



9 December 2022

## Submission: Treasury Employment White Paper Consultation 2022

We welcome the opportunity to make a submission to the Treasury Employment White Paper Consultation 2022.

The Migrant Justice Institute uses strategic research, advocacy and legal action to achieve fair treatment and justice for migrant workers globally, and in Australia. Our research uncovers the reality of migrant worker exploitation and the operation of laws and systems in practice. We seek to drive systemic change by governments and business by charting evidence-based pathways to reform, grounded in migrants' experiences. We closely collaborate with migrant communities, civil society organisations and trade unions to amplify migrants' voices and support migrant worker empowerment.

The Migrant Justice Institute is led by law professors at UTS and UNSW. Incorporated in late 2021, it has grown out of a five-year collaboration between the two universities and retains close connections with both institutions.

The Migrant Justice Institute acknowledges the Traditional Owners and Custodians of the lands on which we work, including the Wurundjeri people of the Kulin Nation, and the Gadigal and Bedegal people of the Eora Nation. We acknowledge that sovereignty was never ceded.

### Introduction

The Migrant Justice Institute welcomes the Government's initiative to create a roadmap for Australia to 'build a bigger, better-trained and more productive workforce – to boost incomes and living standards and create more opportunities for Australians'.<sup>1</sup> In our view, a key component of achieving these aims are reforms to improve access to and enforcement of minimum employment standards for all vulnerable workers – and in particular, migrant

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<sup>1</sup> White Paper Terms of Reference.

workers. Without protection of those most vulnerable to exploitation, and reforms to address the structural drivers of exploitation and systemic barriers to addressing exploitation that migrant and other vulnerable workers face, we will continue to see widespread non-compliance with workplace laws, and an uneven playing field for businesses who do the right thing.

Our submission is divided into four sections reflecting the relevant aspects of the Terms of Reference (**TOR**):

- Building more resilient supply chains in a changing geopolitical landscape (TOR 2.4);
- Job security, fair pay and conditions, including the role of workplace relations (TOR 3);
- Migration settings as a complement to the domestic workforce (TOR 5.4); and
- The role of collaborative partnerships between governments, industry, unions, civil society groups and communities, including place-based approaches (TOR 6).

Productivity and better living standards should not come at the cost of justice and fairness. In fact, without the latter, it is impossible to achieve the former. This Treasury Employment White Paper presents an opportunity to articulate a pragmatic and sophisticated policy vision that establishes a broad notion of sustainable productivity. This should be predicated on the promotion of job security and enforcement of fair pay and conditions, access to justice and robust protections which address the broader structural drivers of exploitation of migrants other vulnerable workers.

We support the commitment to implement the recommendations of the 2019 Migrant Workers' Taskforce (**MWT**),<sup>2</sup> and welcome the plan to introduce a package of reforms to address migration worker exploitation during 2023. We look forward to working with Government and others to ensure that these reforms effectively curb exploitation and provide meaningful protection for migrant workers, and in turn, all workers in Australia.

## Summary of Recommendations

### **Overarching recommendation: White Paper roadmap must reflect the importance of addressing migrant worker exploitation**

The Treasury White Paper should include a specific focus on the experiences and needs of migrant workers, as a significant part of the Australian workforce. The White Paper roadmap should include measures to address the systemic drivers of exploitation and the structural barriers to enforcement of labour laws experienced by migrant and other vulnerable workers.

### **Section 1: Building more resilient supply chains**

- **Recommendation 1**

#### **Legal responsibilities for individuals and supply chains**

In order to build more resilient supply chains in a changing geopolitical landscape, it is crucial that our workplace relations and modern slavery laws work to effectively detect, prevent and remedy exploitation. By ensuring decent, safe and fair working conditions are the norm, these legal frameworks can enable businesses to focus on productivity and innovation rather than a race to the bottom. The Government has committed to implementing Recommendation 11 of the MWT which proposes that the government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws. This can be achieved by strengthening existing accessorial liability and responsible franchisor provisions, extending the responsible franchisor provisions more broadly to certain supply chain and subcontracting arrangements, extending the successful outworker provisions to certain high-risk industries, and establishing a positive duty to provide and maintain a working environment that complies with the *Fair Work Act 2009* (Cth) (**FW Act**). The *Modern Slavery Act 2018* (Cth) (**MS Act**) should also be amended to require businesses to report on measures taken to assess and address the risks of exploitation in their Australian supply chains and risks of modern slavery in global and Australian supply chains.

## Section 2: Job security, fair pay and conditions

- **Recommendation 2**

### **Minimum entitlements for all vulnerable workers, including migrants**

To promote job security for those most in need of protection, the FW Act should be amended to:

- Introduce a definition of employment that presumes all workers are employees not contractors (unless the principal/employer proves otherwise)
- Introduce provisions that deem all workers in high-risk industries to be employees
- Give the Fair Work Commission (**FWC**) the power to make Minimum Entitlements Orders
- Introduce a national labour hire licensing scheme

- **Recommendation 3**

### **Objects of the FW Act be amended to promote decent work and eliminate exploitation:**

A commitment to fair pay and conditions and the elimination of exploitation must be more clearly articulated in the objects of the FW Act, as these set the tone and framework for workplace relations laws and institutions in Australia. The Migrant Justice Institute welcomes the recent broadening of the FW Act objects pursuant to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth). However, in addition to promoting secure work and gender equity, further amendments to the objects of the FW Act should include the promotion of decent work and eliminating exploitation of vulnerable workers. This will establish a legislative framework that aligns with the Government's vision for full employment and higher living standards.

