Australian Government

Fair Work OMBUDSMAN

Fair Work Ombudsman Submission to 'A Migration System for Australia's Future' Review

December 2022

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Introduction and FWO Overview

1. The Fair Work Ombudsman (FWO) welcomes the opportunity to make a submission into the review of Australia's migration system, 'A Migration System for Australia's Future'.
2. The FWO is an independent statutory office that provides education, assistance and advice about Australian workplace laws as prescribed under the *Fair Work Act 2009* (FW Act) and, where appropriate, impartially enforces those laws.
3. The FWO's functions include:
    - promoting harmonious, productive and cooperative workplace relations through education, advice and assistance;
    - monitoring compliance with workplace laws;
    - inquiring into and investigating breaches of the FW Act; and
    - taking appropriate enforcement action when necessary.
4. The FWO has a nationwide presence with a network of 22 offices located in all capital cities and 14 regional areas. Since the agency's establishment in 2009, the FWO has recovered more than one billion dollars in unpaid entitlements for nearly 639,000 employees, completed over 317,000 disputes and more than 50,000 proactive audits, and commenced 726 litigations.
5. The FWO also provides an extensive range of free information, tools and resources to help workplace participants understand their workplace rights and obligations. Our website includes professionally translated in-language resources available in over 30 languages and an automated translation plug-in tool. Translation and interpreter services are also available for conversations with FWO staff. Since 2009, the FWO's website has been visited more than 181 million times and advice and information on workplace rights and obligations been provided in response to 6.5 million phone calls and 826,000 digital enquiries.
6. In undertaking its functions, the FWO works closely with a wide range of stakeholders including employees, employers, their organisations and representatives, non-government organisations, community legal centres, the community and relevant public sector agencies including other regulators.
7. The FWO was a member of the Migrant Workers' Taskforce (MWT), which reported in 2019. To inform MWT activities, including the drafting of the final report, the FWO shared knowledge and intelligence of migrant worker issues gained through our extensive investigation, compliance, educative and engagement work.
8. We have continued to contribute to the MWT through our participation in the Migrant Workers Interagency Group (MWIAG), collaborating across government on the implementation of MWT recommendations.
9. The FWO has also published findings from its Inquiries involving migrant worker issues and the structural and behavioural drivers that lead to serious and/or widespread non-compliance with workplace laws. These include:
    - Published in June 2015, an Inquiry into the labour procurement arrangements of the Baiada Group. Fair Work Inspectors inquired into allegations of migrant worker exploitation at three Baiada Group processing sites in NSW, finding significant underpayments, migrant labour

working extremely long hours and requirements to pay high rents for overcrowded and unsafe worker accommodation.[1]

- Published in April 2016, an Inquiry into 7-Eleven Australia Pty Ltd. A large number of international students from non-English speaking backgrounds were employed by 7-Eleven and its franchisees. The Inquiry report detailed changes made by 7-Eleven to ensure future compliance and made recommendations designed to, among other things, enhance the FWO's effectiveness to hold entities and persons responsible for exploiting vulnerable workers on temporary working visas to account.[2]
- Published in October 2016, an Inquiry focusing on the wages and conditions of 417 visa holders. The Inquiry examined the impact of conditions attached to the 417 visa, specifically the 88 day requirement, and whether it is a driver of non-compliance. The Inquiry found that the 417 visa program created an environment where unreasonable and unlawful requirements were being imposed on visa holders by unscrupulous businesses, and recommended a number of measures.[3]
- Published in November 2018, an Inquiry into workplace arrangements on the Harvest Trail, which found widespread non-compliance amongst employers investigated, resulted in a number of compliance and enforcement outcomes and recovered more than $1 million for over 2000 employees.[4]

10. The FWO has been involved in and made contributions to several other Inquiries, reviews and taskforces relating to migrant worker exploitation over a number of years, including Parliamentary Inquiries into:
    - The impact of Australia's temporary work visa programs on the Australian labour market and on temporary visa holders;[5]
    - Temporary Migration;[6] and
    - The Working Holiday Maker Visa Program.[7]
11. Every year the FWO publishes its annual Compliance and Enforcement Priorities, focusing on industries or cohorts that are at significant risk of non-compliance and emerging issues that are of considerable public interest and concern. In 2022-23, as in previous years, assisting vulnerable workers, including visa holders and migrant workers, is an enduring priority for the FWO.[8]
12. In 2022-23, the FWO has also prioritised industries where migrants are known to work, including agriculture. The FWO has a dedicated two-year Agriculture Strategy, which commenced in December 2021, that aims to enhance compliance amongst participants in the horticulture, viticulture and

