

# Panel 4B - Migrant Workers

Dr John Boersig - CEO Legal Aid ACT

# Pathways for Entry

- ▶ Temporary
  - ▶ Working Holiday Visa
  - ▶ International Student Visa
  - ▶ Seasonal Workers Program
- ▶ Employer-Sponsored
  - ▶ Temporary Skills Shortage
- ▶ General Skilled Migration
  - ▶ Skill Select application
  - ▶ Government-sponsored





- National Employment Standards apply to all workers
- Common issues for migrant workers:
  - Cash for visa
  - Cash back (after payment)
  - Fabricated time sheets
  - Sham contracting
  - Debt bondage

# Community Legal Education for Migrant Workers

## Employment Problems Spot the Signs



**Is this happening to you?**

Then it's time to get  
employment law advice

### **"I am paid less than \$18.93 an hour"**

The national minimum wage is \$18.93 per hour. All workers should be paid at least this amount, unless they are a 'junior' (usually 20 years of age or less). Most minimum rates in Awards\* are higher than the minimum wage. If an ordinary worker is receiving less than \$18.93 per hour then they are almost certainly being underpaid.

### **"I am paid 'cash in hand' and don't get a payslip"**

It is legal for a worker to be paid cash in hand – but all workers must be given a payslip. If a worker receives cash without a payslip there is a real risk that the employer is not following the law – for example the employer may not be sending the worker's tax to the Tax Office or contributing superannuation for the worker.

### **"I am working for a trial period with no pay"**

All workers are entitled to be paid for their work, even when on probation or being trained. Many workers who are new to Australia are mistaken about this because of bad labour practices in other countries. Many workers who are new to Australia are exploited this way. The employer can establish a probationary period but the worker must still be paid. Volunteers and work experience students do not expect payment – but these volunteer arrangements are well recognised, for example charity workers and organised student placements.



## 雇佣问题 发现征兆

**在你身上是否发生了这样的情况？**

如果是，那么你应该获取雇佣法相关的建议了！

### **"我的时薪不到 18.93 澳元"**

全国最低工资标准为每小时 18.93 澳元。除非是“青少年工作者”（通常指 20 岁及以下），否则，所有工作者的薪资都不得低于这一金额。薪资裁定\*中的大多数最低薪酬都要高于最低工资。如果一位普通工作者的时薪低于 18.93 澳元，那么他的薪酬几乎可以肯定属于不足。

### **"我的薪水都是‘现款现付’，没有工资单"**

用现金给工作者支付薪资是合法的，但所有工作者都必须获得工资单。如果一名工作者在收到现金薪水时没有收到工资单，那么很可能是雇主没有遵守法律——比如，雇主可能没有替你向税务局交税，或是没有替你缴纳养老金。

## Panel 4B – Migrant Workers

### Overview

There are a number of avenues for entering Australia as a migrant worker. The most appropriate visa will depend on a person's age, skills, expertise, and how long they plan to stay in Australia. Principally, Australia's policy on migrant workers is 'demand-driven', meaning that it attempts to fill gaps in the Australian economy, rather than a 'supply-driven' system which focusses primarily on the attributes of potential migrants. Because of this, migrant workers who wish to work in regional areas (outside of major cities), or in particular industries (principally primary industries such as agriculture and mining), or who have particular skills (of which there is a shortage of domestic workers) will be more likely to receive a working visa. Some working visas also allow the visa holder to bring children or other family such as a spouse.



## Immigration Policy

The Australian Government sets an annual migration quota of 190,000 people, divided into skilled, family, and special entry streams, with an additional allowance for children (although places for children are not capped).<sup>1</sup> The skilled migration category has the most places, with a total of 128,550 each year. The family stream receives 57,400 people annually (mostly Partner Visas), and the special stream allows for just 565 visas each year. The Migration Program does not include refugee or humanitarian visas, or temporary visas such as the Working Holiday Visa.