- **Recommendation 4**

### **Changes to the FW Act to improve information and transparency**

To ensure that vulnerable workers are able to access fair pay and conditions, the Government must implement **MWT Rec 2** (in part) by ensuring that workers are aware of their specific rights and entitlements and able to identify their employing entity if they wish to bring a claim. This can be achieved by amending the FW Act to:

- require employers to provide each worker with a statement of specific working conditions (Award, wage rates, hours etc.) and employer contact details (including address for service) upon commencement

- itemise deductions on payslips, and provide workers with a right to unpaid superannuation as part of the NES.

- **Recommendation 5**

#### **Effective enforcement of labour laws and swift remediation of labour claims**

In addition to ensuring that all workers are entitled to fair pay and conditions at law, it is crucial that Government ensures that legal rights are effectively enforced. Without an accessible and effective regulator, vulnerable workers will not complain about workplace exploitation or modern slavery. In line with **MWT Recs 9 and 10**, we recommend various measures to ensure effective detection and compliance activities by the Fair Work Ombudsman (**FWO**) including systemic deterrence and individual outcomes for exploited migrant workers. This includes a comprehensive review of FWO's resources, purpose and effectiveness with a particular focus on vulnerable workers; the establishment of a dedicated migrant worker support unit including a wage calculation service for vulnerable workers; strengthened administrative sanctions; and consideration of a trial scheme whereby FWO can make binding determinations on labour hire firms based on their licensing conditions within a new federal labour hire licensing scheme (drawing on the Australian Financial Complaints Authority model).

In addition to enhanced regulation, we submit that fair pay and conditions can only be obtained for vulnerable workers if legal entitlements are supported by a fair, fast and effective dispute resolution process. To ensure that workers receive just remediation, to give other workers the confidence to report exploitation and modern slavery, and to increase deterrence value, it is essential that dispute resolution processes provide swift remediation. To implement **MWT Rec 12**, we recommend that the Government immediately reform the small claims process and establish a taskforce to identify the best model for an accessible forum that facilitates efficient and effective remediation of wage claims in the longer term. Options for reform include further changes to the current system, the establishment of a new Fair Work Court in tandem with the FWC and/or the establishment of broader jurisdiction in the FWC to resolve underpayment disputes. Additional measures include access to targeted legal support and information (see **Recommendation 10, Collaborative partnerships**).

- **Recommendation 6**

#### **A safety net when businesses liquidate or disappear**

To ensure that vulnerable workers have access to fair pay when their employers liquidate, deregister or disappear, the Government must shift the enforcement burden off those most vulnerable and provide a genuine safety net. Building on **MWT Rec 13** we recommend that the Fair Entitlements Guarantee (**FEG**) be extended to all workers in Australia regardless of immigration status. We also propose that:

- The Fair Entitlements Guarantee should also be expanded to cover situations where a liquidator has not been appointed, but the company is insolvent or has been deregistered.
- The government should explore the viability of a mandatory Wage Theft Insurance Scheme

- **Recommendation 7**

**Government leadership and incentives for businesses that do the right thing**

To ensure fair pay and conditions is the norm, the Government must ensure that compliance with labour laws is recognised as the way business must take place in Australia. The Government should lead the way in its own procurement and supply chains, both by fulfilling its election commitment to introduce a Secure Australian Jobs Code and by ensuring that compliance with labour laws and swift remediation of breaches is a condition of doing business with the government. We also recommend establishing a taskforce to explore innovative regulatory levers to commercially reward businesses that comply with the FW Act.

### Section 3: Migration settings

- **Recommendation 8**

**Legal protection for all workers**

To ensure that Australia's migration program complements the domestic workforce and does not facilitate an underclass of exploited workers, and to remove employer impunity for exploitation of undocumented workers, the FW Act and Migration Act must be amended to confirm that workplace protections apply regardless of undocumented immigration status.

- **Recommendation 9**

**Whistleblower protections:** Our research reveals that many migrant workers do not report exploitation (or modern slavery) due to concerns that complaining will impact their visa. As set out in our widely endorsed Research and Policy Brief *Breaking the*

*silence: A proposal for whistleblower protections to enable migrant workers to address exploitation, we recommend amendments to migration laws and policy that enable migrant workers to safely report exploitation without risking their visa. These include protections against visa cancellation for migrant worker whistleblowers who report exploitation and seek to hold the responsible employer to account and a new short-term visa to enable migrant workers to remain in Australia to report exploitation and pursue meritorious labour claims against their employer at the conclusion of their stay.*

#### Section 4: Collaborative partnerships

- **Recommendation 10**

**Better collaboration and communication between government, departments, agencies and institutions, including community legal centres, the broader community sector and unions:** Community legal services and other migrant worker organisations must be consulted and play a key role in the development and implementation of all reforms, as well as being formalised and supported as key partners in service delivery for migrant workers.

### Context: exploitation of migrant workers: a problem for all

To achieve a productive workforce and improved wages and living standards, it is essential that all workers in Australia are protected by the law and can access justice systems to enforce their rights. Without robust protections for the employment rights of vulnerable workers, Australia will continue to host an underclass of exploited workers who live in the margins. Companies who adopt a business model premised on the expectation of impunity for routine exploitation will continue to enjoy a competitive advantage at the expense of businesses who comply with legal standards. Systemic exploitation of migrant workers also creates conditions for forced labour and modern slavery.

