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Exploitation of Unauthorised Migrant Workers in Australia: Access to the Protection of Employment Law

Laurie Berg and Bassina Farbenblum

I. INTRODUCTION

Unauthorised workers are notoriously susceptible to exploitative working conditions across the Western world.[1] However, Western legal systems differ markedly in their approach to according labour rights to this vulnerable group of workers. There are still great divergences when it comes to enforcement of labour standards for unauthorised work, and in the extent to which, when these migrants are exploited at work, they can access government assistance and recover their wages.

This chapter examines the work experiences of migrants engaging in unauthorised work in Australia. These workers include individuals who have overstayed their visa, and those who have worked in breach of their visa conditions. The latter include tourists, and international students who have exceeded the number of work hours permitted under their visa.[2] The chapter explores the legislative framework and the unsettled body of case law concerning the entitlement of unauthorised workers to basic employment protections.[3] It also reviews a range of government policies and attitudes which have historically prioritised immigration compliance goals over the enforcement of labour rights for these migrant workers. Finally, it considers the extent to which exploited unauthorised workers are able to access assistance from Australia's federal labour inspectorate, the Fair Work Ombudsman ('FWO'), and recover their wages in practice.[4]

This study draws on the authors' broader empirical research on access to justice for temporary and unauthorised workers in Australia. This included field research conducted between 2016 and 2017 in Sydney, Melbourne, Brisbane, Adelaide and Canberra, involving six focus groups with 26 temporary migrants in Sydney, Melbourne and Brisbane, and 36 interviews with a range of stakeholders involving government agencies, legal service providers, advocates, unions, and five

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[1] Although the term 'illegal worker' is used by the Department of Home Affairs (DHA), and often found in the Australian media, this chapter uses the term 'unauthorised migrant worker'. This term acknowledges that some permission (to remain or to work or both) has been withheld. But it also suggests the possibility of change of status, and in particular the ability of a government authority (whether the department or parliament) to effect that change.

[2] Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016) 150-155.

[3] In Australia, labour law (also known as employment or industrial relations law) is extremely complex. It contains rights and obligations for workers and employers in a range of different instruments, including a mix of federal, State and Territory statutes and regulations, industry-based awards authorised by tribunals which have the force of legislation, registered enterprise agreements setting out conditions in a business, and common law principles, especially those related to contracts of employment. As this chapter deals with underpayments of minimum wage, it considers primarily the *Fair Work Act 2009* (Cth) and its interaction with contract law and the *Migration Act 1958* (Cth).

[4] For detailed discussion of other temporary migrant workers' access to employment protections and recovery of wages in Australia, see: Berg, above n 2; Joanna Howe, Laurie Berg and Bassina Farbenblum, 'Unfair Dismissal Law and Temporary Migrant Labour in Australia' (2018) 46(1) *Federal Law Review* 19; Bassina Farbenblum and Laurie Berg, "Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman" (2017) 23(3) *Australian Journal of Human Rights* 310 and UNSW Human Rights Law Clinic, *Temporary Migrant Workers in Australia* (Issues Paper, 15 October 2015).

temporary migrants. Together with Stephen Clibborn, the authors also conducted the National Temporary Migrant Work Survey in 2016, which yielded 4,322 responses from individuals who have worked on a temporary visa in Australia, including 281 who had engaged in unauthorised work in breach of their visa conditions.[5] That survey was distributed to temporary migrant workers via social media and email lists of unions and service-providers, and asked participants about the wages and other conditions in their lowest paid job in Australia, as well as a range of questions about their experiences, perceptions and knowledge of their rights at work.

Our analysis reveals a lack of clarity as to the protections accorded to unauthorised work under the Fair Work Act 2009 (Cth), which is the statutory framework underpinning Australia's minimum employment laws and agency bodies. In addition, there appears to be a practice among government agencies in Australia of differential treatment of the two subsets of unauthorised workers: those, including international students, who work in breach of temporary visas authorising work (likely the vast majority), and those working in breach of visas that do not permit work, or who work having overstayed a valid visa. In relation to the first group, the immigration authorities appear to be more willing to overlook breaches of work-related visa conditions in exercising discretion not to cancel visas and initiate removal from Australia. The same discretion does not seem to be accorded to unauthorised workers who do not hold visas with work rights. Further, in response to recent intense media coverage of systemic underpayment of international students, and given the very large numbers of international students in Australia, the FWO appears to be more willing to deliberately involve them in its investigations and provide them with targeted of assistance to recover unpaid wages. At the same time, following Australia's longstanding deference to immigration compliance, the labour regulator has not yet instituted a strong firewall insulating students who have breached visa conditions from referrals to immigration officials.

Indeed, serious barriers remain to unauthorised workers in Australia recovering their wages in practice. We therefore conclude this chapter with suggested regulatory reforms. These include legislative action to ensure the validity of employment contracts of those engaging in unauthorised work and an enforceable firewall regarding immigration status to decrease unauthorised workers' fear of detection when seeking FWO assistance.

II. THE CONTOURS OF UNAUTHORISED WORK IN AUSTRALIA

There are good reasons to think that unauthorised migrant labour in Australia occurs on a far more limited scale than elsewhere in the world. This is primarily because both Australia's geographic isolation and lack of contiguous land borders prevent clandestine entry and facilitate the strict monitoring of arrivals and departures by means of a universal visa system. Australia's own Auditor-General has concluded that the country's immigration compliance arrangements are 'arguably the most effective of any country in the world'.[6] These compliance systems mean that the numbers of migrants who are present without a right to remain are small but known. By contrast, the extent of

[5] Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (2017) 46.

[6] Australian National Audit Office, *Onshore Compliance – Visa Overstayers and Non-Citizens Working Illegally: Department of Immigration and Multicultural and Indigenous Affairs* (the Auditor-General Audit Report No 2, 2004-05) 20.

visa-holders working in contravention of their particular visa conditions is 'not well understood'.[7] A government-commissioned review of unauthorised migrant labour in Australia in 2011 posited that roughly 100,000 people may work without permission in Australia at any one time, or around 0.8% of the Australian workforce.[8]

A. Who are Unauthorised Workers in Australia?

The first group of unauthorised workers are those who are present without a visa. Since all non-citizens in Australia require a visa in order to lawfully remain and virtually no one has ever entered Australia without detection, these unauthorised migrants are all overstayers. As of May 2017, the Department of Home Affairs ('DHA') estimated that there were 64,600 overstayers in Australia, of whom 70 per cent had entered on a visitor visa.[9] Approximately 20,000 of these were thought to be working unlawfully.[10] This produces a ratio of unlawful non-citizens to total population in Australia of about 1:450, compared to the ratio of 1:29 in the United States, where there were an estimated 11 million undocumented migrants in 2016,[11] or 1:100 in the United Kingdom, where the number of unauthorised residents in 2007 was estimated at 618,000.[12] According to statistics released by the DHA in 2014, the largest proportions of overstayers were from China (12.3%), Malaysia (10.2%), the United States (8.3%), the United Kingdom (6%), and India (5.5%).[13] It has been estimated that, as of 2015, 25% of overstayers had overstayed their visa by between 5 and 15 years, and a further 28% had overstayed by 15 years or more.[14]

The remaining unauthorised workers are made up of two groups of visa-holders who engage in work contrary to their visa conditions. One such group comprises individuals who are working while holding a visa that prohibits work entirely. These are largely tourists, but may also be asylum seekers who arrived by boat without authorisation, and who have ultimately, after a long period in immigration detention, been offered temporary bridging visas without work rights.

