Protecting the underclass:

A proposal for workplace protections for all workers in Australia

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Introduction

Unauthorised workers, including visa overstayers and international students who have breached the work limitation in Condition 8105 on their student visa, are the most fearful of reporting and often the most vulnerable to exploitation. There is conflicting jurisprudence as to whether these migrant workers are entitled to protections of the *Fair Work Act 2009* (Cth), state workers compensation legislation and other labour laws including anti-discrimination laws.

Amendments to the *Migration Act 1958* (Cth), the *Fair Work Act 2009* (Cth) and other workplace laws are required to clarify that all workers are covered by employment protections in Australia regardless of immigration status. The FWO has stated that the agency can and does enforce the *Fair Work Act* with respect to all workers, including migrant workers, irrespective of their visa conditions. However, there is conflicting legal authority on the issue of whether unauthorised migrant workers are legally entitled to employment protections. For this reason, recommendation 3 of the Migrant Worker Taskforce provides that legislation be amended to clarify that temporary migrant workers working in Australia are entitled at all times to workplace protections under the *Fair Work Act*.

This note sets out analysis and recommendations to address uncertainty as to the protection of unauthorised workers under labour laws in Australia.

Unsettled status of the law on whether unauthorised workers are covered under Australian labour laws

There is conflicting legal authority on the issue of whether unauthorised migrant workers are legally entitled to employment protections. Analysis of these cases is complicated by the fact that they involve a mix of judicial decisions from courts of different levels in different states along with administrative tribunal decisions. The cases consider a variety of employment protections in different state and federal statutes, as well as the interaction of these with different versions of criminal offence of unauthorised work set out in the *Migration Act* over time. There has to date been no consideration of this issue by the High Court of Australia.

Working without authorisation under the *Migration Act* - whether as an overstayer, or working in breach of a visa condition on an otherwise valid visa – is a criminal offence, set out in s 235 of the *Migration Act*. Overall, the pre-eminent approach has been to hold an employment contract performed in breach of the statutory s 235 offence void for illegality and unenforceable. This means not only that an unauthorised worker would not be entitled to remuneration for work performed under the contract, but also that he or she would be ineligible for statutory protections under the *Fair Work Act*, which extend only to employees defined as those who hold valid contracts of employment (s 11). However, the approaches which have been taken have been so divergent as to leave the law unsettled, such that a litigant seeking employment entitlements in relation to unauthorised work would lack certainty

as to which way their case would be decided.

Decisions of federal and state courts and tribunals

In *WorkCover Corporation v Da Ping* (1994) 175 LSJS 469, the Supreme Court of South Australia denied South Australian workers' compensation protection to an unauthorised worker, Liang Da Ping, a Chinese man, who had injured his right hand while working in a factory. In South Australia, the *Workers Rehabilitation and Compensation Act 1986* (SA) provided that entitlement to compensation depends on the existence of a valid contract of service. However, Liang Da Ping was working without a visa in breach of (then) s 83(2) of the *Migration Act*. In relation to the common law principles governing the legality of contracts, the court noted Australian High Court authority that 'the cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it should be valid and enforceable'. Applying this jurisprudence to the s 83(2) offence, the South Australian Supreme Court found that the 'act to be performed under the contract [was] the very act forbidden by the statute', which strongly suggested an implication that the prohibition rendered the employment contract void. Consequently, Da Ping was determined not to be a worker for the purposes of the legislation, and had no entitlement to workers' compensation for his injury.

Four years later, in *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312, the New South Wales Court of Appeal considered the implications of the s 83(2) offence for workers' compensation coverage in New South Wales legislation but arrived at the opposite result. Silivenusi Taufia had entered Australia from Tonga in March 1992 on a tourist visa, subsequently overstayed, and began working at the Nonferral aluminium foundry. He sustained a leg injury when a block of aluminium fell onto him, and was soon after arrested as an 'illegal entrant' and deported. After the New South Wales Compensation Court awarded him workers' compensation benefits under the *Workers Compensation Act 1987* (NSW), his employer appealed to the Court of Appeal. That court focused on two High Court judgments that had been delivered since Da Ping, in which the High Court had become somewhat more circumspect about rendering a contract illegal on the basis that its performance breached a statute. The Court of Appeal observed that unauthorised work would not invalidate a contract of employment, because it was not necessarily contrary to public policy, nor the intent of the *Migration Act* at that time, to deny employment entitlements to a worker who has contravened its provisions in relation to unauthorised work.