The MWT Report recognised that exploitation of temporary migrant workers in Australia (about 7% of our workforce<sup>2</sup>) is widespread and endemic across numerous industries. Our 2016 survey of 4,322 temporary visa holders, cited in the MWT Report, found at least a third

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<sup>2</sup> Will Mackey, Brendan Coates and Henry Sherrell, [Migrants in the Australian Workforce: A Guidebook for Policy Makers](#) (Grattan Institute, May 2022) 155.

earned less than \$12 an hour.<sup>3</sup> Our subsequent large-scale survey in 2019 produced similar findings.<sup>4</sup>

Exploitation flourishes due to a range of systemic drivers: visa settings discourage workers from reporting exploitation; insecure work is widespread and workers fear losing their job if they complain; workplace laws fail to incentivise compliance; regulators have insufficient resources and fail to detect and punish labour law noncompliance; vulnerable workers do not pursue legal claims against employers because court processes for resolving wage claims are inaccessible, slow and ineffective; and there is no safety net when businesses liquidate or refuse to pay wage claims. A migrant worker who tries to recover unpaid wages encounters systemic obstacles at every stage of the process. Our research shows that nine in ten underpaid migrant workers suffer wage theft in silence and take no action because immigration and labour laws do not encourage these workers to come forward and do not routinely deliver just remedies when they do.

We recognise the work of community legal centres and unions in assisting vulnerable workers, and commend the joint submission of JobWatch, WEstjustice, SMLS and University of Melbourne Student Union Legal Service to this Taskforce.

It is clear that current measures to address exploitation are not working, and systemic exploitation continues to flourish because employers know they are unlikely to get caught. To genuinely break the cycle of business impunity for exploitation and systemic noncompliance, the White Paper must lay a roadmap for addressing these barriers to access to justice for migrant and other vulnerable workers and placing the burden of ensuring compliance where it fairly lies – on business and government.

### **Overarching recommendation**

**The Treasury White Paper must include a specific focus on the experiences and needs of migrant workers. The White Paper roadmap must include measures to address the systemic drivers of exploitation and the structural barriers to enforcement of labour laws experienced by migrant and other vulnerable workers.**

## **Section 1: Building more resilient supply chains**

In order to build more resilient supply chains in a changing geopolitical landscape, it is crucial that our workplace relations and modern slavery laws work to effectively detect, prevent and

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<sup>3</sup> Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (2017), 5.

<sup>4</sup> Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (2020), 8.



remedy exploitation.

The FW Act focuses primarily on regulating the direct employer-employee relationship and, in this regard, is no longer fit for purpose. Businesses have few responsibilities for workers they do not directly employ and can easily establish business arrangements that evade liability.<sup>5</sup> The Government must introduce measures in the FW Act that establish legal responsibilities for individuals and entities with decision-making power or commercial leverage to prevent and remedy exploitation, particularly in supply chains where exploitation is systemic, foreseeable and detectable.

The Government has committed to implementing MWT Rec 11 which proposes that the government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws. This can be achieved by strengthening existing accessorial liability and responsible franchisor provisions, extending the responsible franchisor provisions more broadly to certain supply chain and subcontracting arrangements, and extending the successful outworker provisions to certain high-risk industries. The government should consider establishing a positive duty to identify and reduce the risks of FW Act non-compliance. The *Modern Slavery Act 2018* (Cth) (**MS Act**) should also be amended to require businesses to report on measures taken to assess and address the risks of exploitation in their supply chains in Australia, in addition to modern slavery in global and Australian supply chains.

These reforms should be introduced in the Government's second tranche of industrial relations reforms in 2023 and we can provide further detail on these recommendations upon request.

#### Recommendation 1

**The Government has committed to implementing MWT Rec 11 which proposes that the government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws. This can be achieved by strengthening existing accessorial liability and responsible franchisor provisions, extending the responsible franchisor provisions more broadly to certain supply chain and subcontracting arrangements, and extending the successful outworker provisions to certain high-risk industries. The government should also consider establishing a positive duty to provide and maintain a working environment that complies with the FW Act. The MS Act should also be amended to require businesses to report on measures taken to assess and address the risks of exploitation in their supply chains in Australia, in addition to risks of**

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<sup>5</sup> Associate Professor Tess Hardy notes that 'it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions', Tess Hardy, *Submission No 62 to Senate Inquiry, The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders*, 8.

## Section 2: Job security, fair pay and conditions

The Migrant Justice Institute welcomes the Government's focus on job security, fair pay and conditions. Migrant and other vulnerable workers face additional barriers to knowing and enforcing their employment rights, including visa insecurity (as explored in section 3) and language and cultural barriers, while being more likely to be employed in complex, illegal and often insecure employment arrangements.

To address this, we propose changes to the scope of FW Act protections and how they are enforced, along with amendments to other legislation to provide a genuine safety net when businesses liquidate or are deregistered.

### 2.1 Minimum entitlements for all vulnerable workers, including migrants

To promote job security for those most in need of protection, the FW Act should be amended so that it supports vulnerable workers to be classified as employees, to give the FWC power to make Minimum Entitlement Orders that certain classes of workers are to be treated as employees, to permit industry wide bargaining and to establish a national labour hire licencing scheme.

***Introduce a definition of employment that presumes all workers are employees not contractors (unless the principal/employer proves otherwise)***

Many migrant workers are purportedly engaged as contractors with ABNs when they are in fact employees. This means that they are treated as though they do not have a right to minimum pay and other employee entitlements. Vulnerable workers should not bear the burden of proving their employment status. The law must be amended to provide all workers with the right to the minimum pay and entitlements, unless the employer/principal can show that the worker was genuinely running their own business.<sup>6</sup> For clarity and efficiency, the definition could exclude high-income workers.