### Temporary Working Visas

#### *Working Holiday (417)*

This is a popular visa for young people aged 18 to 30 years old from eligible countries such as Taiwan, Hong Kong, France, Germany and the United Kingdom.<sup>2</sup> Over 211,000 Working Holiday visas were granted in 2016-17.<sup>3</sup>

Taiwanese young people are major recipients of Working Holiday visas, with 15,

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<sup>1</sup> <https://www.homeaffairs.gov.au/about/corporate/information/fact-sheets/20planning>

<sup>2</sup> <https://www.homeaffairs.gov.au/trav/visa-1/417-#tab-content-1> > Visa Applicants > Eligible Countries

<sup>3</sup> Department of Immigration and Border Protection, Working Holiday Maker Visa Program Report (2017).

704 young people from Taiwan receiving Working Holiday visas in 2013.<sup>4</sup> The Working Holiday visa allows young people to work and travel in Australia for up to one year, although holders of this visa may not generally work for more than six months with a single employer. This visa can be extended for up to two years if the visa holder works for at least three months in a regional area (outside of the major cities) and in a primary industry (such as farming, fishing, forestry, or mining) or in construction.<sup>5</sup> This allows holders of Working Holiday visas to experience rural Australia, and fill vacancies for seasonal or unskilled work.

### *International Student Visa*

International students in Australia are allowed to work 20 hours per week whilst undertaking their studies. While this does help to ease the financial burden of studying overseas, the 20 hour limit also means that international students may be vulnerable to coercive practices by employers. In 2016, there were 712, 884 international students enrolled in Australian universities. This

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<sup>4</sup> Senate Standing Committee on Education and Employment, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Visa Holders* (2016) 7.10.

<sup>5</sup> <https://www.homeaffairs.gov.au/trav/visa-1/417-#tab-content-1> > Visa Applicants > Specified Work.

number has almost doubled since 2006, when only 381, 260 international students were enrolled. A 2016 survey of 1400 international students found that 60% were underpaid. Similar findings have been made in other surveys. This remains a major policy issue for Australia.

### *Seasonal Workers Program*

The seasonal worker program offers employment in agriculture or tourism for migrants from nine Pacific countries (Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu). This allows Australian businesses to fill seasonal vacancies for positions which local workers are often unwilling to take, due to the unstable nature of the work. Additionally, the Seasonal Worker program allows workers from neighbouring countries to earn higher wages than they would in their home country, and to gain skills and experience with an Australian employer.

### *Skilled Employment Visas*

For migrant workers who wish to engage in skilled employment, or who wish to work for a longer period of time than the Working Holiday visa allows, there



are two main entry pathways – Employer Sponsored visas, and General Skilled Migration Visas. Both of these pathways reflect underlying aims of the government policy on migrant workers – that is, that migrant workers should fill gaps in the economy where businesses cannot find appropriately skilled Australian workers. While employer-sponsored visas assist in shaping the demand-driven immigration system, by directly linking Australian businesses with overseas workers, this system also encourages exploitation through ‘cash-for-visa’ schemes.<sup>6</sup> Employers will often offer to sponsor a migrant worker in exchange for payment, either upfront or as a debt to be deducted from wages. Despite the illegality of these schemes, they remain prevalent, especially amongst employers who have contacts in other countries from which they can source workers willing to pay for visas.<sup>7</sup> Once they have entered the country, workers in cash-for-visa schemes are often threatened with exposure and deportation. Unscrupulous employers often have significant scope to exploit workers whom they have coerced into illegal schemes.

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<sup>6</sup> Senate Standing Committee on Education and Employment, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Visa Holders* (2016) 6.55.

<sup>7</sup> *Ibid* 7.46.

### *Temporary Skills Shortage Visa (482)*

The main employer-sponsored visa scheme is the Temporary Skills shortage visa. Where an Australian employer is unable to find appropriately skilled labour in Australia, the employer can use the Temporary Skills Shortage Scheme in order to bring in an employee from overseas. The length of the visa and the employee's eligibility for permanent residency depends on the applicant's occupation. Where the government believes that a particular skill or occupation will be in high demand in the long-term, migrant workers in that field are more likely to be eligible for permanent residency. As above, where a worker's residency status depends on ongoing employer sponsorship, employers will have significant scope to exploit the employee with promises of continued residency or the threat of deportation.

