours at their education institutions.

Our proposal is not likely to open the floodgates for international students to throw in the studies in favour of unconstrained employment. Contraventions will still be subject to regulatory action, including warnings and penalties and still a possibility of visa cancellation where there is a subsequent breach.

Further, non-attendance by students is strictly regulated by the *Education Services For Overseas Students Act 2000* and the *National Code of Practice for Providers of Education and Training to Overseas Students* (National Code). Student visa condition 8202 requires satisfactory course attendance and progress in the registered course.

20. The National Code requires education providers to have documented policies and procedures for recording the attendance and course progression of each international student. The students are expected to achieve a minimum of 70%-80% of the scheduled course contact attendance, with an additional early warning system in place, which notifies the education provider if the student has been absent for more than five consecutive days without approval.

Where there is a breach and the student cannot satisfy internal review processes, the education provider must report to the Secretary of the Department of Education the cancellation of the student's enrolment. Students are given an opportunity to explain their situation to the Department of Immigration, as well as an opportunity to enrol in an alternative course or return to their home country. A breach of student visa condition 8202 may result in cancellation of the student's visa.

21. We consider that our proposal in fact will discourage the current extensive breaches of the visa regime by providing a safer framework for exploited workers to go on the record about their

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circumstances. It is more likely to ensure the workplace rights of international students are implemented, complied with and enforced, by facilitating safe and secure reporting of breaches of Australian law.

All the inquiries, reviews, reports and recommendations into protecting vulnerable migrant workers will not strike at the heart of this shameful workplace abuse as long as employers can wield threats of deportation against those who dare to complain.