The other group are those who are working contrary to work limitations on their visas. The pool of temporary visa-holders with restricted work authorisation in Australia has grown dramatically since the 1990s. While Australia has historically prioritised permanent residence, from

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[7] Australian National Audit Office, *Managing Compliance with Visa Conditions: Department of Immigration and Border Protection* (Auditor-General, ANAO Report No 13, 2015-16), 8.

[8] Stephen Howells, *Report of the 2010 Review of the* Migration Amendment (Employer Sanctions) Act 2007 (Cth of Australia, 2011), 12. This rudimentary estimation was based on adding the 53,900 non-citizens in Australia at that time having overstayed their visa (recorded in the Department of Immigration and Citizenship *Annual Report 2019-10*) to the unknown number of non-citizens working in breach of visa conditions which 'it is not possible to determine or even estimate' (at 26).

[9] The Department of Home Affairs (DHA) is Australia's federal agency responsible for federal law enforcement, national security, immigration and border-related functions. It was preceded by the Department of Immigration and Border Protection (DIBP), which operated between 2007 and 2013.

[10] Senate Legal and Constitutional Affairs Committee (Budget Estimates 2016-17), Parliament of Australia (23 May 2017), 17.

[11] Jeffrey Passel and D'Vera Cohn, 'Overall Number of US Unauthorised Immigrants Holds Steady Since 2009' (Pew Hispanic Centre, September 2016).

[12] Ian Gordon, Kathleen Scanlon, Tony Travers and Christine ME Whitehead, *Economic Impact on the London and UK Economy of an Earned Regularisation of Irregular Migrants to the UK* (GLA Economics, Greater London Authority, 2009), 48.

[13] DIBP, *Australia's Migration Trends 2012-13* (2014), 78.

[14] Australian National Audit Office, above n 7, 22.

2000 the net migration gain from long-term temporary movement exceeded that from permanent movement, effecting a transformational shift to temporary migration.[15] If we exclude New Zealanders, whose work rights are unrestricted, as of 2016, there were over 878,000 temporary migrants with work rights in Australia, comprising 11 percent of the Australian labour market.[16]

International students are the largest group of temporary visa-holders with work entitlements, and the group which has increased most in recent years: as of 2018 there were more than 525,000 international students in Australia.[17] Over one-third are from China (20 percent) or India (15 percent).[18] Australia is the third most population destination for international students after the US and UK, although international students comprise a far greater proportion of the Australian population than its competitors.[19] Indeed, Australia may soon overtake the UK in terms of actual numbers of incoming students.[20] As funding for the higher education sector has become increasingly reliant on international student fees,[21] there is a significant incentive and effort across government to maintain a positive image of international students' experience in Australia. While some international students may come from wealthy families, this is not the case for many of them. In a recent survey, around half of international undergraduate students were worried about their financial situation and one in seven regularly went without food or other necessities because they could not afford them.[22] A large subgroup is undertaking short English language or vocational courses.[23] As workers, their circumstances may be such that they are more like archetypal vulnerable migrant workers than they at first appears.[24] The National Temporary Migrant Work Survey found that a quarter of all international students earned half the minimum wage or less in their lowest paid job in Australia.[25]

Because of the large numbers of international students in Australia, and the financial pressures on them, international students may also be the group of temporary visa holders most likely to be working in Australia contrary to their visa conditions. These visas permit a mandatory maximum of 40 hours' work per fortnight while the student's course is in session, and the same limitation also applies to their partners on secondary visas. Many students may be working more hours than permitted to service significant debts to finance their studies. For others, unlawfully low pay rates may lead them to work more hours than permitted.[26] Others may overshoot their work

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[15] Peter Mares, *Not Quite Australia: How Temporary Migration is Changing the Nation* (2016); Graeme Hugo, 'A New Paradigm of International Migration: Implications for Migration Policy and Planning in Australia', Information and Research Services, Parliamentary Library, Research Paper No. 10, 2003-04, March 2004.
[16] Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016) 15; DIBP, *Temporary Entrants and New Zealand Citizens in Australia: As at 31 December 2016* (2016) 3.
[17] Natasha Robinson, 'Australia Hosting Unprecedented Numbers of International Students', *ABC News*, 18 April 2018.
[18] DHA, *Student Visa and Temporary Graduate Visa Program Bi-Annual Report* (ending at 31 December 2017) 11.
[19] 'UK Slipping Behind Australia in International Education' *University World News*, Issue No 515, 19 July 2018.
[20] Ibid.
[21] Andrew Norton and Ittima Cherastidtham, *Mapping Australian Higher Education 2018* (Grattan Institute Report No 18-11, September 18) 45-46.
[22] Universities Australia, *2017 Universities Australia Student Finances Survey* (August 2018) 13.
[23] 14% of enrolments in May 2018 were in English language courses and 26% were in vocational education and training: Department of Education and Training, *International Student Data: Monthly Summary* (May 2018).
[24] Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181.
[25] Berg and Farbenblum, above n 5, 6.
[26] Reilly, above n 24, 188.

cap by a small amount, or on isolated occasions, and may do so unintentionally or without realising it has happened. [27]

A number of other visa-holders may become unauthorised workers by virtue of the structure of their temporary visas, albeit that the numbers are likely to be small. One such group is young Working Holiday Makers, whose work is restricted to no more than six months with any one employer (except in certain exceptional cases). Another is temporary skilled visas permit work only in the sponsored occupation at a salary at the market rate, and at a salary at least as high as the minimum specified amount. (These were known as 457 visas until March 2018, when they were replaced with the Temporary Skill Shortage visa scheme.)

Consequently, the population of unauthorised workers is highly varied in Australia. On the one hand, are those who have overstayed a visa, often a tourist visa. Many of these will have deep roots in the community, having lived in Australia for many years, and they may be living with their families, contributing to the community, and working informally. Their circumstances are particularly precarious because they lack the legal authority to remain in Australia at all. A potentially larger group are international students who work (or have worked) more than the 40 hours per fortnight permitted to them. These may in some ways have more privileged circumstances: they are not in Australia illegally, are likely to have private health insurance and may have families back home providing some financial support for their stay.[28] We shall see below that, increasingly, these quite diverse populations of workers are subject to different treatment both in law and at a policy level.

B. The Immigration Regulatory Framework Governing Unauthorised Work

The legal treatment of unauthorised work under the Migration Act is similar for all migrant workers. In Australia the ever-present status of 'deportability'[29] for overstayers is particularly acute because of the country's rigid and punitive approach to immigration regulation and enforcement, justifiably described as a 'culture of control'.[30] On expiration of a visa, if the migrant is not eligible for any other visa, they become an 'unlawful non-citizen'. Unlawful non-citizens in Australia are *automatically* subject to mandatory detention and removal *as soon as practicable* without the judicial oversight or bureaucratic discretion which exist in other jurisdictions.[31] A small empirical study commissioned by the Immigration Department has found that this threat of detention may be an even greater concern for unauthorised workers than the prospect of removal.[32]

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[27] In some reported cases the breaches are extremely marginal: see, for example, *090314* [2010] MRTA 522, where the visa-holder breached condition 8105 in only one instance, which involved a choice between covering an absent employee's shift or losing his job.

[28] Shanthi Robertson, *Transnational student-migrants and the state: the education-migration nexus* (Palgrave Macmillan 2013).

[29] Nicholas De Genova, 'Migrant "Illegality" and Deportability in Everyday Life' (2002) 31 *Annual Review of Anthropology* 419, 419.

[30] Kathryn Cronin, 'A Culture of Control: An Overview of Immigration Policy-Making' in James Jupp and Marie Kabala (eds), *The Politics of Australian Immigration* (Australian Government Publishing Service, 1993), 83.