[1] A copy is available here: The Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales
[2] A copy is available here: Identifying and addressing the drivers of non-compliance in the 7-Eleven network
[3] A copy is available here: Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program
[4] A copy is available here: Harvest Trail Inquiry Report
[5] The FWO appeared as a witness before the Inquiry in May, July and September 2015. The report of the Inquiry is available on the Australian Parliament House website: The impact of Australia's temporary work visa programs on the Australian labour market and on temporary visa holders
[6] The FWO made a submission to the Inquiry and appeared as a witness in September 2020 and June 2021. The report of the Inquiry is available on the Australian Parliament House website: Temporary Migration
[7] The FWO appeared as a witness before the Inquiry in September 2020. The Report of Inquiry is available on the Australian Parliament House website: The Working Holiday Maker Visa Program
[8] More information is available on our website: Our priorities - Fair Work Ombudsman

agriculture sectors. The development of the Strategy was informed by the FWO's tripartite Horticulture Reference Group, which was established following the Harvest Trail Report.

13. The Agriculture Strategy has identified 15 hot spot regions that we are focusing on and provides flexibility to respond to emerging issues and intelligence. In the last year, growers and labour hire providers have been fined a combined $78,362 for breaching pay slips and record-keeping laws.

Migrant worker education and engagement

14. Regardless of their citizenship or visa status, migrant workers and visa holders in Australia are entitled to the same workplace rights and protections, and are entitled to the same rates of pay, as other workers. However, they can face additional barriers to enforcing their rights which can make them vulnerable to exploitation, including:
    - cultural and language barriers;
    - lack of knowledge of Australia's workplace rights and entitlements; and
    - a reluctance to question their entitlements.
15. To ensure they understand their entitlements and how to seek assistance when those entitlements are not received, the FWO prioritises education and engagement activities with migrant workers as well as their communities.
16. We encourage the community, industry and other stakeholders to come to us with intelligence, information and allegations. This can be done anonymously if preferred, with the ability for migrants to make reports in-language.[9] Any credible information or allegations we receive are considered in line with our Compliance and Enforcement policy.
17. The FWO has an extensive suite of tools and resources available for migrant workers. These include:
    - a dedicated section on the FWO website with information for visa holders and migrant workers and general information about workplace rights and entitlements particularly relevant for this audience;
    - translated information and resources, including videos, as well as an automatic translation tool that translates most pages across the website into over 30 languages;
    - an anonymous reporting tool to report concerns about workplace practices, which is available in English and 16 other languages; and
    - a free Translating and Interpreting Service.[10]
18. The FWO also undertakes engagement activities to assist migrant workers to understand workplace rights and entitlements, and break down barriers that might prevent them from approaching us, including:
    - dedicated FWO webinars (including in-language) tailored for migrant workers and employers;
    - direct engagement with migrant workers and employers at community and stakeholder events, with bi-lingual staff delivering information in language where possible;

[9] More information is available on our website: Report an issue anonymously
[10] More information is available on our website: Language help

- provision of resources to intermediaries including migrant resource centres, consulates/embassies, community legal centres, community leaders, international education providers and student leaders;
- delivering 'train the trainer' sessions to intermediaries; and
- collaborating with community networks.

19. The FWO regularly runs communications campaigns to promote our in-language information and education resources, including digital campaigns across social media.