### *SkillSelect Visas*

The SkillSelect scheme allows interested persons (who have not already received an offer of employment) to nominate themselves for a working visa by completing an Expression of Interest which sets out their skills and

experience, as well as whether they would consider working in a regional area. Commonwealth, state, and territory governments can then select workers and invite them to apply for a visa. This allows governments to tailor their migration intake to the particular areas of geographical and economic need. Additionally, most sponsored visas require that an applicant is aged under 45 at the time of invitation. This requirement exists in order to counteract Australia's ageing population.

### Undocumented Migrant Workers

In addition to holders of temporary and permanent work visas, there are a significant number of 'undocumented' migrant workers. These people are considered undocumented either because they entered Australia without a visa or, more commonly, because they entered Australia legally and overstayed their visa. Undocumented migrant workers are particularly vulnerable to exploitation because they fear detection and deportation by immigration authorities. In the absence of formal legal protections for undocumented workers subject to exploitation, their legal rights remain

unclear.<sup>8</sup> The Department of Border Protection and Immigration has refused to grant an amnesty for undocumented migrant workers, and has in some cases obstructed potential prosecutions by deporting the workers before the action can take place.<sup>9</sup> Despite law reform recommendations to afford legal protection to the employment rights of undocumented workers, no provisions have as yet been changed.

### Common Legal Issues

Migrant workers commonly experience legal issues with their employment, such as underpayment or exploitation. These issues occur most frequently for temporary and undocumented workers because these visa holders are most vulnerable to deportation. Employment issues occur less frequently for holders of permanent or unrestricted working visas, who are not at risk of deportation for working in breach of their visa.

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<sup>8</sup> Ibid 8.34.

<sup>9</sup> Ibid 8.30.

## *Employment Conditions*

Migrant workers are entitled to the same payment and working conditions as Australian workers.<sup>10</sup> In general, this means that an employer must pay employees at least AUD \$18.93 (TWD \$419.54) per hour,<sup>11</sup> and provide proof of payment and hours worked (a pay slip). Full-time or part-time employees are entitled to benefits such as sick leave, annual leave, and superannuation. Casual employees are paid 25% more than regular employees, but do not receive benefits. Most employees are also entitled to higher hourly rates for working overtime, or on weekends, public holidays, or night shifts. However, while migrant workers are entitled to the above conditions, they are also vulnerable to exploitation in a way that domestic workers are not. The causes of this vulnerability include:

- Reliance on an employer's continuing support (for migrant workers on 'sponsored' visas)

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<sup>10</sup> <https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>

<sup>11</sup> <https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/employment-problems>

- Difficulty finding work due to visa restrictions (especially for international students, who are restricted to working 20 hours per week)
- Obligations to work in particular areas or industries in order to have a visa renewed (for example, the Working Holiday visa requires 88 days work in Northern Australia)
- Threat of deportation for working in breach of visa conditions<sup>12</sup>
- Lack of awareness about employment rights
- Lack of awareness of Fair Work or Union protection

Eliminating exploitative employment practices is a policy priority in Australia.

The Australian government recognises that any exploitation of workers, whether migrant or domestic, is a serious offence. Furthermore, such exploitation has detrimental effects on the Australian economy. In 2016, the Senate Standing Committee on Education and Employment produced a report titled 'A National Disgrace: The Exploitation of Temporary Work Visa

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<sup>12</sup> Senate Standing Committee on Education and Employment, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Visa Holders* (2016) 8.49.



Holders’.<sup>13</sup> This report identified a number of industries in which exploitative practices were rife. In particular, common forms of exploitation included:

- ‘sham contracting’: classifying employees as contractors in order to avoid providing minimum conditions<sup>14</sup>
- Cash for visa arrangements (sponsoring workers for visas in exchange for payment from the worker)<sup>15</sup>
- Debt bondage (forcing an employee to work to pay off a fabricated ‘debt’ – often a debt incurred through a ‘cash for visa’ arrangement)
- ‘cash back’ arrangements under which employees must pay money back to their employer<sup>16</sup>
- ‘half pay’ schemes in which only a fraction of an employee’s actual hours are recorded<sup>17</sup>

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<sup>13</sup> Senate Standing Committee on Education and Employment, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Visa Holders* (2016).