[31] Migration Act, ss 189 and 198. The constitutionality of mandatory detention and removal have been upheld in numerous High Court judgments: *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; *Al-Kateb v Godwin* [2004] HCA 37.

[32] Hall & Partners Open Mind, *Engagement Strategies Associated with Deterring Illegal Workers* (research report submitted to DIAC, 11 October 2012), 17.

Those visa-holders who work contrary to visa restrictions similarly fear detection of their unauthorised work, as DHA decision-makers are accorded discretion to cancel visas on this basis.[33] Upon visa cancellation, they too face mandatory detention and summary removal. However, in contrast to the gravity of these fears and the severe consequences of visa cancellation, the DHA in fact rarely exercises its visa cancellation power on this basis. For example, the agency has informed the authors that between 1 July 2012 and 30 June 2015, only 32 student visas were cancelled for breach of work rights, and that 102 visas of students' dependents were cancelled for breach of their identical work rights.[34]

The climate of insecurity in which unauthorised workers live has been intensified, at least symbolically, by the introduction of a number of civil and criminal offences related to unauthorised work. Working without authorisation - whether as an overstayer, or while holding an otherwise valid visa – has been a criminal offence since 1979.[35] This criminal offence is set out in section 235 of the Migration Act 1958 (Cth): we return to the legal implications of this offence in more detail in Section III, below. Employers found to have allowed a non-citizen to work in breach of their visa may also face civil and criminal sanctions.[36] Fault-based criminal offences for knowingly or recklessly allowing a non-citizen to work without authorisation were introduced in 2007. In order to create a more graduated employer sanctions scheme, strict liability offences were introduced in 2013 with no-fault civil penalties for those who employ unauthorised workers. However, there is no evidence of investigations or prosecutions of the worker-related offence in Australia, presumably because of the overwhelming policy imperative to remove unauthorised migrants from Australia without delay.[37] Between 2007, when criminal offences related to employers were introduced, and 2013, there were less than ten convictions.[38] Although far more employers have received lower-tier sanctions - for instance, 414 Illegal Worker Warning Notices were issued to employers in 2015-16 - these sanctions carry no financial penalty.[39] Compared with the financial and social upheaval of summary removal for workers. such sanctions therefore do very little to disrupt the power imbalance within exploitative employment arrangements.[40]

C. The Working Conditions of Unauthorised Workers

There is very limited data available on the working conditions of unauthorised workers, due in large part to the hidden nature of this population and their reluctance to seek assistance. Given the diversity of unauthorised workers in Australia, it is likely that experiences and conditions vary between groups. It is clear from the few government reviews conducted in recent years into unauthorised labour that the ever-present threat of detection and removal leaves all unauthorised workers susceptible to employer exploitation. There is evidence of employers pressuring international students into breaching their work restrictions, then 'blackmailing' them with demands

[33] Migration Act, s 116.
[34] Private communication between DIBP and Laurie Berg, 5 May 2016.
[35] Migration Act, s 235. Berg, above n 2, 169.
[36] Migration Act, s 245AB.
[37] Private communication between DIBP and Laurie Berg, 19 July 2013.
[38] More recent decisions include: *R v Simonetta* [2017] VCC 2015; *Kartawidjaja v Rowe* [2016] VSC 176.
[39] DIBP, *2015-16 at a Glance*, https://www.border.gov.au/about/reports-publications/research-statistics/statistics/year-at-a-glance/2015-16 (2016).
[40] Migrant Worker Focus Group, Brisbane, 2016; Catherine Hemingway, 'Not Just Work: Ending the Exploitation of Refugee and Migrant Workers' (WEstjustice Employment Law Project, Final Report, November 2016) 9.

for 'work at reduced wages, breaches of occupational health and safety conditions, even sexual favours'.[41] A government-commissioned report into employer sanctions in 2011 recorded the poor treatment typically experienced by tourist visa-holders and overstayers engaging in unauthorised work:

> [Immigration] officers have encountered dozens of [unauthorised] workers in single rooms and [busloads] of workers who do not appear to know who is employing them, where they are working or staying, who will pay them, whether they are actually entitled to work and what is the proper rate of pay … These workers are particularly vulnerable. They may be underpaid, mislead [sic] about what they are doing, undernourished, beaten and threatened.[42]

The Temporary Work Survey 2017, undertaken by the authors with Clibborn, explored the working conditions of different sets of unauthorised workers. It included 281 unauthorised workers, comprising 247 international students who admitted to working more than 20 hours per week in an average week in their lowest-paid job, and 34 individuals who had been tourists when working in their lowest-paid job in Australia. As suggested in previous research on international student vulnerability, these figures are likely to underestimate the unauthorised work among the survey's total 4,322 respondents, since many students are reluctant to report work done in excess of visa conditions, even in an anonymous survey.[43]

Within the group of 281 respondents who admitted to engaging in unauthorised work while holding tourist or student visas, a fifth (21%) worked as convenience store or petrol station attendants. This finding accords with a number of recent media exposés of systemic underpayment of international students working in excess of the hours permitted on their visa in these types of premises.[44] The industry with the next highest number of these unauthorised workers (12%) was cleaning, which has also been the subject of investigation in relation to the exploitation of international students.[45] This was followed by retail (8%) and food services (7%), the latter of which is another industry that has been the subject of research into the exploitation of international students.[46]

Figure 1. Occupations with the highest number of international students working more than 20 hours per week and tourists

[41] Michael Knight, *Strategic Review of the Student Visa Program 2011 - Report* (Cth of Australia, 30 June 2011), 85.

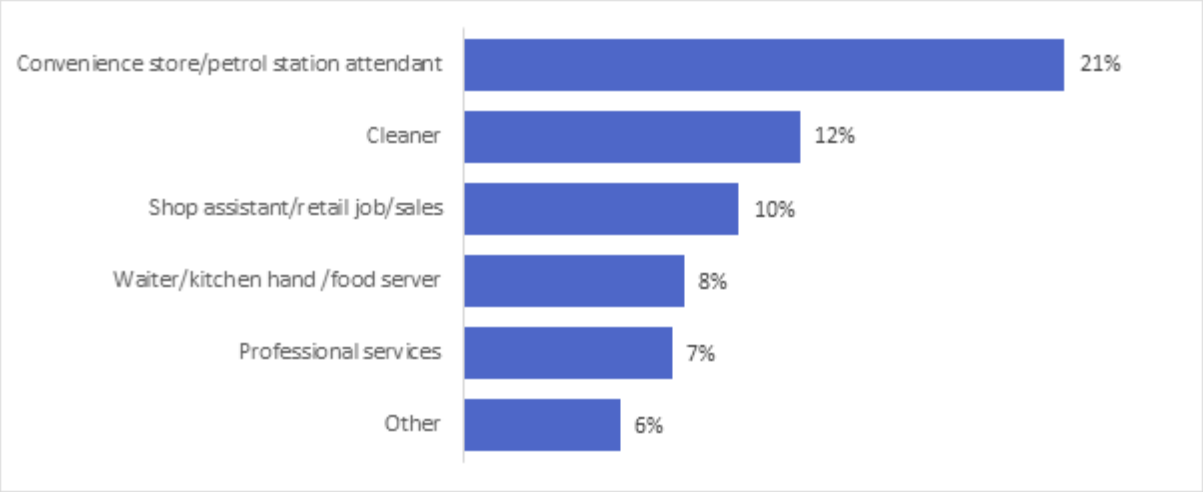
[42] Howells, above n 8, 56.

