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# Temporary Migrant Workers in Australia

Issues Paper, 15 October, 2015



## **ABOUT THE AUTHOR**

The UNSW Human Rights Clinic works to systemically advance the rights of temporary migrants and asylum seekers in Asia and Australia. Under intensive faculty supervision, clinic students work as legal advisers and advocates with individual clients, NGOs, governments and inter-governmental institutions globally. Bridging theory and practice, students learn the skills and responsibilities of human rights lawyering.

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## Preface

This issues paper was originally prepared as a briefing paper for the United Nations Special Rapporteur on the Human Rights of Migrants, François Crépeau. The Special Rapporteur had planned a two-week visit to Australia from 27 September to 9 October 2015 to gather information about the situation of migrants and asylum seekers in Australia and neighbouring detention centres.<sup>1</sup> The visit was postponed due to the 'lack of full cooperation from the Government regarding protection concerns and access to detention centres'.<sup>2</sup>

The paper provides the first broad overview of legal frameworks and key issues concerning the treatment of migrant workers in Australia, for a general audience. It is intended to stimulate and inform public discussion about addressing systemic gaps in protection for international students, working holiday makers, and other temporary migrant workers who make up a substantial portion of Australia's workforce. The paper will be a useful resource for policymakers, journalists, civil society organisations, industry, unions, students and the general public who wish to better understand laws and issues concerning temporary migrant labour in Australia and the causes and consequences of workers' vulnerability to mistreatment.

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<sup>1</sup> Officer of the High Commissioner for Human Rights, 'Migrants/Human Rights: Official Visit to Australia Postponed due to Protection Concerns' (Media Release, 25 September 2015) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>>.

<sup>2</sup> Ibid.

## LIST OF ABBREVIATIONS

457 visa – Subclass 457 Temporary Work (Skilled) visa  
AAT– Administrative Review Tribunal  
ACTU – Australian Council of Trade Unions  
AFP – Australian Federal Police  
AHRC – Australian Human Rights Commission  
BVA – Bridging Visa A  
BVE – Subclass 050 Bridging visa E  
BVF – Subclass 060 Bridging visa F  
CAT – Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment  
CERD – International Convention on the Elimination of all forms of Racial Discrimination  
Class TU visa – Student Temporary Class TU Visa  
CJSV – Criminal Justice Stay Visa  
CLC– Community Legal Centre  
CRC – Convention on the Rights of the Child  
DAMA – Designated Area Migration Agreement  
DIBP – Department of Immigration and Border Protection  
DEP – Department of Employment  
DET – Department of Education and Training  
ENS – Employer Nomination Scheme (subclass 186)  
EEZ – Exclusive Economic Zones  
FWC – Fair Work Commission  
FWO – Fair Work Ombudsman  
FEG – Fair Entitlements Guarantee  
IAAAS – Immigration Advice and Application Assistance Scheme  
ICCPR – International Covenant on Civil and Political Rights  
ICESCR – International Covenant on Economic, Social and Cultural Rights  
ICRMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families  
IDC – Interdepartmental Committee on Human Trafficking and Slavery  
ILO – International Labour Organisation  
Migrant Workers Convention/ICRMW – United Nations International Convention on Protection of the Rights of All Migrants Workers and Members of their Families  
MRT – Migration Review Tribunal  
NGOs – Non-government organisations  
OECD – Organisation for Economic Cooperation and Development  
RSMS – Regional Sponsored Migration Scheme visa (subclass 187)  
SWP – Seasonal Workers Programme  
TSMIT – Temporary Skilled Migration Income Threshold  
UN – United Nations  
WHM – Working Holiday Maker programme (includes visa subclasses 417 and 462)  
WHS – Workplace Health and Safety  
WPTV – Witness Protection Trafficking Visa

## LEGISLATION

Aged Care Act 1997 (Cth)  
Australian Institute of Multicultural Affairs Act 1979 (Cth).  
Carer Recognition Act 2010 (Cth),  
Commonwealth of Australia Constitution Act 1901.  
Crimes Act 1900 (ACT)  
Crimes Act 1900 (NSW)  
Crimes Act 1958 (VIC)  
Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth)  
Criminal Code Act 1899 (QLD)  
Criminal Code Act 1913 (WA)  
Criminal Code Act 1924 (Tas)  
Criminal Code Act 1983 (NT)  
Criminal Code Act 1995 (Cth)  
Education Services for Overseas Students Act 2000 (Cth)  
Fair Entitlements Guarantee Act 2012 (Cth)  
Fair Work (Registered Organisations) Act 2009 (Cth)  
Fair Work Act 2009 (Cth)  
Health Insurance Act 1973 (Cth)  
Health Insurance Act 1973 (Cth)  
Higher Education Funding Act 1988 (Cth)  
Migration Act 1958 (Cth)  
Migration Amendment (Offshore Resources Activity) Repeal Bill 2014 (Cth)  
Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth)  
Migration Amendment Regulations 2009 (No 5) (Cth)  
Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1) (Cth)  
Migration Amendment Regulations 2009 (No 9) (Cth)  
Migration Amendment Regulations 2013 (No 1) (Cth)  
Migration Legislation Amendment (Student Visas) Act 2012 (Cth)  
Migration Legislation Amendment (Worker Protection) Act 2008 (Cth)  
Migration Regulations 1994 (Cth)  
National Employment Standards (in the Fair Work Act)  
National Health Act 1953 (Cth)  
National Health Act 1953 (Cth)  
Paid Parental Leave Act 2010 (Cth)  
Racial Discrimination Act 1975 (Cth)  
Safety, Rehabilitation and Compensation Act 1988 (Cth)  
Schools Assistance Act 2008 (Cth)  
Sex Discrimination Act 1984 (Cth)  
Social Security (Administration) Act 1999 (Cth)  
Social Security Act 1991 (Cth)  
Work, Health and Safety Act 2011 (Cth)



## INTRODUCTION

Australia has always pursued a strategic migration policy, which has altered to meet changing social and economic conditions, as well as foreign policy concerns. Australia's first national migration policies emerged as a product of federation in 1901,<sup>1</sup> which was celebrated as a tactical unification to protect the different colonies from foreigners.<sup>2</sup> 1901 also marked the beginning of the White Australia Policy, which limited migration to white-skinned Europeans, predominantly of British heritage.<sup>3</sup> In the decades following federation, Australia's openness to migration fluctuated. The government limited migration during the Great Depression of the 1930s, before strongly encouraging it in the immediate aftermath of World War II in 1945. With the government promoting a 'populate or perish' policy, Australia's migrant population increased at an unforeseen rate in the post-war period.<sup>4</sup> Simultaneously, the government progressively dismantled the White Australia Policy between 1949 and 1973, officially adopting a policy of Multiculturalism in 1979.<sup>5</sup>

It was not until the 1980s and 1990s that deregulation of the national labour market normalised temporary migrant labour in Australia. In particular, the introduction of the 457 visa scheme in 1996 allowed a significant number of high-skilled professionals to temporarily live and work in Australia.<sup>6</sup> Since the mid-2000s, hundreds of thousands, possibly millions, of international students and holidaymakers have entered the temporary labour market.<sup>7</sup> More recently, the Seasonal Workers Programme has been introduced to address development goals for the Pacific region and to fill labour gaps in particular industries, including horticulture.<sup>8</sup>

Unlike most other OECD countries, Australia still has no general low-wage migrant labour program.<sup>9</sup> Some attribute this to Australia's historical hostility towards temporary foreign workers, and the recency of their presence in Australia.<sup>10</sup> Australia's current temporary working population of 736,124<sup>11</sup> primarily consists of skilled temporary workers on 457 visas, international students, working holiday makers and workers in the Seasonal Workers Programme,<sup>12</sup> in addition to approximately 100,000 unauthorised workers.<sup>13</sup>

The only categories of low-wage temporary migrant workers with a dedicated regulatory framework are skilled temporary workers (457 visa-holders) and workers under the small Seasonal Workers scheme. Working holiday makers and international students are still not conceptualised as part of the Australian workforce, despite constituting a major component of it. These groups, existing within a gap between employment and migration law, are particularly vulnerable to mistreatment by their employers. They are also largely invisible as workers, having only recently attracted broad public attention in the wake of Senate inquiries and two major media investigations.<sup>14</sup>

This issues paper provides an overview of the situation of temporary migrant workers in Australia, including unauthorised workers. It commences by identifying the domestic and international legal frameworks governing temporary migrant workers in Australia. This is followed by an overview of the visa categories of temporary migrant workers in Australia, as well as categories of unauthorised workers. The paper then unpacks the structural factors that make various categories of temporary migrant workers especially vulnerable to mistreatment, and willing to acquiesce to ongoing mistreatment without complaint. This is followed by an overview of the main problems that temporary migrant workers face in connection with their employment in Australia. The paper concludes with a summary of the primary institutions and government programs that are in place for the protection of low-wage migrant workers. Programs provided by the non-government sector are set out in an appendix. Though comprehensive policy recommendations are beyond the scope of this paper, the discussion demonstrates the need for significant reforms to policy, law and practice to address systemic mistreatment of temporary migrant workers in Australia and to ensure that protective laws and programs are effectively implemented and enforced.<sup>15</sup>

<sup>1</sup> *Commonwealth of Australia Constitution Act 1901* (Cth).

<sup>2</sup> See, eg, Parliamentary Education Office, Federation, Australian Government <<http://www.peo.gov.au/learning/closer-look/federation-cl.html>>.

<sup>3</sup> See the *Immigration Restriction Act 1901* (Cth) which gave immigration officials a virtually unfettered discretion which they exercised in a racially discriminatory way pursuant to the White Australia Policy; see also Migration Heritage Centre, *1901 Immigration Restriction Act*, 2011, <<http://www.migrationheritage.nsw.gov.au/exhibition/objectsthroughtime/immigration-restriction-act/>>.

<sup>4</sup> Brian Carroll, *From Barton to Fraser* (Cassell Australia, 1978).

<sup>5</sup> See, eg, objects of the *Australian Institute of Multicultural Affairs Act 1979* (Cth).

<sup>6</sup> *Migration Regulations (Amendment) 1996 No 76* (Cth).

<sup>7</sup> Laurie Berg, *Migrants at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016) 51.

<sup>8</sup> Department of Immigration and Border Protection, (Cth) *Special Program Visa (Subclass 416) for the Seasonal Worker Program* <<http://www.border.gov.au/Trav/Visa-1/416>>.

<sup>9</sup> Berg, above n 7, 51.

<sup>10</sup> Mary Crock, 'Contract or Compact' in Mary Crock (ed), *Nation Skilling: Migration Labour and the Law* (Desert Pea Press, 2002) 55.

<sup>11</sup> Department of Immigration and Border Protection, *Australian's Migration Trends 2013-14 at a Glance*, <<http://www.border.gov.au/ReportsandPublications/Documents/statistics/migration-trends13-14-glance.pdf>>.

<sup>12</sup> This excludes New Zealanders who may undertake unlimited work on dedicated temporary visas.

<sup>13</sup> Stephen Howells, Report of the 2010 *Review of the Migration Amendment (Employer Sanctions) Act 2007* (Cth of Australia, 2011) 12, 22.

<sup>14</sup> ABC, 'Slaving Away', *Four Corners*, 4 May 2015 (Caro Meldrum-Hanna) <<http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>>; ABC, '7-Eleven: The Price of Convenience', *Four Corners*, 2 September 2015 (Adele Ferguson and Klaus Toft) <<http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm>>.

<sup>15</sup> A comprehensive analysis of forced labour, as well as the experience of higher waged migrant workers, is also outside the scope of this issues paper.

