

Committee Secretary  
Senate Education and Employment Committee  
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Dear Sir/Madam

**Submission: Fair Work Amendment (Protecting Australian Workers) Bill 2016**

Thank you for the opportunity to make this submission regarding the *Fair Work Amendment (Protecting Australian Workers) Bill 2016*. This submission relates to the proposed amendments impacting rights of unauthorised migrant workers under the Fair Work Act.

I made submissions to the Productivity Commission's inquiry into the workplace relations framework and the Senate's inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders, calling for three key reforms:

1. Amend legislation to ensure that the Fair Work Act applies to all migrant workers regardless of immigration status;
2. Create an institutional firewall between the Department of Immigration and Border Protection (DIBP) and the Fair Work Ombudsman (FWO); and
3. Increase the FWO's budget.

I set out my arguments for these reforms more fully in my article entitled 'Why undocumented immigrant workers should have workplace rights' published in 2015 in the Economic and Labour Relations Review (Clibborn, 2015a). Attached is a copy of the article for your reference. These submissions were broadly accepted in the final reports of the Productivity Commission and the Senate.

I am encouraged by the amendments proposed in Item 3. Ensuring that the Fair Work Act applies equally to all employees regardless of their migration status is an important first step towards ensuring protection of not only the unauthorised migrant workers but also other vulnerable workers.

However, simply creating a legal right will be ineffective if it is not also practically enforceable. If the proposed amendments to the Fair Work Act are to '*motivate more migrants to report their employer, and reduce instances of exploitation*', as stated in the Bill's Explanatory Memorandum, the workers in question must be able to report their employers to the FWO without fear of being reported in turn to the DIBP. As outlined in the attached article, the FWO has a formal information-sharing arrangement with the DIBP. As long as the FWO shares any information with the DIBP, anyone working in breach of their visa will fear deportation/removal, will not report their employer to the FWO and will remain vulnerable to underpayment and other poor treatment. Maintaining an easily exploited segment of the workforce such as this risks a race to the bottom for wages and employment conditions that will impact other

vulnerable migrant workers and potentially all workers in certain sectors of the economy.

Therefore, I encourage you to consider additional reforms creating an institutional firewall between the FWO and DIBP. The FWO should not be required to share any information with the DIBP. Additionally, with its current staffing levels, the FWO is unable to respond to reports of underpaid wages submitted by many employees. The FWO is doing good work with limited resources through proactive strategic enforcement but it simply has too few inspectors and related resources to follow up complaints made by individual workers. The FWO is already developing this reputation among some groups of temporary migrant workers. The FWO needs to be adequately funded to ensure the viability of Australia's minimum employment standards.

Finally, I note that point 9 of Schedule 1 refers to the FWO successfully recovering payments for some unauthorised workers. I respectfully caution the Committee not to overemphasise these cases. The employers in the cases referred to in the FWO's submission to the Productivity Commission do not appear, in the published judgments, to have raised the defence of illegality of contract and therefore the courts were not asked to decide the issue. Had the defence been raised, the cases may have been decided differently. In any event, this highlights the need to clarify this issue and, in particular, the need to amend legislation to ensure that unauthorised workers do have workplace rights. The Australian Chamber of Commerce and Industry (ACCI) raised this issue in its submission regarding the exposure draft of the Bill (ACCI, 2016). Additionally ACCI suggested that only the case of *Smallwood v Ergo Asia Pty Ltd* (2014) FWC 964 was relied on to found the position on which the proposed amendment is based. With respect to ACCI, this is an incorrect interpretation of the situation given the long line of caselaw on this issue, some of which was referred to in the *Smallwood* decision. In particular, the Fair Work Commission in *Smallwood* relied on the Queensland's Court of Appeal decision in *Australian Meat Holdings v Kazi* (2004) QCA 147. To assist further in relation to this issue, I attach my post-draft submission to the Productivity Commission (Clibborn, 2015b) and refer you in particular to part 2 relating to employment rights of undocumented workers.

In summary, the proposed amendment to ensure that the Fair Work Act applies equally to all workers irrespective of immigration status is commendable and should be passed. However, it will be rendered unenforceable in practice without also removing the significant institutional source of fear that will prevent workers from reporting to the FWO and without ensuring that the FWO can actually investigate and prosecute reports once received.

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## References

Australian Chamber of Commerce and Industry (2016) 'Exposure Draft of the Fair Work Amendment (Protecting Australian Workers) Bill 2016', 10 March, Source: [https://www.acci.asn.au/sites/default/files/uploaded-content/field\\_f\\_content\\_file/exposure\\_draft\\_of\\_the\\_fair\\_work\\_amendment\\_protecting\\_australian\\_workers\\_bill\\_2016.pdf](https://www.acci.asn.au/sites/default/files/uploaded-content/field_f_content_file/exposure_draft_of_the_fair_work_amendment_protecting_australian_workers_bill_2016.pdf)

Clibborn (2015a) 'Why undocumented workers should have workplace rights', *The Economic and Labour Relations Review*, vol.26:3, pp. 465-73

Clibborn (2015b) 'Post-draft submission to the Productivity Commission Inquiry into the Workplace Relations Framework', September 2015