[43] Simon Marginson, Chris Nyland, Erlenawati Sawir and Helen Forbes Mewett, *International Student Security* (Cambridge University Press, 2010).

[44] Adele Ferguson,'7-Eleven: Workers caught in cashback scam' *Sydney Morning Herald*, 8 September 2015; Mario Christodoulou, 'Caltex audits to date reveal 80 per cent of franchisee petrol stations underpaid staff' *Sydney Morning Herald*, 2 May 2017.

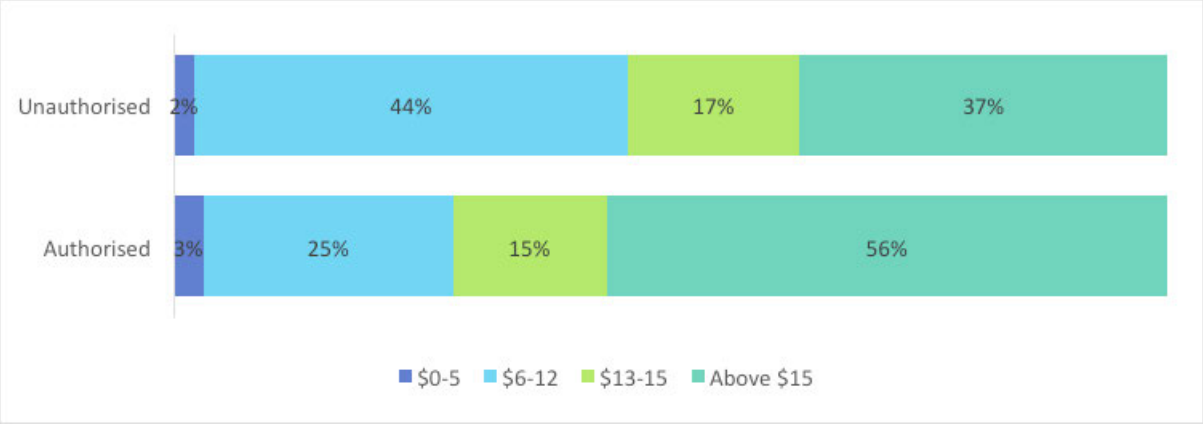
[45] Fair Work Ombudsman 'Statement on outcome of Inquiry into the housekeeping services of 4 and 5-star hotels' (2016), www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160520-hotel-housekeepers-inquiry; United Voice, *A Dirty Business: The Exploitation of International Students in Melbourne's Office Cleaning Industry* (2013).

[46] Iain Campbell, Martina Boese and Joo-Cheong Tham, 'Inhospitable Workplaces? International Students and Paid Work in Food Services' (2016) 51(3) *Australian Journal of Social Issues* 279.



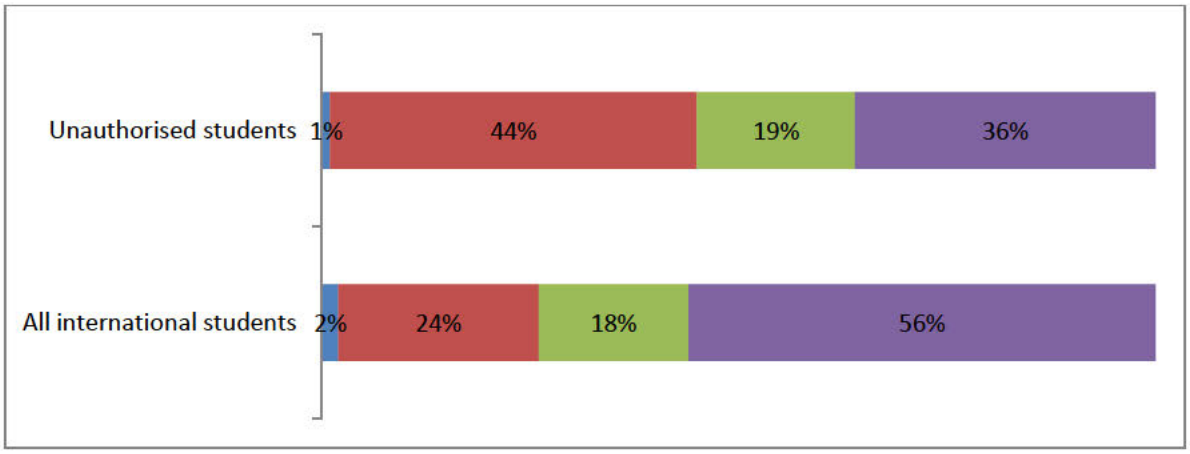
As can be seen in Figure 2 below, these workers were paid substantially less in their lowest paid job than the other temporary visa holders who participated in the survey. Almost half (46%) of the unauthorised workers were paid $12 per hour or less, compared with just over a quarter (28%) of other temporary workers.[47] The difference in wage rates is also striking between the outcomes of more similarly situated workers: students working in breach of visa conditions and students working in compliance with visa conditions. Figure 3 below reveals that while 46% of unauthorised students were paid $12 per hour or less, only 26% of all other international students were paid $12 per hour or less.

Figure 2. Pay in lowest paid job for international students working more than 20 hours per week and tourists (unauthorised) vs. all other visa holders (authorised)



[47] It may be added that $12 per hour was probably around half the minimum wage for the job. The minimum statutory wage at the time was $17.70 per hour, and in most cases workers would have been entitled to more under relevant Awards (higher arbitrated minimums in a range of industries). Furthermore, the vast majority of unauthorised migrants worked in casual positions, which attract a 25% loading in lieu of regular hours, paid leave and other entitlements.

Figure 3. Pay in lowest paid job for international students working more than 20 hours per week vs. international students overall



Almost a third (30%) of the respondents who admitted to unauthorised work while holding tourist or student visas were in their lowest-paid job for a year or more, and almost three-quarters (73%) were in their lowest -paid job for four months or more. This suggests that these unauthorised workers often stay in underpaying jobs for significant lengths of time.

In another study published in 2017, Marie Segrave reported on the results of the first detailed empirical examination of the experience of overstayers working in Australia, having interviewed 46 workers who had worked unlawfully. She reported that every participant in her study had experienced non- or low-payment for work, as well as incidences of debt bondage and unauthorised deduction from wages, frequently without explanation.[48] Segrave reports that participants either worked without formalised work agreements, or in a web of complex subcontracting arrangements in which workers were uncertain about who was paying or employing them. Workers were generally aware that they were being underpaid, but accepted their position as one of powerlessness.[49] As one worker noted, '[i]t [is] very tough to live in a country like in Australia compared to where we come from... [but] we can't afford to do anything else so we have to just stay... as long as we get something [i.e. some money]. (14 March 2017)'.[50] Other workers reported having to work under degrading and dehumanising conditions. For example one worker stated,

> It's – they treat us like it's not like a human. They treat us like very low, low, low person. It's not come from planet. Maybe some other planet that treat us like – it's saying animals, but they don't treat you like animal, more than like – it's not good.... [but] you don't complain, in case you don't get your job.... Once you complain, you're gone anyway. (18 February 2017, 6 female workers).[51]

III. THE LABOUR ENTITLEMENTS OF UNAUTHORISED WORKERS

There is conflicting Australian authority on the issue of whether unauthorised migrant workers are entitled to employment protections. Analysis of these cases is complicated by the fact that these

[48] Marie Segrave, *Exploited and illegal: The impact of the absence of protections for unlawful migrant workers in Australia* (The Border Crossing Observatory and the School of Social Sciences Monash University, 2017), 38.
[49] Ibid, 36.
[50] Ibid, 37.
[51] Ibid, 34.

cases involve a mix of judicial decisions from courts of different levels in different states along with administrative tribunal decisions. The cases consider a variety of employment protections in different state and federal statutes, as well as the interaction of these with different versions of statutory offence of unauthorised work set out in the Migration Act over time. There has, however, to date been no consideration of this issue by the High Court of Australia, Australia's highest court of appeal.