<sup>14</sup> Ibid 7.103

<sup>15</sup> Ibid 6.55.

<sup>16</sup> Ibid 8.101.

<sup>17</sup> Ibid.

Whilst the report identified several industries, and even companies, who were known for exploitative practices, there are a number of significant barriers to enforcing legal rights against employers. These barriers include:

- Court delays (most temporary visas will expire before judgment is reached)<sup>18</sup>
- Immediate deportation of non-compliant workers (meaning that workers cannot seek redress)<sup>19</sup>
- ‘phoenix’ operators (especially contractors and franchisees) that disappear before legal action can be taken<sup>20</sup>

The report suggested a number of reforms aimed at increasing employers’ accountability for exploitative practices. The suggested reforms were:

### **1. Clarification of legal rights**

The Senate Committee recommended the amendment of the *Fair Work Act 2009* to explicitly state that:

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<sup>18</sup> Ibid 7.85.

<sup>19</sup> Ibid 8.40

<sup>20</sup> Ibid 7.86.

- The *Fair Work Act* standards apply even when a person breaches their visa conditions or works without a visa,<sup>21</sup> and
- Breach of a visa condition does not necessarily void an employment contract.<sup>22</sup>

The first amendment is an important clarification of the rights of migrant workers. While Australian courts have held that employment rights are unaffected for work undertaken *in breach* of a visa, the situation for workers entirely without a visa is unclear. For example, in *Fair Work Ombudsman v Bosen*<sup>23</sup> and *Fair Work Ombudsman v Haider*,<sup>24</sup> the courts ordered back payments to international students who had worked in excess of their visa conditions. Similar decisions have been reached in relation to holders of 457 and 801 visas.<sup>25</sup> However, the employment rights of undocumented workers are unclear. The report noted that a lack of minimum standards for undocumented workers undoubtedly put downwards pressure on wages for

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<sup>21</sup> Ibid 8.263.

<sup>22</sup> Ibid.

<sup>23</sup> *Fair Work Ombudsman v Bosen Pty Ltd & Anor* (unreported, Magistrates' Court of Victoria Industrial Division, 21 April 2011).

<sup>24</sup> *Fair Work Ombudsman v Haider Pty Ltd & Anor* (2015) FCCA 2113.

<sup>25</sup> *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* (2012) FMCA 258; *Fair Work Ombudsman v Shafi Investments Pty Ltd & Ors* (2012) FMCA 1150.

legitimate workers, as well as enabling the exploitation of migrant workers.<sup>26</sup>

Therefore, it is important to clarify that all employees, regardless of their visa status, are entitled to the same minimum conditions of employment.

## **2. Immigration amnesty for victims of exploitation**

The Senate Committee found that fear of deportation was a major barrier to migrant workers reporting exploitation. This was the case even where the Department of Immigration announced an intention not to take action (although not a blanket amnesty) for breaches of visa conditions, as was the case in the 7-Eleven investigation.<sup>27</sup> The report found that, for many victims of exploitation, nothing short of a blanket amnesty would persuade them to report their exploitation to authorities.<sup>28</sup> However, the Department of Immigration was reluctant to grant such an amnesty. In general, the Department of Home Affairs will not cancel a migrant worker's visa where they had an entitlement to work, believed they were being exploited at work, and

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<sup>26</sup> Ibid 8.242.

<sup>27</sup> Ibid 8.197-8.202.

<sup>28</sup> Ibid.

are actively assisting the FWO's investigation.<sup>29</sup> However, this is not a binding policy and many victims of exploitation may still be reluctant to report their employer's conduct due to fear of deportation.

### **3. Reconsideration of penalties**

The report noted that there was a severe asymmetry in the consequences for employers and employees.<sup>30</sup> While employers who were found to be exploiting migrant workers were subject to fines, the workers who breached their visa conditions were in most cases deported. This means that employees fear detection far more than the employers engaging in exploitative practices. The report found that allowing victims of exploitation, trafficking, or slavery an automatic right of stay would alter employers' calculations of the risk of prosecution and remove some incentives for exploiting migrant workers.<sup>31</sup>

### **4. Regulation of labour-hire companies**

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<sup>29</sup> <https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants> 'Visa Protections'

<sup>30</sup> Senate Standing Committee on Education and Employment, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Visa Holders* (2016) 8.38.

