# A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales

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Australian Government

Fair Work OMBUDSMAN

# Executive summary

This report details the findings of the Fair Work Ombudsman's (FWO) Inquiry into the Baiada Group's labour procurement processes in New South Wales (NSW).

In a poultry processing industry dominated by two major entities, the Baiada Group[1] and Ingham Enterprises, the Inquiry found the Baiada Group has adopted an operating model which seeks to transfer costs and risk associated with the engagement of labour to an extensive supply chain of contractors responsible for sourcing and providing labour.

The Inquiry found that employees working at the Baiada Group's sites are not being paid their lawful entitlements. The Inquiry also found that there were a number of entities throughout extensive supply chain networks which did not engage any workers or have any direct involvement in work undertaken within the Baiada Group's NSW processing plants or the sourcing or management of labour undertaking the work.

During the Inquiry, a large number of the entities identified in the supply chains ceased trading; at times ceasing to exist the day before scheduled meetings with the FWO. The Inquiry found a large amount of work was performed 'off the books' as amounts paid to contractors within the labour supply chain did not correspond with the number of workers and amounts allegedly paid to those workers documented to perform the contracts. There is also a range of other conduct which may contravene the *Fair Work Act 2009* (FW Act) under way at Baiada's sites.

The Inquiry encountered a failure by the Baiada Group to provide any significant or meaningful documentation as to the nature and terms of its contracting arrangements with businesses involved in sourcing its labour. Moreover, the Baiada Group denied Fair Work Inspectors access to its three sites in NSW which would have provided the Inquiry with an opportunity to observe work practices as well as talk to workers about work conditions, policies and procedures[2].

[1] The Baiada Group refers to Baiada Poultry Pty Limited (ACN 002925948) and Bartter Enterprises Pty Limited (ACN 087485943).

[2] Note: Distinct from the Inquiry, as part of a discrete compliance activity, Fair Work Inspectors were granted access to the Conference room contained in the administration block at the Baiada Hanwood site by local management on 21 and 22 May 2015 for the purposes of interviewing the Production Manager and Payroll officer on 21 May and Site contractors on 22 May. As part of another discrete compliance activity, on 27 May 2015, Fair Work Inspectors were invited into the local state manager's office at the Steggles poultry site in Osborne Park, WA where Inspectors were able to meet with four contracted workers.

Progressing further down the supply chain, the Inquiry found contractors unwilling to engage with Fair Work Inspectors, production of inadequate, inaccurate and/or fabricated records to Inspectors, invoices from contractors that were either no longer registered as businesses or claimed not to be involved in the industry and workers too scared to talk. Calculations conducted by Fair Work Inspectors on the records provided identified contractors in the chain were not providing full and accurate records. The Inquiry was unable (based on the limited material provided to it) to account for hundreds of thousands of dollars as money moved down the supply chain.

In summary, the Inquiry found:

- non-compliance with a range of Commonwealth workplace laws
- very poor or no governance arrangements relating to the various labour supply chains
- exploitation of a labour pool that is comprised predominantly of overseas workers in Australia on 417 working holiday visas, involving:
    - significant underpayments
    - extremely long hours of work
    - high rents for overcrowded and unsafe worker accommodation
    - discrimination
    - misclassification of employees as contractors.

The findings of the Inquiry have enhanced the FWO's understanding of how it can take steps to improve compliance with workplace laws on Baiada sites, and build a culture of compliance more generally within the poultry industry. It is the FWO's intention to commence focusing on three broad areas disclosed in the Inquiry with a view to identifying and taking enforcement action against persons who are:

1. accessories to contraventions under the FW Act;
2. involved in sham arrangements under the FW Act;
3. providing false or misleading records to the FWO, with particular consideration given to pursuing accounting and legal professionals.

The FWO will also work with other regulatory agencies and stakeholders to address non-compliance with a range of laws, and invites Baiada to work with us to improve compliance on its sites.

# About the Fair Work Ombudsman

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

The FWO supports compliant, productive and inclusive Australian workplaces.

The FWO ensures compliance with Australia's workplace laws by:

- offering people a single point of contact to receive accurate and timely advice and information about Australia's workplace relations system
- educating people working in Australia about their workplace rights and obligations
- monitoring compliance with, inquiring into and, investigating any act or practice that may be contrary to workplace laws, awards and agreements
- litigating to enforce workplace laws and to deter people from not complying with their workplace responsibilities.

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

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

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

# Background

In October 2013 the ABC's *Lateline* broadcast a story alleging underpayments of overseas workers at the Baiada Group's Beresfield (NSW) plant. The story alleged:

- overseas workers were being paid cash in hand wages of $11.50 - $13.50 per hour and working shifts of 16 hours per day
- payslips were not provided to workers
- workers were forced to live in overcrowded residential houses.

The allegations contained in the broadcast aligned with information the FWO also received through requests for assistance from plant workers, the Australian Meat Industry Employees' Union (AMIEU) and members of the local communities of Griffith and Tamworth.

On the basis of these allegations and the evident complexity of corporate and labour supply arrangements, the FWO commenced the Inquiry into the Baiada Group's labour procurement processes in November 2013.

The Inquiry aimed to identify and better understand the drivers of non-compliance in the poultry processing industry, to map and profile the key decision makers within the supply chains at the Baiada Group's three NSW sites in Beresfield, Hanwood and Tamworth, and to determine who in the supply chain was responsible for the exploitation of workers.

The Inquiry focused on what was causing the ongoing requests for assistance from workers engaged by contractors to undertake processing work at the Baiada Group's NSW sites; seeking to answer questions such as, 'Why do workers agree to work very long hours for low rates of pay, living in overcrowded houses?' and 'How can the FWO address this non-compliance moving forward?'. The Inquiry sought to detail the need for the most effective forms of regulatory intervention by the FWO in collaboration with other state, federal and local government agencies.

# The poultry processing industry & the Baiada Group

The poultry processing industry in Australia (the industry) is dominated by two major entities who supply 70% of poultry meat nationally, the Baiada Group and Ingham Enterprises[3].

The business models of these two entities are vertically integrated, meaning they own or control all aspects of the production chain.

For the purposes of this report, the Baiada Group refers to both Baiada Poultry Pty Ltd [ACN 002925948] and Bartter Enterprises Pty Ltd [ACN 000451374]. The Baiada Group operates poultry processing plants in Beresfield, Hanwood and Tamworth as well as five other processing plants around Australia.

In 2009, the Baiada Group purchased Bartter Enterprises Pty Ltd. This purchase increased the Baiada Group's revenue from $346 million to $1.055 billion in the first year and created the current vertically integrated structure[4].

The Baiada Group operates a complete growing, processing and supply operation including 'broiler & breeder farms, hatcheries, processing plants, feed milling and protein recovery'.[5] The Baiada Group's products include 'sales of live poultry including breeding stock, poultry feed, fertile eggs, day old chickens, primary processed chicken (raw) and further processed chicken products and pet food.'[6]

The Baiada Group employs 2200 direct employees and procures the rest of its processing labour force through labour hire providers paid by the hour and a network of contractors paid by piece rates. These contractors in turn engage further subcontractors who also then engage further subcontractors to supply workers to the Baiada Group sites. This procurement of labour creates the complex supply chains outlined in this report that undertake the poultry processing work at these Baiada Group sites.

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[3] Australian Chicken Meat Federation Inc, The Australia Chicken Meat Industry: An Industry in Profile, 2011, p.13.

[4] Lin, Ryan, *Poultry Processing in Australia,* IBISWorld Pty Ltd, February 2014.

[5] www.baiada.com.au, http://www.baiada.com.au/#

[6] www.baiada.com.au, http://www.baiada.com.au/#

In contrast Ingham Enterprises employs around 9000 direct employees[7], and uses minimal contracting arrangements.