This section provides a chronological account of the main caselaw.[52] We shall see that, in the case of workers' compensation legislation, the pre-eminent approach has been to deny coverage to unauthorised workers, on the basis that their employment contract was void for illegality because it contravened Migration Act offences. However, the approaches which have been taken have been so divergent as to leave the law unsettled, such that a litigant seeking employment entitlements in relation to unauthorised work would lack certainty as to which way their case would be decided.

Both the first and most recent judicial considerations of the work-related rights of unauthorised workers have held that an employment contract performed in breach of the Migration Act is invalid and unenforceable. This means not only that an unauthorised worker would not be entitled to remuneration for work performed under the contract, but also that he or she would be ineligible for statutory protections under the Fair Work Act, which extend only to employees defined as those who hold valid contracts of employment.[53] In 1994, in *WorkCover Corporation v Da Ping*, the Supreme Court of South Australia denied South Australian workers' compensation protection to an unauthorised worker, Liang Da Ping, a Chinese man, who had injured his right hand while working for San Remo Macaroni Company.[54] In South Australia, the Workers Rehabilitation and Compensation Act 1986 (SA) provided that entitlement to compensation depends on the existence of a valid contract of service.[55] However, Liang Da Ping was working in breach of section 83(2) of the Migration Act, which was in effect from 1979 until 1994, and provided that '[w]here a person who is an illegal entrant performs any work in Australia without permission, in writing, of the Secretary of the Department of Immigration, the person commits an offence'. In relation to the common law principles governing the legality of contracts, the court noted Australian High Court authority that 'the cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it should be valid and enforceable'.[56] Applying this jurisprudence to the section 83(2) offence, the South Australian Supreme Court found that the 'act to be performed under the contract [was] the very act forbidden by the statute', which strongly suggested an implication that the prohibition rendered the employment contract void.[57] Consequently, Da Ping was determined not to be a worker for the purposes of the legislation, and had no entitlement to workers' compensation.

Four years later, in *Nonferral (NSW) Pty Ltd v Taufia*, the New South Wales Court of Appeal (the highest court in that state) considered the implications of the section 83(2) offence for workers'

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[52] For a more detailed discussion of this caselaw, see Berg, above n 2, 170-178.

[53] Fair Work Act, s 11.

[54] (1994) 175 LSJS 469. For excellent reviews of the early case law on unauthorised workers, see Robert Guthrie, 'Tourists overstaying their welcome: when the visa runs out and the workers stay on' (2004) 6 *The Tourism Industry* 1; Robert Guthrie and Michael Quinlan, 'The occupational safety and health rights and workers' compensation entitlements of illegal immigrants: an emerging challenge' (2005) 3(2) *Policy and Practice in Health and Safety* 69.

[55] Workers Rehabilitation and Compensation Act 1986 (SA), ss 3 and 30(1).

[56] *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 413.

[57] *Da Ping* (1994) 175 LSJS 469, 473.

compensation coverage in New South Wales legislation, but arrived at the opposite result.[58] Silivenusi Taufia had entered Australia from Tonga in March 1992 on a tourist visa, subsequently overstayed, and began working at the Nonferral aluminium foundry. Shortly after he sustained a leg injury when a block of aluminium fell onto him, Taufia was arrested as an 'illegal entrant' and deported. After the New South Wales Compensation Court awarded him workers' compensation benefits under the Workers Compensation Act 1987 (NSW), his employer appealed to the Court of Appeal. That court focused on two High Court judgments that had been delivered since *Da Ping*, in which the High Court had become somewhat more circumspect about rendering a contract illegal on the basis that its performance breached a statute.[59] The New South Wales Court of Appeal observed that unauthorised work would not invalidate a contract of employment, because it was not necessarily contrary to public policy, nor the intent of the Migration Act at that time, to deny employment entitlements to a worker who has contravened its provisions in relation to unauthorised work.[60]

However, when the issue arose again before the Queensland Court of Appeal (the highest court in that state), in *Australia Meat Holdings v Kazi* in 2004, that court held that a worker who had of engaged in unauthorised work was not entitled to workers' compensation under a Queensland statute.[61] A Bangladeshi man, Mainuddin Kazi, having overstayed a visitor visa, was working at a meatworks when he injured his knee falling over the conveyor belt in the cold store. He received medical treatment for the injury, before ceasing employment in June 2002. His employer sought a declaration that Kazi was not entitled to workers' compensation. In this case, the relevant provision of the Migration Act was the criminal offence in section 235, which had been introduced in 1994, after the facts considered by the New South Wales Court of Appeal in *Nonferral*. The majority of the Queensland Court of Appeal declined to follow the New South Wales Court of Appeal's reasoning, on the basis that, unlike the repealed section 83, section 235 absolutely proscribes work by a migrant contrary to visa conditions. According to the majority, the Act no longer envisages any circumstance in which an unlawful non-citizen may enter into an employment contract, for instance with the permission of the Departmental Secretary.

Several scholars have submitted that the NSW Court of Appeal's reasoning in *Nonferral* is preferable to that of the Queensland Court of Appeal in *Australia Meat Holdings*.[62] Nevertheless, the Queensland Court of Appeal's approach to invalidity has since been applied by tribunals, in preference to *Nonferral*, even in New South Wales, on the basis that *Australia Meat Holdings* dealt with the current statutory provision, section 235. In 2006, the NSW Workers Compensation Commission found an unauthorised worker's employment contract void pursuant to *Australia Meat Holdings*.[63] (The worker nevertheless received an award of workers' compensation because the NSW legislation granted the Commission a statutory discretion to deem an illegal contract to be legal.) In 2014, the Fair Work Commission (Australia's federal industrial tribunal) applied the Queensland Court of Appeal's decision in *Smallwood v Ergo Asia Pty Ltd* in a different statutory context.[64] It

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[58] (1998) 43 NSWLR 312.
[59] *Nelson v Nelson* (1995) 184 CLR 538; *Fitzgerald v JF Leonhardt Pty Ltd* (1997) 189 CLR 215.
[60] *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312.
[61] *Australia Meat Holdings v Kazi* [2004] QCA 147.
[62] Stephen Clibborn, 'Why undocumented immigrant workers should have workplace rights' (2015) *Economic and Labour Relations Review* 1; Robert Guthrie and Michael Quinlan, 'The Occupational Safety and Health Rights and Workers' Compensation Entitlements of Illegal Immigrants: An Emerging Challenge' (2005) 3(2) *Policy and Practice in Health and Safety* 69.
[63] *Yong Fu Zhang v Mei Hu t/as Eden Furniture and the WorkCover Authority of NSW* [2006] NSWWCCPD 15.
[64] [2014] FWC 964.

rejected an unfair dismissal application brought by an employer-sponsored migrant worker, on the basis that, contrary to the condition of her 457 visa, she was employed by a labour hire company rather than her sponsor.

