

WAGE THEFT AND MODERN SLAVERY RISKS ON CAMPUS

UNIVERSITIES' RESPONSIBILITIES FOR WORKING CONDITIONS IN CONTRACTOR AND TENANT BUSINESSES



UNSW HUMAN RIGHTS CLINIC
AUGUST 2020



UNSW
SYDNEY



Human Rights Clinic
UNSW Law

I INTRODUCTION

In recent years, academic research and media investigations have revealed systemic wage theft and exploitative working conditions across numerous industries in Australia. These include food retail, cleaning, construction and security industries, in which large numbers of international students and other temporary migrants work. Most Australian universities have workers in these industries on their campuses, however these services are now largely outsourced to commercial tenant businesses (e.g. food retailers) or third party contractors (e.g. cleaning services). Exploitation within these industries is widespread in Australia, and university campuses are no exception. Instances of worker exploitation have been identified in the media across numerous Australian university campuses, with calls for universities to accept responsibility and take action to address these issues.¹

Although universities do not have direct employment relationships with workers in tenant and contractor businesses on campus, they bear substantial legal and reputational risks associated with their working conditions. Alongside their legal obligations, universities bear further social responsibilities for these workers that extend beyond those of ordinary commercial landlord or contracting relationships, for several reasons. First, many of the workers in these businesses are international students, and in many retail outlets on campus they are the university's own international students. Second, many Australian universities seek to be social exemplar-setting institutions with core values and commitments to promoting non-discrimination, a just society and respect for human rights. These values are fundamentally undermined by universities' failure to prevent worker exploitation on their own campuses, and expose universities to significant reputational damage when uncovered. Third, as large networked businesses Australian universities have substantial leverage over their suppliers and tenants, and have the capacity to prevent exploitation and ensure it is remedied.

Despite intensified public attention on worker exploitation that has led to numerous legislative reforms, inquiries and expanded enforcement efforts by the Fair Work Ombudsman ('FWO'), universities appear to have taken limited measures to prevent and address worker exploitation within third party businesses on their campuses. A lack of data, exacerbated by the under-reporting of workplace exploitation generally,² has made the problem easy to overlook and difficult to address. However, given the weight of evidence that has emerged regarding noncompliance in these industries, it is no longer possible for universities to turn a blind eye to the high likelihood of violations on their watch.

This brief seeks to assist Australian universities to take effective action by filling several critical gaps in information and legal analysis. First, it identifies areas in which there is a high risk of noncompliance with employment laws by businesses on university campuses, based on new

¹ See, eg, Carrie Wen and Alan Zheng, '[Epic Tea Outlet on Campus Underpaying Staff, Investigation Finds](#)', *Honi Soit* (online, 3 August 2019); Alison Xiao and Natassia Chrysanthos, '[EasyWay on Campus Paying Staff as Little As \\$10 an Hour](#)', *Honi Soit* (online, 7 June 2017); Ruby Perryman and Martin Dittmann, '[Overworked and Underpaid](#)', *FARRAGO* (online, 30 March 2017); Max Koslowski, '[ANU'S Sumo Salad Has Been Paying Workers as Little as \\$12 an Hour for Years](#)', *Woroni* (online, 3 May 2018); CityNews, '[ANU Turns Blind Eye to 'Wage Theft' Says UnionsACT](#)', *CityNews* (online, 4 May 2018); UnionsACT, '[ANU Must Take Action over Woroni Investigation Into Wage-Theft on Campus](#)' (media release, 5 April 2018); Rowan Evans, '[Indian Feast at UQ Underpaid Workers](#)', *Semper Floreat* (online, 12 March 2019).

² Bassina Farbenblum and Laurie Berg, '[Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia](#)' (Report, October 2018).

empirical data, expert consultations and secondary reports. Second, it considers universities' domestic and international legal responsibilities to prevent worker exploitation on university campuses. These include responsibilities under the *Fair Work Act 2009* (Cth) (including accessorial liability for noncompliance by contractors) and reporting responsibilities under the new *Modern Slavery Act 2018* (Cth). It also considers the application of the UN Guiding Principles on Business and Human Rights which provide a best practice approach for businesses to prevent exploitative working conditions and ensure aggrieved workers can access redress. The brief concludes by recommending a range of measures that can be taken by universities in collaboration with other stakeholders to prevent the exploitation of workers on campus and remedy adverse human rights impacts that have already occurred.

METHODOLOGY

This brief draws on a range of primary and secondary data sources. Secondary sources include an analysis of relevant domestic and international law and principles, as well as a review of academic studies, NGO reports, media articles, government enquiries and other publicly available literature on risks of workplace exploitation nationally and on university campuses.

In October and November 2019, the Human Rights Clinic conducted interviews³ with five experts, including, union representatives across Sydney, Melbourne and Tasmania, as well as a university legal services provider and a representative of the Catholic Archdiocese of Sydney's Anti-Slavery Taskforce. The brief is also informed by feedback on earlier drafts and background discussions with a range of experts including staff at the Cleaning Accountability Framework and the Australian Centre for Corporate Responsibility. Finally, the brief incorporates unpublished data from the *Information for Impact* survey supplied by the Migrant Worker Justice Initiative.⁴ The anonymous online survey, conducted between April-May 2019, included responses from over 5,000 international students across Australia, among whom 31 indicated they had worked in a retail outlet on campus. These 31 survey respondents included international students across 10 universities and 6 private colleges. Given the small sample size, the survey data is treated akin to individual interviews that establish examples of the broader issues identified, rather than for quantitative purposes.

II EVIDENCE OF RISKS OF WORKPLACE EXPLOITATION ON UNIVERSITY CAMPUSES

Food retail, cleaning, construction and security industries have each been identified as areas of high risk for workplace exploitation in Australia. Whilst there has not been a comprehensive study of worker exploitation in the Australian university context, there is now clear evidence of its widespread nature across these industries, along with numerous reported incidences in businesses across several university campuses.⁵ These include, for example, wage theft, inadequate record keeping and threats of dismissal at a range of food outlets on university

³ Data was collected pursuant to UNSW Ethics approval no. HC15664.

⁴ For further information on the survey, see www.mwji.org/information4impact.

⁵ Interview with student legal service provider at a Sydney university (31 July 2019); Interview with Victorian union representative (28 October 2019); Interview with a NSW union representative (10 October 2019); Interview with a Tasmania union representative (23 October 2019); Interview with representative of the Catholic Archdiocese of Sydney's Anti-Slavery Taskforce (30 October 2019).

campuses.⁶ This section sets out the categories of worker rights violations, including indicators of modern slavery, that are likely prevalent within tenant businesses and contracted services in several industries.

