



Federation of Ethnic Communities' Councils of Australia

Submission on Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 Inquiry

14 April 2023



In development of this submission, we pay our respects to Aboriginal and Torres Strait Islander Elders past and present and recognise that the land we live and work upon was never ceded. FECCA proudly supports the Uluru Statement from the Heart and its call for the establishment of a First Nations Voice protected by the Constitution.

FECCA acknowledges that our work on behalf of multicultural Australia has learnt from and been enriched by First Nations peoples and organisations. We are committed to continuing to listen, learn and support First Nations peoples in the journey to a more inclusive society.

Foreword

The Federation of Ethnic Communities' Councils of Australia (FECCA) appreciates the opportunity to provide input into the inquiry. Due to the timeframe given for providing a submission, we have limited our input to the areas of focus most closely aligned to strategic policy platform. You may like to refer to our recent related submissions on Workplace Relations Reforms Inquiry, [Jobs and Skills Issues Paper, Employment White Paper Submission](#) and [Migration, Pathway to Nation Building](#).

Additionally, we would like to acknowledge that the information presented in this submission was informed by the work of the Migrant Justice Institute.

For enquiries, please contact FECCA CEO Mohammad Al-Khafaji

Who we are

FECCA is the national peak body representing people from multicultural communities and their organisations across Australia. Through the membership of state, territory, and regional councils, we represent over 1,500 community organisations and their members.

What we do

For over 40 years, FECCA has proudly worked alongside culturally and linguistically diverse communities, the broader Australian society and the Commonwealth government to build a successful, productive and inclusive multicultural Australia where everyone, no matter their background or how long they have lived in this country, can belong equally and reach their full potential.

FECCA draws on the lived experiences of the people and their descendants that have migrated to Australia and the expertise of its extensive and diverse membership to develop and promote inclusive, innovative and responsible public policy that reflects the needs and perspectives of multicultural Australia to build a strong, innovative and inclusive nation that harnesses its greatest strength, the diversity of its people.

The FECCA network is FECCA's greatest strength. Through our network we can enhance the capacity of governments to strengthen public policy to meet the needs of the diverse Australian population. FECCA is a proven trusted partner to both communities and government, operating as a sophisticated conduit by mobilising communities to work with government to develop and enrich public policy through community-led expertise and action.

A prosperous nation

A prosperous and multicultural future for Australia hinges on having a secure and thriving multicultural workforce. By providing job security, we empower individuals and foster their self-confidence and sense of stability, particularly for those from diverse cultural backgrounds. It is imperative policies and practices are implemented that recognise the value of migrant and multicultural workers and prioritise their safety and wellbeing. Such workers bring with them a range of backgrounds, life experiences, skills, and strengths that enrich Australian society.

Supportive employment settings

Creating a supportive and inclusive workplace for migrant workers is essential for their success and integration in Australia. It also benefits employers by creating a diverse and talented workforce, leading to better productivity and innovation. Having a workforce that reflects our multicultural diversity is key to achieving better outcomes across government, service delivery, academia, and industry. However, many migrant workers in Australia who have gained permanency and citizenship experience exploitation, wage theft and sexual harassment. Australia's employment system needs offer better protections for all migrant and multicultural workers in Australia.

Recommendations

FECCA welcomes the amendment to the Fair Work Act to ensure migrant workers are entitled to the benefits of the Act regardless of immigration status and makes the following additional recommendations:

Recommendation 1: Establish whistleblower protection mechanism for migrant workers

Fear of visa cancellation or retaliation can be a significant barrier for workers in reporting exploitation. Regulatory amendments that protect workers who report workplace contraventions, ensuring that their visa will not be cancelled, and future visa applications will not be impacted, even if a worker has breached a work-related visa condition, can be an effective way to encourage migrants to whistle blow. These amendments can help to create an environment where migrant workers feel safe and secure in reporting exploitation and other workplace contraventions.

Recommendation 2: Establish A firewall between the Fair Work Ombudsman and the Department of Home Affairs

To encourage reporting it is important to prohibit transfer of information regarding visa breaches from the Fair Work Ombudsman to the Department of Home Affairs. The firewall should extend to all non-citizens, including those whose visas prohibit work or who have overstayed their visa in Australia. The Department can consider issuing a written assurance letter that the visa will not be cancelled, and that they will not consider any breaches of work-related visa conditions when reviewing future visa applications.