The *Australia Meat Holdings* line of reasoning would preclude an undocumented immigrant worker from benefits under minimum wage guarantees, unfair dismissal and anti-bullying provisions under the Fair Work Act. However, several labour law experts have argued that, notwithstanding this precedent, a court could justifiably uphold the enforceability of an unauthorised worker's employment contract, so as not to allow the employer to unjustly avoid its responsibilities under the Fair Work Act.[65] In the more recent case of *Gnych v Polish Club Ltd*, outside the migration context, the High Court considered whether a statutory prohibition should be construed as denying all effect to a particular contract.[66] The Court emphasised that that is not necessarily the case, and that it depends on a careful consideration of the legislative regime. In the course of their joint judgment, French CJ, Kiefel, Keane and Nettle JJ made the following remarks:

> As a matter of legislative construction, the likelihood of adverse consequences for the 'innocent party' to a bargain has been recognised as a consideration which tends against the attribution of an intention to avoid the bargain to the legislature. That consideration is consistent with the general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing. There may be cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination; but it is hardly surprising that the courts are not astute to ascribe such an intention to the legislature where it is not made manifest by the statutory language.[67]

This observation appears pertinent to the case of an employer who deliberately employs a temporary migrant in breach of their visa conditions, then seeks to rely on that breach to avoid liability for an underpayment of wages or denial other entitlements under the Fair Work Act.

Indeed, there is another basis upon which a court could justifiably uphold the enforceability of an unauthorised worker's employment contract, notwithstanding breach of section 235. To date, all decisions considering the enforceability of employment contracts which contravene the Migration Act have focused solely on the criminal conduct of the employee in undertaking unauthorised work. None have considered the effect of employer sanctions offences introduced in 2007, which criminalise *employers'* use of labour performed in contravention of the Migration Act.[68] A court which attended to the wrongdoing of both parties to the contract could justifiably uphold the validity of the employment contract.

There is, therefore, reason to believe that a court might today take a different view to the one reached in *Smallwood* and *Australia Meat Holdings*. Challenging these decisions, however, may create a risk that a worker identifies themselves as having undertaken unauthorised work. For that reason, legal services providers advise clients who have engaged in unauthorised work that it is likely a court will not enforce their workplace rights.[69]

Consequently, it would be preferable to put this jurisprudential issue beyond doubt through legislative amendment. Such a legislative amendment could take a number of forms. Section 235

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[65] Andrew Stewart, Shae McCrystal and Joanna Howe, submission DR271 responding to Draft Report of the Productivity Commission Inquiry into the Workplace Relations Framework (September 2015), 24.
[66] [2015] HCA 23.
[67] Ibid at [45]. See also Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017).
[68] Introduced by *Migration Amendment (Employer Sanctions) Act 2007* (Cth).
[69] Interview CLC, 2016.

could be amended so as to clarify that commission of this offence does not render protections under other statutes unenforceable.[70] Alternatively, as has been recommended in two government inquiries into migrants and labour law, the Fair Work Act could be amended to clarify that it applies to all workers regardless of immigration status.[71] (The opposition Labor Party has indicated support for such a reform, to amend the Fair Work Act to clarify its applicability to 'all workers, irrespective of their immigration status'.[72]) Thirdly, a provision of the type found in some workers' compensation statutes could be inserted into the Fair Work Act,[73] to specify that, as a matter of discretion, the illegality of an employment arrangement may be disregarded in any proceedings brought under the Act.[74]

IV. UNAUTHORISED WORKERS' ABILITY TO RECOVER WAGES IN PRACTICE

Having considered unauthorised workers' entitlements to remedies at law, this section now examines these workers' access to these remedies in practice. It outlines the contradictory approaches of different federal government agencies to providing legal and support services to unauthorised workers. On the one hand, border protection officials subject the vast majority of unauthorised workers they encounter to summary removal, with exceptions mainly for the very small numbers whose circumstances amount to suspected human trafficking. On the other, the FWO has prioritised employment protection for unauthorised workers, espousing the view that all workers in Australia are entitled to protections under the Fair Work Act, notwithstanding the legal authority discussed in the previous section. However, as this section explains, it would appear that both the DHA and the FWO accord differential penalties and protections to subsets of unauthorised workers.

A. Government Policy towards Unauthorised Workers

In recent years, legislative and policy reforms have strengthened protections for victims of trafficking and forced labour. Australia's laws criminalise slavery - the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised - and slavery-like practices.[75] The offence of forced labour occurs where a person does not consider themselves free to stop working or to leave the place where they work, because of threats, coercion or deception (s 270.6 of the Criminal Code (Cth)). The offence of servitude contains an additional element to forced labour that the person must be significantly deprived of personal freedom in other aspects of their lives not linked to their work (s 270.5 of the Criminal Code). The offence of debt bondage occurs when a person pledges their services as a security for a debt, if the debt is manifestly excessive or the value of the services is not reasonably applied towards reducing the debt (s 271.8 of the Criminal Code). There are additional specific offences for trafficking in persons, which prohibit moving a victim into,

[70] See Berg, above n 2; Segrave, above n 8; Reilly, above n 24.

[71] Productivity Commission, Report on Inquiry into Workplace Relations Framework (21 December 2015), Recommendation 29.4; Senate Education and Employment References Committee, above n 16, Recommendation 23. See also Clibborn, above n 0, 5.

[72] Proposed s 15A of Fair Work Amendment (Protecting Australian Workers) Bill 2016, introduced into parliament by the Labor Party, although not passed into law.

[73] See eg Workers Compensation Act 1987 (NSW) s 27.

[74] Stewart, McCrystal and Howe, above n 3, 25.

[75] Divisions 270 and 271 of the Criminal Code. See further Berg, above n 2, 225ff.

out of, or within Australia if that movement occurs because of force, threats or deception for the purpose of exploitation.[76]

An unauthorised migrant worker who has been identified by federal or state/territory police as being a suspected victim of trafficking, slavery or slavery-like practices receives a comprehensive suite of protections. These include authorisation to remain in Australia through a special visa, various social and other support services (including income support, legal advice, counselling and housing assistance), and the prospect of a civil remedy at the conclusion of criminal proceedings.[77] The circumstances of only a tiny number of unauthorised workers would meet the definitions of trafficking, slavery or forced labour in criminal law.

The vast majority of unauthorised workers, whose circumstances do not amount to criminal trafficking or who do not come forward as trafficking victims, are subject to summary removal once detected. They are not proactively referred to the support services set out above, or to legal assistance to enforce any employment rights they may have. A search of the DHA LEGENDcom database reveals no relevant policy or direction requiring the referral of unauthorised workers to the federal labour inspectorate, the FWO, or support services (including to obtain legal advice) prior to removal, or notification to the migrant that they may have an employment claim.[78] Rather, the only reference to employment claims in the context of removal is that '[t]he existence of unresolved claims or complaints should not stop or delay removal'.[79] Indeed, in one case we know of, immigration officials were aware that a labour hire operator withheld payments from unauthorised workers and then reported them, whereupon the officials rapidly removed the workers without payment.[80]

B. The Approach of the Fair Work Ombudsman to Unauthorised Workers

The FWO is an independent statutory body established by the Fair Work Act to educate employees and employers about their employment rights and to ensure compliance with the federal workplace relations system. It has identified overseas workers as particularly vulnerable to exploitation, and in recent years has directed substantial resources to investigating industries and key employers associated with exploitation of migrant workers, including especially temporary visa-holders and permanent residents who are new arrivals. The FWO has expressed its determination 'to use every avenue in addressing exploitation of ... migrant workers'.[81] In 2012, it established an Overseas Workers Team of specialist inspectors, which coordinates targeted investigations in industries known to employ high numbers of visa-holders, such as hospitality, horticulture, poultry processing, cleaning, convenience stores and trolley collectors. In 2015, it established a Migrant Worker Strategy and Engagement Branch to coordinate effective compliance, education and engagement activities for visa holders. Between 2014 and 2016, these initiatives, campaigns and inquiries into

[76] Divisions 271.2 and 271.3 of the Criminal Code. See further Berg, above n 2, 225ff.