Under current FW Act provisions, an employer will not be held liable for sham contracting if they can show that they did not know, or were not reckless as to whether, their employee was a contractor or employee.<sup>7</sup> In line with other employment standards, minimum wages and award entitlements, employers should be expected to know their legal obligations in

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<sup>6</sup> See for example, proposed definition by Andrew Stewart and Cameron Roles in Andrew Stewart and Cameron Roles, [ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry](#), 5.

<sup>7</sup> FW Act, s 357(2).

relation to sham contracting. The defences to sham contracting should be tightened to introduce either an objective standard (such that an employer will be held liable if they could be reasonably expected to have known that the arrangement constitutes sham contracting) or strict liability (to ensure consistency with other FW Act obligations).

### ***Introduce provisions that deem all workers in high-risk industries to be employees***

To reduce uncertainty and promote secure work, the FW Act must be amended to deem all workers in key industries to be employees (for example contract cleaning, security and aged care). These provisions could be modelled on existing FW Act provisions regulating the employment of outworkers.

### ***Give the FWC the power to make Minimum Entitlements Orders***

We welcome the government's commitment to give the FWC the power to make Minimum Entitlements Orders. This should enable the FWC to make determinations that certain classes of workers are to be treated as employees, and that protections in the FW Act, and/or an award or enterprise agreement apply. Minimum Entitlement Orders must be comprehensive and ensure that employee-like workers receive the same protections as employees, including the right to collectively bargain, unfair dismissal protections, and the enjoyment of all safety net entitlements and conditions afforded to employees.<sup>8</sup>

### ***A national labour hire licensing scheme***

**MWT Rec 14** recommends introduction of a national labour hire licensing scheme. The scheme should incorporate best practice elements drawn from an evaluation of existing state schemes and international models and ensure that no fewer protections are offered than available under state schemes. Importantly, any scheme must be enforced by a well-resourced and proactive regulator.

#### **Recommendation 2**

**The FW Act should be amended to:**

- **Introduce a definition of employment that presumes all workers are employees not contractors (unless the principal/employer proves otherwise)**
- **Introduce provisions that deem all workers in certain high-risk industries to be employees**
- **Give the FWC the power to make Minimum Entitlements Orders**

<sup>8</sup> It is not clear whether 'employee-like' workers will be required to receive the same protections as other employees: ALP, [Labor's Secure Australian Jobs Plan](#).

- **Introduce a national labour hire licensing scheme**

## 2.2 FW Act objects that promote secure and decent work for all

A commitment to fair pay and conditions and the elimination of exploitation must be more clearly articulated in the objects of the FW Act, as these set the tone and framework for workplace relations laws and institutions in Australia. The objects critically inform statutory interpretation, and shape institutions' performance of their daily functions and exercise of their legal powers, including in dispute resolution.<sup>9</sup>

Recognising that a core function of labour law is to address the power imbalance between workers and employers, and recognising the widespread and systemic nature of non-compliance with the FW Act, the objects of the FW Act should address the need for decision-makers and the regulator to focus on the promotion of secure<sup>10</sup> and decent work, eliminating exploitation of vulnerable workers and ensuring remediation addresses the systemic causes of non-compliance beyond penalties and individual compensation.

We welcome the Secure Jobs Better Pay Bill's changes to the objects clause in the FW Act,<sup>11</sup> but strongly recommend further amendments which are necessary in order to give effect to the Government's commitment to "tackl[ing] the exploitation and mistreatment of temporary migrant workers".<sup>12</sup>

We recommend further expanding the objects clause of the FW Act to include:

- **promoting decent<sup>13</sup> work.** A new FW Act object should be inserted as follows:

*promoting and facilitating the progressive realisation of secure and decent work, as far as reasonably practicable, including by recognising that—*

- *(i) insecure and indecent work can cause social and economic disadvantage and that access to secure and decent work is not equitably distributed throughout society;*
- *(ii) vulnerable workers (who may include those in low-paid industries, from culturally and linguistically diverse and/or non-English speaking backgrounds,*

<sup>9</sup> *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth), Explanatory memorandum, [334].

<sup>10</sup> ALP, [Labor's Secure Australian Jobs Plan](#) states that 'Labor will enshrine secure work as an objective of the Fair Work Act'.

<sup>11</sup> ALP, [Labor's Secure Australian Jobs Plan](#).

<sup>12</sup> ALP Policy, [Pacific Australia Labour Mobility](#).

<sup>13</sup> Decent work could be defined in accordance with recognised ILO principles of decent work including a fair income, job security and equality of opportunity. See for example '[Decent Work](#)', *International Labour Organisation*.

*those who have difficulty reading or writing, those on temporary visas, and young workers) face additional barriers and needs in accessing secure and decent work.*

- **eliminating exploitation:** in addition to 'ensuring a guaranteed safety net' in the current objects clause of the FW Act, a further objective of eliminating exploitation should be included as follows:

*ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders, and eliminating exploitation of vulnerable workers and non-compliance with such minimum terms and conditions to the greatest possible extent.*

- **addressing the systemic drivers of exploitation:** a new object should be inserted as follows:

*'encouraging the identification and elimination of systemic causes of exploitation and non-compliance with minimum terms and conditions'*

Amongst other things, this will support the FWO, Courts and Commissions to focus on systemic remedies (such as independent audits of all wages and records and mandated training etc.) in addition to individual compensation and penalties in civil matters.