# 1 THE LEGAL FRAMEWORK GOVERNING TEMPORARY MIGRANT WORKERS

## 1.1 Domestic Legal Framework

Under Australia's federal legal system, migrant workers' immigration status and employment rights are governed by a combination of national laws and the laws and court systems of each Australian state or territory.<sup>16</sup>

At the national (Commonwealth) level, the *Migration Act 1958* (Cth) ('*Migration Act*') contains Australia's immigration regulatory framework, including control of arrivals and presence of non-citizens; decision-making processes for granting, refusing or cancelling visas; criminal offences for breaching visa conditions; and a review system for challenging visa decisions. The *Migration Regulations 1994* (Cth) ('*Migrations Regulations*') establish each visa category, along with the rights and conditions that are attached to those visas.<sup>17</sup> The Department of Immigration and Border Protection ('DIBP') makes initial decisions regarding visas, sponsorship and nominations, and the Migration and Refugee Division of the Administrative Appeals Tribunal ('AAT') reviews contested DIBP decisions.<sup>18</sup>

The *Fair Work Act 2009* (Cth) ('*Fair Work Act*') is the main legislation governing employee-employer relationships in most Australian workplaces. It provides minimum entitlements,<sup>19</sup> allows for flexible work arrangements,<sup>20</sup> ensures fairness at work (through, for example, the regulation of unfair dismissal)<sup>21</sup> and prevents discrimination.<sup>22</sup> Implementation and enforcement of this legislation is supported by Australia's national workplace relations tribunal, the Fair Work Commission ('FWC'), which is responsible for establishing minimum wage and working conditions, and resolving disputes between employers and employees.<sup>23</sup> The *Fair Work Act* and its *National Employment Standards* only cover employers and employees who are part of the national Fair Work system.<sup>24</sup> They do not, for example, cover employees of 'sole traders', such as domestic workers who are on 403 visas, international student visas or on working holiday visas.<sup>25</sup> They also may not cover workers in an irregular status, as discussed in Section 3.11 below.

Each state and territory also has its own Work Health and Safety ('WHS') legislation, which it is responsible for regulating and enforcing.<sup>26</sup> In January 2012, many states and territories adopted uniform WHS legislation which included a WHS Act, regulations, codes and a national enforcement policy.<sup>27</sup> Safe Work Australia is the national body which oversees the development of WHS laws and workers' compensation policy.<sup>28</sup> This framework imposes a primary duty of care on employers to ensure workers are not exposed to risks to their health and safety. There is also a regime for the enforcement of these regulations and codes which includes workers' compensation claims and prosecutions for those in breach of WHS laws.<sup>29</sup>

The criminal law of each state and territory protects all workers from forced labour and trafficking,<sup>30</sup> and from physical<sup>31</sup> and sexual assault.<sup>32</sup>

Alongside the *Fair Work Act*,<sup>33</sup> the *Sex Discrimination Act 1984* (Cth) ('*Sex Discrimination Act*') protects workers from sexual harassment in the workplace and in the provision of accommodation. The *Racial Discrimination Act 1975* (Cth)<sup>34</sup> ('*Racial*

<sup>16</sup> Australian Government, *Courts and Tribunals* <<http://www.australia.gov.au/information-and-services/public-safety-and-law/courts-and-tribunals>>.

<sup>17</sup> *Migration Regulations 1994* (Cth) sch 2. An overview of visa categories is contained in Section 2 of this issues paper.

<sup>18</sup> Administrative Appeals Tribunal, *Migration & Refugee Division*, Australian Government <<http://www.mrt-rrt.gov.au/>>; Prior to 1 July 2015 this function was performed by the Migration Review Tribunal.

<sup>19</sup> See, eg, *Fair Work Act 2009* (Cth) s 284.

<sup>20</sup> *Ibid* s 202.

<sup>21</sup> *Ibid* ss 385, 390. For a discussion of unfair dismissal laws, see Section 4.5.2 of this issues paper.

<sup>22</sup> See, eg, *Fair Work Act 2009* (Cth) s 351(1). For greater detail on discrimination laws, see Section 4.5.1 of this issues paper.

<sup>23</sup> Fair Work Commission, *About Us: Overview*, Australian Government <<https://www.fwc.gov.au/about-us/overview>>.

<sup>24</sup> *Fair Work Act 2009* (Cth) ss 13, 14.

<sup>25</sup> See also The Salvation Army and Walk Free Foundation, *Improving Protection for Migrant Domestic Workers in Australia: Policy Brief*, June 2015, 7, citing *Industrial Relations Act 1979* (WA) s 7, 'employee means – (a) any person employed by an employer to do work for hire or reward (d) but does not include any person engaged in domestic service in a private home'.

<sup>26</sup> Australian Government, *WHS/OH&S Acts, Regulations and Codes of Practice*, (2015) <<http://www.business.gov.au/business-topics/employing-people/workplace-health-and-safety/Pages/whs-acts-regulations-and-codes-of-practice.aspx>>.

<sup>27</sup> *Ibid*.

<sup>28</sup> Safe Work Australia, *About Safe Work Australia*, Australian Government <<http://www.safeworkaustralia.gov.au/sites/swa/about/pages/about>>.

<sup>29</sup> Australian Government, *Workers' Compensation Requirements* (2015) <<http://www.business.gov.au/business-topics/employing-people/workplace-health-and-safety/Pages/whs-acts-regulations-and-codes-of-practice.aspx>>.

<sup>30</sup> See, eg, *Criminal Code 1995* (Cth) divs 270, 271, s 270.6A. Forced labour and trafficking are addressed in Section 4.8 and in Appendix C of this issues paper.

<sup>31</sup> *Crimes Act 1900* (ACT) ss 23-26; *Crimes Act 1900* (NSW) ss 59, 61; *Criminal Code Act 1983* (NT) ss 188, 188A; *Criminal Code Act 1899* (QLD) ss 335, 339, 340, 346; *Criminal Code Act 1924* (Tas) ss 183, 184, 184A; *Crimes Act 1958* (Vic) s 31; *Criminal Code Act 1913* (WA) ss 313, 317, 317A, 318. Physical abuse is addressed in Section 4.4.2 of this issues paper.

<sup>32</sup> *Crimes Act 1900* (ACT) pt 3; *Crimes Act 1900* (NSW) s 611-K; *Criminal Code Act 1983* (NT) ss 3, 192, 192B; *Criminal Code Act 1899* (QLD) ss 1, 347-349, 352; *Criminal Code Act 1924* (Tas) ss 1, 127A, 185; *Crimes Act 1958* (Vic) ss 35, 38-43; *Criminal Code Act 1913* (WA) ss 319, 325, 326. Sexual violence is addressed in Section 4.4.1 of this issues paper.

<sup>33</sup> *Racial Discrimination Act 1975* (Cth) s 9(1).

<sup>34</sup> The *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth) prohibit discrimination in various areas of public life including employment, while the *Fair Work Act 2009* (Cth) specifically prohibits discrimination in the field of employment, via adverse action, including dismissing an employee or otherwise treating an employee differently (s 342). See also Australian Human Rights Commission, *A Quick Guide to Australian Discrimination Laws*, Australian Government <<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/quick-guide-australian-discrimination-laws>>.

*Discrimination Act*) protects workers from unfair treatment based on their 'race, colour, descent, national or ethnic origin' or immigrant status<sup>35</sup> in various areas of public life including employment, accommodation and accessing services.<sup>36</sup>

Although Australia has a robust social security framework providing access to health,<sup>37</sup> education<sup>38</sup> and other social services,<sup>39</sup> temporary migrant workers are frequently excluded from its operation.<sup>40</sup>

## 1.2 International Legal Framework

Australia has ratified a broad range of United Nations ('UN') human rights treaties and International Labour Organisation ('ILO') conventions that establish obligations to temporary migrant workers. These include seven of the ten core international human rights instruments.<sup>41</sup> Under these treaties, Australia is required to respect, protect and fulfil the rights of all migrant workers across a range of areas, including:

- The right to work<sup>42</sup> in favourable conditions<sup>43</sup> which safeguard migrants' political and economic freedoms.<sup>44</sup> Australia must recognise the right of all migrant workers to be free from slavery and compulsory labour.<sup>45</sup> It must take measures to prevent trafficking and protect trafficking victims<sup>46</sup>; and must suppress<sup>47</sup> forced labour.<sup>48</sup> In addition, Australia is obligated to protect children and young persons from economic and social exploitation in the workplace.<sup>49</sup>
- The right to be free from discrimination. Australia must prohibit discrimination<sup>50</sup> as well as any national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>51</sup>
- The right to enjoy the highest attainable standard of physical and mental health.<sup>52</sup> Australia must ensure that migrant workers are not subjected to cruel, inhuman or degrading treatment.
- The right to an adequate standard of living, including adequate food, water, clothing and housing.<sup>53</sup>
- The right to access health,<sup>54</sup> education<sup>55</sup> and social security<sup>56</sup> benefits.
- Civil and political rights, including rights to: recognition as a person before the law;<sup>57</sup> the affordance of due process;<sup>58</sup> life;<sup>59</sup> privacy;<sup>60</sup> liberty and security of the person;<sup>61</sup> and freedom of association.<sup>62</sup> Depending on their visa status some migrant workers are also entitled to freedom of movement.<sup>63</sup> In practice, however, where migrant workers are entitled to freedom of movement, they may be partially or wholly be restricted in their movement and communication.<sup>64</sup>

<sup>35</sup> Australian Human Rights Commission, *Complaints Under the Racial Discrimination Act*, Australian Government <<https://www.humanrights.gov.au/complaints/complaint-guides/making-complaint/complaints-under-racial-discrimination-act>>.

<sup>36</sup> *Racial Discrimination Act 1975* (Cth) s 9(1).

<sup>37</sup> *Health Insurance Act 1973* (Cth); *National Health Act 1953* (Cth).

<sup>38</sup> *Higher Education Funding Act 1988* (Cth); *Schools Assistance Act 2008* (Cth); *Education Services for Overseas Students Act 2000* (Cth).

<sup>39</sup> *Social Security Act 1991* (Cth); *Social Security (Administration) Act 1999* (Cth); *Carer Recognition Act 2010* (Cth); *Aged Care Act 1997* (Cth); *Paid Parental Leave Act 2010* (Cth); *Safety, Rehabilitation and Compensation Act 1988* (Cth).

<sup>40</sup> See Section 4.7 of this issues paper for a detailed discussion.

<sup>41</sup> See Appendix A of this issues paper.

<sup>42</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 6(1) ('ICESCR').

<sup>43</sup> ICESCR art 7.

<sup>44</sup> *Ibid* art 6(2).

<sup>45</sup> *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 8(1), 8(2) ('ICCPR'); *Convention concerning Forced or Compulsory Labour* (C29), opened for signature 28 June 1930, International Labour Organisation (ILO) (entered into force 1 May 1932) ('C29 Convention'); *Convention concerning the Abolition of Forced Labour* (C105), opened for signature 25 June 1957, International Labour Organisation (ILO) (entered into force 17 January 1959) art 1 ('C105 Convention').

<sup>46</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, signed 15 November 2000, United Nations General Assembly, art 9.

<sup>47</sup> C29 Convention art 1.

<sup>48</sup> C105 Convention art 1.

<sup>49</sup> ICESCR art 10(3).

<sup>50</sup> ICCPR arts 2(1), 26; ICESCR art 2(2). These rights also extend to gender-based discrimination: *Convention on the Elimination of All Forms of Discrimination against Women*, open for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 2 ('CEDAW').

<sup>51</sup> ICCPR art 20(1).

<sup>52</sup> ICESCR art 12.