[77] Frances Simmons and Jennifer Burn, 'Evaluating Australia's Response to all forms of Trafficking: Towards Rights-centred Reform' (2010) 84:10 *Australian Law Journal* 71; Marie Segrave and Sanja Milivojevic, 'Auditing the Australian Response to Trafficking (2010) 22(1) *Current Issues in Criminal Justice* 632.

[78] LEGENDcom is an electronic database of migration and citizenship legislation and policy documents that is available on a subscription basis, containing statutes, regulations, the Procedures Advice Manual 3 (detailed policy material to assist immigration officials), non-legislative instruments, gazette notices and Migration Series Instructions.

[79] DIBP Procedures Advice Manual 3, 2016 'Removal from Australia'.

[80] Howells, above n 8, 57.

[81] Ibid, 2.

systemic non-compliance involving migrant workers tripled the wages recovered for migrants.[82] In 2015-16, visa-holders comprised 13% of all formal complainants and were significantly overrepresented in the agency's compliance and enforcement initiatives. 76% of litigations it initiated in 2015–16 involved visa-holders, some achieving record-breaking penalties.[83]

No information is available on how many of the workers assisted by the FWO may have worked without authorisation. The FWO has expressed the scope of its assistance to unauthorised migrants differently on different occasions. The Fair Work Ombudsman, Australia's federal labour regulator, publicly takes the position that, despite the decision of the Fair Work Commission in *Smallwood* and the majority judgment of the Queensland Court of Appeal in *Australia Meat Holdings*, unauthorised workers *are* subject to employment protections afforded by the Fair Work Act, as evidenced by its recognition of jurisdiction with respect to unauthorised work. In a submission to a government inquiry, it stated that:

> it is critical that the Government makes clear to workers, employers and their advisers that the FWO can and does enforce Fair Work laws with respect to all workers, including migrant workers, irrespective of their visa conditions.[84]

Pursuant to this position, the FWO has on numerous occasions pursued employers for contraventions involving unauthorised workers. These workers have included: students who had worked in excess of 40 hours;[85] 457 visa-holders who worked outside their visa conditions;[86] 457 visa-holders whose underpayments breached the terms of their visas;[87] and, a partner visa-holder who worked in excess of the permitted hours.[88] In none of these matters did the employers raise the unenforceability of the employment contract as a defence to the FWO's suits, and so the issue of the applicability of the Fair Work Act to these workers was not tested.

Elsewhere, however, the FWO has referenced a narrower set of workers whom it targets for assistance. For example, the FWO's Overseas Worker team, established in 2012, provides assistance to newly settled residents and 'workers in Australia on temporary visas who have work rights',[89] apparently excluding from its remit workers who have worked while on tourist visas or as overstayers. Indeed, the numerous cases concerning unauthorised work which the FWO has litigated in recent years all appear to have involved recovery of underpayments for students, 457 visa-holders or a partner visa-holder. These cases therefore all involved workers who held visas that permitted work, but who worked in breach of the work limitations in those visas. Of course, it is possible that tourist visa-holders or overstayers have benefited from FWO assistance in matters that have not resulted in litigation. Alternatively, the FWO may have undertaken litigation on behalf of tourist visa-holders or overstayers without specifying their visa status.[90]

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[82] Ibid, 2.

[83] Ibid, 1-2, 22.

[84] FWO, submission responding to Draft Report of the Productivity Commission Inquiry into the Workplace Relations Framework No DR368 (2015), 3.

[85] *FWO v Bosen Pty Ltd* [2011] VMC 21; *FWO v Haider Enterprises Pty Ltd* [2015] FCCA 2113.

[86] *FWO v Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012] FMCA 258.

[87] *FWO v Chia Tung Development Corp Ltd* [2016] FCCA 3457; *FWO v Rubee Enterprises Pty Ltd* [2016] FCCA 3456.

[88] *FWO v Shafi Investments Pty Ltd* [2012] FMCA 1150.

[89] FWO, 'FWO specialist team flies in to gather intelligence on 417 visa-holder wages & conditions', media release, 13 April 2015.

[90] For instance, in *FWO v South Jin Pty Ltd (No 2)* [2016] FCA 832, the Federal Court noted that the employer underpaid a large group of trolley collectors, which included international students and tourist visa-holders,

C. The Impact of Fear of Removal on Access to Assistance from the Fair Work Ombudsman

Fear of detection is likely the overwhelming barrier to unauthorised workers reporting violations of employment standards when they feel aggrieved. The potential costs of complaining about abusive treatment - visa cancellation and removal - are likely to be dramatically higher for this workforce than for all other workers, and have a powerful silencing effect. Segrave found that unauthorised workers in her interviews simply knew not to complain and accepted that being exploited, primarily financially, was an inevitable aspect of this way of life and something about which they could do nothing.[91] As participants in one group interview observed:

> P1: It's just instinct in us. We shouldn't be complaining.
> P4: [We] just ignore [it].
> P5: Just in case we get thrown out. (18 February 2017, 6 female workers).[92]

It does not appear to be unlawful for an employer to prevent a worker from exercising their workplace right by threatening to report, or actually reporting, their unauthorised status to the immigration authorities.[93] Revealing the employment of unauthorised workers carries little risk for the employer because, as discussed in section II, above, there appears to be limited enforcement of sanctions against employers for employment of an unauthorised worker. Unauthorised workers are aware of this, and of the power imbalance that unauthorised status creates between the worker and their employer. As one worker in the Segrave study observed,

> I think they rip off because they think it's no point even we report to the Government or we report to the awards, rights, they cannot do anything because we don't have legal here, we don't have power to fight with them. (15 February 2017, 2 female workers).[94]

In the context of widespread underpayment of international students working at 7-Eleven, uncovered by an investigative journalist in 2015,[95] a key factor that deterred workers from reporting their conditions to the FWO was that many had worked more hours than permitted on their visa, and feared visa cancellation and removal. As one former 7-Eleven employee stated to a federal Senate committee inquiry into temporary migrant labour in Australia:

> '[t]hey are all scared to stand up because of the [previous] 20 hour [per week] work limit. I believe that if Immigration say in the newspaper that the 20 hour limit does not apply, people will just run in behind it, and you could get thousands of people right now saying, 'Yes, I have been underpaid'.[96]

Another former 7-Eleven worker confirmed in an interview with us that 'there's this notion among students that Fair Works [sic] and Immigration work together, so as soon as you get some information to the Fair Works [sic], it's already gone to the Immigration'.[97]

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but did not state whether the latter group of these workers were the recipients of back payments recovered by the FWO.

[91] Segrave, above n 8, 51.

[92] Ibid, 34.

[93] Fair Work Act, s 342.

[94] Segrave, above n 48, 42.

[95] Ferguson, above n 44.

[96] Mohamed Rashid Ullat Thodi, Evidence to Education and Employment References Committee, Senate, Melbourne, 24 September 2015, 6.

[97] International Student 2016, interview with authors.