### **Recommendation 3**

**In addition to promoting secure work and gender equity, further amendments to the objects of the FW Act should include the promotion of decent work and eliminating exploitation of vulnerable workers. This will establish a legislative framework that aligns with the Government's vision for full employment and higher living standards.**

## **2.3 Improved information and transparency**

To ensure that vulnerable workers are able to access fair pay and conditions, the Government must implement MWT Rec 2 (in part) by ensuring that workers are aware of their specific rights and entitlements and able to identify their employing entity if they wish to bring a claim.<sup>14</sup>

Many migrant workers (and other vulnerable employees) are impeded from pursuing labour claims against their employer, including for serious exploitation, because they are unable to

<sup>14</sup> Migrant Workers Taskforce, [Final Report](#) (7 March 2019), Recommendation 2.

identify the applicable Award or enterprise agreement, or their minimum rate of pay, or whether any wage deductions were lawful. Migrant workers who overcome these obstacles may be unable to identify the legal identity of their employing entity, or how to complete service of court documents, especially when employers engage vulnerable workers through complex commercial arrangements and trusts.

Straightforward amendments to the FW Act can address these barriers to migrant workers enforcing their rights and reporting exploitation and even modern slavery. These include a new requirement for employers to provide each worker with a tailored statement of working conditions upon commencement of employment. As suggested by Charlesworth and Campbell,<sup>15</sup> this ‘Statement of Terms and Working Conditions’ should include ‘job title (and classification), wage rates, working-time conditions including applicable premia for overtime and unsocial hours of work, type of employment and the name of the relevant regulatory instrument (e.g., award, enterprise agreement)’. It should also include the name, ABN and address for service of the employing entity. Similar obligations exist already in New Zealand, the UK and EU countries.<sup>16</sup>

The FW Act should also be amended to require employers to itemise<sup>14</sup> deductions on each payslip. This is particularly important for PALM scheme workers. Currently, if ‘an amount is deducted from the gross amount of the payment, the pay slip must include the name, or the name and number, of the fund or account into which the deduction was paid’.<sup>17</sup> However, frequently more than one deduction is made while only a total amount is listed, leaving the purpose and amount of individual deductions unknown. Requiring employers to itemise<sup>14</sup> deductions would assist in the identification of unlawful deductions, which in extreme cases can underpin debt bondage, forced labour and modern slavery.

Finally, workers must have the ability to pursue their unpaid superannuation entitlements as a workplace right and we welcome the Government’s commitment to include a right to superannuation as part of the NES.<sup>18</sup>

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<sup>15</sup> Iain Campbell and Sara Charlesworth, ‘The National Employment Standards: An Assessment’ (2020) 33 *Australian Journal of Labour Law* 36.

<sup>16</sup> *Ibid.*

<sup>17</sup> Required by regulation 3.46(2) of the *Fair Work Regulations 2009* (Cth).

<sup>18</sup> ALP, [Labor’s Secure Australian Jobs Plan](#); Senate Standing Committees on Economics, [Systemic, sustained and shameful: Unlawful underpayment of employees’ remuneration](#) (March 2022), Recommendation 10.

#### Recommendation 4

The Government should amend the FW Act to:

- require employers to provide each worker with a statement of specific working conditions (Award, wage rates, hours etc.) and employer contact details (including address for service) upon commencement
- itemise deductions on payslips, and
- provide workers with a right to unpaid superannuation as part of the NES.

#### 2.4 Effective enforcement of labour laws and swift remediation of labour claims

In addition to ensuring that all workers are legally entitled to fair pay and conditions, it is crucial that Government ensures that legal rights are effectively enforced. A national labour regulator that is accessible to and trusted by migrant workers, and routinely delivers outcomes for migrant workers, is critical to encouraging vulnerable workers to seek assistance in relation to workplace exploitation, forced labour and modern slavery.

Our research shows that the FWO is largely inaccessible and ineffective for migrant workers. As noted above, in our [survey of over 4000 temporary visa holders](#), only 3% of underpaid workers contacted the FWO for assistance. Among those who contacted the FWO, the majority recovered none of their unpaid wages.<sup>19</sup> Migrant workers rarely contact mainstream agencies for help as a result of visa fears, low rights awareness, language and literacy barriers, and cultural and practical barriers. When they do, they are often turned away or directed to 'self help' materials that are not appropriate for vulnerable workers including migrants. The FWO is not well-placed to provide targeted assistance to migrant workers or to adequately deal with individual claims (especially small claims).

In recognition of this, the MWT recommended that 'the Government consider whether the FWO requires further resourcing, tools and powers to undertake its functions under the FW Act, with specific reference to whether vulnerable workers could be encouraged to approach the FWO more than at present for assistance'.<sup>20</sup>

In implementing this MWT recommendation, the Government should conduct a comprehensive review of the FWO's resources, purpose and effectiveness with a particular focus on vulnerable workers. This should include consideration of various measures to improve the effectiveness of the FWO's detection and compliance activities in relation to

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<sup>19</sup> Bassina Farbenblum and Laurie Berg, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (Migrant Justice Institute, 2018).

<sup>20</sup> Migrant Workers Taskforce, [Final Report](#) (7 March 2019), Recommendation 10.

migrant workers, including the establishment of a dedicated migrant worker support unit including a wage calculation service to assist vulnerable workers to recover unpaid wages; strengthened administrative sanctions; and consideration of a trial scheme whereby FWO can make binding determinations on labour hire firms based on their licensing conditions within a new federal labour hire licensing scheme (drawing on the Australian Financial Complaints Authority model).

In addition to enhanced regulation, fair pay and conditions can only be obtained for vulnerable workers if legal entitlements are supported by a fair, fast and effective dispute resolution process. To ensure that workers receive just remediation, to give other workers the confidence to report exploitation, and to strengthen deterrence of non-compliance, it is essential that dispute resolution processes provide swift remediation.