The industry is characterised by a small direct customer base with supermarkets purchasing over 53% of product followed by fast food outlets and food processors that purchase nearly 20% of product.[8] Intensive discounting undertaken by the major supermarkets is reported to have placed downward pressure on profit margins in the industry which has led to diminished profits at the processing level.[9]

The Baiada Group produces the Lilydale Select and Steggles brands. The Group's customers include Woolworths, Coles, IGA, Aldi, McDonald's, KFC, Pizza Hut, Red Rooster, Nando's and Subway.

# Information gathering

The Inquiry was principally concerned with identifying the nature and terms of labour procurement through the Baiada Group's contracting networks. Understanding in detail the characteristics of the labour arrangements was critical to identifying whether the arrangements comply with the FW Act and who may be responsible for non-compliance with workplace laws.

The FWO conducted the Inquiry by relying upon powers contained in subsections 682(1)(a), 1(b) and 1(c) of the FW Act. These provisions allow Fair Work Inspectors to conduct monitoring, investigation and enforcement functions.

Stakeholder consultation was undertaken with those closely aligned with the industry including, the AMIEU, local councils, NSW Police, labour hire providers, hostel owners, the Australian Tax Office (ATO) and the Department of Immigration and Border Protection (DIBP).

[7] Lin, Ryan, *Poultry Processing in Australia,* IBISWorld Pty Ltd, February 2014.

[8] Lin, Ryan, *Poultry Processing in Australia,* IBISWorld Pty Ltd, February 2014.

[9] Lin, Ryan, *Poultry Processing in Australia,* IBISWorld Pty Ltd, February 2014.

Information was sourced from the Baiada Group and its subcontractors to identify the labour supply model. As each level of contractor was identified, records were sought for the sample period of October 2013 including:

- contracts
- invoices and bank records
- time and wages records.

Analysis of records was undertaken to examine how payments were distributed through the labour supply chain. The Baiada Group's inability to provide attendance records for the workers supplied by each principal contractor for the one month sample audit period (sample period) prevented cross checking against records provided by the contractors for labour supply. Analysis of the records provided to the Inquiry found that contractors did not provide full and accurate records. The Inquiry was unable (based on the limited material provided to it) to account for hundreds of thousands of dollars as money moved down the supply chain.

Meetings were undertaken with a number of contractors to better understand the labour supply processes. Accounts of first-hand experiences of workers at the plants were obtained by bilingual Fair Work Inspectors who travelled to Beresfield and Hanwood. Community opinions and experiences were also obtained through coordinated listening posts set up for the purpose of the Inquiry.

# Industrial instruments

During the sample period of October 2013 a number of industrial instruments specified workplace entitlements that applied to workers providing labour at the three sites. At the Hanwood and Tamworth sites the *Poultry Processing Award 2010* [MA000074] (Modern Award) applied, with wages and entitlements phasing from the *Poultry Industry Preparation State Award* [AN120428] (Poultry Pre Modern Award) as per the transitional provisions contained in Schedule A of the Modern Award.

At the Beresfield site the *Bartter Enterprises Steggles Food Products Pty Ltd Beresfield Site Operations AMIEU Integrated Award 2005 – 2008* [AN120045] (Bartter, Beresfield Enterprise NAPSA) applied in its entirety until 31 December 2013.

From 1 July 2014 the Modern Award applied in full across all three sites for workers engaged through contractors undertaking poultry processing work.

Although contractors within the supply chain reported paying piece rates, the industrial instruments that covered the work undertaken did not provide for payment of piece rates. In circumstances where piece rates are provided for in a Modern Award or enterprise agreement, there remains a requirement to ensure workers receive wages that equate to award minimums. Where piece rates are not provided for in an industrial instrument, employers are obligated to meet record keeping requirements in accordance with the FW Act, including maintaining accurate time and wages records.

# Baiada Group's contractor operating model – labour supply chains

The Inquiry observed that the Baiada Group's contractor operating model was influenced by the need to source labour at short notice for varying durations.

As at October 2013, the information disclosed that the Baiada Group had agreements to source labour with six principal contractors:

- B & E Poultry Holdings Pty Ltd [ACN 137 454 678]
- Mushland Pty Ltd [ACN 139 033 686]
- JL Poultry Pty Ltd [ACN 159 101 309]
- VNJ Foods Pty Ltd [ACN 146 980 574]
- Evergreenlee Pty Ltd [ACN 129 340 709]
- Pham Poultry (AUS) Pty Ltd [ACN 158 702 295].

The Inquiry found there was no documentation establishing or governing these arrangements. All of these agreements were verbal agreements. The Inquiry identified the following information with respect to these contractors:

- Baiada Group made payment to these principal contractors by the kilogram of poultry processed rather than by hours worked or the times processing work was performed (e.g. if work was undertaken on weekends, public holidays or during night shift)
- the principals contracted to at least seven entities acting as second tier contractors
- the second tier contractors, often contracted down a further two or three tiers
- the principal and second tier contractors were not generally engaged in the direct sourcing of labour
- the operating model relied upon verbal agreements and operated on high levels of trust
- the various contractors who engaged with Fair Work Inspectors during the Inquiry held no concerns about receiving payment from the entity above it in the supply chain for the invoicing of work, notwithstanding a lack of written contracts.

The effect of this operating model is to transfer costs and risks associated with the engagement of labour to a supply chain of contractors. Such a model is common to manufacturing[10] and retail sectors.

During the course of the Inquiry, 23 of the 39 identified contractors evidenced financial instability or hardship and four of the six principal contractors ceased operations. In respect of such prevalent financial precariousness, the FWO noted comments made by labour economist, Professor Weil:

> 'If subcontractors are financially viable they will be exposed to the costs imposed by their mistakes and accidents. Although the lead company is not liable in such an instance, contractors will end up forcing it to bear some of these potential costs in the form of higher prices upfront. However, if the contractors are financially unstable they become 'judgement-proof' because they will have few or no assets to claim. Such insolvent subcontractors will therefore price their services at a lower level'[11]

This report outlines the supply chains identified from information disclosed during the course of the Inquiry. These supply chains contain a number of entities that ceased operation following initial contact by the FWO.

In one example, the director of DHA Australia Pty Ltd operating in Hanwood and Azurenet Pty Ltd operating in Beresfield, agreed to meet with Fair Work Inspectors. The day before the meeting was to take place he sent an email advising Fair Work Inspectors that as a result of the Inquiry he was liquidating the entities. The liquidator sought records from the director, which he failed to provide. This matter is being referred to the Australian Securities and Investment Commission (ASIC).

Over the course of the Inquiry, Fair Work Inspectors made numerous site visits to the registered addresses of the various contractors. Contact was also attempted by email, fax and phone using interpreters and bilingual Fair Work Inspectors. Lack of cooperation from the Baiada Group, including failure to provide accurate contact details for contractors, lengthy delays in providing requested records and refusing Fair Work Inspectors access to worksites, along with the failure of contractors to update business registration records in

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[10] For instance, "'lean manufacturing' is a core production strategy famously developed for the auto industry by Toyota and then widely diffused across the sector", Weil, David, *The Fissured Workplace. Why work became so bad for so many and what can be done to improve it'* Harvard University Press, Cambridge, 2014, at p. 160

[11] Weil, op cit. at page 189. Professor Weil is also the Administrator of the Wages and Hours Division in the United States – which is a regulator contained within the US Department of Labour.

contravention of the *Corporations Act 2001* (Corporations Law), presented challenges in contacting directors and serving notices issued by the Fair Work Inspectors under the FW Act[12]. Instances of contractors that appeared to be failing to meet their obligations under the Corporations Law are also being referred to ASIC.

# Profile of the typical poultry process worker at Baiada Group sites

The Inquiry found overseas workers (mostly from Taiwan and Hong Kong) with work rights granted through the 417 Working Holiday Visa (WHV) program were the dominant source of labour for the poultry processing sites.