<sup>53</sup> ICESCR arts 11(1), 11(2). See also ICESCR art 11; CEDAW art 14(2); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 16(1) and 27(3) ('CRC'); *International Convention on the Elimination of All Forms of Racial Discrimination*, signed 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iii) ('CERD').

<sup>54</sup> ICESCR art 12; CERD art 5(e)(iv); CEDAW arts 12, 14(b); CRC arts 24, 25.

<sup>55</sup> ICESCR arts 13, 14; CRC arts 28, 29; CERD art 5(e)(v).

<sup>56</sup> ICESCR art 9; CRC art 26.

<sup>57</sup> ICCPR art 16.

<sup>58</sup> *Ibid* arts 9-16.

<sup>59</sup> *Ibid* art 6.

<sup>60</sup> *Ibid* art 17.

<sup>61</sup> *Ibid* art 9(1).

<sup>62</sup> Specifically regarding the right to participate in trade unions: ICCPR art 22 (especially art 22(1)); ICESCR art 8(1). In addition, migrant workers should also not lose the right to vote in the elections of their countries of origin upon migrating overseas: ICCPR art 25.

<sup>63</sup> Note that ICCPR art 12 distinguishes between documented and irregular workers by providing that '[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence'. (Emphasis added).

<sup>64</sup> See Section 4.6 of this issues paper for examples.

- The right of all migrant workers - as national, ethnic, religious or linguistic minorities - to participate in the cultural life of their community,<sup>65</sup> and to freedom of thought, conscience and religion.<sup>66</sup>
- Family rights. All individuals, irrespective of their migrant status, have the right to family protection.<sup>67</sup> Additionally, Australia must respect and put in place measures that recognise the special vulnerabilities of children of migrant workers.<sup>68</sup>

Australia has not yet ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ('ICRMW'), which establishes more detailed state obligations with respect to migrant workers. Despite the recommendation of the 2011 Universal Periodic Review to ratify or consider ratifying the ICRMW, the Australian Government has stated that it does not intend to become a party to the ICRMW because it perceives existing protections for migrant workers as adequate.<sup>69</sup>

Australia has obligations to migrant workers under a range of ILO conventions,<sup>70</sup> including obligations regarding the promotion of equal treatment and opportunity in employment.<sup>71</sup> These ILO obligations extend to all workers irrespective of their nationality or immigration status, including migrant workers in an irregular status, unless otherwise stated.<sup>72</sup> Australia is yet to ratify several Conventions and Protocols that establish significant further protections for especially vulnerable groups of migrant workers. These include the ILO Domestic Workers Convention 2011 (No 189), and the recent Protocol of 2014 to the Forced Labour Convention of 1930.<sup>73</sup>

For a list of Australia's ratification status in relation to international human rights treaties relevant to the protection of the rights of migrant workers, please see Appendix A.

## 2 LOW WAGE MIGRANT WORKERS – AN OVERVIEW OF MAJOR VISA CATEGORIES

Although temporary migrants constitute a substantial portion of the Australian workforce, unlike countries such as the United States and Canada, Australia does not have a large official low-wage guest-worker program. Rather, low-wage work is performed by workers on a variety of visas, some of which are not primarily work visas. The following sections set out the major categories of temporary resident visas, as established in the *Migration Regulations*, made under the *Migration Act*.<sup>74</sup> Further categories of temporary work visas are set out in Appendix B.

Temporary visa grants 2013-14

Category	Grants 2013-14
Visitors <sup>1</sup>	3,969,215
Working Holiday Makers	239,592
Students	292,060
Temporary Work (Skilled) <sup>2</sup>	98,571
Temporary Graduate	22,867
Other Temporary Visas <sup>3</sup>	83,034
Total	4,705,339

Source: DIBP *Australia's Migration Trends 2013-14 at a glance*, (2015), p.3.  
 1 Visitor visas are reported as offshore grants only and exclude a small number where the client is onshore.  
 2. Excludes subclass 457 Independent Executive.  
 3. Excludes Bridging visas.

<sup>65</sup> ICESCR art 15(1)(a); ICCPR art 27.

<sup>66</sup> ICCPR art 18; CRC art 14.

<sup>67</sup> ICESCR art 10; ICCPR art 23.

<sup>68</sup> ICESCR art 10(3); ICCPR art 24.

<sup>69</sup> Australian Human Rights Commission, *Summary of UPR Recommendations and Responses*, <<https://www.humanrights.gov.au/summary-upr-recommendations-and-responses>>. According to its preamble, the ICRMW does not technically create any new rights for migrant workers (*International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, A/RES/45/158 (entered into force 1 July 2003), preamble). Rather it establishes the application of rights and obligations from key instruments such as the ICCPR and the ICESCR (which Australia has already ratified) in the context of migration (see Address by Navi Pillay, High Commissioner for Human Rights to the Graduate Institute of International Development Studies, Geneva – 14 December 2011, <<http://www.ohchr.org/enu/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E>>, cited in Human Rights Council of Australia, Submission 33 to Australian Ratification of the Migrant Worker Conventions, *Responses to Concerns Raised by the Australian Government*, 13 December 2011, 2). However, Scarlet Alliance argues strongly that migrant workers in Australia need legitimisation, not criminalisation: '[t]he most important support that the Australian Government could provide for these workers is to ratify the UN International Convention on the Rights of All Migrant Workers and their Families': Scarlet Alliance, 'Offences Against Humanity - Slavery Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (Discussion Paper) 6' <<http://www.scarletalliance.org.au/library/slavery-briefingpaper>>.

<sup>70</sup> See Appendix A of this issues paper.

<sup>71</sup> *Convention Concerning Discrimination in Respect of Employment and Occupation* ('C111'), opened for signature 25 June 1958, International Labour Organisation ('ILO') (entered into force 15 June 1960) art 2.

<sup>72</sup> International Labour Organisation, *ILO Note on the Dignity and Rights of Migrant Workers in an Irregular Situation*, submitted to the Fundamental Rights Agency 2011 Annual Conference, Warsaw, 21 November 2011, 1 <[http://www.ilo.org/wcmsp5/groups/public/-europe/-ro-geneva/-ilo-brussels/documents/genericdocument/wcms\\_177275.pdf](http://www.ilo.org/wcmsp5/groups/public/-europe/-ro-geneva/-ilo-brussels/documents/genericdocument/wcms_177275.pdf)>.

<sup>73</sup> Australia is also yet to ratify the *ILO Domestic Workers Convention 2011 (No 189)*, the *International Labour Organisation Migration for Employment Convention (Revised) 1949 (ILO C-97)*, the *International Labour Organisation Migrant Workers (Supplementary Provisions) Convention 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO C-143)*; Protocol of 2014 to the Forced Labour Convention 1930, opened for signature 11 June 2014 (Geneva, 103rd ILC Session) (not yet entered into force).

<sup>74</sup> *Migration Act 1958* (Cth); *Migration Regulations 1994* (Cth) regs 2.01–2.02.

## 2.1 International Students

International students in Australia study in secondary and tertiary education institutions on the Student (Temporary) (Class TU) visa.<sup>75</sup> On 31 December 2014 there were 303,171 international student visa holders in Australia.<sup>76</sup> By one estimate, there are over 200,000 international students in casual part-time or full-time paid employment in Australia at any one time throughout the year – up to two per cent of the Australian workforce.<sup>77</sup>

International students are allowed to work part-time during their studies<sup>78</sup> and are covered by the *Fair Work Act*, but have no dedicated legal regime for their labour market protection.<sup>79</sup> The DIBP is responsible for international student visas in Australia and the Department of Education and Training ('DET') oversees all students in Australia, although neither department closely monitors the employment conditions of international students.<sup>80</sup> While there is no comprehensive data concerning the employment of international students, scholars observe that students generally work in service-based industries, such as retail, cleaning and taxi-driving.<sup>81</sup>

Most student visas limit their work to 40 hours per fortnight during course sessions, with unlimited work allowed during breaks.<sup>82</sup> The 40 hour working limit pushes international students into 'casualised and uncertain' work,<sup>83</sup> as well as into unauthorised work.<sup>84</sup>

Purposeful or inadvertent breaches of the Class TU visa conditions, including the 40 hour fortnightly work limit, can trigger visa cancellation, mandatory detention and removal from Australia.<sup>85</sup> The consequences of working beyond the 40 hour limit make international students particularly susceptible to mistreatment as discussed in Section 4 of this issues paper, and as demonstrated in a recent media investigation of 7-Eleven workers.<sup>86</sup>

International students are also eligible for the subclass 485 Temporary Graduate Visa, comprising the Graduate Work stream and the Post-Study Work stream, discussed in Appendix B.

## 2.2 Skilled Temporary Worker Programs

The subclass 457 visa scheme was introduced in 1996 to fill temporary skill gaps in Australia's labour market.<sup>87</sup> As of 31 March 2015, the number of 457 visa holders in Australia was 106,750.<sup>88</sup> The 457 is a flexible scheme that has been responsible for normalising temporary labour migration in Australia, particularly of high-skilled workers.<sup>89</sup> 457 visa holders are allowed to work in Australia for up to four years, after which further visas may be granted. 457 visa holders are required to work for a specified sponsor, in a specified occupation.<sup>90</sup> 457 holders are covered by the *National Employment Standards* which set minimum standards for Australian workers such as maximum weekly hours, as well as modern awards<sup>91</sup> and their partners and children have the right to work in any occupation without the restrictions of the primary visa holder.<sup>92</sup> However, 457 visa holders can

<sup>75</sup> *Migration Regulations 1994* (Cth) sch 8 cl 8535(c). To be eligible, students must demonstrate evidence of their ability to fund their tuition fees, airfare, \$18,610 per year for personal living expenses and adequate English proficiency.

<sup>76</sup> Department of Immigration and Border Protection, 'Student Visa and Temporary Graduate Visa Programme Quarterly Report', (Commonwealth, 31 December 2014) 8.

<sup>77</sup> Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181, 185.

<sup>78</sup> International students' partners may also be allowed to work on secondary visas: *Migration Regulations 1994* (Cth) schs 5A–5B, sch 8 cl 8104.

<sup>79</sup> Reilly, above n 77, 181-208.

<sup>80</sup> See the following sections of this issues paper for further information: 5.1.3 ('Department of Immigration and Border Protection') and 5.1.6 ('Department of Education and Training').

<sup>81</sup> Peter Mares, 'Fear and Instrumentalism: Australian Policy Responses to Migration from the Global South' (2011) 100(415) *The Round Table: The Commonwealth Journal of International Affairs* 407, 417.

<sup>82</sup> *Migration Regulations 1994* (Cth) schs 2, 8 cl 8105. Students must also attend a majority of their classes and satisfactorily fulfil all course requirements: *Migration Regulations 1994* (Cth) schs 2, 8 cl 8202.

<sup>83</sup> Berg, above n 7, 99.

<sup>84</sup> Unauthorised workers are detailed in Section 2.5 of this issues paper.

<sup>85</sup> *Migration Act 1958* (Cth) s 116(3); *Migration Regulations 1994* (Cth) reg 2.34(2)(aa), amended by *Migration Legislation Amendment (Student Visas) Act 2012* (Cth) and *Migration Amendment Regulations 2013* (No 1) (Cth) (Berg, above n 7, 99, 163).

<sup>86</sup> ABC, '7-Eleven: The Price of Convenience', above n 14.

<sup>87</sup> *Migration Regulations (Amendment) 1996 No 76* (Cth); Peter Mares, 'The Permanent Shift to Temporary Migration' in Suvendrini Perera, Graeme Seal and Sue Summers (eds), *Enter At Own Risk? Australia's Population Questions for the 21st Century* (Black Swan Press, 2010) 65; Graeme Hugo, 'A New Paradigm of International Migration in Australia' (1999) 25(1) *New Zealand Population Review* 1. Peter Mares has argued it was also designed to facilitate intra-company transfers of high level executives and specialist staff, and boost Australia's economic internationalisation: Peter Mares, Submission 2 to Senate Standing Committees on Education and Employment, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 1 May 2015, 7.