Recognising that the FW Act small claims process is inaccessible to most migrant workers, the Government recently announced a review into its effective operation, implementing a recommendation of the MWT.<sup>21</sup> We welcome this review and elsewhere propose a number of immediate reforms to make this process a more effective avenue for wage redress for migrant workers (we can provide further detail on these recommendations upon request).

We also recommend the establishment of a taskforce to identify the best model for an accessible forum that facilitates efficient and effective remediation of wage claims in the longer term to incentivise a far greater number of migrant workers to report workplace exploitation and pursue remedies. Options for reform include further changes to the current system, the establishment of a new Fair Work Court in tandem with the FWC and/or the establishment of broader jurisdiction in the FWC to resolve underpayment disputes.

We also recommend various procedural reforms including increased access to targeted legal support and information for vulnerable workers. Community-based employment assistance services have been widely recognised as a critical mechanism to improve accessibility and outcomes for vulnerable communities. In addition to existing (and time-limited) pro bono Court assistance schemes such as the Justice Connect Self Representation Service,<sup>22</sup> community legal centres, including dedicated Migrant Worker Centres, need recurrent funding to deliver employment law advice and ongoing casework support for those who need it. Additionally, all government institutions must have a dedicated team to support vulnerable

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<sup>21</sup> Migrant Workers Taskforce, [Final Report](#) (7 March 2019), Recommendation 12.

<sup>22</sup> The Justice Connect Self Representation Service 'connects people with information and legal assistance through one hour appointments with lawyers. We provide task-orientated assistance in preparation for court, we don't provide ongoing legal representation': Justice Connect Self Representation Service [website](#). For many migrant workers, ongoing assistance is critical, and for this reason we recommend that community-based services be funded to provide this.



workers to help articulate and pursue complaints.<sup>23</sup>

#### **Recommendation 5**

**We recommend a comprehensive review of FWO’s resources, purpose and effectiveness with a particular focus on vulnerable workers; the establishment of a dedicated migrant worker support unit including a wage calculation service for vulnerable workers; strengthened administrative sanctions; and consideration of a trial scheme whereby FWO can make binding determinations on labour hire firms based on their licensing conditions within a new federal labour hire licensing scheme (drawing on the Australian Financial Complaints Authority model). We commend the Government’s announcement of a review of the small claims process, and also recommend the establishment of a taskforce to identify the best model for an accessible forum that facilitates efficient and effective remediation of wage claims in the longer term.**

### **2.5 A safety net when businesses liquidate or disappear**

To ensure that vulnerable workers have access to fair pay when their employers liquidate, deregister or disappear, the Government must shift the enforcement burden off those most vulnerable and provide a genuine safety net.

MWT Rec 13 proposes the Fair Entitlements Guarantee (FEG) be extended to all workers in Australia regardless of immigration status.<sup>24</sup> We submit that it should also be available where an employing entity is deregistered or insolvent but no liquidator is appointed.<sup>25</sup> In addition to extending the FEG, the Government should explore the viability of a mandatory Wage Theft Insurance Scheme which would provide an accessible and efficient forum for workers who are unable to recover their outstanding wages from their employer.

#### **Recommendation 6**

**Building on MWT Rec 13 we recommend that the Fair Entitlements Guarantee (FEG) be**

<sup>23</sup> Select Committee on Temporary Migration, *Final Report* (September 2021), Recommendation 27 (increased resources for migrants integrating into Australian communities, including to community legal centres); Migrant Workers Taskforce, *Final Report* (7 March 2019), Recommendation 12 (review the small claims process including ‘increased funding to the FWO and/or community legal services to support improved personalised assistance to potential claimants to help them make a small claim’).

<sup>24</sup> Migrant Workers Taskforce, *Final Report* (7 March 2019), Recommendation 13 (recommends extending access to FEG following consultation, but the exclusion of people who have deliberately avoided taxation obligations); Senate Standing Committees on Economics, *Systemic, sustained and shameful: Unlawful underpayment of employees’ remuneration* (March 2022), Recommendation 15.

<sup>25</sup> As discussed in the WEstjustice [submission](#) to the *Reforms to address corporate misuse of the Fair Entitlements Guarantee Scheme Inquiry*, ‘in order to qualify for the FEG, a claimant must be able to demonstrate that an insolvency event has occurred... There are two main issues with the definition of an insolvency event that limit its utility in protecting the most vulnerable workers: An insolvent company that doesn’t have any assets is not required to appoint a liquidator and therefore does not meet this definition, and Deregistration does not fall within the definition of an insolvency event... Consequently, many deserving people for whom the legislation is supposed to operate are missing out on their entitlements.’

extended to all workers in Australia regardless of immigration status.<sup>26</sup> We also propose that the FEG be expanded to cover situations where a liquidator has not been appointed, but the company is insolvent or has been deregistered.<sup>27</sup> The Government should explore the viability of a mandatory Wage Theft Insurance Scheme.

## 2.6 Government leadership and incentives for businesses that do the right thing

To ensure fair pay and conditions is the norm, the Government must ensure that compliance with labour laws is recognised as the way business must take place in Australia.

The Government must lead the way in its own procurement and supply chains, both by fulfilling its election commitment to introduce a Secure Australian Jobs Code and by ensuring that compliance with labour laws and swift remediation of breaches is a condition of doing business with the Government.<sup>28</sup> The Government should also establish a taskforce to explore innovative regulatory levers to commercially reward businesses that comply with the FW Act. This could include taxation or other incentives for businesses that demonstrate compliance with the FW Act and the promotion of secure work and amending business licensing requirements in various arenas to require compliance with the FW Act and wage judgments.