The WHV is a temporary visa for young people who want to holiday and work in Australia for 12 months. The WHV is designed to encourage cultural exchange and closer ties between Australia and eligible countries.[13]

The WHV program allows a second visa (permitting an additional 12 month stay with work rights) to be granted once the applicant works 88 days in a regional area in certain industries (including "processing of animal products"[14]).

In the first half of 2013 – 2014, Taiwan was the top country for visas granted under the WHV program, representing an 80.8% increase in Taiwanese WHV holders from the previous financial year. There was a 46.4% increase in Hong Kong WHV holders in the same period.[15]

The minimum wage in Taiwan is currently equivalent to $4.95 AUD per hour[16] while in Hong Kong it is equivalent to $5.35 AUD per hour[17]. This is compared to the current Australian

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[12] Note: Under the Fair Work Act 2009, Fair Work Inspectors do not have an automatic right of entry power

[13] Department of Immigration and Border Protection, www.immi.gov.au, http://www.immi.gov.au/Visas/Pages/417.aspx

[14] Department of Immigration and Border Protection www.immi.gov.au, http://www.immi.gov.au/allforms/pdf/1263.pdf

[15] Department of Immigration and Border Protection, *Working Holiday Maker visa programme report*, 2013, www.immi.gov.au, p.19.

[16] *Taiwan raises hourly minimum wage to NT$115 from Jan 1*, 2013, www.focustaiwan.tw, http://focustaiwan.tw/news/asoc/201312300006.aspx

[17] *Statutory Minimum Wage: Latest Version*, www.labour.gov.hk, http://www.labour.gov.hk/eng/news/pdf/SMW_Latest_Revision.pdf

national minimum wage of $16.86 per hour, with workers generally entitled to higher rates and penalties under the applicable industrial instruments.

By comparison, there were 31 Australians granted a Taiwanese WHV in 2013 compared to 15,704 Taiwanese granted a WHV for Australia in the same period[18].

A number of workers informed the Inquiry they were paid in cash, often required to work up to 18 hours per day without payment of overtime. They also reported that pay rates were not increased for weekend or public holiday work, as required by the applicable industrial instruments. While the workers did not pay any taxation on their income, they alleged they also did not receive any superannuation payments.

Records provided by some contractors showed workers being engaged for as little as four hours per week which did not correlate with the work patterns identified during discussions with key stakeholders. Referrals are being made to the ATO and NSW Office of State Revenue in relation to tax issues identified in the records provided.

Visits undertaken by Fair Work Inspectors identified migrant workers living in overcrowded residential houses in the Beresfield area surrounding the Baiada Group plant. Workers advised they were informed by their recruiters that they would not get work unless they rented accommodation from the contractor. They alleged rent was then deducted from their pay. Subsection 325(1) of the FW Act provides that "an employer must not directly or indirectly require an employee to spend any part of an amount payable to the employee in relation to the performance of work if the requirement is unreasonable in the circumstances."

One Beresfield property was found to have sleeping accommodation for 21 people. Residents in the overcrowded house were identified as being migrant workers at the Baiada plant. The Newcastle City Council issued a Notice of Intent to serve an order to cease operating as a backpacker hostel. The Notice resulted in the owner negotiating with the council to reduce the number of occupants to prevent the council serving the order. Land title searches show this property was purchased by an individual from Sydney for use as a tenancy in March 2012 for $370,000. Based on 20 people paying $100 per week, the potential rental income for this property is over $100,000 per year.

The WHV holders were primarily recruited by contractors through Chinese newspapers, Facebook or Taiwanese backpacker websites. Bilingual Fair Work Inspectors monitored Chinese language websites and Facebook over the course of the Inquiry and found a

[18] Information provided by Taipei Economic and Cultural Office, Sydney on 26 May 2014.

number of examples of recruitment posts for poultry processing factories at Beresfield, Tamworth and Hanwood. For example, the following job advertisements were placed on a Taiwanese backpacker website:

> Chicken factory is recruiting…come in to check it out quickly
> Agent fee: Nil, Location: Tamworth, Ends: Until full
> Number of ppl: Some, Job description: Packaging Boner, Hourly rate: Piece rate
>
> Employment news is coming again…chicken factory
> Need two female doing packaging work….on piece rate, 5 days a week
> But need to pay $300 bond, guaranteed refund in 3 months Location: Tamworth[19]

The Inquiry identified potentially discriminatory elements in a number of recruitment advertisements. Section 351 of the FW Act provides that an employer must not discriminate against a prospective employee based on race, colour, sex, age, physical or mental disability, national extraction or social origin.

[19] www.backpackers.com.tw, Viewed 1 April 2014, http://www.backpackers.com.tw/forum/showthread.php?t=1154891.

Jobs were specifically advertised as being for males or females and many asked applicants to respond with details of their nationality, height and weight.

> Chicken factory urgently recruiting male employees high salary
> Agent fee: Nil, Location: Rural area of NSW, Ends on: 12-01-2014 Hourly rate: By hour
> Require Male, no agent fee
> Location is about 5 hours drive from Sydney
> Can get there by train
> "not white job" but the weekly rate at least will get to 900 Australian dollars
> Name.
> Telephone.
> Height
> Weight
> Nationality[20]

[20] www.backpackers.com.tw, Viewed 10 January 2014, http://www.backpackers.com.tw/forum/showthread.php?t=1099008>

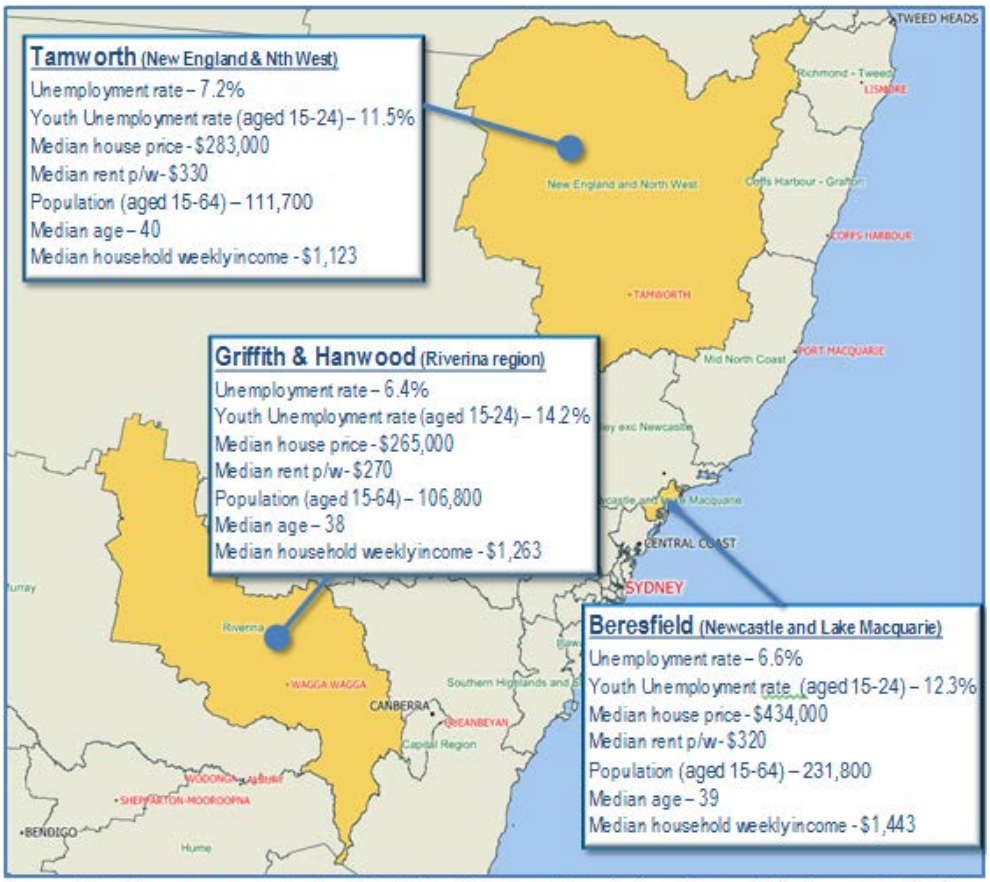
# Labour supply chain arrangements

The Inquiry examined the labour supply chain arrangements at the Baiada Group's three poultry processing sites in NSW:

- Beresfield
- Hanwood
- Tamworth

Each of the locations demographics are outlined in Figure 1.