<sup>88</sup> Department of Immigration and Border Protection, 'Subclass 457 quarterly report', (Quarter ending 31 March 2015, Commonwealth, 2015), 1.

<sup>89</sup> Mares, 'The Permanent Shift to Temporary Migration' above n 87, 65; Hugo, above n 87. Despite this recent tightening of the framework, the 457 visa program is still not subject to a numerical cap: Iain Campbell and Joo-Cheong Tham, 'Labour Market Deregulation and Temporary Migrant Labour Schemes: An Analysis of the 457 Visa Program' (2013) 26 *Australian Journal of Labour Law* 239, 241; Mary Crock, 'Immigration and Labour Law: Targeting the Nation's Skills Needs' in Andrew Frazer, Ron McCallum and Paul Ronfeldt (eds), *Individual Contracts and Workplace Relations* (Australian Centre for Industrial Relations Research and Teaching, 1997) 140.

<sup>90</sup> Berg, above n 7, 65.

<sup>91</sup> Fair Work Australia, *457 Visa Holders - Workplace Rights and Entitlements* (2015) <<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/rights-and-obligations/457-visa-holders-workplace-rights-and-entitlements>>.

<sup>92</sup> Joanna Howe and Alexander Reilly, Submission 5 to Senate Standing Committees on Education and Employment, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 1 May 2015, 5.

only be employed in occupations deemed to be in shortage in the domestic economy and listed on the Consolidated Sponsored Occupations List.<sup>93</sup> The main pathways for permanent residence that 457 workers use are the Employer Nomination Scheme and the Regional Sponsored Migration Scheme, and both of these rely on employer sponsorship.<sup>94</sup> Indeed, both schemes offer various concessions to applicants who are sponsored by the same employer as that which sponsored their 457 visa. This creates an incentive for workers to remain with an employer despite mistreatment.

The program has undergone legislative reform in response to national inquiries and continuing criticism.<sup>95</sup> This has included the introduction of several safeguards to protect 457 workers, such as the extension in 2013 of the period between an employer's termination of sponsorship and visa cancellation to 90 days, giving the worker longer to find an alternate job and sponsor before he or she is subject to removal.<sup>96</sup> Reform in 2009 required that sponsors accord 'no less favourable' conditions to migrant workers than their Australian counterparts.<sup>97</sup>

### 2.2.1 Labour Agreements - Designated Area Migration Agreements

The 457 visa contains a variety of streams, including the labour agreements stream designed for semi-skilled workers.<sup>98</sup> Labour agreements pose unique risks for temporary migrant workers because the conditions of sponsorship are determined through specialised employer-DIBP agreements, which fall outside of the standard 457 regulations.<sup>99</sup> Although sponsors are still bound by core 457 sponsorship obligations, such as the 'no less favourable' requirement, the agreement conditions are less visible and less standardised. Not being governed by statute, the conditions can remain hidden, treated as 'Commercial-in-Confidence'.<sup>100</sup> As executive arrangements, they are vulnerable to swift and radical alteration without public or parliamentary consultation.<sup>101</sup> In August 2014, the Government introduced a new form of labour agreement, a Designated Area Migration Agreement ('DAMA').<sup>102</sup> DAMAs are special agreements that allow designated regional areas to have wages that are up to 10 per cent lower than the Temporary Skilled Migration Threshold ('TMSIT'), which is approximately \$48,510.<sup>103</sup> DAMAs allow sponsoring employees to negotiate concessions on standard 457 salary and English requirements.<sup>104</sup> In conjunction with the higher associated cost of living in regional areas, lower salaries may undermine an employee's ability to independently support themselves.<sup>105</sup>

### 2.3 Working Holiday Makers

The Working Holiday Maker ('WHM') program is comprised of the Working Holiday (subclass 417) and the Work and Holiday (subclass 462) visa programs. At December 31 2014 there were 154,599 temporary migrants on 417 visas and 6,342 temporary migrants on 462 visas (160,941 in total).<sup>106</sup> WHM visas permit temporary migrants between 18 and 30 years old from over 30 countries<sup>107</sup> to work while holidaying in Australia. To be eligible applicants must meet the health, character and financial requirements, and cannot be accompanied by dependent children.<sup>108</sup> Subclass 462 applicants must additionally have functional English and have completed at least two years of undergraduate university study.<sup>109</sup> In Australia, WHM visa holders are entitled to work for 12 months, but only six months with any one employer,<sup>110</sup> unless granted permission by the DIBP.<sup>111</sup>

Since November 2005, WHM visa holders can apply for a second visa if they have spent three months undertaking 'specified

<sup>93</sup> Joanna Howe and Alexander Reilly, Meeting Australia's Labour Needs: The Case for a New Low-Skill Work Visa *Federal Law Review* 62 (forthcoming); Joanna Howe, 'Is the Net Cast Too Wide? An Assessment of Whether the Regulatory Design of the 457 Visa Meets Australia's Skill Needs' (2013) 41(3) *Federal Law Review* 443.

<sup>94</sup> Joo-Cheong Tham, Submission 3 to Senate Standing Committees on Education and Employment, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 29 April 2015, 10.

<sup>95</sup> See, eg, Visa Subclass 457 Integrity Review, *Final Report* (Commonwealth of Australia, October 2008) 32.

<sup>96</sup> *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth); *Migration Amendment Regulations 2009 (No 5)* (Cth); *Migration Amendment Regulations 2009 (No 9)* (Cth); *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1)* (Cth); *457 Amendment Act 2013* (Cth).

<sup>97</sup> *Migration Amendment Regulations 2009 (No 5)* (Cth) sch1, inserting reg 2.72(1)(10)(c).

<sup>98</sup> Howe and Reilly, 'Meeting Australia's Labour Needs', above n 93, 60.

<sup>99</sup> Berg, above n 7, 126.

<sup>100</sup> Department of Immigration and Citizenship, *Labour Agreement Information Pack* (2012) 1.

<sup>101</sup> Campbell and Tham, above n 89, 241; Joanna Howe, 'Enterprise Migration Agreements under the Subclass 457 Visa: Much Ado about Nothing?' (2014) 27 *Australian Journal of Labour Law* 86.

<sup>102</sup> Department of Immigration and Border Protection (Cth), *Designated Area Migration Agreements* (August 2014).

<sup>103</sup> United Voice, Submission 19 to Senate Standing Committees on Education and Employment, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 1 May 2015, 3.

<sup>104</sup> Department of Immigration and Border Protection, *Designated Area Migration Agreements* (August 2014).

<sup>105</sup> United Voice, above n 103, 3.

<sup>106</sup> Department of Immigration and Border Protection, 'Working Holiday Maker Visa Programme Report' (31 December 2014) 34.

<sup>107</sup> See full list of countries at Department of Immigration and Border Protection, 'Working Holiday Maker Visa Programme Report' (31 December 2014) 3.

<sup>108</sup> Department of Immigration and Border Protection, 'Working Holiday Maker Visa Programme Report' (31 December 2014) 3.

<sup>109</sup> *Ibid.*

<sup>110</sup> Howe and Reilly, 'Meeting Australia's Labour Needs', above n 93, 66; *Migration Regulations 1994* (Cth) sch n2 regs 417.611, 462.611. See also Department of Immigration and Citizenship, *Working Holiday Maker Visa Program Report* (30 June 2013) 4.

<sup>111</sup> Department of Immigration and Border Protection, *Request Permission to Work with an Employer beyond 6 Months on a Working Holiday or Work And Holiday Visa*, Australian Government <<https://www.border.gov.au/Forms/Documents/1445.pdf>>.

work' in mining, construction or agriculture in regional Australia.<sup>112</sup> This creates a strong incentive for WHMs who would like to stay another year in Australia to undertake and complete three months of specified work.

The WHM program was not originally conceived as a working visa, and consequently WHMs have not traditionally been seen as a vulnerable working population. Scholars argue that the regulatory framework for WHMs needs to be improved.<sup>113</sup> Indeed some leading academics argue that the WHM visa should be reconceptualised not as a 'cultural exchange' visa,<sup>114</sup> but primarily a work visa with secondary tourism and cultural benefits.<sup>115</sup> Without reform, employers who employ working holiday makers will continue to be exempt from sponsorship and associated reporting obligations applicable to the employment of temporary migrant workers under the 457 visa scheme.<sup>116</sup> Due to under-resourcing, the Fair Work Ombudsman ('FWO') is unable to systematically monitor employers' compliance with their employment obligations, although the FWO has been engaged in a specific campaign targeting WHMs in regional areas.<sup>117</sup>

## 2.4 Seasonal Workers Programme

The Seasonal Worker Programme ('SWP') is a small and heavily regulated guest worker program, which is overseen by both the DIBP and the Department of Employment. It aims to both provide seasonal employment to workers from the Pacific Islands and East Timor, and to help Australian employers in certain industries find labour.<sup>118</sup> Participants in this Programme must be citizens of and residents in Timor-Leste, Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu or Vanuatu.<sup>119</sup> The main industry that migrant workers in this Programme can work in is horticulture, and in limited locations, they may work in tourist accommodation, sugar cane farming, aquaculture or cotton farming.<sup>120</sup> Migrant workers in the Programme must hold a 416 visa, which allows them to work in Australia for an 'approved employer', for 14 weeks to 6 months.<sup>121</sup> The visa holder cannot bring their family with them and there is no option to renew the visa and no path to permanent residency.

Sponsors of migrant workers under this Programme must be approved by the Australian Government and become an 'approved employer' before they can recruit seasonal workers.<sup>122</sup> These employers are subject to industrial regulations specific to their industry and the FWO monitors arrangements between workers and employers.<sup>123</sup> Sponsors also have obligations under the Migration Regulations. In particular, they must provide records and information to the DIBP,<sup>124</sup> co-operate with inspectors,<sup>125</sup> and provide a reasonable standard of accommodation.<sup>126</sup> This formal monitoring scheme for the SWP provides far greater protection to workers than other visa categories, such as student and WHM visas.

There is anecdotal evidence of underpayment of seasonal workers,<sup>127</sup> but no reports suggest that this is a pervasive issue. The Australian Institute of Criminology's 2011 report on the initial pilot program noted that some workers reported instances of inappropriate infrastructure, accommodation and pastoral care.<sup>128</sup> The Institute suggested these transgressions of labour rights are not specific to seasonal workers, but affect all migrant workers in horticulture and other low-paying industries.<sup>129</sup> Additionally, the Institute's report notes there is legal complexity in Australian industrial agreements in general, due to variation by state or territory jurisdiction and employment sector, which means that the specific conditions for each worker may vary.<sup>130</sup>

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<sup>112</sup> Howe and Reilly, 'Meeting Australia's Labour Needs', above n 93, 66; Department of Immigration and Citizenship, 'Working Holiday Maker Visa Program Report', above n 110, 4. In May 2015, the Government announced that volunteer work would no longer qualify for the visa extension: Department of Immigration and Border Protection, Working Holiday Visa, Australian Government <<http://www.border.gov.au/Trav/Visa-1/417->>.

<sup>113</sup> Howe and Reilly, 'Submission 5 to Senate Standing Committees on Education and Employment', above n 92, 14.

<sup>114</sup> Department of Immigration and Border Protection, 'Working Holiday Maker Visa Programme Report' (31 December 2014) 3.