1. Wage Theft

Government inquiries, media investigations and academic research have found widespread theft of wages and entitlements within the cleaning,⁷ construction,⁸ security,⁹ and food retail industries¹⁰ in Australia. Wage theft includes noncompliance with minimum wages,¹¹ applicable penalty rates¹² and compulsory superannuation contributions.¹³ The mounting evidence leaves no plausible doubt of the high risk of wage theft in any Australian food retail business. For example, in 2017, a Commonwealth Senate committee inquiry found widespread wage theft in the hospitality industry, particularly among international students and other migrant workers.¹⁴ The Senate report estimated one in two workers were not paid in accordance with national minimum wage standards in the industry.¹⁵ The 2017 National Temporary Migrant Work Survey ('NTMW Survey') of over 4,000 migrant workers found that 49% of workers in the food services industry earned \$15 or less per hour. At the time, the legal minimum wage for casual workers was \$22.13 per hour.¹⁶ Courts have similarly accepted that 'the restaurant and hospitality industry have been recognised as notorious for non-compliance with workplace laws'.¹⁷

Wage theft is common within food franchises, in particular fast food outlets and beverage retailers, many of which operate on university campuses. FWO investigations have identified (and publicised) systemic wage theft in food franchises that sell, for example, sushi,¹⁸ bubble

⁶ These included outlets selling bubble tea (Wen and Zheng (n 1), and Xiao and Chrysanthos (n 1)); salad (Koslowski (n 1)); kebab (Perryman and Ditmann (n 1)) and Indian food (Evans (n 1)).

⁷ See Fair Work Ombudsman, [An inquiry into the procurement of cleaners in Tasmanian supermarkets](#) (Report, February 2018); Senate Education and Employment References Committee, Parliament of Australia, [Wage theft? What wage theft?!](#) (Report, November 2018).

⁸ Fair Work Ombudsman, [National Building and Construction Industry Campaign 2014/15](#) (Report, July 2015) 5.

⁹ Fair Work Ombudsman, [National Security Industry Campaign 2009](#) (Report and Recommendations, March 2010).

¹⁰ Joo-Cheong Tham and Judy Fudge, 'Unsavory Employer Practices: Understanding Temporary Migrant Workers in the Australian Food Services Sector' (2019) 35(1) *International Journal of Comparative Labour Law and Industrial Relations* 31; Senate Education and Employment References Committee, Parliament of Australia, [Corporate Avoidance of the Fair Work Act 2009](#) (Report, September 2017) ch 6.

¹¹ *Fair Work Act 2009* (Cth) pt 2.6; see also Laurie Berg and Bassina Farbenblum, [Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey](#) (Report, November 2017).

¹² See Berg and Farbenblum (n 11) 24.

¹³ *Superannuation Guarantee (Administration) Act 1992* (Cth); see also Industry Super Australia and Cbus, [Overdue: time for action on unpaid super](#) (Report, December 2016).

¹⁴ Senate Education and Employment References Committee, Parliament of Australia (n 10) ch 6.

¹⁵ *Ibid* 59.

¹⁶ Note the statutory minimum wage for all workers was \$17.70 per hour at the time of the survey: Berg and Farbenblum (n 11) 5.

¹⁷ *Fair Work Ombudsman v Primeage Pty Ltd & Ors* [2015] FCCA 139, [32].

¹⁸ Fair Work Ombudsman, [Sushi outlets allegedly underpaid workers \\$694,000](#) (Media Release, 1 February 2019).

tea,¹⁹ coffee,²⁰ and pizza.²¹ A Commonwealth Senate inquiry recognised that the franchise business model places pressure on franchisees to circumvent worker wage entitlements, because of the substantial proportion of profits that go to the franchisor and other high fixed costs.²²

The *Information for Impact* survey of international students found that, out of 31 international students who indicated they worked in a retail outlet on campus, 14 were underpaid according to the casual award rate.²³ They worked in food outlets at 9 different education institutions. At least 7 of the 14 underpaid students did not report the wage theft to anyone or seek help to address it.

Systemic wage theft has also been well-documented in industries in which universities contract third party suppliers. For example, in the cleaning industry, 55% of workers in the NTMW Survey earned \$15 or less per hour.²⁴ A Commonwealth Senate report found that outsourcing of cleaning services, rather than direct employment of cleaners, heavily contributes to wage theft and other noncompliance.²⁵ The outsourcing model can increase pressure for employers to reduce labour costs through exploitative practices, as the price points for cleaning contracts typically remain static despite rises in labour costs, inflation and other business expenses.²⁶ This is reflected in the university model of outsourcing, where there is pressure on contractors to reduce labour costs to be competitive in securing university contracts that may enhance their ability to secure further contracts elsewhere.²⁷

¹⁹ Fair Work Ombudsman, '[Former Chatime franchisee faces court](#)' (Media Release, 4 April 2019).

²⁰ Fair Work Ombudsman, '[Cafe operators penalised \\$110,000 for paying international students just \\$8 an hour](#)' (Media Release, 2 February 2015); Commonwealth, *Parliamentary Debates*, Senate, 14 August 2017, 5578 (James Paterson).

²¹ Fair Work Ombudsman, '[FWO takes Crust pizza franchisee to Court](#)' (Media Release, 4 October 2018).

²² Senate Education and Employment References Committee, Parliament of Australia, [A National Disgrace: The Exploitation of Temporary Work Visa Holders](#) (Report, March 2016), chapter 8.

²³ Bassina Farbenblum and Laurie Berg, *Information for Impact* survey data (on file with authors). The anonymous online survey was conducted between April and May 2019 and was open to any current international student in Australia. The rate used to calculate underpayment here is the casual rate of the Fast Food Industry Award 2010 Level 1 at March 2019, as it is likely that the students were employed on a casual basis. It is likely that the number of underpaid students is in fact greater than 14 because some workers may have been performing supervisory tasks above Level 1 responsibilities and therefore entitled to a higher wage. Moreover, because the highest pay category in the survey was \$22 and over, there may have been further underpaid workers who earned between \$22 and the \$25.99 Level 1 award at the time.

²⁴ Berg and Farbenblum (n 11) 30.

²⁵ Senate Education and Employment References Committee, Parliament of Australia (n 7) 6-7.

²⁶ United Voice, Submission No 09 to the Senate Standing Committees on Education and Employment, Parliament of Australia, *Inquiry on the Exploitation of General and Specialist Cleaners Working in retail chains for contracting or subcontracting cleaning companies* (18 July 2018) 7.

²⁷ Interview with a NSW union representative (10 October 2019).