***Figure 1: demographics by location***




*Source data – 'Unemployment rates' and 'Population' via Labour Market Information portal (lmip.gov.au), 'Median house prices' sourced via Domain.com. 'Median rent p/w' sourced via Realestate.com.au. All other sources Census 2011 via Maptitude ABS Census 2011 data.*

# The Beresfield site

Beresfield is 22 kms northwest of Newcastle. The Baiada Group's plant is centrally located within the town and processes approximately one million birds per week. Fair Work Inspectors received a particularly low level of engagement from contractors working within the supply chain at the Beresfield site. Four principal contractors were identified at the site as outlined in Figure 2.

B & E Poultry Holdings Pty Ltd (B & E) was identified as a principal contractor at the three Baiada Group processing sites in NSW. In addition, B & E operates its own processing factories in Ormeau in Queensland and Blacktown in NSW.

In the last three years 14 requests for assistance have been received from direct employees of B & E working at the Ormeau site resulting in recoveries of over $100,000 in underpayments. On 1 August 2014 B & E entered into a three year Enforceable Undertaking[21] with the FWO in respect of admitted contraventions by B & E in relation to its direct employees. The admitted contraventions concerned: underpayment of base hourly rates, underpayment of casual loadings, overtime rates, weekend penalties and shift penalties.

The Enforceable Undertaking requires B & E to:

- place workplace notices at the Ormeau site
- send an apology to the underpaid employees
- implement systems and processes to ensure future compliance with Commonwealth workplace laws
- have an external accounting professional conduct audits every six months for three years to ensure compliance with Commonwealth workplace laws
- implement a workplace relations training program for the directors and managers
- ensure all associated entities comply with workplace laws and industrial instruments.

[21] http://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/october-2014/20141009-be-eu-presser

While B & E was identified as a principal contractor, it did not directly engage any employees at any of the three Baiada NSW sites. At each site B & E contracted down a further two to three tiers to source the necessary labour.

***Case study*** - In February 2015 two Taiwanese WHV workers contacted the FWO after working up to 17 hours a day for three days at the Baiada Beresfield plant without receiving any payment. They provided the FWO with Baiada photo ID which listed the company name as "B & E Poultry". The FWO contacted B & E Poultry, they advised the workers were directly engaged by a supervisor subcontracting to one of their subcontractors in a personal capacity. They were unable to provide any details of this individual. They did not dispute the long hours worked and resolved the matter on behalf of the subcontractor through payment to the workers of the award rate.

When Fair Work Inspectors contacted the employing entities at the bottom of the various labour supply chains where B & E was the principal contractor, the majority of entities ceased operating either through strike off action, voluntary liquidation or deregistration.

At the Beresfield site, B & E was the only principal contractor still operating by the completion of the Inquiry.

Early on in the Inquiry, another principal contractor Mushland Pty Ltd (Mushland) provided a limited number of records though failed to disclose information that was specifically requested by Fair Work Inspectors. During the course of the Inquiry, the phones of both the company director and accountant were disconnected and the Baiada Group was unable to provide any further contact details for the parties.

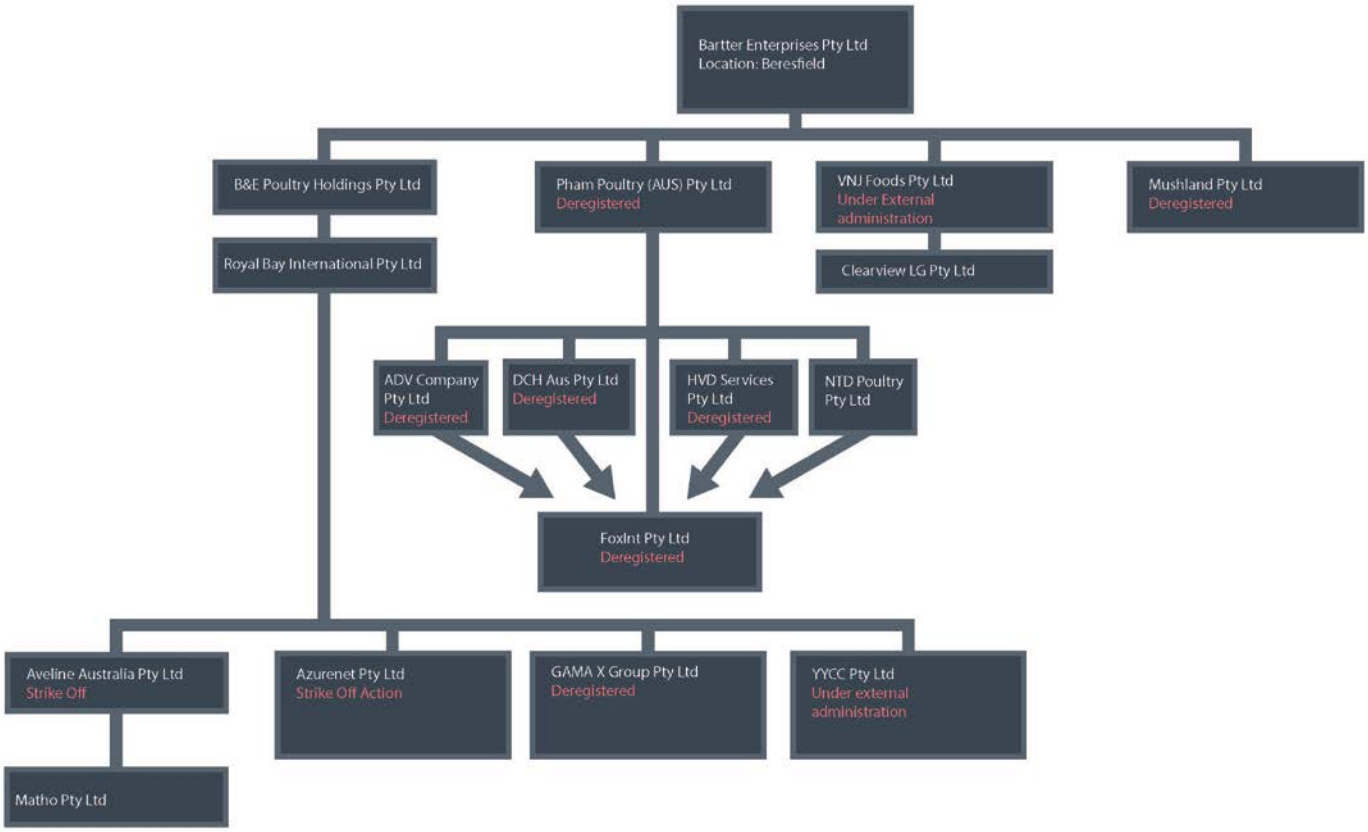
Analysis of the limited records, which included invoices and pay records provided by Mushland, identified the entity was paid $255,415.07 by the Baiada Group for the month of October 2013 (the Inquiry's sample period). The records also disclosed Mushland paid $52,460.85 in wages to 18 employees during this period, leaving a margin of $202,954.22.

An underpayment of $3,378.76 for 11 employees during the one month sample period was also identified. Mushland deregistered on 16 July 2014 without back payment to the workers being made.