<sup>115</sup> Howe and Reilly, 'Submission 5 to Senate Standing Committees on Education and Employment', above n 92, 5.

<sup>116</sup> *Ibid* 1.

<sup>117</sup> Fair Work Ombudsman, 'Fair Work Ombudsman to Review Entitlements of Overseas Visa-Holders on Working Holidays' (Media Release, 4 August 2014) <<http://www.fairwork.gov.au/about-us/news-and-mediareleases/2014-media-releases/august-2014/20140804-working-holiday-entitlements-review>>.

<sup>118</sup> Department of Employment (Cth), *Seasonal Worker Program* (19 June 2015) <<https://employment.gov.au/seasonal-worker-programme>>.

<sup>119</sup> Department of Immigration and Border Protection, *Special Program Visa (Subclass 416) for the Seasonal Worker Program*, Australian Government <<http://www.border.gov.au/Trav/Visa-1/416-#>>.

<sup>120</sup> *Ibid*.

<sup>121</sup> The Australian Government plans to remove the minimum stay requirement: Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia* (2015) 113.

<sup>122</sup> Department of Employment, *Information for Employers on How to Recruit Seasonal Workers*, Australian Government (19 June 2015) <<https://employment.gov.au/information-employers-how-recruit-seasonalworkers>>.

<sup>123</sup> Australian Institute of Criminology (Cth), *Australia's Pacific Seasonal Worker Pilot Scheme: Managing Vulnerabilities to Exploitation* (2011) 4.

<sup>124</sup> *Migration Regulation 1994* (Cth) reg 2.83.

<sup>125</sup> *Ibid* reg 2.78.

<sup>126</sup> *Ibid* reg 2.85.

<sup>127</sup> Jesse Doyle and Stephen Howes, *Australia's Seasonal Worker Program: Demand-Side Constraints and Suggested Reforms* (World Bank, 2015) 14.

<sup>128</sup> Australian Institute of Criminology (Cth), above n 123, 5.

<sup>129</sup> *Ibid*. See also Section 4 of this issues paper on the main problems faced by migrant workers.

<sup>130</sup> *Ibid*, 4.

Currently, the program remains small, and not all available places are filled. Although the cap on 416 visa grants has increased from 2000 to 2500,<sup>131</sup> and actual grants have increased from 1473 to 2014 between 2012-13 and 2013-14, this total remains insignificant in the context of the Australian horticulture industry, which employs between 75,000 and 175,000 workers annually.<sup>132</sup> This is likely partly the result of the prevalence of undocumented migrant workers<sup>133</sup> and WHMs in the horticulture industry, especially since the WHM second-year extension option was introduced.<sup>134</sup> However, in the Northern Australia White Paper, released earlier this year, the Government outlined its plan to expand the SWP by: extending the number of industries participants can work in; removing the minimum 14 week stay requirement; abolishing the national cap on the number of workers able to participate; and extending the number of countries from the Pacific Island Forum that are eligible.<sup>135</sup> These changes align with several recommendations in the World Bank's *Australia's Seasonal Workers Program: Demand-side Constraints and Suggested Reforms* report, which outlines reasons why potential employers have been slow to participate in the current program.<sup>136</sup> Given the planned changes to make the SWP more attractive to potential employers, the program is likely to grow in scale over the coming years, demanding close monitoring to ensure that the current worker protections under the SWP are maintained.

## 2.5 Unauthorised Workers<sup>137</sup>

It is estimated that there are between 50,000 to 100,000 people working in Australia without permission at any one time.<sup>138</sup> They may be unauthorised to work in one of two ways. First, workers may attain an irregular immigration status in Australia, usually by overstaying their visas, and are then considered "unlawful non-citizens" under the *Migration Act*.<sup>139</sup> Second, workers may perform work in an unauthorised status if they work when their visa does not permit them to do so.

It is an offence under section 235 of the *Migration Act* for an unlawful non-citizen to perform work in Australia, whether for reward or otherwise.<sup>140</sup> There is an emerging line of cases that limit employment rights and contract enforceability for unauthorised workers based on the criminalisation of their work, as discussed in Section 3.11 ('Further Barriers to Accessing Remedies').

Under criminal offences introduced in 2007,<sup>141</sup> an employer breaches the *Migration Act* if it employs workers in an irregular status. Workers are unlikely to report an employer's breach as they face detention upon discovery of their irregular immigration status.

### 2.5.1 Visa Overstayers

The DIBP estimated that around 62,100 people were unlawfully remaining in Australia following the expiry or cancellation of their visa, as of 30 June 2014.<sup>142</sup>

The majority of visa overstayers are those who have overstayed visitor (tourist) visas.<sup>143</sup> The top three countries of citizenship for visa overstayers are the People's Republic of China, Malaysia and the United States of America.<sup>144</sup> It is estimated that half of visa overstayers in Australia work, because they are ineligible for government services and support due to their irregular migration status.<sup>145</sup>

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<sup>131</sup> Note that the cap has been removed as of 1 July 2015: Australian Government, 'White Paper on Developing Northern Australia', above n 121, 113.

<sup>132</sup> Doyle and Howes, above n 127, 3.

<sup>133</sup> *Ibid* 14.

<sup>134</sup> *Ibid*. See also Howe and Reilly, 'Meeting Australia's Labour Needs', above n 93, 73.

<sup>135</sup> Australian Government, 'White Paper on Developing Northern Australia', above n 121, 113.

<sup>136</sup> Doyle and Howes, above n 127, 26. The Report also makes other recommendations which have been either unmentioned or partially addressed in the *White Paper on Developing Northern Australia*, including the recommendation to increase funding for employer compliance to reduce the number of undocumented workers in horticulture, and to remove of employer contributions to the worker's international and domestic travel expenses, to make the program more attractive for potential employers.

<sup>137</sup> Within this paper, the term 'unauthorised worker' is used interchangeably with 'worker in an irregular status' to reflect workers who do not have permission to be in Australia, or who are working in contravention of their visa conditions.

<sup>138</sup> Howells, above n 13, 22.

<sup>139</sup> Entrants arriving in Australia without visas, whether by boat or plane, are routinely identified and taken to detention and therefore unlikely to be able to enter to the workforce: Berg, above n 7, 154.

<sup>140</sup> *Migration Act 1958* (Cth) s 235(3). Berg notes that there is no evidence of prosecutions of this offence, and suggests that reason is that the primary goal upon detection of illegal status is to remove the person: Berg, above n 7, 170.

<sup>141</sup> Berg, above n 7, 197. See *Migration Act 1958* (Cth) div 12, sub-div C 'Offences and Civil Penalties in Relation to Work By Non-Citizens'. These amendments were introduced in 2007 and reinforced in 2013, and include both civil and criminal penalties: see *Migration Amendment (Reform of Employer Sanctions) Act 2013* (Cth); *Migration Amendment (Employment Sanctions) Act 2007* (Cth).

<sup>142</sup> Department of Immigration and Border Protection (Cth) *Australia's Migration Trends 2013-14* (2014) 69. The DIBP also notes that the number of people in Australia who have overstayed their visa is in constant flux because there is constant movement out of the pool, as peoples' statuses are resolved, including their departure or removal.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid* 70.

<sup>145</sup> Berg, above n 7, 151, citing Department of Immigration and Multicultural Affairs (Cth), *Review of Illegal Workers in Australia: Improving Immigration Compliance in the Workplace* (1999) 18.



Table 5.1: Unlawful Non-Citizens by visa category at 30 June, 2012, 2013 and 2014

Category	2012	2013	2014	Change (%) 2013 to 2014	Proportion (%) of 2014 total
Visitors	43,510	44,800	44,840	0.1	72.2
Students	10,600	10,720	10,060	-6.2	16.2
Working Holiday	1,720	1,980	1,900	-4.0	3.1
Other temporary residents	2,340	2,140	1,860	-13.1	3.0
All other categories	2,720	3,060	3,430	12.1	5.5
<b>Total</b>	<b>60,900</b>	<b>62,700</b>	<b>62,100</b>	<b>-1.0</b>	<b>100.0</b>
Temporary residents (lawful) <sup>1</sup>	986,180	1,026,120	1,038,990	1.3	100.0

Source data: BISC and PAS, DIBP

1. Stock of temporary entrants, Visa Reporting—excludes New Zealand citizens.

Note: There are known errors in the estimate of UNCs and numbers are provided as an estimate only. Numbers are rounded which can result in rounding errors and estimate of UNCs numbers are only provided yearly.

## 2.5.2 Visas without Permission to Work

Some temporary visas carry no working rights, including visitor visas and Bridging Visa D, which is a short stay visa providing time for the holder to lodge a substantive visa application or leave.<sup>146</sup> Asylum seekers are usually granted Bridging Visa E ('BVE') pending the determination of their application for asylum, with no entitlement to work. As of February 2014, over 19,000 asylum seekers were living in the community holding BVEs.<sup>147</sup>

In September 2014, there were over one million temporary visa holders in Australia with limited or no permission to work.<sup>148</sup> The Australian Government speculates that a 'significant number' may be working in breach of their visas conditions, though this figure is difficult to quantify because much of the work is hidden to avoid detection.<sup>149</sup> A visa may be cancelled for breach of a condition, which includes working contrary to a no-work condition.<sup>150</sup> If an officer knows or reasonably suspects that a non-citizen holds a visa that may be cancelled, the officer must detain that person.<sup>151</sup> There has been an attempt to soften the harsh consequence of detention through the introduction of the Assisted Voluntary Return program.<sup>152</sup> While this program does allow migrants in an irregular visa status to come forward and leave Australia voluntarily, through granting a short term Bridging Visa, it has been argued that this process is not truly 'voluntary' because people who are classed as unlawful non-citizens have no other way to support themselves.<sup>153</sup>

For discussion of further categories of visas associated with temporary migrant work, see Appendix B.

## 3 STRUCTURAL FACTORS THAT CONTRIBUTE TO THE VULNERABILITY OF LOW-WAGE MIGRANT WORKERS

Low wage migrant workers in Australia are particularly vulnerable to mistreatment and violations of their employment rights and other legal rights across a range of areas, as discussed in Section 4. This section identifies the main systemic factors that contribute to workers' vulnerability and undermine their ability to protest mistreatment and enforce their rights in the workplace and elsewhere.

### 3.1 Temporary Migration Status

Workers' temporary migration status often makes them more likely to accept poor working and living conditions in order to maintain their visa status, avoid deportation or, for eligible visa holders, gain permanent residency.<sup>154</sup> The coerciveness and uncertainty of temporary migration status can reconstitute temporary workers' employment relationships in ways that create

<sup>146</sup> See Department of Immigration and Border Protection, *Bridging Visa D - BVD (Subclass 040-041)*, Australian Government <<http://www.border.gov.au/Trav/Visa-1/040>>. Other bridging visas may include permission to work, and such permission may be subject to restrictions: see Department of Immigration and Border Protection, *010 Bridging Visa A BVA*, Australian Government <<http://www.border.gov.au/Trav/Visa-1/010>>; Department of Immigration and Border Protection, *Bridging Visa B - BVB - (Subclass 020)*, Australian Government <<http://www.border.gov.au/Trav/Visa-1/020>>; Department of Immigration and Border Protection, *Bridging Visa C - BVC - (Subclass 030)*, Australian Government <<http://www.border.gov.au/Trav/Visa-1/030>>; Department of Immigration and Border Protection, *Bridging Visa E - BVE (Subclass 050-051)*, Australian Government <<http://www.border.gov.au/Trav/Visa-1/051>>.

<sup>147</sup> Berg, above n 7, 154. For a brief outline of the impact of inability to work on asylum seekers and how this relates to Australia's international human rights obligations, see Australian Human Rights Commission, *Tell Me About: Bridging Visas for Asylum Seekers*, (2013), 3.