### Recommendation 7

**The Government should fulfill its election commitment to introduce a Secure Australian Jobs Code and ensure that compliance with labour laws and swift remediation of breaches is a condition of doing business with the Government. We also recommend establishing a taskforce to explore innovative regulatory levers to commercially reward businesses that comply with the FW Act.**

<sup>26</sup> Migrant Workers Taskforce, *Final Report* (7 March 2019), Recommendation 13 (recommends extending access to FEG following consultation, but the exclusion of people who have deliberately avoided taxation obligations); Senate Standing Committees on Economics, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (March 2022), Recommendation 15.

<sup>27</sup> As discussed in the WEStjustice [submission](#) to the *Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme Inquiry*, 'in order to qualify for the FEG, a claimant must be able to demonstrate that an insolvency event has occurred... There are two main issues with the definition of an insolvency event that limit its utility in protecting the most vulnerable workers: An insolvent company that doesn't have any assets is not required to appoint a liquidator and therefore does not meet this definition, and Deregistration does not fall within the definition of an insolvency event... Consequently, many deserving people for whom the legislation is supposed to operate are missing out on their entitlements'.

<sup>28</sup> ALP, *Labor's Secure Australian Jobs Plan* states that Labor will introduce a Secure Australian Jobs Code and 'be a model employer and only utilise non-permanent employment where it is essential'; Senate Standing Committees on Economics, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (March 2022), Recommendation 18 (recommends that the Australian Government act as a model procurer).

## Section 3: Migration settings as a complement to the domestic workforce

To ensure that Australia's migration program complements the domestic workforce and does not facilitate an underclass of exploited workers, and to remove employer impunity for exploitation of undocumented workers, we recommend a number of amendments to the FW Act and Migration Act.

### 3.1 Legal protection for all workers

Undocumented workers are at greatest risk of exploitation in relation to their work in Australia. This is because they are the least likely to report exploitation for fear of detection and deportation, and there is uncertainty as to whether they are even covered by Australian labour law. Caselaw across Australia is currently unclear as to whether these workers are covered by the FW Act and other workplace protections including workplace health and safety and workers' compensation laws.<sup>29</sup> The lack of certainty as to whether undocumented workers are entitled to these fundamental workplace protections creates a loophole through which unscrupulous employers can freely underpay and exploit undocumented workers in dangerous jobs while evading any legal liability for exploitation or workplace injury.

This line of cases relies on the fact that a migrant working without permission under the *Migration Act 1958* (Cth) (**Migration Act**) - whether as a visa overstayer, or working in breach of a visa condition on an otherwise valid visa – commits a criminal offence (set out in s 235). Judgments across multiple states have held an employment contract performed in breach of the statutory s 235 offence void for illegality and therefore unenforceable. This renders undocumented workers not only ineligible for remuneration for work performed, but also for statutory protections under the FW Act, workers compensation laws and other laws affording workplace protections, since these extend only to employees defined as those who hold valid contracts of employment (eg, s 11 of the FW Act). The MWT recommended that the FW Act be amended to confirm that it applies regardless of undocumented immigration status.<sup>30</sup>

We support this recommendation and, in addition, recommend that s 235 of the Migration Act itself be amended to clarify that commission of this offence (of unauthorised work) does not render protections under other federal or state statutes unenforceable. An amendment to the Migration Act is preferable to an amendment to the FW Act alone because it would provide certainty that commission of this offence does not nullify a worker's entitlements across not only the FW Act but other state and federal labour laws. Nevertheless, for avoidance of doubt and for the important signal it sends, the FW Act should also be amended to clarify that it applies to workers regardless of immigration status and regardless of any contravention by

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<sup>29</sup> *WorkCover Corporation v Da Ping* (1994) 175 LSJS 469; *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312; *Australia Meat Holdings v Kazi* [2004] QCA 147; *Lal v Biber* [2021] FCCA 959.

<sup>30</sup> Migrant Workers Taskforce, *Final Report* (7 March 2019), Recommendation 3.

the worker of the Migration Act.

#### **Recommendation 8**

**The FW Act and Migration Act must be amended to confirm that workplace protections apply regardless of undocumented immigration status.**

### **3.2 Whistleblower protections and other immigration settings that reduce exploitation**

Our research reveals that many migrant workers do not report exploitation due to concerns that complaining will impact their visa. For example, in our 2019 survey of over 5,000 international students in Australia, 38% did not seek information or help for a problem at work because they did not want 'problems that might affect my visa'.<sup>31</sup>

Our Policy and Research Brief, *Breaking the Silence: A Proposal for Whistleblower Protections to Enable Migrant Workers to Address Exploitation* to be released this year, recommends new measures that enable migrant workers to safely report exploitation and modern slavery without risking their visa. These include legislative protections against visa cancellation for migrant worker whistleblowers who address exploitation and a new short-term visa to enable migrant workers to remain in Australia to report exploitation and pursue meritorious labour claims. The proposal has been endorsed by over 40 organisations and the NSW Anti-Slavery Commissioner. This underscores the broad acceptance among unions, legal service providers, settlement agencies and peak ethnic affairs and other national organisations that nothing short of these protective measures will be adequate to give migrant workers the confidence to report exploitation without fear of ramifications for their current or future visa. The MWT Recommendation 21 (a review of the Assurance Protocol including consideration of additional measures) supports the widely held view that current mechanisms are insufficient to encourage migrant worker reporting. We also propose increased portability of employer sponsored workers (including a longer period to find an alternative sponsor).