Enforcement of migrant worker rights and entitlements

20. Where entitlements aren't being received, and particularly where migrant workers are being exploited, the FWO takes a very firm compliance and enforcement approach. In line with our prioritisation of matters involving vulnerable workers, matters involving visa holders are more likely to have compliance action taken through enforcement tools than other matters.
21. In the past five full financial years, the FWO has recovered more than $7.95 million for visa holders, filed 126 litigations involving visa holders and secured more than $13.4 million in court ordered penalties.
22. In May 2020, record penalties of $891,000 were ordered against the operators of three sushi restaurants for underpayments totalling $700,832. This matter involved underpayment of student and working holiday visa holders from Korea and Japan and the provision of false records to the FWO.
23. We have also been actively using the higher penalties inserted into the FW Act by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* to ensure effective deterrence against the exploitation of migrants. Examples include:
    - in June 2022, we obtained $355,000 in total penalties against the operators of a Brisbane sushi restaurant and its director, which deliberately underpaid 34 employees, including many young Chinese, Japanese, Korean and Thai visa holders; and
    - in May 2022, the FWO secured $204,000 in penalties against the operators of a Brisbane fast food business after they provided false and misleading records. We investigated after receiving a request from a Nepalese visa holder employed as a casual kitchenhand who alleged he was working between 50 and 60 hours per week and paid $11 to $13 an hour.
24. The FWO publicises enforcement outcomes, including via in-language media releases, as an important means of deterring such behaviour and to increase awareness of these issues to encourage vulnerable workers to seek the FWO's assistance.
25. The FWO also plays an important educative and enforcement role in the Pacific Australia Labour Mobility (PALM) scheme, which includes:
    - conducting investigations and proactive audit activities;
    - conducting on-arrival briefings for workers; and
    - developing and delivering tailored information, education and resources about workplace rights and entitlements for program participants.
26. It is important to note that the data above likely underrepresents the amount of FWO's enforcement work relating to visa holders, as we do not require workers to disclose their visa status when providing them with assistance. Further to visa status being immaterial to a worker's eligibility to receive

assistance from the FWO, our experience is that requiring such a disclosure can be a barrier to visa holders engaging with government agencies.

27. This limitation in data collection also applies to matters self-reported by employers to the FWO, which make up an increasing amount of the FWO's enforcement activities and monetary recoveries. It is beyond the scope of the FWO's investigation into these matters to confirm the visa status of the many thousands of workers who benefit from having their unpaid entitlements returned to them.
28. Despite this likely underrepresentation in the FWO's data, in 2021-22, while making up about 4% of the Australian workforce, visa holders as the exploited party have accounted for:
    - 26% of all litigations commenced (36 commenced);
    - 65% of all penalties achieved ($1,759,023 in penalties); and
    - 18% of all anonymous reports received (2,236 anonymous reports, with 428 in-language anonymous reports from a possible 16 languages).
29. That fact that visa holders and migrants are overrepresented in the FWO's work, even though the problem is likely underreported, underscores the systematic nature of migrant worker exploitation and why this cohort is prioritised by the FWO.

Addressing migrant worker exploitation

30. As outlined above, the FWO has made and continues to make every effort to combat migrant worker exploitation within the confines of our role and the resources available, through education for migrant workers, engagement with migrant communities and stakeholders, and strong enforcement of workplace laws where appropriate.
31. We work collaboratively across Government to support the delivery of Government programs and to share information where appropriate to detect and disrupt employers who exploit vulnerable migrant workers, including:
    - the Assurance Protocol with Home Affairs, which encourages migrant workers who may have breached their work-related visa conditions as part of an exploitative employment arrangement to seek assistance from the FWO without fear of visa cancellation;
    - a subsidiary arrangement with the Australian Border Force, which is assisting us to ensure compliance in the horticulture and other priority sectors through joint operations;
    - compliance and enforcement activity in several joint agency operations led by the Australian Taxation Office's Black Economy Standing Taskforce and Phoenixing Taskforce, and
    - collaboration with the Department of Employment and Workplace Relations and the Department of Foreign Affairs and Trade to promote compliance with workplace laws and the role and services of the FWO within the PALM Scheme.
32. The FWO has also partnered with community organisations through Community Engagement Grants, awarding $14.5 million in funding to community organisations since 2017 to provide vulnerable groups, including migrant workers, with advice, information and assistance about workplace laws.
33. The FWO and the work we do is, however, only one part of the wider regulatory settings pertaining to migrant workers and we are unable to fully address the root causes or impacts of migrant worker exploitation on our own.

34. To best address migrant worker exploitation, a co-ordinated approach that includes both government and other stakeholders is needed to both prevent exploitation in the first place and, where exploitation does occur, to better encourage migrant workers to come forward with their concerns.