<sup>148</sup> Department of Immigration and Border Protection, *Temporary Entrants and New Zealand Citizens in Australia at 30 September* (2014) cited in Berg, above 7, 153.

<sup>149</sup> Howells, above n 13, 22.

<sup>150</sup> *Migration Act 1958* (Cth) s 116.

<sup>151</sup> *Ibid* s 192.

<sup>152</sup> International Organisation for Migration, *Assisted Voluntary Return* <[http://www.thinkingofhome.org/considering-return#assisted\\_voluntary\\_return](http://www.thinkingofhome.org/considering-return#assisted_voluntary_return)>.

<sup>153</sup> Berg, above n 7, 158.

<sup>154</sup> Queensland Council of Unions, *Migrant Workers in the Spotlight* <[http://www.queenslandunions.org.au/migrant\\_workers](http://www.queenslandunions.org.au/migrant_workers)>.

or perpetuate their susceptibility to poor working conditions and labour law violations.<sup>155</sup> This is especially the case for workers engaged in jobs or activities that do not fall within the conditions of their visa, or who have overstayed their visa. Because the consequence of unauthorised work<sup>156</sup> is generally automatic visa cancellation and removal, a law-violating employer can use the threat of reporting the worker to the DIBP as leverage against the worker protesting the conditions and asserting her rights.<sup>157</sup> For example, international students can face visa cancellation and deportation if they exceed the 40 hours of work per fortnight that they are allowed under their visa. As breach of this condition is a ground for visa cancellation and removal, students who have worked more than the permitted 40 hours can in practice lose their ability to claim basic employment law protections due to fear of detection or reporting to DIBP by their employer.<sup>158</sup>

Employer-sponsored visas, such as the 457 visa and domestic work 403 visa,<sup>159</sup> create powerful disincentives against protesting employer mistreatment or leaving a job that has substandard work conditions.<sup>160</sup> Indeed, the additional layer of dependence created by the tying of migration status to employment can intensify the inherently unequal nature of employment relationships. In the case of the 457 visa, the worker would risk not only their ability to stay in the country, but also their path to employer-sponsored permanent residence, as both are dependent on continued sponsorship. Although this pressure has been relieved for some workers through the recent extension of time in which a 457 visa holder may remain in Australia and look for alternative work if she leaves her employer,<sup>161</sup> some 457 holders still believe that their sponsoring employer has the ability to cancel their visa with the associated consequence of removal from Australia.<sup>162</sup> As was stated by the director of the migration sponsor in *Jones v Hannsen Pty Ltd*,<sup>163</sup> 457 visa holders 'will sign anything' because they are 'frightened of ... being sent back'.

### 3.2 Language

Many low-wage migrant workers from non-English speaking countries have relatively poor English language skills. A lack of working fluency in written and spoken English can impair the ability of migrant workers to read work contracts, negotiate fair working conditions and understand Australian workplace rights.<sup>164</sup> It also impedes migrant workers' awareness and understanding of the systems in place and organisations available to support them, and may undermine their ability or confidence to complain to their employer or external agencies about mistreatment.

### 3.3 Lack of Political Agency

Temporary migrant workers generally lack the capacity of Australian citizens to participate in the political and legal system that determines their rights at work,<sup>165</sup> and are reliant on others to advocate for their rights and demand reform.

### 3.4 Economic Vulnerability

Low wage migrant workers are often driven to migrate for work (or to work while studying or holidaying in Australia) due to their limited financial resources. Their economic vulnerability upon arrival is compounded by the high cost of living in Australia, and sometimes by below minimum wage conditions when they commence work. International students face particular financial pressure due to their substantial university fees and living expenses, and the limits placed on the number of hours they can work.<sup>166</sup> Payments and indebtedness to labour-hire contractors, migration agents and other intermediaries further contribute to migrant workers' economic vulnerability. For example, in some cases, migrant workers have paid a deposit or bond in their country of origin, or prior to coming to Australia have agreed to repay the cost of their recruitment and travel through wages.<sup>167</sup> These conditions, and economic vulnerability more generally, can make migrant workers financially dependent on their employer and reluctant to leave or complain about their employment despite substandard conditions.

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<sup>155</sup> Berg, above n 7, 50.

<sup>156</sup> Unauthorised workers are addressed in Section 2.5 of this issues paper.

<sup>157</sup> Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 11.

<sup>158</sup> Reilly, above n 77, 190, 194; Australian Council of Trade Unions, Submission 48 to Senate Standing Committees on Education and Employment, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (May 2015) 115. This can include, for example, an inability to challenge decisions.

<sup>159</sup> See Appendix B of this issues paper for an outline of the 403 visa – 'Domestic Workers who Work for Diplomats'.

<sup>160</sup> Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 8.

<sup>161</sup> See Section 2.2 of this issues paper for further information about the 90 day extension granted to 457 visa holders.

<sup>162</sup> Berg, above n 7, 77; Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 9.

<sup>163</sup> *Jones v Hannsen Pty Ltd* [2008] FMCA 291, [8].

<sup>164</sup> Fiona David, 'Labour Trafficking' (Research and Public Policy Series Paper No 108, Australian Institute of Criminology, 2010) xiii.

<sup>165</sup> Reilly, above n 77, 187.

<sup>166</sup> Joo-Cheong Tham, 'Australia Grows Richer by Exploiting Foreign Workers', *The Age* (online), 19 August 2015 <<http://www.theage.com.au/comment/tackling-the-exploitation-of-international-student-workers-20150818-gj1ge3>>.

<sup>167</sup> David, above n 164.

### 3.5 Age

International students and WHMs are often young, mostly ranging from 18 to 30 years.<sup>168</sup> As a result, many lack experience in the workforce and have limited skills and training, which can place them in unsafe positions and exacerbate the power differential with their employer.<sup>169</sup> Both groups generally also enter the workforce in Australia without family and other community support mechanisms nearby.<sup>170</sup>

### 3.6 Non-classification as Workers

Because significant groups of migrant workers such as international students are not primarily classified as 'workers', their role in the Australian workforce and the issues they face are often invisible.<sup>171</sup> According to Associate Professor Joo-Cheong Tham, the failure to address and track employment of international students within government policy and oversight frameworks has created a structural risk of non-compliance with labour laws by their employers.<sup>172</sup> Similar issues are encountered by WHMs, who for government policy and regulatory oversight purposes, are regarded primarily as holidaying backpackers rather than workers. Both groups have however been targeted as vulnerable populations by the FWO for investigative purposes.

### 3.7 Geographical Isolation

Many migrant workers, particularly WHMs and those on 457 visas, work in factories or on farms in remote rural areas which makes it difficult for them to seek assistance and access services when their employment and other legal rights are violated. For example, their geographical isolation may prevent them from obtaining legal advice from trade unions or other legal service providers, or contacting the FWO about poor working conditions.<sup>173</sup> More fundamentally, their isolation may contribute to a lack of awareness about their workplace rights or availability of assistance and community support, and may consequently increase their dependence on their employer or labour-hire contractor as their primary information source.

### 3.8 Under-Regulated Industries

The industries in which migrant workers are employed are often under-regulated, and noncompliance with labour laws is common. Industries such as industrial cleaning, taxi driving and hospitality, for example, are commonly associated with poor working conditions.<sup>174</sup> A recent audit by the FWO of 578 cleaning businesses found that 38 per cent of businesses were noncompliant with Australian labour laws.<sup>175</sup> Poor working conditions are also associated with the agriculture and meatworks industries,<sup>176</sup> particularly for WHMs and workers in an irregular status.<sup>177</sup> Migrant workers often find these fruit-picking and harvesting jobs through labour-hire contractors whom farmers engage in order to avoid dealing directly with workforce recruitment and management, thereby distancing themselves from responsibility for worker treatment or for hiring workers in an irregular status.<sup>178</sup> The nature of the work in these under-regulated industries also often involves a high level of exposure to physical hazards that can be accompanied by a failure to comply with workplace, health and safety laws, as discussed in Section 4.3 below ('Work Conditions').<sup>179</sup>

### 3.09 Conditions Relatively Better Than Home

Some migrant workers may acquiesce to substandard conditions despite awareness of violation of their rights under Australian law because the employment conditions are still better than those in their home country.<sup>180</sup>

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<sup>168</sup> Reilly, above n 77, 184, 187.

<sup>169</sup> Ibid 188.

<sup>170</sup> Ibid.

<sup>171</sup> Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 15.

<sup>172</sup> Tham, 'Australia Grows Richer by Exploiting Foreign Workers', above n 166; *ibid* 15, 22.

<sup>173</sup> Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 20.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid 19.

<sup>176</sup> Ibid 4.

<sup>177</sup> Elsa Underhill, Submission 42 to Senate Standing Committees on Education and Employment, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 6.

<sup>178</sup> Ibid 15.

<sup>179</sup> Ibid 34.

<sup>180</sup> Berg, above n 7, 229.

### 3.10 Labour-Hire Contracting

Migrant workers are made especially vulnerable and less able to access redress when they work under a labour-hire contracting arrangement.<sup>181</sup> These situations generally involve a triangular work arrangement where an intermediary (the labour-hire contractor) supplies migrant workers to a company and assumes all responsibility for their wages.<sup>182</sup> Labour-hire contracting is prevalent among migrant workers employed to work on farms, where contractors can take advantage of them by paying a reduced wage in return for sourcing employment, providing housing and transporting them to and from their workplace.<sup>183</sup> This leaves migrant workers in a precarious situation as there is no legal framework governing labour-hire contractors and migrant workers can find it difficult to identify their employer and seek appropriate remedies, especially when fly-by-night labour-hire contractors disappear.<sup>184</sup>

### 3.11 Further Barriers to Accessing Remedies

Low-wage migrant workers face both jurisdictional and practical barriers to accessing remedies for violations of Australian labour laws. All those working legally on any visa should be covered by Australia's extensive labour laws. However there are a number of areas in which migrant workers are jurisdictionally excluded from pursuing remedies for employment-related harms. For example, as discussed in Section 1.1 ('Domestic Legal Framework') above, the *Fair Work Act* and other industrial relations protections do not apply to certain categories of employees, such as domestic workers and other employees of individual employers. Some courts have also held that unauthorised workers may not be covered by the *Fair Work Act* provisions against unfair dismissal,<sup>185</sup> or by state legislation on worker's compensation.<sup>186</sup> These decisions regard as invalid the employment contract under which undocumented migrant workers were employed, because it is a criminal offence to work without a valid visa.<sup>187</sup> By extension, undocumented workers may also not be covered by other provisions in the *Fair Work Act* on minimum working standards and minimum wages.<sup>188</sup> Taking this a step further, in a recent industrial tribunal decision an employment contract held by a worker in an irregular status was found to be void for illegality and therefore not a valid basis for claiming unpaid wages, due to contravention of the section 235 offence.<sup>189</sup> Though this signals a troubling direction that Australian courts and tribunals may take, case law in this area remains fragmented and somewhat inconsistent amongst different states and territories,<sup>190</sup> and there is no High Court authority on this issue.