2. Record-keeping and Payslips

Since 2016, a string of reports by a Commonwealth Senate committee,²⁸ the FWO²⁹ and the Productivity Commission³⁰ have highlighted the widespread failure of Australian employers to provide accurate payslips to migrant workers and other vulnerable employees, especially in hospitality and franchises.³¹ For example, the NTMW Survey found that 50% of migrant workers did not receive or rarely received payslips in hospitality and numerous other industries.³² FWO audits have also confirmed widespread noncompliance with payslip obligations in the cleaning³³ and construction industries.³⁴ The failure to provide payslips contravenes employers' obligations under the *Fair Work Act*,³⁵ and leads workers to remain silent in the face of wage theft because they believe they cannot prove their hours worked or pay received, and would therefore be unsuccessful in recovering the wages they are owed. Furthermore, even where payslips are produced, they often do not accurately reflect the wages paid. This can occur through a range of common practices including employers requiring workers to pay back a portion of their earnings in cash (known as the 'cash back' practice), employers recording correct pay for one worker which is in fact split between two workers, or simply paying workers an amount in cash that is less than the amount recorded on the books with no electronic transfer records.³⁶

The scale of this problem prompted amendments to the *Fair Work Act* in 2017.³⁷ These amendments imposed increased penalties on employers and greater protections for vulnerable workers who do not receive payslips. However, it is not clear whether these amendments have reduced contraventions as the provisions are only triggered by reporting from the worker leading to litigation, or investigation by the regulator. Universities therefore cannot assume that this provision has or will improve compliance among contractors and tenant businesses.³⁸

3. Sham Contracting and Phoenix Activity

Employers in high-risk industries such as construction and cleaning frequently deny workers their legal rights by misclassifying employees as independent contractors. This practice, known as 'sham contracting',³⁹ enables employers to underpay workers and deny employee

²⁸ See, eg, Senate Education and Employment References Committee, Parliament of Australia (n 22).

²⁹ Fair Work Ombudsman, [A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network](#) (Report, April 2016); Fair Work Ombudsman, [The Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales](#) (Report, June 2015).

³⁰ Productivity Commission, [Workplace Relations Framework](#) (Final Report, December 2015).

³¹ [Explanatory Memorandum, Fair Work Amendment \(Protecting Vulnerable Workers\) Bill 2017](#) (Cth).

³² Berg and Farbenblum (n 11) 40.

³³ Fair Work Ombudsman, [National Cleaning Services Compliance Campaign 2014/15](#) (Report, March 2016).

³⁴ Fair Work Ombudsman, [National Building and Construction Industry Campaign 2014/15](#) (Report, July 2015) 5.

³⁵ *Fair Work Act 2009* (Cth) ss 535, 536.

³⁶ Interview with representative of the Catholic Archdiocese of Sydney's Anti-Slavery Taskforce (30 October 2019).

³⁷ *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

³⁸ *Fair Work Act 2009* (Cth) s 557C; Farbenblum and Berg (n 2) 15.

³⁹ *Fair Work Act 2009* (Cth) s 357.

entitlements such as leave, insurance and superannuation.⁴⁰ The Australian Council of Trade Unions estimates that 26% to 46% of independent contractors in the construction industry are engaged through sham contracts.⁴¹ In 2017 the FWO ordered a Sydney-based cleaning company to pay \$447,300 in penalties for sham contracting arrangements which were used 'in a calculated attempt to avoid responsibility for vulnerable workers' entitlements'.⁴²

Within the cleaning and security industries, smaller subcontractors avoid paying employees' wages and entitlements by liquidating and re-emerging as a new business in a practice known as 'phoenixing'.⁴³ According to United Voice, 10% of employees in cleaning and security industries are affected by phoenix activity.⁴⁴

4. Threats of Dismissal and Unfair Dismissal

Academic studies have found that unfair dismissal or threats of dismissal are common among migrant workers but often go unreported.⁴⁵ This is indeed the case for international students working on university campuses.⁴⁶ Even among those who are not explicitly threatened, in a highly limited job market for international students, the implicit threat of job loss acts as a powerful deterrent against reporting exploitative working conditions. The *Information for Impact* survey found that among participants who were underpaid in a retail outlet on campus and did not seek help to address the problem, the majority (10 out of 13) did not do so because they feared losing their job. International students and temporary migrants also commonly lack legal protection from unfair dismissal under the *FWA* as they are frequently classified as casual employees or independent contractors to whom unfair dismissal protections may not apply.⁴⁷

⁴⁰ Fair Work Ombudsman, [An Inquiry into the Procurement of Security Services by Local Governments](#) (Report, June 2018) 26-27; Senate Education and Employment References Committee, Parliament of Australia; Industrial Relations Victoria, Parliament of Victoria, [Victorian Inquiry into the Labour Hire Industry and Insecure Work](#) (Final Report, August 2016).

⁴¹ Australian Council of Trade Unions, Submission No 182 to Treasury consultation *Government Response to the Black Economy Taskforce Report: Designing a modern ABN system* (September 2018) 3.

⁴² Fair Work Ombudsman, [Penalties of \\$447,300 and \\$223,000 back-pay ordered after workers treated as "slaves"](#) (Media Release, 8 June 2017).

⁴³ PricewaterhouseCoopers Consulting (Australia) Pty Limited, [The Economic Impacts of Potential Illegal Phoenix Activity](#) (July Report, 2018) 1; see also Helen Anderson et al. [Quantifying Phoenix Activity: Incidence, Cost, Enforcement](#) (Report, October 2015) University of Melbourne Law School and Monash Business School.

⁴⁴ United Voice, Submission No 09 to the Senate Standing Committees on Education and Employment, Parliament of Australia, *Inquiry on the Exploitation of General and Specialist Cleaners Working in retail chains for contracting or subcontracting cleaning companies* (18 July 2018) 27.

⁴⁵ Joanna Howe et al, 'Unfair Dismissal Law and Temporary Migrant Labour in Australia' (2018) 46 *Federal Law Review* 19, 27.

⁴⁶ Interview with legal service provider of a Sydney university (31 July 2019).

⁴⁷ Howe et al (n 45) 27.

III UNIVERSITIES' RESPONSIBILITIES TO PREVENT WORKER EXPLOITATION ON CAMPUS: DOMESTIC LAW AND INTERNATIONAL PRINCIPLES

All individuals have a fundamental human right to work under just and favourable conditions.⁴⁸ The core components of this right are reflected in Australian domestic law, under the *Fair Work Act 2009* (Cth) ('FWA'). All individuals also have a human right to be free from forced labour and other forms of mistreatment that fall under the umbrella of 'modern slavery'.⁴⁹ In addition to specific legal responsibilities under the FWA and other areas of domestic law, it is now well-recognised at the international level that duties to respect, protect and fulfil workers' rights extend beyond states to businesses.

Both domestic law and international human rights principles now clearly extend legal responsibilities for workers' rights beyond direct employment relationships to workers within a business' operations more broadly. It is therefore no longer possible for an Australian university to evade legal and social responsibility for workers merely as a result of outsourcing services to a third party business.

This section outlines the three primary sources of universities' responsibilities and liability for the conditions of workers on their campuses. First, universities are at risk of accessorial liability under section 550 of the FWA for their third party contractors' or tenants' contraventions of the Act. Second, universities are required to report on the measures they have taken to prevent and remedy modern slavery under the *Modern Slavery Act 2018*, including identifying risks within their business operations based on indicators including wage theft. Third, under the United Nations Guiding Principles on Business and Human Rights, as businesses, universities have responsibilities to prevent adverse human rights impacts that are directly linked to their operations.