The FWO has stated publicly that it does not require complainants to disclose their immigration status, and does not routinely refer international student visa breaches to the DHA.[98] However, there is no firewall in place between the two agencies - that is, no commitment by the FWO to withhold information about identity and visa status from the immigration authorities when assistance is sought from the regulator. There is nothing preventing the FWO's sharing of information on workers' visa status with the DHA.[99] Indeed, it is unclear how the FWO's openness fits with the agency's various roles in relation to immigration enforcement. These include the FWO' direct involvement in immigration enforcement through its role, since 2012, in monitoring employers' immigration-related sponsorship obligations under the 457 visa scheme (now rebranded as the Temporary Skills Shortage (TSS) visa scheme).[100] Pursuant to Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth), Fair Work Inspectors are vested with powers to detect certain breaches of immigration laws, which must be reported to the DHA. Consequently, the FWO is *required* to refer to the DHA any TSS visa-holders who have engaged in unauthorised work. The FWO also has commitments within Taskforce Cadena, which was established by the government in 2016 as a collaboration between the DHA, the Australian Border Force, and the FWO. Taskforce deliverables include joint intelligence, information-sharing and investigative activities between the three agencies, "ensuring a coordinated, strategic approach is taken to tackling the issue of visa fraud, illegal work and foreign worker exploitation nationally".[101]

For some time, FWO's practice has been to seek DHA assurances against visa cancellation in order to facilitate visa-holders' engagement with the regulator and potential court action.[102] However, the unpredictability of FWO's discretion to seek leniency from the DHA led legal service providers to recommend that migrant workers not contact FWO where work had been undertaken in breach of visa conditions.[103] Despite the low likelihood of removal in practice, even a remote possibility has been sufficient to deter unauthorised workers from approaching the regulator.[104] Even workers who are compliant with immigration requirements may be deterred by the possibility that their complaint will trigger the detection of co-workers who may be working in breach of visa conditions ('if I have to go forward and tell them what's happening, I'm going to put everyone into trouble').[105] For these reasons, government reviews and scholars have called for workers' immigration status to be insulated from their labour claims more strongly via a firewall between the

[98] Natalie James, Evidence to Education and Employment Legislation Committee, Senate, Canberra, 2 March 2017, 79; Productivity Commission 2015, above n 1, 931.

[99] For a fuller discussion of the use of institutional firewalls to safeguard the rights of irregular migrants, see Francois Crepeau and Bethany Hastie, 'The Case for "Firewall" Protections for Irregular Migrants' (2015) 17 *European Journal of Migration and Law* 157; Joseph Carens, 'The rights of irregular migrants' (2008) 22(2) *Ethics and International Affairs* 163.

[100] See John Howe, Tess Hardy and Sean Cooney, 'Mandate, Discretion and Professionalism at an Employment Standards Enforcement Agency: An Antipodean Experience' (2013) 35 *Law and Society* 1.

[101] Taskforce Cadena Joint Agency Agreement (2016), 3-4.

[102] Unite Organiser 2016, interview.

[103] Community Legal Centre Representative 2016, interview; Pro bono practice in private firm 2016, interview.

[104] International Students Focus Group 2016; Community Legal Centre Representative 2016, interview; Jobwatch Representative 2016, interview.

[105] Migrant Worker 2016, interview.

FWO and the DHA,[106] and for entitlement to a bridging visa to regularise stay while a labour claim is under determination.[107]

Amidst these calls, in mid-2017, for the first time, a formal arrangement was publicised between the FWO and the DHA regarding the relationship between the two agencies in relation to unauthorised workers. Recognising that fear of visa cancellation impedes migrant workers from approaching the FWO, the two agencies established a new protocol designed to provide protection against removal to certain unauthorised workers, under certain conditions. The FWO announced the following on its website:

> We've set up an arrangement with the Department of Immigration and Border Protection (DIBP) to support and encourage migrant workers to come forward to request our assistance and provide us with any evidence or information about exploitation. This will help us to better understand the issues faced by visa holders and migrant workers so that we can educate employers and employees about entitlements and obligations.
>
> We've come to an agreement with DIBP that a person's temporary visa will not be cancelled if they
>
> - had an entitlement to work as part of their visa
> - believe they have been exploited at work
> - have reported their circumstances to us
> - are actively assisting us in an investigation.
>
> This applies as long as:
>
> - they commit to abiding by visa conditions in the future
> - there is no other basis for visa cancellation (such as on national security, character, health or fraud grounds).
>
> For temporary visa holders who don't have work entitlements attached to their visa, DIBP will consider the case on its merits.[108]

The protocol therefore extends protections only to visa-holders who have the right to work, and so left overstayers and tourist visa-holders unprotected.[109]

For those workers whom the protocol does cover, the dispensation is conditional on the FWO's assessment as to the whether the individual is actively assisting it. Thus, it is unclear whether the dispensation could be withheld or revoked if the migrant worker did not wish to participate, or to continue participating, in an investigation, or if the FWO declined to pursue the matter further. Moreover, the protocol does not establish a firewall between FWO and DHA; to the contrary, it requires that FWO notify DHA of the migrant worker's visa status to obtain the visa cancellation dispensation. It is also unclear whether the protocol gives rise to any rights on the part of a visa-holder, such as a right to appeal a visa cancellation on the basis of unauthorised work. (These

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[106] Productivity Commission, above n 711, 915; Berg, above n 2, 272; Chris Wright, Stephen Clibborn, Nicola Piper and Nicole Cini, 'Economic Migration and Australia in the 21st Century', *Lowy Institute Analyses*, 19 October 2016.

[107] Berg, above n 2, 277ff; Senate Education and Employment References Committee, above n 16, Recommendation 19.

[108] https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants, accessed 15 August 2017. The Department of Immigration and Border Protection (DIBP) preceded the DHA, and was in operation between 2007 and 2013.

[109] Segrave, above n 488.

concerns may be mitigated by the fact that in practice DHA very rarely cancels a student visa due to a breach of work conditions, as discussed above.)

The protocol reflects a significant step towards protecting temporary migrants with work rights. Given its limitations, however, it is unclear whether it will offer comfort to these workers, sufficient to enable them to come forward and report exploitation, as distinct from a firewall that would prohibit the FWO from sharing any visa-related information with the DHA when a worker sought their assistance. As one union official remarked, "it's just got to be clear and simple, otherwise the foreign students don't get it. You and I would be exactly the same… You've either got a firewall, or you haven't".[110]

V. PATHS FORWARD

While it is unlikely that unauthorised workers would rush to seek remedies on a large scale, even if broader protections were instituted, there are several key reforms that would make access to justice for unauthorised workers a clear possibility. These include, first, repealing section 235 of the Migration Act which criminalises unauthorised work, and amending the Fair Work Act to clarify that it applies to all workers regardless of immigration status. Second, a firewall should be established within the FWO requiring that no information on workers' immigration status be shared with the DHA, with application to *all* workers. Third, and related, a protocol should be instituted within the DHA to ensure referral to the FWO prior to removal of all non-citizens who have engaged in unauthorised work.[111] Fourth, consideration should be given to the introduction of a bridging visa to regularise the status of migrants pursuing employment-related claims, whether through FWO, unions or courts, to ensure unauthorised workers can recover wages in practice prior to their removal from Australia.[112]

The inability or unwillingness of unauthorised workers to complain to the authorities, or to seek employment remedies, makes these workers highly susceptible to exploitation. In order to reduce employer impunity for exploitation of unauthorised workers, the Australian government and parliament must create legislative and practical pathways for these workers to access employment remedies. That would increase the ability of government agencies to detect and address instances of serious exploitation including situations of forced labour and trafficking that remain unreported. Most importantly, these reforms would enable a number of unauthorised workers to obtain the wages that their employer owed them for the work they have performed.

[110] Union Official 2016, interview.
[111] Berg above n 2, 284-285; Productivity Commission, above n 711, 931.
[112] Berg above n 2, 277ff.