Similarly, while principal contractor VNJ Foods Pty Ltd (VNJ Foods) directly engaged one employee to perform processing work, records obtained disclosed cash payments made to its subcontractor (Clearview LG Pty Ltd) of up to $150,000.00 per week. Despite repeated site visits, telephone and email contacts by Fair Work Inspectors, Clearview LG Pty Ltd

failed to provide any records or engage with the Inquiry. VNJ Foods entered into voluntary liquidation during the course of the Inquiry.

***Figure 2: the Beresfield site***




In November 2013 the FWO commenced a separate investigation in to the fourth principal contractor at the Beresfield site Pham Poultry (AUS) Pty Ltd (Pham Poultry) after receiving formal requests for assistance from 13 workers.

The Inquiry identified the labour supply chain headed by Pham Poultry involved a common director, Mr Quoc Hung Pham and during the month of October 2013 the Baiada Group paid Pham Poultry $1,078,155.30 for services provided at the Beresfield site.

The Pham Poultry arm of the labour supply chain involved four companies at a tier below the principal, these four companies subsequently contracted a further tier to a company called FoxInt Pty Ltd [ACN 159942202] (FoxInt). The director, Quoc Hung Pham, was also a director of the principal Pham Poultry.

Although Pham Poultry directly engaged some workers who were supervisors at the site, all process workers were engaged by FoxInt. Workers were paid between $11.50 and $13.50 per hour for shifts of up to 19 hours and were not paid any leave entitlements or provided payslips. The wages paid to the process workers at the bottom of this supply chain did not meet the required minimum entitlements.

Thirty workers engaged within the Pham Poultry supply chain were housed in a six bedroom house with two bathrooms, with the supervisor having one bedroom for her exclusive use. Each worker was required to pay $100 per week, deducted from their wages. There were no written agreements in relation to these deductions. Subsection 325(1) of the FW Act provides that “an employer must not directly or indirectly require an employee to spend any part of an amount payable to the employee in relation to the performance of work if the requirement is unreasonable in the circumstances.”

Subsection 326(1) provides that a term of a contract permitting a deduction has no effect to the extent that the deduction is “directly or indirectly for the benefit of the employer” and “unreasonable in the circumstances.”



*Image: This photograph was provided by the Newcastle City Council detailing a site inspection of accommodation used by poultry processing workers’ in the town of Beresfield. Fair Work Inspectors visited this house as part of the Inquiry.*

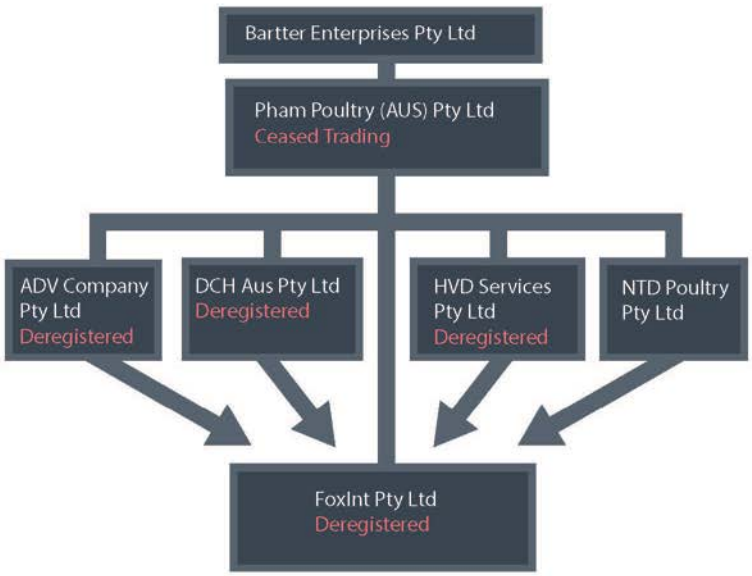
While the Inquiry was unable to locate Mr Quoc Hung Pham, the second director of Pham Poultry, Mr Binh Hai Nguyen, made voluntary payments of $20,250 to 10 workers to partially rectify the underpayment of entitlements.

The Baiada Group advised Fair Work Inspectors that following the broadcast of the *Lateline* story, they had asked Pham Poultry whether workers in the supply chain were being paid correctly and received the following information:

- a letter from Pham Poultry's accountant stating Pham Poultry was compliant with the Modern Award
- an unsigned letter on Pham Poultry company letterhead stating it was compliant with the Modern Award
- one week of payslips for 12 employees (one being the Pham Poultry company director) revealing wage payments totalling $6,828.63 compared to payment made by Bartter Enterprises Pty Ltd to Pham Poultry of $196,307.01 for that week.

The Baiada Group advised Fair Work Inspectors that following the receipt of this information they were satisfied that Pham Poultry was compliant with Commonwealth workplace laws. The FWO does not consider this information is able to support that conclusion.

***Figure 3: Labour procurement at the Baiada Beresfield site until December 2013***

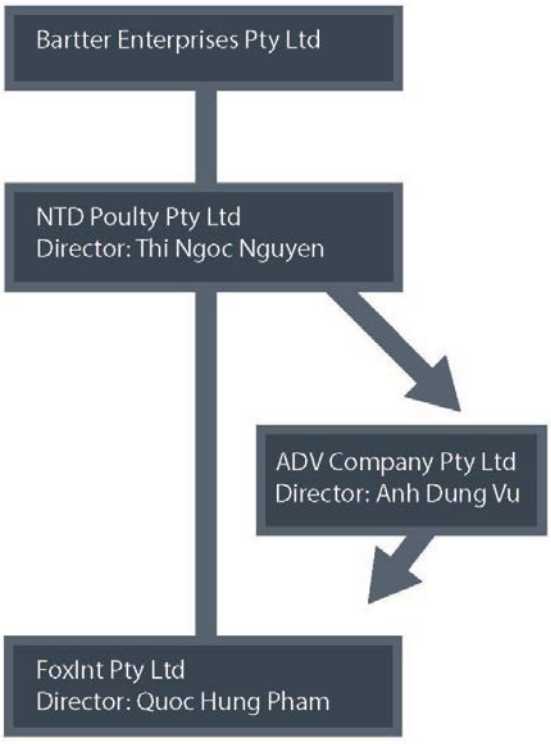


In December 2013, NTD Poultry Pty Ltd [ACN 165136194] (NTD Poultry) was identified as the principal contractor replacing Pham Poultry.

The labour supply chain operated by NTD Poultry contained the same entities as those in the Pham Poultry labour supply chain (see Figure 3). That is, a three tier supply model remained in place and the final contractor of labour FoxInt Pty Ltd, remained, whose Director, Mr Quoc Hung Pham, had been the Director of Pham Poultry and who could not be located by Fair Work Inspectors.

While the Inquiry was informed that workers continued to be underpaid (receiving $11.50 - $12.50 per hour), workers were reluctant to be witnesses in any ongoing investigation. Documentary evidence had not been recorded or maintained by the employing entity.

***Figure 4: The NTD Poultry supply chain as at January 2014***



# The Hanwood site

Hanwood is a rural town located 5 kms from Griffith, NSW. The area is also home to fruit farms and wineries. There are a number of workers hostels which assist backpackers to find work. Generally, there is a variety of work year round in the area.

As Figure 5 demonstrates, this site has a complicated procurement chain at the bottom level and the Inquiry was unsuccessful in its efforts to engage with a number of the lower level contractors, with all but one ceasing operations when contacted by the FWO.