1. Responsibilities for compliance with the Fair Work Act

Under section 550 of the FWA, an individual or business may be held legally liable for contraventions of the FWA if the entity was 'involved in' the contravention. This extends beyond direct employers, and includes individuals or businesses that have 'procured the contravention' or been 'in any way, by act or omission, directly or indirectly, knowingly concerned in ... the contravention'.⁵⁰ Universities may therefore be exposed to risk of legal liability for contraventions of the FWA in their contracting and leasing operations if there is a 'practical connection' between the university and the contravention, even if the university is not a direct employer of the exploited worker.⁵¹ This could include contraventions such as underpayment, failure to provide payslips or sham contracting.

⁴⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 23; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 7.

⁴⁹ Department of Home Affairs, Parliament of Australia, [Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities](#) (Guide, 2019) 8.

⁵⁰ *Fair Work Act 2009* (Cth) ss 550(2)(a), (c).

⁵¹ *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456, [227].

Businesses held responsible for breaches of the *FWA* can be ordered to pay penalties of up to \$630 000 for a serious contravention, alongside the additional costs of paying employees their outstanding entitlements and compensation.⁵² Findings of underpayment or other violations of workers' rights in third party businesses also carry substantial reputational risks - either through direct media exposure (as in the case of 7-Eleven), or through the FWO publicising findings of its investigations (such as the FWO's recent investigations into exploitation of workers employed by sporting stadiums' cleaning contractors⁵³). This reputational damage could have far greater financial consequences for a university than monetary penalties. This is especially the case if the university is on notice of potential noncompliance in high risk industries, and all the more so if international students are involved in the contravention, as is relatively likely given the composition of the workforce.

The FWO's strategic priorities for 2019-20 directly map the businesses employing workers on university campuses: supply chain risks, food outlets, franchises and sham contracting.⁵⁴ The agency is increasingly using litigation to expand the liability of businesses that may be 'involved in' third party breaches of the *FWA*,⁵⁵ in line with its stated priority to test the accessorial liability provisions under s 550.⁵⁶ It is also escalating its use of investigations, enforceable undertakings and compliance partnerships to hold businesses to account for the workplace practices of third parties in their supply chain. For example, after instigating litigation, the FWO entered into an enforceable undertaking with Coles in which the retailer accepted responsibility for ensuring compliance with the *FWA* by their trolley collection contractors.⁵⁷ Coles was also required to pay over \$220,000 to 10 employees who had been underpaid by the trolley collection contractor and establish a \$500,000 fund to pay back others.⁵⁸ Recognising these financial and reputational risks, large businesses such as Woolworths have recently sought to proactively avoid sanction for exploitative practices of their suppliers by entering a compliance partnership with the FWO to acknowledge their responsibility and implement monitoring and compliance arrangements. For instance, this has included a commitment by Woolworths to back-pay underpaid employees of their trolley collection contractors where necessary.⁵⁹

The FWO has made clear that a business may be held accountable for passively ignoring a likely breach by a supplier, and recently cautioned, '[u]nder section 550 of the Fair Work Act ... all participants within a labour supply chain are exposed to potential penalties if they turn a blind eye to any workplace breaches.'⁶⁰ It is not clear how far down a supply chain s 550 might extend, but there is a clear risk in relation to those businesses with whom the university contracts directly and which operate in plain sight of the university on its campus by directly providing services to its staff and students. Although the FWO has not yet pursued a business

⁵² ['Litigation'](#), *Fair Work Ombudsman* (Web Page).

⁵³ See, eg, ['Optus Stadium target of surprise workplace audit during WAFL grand final'](#), *WA Today* (online, 23 September 2019).

⁵⁴ ['Our Priorities'](#), *Fair Work Ombudsman* (Web Page).

⁵⁵ See, eg, Fair Work Ombudsman, ['FWO Files Special Leave Application in Marland Mushrooms Case'](#) (Media Release, 19 September 2019).

⁵⁶ ['Our Priorities'](#), *Fair Work Ombudsman* (Web Page).

⁵⁷ See, eg, *Fair Work Ombudsman v Al-Hilfi* [2012] FCA 1166; *Fair Work Ombudsman v Al-Hilfi* (No 2) [2013] FCA 16.

⁵⁸ ['The enforceable undertaking'](#), *Fair Work Ombudsman* (Web Page).

⁵⁹ Fair Work Ombudsman, ['Fair Work Ombudsman compliance partnership with Woolworths a new benchmark in supply chain governance'](#) (Media Release, 11 October 2017).

⁶⁰ Fair Work Ombudsman, ['Fair Work Ombudsman to work with local councils to improve management of security supply chains'](#) (Media Release, 25 June 2018).

under s 550 for noncompliance by a commercial tenant, there is a clear risk that the FWO's enforcement efforts could logically be directed to universities in relation to food outlets and other commercial tenants on its campus. In the university context, although the relationship is governed by a commercial lease, it is not an ordinary landlord-tenant business relationship conducted at arm's length. A university's decision to outsource the provision of food and other services to its students and staff through these retail outlets arguably establishes a far more intimate relationship similar to its relationships with its direct contractors: the university's own students and staff are the beneficiaries of the tenant's services, and a substantial proportion of the employees are the university's own students for whom the university has care responsibilities.

Finally, universities face increased future potential liability under s 550 as the government explores law reform to extend the reach of the provision into supply chains. In March 2019, the Migrant Workers' Taskforce handed down its report on migrant worker exploitation in Australia, recommending that s 550 be amended to include 'a broader range of business models, including where businesses contract out services'.⁶¹ The recommendation has been accepted in principle by the Commonwealth Government, and a public consultation is underway on the scope of the expansion.⁶²

In sum, the prospect of legislation broadening the application of s 550, the current trend towards an increasingly expansive interpretation of the provision by the FWO, and increased investigation and enforcement activity expose universities to substantial legal, financial and reputational risks in connection with underpayment by contractors and tenant businesses. This is especially the case in high risk industries known for systemic noncompliance.

2. Responsibilities under the Modern Slavery Act 2018

Underpayment, lack of accurate payslips and practices of sham contracting and phoenixing not only breach fundamental work rights under Australian law, but may also indicate more serious human rights violations such as modern slavery, which exists on a continuum of exploitative practices.⁶³ In 2018, Australia enacted the *Modern Slavery Act 2018* (Cth) ('MSA'), which requires businesses, including universities, with a minimum annual consolidated revenue of \$100 million to file an annual modern slavery statement.⁶⁴ The statement must report on due diligence undertaken by the business with regards to their 'operations and supply chains',⁶⁵ which encompass any activity undertaken to pursue business objectives and strategies, and any services, including labour, that contribute to the business.⁶⁶ For a university, this includes commercial tenants, contractors and subcontractors, especially those operating on the university's campus. The MSA also requires businesses to report on the specific risks identified, and the business' implementation of preventative and remedial actions addressing identified adverse human rights impacts.⁶⁷

⁶¹ Australian Government, [Report of the Migrant Workers' Taskforce](#) (Report, March 2019) 10.