35. Providing education to migrant workers on their workplace rights and the avenues available to them to report exploitation assists with both of these goals. Education providers are the main point of contact and support for many international students studying in Australia. The FWO works with education providers to help reach international students to increase their knowledge of workplace laws and awareness of the FWO and our role. A similar approach has proven effective for the PALM Scheme, where the FWO has a key educative role and has received funding to prioritise this work.

36. Education providers were the subject of several recommendations of the MWT Report relating to education and assistance for international students. While steps have been taken to implement these recommendations, the FWO would support further efforts to promote the education resources available, both across government, and by education providers with greater access to international student communities.

37. While greater education of migrant workers will assist with prevention of exploitation, there is an opportunity to expand the other levers available to the FWO and other regulators within the system, particularly employer sanctions. The FWO supports greater use and visibility of the employer sanctions currently available under the migration framework, and the work of Home Affairs to address recommendations 7, 19 and 20 of the MWT Report.

38. These recommendations relate to adverse publicity and banning orders, the creation of an offence where a person knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a visa condition, and consideration of mechanisms to exclude employers who have been found to have underpaid a temporary migrant worker for employing new temporary visa holders for a specified period.

39. In relation to recommendations 7 and 20 of the MWT Report, the FWO would support providing powers to Home Affairs to issue banning and/or exclusion orders to employers directly. Resting such powers with Home Affairs enables broader considerations to be taken into account that fall outside the scope of the FWO, such as WHS matters and contraventions of other legislation, including migration laws.

40. This model has been adopted in New Zealand (NZ), administered by the NZ Ministry of Business, Innovation and Employment, which has responsibility for immigration and maintains a public 'stand-down list' listing employers who have breached employment standards. These employers are unable to support visa applications for migrant workers for a set stand-down period.

41. The FWO, as outlined above, prioritises enforcement action relating to migrant workers, who are over represented in our work relative to their numbers in the workforce. In our experience, however, we often find that when migrant workers approach us for assistance, they have already left their employer and/or are soon to return to their home country. This can lead to difficulties in gathering the information and intelligence we need to pursue allegations of exploitation, and, in many cases, it is simply too late for any meaningful action to be taken to address the contravening conduct. This is particularly the case in industries such as horticulture, where it is not uncommon for employees to have little knowledge of who their employer is beyond a phone number.

42. While there are a number of reasons for this reluctance to report concerns to the FWO, in our experience visa holders are primarily concerned that reporting allegations of exploitation will lead to negative consequences from their employer, including loss of employment and possible visa cancellation. We find that this is the case even where visa holders are not on a sponsored visa.

43. Visa holders are often also concerned, again for a number of reasons, that reporting allegations to a government entity may lead to visa issues, particularly where they may have breached visa conditions or contravened other legislation (such as through payment of wages in cash for tax avoidance purposes) as part of an exploitative employment arrangement.

44. The Assurance Protocol between the FWO and Home Affairs was put in place in response to concerns around breaches of work-related visa conditions which occurred due to exploitation. As of 30 June 2022, the FWO had referred 77 workers to Home Affairs under the Assurance Protocol and none of these visa holders have had their visa cancelled. While the Assurance Protocol has been successful in that respect, stakeholders have expressed concerns that the arrangement is not suitable and does not fully address the broader issue of how to encourage migrant workers to report exploitation.

45. The FWO would be supportive of further detailed consideration of the Assurance Protocol through the MWIAG to ensure it is fit for purpose, particularly in relation to feedback provided by stakeholders such as community legal centres.

46. The FWO notes that, in addition to the concerns we have outlined above, there are a number of other outstanding issues within the migration system which contribute to or exacerbate the incidence of migrant worker exploitation, and where further work is needed. These include requirements for migrant workers in remote locations to use and pay for sub-standard on-site accommodation through deductions from wages, over-charging for transport to and from the accommodation site to the work site, unsafe working conditions, and sexual harassment and bullying of migrant workers.

Further information

47. We trust the information included in this submission is of assistance to the review. If you have any questions about the contents of this submission or the FWO's approach to migrant worker exploitation, you are welcome to contact Mr Anthony Fogarty, Executive Director of Policy, on (03) 9954 2746 or at Anthony.Fogarty@fwo.gov.au.