The Brief will be available at [www.migrantjustice.org](http://www.migrantjustice.org) and can be provided upon request.

#### **Recommendation 9**

**As set out in our widely endorsed proposal, *Breaking the silence: A proposal for whistleblower protections to enable migrant workers to address exploitation*, we recommend amendments to migration laws and policy that enable migrant workers to**

<sup>31</sup> Bassina Farbenblum and Laurie Berg, [International Students and Wage Theft in Australia](#) (Migrant Justice Institute, 2020) 10.

safely report exploitation without risking their visa. These include protections against visa cancellation for migrant worker whistleblowers who report exploitation and seek to hold the responsible employer to account and a new short-term visa to enable migrant workers to remain in Australia to report exploitation and pursue meritorious labour claims against their employer at the conclusion of their stay.

## Section 4: The role of collaborative partnerships

### 4.1 Ensure better collaboration and communication between government, departments, agencies and institutions, with community legal centres, the broader community sector and unions

In any reform processes affecting migrant workers, migrant workers and the organisations working with them should have a seat at the table.<sup>32</sup> Community legal services and migrant worker organisations must be consulted and play a key role in the development and implementation of all reforms.

In addition, there is the need for enhanced collaboration between Government agencies and legal institutions and the community sector. This could be achieved for example, by things like developing a formal MOU that ensures that community legal centre lawyers and representatives are copied in on all communication between the FWO and their clients, and dedicated funding for community organisations to collaborate with the FWO to deliver education, improve rights awareness and build trust in the community.<sup>33</sup> As noted above, we also propose that the FWO establish a dedicated migrant worker support unit to develop and pursue claims in partnership with unions and community legal service providers, including a wage claim calculation service for vulnerable workers.

In accordance with MWT Recs 1 (whole of government response) and 22 (build an evidence base), all reforms should be based on data and evidence. Where this is unavailable, new research and analysis should be undertaken, especially concerning the experiences and perspectives of migrant workers. This includes collecting first-hand data on those who

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<sup>32</sup> Select Committee on Temporary Migration, *Final Report* (September 2021), Recommendation 4 (recommends that the Government should invest in development of data collection, integration and dissemination capacity), Recommendation 14 (recommends that the Department of Home Affairs regularly publish data on the number of temporary visa holders engaged in work in Australia and the number of employers who have engaged such labour); Migrant Workers Taskforce, *Final Report* (7 March 2019), Recommendation 22 (recommends that 'the Government give a greater priority to build an evidence base' on areas affecting migrant workers, including through research, data collection and surveys).

<sup>33</sup>This builds on the Select Committee on Temporary Migration, *Final Report* (September 2021), Recommendation 39, which recommends that FWO enter into a formal partnership with registered organisations in the shared mission of combating temporary visa worker exploitation.

attempt to make claims, and the vast majority of migrant workers who endure exploitation in silence.

We also recommend that a key priority moving forward for all government agencies and regulators be the establishment and maintenance of meaningful data capture and review systems to ensure Australia is leading the way on compliance and enforcement of our workplace laws - particularly for those who need protection the most.

As part of this work, it is critical that meaningful data is collected to measure and improve performance of the FWO over time, as well as other statutory agencies undertaking enforcement work, to evaluate and ensure ongoing improvements to and accountability of dispute resolution systems.<sup>34</sup> This evidence gathering should include data in relation to migrant workers who pursue remedies, along with the more difficult but essential task of gathering data from the vast majority that endure exploitation in silence. In addition to identifying the data that should be collected, the Government should identify and report on opportunities for collaboration and data-matching between the ATO, ASIC and the FWO to more effectively drive compliance with the FW Act.

#### **Recommendation 10**

**Better collaboration and communication is required between government, departments, agencies and institutions, with community legal centres, the broader community sector and unions. Community legal services and other migrant worker organisations must be consulted and play a key role in the development and implementation of all reforms, as well as being formalised and supported as key partners in service delivery for migrant workers.**

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<sup>34</sup>For example, publicly available data on lodgement of applications has varied over the years. The FWC Annual Report shows that in 2020-2021, there were 13,281 unfair dismissal claims lodged at the FWC (Fair Work Commission Annual Report 2020-2021, 19). The Annual Report of the Federal Circuit Court shows that only 1,352 applications for all FW Act related matters in total filed in the Federal Circuit Court; Federal Circuit Court Annual Report 2020-2021, 43). There is no data in the Annual Report for 2020-2021 on the number of *small claims* applications made in that year. Senate Committee data indicates that, in 2018-2019, 496 small claims applications were made to the Federal Circuit Court (Senate Select Committee on Temporary Migration Report, 50). It would be very helpful for the Court to provide consistent and more detailed information about the number and type of claims lodged. More detailed data, which can also be compared across jurisdictions, would also be helpful in evaluating timeframes for resolution of applications. The Annual Report of the FWC provides the median time taken from lodgement to conciliation in unfair dismissal applications in 2020-2021 (which was 21 days) (Fair Work Commission Annual Report 2020-2021, 19). However, no data was provided on median time for matters proceeding to hearing. A Senate Committee obtained data indicating that the average wait time for first hearing of a case in the small claims jurisdiction in 2018-2019 was 2.2 months, and the average age of a case was 5.6 months (Senate Select Committee on Temporary Migration Report, 51), but no data was provided in the Federal Circuit Court annual report.

## Conclusion

Thank you for the opportunity to comment on this White Paper.

We would welcome the opportunity to discuss this submission and our recommendations with the Treasury and look forward to working with the Government to develop these reforms.