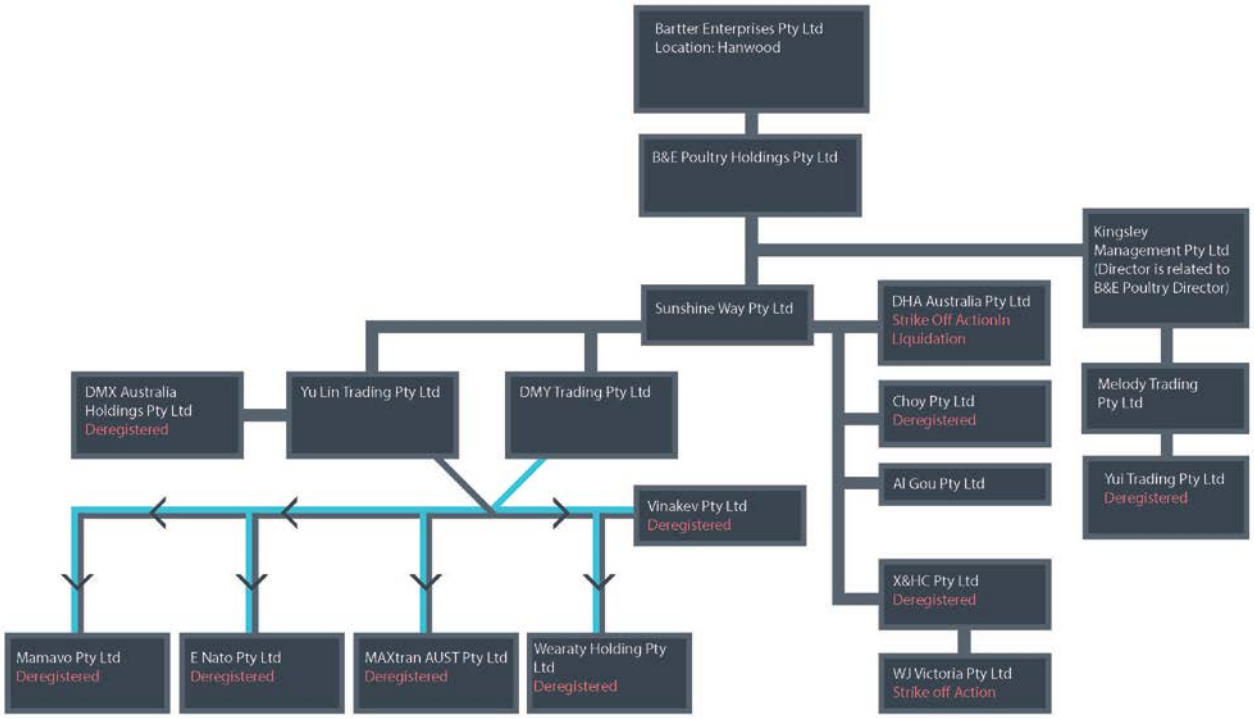
DMY Trading Pty Ltd and Yu Lin Trading Pty Ltd, operated by husband and wife directors, provided Fair Work Inspectors with records for their six subcontractors at the Hanwood site. When Fair Work Inspectors attempted to serve a Notice to Produce on one subcontractor they found an automotive workshop. The director of that business advised he had been at the registered address for 25 years and had never heard of the subcontractor named in the Notice.

Contact with two further entities identified they operated as clothing manufacturers, and were not involved in the poultry processing industry. One of these entities had ceased operating in 2012 and the other ceased operating during the course of the Inquiry. Referrals are being made to other relevant enforcement agencies.

At the Hanwood site, based on records provided to Fair Work Inspectors, the majority of workers were managed by Choy Pty Ltd [ACN 145026562]. This business deregistered during the course of the Inquiry. During conversations held with workers it was repeatedly alleged the director of Choy Pty Ltd, Mr Sin, directed workers to work very long hours. It was alleged that the workers had been required to work from 5:30 am to 11 pm on the Friday prior to Fair Work Inspectors visiting the area.

A number of current investigations are ongoing. Allegations have been made against Mr Sin, in his current capacity as a manager of migrant workers at the Hanwood site. Allegations involve a number of third tier contractors and Mr Sin's direction to require workers to work long hours. The current investigations have found Mr Sin is also involved in subletting accommodation to workers.

***Figure 5: the Hanwood site supply chain***




# The Tamworth site

Tamworth is located 420 km north west of Sydney. Tamworth is also home to a number of businesses undertaking beef and lamb processing operations. The Baiada Group factory is located in West Tamworth about 2 kms from the CBD. This site uses the simplest supply chain and as a result the Inquiry had the most success in engaging with contractors from this site.

Three principal contractors were identified at the Tamworth site: B & E, Evergreenlee Pty Ltd (Evergreenlee) and JL Poultry Pty Ltd (JL Poultry).

Evergreenlee did not engage any employees directly. Rather, it subcontracted to two entities CCKY Pty Ltd [ACN 160944963] and WL Jian Pty Ltd [ACN 164920852] which directly engaged 19 and 33 employees respectively. These second tier entities had one common director. CCKY Pty Ltd, ceased operating on 8 June 2014.

The Inquiry identified that WL Jian Pty Ltd failed to keep time and wage records in the form required under the FW Act. In response to these contraventions, Fair Work Inspectors issued two Infringement Notices and a Letter of Caution to WL Jian Pty Ltd.

Another principal contractor JL Poultry took seven months to provide records. Fair Work Inspectors conducted two site visits to the registered address. On both occasions those present at the address advised the director was not known and was not located at the site.

Written correspondence was only able to be directed to JL Poultry once a Notice to Produce issued to its financial institution resulted in additional address details being provided.

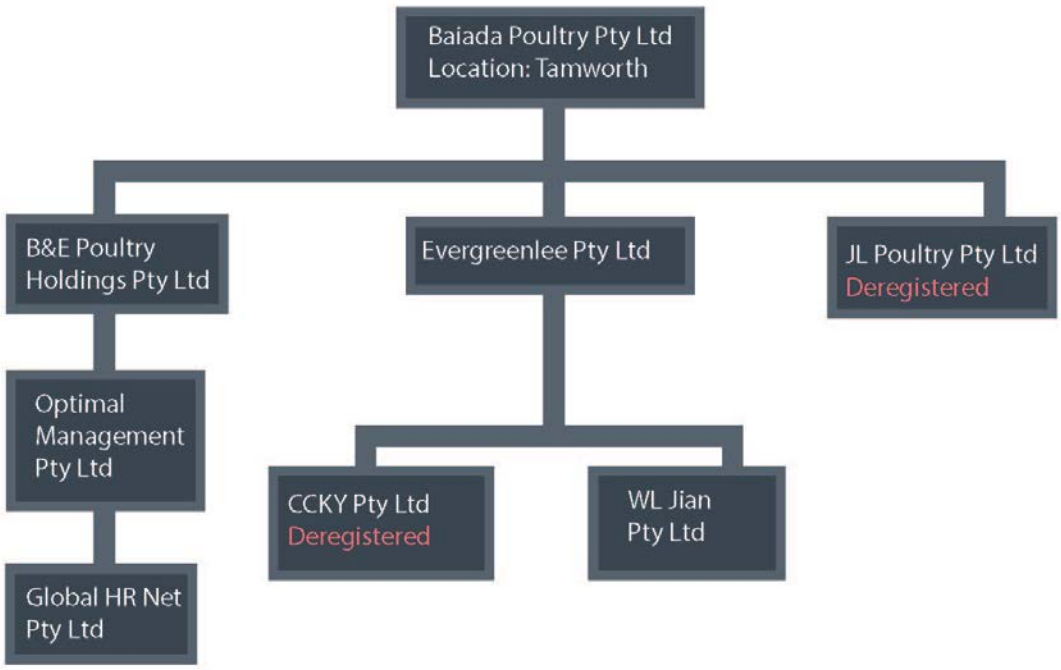
The records provided by JL Poultry indicated the entity was paid $139,080.37 by Baiada Poultry Pty Limited for two weeks of the Inquiry sample period. During this sample period JL Poultry paid $8,746.80 in wages to nine direct employees (including the director). This left a margin of $130,333.57 for the two week Inquiry sample period. During the course of the Inquiry JL Poultry advised its contract with the Baiada Group had been cancelled.

The records provided by JL Poultry identified it had failed to issue payslips in the form prescribed by the FW Act. Fair Work Inspectors issued JL Poultry with an Infringement Notice and Letter of Caution but the entity was deregistered on 17 December 2014 and as a result, the FWO was unable to pursue payment of the Notice.