⁶² Attorney General's Department, [Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance](#) (Discussion Paper, September 2019) 8.

⁶³ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, [Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia](#) (Report, December 2017) 47; Department of Home Affairs (n 49) 9.

⁶⁴ Modern Slavery Act 2018 (Cth) s 3.

⁶⁵ Modern Slavery Act 2018 (Cth) s 3.

⁶⁶ Department of Home Affairs (n 49) 60.

⁶⁷ Modern Slavery Act 2018 (Cth) s 11.

According to the Joint Standing Committee on Foreign Affairs, Defence and Trade, efforts to address modern slavery 'must also address other exploitative practices that may indicate or lead to modern slavery'.⁶⁸ The *MSA Guidance for Reporting Entities* identifies several such practices, including underpayment of workers and excessive work hours, that also contravene the *FWA*.⁶⁹ Further indicators of modern slavery that arise in relation to businesses on campus are the 'use of short-term contracts and outsourcing', 'use of foreign workers ... to carry out functions which are not immediately visible because the work is undertaken at night time ... such as security or cleaning' and the workers 'not hav[ing] permission to work because they are from another country or appear to be working in breach of visa requirements'.⁷⁰

Though universities may not be expected to report on steps taken to address all risks throughout their supply chains within their first Modern Slavery Statement, they can reasonably be expected to report on immediate risks in entities with whom they have direct business relationships on their campuses. Universities have an opportunity to demonstrate they are proactively addressing risks of modern slavery by highlighting effective control over retail tenants and suppliers on campus and knowledge of their employment practices within their first Statement.

3. *UN Guiding Principles on Business and Human Rights and reporting under the UN Global Compact*

The United Nations Guiding Principles on Business and Human Rights ('UNGPs') are non-binding international principles that establish the contours of business' responsibilities to protect, respect and fulfil human rights.⁷¹ They call for universities to prevent adverse human rights impacts that are directly linked to their operations or business relationships, even if they have not contributed to those impacts.⁷² Business relationships are those 'with business partners, entities in its value chain and any other non-State or State entities directly linked to its business operations, products and services'.⁷³ At a minimum, these include commercial tenants and contractors operating on campus, which are directly linked to the university's business operations through a contract (or commercial lease) to provide products or services to their students and staff.⁷⁴ Universities have significant commercial leverage to prevent exploitation and improve the practices of their tenants and contractors. According to the UNGPs, 'if the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it'.⁷⁵ These responsibilities are not offset by undertaking other activities to support or promote human rights.

Building on the UNGPs, the United Nations Global Compact ('the Compact') is a set of principles that assist businesses to align strategies and operations with their stated commitment to respecting human rights. Businesses can voluntarily become a signatory to

⁶⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia (n 63) 47.

⁶⁹ See eg *Fair Work Act 2009* (Cth) ss 45, 62.

⁷⁰ Department of Home Affairs (n 49) 80, 82.

⁷¹ United Nations Office of the High Commissioner for Human Rights ('OHCHR'), [Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework](#) (2011) Principle 11.

⁷² OHCHR (n 71) Principle 13.

⁷³ OHCHR (n 71) Principle 13.

⁷⁴ Department of Home Affairs (n 49) 40.

⁷⁵ OHCHR (n 71) Principle 19.

the Compact, acknowledging their responsibility to protect human rights and not be complicit in human rights abuses.⁷⁶ Several Australian universities are now signatories.⁷⁷ Signatories to the compact agree to create a Communication on Engagement ('COE') every two years that identifies work undertaken by the business to protect and promote human rights. The majority of Australian universities have lodged COEs and have reported on their engagement with human rights for direct employees on campus.⁷⁸ The University of Melbourne stated in their 2017 COE (combined with a Sustainability Report) that their policy requires that 'suppliers in contracts relating to cleaning and security must ensure payments made to employees cover minimum award rates'.⁷⁹ No universities have lodged a COE that addresses measures the university is taking to ensure compliance with National Employment Standards or consequences for noncompliance and remediation of breaches. It appears that very few Australian universities have developed policies or reported on working conditions in their contractor businesses, and none in tenant businesses. All universities should become part of the Compact and report on the full extent of their responsibilities in relation to workers in contractor and tenant businesses on campus. This should include compliance with award wages as well as providing workers with breaks, leave and superannuation and payslips. COEs should also address measures the university is taking to ensure compliance with minimum employment standards, and consequences and remediation of breaches.

IV RECOMMENDATIONS

Australian universities have responsibilities under domestic law and international human rights principles to prevent worker exploitation and address risks of modern slavery. Universities must now consider how to meet these responsibilities by implementing meaningful and effective measures to ensure compliance with workplace laws in third party businesses whom they contract to provide services on their campuses. The following recommendations should be implemented across the whole of a university's service procurement and leasing activities, with particular urgency for businesses in industries in which there is clear evidence of a high risk of noncompliance, including cleaning, food retail, construction and security. In these areas especially, regulators, students and the public will reasonably expect universities to act proactively and swiftly to institute systemic efforts to prevent, detect and remedy noncompliance. As the FWO and the media pursue cases of workplace exploitation associated with well-known institutions and brands, Australian universities are vulnerable to substantial reputational damage if they fail to effectively respond to known risks, especially if their own international students are involved.

This section seeks to identify core components of an effective response. These measures are drawn from international guidelines, domestic law and best practice across sectors. They are intended to provide a framework within which Australian universities can develop their own detailed response in collaboration with relevant external stakeholders.

⁷⁶ United Nations Global Compact, The Ten Principles of the UN Global Compact (2000).

⁷⁷ The universities are: Deakin University, Griffith University, La Trobe University, Monash University, RMIT University, University of Melbourne, The University of Sydney, University of Technology Sydney, The University of Western Australia, and University of Wollongong.

⁷⁸ The universities are: Deakin University, Griffith University, La Trobe University, Monash University, RMIT University, University of Melbourne, The University of Western Australia, and University of Wollongong.

⁷⁹ University of Melbourne, [Sustainability Report](#) (Report, 2017) 34.

At the outset it must be stated that the most effective way to reduce worker exploitation is for universities to directly employ workers, especially in cleaning and security industries. This would allow universities to have full transparency and control over working conditions and eliminate the need for oversight of third parties. However, universities that continue to outsource services on campus to third party contractors and retail tenants should consider adopting the following measures, among others.

1. Policy and Process Commitments

Collaborative sector-wide statement

Australian universities should collaborate to develop a clear policy demonstrating their collective commitment to ensuring respect for the rights of all workers on their campuses, including ensuring all workers receive their full wages and entitlements and work under conditions that comply with the *Fair Work Act*.⁸⁰ This could be implemented through a sector-wide network such as Universities Australia, or initially through smaller networks such as the Australian University Procurement Network ('AUPN'), the Group of Eight ('Go8'), or state-based networks of Deputy Vice Chancellors. This process should include consultation with legal service providers, unions, non-government organisations and workers on campus.