Rationale for stronger whistle blowing and assurance protocol

Australia's employment legislation contains many protections for workers. The Fair Work Act ensures that everyone is entitled to the same benefits regardless of immigration status.ⁱ However, the Fair Work Act and associated regulations, rules, awards, and processes are complex for many migrant workers to understand and process to make complaints.

Migrant workers are still over-represented in the work of the Fair Work Ombudsman due to factors including limited understanding of Australia's workplace rights and entitlements and language and cultural barriers. ⁱⁱ When migrant workers are exploited and in breach of their visa conditions, they often do not seek assistance due to the belief that they are not entitled for protectionⁱⁱⁱ and fear of visa repercussions if they make a complaint. This can undermine both detecting the scale of labour exploitation cases and pursuing remedial action.

Although the Fair Work Ombudsman has an agreement with the Department of Home Affairs that workers who report exploitation are unlikely to lose their visa, there is no guarantee of protection. The Fair Work Ombudsman may choose to share information on work visa breaches with immigration, which puts workers at risk. The Assurance Protocol fails to offer explicit protection for future visa applications, there is currently no clear safeguard mechanism in place to protect whistle-blowers, and the current measures lack the much-needed guarantee of protection to incentives reporting complaints.

Recommendation 3: Bridging arrangements for all temporary visa holders, and visa-overstayers, should be introduced to pursue claims under workplace and occupational health and safety legislation if their visa would expire or be cancelled before their claim is resolved.

In order to foster a culture of whistleblowing and eliminate exploitative employers from the Temporary Skills Shortage visa (TSS) and other visa sponsorship schemes, it is recommended that Condition 8107 be extended to a duration of 120 days, accompanied by the provision of work rights to affected workers while they seek an alternative sponsor. Furthermore, it is advised that the Australian government explores strategies to enhance portability and implements additional reforms to the Pacific Australia Labour Mobility (PALMS) scheme and Seasonal Worker Programme (SWP), thereby creating an environment that facilitates the safe reporting of instances of employer abuse by seasonal workers without any potential repercussions.

Recommendation 4: Stronger prevention of employers using visa eligibility and conditions as means for exploitation must be established with enhanced pathways to safety:

- Employer-sponsored visas should be replaced with industry-sponsored visas to allow greater flexibility for migrants to move between employers within an industry, thereby reducing the risk of exploitation.
- Visa arrangements for all temporary visa holders, and visa-overstayers, should be introduced to enable pursuit of claims under workplace and health and safety legislation.

Rationale for prevention of using visa eligibility and conditions as means for exploitation

The power imbalance between temporary migrants' workers and employers puts migrant workers at increased risk of exploitation in the workplace, including being subjected to wage theft or sexual harassment. The conditions and type of visa exacerbate the situation by making the workers reliant on their employers, for example, in some cases the employer's approval is required for migrant workers to remain in Australia. As a result, workers are often afraid to report illegal practices or harassment because they fear losing their job, income, safety, and even their right to live in Australia before pursuing a claim, exacerbating

their vulnerability to exploitation.^{iv} This has led unscrupulous employers to assume that they can act without fear of being reported or held accountable.

This is prevalent among employer-sponsored visa holders (including Temporary Shortage Skills visa) who fear leaving exploitative jobs and blowing the whistle on exploitative employers because their visa will be cancelled if they do not find a new sponsor within 60 days, and they cannot work during that time. This timeframe is unreasonably short and therefore does not mitigate the visa concerns of many workers contemplating leaving exploitative employment and whistleblowing. Further, the Pacific Australia Labour Mobility (PALM) scheme is an example of conditions that can easily result in exploitation where participants are particularly at risk due to factors including employer sponsorship, regional location, employers often being the workers' landlords, inexperience with formal contracts and lower levels of English proficiency.