The Inquiry identified that the third tier contractor under the B & E arm of the supply chain, Global HR Net Pty Ltd [ACN 159451813], engaged workers to hang live chickens on hooks prior to being slaughtered. While the workers had been paid above award rates, the Inquiry's view was that the workers had been misclassified as independent contractors when they were in fact employees. The reasons for this view were the application of the 'multi-factor' test by Fair Work Inspectors which determined the workers were employees, not independent contractors. This involved considering the totality of the situation and how the relationship operated on the ground on a day-to-day basis.

The Inquiry found the workers in this situation were not paid superannuation, tax was not deducted from wages and the workers were required to provide Australian Business Numbers and were subsequently paid per crate. Following meetings with the directors, Fair Work Inspectors were able to identify that the workers had been incorrectly engaged as contractors and a Letter of Caution was issued warning the company about the misclassification of workers. Two Infringement Notices in relation to failure to keep correct records as required by the FW Act were also issued.

***Figure 6: the Tamworth site supply chain***




# Other findings – involving other government regulatory agencies

The Inquiry identified a number of issues which also give rise to potential breaches of other federal, state and local government laws and reflect the workers' overall experience in the industry, including workers required to pay high rents to share overcrowded and unsafe housing, discriminatory advertising for labour, workplace health and safety concerns, entities failing to update their details with ASIC, operating when deregistered and potential non-payment of taxation and superannuation. These findings are being referred to the appropriate agencies and the prescribed phoenix taskforce[22].

[22] The phoenix taskforce is an Australian Government initiative dedicated to detecting and deterring fraudulent phoenix behaviour: https://employment.gov.au/inter-agency-phoenix-taskforce

# Concluding observations

The information obtained through the Inquiry indicates that the Baiada Group's operating model is influenced by the need to source labour at short notice and for varying durations. The Inquiry also identified that this operating model transfers the cost and risk associated with the engagement of labour from the Baiada Group to labour supply chains of contractors. When contractors are asked to demonstrate to the Baiada Group that they are complying with minimum entitlements, they provide very minimal evidence, which appears to be accepted.

Employees working at the Baiada Group's sites are not being paid their lawful entitlements. There is also a range of other conduct which may contravene the FW Act under way at Baiada's sites. The FWO encountered significant barriers to pursuing further inquiries or taking enforcement action in relation to a number of contractors who directly engaged workers because they did not cooperate, entered into voluntary liquidation or were deregistered.

In a large number of instances, where Fair Work Inspectors attempted (and persisted in attempting) to engage with contractors, contractors ceased operations and were very quickly replaced with new "price takers", resulting in suppliers of labour being forced into accepting market prices with no power to negotiate a higher price.

It is important to note the actual work and subsequent non-compliance with Commonwealth workplace laws is taking place on premises owned and operated by the Baiada Group. Baiada Group is therefore the chief beneficiary of work carried out by this labour force. The Baiada Group has the ability to take steps to ensure that workplace laws are complied with on their sites.

There has been extensive media coverage and public debate regarding underpayment practices occurring at the Baiada Group's sites. The FWO has a history of investigations at work sites where these issues have been raised with Baiada Group representatives. The findings of this Inquiry place the Baiada Group and the head contractors on notice and therefore, aware workplace laws are not being complied with and that correct minimum entitlements may not have been and may not be met at Baiada sites.

While the outsourcing of labour is a legitimate business decision, in the FWO's experience, doing so without appropriate governance and oversight can create an environment where it is more likely that contraventions of workplace laws may occur.

In order to change behaviour and build a culture of compliance, the Inquiry identified the importance of continuing to inquire into and monitor the Baiada Group and its principal contractors. Further work is necessary to ensure that workers at the Baiada Group sites receive their lawful minimum entitlements and are paid in accordance with the applicable awards or agreements, and that record keeping and payslip obligations under the FW Act are met.

# Recommended next actions

The FWO considers that the information obtained to date warrants further investigation into the Baiada Group and its contractors. In particular, the FWO's next actions need to focus on three broad areas of inquiry to assess whether there is sufficient evidence to determine that the FW Act has been contravened. The three areas are:

## 1. Accessorial liability by supply chain participants

The *FW Act* sets out accessorial liability provisions at section 550:

*Involvement in contravention treated in same way as actual contravention*

*(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.*

*(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:*

*(a) has aided, abetted, counselled or procured the contravention; or*

*(b) has induced the contravention, whether by threats or promises or otherwise; or*

*(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*

*(d) has conspired with others to effect the contravention.*

An accessory is any person who is "involved in" a contravention under section 550 of the FW Act. A range of persons or entities can be accessorily liable to a contravention, including businesses and individuals involved in or part of a supply chain. A company or individual who is part of the supply chain can be accessorily liable where it is determined that the company or individual is aware or at the very least turns a blind eye to the fact that sums paid by the principal contractor to companies within the supply chain are not sufficient to meet the lawful labour costs of performing the work.

A large company that sources labour through smaller companies with knowledge that sums paid to those companies are not sufficient to meet the lawful employee entitlements of those performing the work who are either directly engaged by the smaller companies or by companies subcontracting to them, could potentially be accessorily liable.

## 2. The possible existence of "sham contracting arrangements"

In this context, "sham contracting arrangements" refers to contractual arrangements where, unlike genuine labour hire arrangements, one or more parties seek to disguise (either deliberately or recklessly) the reality of the relationship between the worker and either that entity, or other entities. For example, a company may claim wrongly that a worker is an independent contractor when they are in fact an employee, or that the worker does not have an employment relationship with another company when they do. These arrangements may particularly arise where there are multiple levels of contracting between the business receiving the benefit of the labour and the people working in the business. Companies will engage in sham contracting for a variety of reasons including to avoid the responsibilities associated with having employees, such as paying annual and personal leave, or to ensure that the business is unable to meet debts owed to employees when they are claimed, because the employing entity is undercapitalised.

## 3. Knowingly providing false or misleading records, with consideration given to pursuing accounting and legal professionals who assist businesses in providing false or misleading records.

Record keeping is of great practical importance in ensuring compliance with legal minimum conditions of employment. The courts have confirmed that employment records are not merely technical or procedural requirements. Provision of false or misleading records can have the effect of preventing any action to remedy significant underpayments of wages, and non-payment of annual leave and superannuation for those workers who may have been entitled to these employment benefits.[23] This is particularly serious when the employees affected are vulnerable workers often without local ties and therefore without the support, ability or the motivation to pursue underpayments.[24]

Paying cash wages without keeping any records creates an opportunity to avoid the operation of a range of laws including: income and payroll tax, workers compensation, social security, and immigration law.

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[23] *Fair Work Ombudsman v Honest and Frank Pty Limited & Hyun Teh Seok [2010] SAIRC 23 per IM Sm Lieschke* at [24]

[24] Ibid at [25]

Record keeping is the bedrock of compliance. Where employers or associates such as human resource professionals or accountants provide false or misleading records to the FWO a range of enforcement options can be considered against the parties involved. Contractors responding to the Inquiry used common legal and accounting professionals with analysis of the records provided giving rise to concerns that many of the records were false or misleading.

The FWO is going to actively pursue these three lines of inquiry with a view to taking appropriate action.

**The FWO recommends that the Baiada Group:**

- ensure its entities identify the true employer of workers and display the correct employing entity on the Baiada identification cards issued to workers
- install an electronic time keeping system which applies to all workers at the plants, enabling them to maintain accurate records of workers on site and their start and finish times
- establish a formal complaint reporting process with a Mandarin speaking human resources representative within the Baiada Group to receive complaints and/or questions from persons engaged as poultry processing workers on Baiada Group sites
- implement protocols and policies that improve governance arrangements to ensure workers at their sites are being paid correct rates for all time worked
- provide transparency of labour supply arrangements through documentary substantiation of the contracting arrangements between themselves and all levels of suppliers of labour
- prepare industry and language specific induction materials, and provide these to all workers on Baiada Group sites
- commission an appropriate external specialist (e.g. a business consulting group or similar, not being an entity or person who has previously provided the Baiada Group with advice on these matters) to review the Group's business model and provide advice about the model's impact on compliance with workplace laws at its sites.