University specific policy commitment

Each university should develop an individual policy that establishes its commitment to ensuring compliance with workplace laws in all businesses providing services on its campus, and ideally throughout its supply chain. The policy should provide a clear message to the university's contractors, tenants and the workers within those businesses, that noncompliance with workplace laws will not be tolerated.

The policy should apply to contractors, subcontractors and commercial tenants across all sites of university-related activity. Universities should communicate the policy to all entities with whom that they engage in business relationships,⁸¹ as well as with workers within those businesses.

Universities should accompany a general policy with specific measures, including:

- A. Embedding contractual clauses in every new supply contract and commercial lease that require compliance with the *Fair Work Act* as a condition of the contract or essential term of the lease, and stipulate due diligence and reporting measures, and consequences for noncompliance. These could also include, for example, clauses that establish that suppliers/tenants are:
 - prohibited from subcontracting, or otherwise should only be permitted to subcontract with the university's permission, provided the supplier can demonstrate ongoing *FWA* compliance by the subcontractor for which the contractor remains responsible.

⁸⁰ OHCHR (n 71) Principle 16.

⁸¹ OHCHR (n 71) Principle 16.

- where relevant, required to continue to employ workers from the previous contract, particularly union members who are vulnerable to retaliatory job loss, to reduce labour turnover and promote job stability at a change of contract.⁸²
 - required to ensure workers are able to join a union and individually or collectively meet with union representatives at the worksite.⁸³
 - required to provide workers with information on work rights and grievance processes in a form and manner mandated by the university (including displaying it at the worksite).
 - required to engage in an auditing and reporting program mandated by the university, and ensure that any wage theft or other breaches identified are rectified within a short defined period (including breaches by subcontractors).
- B. Developing standard forms of these clauses across the Australian university sector.
- C. Accompanying general policies and contractual clauses with detailed due diligence procedures and enforcement measures to ensure compliance, as well as effective complaint mechanisms, investigation processes and remedial frameworks for aggrieved workers (see subsequent recommendations).
- D. Evaluating costing to ensure the contract price, commercial rent and completion time realistically enable contracted businesses and tenants to pay their workers minimum wage rates and entitlements, taking into account CPI increases and other costs.⁸⁴
- E. Adopting industry-specific compliance frameworks such as the Cleaning Accountability Framework, an independent, multi-stakeholder initiative focused on improving labour standards in the cleaning industry in Australia.⁸⁵ This comprehensive framework establishes best practice tendering and compliance approaches in outsourced cleaning services.

2. Due Diligence Process

Universities should ensure that they have due diligence processes to effectively prevent, monitor, identify, and mitigate risk of worker exploitation on their campuses. Under the *Modern Slavery Act*, universities are required to report on risks of modern slavery practices in their operations and supply chains as part of their annual statement.⁸⁶ This includes identifying within third party businesses on campus exploitative practices such as underpayment that are indicators of modern slavery.⁸⁷ If workplace exploitation is occurring on campus, reputational

⁸² Cleaning Accountability Framework, *Guide to the CAF Building Certification Scheme* (2019) 7; Interview with a Tasmania union representative (23 October 2019).

⁸³ Contractors should also be prohibited from inserting clauses in their employment contracts which forbid their employees from speaking directly to third parties (such as the procuring business or university) about their employment conditions: Interview with a Tasmania union representative (23 October 2019).

⁸⁴ Interview with representative of the Catholic Archdiocese of Sydney's Anti-Slavery Taskforce (30 October 2019). Some recommend that this accounting process should assume a 5% profit margin on top of costs: Interview with Victorian union representative (28 October 2019)

⁸⁵ See also Electronics Watch, an independent monitoring organisation that provides a framework for organisations to protect the rights of workers in electronic supply chains, widely used by UK universities.

⁸⁶ *Modern Slavery Act 2018* (Cth) s 16(c).

⁸⁷ Department of Home Affairs (n 49) 81.

harm can be mitigated by demonstrating meaningful and effective efforts to identify and address these practices.

Due diligence processes should be worker-centred and should include:

- A. Ongoing risk assessments, which start within the tendering process prior to a university engaging a contractor or tenant, especially where the university is changing suppliers.⁸⁸ Where possible, during the tender process, universities should contact the relevant union to seek their opinion on the potential contractor's workplace practices at other sites, to assist with pre-emptively identifying risks of exploitation.⁸⁹
- B. Ongoing monitoring of all contractors and commercial tenants to ensure compliance with the *FWA* and prevention of modern slavery. To effectively monitor compliance, universities should ideally collaborate with relevant unions and potentially with regulators.⁹⁰ This collaboration should include:
 - Ensuring workers are able to exercise their right to actively participate in and be represented by a union without fear of reprisal, including requiring all contractors and commercial tenants to respect this right as a condition of the contract.⁹¹
 - Facilitating physical access for union staff to conduct spot checks at times when workers are present (including night time for cleaning staff).
 - Mandating that contractors/tenants allocate paid time for union representatives to meet with employees collectively on campus at a time when workers are at the worksite.⁹²
- C. Requiring businesses to demonstrate that ongoing audits are being conducted to show the businesses' and their subcontractors' compliance with workplace laws.⁹³ Meaningfully involving unions, workers, and other stakeholders in the process of auditing is important because paper-based audits alone may fail to identify underpayment or other modern slavery risks.⁹⁴ Workers decline to report exploitation for a range of reasons,⁹⁵ and practices of inaccurate or fraudulent record-keeping are well documented.⁹⁶

⁸⁸ OHCHR (n 71) Principle 18.

⁸⁹ Interview with a Tasmania union representative (23 October 2019); Interview with a NSW union representative (10 October 2019); Interview with Victorian union representative (28 October 2019).

⁹⁰ The National Temporary Migrant Work Survey found that underpaid migrant workers who were union members were three times more likely than non-union members to have tried or be planning to recover unpaid wages; Farbenblum and Berg (n 2) 6.

⁹¹ Cleaning Accountability Framework (n 82) 7.

⁹² Interview with a NSW union representative (10 October 2019).

⁹³ See, eg, [Proactive Compliance Deed Between The Commonwealth of Australia \(as represented by the Office of the Fair Work Ombudsman\) and Woolworths Limited](#) (Proactive Compliance Deed, 2017) 16.

⁹⁴ See, eg, Senate Education and Employment References Committee, Parliament of Australia (n 22) 216.

⁹⁵ Farbenblum and Berg (n 2).

⁹⁶ Richard Locke et al, 'Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains' (2009) 37(3) *Politics & Society* 319; Sarah Labowitz and Dorothee Baumann-Pauly, [Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza](#) (Report, April 2014).