Recommendation 5: Expand the Fair Entitlements Guarantee (FEG) scheme to all workers irrespective of their visa status

Consideration must be given to expand access to the Fair Entitlements Guarantee to all migrant workers regardless of their visa status. The Fair Entitlements Guarantee provides a critical safety net for workers when their employer goes insolvent and cannot pay unpaid wages and entitlements and this is critical for migrant workers who are already susceptible to labour violations such as wage theft.

Rationale for the Fair Entitlements Guarantee to be expanded to migrant workers

Currently, only Australian citizens, permanent visa holders and visa holders of a special category are covered under the Fair Entitlements Guarantee. Temporary migrant workers (apart from Special Category visa holders from New Zealand) are excluded,^{v, vi} along with international students, working holiday workers and other temporary visa holders. This discriminatory exclusion means that workers miss out on their lawful entitlements simply because of their visa status.^{vii} Left unaddressed, many migrant workers will continue to be exploited and their inability to recover their entitlements can result in significant financial and mental health pressures.

Recommendation 6: Establish a Wage Theft Act that includes criminalising wage theft and stronger enforcement of wage theft penalties

Increased enforcement of civil penalties and other punitive measures, including criminal sanctions (imprisonment) and significant financial penalties, may create a stronger deterrent against violations related to migrant workers.

Rationale for establishing a Wage Theft Act

The issue of wage theft in Australia is significant, for example, the Fair Work Ombudsman recovered more than \$532 million for 384,805 underpaid workers in 2021-22.^{viii} The 2019 Migrant Justice Institute report cited wage theft was becoming endemic among international students, backpackers and other temporary migrants in Australia.^{ix} The report found 30 per cent of survey respondents on temporary visa were being paid half the minimum wage.

Establishing a Wage Theft Act would send a clear message to unscrupulous employers that wage theft will not be tolerated.

Recommendation 7: Fund culturally informed and in-language education on workers rights and employer obligations

Addressing language barriers and a lack of knowledge about Australian workers rights, laws and obligations amongst migrant workers and their employers would result in decreasing the occurrence of wage theft and other exploitative practices by empowering employees to know their rights, how to report issues and what implications this will have.

Rationale for providing education for migrant workers and employers

Due to language barriers and limited familiarity with government infrastructure and services, migrant workers often lack knowledge of their workplace rights and may find it challenging to assert them with their employer. Additionally, they may be directed to "self-help" resources that prove ineffective or are turned away when they attempt to raise their concerns. Research highlights that the Fair Work Ombudsman is generally inaccessible and inefficient for migrant workers, and this issue is sometimes compounded by the lack of diversity within the workforce. This underscores the scale of the wage theft and information gap between the employer's obligation and employees' rights. This can be addressed by initiating and implementing culturally informed and in language information and education campaign strategies targeted at both employees and employers.

ⁱ [Workers rights and visa protections \(homeaffairs.gov.au\)](https://www.homeaffairs.gov.au/workers-rights-and-visa-protections)

ⁱⁱ <https://www.abc.net.au/news/2022-09-13/skilled-migrant-workers-sponsorship-visa-exploitation/101430186>

ⁱⁱⁱ [Report of the Migrant Workers' Taskforce - Department of Employment and Workplace Relations, Australian Government \(dewr.gov.au\)](https://www.dewr.gov.au/migrant-workers-taskforce-report)

^{iv} <https://www.abc.net.au/news/2022-09-13/skilled-migrant-workers-sponsorship-visa-exploitation/101430186>

^v <https://www.dewr.gov.au/fair-entitlements-guarantee>

^{vi} <https://www.hcamag.com.au/specialisation/employment-law/migrant-workers-ineligible-for-wages-they-were-owed-but-why/409891>

^{vii} Migrant Workers Taskforce, *Final Report* (7 March 2019), Recommendation 13; Senate Standing Committees on Economics, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (March 2022), Recommendation 15 (extend FEG to all employees including those on temporary visas), Recommendation 11 (consider including superannuation in FEG payments).

^{viii} <https://www.fairwork.gov.au/newsroom/media-releases/2022-media-releases/october-2022/20221020-fwo-annual-report-2021-22-media-release>

^{ix} <https://www.migrantjustice.org/iswagetheft>