However, when the issue arose again before the Queensland Court of Appeal, in *Australia Meat Holdings v Kazi* [2004] QCA 147, that court held that a worker who had engaged in unauthorised work was not entitled to workers' compensation under a Queensland statute. A Bangladeshi man, Mainuddin Kazi, having overstayed a visitor visa, was working at a meatworks when he injured his knee falling over the conveyor belt in the cold store. He received medical treatment for the injury, before ceasing employment in June 2002. His employer sought a declaration that Kazi was not entitled to workers' compensation. In this case, the relevant provision of the *Migration Act* was the existing criminal offence in s 235,

which had been introduced in 1994, after the facts considered by the New South Wales Court of Appeal in *Nonferral*. The majority of the Queensland Court of Appeal declined to follow the New South Wales Court of Appeal's reasoning, on the basis that, unlike the repealed s 83, s 235 absolutely proscribes work by a migrant contrary to visa conditions. According to the majority, the *Migration Act* no longer envisages any circumstance in which an unlawful non-citizen may enter into an employment contract, for instance with the permission of the Departmental Secretary.

The Queensland Court of Appeal's approach to invalidity has since been applied by tribunals, in preference to *Nonferral*, even in New South Wales, on the basis that Australia Meat Holdings dealt with the current statutory provision, s 235. In 2006, the NSW Workers Compensation Commission found an unauthorised worker's employment contract void pursuant to *Australia Meat Holdings*. (The worker nevertheless received an award of workers' compensation because the NSW legislation granted the Commission a statutory discretion to deem an illegal contract to be legal.) In 2014, the Fair Work Commission applied the Queensland Court of Appeal's decision in *Smallwood v Ergo Asia Pty Ltd* in a different statutory context. It rejected an unfair dismissal application brought by an employer-sponsored migrant worker, on the basis that, contrary to the condition of her 457 visa, she was employed by a labour hire company rather than her sponsor.

Most recently, the Federal Circuit Court of Australia considered this issue in 2021, enforcing the worker's *Fair Work Act* entitlements notwithstanding their unauthorised work. In *Lal v Biber* [2021] FCCA 959, Jeevan Lal was paid less than $8 per hour for cleaning a food factory, and admitted to working more than 40 hours of work per week in contravention of his student visa condition. The defendant claimed it did not need to pay the $147,900 the worker was owed because the contract was performed in breach of the *Migration Act* and was therefore void for illegality. The Court found that because the applicant was permitted to work in Australia, and because the initial contract of employment provided for up to 20 hours was within the terms of his visa, the contract itself was found not void for illegality. The Court observed:

The clear policy of the *Fair Work Act* is to ensure that all those who work in Australia receive a minimum rate of pay. To limit such protections to Australian citizens would be to create a class of people ripe for exploitation. To fail to ensure that employers fulfil all of the obligations imposed by the *Fair Work Act*, in cases where there are breaches of visa conditions ultimately disadvantages Australian citizens, as it creates an incentive for unscrupulous employers to engage immigrants in breach of the Migration Act, for lower wages than would be payable to Australian workers. If employers must engage all workers at the same minimum rates, then the offences in *Migration Act* create an incentive to only employ workers who are citizens or who have appropriate work rights.

The reasoning in this case appears to turn on the applicant's work rights, and raises the question of whether a similar finding would have been reached if the applicant was not entitled to work under his visa.

Given the lack of clarity of the law, legal services providers advise clients who have engaged in unauthorised work that if they bring litigation against their employer it is possible a court will not enforce their workplace rights, and their unauthorised work may be detected and result in their removal.

Proposed reforms

It is necessary to introduce legislation to address the uncertainty created by this conflicting jurisprudence and practice and the numerous considerations guiding these decisions.

This should be achieved by amending s 235 to clarify that commission of this offence does not render protections under other federal or state statutes unenforceable. An amendment to the *Migration Act* is preferable to an amendment to the *Fair Work Act* alone because it would provide certainty that commission of this offence does not nullify a worker's entitlements across numerous state and federal labour laws, including workers' compensation and anti-discrimination laws, as well as the *Fair Work Act*.

Conversely, an amendment to the *Fair Work Act* alone, as has been recommended by the Migrant Worker Taskforce as well as several inquiries by the Commonwealth Senate and Productivity Commission, would only clarify unauthorised workers' entitlements under that legislation. Nevertheless, for avoidance of doubt and for the important signal it sends, the *Fair Work Act* should also be amended to clarify that it applies to all workers regardless of immigration status and regardless of any contraventions of the *Migration Act*.

About the Migrant Justice Institute

The Migrant Justice Institute is Australia's first research and policy organisation driving fair treatment for migrant workers. We are a trusted source of research and analysis for governments, business, and international organisations, and a trusted partner of unions, migrant communities, civil society organisations, and legal service providers.

Our evidence-based pathways to reform are grounded in migrants' experiences, legal and policy expertise, and a deep understanding of the operation of laws, policies and practices in other countries. Over the past 5 years we have surveyed over 15,000 temporary migrants in Australia, and our work has informed government responses to migrant worker exploitation, wage theft, modern slavery, and pandemic-related support for migrant workers.

Led by law professors at UTS and UNSW, we are an independent not-for-profit organisation with offices at UNSW Sydney Faculty of Law and Justice and the Migrant Workers Centre in Melbourne.