- D. Appointing a designated member of staff within facilities management or other university unit who is allocated time to develop ongoing relationships with workers on campus and establish a confidential open channel for direct worker reporting of problems and conducting periodic inspections.⁹⁷
- E. Communicating with external stakeholders the actions that the university is taking in sufficient detail to enable them to evaluate the response.⁹⁸ This could include public documents, in-person meetings, forums or online dialogues with affected stakeholders including unions. The annual statement under the *Modern Slavery Act* provides an avenue for communicating the university's actions to address risks of modern slavery. These forums can provide transparency and accountability to affected workers.

3. Ensuring employers are aware of their obligations and workers are aware of their rights and enforcement mechanisms

Universities can reduce risks of exploitation by educating employers about their workplace responsibilities, and educating workers about their rights. This includes ensuring workers know how to obtain information on their entitlements, and how to report problems and seek redress. In the *Information for Impact* survey, 13 international students who worked in retail outlets on campus encountered problems but did not report them. Among those 13, seven indicated they did not report workplace issues because they did not know where to go for information. In addition, six indicated they did not do so because it felt like too much work or it was too hard to report the issue. This suggests that information alone will not enable all workers on campus to come forward, and that for many, a greater level of support and assistance is required.

Measures to raise awareness may include:

- A. Mandating that businesses hold induction training briefings for workers on campus with union representatives or legal service providers. These should be held (1) during the periods of highest risk, which are prior to and immediately after a change in contract, and (2) periodically for new staff. These briefings should take place during workers' paid shift time to enable them to attend. The costs of these briefings (delivery of briefings, and payment for workers' time while attending) should be built into contract pricing.⁹⁹
- B. Providing regular mandatory briefings for all contractors and retail tenants on employers' responsibilities under the *FWA*, potentially in collaboration with legal service providers and/or the FWO. Universities can recommend that businesses refer to the FWO website or contact the regulator if they are unsure about their legal obligations.¹⁰⁰ Universities may also require that businesses operating on campus

⁹⁷ Interview with a Tasmania union representative (23 October 2019).

⁹⁸ OHCHR (n 71) Principle 21.

⁹⁹ Interview with a NSW union representative (10 October 2019); Interview with a Tasmania union representative (23 October 2019); Interview with Victorian union representative (28 October 2019).

¹⁰⁰ See '[Find help for...](#)', *Fair Work Ombudsman* (Web Page). Especially relevant for universities is a new dedicated page '[Fast food, restaurants & cafes](#)', *Fair Work Ombudsman* (Web Page).

register with the FWO 'My Account' Portal, which provides information on awards and entitlements that are industry/business specific, and alerts users to amendments.¹⁰¹

- C. Establishing a designated person within the university to whom workers can confidentially report complaints, who can escalate the matter within the university (with the worker's permission) and make referrals to free legal services through the relevant union or a legal service, ideally on campus. This is especially important for industries with low rates of unionisation such as food retail, as workers are less likely to have union support. For workers who are the university's own students, information on student legal services on campus should be provided. The university liaison person should engage regularly with workers and form relationships of trust in which workers know how to contact him/her and feel safe doing so.
- D. Identifying workers who may act as delegates, peer educators and liaisons between workers and the university, ideally including workers who share language/cultural background with the largest groups of migrant workers onsite. Ideally, this role should involve appropriate training by relevant unions or legal service providers to equip the delegate with knowledge of workplace rights and entitlements and how they can assist with advocating on the workers' behalf.¹⁰²
- E. Engaging with international student associations on campus and providing training on relevant employment issues and referral pathways if workers on campus contact them for assistance.
- F. Producing and making available a package of materials for workers on their rights including minimum wages and entitlements, as well as information on who to contact for help and how to make a complaint.¹⁰³ These should be developed in collaboration with legal service providers and/or unions, and include information regarding the university contact. Materials should include a poster with key information that businesses on campus are required to prominently display in the workplace, especially in break rooms, as well as an induction pack for workers employed by tenant businesses and contractors. Translation may be necessary as it is likely that there will be groups of migrant workers from non-English speaking backgrounds. Workers should also be encouraged to download and use the FWO's Record My Hours app to ensure they have a record of their hours worked.

4. Worker Reporting, Grievance Mechanisms and Access to Remedy

Despite the high prevalence of wage theft and other forms of exploitation among migrant workers in Australia, the overwhelming majority endure their working conditions in silence. The NTMW Survey found that nine in every ten migrant workers who were underpaid did not report

¹⁰¹ A common tool used by the FWO to ensure business compliance with workplace laws. See, eg, '[Coffee Club franchisee faces court](#)', *Hospitality magazine* (online, 17 September 2019).

¹⁰² See, eg, Cleaning Accountability Framework (n 82).

¹⁰³ The National Temporary Migrant Survey found that 73% of international students knew they were being paid less than the statutory minimum, but many may not have been aware of their full entitlements (e.g. casual rates, penalty rates). See Berg and Farbenblum (n 2) 48.

the underpayment or seek help to recover their wages.¹⁰⁴ Furthermore, the vast majority (97%) of these workers did not contact the FWO for assistance.¹⁰⁵ This was due to a range of barriers, including a legitimate perception that the difficulty and low likelihood of success of a complaint would not be worth the time, effort and potential risk to their immigration status or keeping their job. Within the *Information for Impact* survey, among the 13 international students who did not seek help in relation to wage theft in a retail outlet on campus, the most common reasons given were that they feared losing their job (selected by 10 students), and they did not wish to create problems that might affect their visa status (selected by 7 students).

In order to address workplace exploitation universities must establish accessible and effective remedial processes that overcome these barriers. Ensuring access to remedy is a fundamental human rights responsibility. Under the UNGPs, a responsibility to provide remediation arises when the business has contributed to adverse human rights impacts.¹⁰⁶ To meet this responsibility, businesses should provide operational-level grievance mechanisms for individuals, involving remedying breaches and ensuring individual workers can recover wages they are owed if they are underpaid.

In light of the challenges to identifying wage theft and other forms of noncompliance, worker reporting through effective grievance mechanisms can provide universities with critical information and intelligence on noncompliance that they may not otherwise be able to obtain through auditing and other due diligence processes. Ensuring effective worker reporting and remediation of noncompliance breaks cycles of impunity in which businesses assume that wage theft and other forms of noncompliance will remain unreported and undetected. As a practical matter, effective remedial mechanisms enable grievances to be addressed early and directly by the university, preventing harm from escalating and enabling the university to refer individuals to their union or specialised services that can assist workers to obtain redress.

An effective remediation process should involve: establishing accessible processes that enable workers to report noncompliance; effective investigation of potential noncompliance; processes for ensuring contractors remediate affected workers; and in the absence of remediation by the contractor, remediation by the university.

Establishing an accessible complaints and investigation process

Australian universities should implement an accessible, confidential and effective complaints process that:

- A. Enables workers to confidentially and safely report noncompliance without fear of reprisal.
- B. Provides assistance to workers to report and document their claim and seek a remedy, including through a dedicated university liaison officer with legal/industrial expertise and/or by making referrals to unions, community legal centres or if the worker is a student, student legal services on campus. In addition, as recommended in the previous section, the university should appoint worker delegates within each contracted/tenant business to act as 'first responders' and liaisons between an

¹⁰⁴ Farbenblum and Berg (n 2) 5.