Migrant workers are also jurisdictionally excluded from accessing the Fair Entitlements Guarantee ('FEG') which assists people to obtain outstanding employee entitlements upon the liquidation or bankruptcy of employers.<sup>191</sup> Temporary visa holders are ineligible for payments under the *FEG Act*, which only applies to Australian citizens, permanent visa and special category visa holders.<sup>192</sup> For example, in a 2013 case, a Victorian cleaning services group went into administration leaving \$2.3 million in unpaid wages to approximately 2500 workers.<sup>193</sup> The employee base included 300 international students who, unlike other workers, were unable to recover their pay.<sup>194</sup>

Even where temporary workers have workers' compensation entitlements, these may not be the same as Australian citizens or permanent residents. For example, in 2010, a 457 visa holder was severely injured while driving for work. The Northern Territory WorkSafe scheme paid the worker's medical bills, as well as 75 per cent of her original salary as compensation.<sup>195</sup> Citizens and

<sup>181</sup> Maria Azzurra Tranfaglia, 'Australian Dream a Nightmare for Many Labour Hire Employees', *The Conversation* (online), 18 February 2015, <<http://theconversation.com/australian-dream-a-nightmare-for-manylabour-hire-employees-37479>>.

<sup>182</sup> Catherine McAloon, 'Call for National Regulation of Labour Hire Companies in Wake of Worker Exploitation', *Australian Broadcasting Corporation* (online), 13 August 2015, <<http://www.abc.net.au/news/2015-08-13/calls-for-contractor-code-in-wake-of-exploitation-revelations/6694344>>; Maria Azzurra Tranfaglia, above n 147, 183; Joanna Howe, 'Turn Spotlight on Labour Hire Contractors', *The Australian* (online), 19 May 2015, <<http://www.theaustralian.com.au/opinion/turn-spotlight-on-labour-hire-contractors/story-e6frg6zo-1227359428307>>.

<sup>184</sup> Tranfaglia, above n 181.

<sup>185</sup> *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964.

<sup>186</sup> *Australia Meat Holdings Pty Ltd v. Kazi* [2004] QCA 147. See also *Masri v Santoso* [2004] NSWIRComm 108, [3], [157]-[176], [181], cited in Berg, above n 7, 188. This issue has been noted by several authors and service providers: see, eg, Mares, 'Submission 2 to Senate Standing Committees on Education and Employment', above n 87, 3; Howe and Reilly, above n 93, 81; The Salvation Army and Walk Free Foundation, above n 25, 7. See also Section 2.5 of this issues paper on 'Unauthorised Workers'.

<sup>187</sup> *Migration Act 1958* (Cth) s 235; *Australia Meat Holdings Pty Ltd v. Kazi* [2004] QCA 147.

<sup>188</sup> Stephen Clibborn, Submission 11 to Senate Standing Committees on Education and Employment, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (May 2015) 1. See also Section 1.1 on 'Domestic Legal Framework'.

<sup>189</sup> *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964.

<sup>190</sup> See, eg, *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312, cited in Berg, above n 7, 172, in which the NSW Court of Appeal upheld the right to workers compensation for an injured worker who had overstayed a tourist visa and was arrested as an 'illegal entrant'.

<sup>191</sup> Department of Employment, *Fair Entitlements Guarantee*, Australian Government (20 April 2015) <<https://employment.gov.au/fair-entitlements-guarantee-feg>>.

<sup>192</sup> *Fair Entitlements Guarantee Act 2012* (Cth) pt 2 div 1 sub-div A para 10(1)(g), cited in Mares, 'Submission 2 to Senate Standing Committees on Education and Employment', above n 87, 2. Special category visa holders are New Zealanders.

<sup>193</sup> Mares, 'Submission 2 to Senate Standing Committees on Education and Employment', above n 87, 2.

<sup>194</sup> Berg, above n 7, 88, citing Joanna Howe, 'Foreign Workers Excluded from the Aussie Fair Go', *Sydney Morning Herald* (online), 3 June 2013 <<http://www.smh.com.au/comment/foreign-workers-excluded-from-theaussie-fair-go-20130603-2nlav.html>>.

<sup>195</sup> Mares, 'Submission 2 to Senate Standing Committees on Education and Employment', above n 87, 3.

permanent residents are entitled to have these wage payments continue until the age of 67.<sup>196</sup> However, as a temporary migrant, this worker's long term rights were unclear.<sup>197</sup> Although this worker's situation was resolved by the grant of a permanent visa as the result of political and media intervention, other temporary migrant workers still face uncertainty should similar circumstances arise.<sup>198</sup>

The practical factors limiting low-wage migrant workers' access to remedies mirror those that establish vulnerabilities to mistreatment in the first place, as discussed earlier in this section. The most prominent practical factor is the fear of jeopardising their right to remain in Australia, as addressed above in Section 3.1 ('Temporary Migration Status'). Additionally, the long timelines for investigation provide a disincentive to seeking remedy. Trade unions have noted that temporary visa workers often leave the country before any claim for unfair working conditions or payment can be completed.<sup>199</sup>

There is no visa that would allow workers to remain in the country for the purpose of enforcing their employment rights. However there is a temporary right to stay under Bridging Visa F for those in an irregular status who have been identified as victims of trafficking or slavery. This visa provides the holder time to consider whether to assist in police investigations of trafficking. However, in order to obtain this visa, the Australian Federal Police ('AFP') must write to the DIBP notifying them that the visa applicant is a suspected trafficking victim.<sup>200</sup> Less than 40 Bridging Visa F grants have been made per year, between 2004 and 2011.<sup>201</sup>

## 4 MAIN FORMS OF MISTREATMENT ENCOUNTERED BY MIGRANT WORKERS

### 4.1 Wage Underpayment

#### 4.1.1 Underpayment of Wages and Entitlements

A range of studies, submissions, reports and media programs have indicated that low-wage migrant workers in Australia are commonly not paid the full wages to which they are entitled under Australian law.<sup>202</sup> Many are paid below the minimum wage of \$17.29 per hour.<sup>203</sup> For example, a 2005 study of 200 international students found that 58 per cent were being paid below the minimum wage.<sup>204</sup> The Fair Work Ombudsman is tasked with investigating and enforcing any suspected minimum wage contraventions, and employers found to be in breach can receive penalties of up to \$10,800 for an individual and \$54,000 for a corporation.<sup>205</sup>

In addition to underpayment, international students and 457 visa holders are especially susceptible to denial of core allowances such as sick leave, penalty rates and superannuation payments.<sup>206</sup> For example, a recent survey of more than 200 international students found that 76 per cent did not receive mandatory penalty rates for weekend or night work.<sup>207</sup> Employers are generally required to pay penalty rates to those who work public holidays, overtime, late night or early morning shifts and weekends, regardless of residence status.<sup>208</sup> Annual leave and personal leave entitlements under the *Fair Work Act* also apply to all part time and full time employees covered by the national workplace relations system, including temporary residents.<sup>209</sup> All employees who are over the age of 18 and are paid more than \$450 per month before tax are also entitled to superannuation contributions of 9.5 per cent of ordinary earnings from their employer.<sup>210</sup>

Though anecdotal evidence from service providers and others suggests that migrant worker wage underpayment is widespread, its full extent is difficult to measure because of the significant under-reporting discussed above in Section 3, and limited systematic oversight and investigation by government. This is particularly the case for WHMs and students for whom government

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Australian Council of Trade Unions, 'Submission 48 to Senate Standing Committees on Education and Employment', above n 158, 76.

<sup>200</sup> *Migration Regulations 1994* (Cth) sch 1 item 1306.

<sup>201</sup> Anti-Human Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response 1 July 2010 - 30 June 2011* (Commonwealth of Australia, 2011) 30. See also Appendix C on BVF and CJSV.

<sup>202</sup> See, eg, Joanna Howe, 'The Migration Amendment (Worker Protection) Act 2008: Long Overdue Reform, but Have Migrant Workers Been Sold Short?' (2010) 24 *Australian Journal of Labour Law* 6; ABC, '7-Eleven: The Price of Convenience', above n 14.

<sup>203</sup> Fair Work Ombudsman, *Minimum Wages*, Australian Government (2015) <<http://www.fairwork.gov.au/pay/minimum-wages>>.

<sup>204</sup> Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 16.

<sup>205</sup> *Fair Work Act 2009* (Cth) s 293; Fair Work Ombudsman, 'Minimum Wages', above n 203.

<sup>206</sup> Chris Nyland et al, 'International Student-Workers in Australia: A New Vulnerable Workforce' (2009) 22 *Journal of Education and Work* 1, 8.

<sup>207</sup> Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 16.

<sup>208</sup> Fair Work Ombudsman, *Penalty Rates & Allowances*, Australian Government (2015) <<http://www.fairwork.gov.au/pay/penalty-rates-and-allowances>>.

<sup>209</sup> Fair Work Ombudsman, *Introduction to the National Employment Standards*, Australian Government (2015) <<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/minimum-workplace-entitlements/introduction-to-the-national-employment-standards>>; *Fair Work Act 2009* (Cth) divs 6, 7.

<sup>210</sup> Australian Taxation Office, *Am I Entitled to Super?*, Australian Government (2015) <<https://www.ato.gov.au/Individuals/Super/Getting-started/Employees/>>.

does not track employment relationships, wages and work agreements. Despite the barriers to reporting, there have been numerous court proceedings that provide examples of cases in which migrant workers were not paid for weeks or months at a time, subsequently making them reliant on their employers for the provision of accommodation, food and transportation.<sup>211</sup>

Access to remedies for wage underpayment is often difficult because employers frequently fail to keep records of wage payments,<sup>212</sup> hindering courts from determining the full extent of underpayment and the compensation due.<sup>213</sup> For example, in one case, a cafe owner in Perth did not pay three Chinese workers for at least 3 months while failing to keep any records or issue any payslips.<sup>214</sup> The Federal Magistrates Court imposed a fine of \$28,820 and reiterated the importance of record-keeping as a way for authorities to monitor migrant worker programs.<sup>215</sup>

Migrant workers employed in a domestic capacity are also particularly vulnerable to unfair pay conditions. Often these individuals are unpaid and fraudulently promised residency, or are paid but have their pay unilaterally reduced over time, or are being paid essentially 'national' wages' to reflect the wages paid in their home country.<sup>216</sup> The Salvation Army has identified a range of gaps in labour laws regarding migrant domestic workers in private homes, and in their implementation (see also Appendix C on 'Forced Labour and Human Trafficking').<sup>217</sup>

#### 4.1.2 Unlawful Wage Deductions

In addition to underpaying low-wage migrant workers, trade unions and others<sup>218</sup> have observed that employers also make improper deductions from migrant workers' pay.<sup>219</sup> For example, there are numerous cases of employers of migrant workers on 457 visas unlawfully deducting money from wages to satisfy debts accumulated prior to the employee's arrival in Australia such as the costs associated with travel, living, migration agents and visas.<sup>220</sup> In one case, the Australian Council of Trade Unions ('ACTU') documented 11 migrant workers on 457 visas who had amounts up to \$1000 deducted from their pay without authorisation for the cost of their flight, visa, red card and agent commission payments.<sup>221</sup> There is also a practice of Australian employers deducting grossly excessive amounts from workers' wages for employer-supplied accommodation, which can be crowded and hardly habitable.<sup>222</sup>

## 4.2 Excessive Work Hours

Migrant workers are regularly compelled to work excessive hours without appropriate breaks, in contravention of Australian labour standards.<sup>223</sup> Indeed, 457 visa holders have been documented working up to 18 hours a day, seven days a week.<sup>224</sup> The National Employment Standards in the *Fair Work Act* prescribe a maximum 38 hours of work per week for full time employees, with the exception of reasonable overtime.<sup>225</sup> Employees are also entitled to paid and unpaid rest and meal breaks during work hours as should be reflected in their awards, enterprise agreements or other registered agreements.<sup>226</sup>

Different categories of migrant workers are vulnerable to pressures to work excessive hours without complaint. For example, as noted above in Section 2.1 ('International Students'), international students are in an especially precarious position when faced with unreasonable requests from employers, such as working additional hours at short notice.<sup>227</sup> When they acquiesce to an employer's demand to work extra hours beyond their permitted 40 hours per fortnight, the employer can then use the threat of reporting them to the DIBP to deter them from asserting their rights or reporting abuse.<sup>228</sup> For example, in the cleaning industry

<sup>211</sup> Berg, above n 7, 78.