<sup>31</sup> *Ibid* 8.246-8.250.

Labour hire companies often allow businesses to avoid responsibility for exploitative practices in their supply chains.<sup>32</sup> Businesses pay a set amount to labour hire operators in exchange for a certain amount of work being completed.<sup>33</sup> Labour hire operators often take the majority of this money as profits and significantly underpay their employees.<sup>34</sup> When a labour hire company is taken to court over its exploitative practices it will go into liquidation. The business itself will thus be unaffected by the penalties for exploitative practices.<sup>35</sup> Some steps are being taken towards addressing phoenix operators and labour hire companies, such as the *Modern Slavery Act 2018* (Cth) under which businesses are obliged to report on potential human rights abuses in their supply chains. However, the Act has no penalties for businesses that fail to comply and is thus considered a ‘toothless’ law which may have little effect on business’ practices.<sup>36</sup>

## 5. Building awareness of rights

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<sup>32</sup> Ibid 7.1.

<sup>33</sup> Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, Commonwealth of Australia, June 2015, p10.

<sup>34</sup> Senate Standing Committee on Education and Employment, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Visa Holders* (2016) 7.96.

<sup>35</sup> Ibid 7.93; Figure 7.1.

<sup>36</sup> <https://www.smh.com.au/politics/federal/taking-on-slavery-with-toothless-laws-20180627-p4zo36.html>



Promoting greater awareness of minimum employment standards is a major priority. Community Legal Education programs, including in foreign languages and through migrant networks, is an important part of promoting awareness of rights. Additionally, migrant workers must be made aware of the avenues for redress. These include the Fair Work Ombudsman, Fair Work Commission, and the various unions. In 2015-16, over 70% of court actions undertaken by the Fair Work Ombudsman involved visa holders.<sup>37</sup> However, the Fair Work Ombudsman nevertheless believed that “the vast majority” of visa-holders were reluctant to seek help from the Ombudsman.<sup>38</sup>

## **6. Successful prosecutions**

In serious cases of exploitation, employers may be subject to criminal prosecution. Eliminating exploitation of migrant workers is a priority for the Australian government and law enforcement authorities, in recognition of the potential for grave human rights violations, and the detrimental economic effects of underpayment and poor working conditions. In 2008, the High Court

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<sup>37</sup> Fair Work Ombudsman, ‘Statement on 7-Eleven’ (Media Release, 9 April 2016) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/april-2016/20160409-7-eleven-presser>.

<sup>38</sup> Ibid.

of Australia in *R v Tang*<sup>39</sup> held that exploitative practices such as confiscation of passports and withholding wages through 'debt bondage' can constitute slavery under s 270 of the *Criminal Code*.<sup>40</sup> Since *R v Tang*, there have been many more successful prosecutions under s 270 of the *Criminal Code*.<sup>41</sup> These cases reflect the seriousness with which exploitation of migrant workers is treated, and the dire consequences for employers found to be exploiting migrant workers.

On the whole, Australian law acknowledges and enforces the rights of migrant workers to work under the same conditions as Australian citizens. Whilst migrant workers who intentionally breach their visa conditions may be at risk of having their visas cancelled, there is a growing acknowledgement that many migrant workers are not aware of their rights under Australian law. In these cases, law enforcement agencies will focus on prosecuting those responsible for the exploitation, rather than punishing migrant workers.

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<sup>39</sup> *R v Tang* [2008] HCA 39 (Unreported, 29 August 2008, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel) [44] (Gleeson CJ).

<sup>40</sup> *Criminal Code Act 1995* (Cth) s 270.

<sup>41</sup> For example: *DPP (Cth) v Huang & Another*, Unreported (QLDDC, 8 February 2017); *DPP (Cth) v McIntosh* [2016] VCC 622; *R v Kuavong* [2013] QCA 310; *R v Chee Mei Wong*, Unreported (NSWDC, 5 July 2013).