¹⁰⁵ Farbenblum and Berg (n 2) 6.

¹⁰⁶ OHCHR (n 71) Principle 22.

aggrieved worker and the university liaison officer if a worker is not comfortable approaching university staff directly.

- C. Triggers an investigation by the university into the reported noncompliance. Should worker exploitation be suspected, unions recommend that a relevant union official is notified and able to investigate the matter prior to the university contacting the contractor in order to avoid the contractor falsifying or removing evidence of noncompliance.¹⁰⁷ Where the university conducts its own investigation it should institute measures to ensure the investigation does not result in negative consequences for the affected worker(s) such as job loss or other forms of reprisal against the worker who made the complaint, or other workers.
- D. Is publicised to workers when they commence employment and at regular intervals to ensure they are aware of the process and how it may be accessed. This information should be included on posters in the workplace.

Working with business to redress exploitation

- E. The university should have a clearly outlined process for addressing verified cases of noncompliance with the *FWA*, which may constitute a breach of the contract/commercial lease. At a minimum this process should include:
- ensuring that the business upholds its legal obligations and rectifies the breach, including identifying the full extent of the breach and paying all outstanding wages and entitlements to any affected workers.
 - identifying the conditions that enabled the noncompliance to occur.
 - reaching an agreement with the business regarding measures the business will implement to rectify the breach and ensure future compliance, and how this will be demonstrated. This should include internal audits, university audits, semi-announced¹⁰⁸ and/or unannounced spot checks, and where relevant, training for managers and staff. Where possible, verification of compliance should be undertaken in collaboration with unions.¹⁰⁹

Disciplinary and remedial action

- F. When noncompliance is identified, universities should not end the business relationship. Rather, they should invest resources in assisting noncompliant suppliers to remedy breaches and develop processes and resources that mitigate risks and enable future compliance. Such an approach enables workers to retain their jobs, and incentivises businesses to invest in improving working conditions if they believe the university will continue the business relationship.
- G. However, as a last resort, if all efforts of the university to exercise its leverage have failed to result in evidence of improvement, the UNGPs and *MSA* Guidance for

¹⁰⁷ Interview with a Tasmania union representative (23 October 2019); Interview with a Sydney union representative (10 October 2019).

¹⁰⁸ Semi-announced audits would involve the university informing suppliers or tenants that audits will be conducted in a particular month, to encourage the business to proactively ensure compliance in collaboration and open dialogue with the university.

¹⁰⁹ Interview with representative of the Catholic Archdiocese of Sydney's Anti-Slavery Taskforce (30 October 2019).

Reporting Entities suggest considering ending the business relationship.¹¹⁰ A new business with a record of respecting its workers' rights should be engaged as a replacement after conducting a risk assessment (as discussed in the Due Diligence section), on the condition that previous workers are able to retain their jobs under the new supplier.

- H. Where a business has failed to provide appropriate redress to aggrieved workers and will not do so (for example, if it denies responsibility because the workers were engaged by a recalcitrant subcontractor), the university should directly remediate workers' unpaid wages and entitlements within 14 days. The university can then seek to recover costs from the contractor or business. The burden should rest with the university, not the workers, to pursue the money owed to them by the contractor/tenant business. Ultimately, the human rights responsibility remains with the university to ensure workers on campus are swiftly remediated regardless of any contractual indemnity clauses with the third party supplier or tenant.

V CONCLUSION

“Big companies sub-contracting out services on their sites have a responsibility to ensure those contracts do not undercut minimum employee entitlements. This responsibility extends to supply-chain contractors. Just because a company doesn't 'own' the contract doesn't mean it can wash its hands of it.”

Fair Work Ombudsman (2014)

It is increasingly likely that universities will be held to account for wage theft and other forms of exploitation occurring on their campuses, regardless of whether the workers are directly employed or are working for contractors or tenants in commercial arrangements with the university. With sustained and escalating public attention on wage theft and worker exploitation in the media, there is a danger of significant reputational damage for universities that ignore known risks and fail to act.

Responses cannot be tokenistic – both because they will fail to mitigate actual risks, and because they will not be publicly acceptable. Under the *Modern Slavery Act* universities must describe in their annual statement their methods for assessing the effectiveness of actions taken to address adverse human rights impacts, including underpayment and other indicators of modern slavery.¹¹¹ Similarly, the UNGPs require businesses to develop processes to track and assess the effectiveness of their responses. These include internal review processes, information from existing grievance mechanisms and review of compliance with contracts of commercial tenants and subcontractors.¹¹² *MSA* statements will be scrutinised by civil society, academics, students and others who will likely place universities on notice of inadequacies in their response.

Finally, as the Fair Work Ombudsman prioritises enforcement of accessorial liability for noncompliance with the *Fair Work Act* within supply chains, universities may soon come under

¹¹⁰ OHCHR (n 71) Principle 19; Department of Home Affairs (n 49) 85.

¹¹¹ *Modern Slavery Act 2018* (Cth) s 16(f).

¹¹² OHCHR (n 71) Principle 20.

the spotlight along with other well-recognised brands that are under investigation for their knowledge of noncompliance by their contractors.

Universities should adopt the measures set out in this brief to mitigate risks and effectively identify and remedy exploitation when it occurs. There is an important opportunity for leadership among individual Australian universities to develop an effective response, and for the sector as a whole to follow and act collectively to advance best practice in a manner expected of Australia's leading social institutions. Universities also have a timely opportunity to demonstrate their concern for, and commitment to, the wellbeing of the many international students working on university campuses who are vulnerable to exploitation. If universities do not seize these opportunities to proactively exercise their substantial leverage over their suppliers and tenants to protect vulnerable workers' human rights, they may soon be compelled to do so at significant financial and reputational costs.

About the Authors

The UNSW Human Rights Clinic works to systemically advance the rights of temporary migrants and asylum seekers in Asia and Australia. Under intensive faculty supervision, clinic students work as legal advisers and advocates with individual clients, NGOs, governments and intergovernmental institutions globally and domestically. Bridging theory and practice, students learn the skills and responsibilities of human rights lawyering.

For further information on the clinic and its publications, see www.law.unsw.edu.au/current-students/law-action/clinics/human-rights-clinic.

Contributing authors:

Isobel Blomfield, Student, UNSW Human Rights Clinic, UNSW Law

Jonathan Barnett, Student, UNSW Human Rights Clinic, UNSW Law

Lily Frame, Student, UNSW Human Rights Clinic, UNSW Law

Hasmindar Dhillon, Student, UNSW Human Rights Clinic, UNSW Law

Bassina Farbenblum, Associate Professor, UNSW Law; Director, UNSW Human Rights Clinic; Co-Director, Migrant Worker Justice Initiative.

Contact: Bassina Farbenblum
Director, UNSW Human Rights Clinic
Email: b.farbenblum@unsw.edu.au

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