**For its part, the FWO will continue to work closely and collaboratively with other regulatory agencies and groups to:**

- use section 550 of the Fair Work Act and its accessorial liability provisions to ensure parties do not turn a “blind eye” to minimum employee entitlements, and hold to account those we find who are involved in contraventions of Commonwealth workplace laws

- investigate labour supply chain practices, such as sham contracting, which deprive vulnerable employees of basic rights and protections, like penalties, overtime, allowances or leave; and pursue those responsible

- initiate enforcement action against parties, including any accounting and legal professionals, found to be assisting businesses to provide false and/or misleading records to Fair Work Inspectors

- engage with major buyers of processed chicken products, such as Coles, Woolworths, KFC, Aldi and others, to raise awareness of the importance of compliant and ethical supply chains and, where appropriate, seek partnership agreements to promote compliance

- assist Baiada to implement the recommendations of this report

- develop a database to record all details and compliance history for contractors in the poultry processing industry. If the pilot is successful, the database could be expanded to include contractor information for other industries, such as the meat, horticulture and cleaning industries

- provide ongoing reports about the findings of investigations into non-compliance with workplace laws in other supply chains to assist other federal and state agencies, lead businesses and customers understand the industries and to help promote ethical, moral and socially responsible practices

- release this report. There has been significant public discussion around the labour supply chain in this industry and there is public interest in the findings of this Inquiry. Baiada customers should have this information to make informed choices. It is also hoped the public release of this report will give confidence to employees previously too frightened to speak to the FWO to now come forward with concerns about potential breaches of workplace law.

- inform the activity of Taskforce Cadena and the prescribed phoenix taskforce.[25]

The FWO's ongoing inquiries and use of a range of specialised regulatory powers will continue to target unlawful practices in supply chain arrangements in the poultry processing industry. We aim to build a culture of compliance among those entities responsible for the procurement of workers at the Baiada Group's poultry processing sites. In particular, we ask Baiada to publicly declare that it has an ethical, moral and social responsibility to join with the FWO to stamp out exploitation of vulnerable workers at its work sites, and we extend an invitation to Baiada to join with us in a compliance partnership.

Michael Campbell

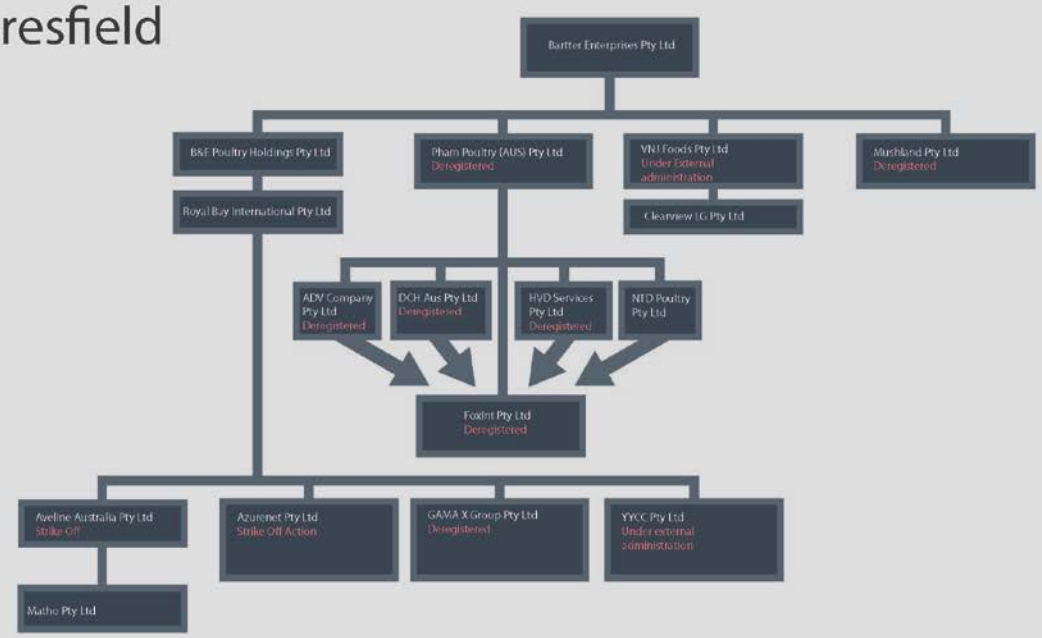
Deputy Fair Work Ombudsman – Operations

18 June 2015

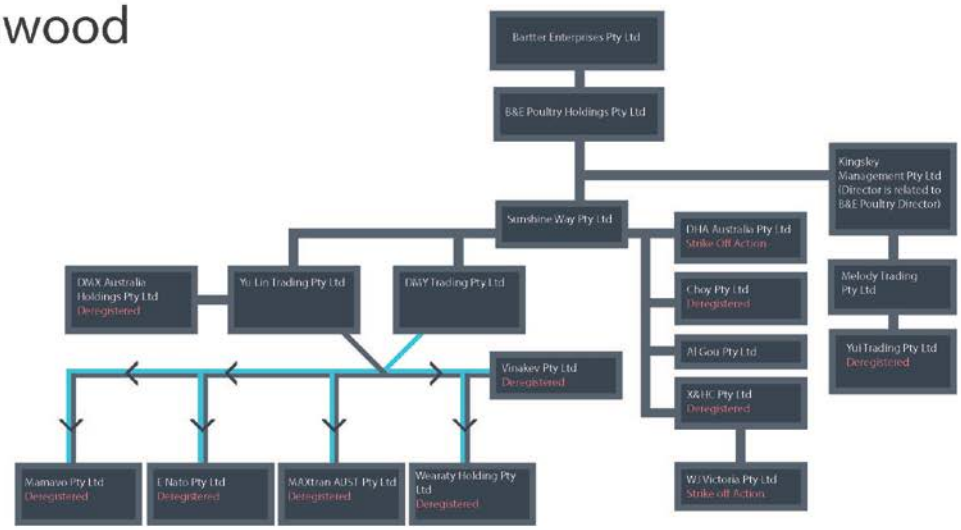
[25] Formally commenced on 4 June 2015, Taskforce Cadena is an Australian government initiative formed for the conduct of multi-agency operations targeting visa fraud, illegal work and the exploitation of foreign workers. The foundation members of the Taskforce include the Department of Immigration and Border Protection, Australian Customs and Border Protection Services and the Fair Work Ombudsman. A key objective of the Taskforce is to influence the behaviour of Australian businesses in order to enhance compliance with Australian workplace laws and regulations in relation to overseas worker rights and obligations.

# Supply chain as at 31 October 2013

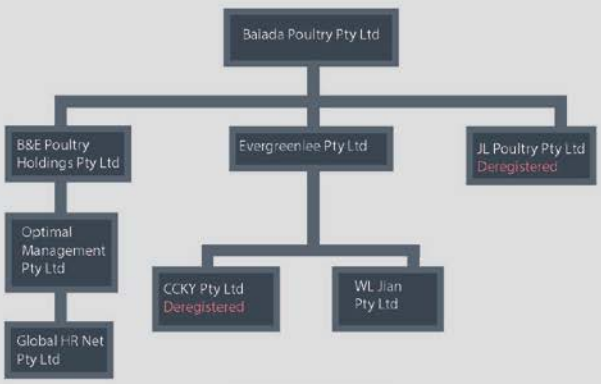
## Beresfield




## Hanwood




## Tamworth




Company status correct as of 25 May 2015