<sup>212</sup> See, eg, 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) 3.

<sup>213</sup> Berg, above n 7, 72.

<sup>214</sup> *Ibid* 73.

<sup>215</sup> *Ibid*.

<sup>216</sup> David, above n 164.

<sup>217</sup> The Salvation Army and Walk Free Foundation, above n 25, 3.

<sup>218</sup> Howe, 'The Migration Amendment (Worker Protection) Act 2008', above n 202; Berg, above n 7, 73; Australian Council of Trade Unions, 'Submission 48 to Senate Standing Committees on Education and Employment', above n 158, 106.

<sup>219</sup> This can be a breach of s 324 of the *Fair Work Act 2009* (Cth) which sets out permitted deductions.

<sup>220</sup> Berg, above n 7, 73.

<sup>221</sup> Australian Council of Trade Unions, 'Submission 48 to Senate Standing Committees on Education and Employment', above n 158, 106.

<sup>222</sup> See Section 4.6 on housing and living conditions.

<sup>223</sup> Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 11.

<sup>224</sup> *Ibid*.

<sup>225</sup> *Fair Work Act 2009* (Cth) s 62; Fair Work Ombudsman, *Maximum Weekly Hours*, Australian Government (2015) <<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/minimum-workplaceentitlements/maximum-weekly-hours>>; Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 11.

<sup>226</sup> Fair Work Ombudsman, *Breaks*, Australian Government (2015) <<http://www.fairwork.gov.au/employeeentitlements/hours-of-work-breaks-and-rosters/breaks>>.

<sup>227</sup> Reilly, above n 77, 188.

<sup>228</sup> *Ibid* 191.

international student workers are frequently pushed to work over 40 hours, or risk losing their job.<sup>229</sup> Another example of this conduct occurred when an international student working at a petrol station had his visa cancelled for one breach of the 40 hour limit which involved a choice between covering an absent employee's shift or losing his job.<sup>230</sup>

The DIBP discovers international students in breach of their working hours restriction mostly through self-presentation to the DIBP to clarify immigration status. They are also reported by the community to the Immigration Dob-In Line<sup>231</sup> and as a by-product of investigations into employers and particular industries.<sup>232</sup> It can also be difficult for international students in certain industries to avoid exceeding the limit as the start and end time of their shift cannot be precisely anticipated.<sup>233</sup> This has been recognised by the DIBP in the taxi industry where there is an informal understanding that a driver who has worked two 12 hour shifts has only completed a total of 20 hours as it is not unreasonable that the drivers would be taking breaks during their shifts.<sup>234</sup>

### 4.3 Work Conditions

Australia has a WHS framework that operates to protect workers from harm in the workplace, as set out in Section 1.1 ('Domestic Legal Framework'). Nevertheless, migrant workers have been documented working under poor conditions that do not comply with Australian labour, health and safety laws and standards.<sup>235</sup> Workers may acquiesce to poor working conditions because of their vulnerable position as described in Section 3.<sup>236</sup>

Migrant workers are especially vulnerable to health, safety and labour law violations because, as discussed in Section 3.8 ('Under-Regulated Industries') above, they work in industries that are physically hazardous and have relatively poor government oversight and regulation, such as hospitality, meat works, and agriculture.<sup>237</sup> For example, a survey conducted by Underhill revealed that work practices in the agriculture industry can involve carrying excessive loads, working in extreme heat and not stopping for drinks breaks.<sup>238</sup> In the meatworks industry, media recently documented the case of a migrant factory worker on a WHM visa who was forced to continue working after wetting his pants because he could not sustain an unreasonably high processing rate of 47 chickens per minute if he went to the bathroom.<sup>239</sup> The excessive hours worked by migrant workers explored above also produce unsafe working conditions by leaving workers fatigued and at a higher risk of injury.

### 4.4 Physical and Sexual Abuse

Each Australian state and territory has legislation that criminalises physical<sup>240</sup> and sexual<sup>241</sup> assault of any person. In addition, the *Sex Discrimination Act* prohibits sexual harassment in the context of current or anticipated employment<sup>242</sup> and in the provision of accommodation.<sup>243</sup> Despite this regulatory framework, migrant workers of various visa categories are subject to physical and sexual violence and harassment in Australia's industrial cleaning, meat works, hospitality, construction, manufacturing, agriculture and other low wage industries.<sup>244</sup> These environments of violence and harassment may readily give rise to forced labour situations, or human trafficking.<sup>245</sup>

<sup>230</sup> 0909314 [2019] MRTA 522. See also ABC, '7-Eleven: The Price of Convenience', above n 14 (Adele Ferguson and Klaus Toft). <<http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm>>.

<sup>231</sup> Australian Government, *Immigration Dob-in Line* (5 September 2013) <[http://www.directory.gov.au/directory?ea0\\_if99\\_120.&organizationalUnit&b977d03c-0641-4a70-b35d-81605048af9e](http://www.directory.gov.au/directory?ea0_if99_120.&organizationalUnit&b977d03c-0641-4a70-b35d-81605048af9e)>.

<sup>232</sup> Department of Immigration and Citizenship, 'Management of Student Visas' (Audit Report No 46, Australian National Audit Office, 2011) 114.

<sup>233</sup> Reilly, above n 77, 190.

<sup>234</sup> Ibid; Department of Immigration and Citizenship, 'Management of Student Visas', above n 232228 Ibid 191.

<sup>235</sup> See Section 3 above for information on the vulnerabilities of migrant workers.

<sup>236</sup> See Section 3 above for information on the vulnerabilities of migrant workers.

<sup>237</sup> Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 4.

<sup>238</sup> Underhill, above n 177, 21.

<sup>239</sup> 'There is Slave Labour in This Country': The Shocking Allegations of Exploitation of Migrant Workers on Australian Farms', *Daily Mail Australia* (online), 4 May 2015 <<http://www.dailymail.co.uk/news/article-3067650/What-young-migrants-forced-endure-Australian-farms-factories.html>>.

<sup>240</sup> *Crimes Act 1900* (ACT) ss 23-26; *Crimes Act 1900* (NSW) ss 59, 61; *Criminal Code Act 1983* (NT) ss 188, 188A; *Criminal Code Act 1899* (QLD) ss 335, 339, 340, 346; *Criminal Code Act 1924* (Tas) ss 183, 184, 184A; *Crimes Act 1958* (Vic) s 31; *Criminal Code Act 1913* (WA) ss 313, 317, 317A, 318.

<sup>241</sup> *Crimes Act 1900* (ACT) pt 3; *Crimes Act 1900* (NSW) ss 611-K; *Criminal Code Act 1983* (NT) ss 3, 192, 192B; *Criminal Code Act 1899* (QLD) ss 1, 347-349, 352; *Criminal Code Act 1924* (Tas) ss 1, 127A, 185; *Crimes Act 1958* (Vic) ss 35, 38-43; *Criminal Code Act 1913* (WA) ss 319, 325, 326.

<sup>242</sup> *Sex Discrimination Act 1984* (Cth) ss 28B, 28C, 28D, 28E.

<sup>243</sup> Ibid s 28H.

<sup>244</sup> David, above n 164.

<sup>245</sup> Victims of sexual harassment can make a complaint to the Australian Human Rights Commission in writing or by email at no cost, and with the assistance of the Commission if required: Australian Human Rights Commission, *Sexual Harassment*, Australian Government <<https://www.humanrights.gov.au/our-work/sexdiscrimination/guides/sexual-harassment>>.

#### 4.4.1 Sexual Violence and Harassment

Sexual violence can be used by employers and labour hire contractors as part of a 'larger package of exploitation and abuse of migrant workers'.<sup>246</sup> Indeed, migrant workers whose visa status disincentivises reporting are particularly vulnerable to sexual violence – including workers in an irregular status, such as tourist visa holders and visa overstayers who are not authorised to work,<sup>247</sup> and international students who must not exceed 40 hours of work per fortnight.<sup>248</sup> Employers have been known to use the threat of reporting breaches of work conditions to demand sexual favours.<sup>249</sup> According to Four Corners,<sup>250</sup> instances of Asian migrant women being sexually assaulted and harassed at work are widespread. For example, WHMs have been asked for sexual favours in exchange for visa extensions.<sup>251</sup> Refusal results in 'working for nothing' or paying a significant 'cash lump sum'.<sup>252</sup>

Migrant workers on the WHM visa program are also vulnerable to sexual violence due to their tendency to work in geographically isolated sectors such as agriculture and meatworks.<sup>253</sup> For example, a media investigation revealed the case of a Taiwanese WHM who was sexually harassed by her work supervisor at home, work and through mobile phone communications. Her eventual report to management resulted in her dismissal by the labour-hire contractor.<sup>254</sup> The same supervisor propositioned sex in exchange for accommodation to another WHM.<sup>255</sup> A WHM was taken to the home of her labour-hire contractor to collect her pay, upon which she was sexually assaulted. Despite her reporting of the incident to the business owner, they continued to use the same labour-hire contractor.<sup>256</sup> These examples demonstrate the manner in which unsafe employer-supplied housing may increase the vulnerability of migrant workers, particularly women, to sexual violence.

#### 4.4.2 Physical Abuse

Many cases of physical violence against migrant workers have been reported across the agriculture, construction, hospitality, manufacturing, and nursing industries.<sup>257</sup> In a particularly egregious example from the construction industry, a migrant worker from the Cook Islands was physically abused by the employer throughout the 18 months of his employment, at one stage being assaulted with a claw hammer which broke his jaw and permanently blinded his right eye.<sup>258</sup> The employer was later found guilty of inflicting grievous bodily harm and sentenced to two years prison, with an order to pay \$136,018 compensation to the victim.<sup>259</sup> In *Singh, Surinder*, a temporary business entry (Class UC) visa holder who worked in the hospitality industry reported 'being locked in the restaurant from time to time with no way to leave ... of his own free will'<sup>260</sup> and 'manhandling'.<sup>261</sup> These cases are likely the tip of the iceberg, with under-reporting common for reasons discussed in Section 3.11 ('Barriers to Accessing Remedies').

#### 4.5 Discrimination and Unfair Dismissal

All people working legally in Australia, including workers who are not Australian citizens or permanent residents, are protected under Australian workplace law.<sup>262</sup> As outlined in Section 1.1 ('Domestic Legal Framework'), it is unclear whether these protections extend to unauthorised workers. Migrant workers encounter discrimination in their workplace and some are subject to unfair dismissal. As in other areas, there is likely significant under-reporting of these violations, as many migrant workers remain unaware of their rights and entitlements to access remedies for discrimination and unfair dismissal. However, even where migrant workers are aware of their rights, they may not be inclined to give effect to them. The reasons for this are outlined in Section 3 ('Structural Factors').

<sup>246</sup> David, above n 164, xi.

<sup>247</sup> See Section 2.5.1 on visa overstayers.

<sup>248</sup> Nyland et al, above n 206, 5.

<sup>249</sup> Michael Knight, 'Strategic Review of the Student Visa Program 2011' (Commonwealth, 30 June 2011) 85, quoted in Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 18.

<sup>250</sup> ABC, 'Slaving Away', above n 14 (Caro Meldrum-Hanna).

<sup>251</sup> Australian Human Rights Commission, Submission to the Visa Subclass 457 *Integrity Review* Issues Paper 3 on Integrity and Exploitation, Integrity Review, 13 October 2008, [10].

<sup>252</sup> ABC, 'Slaving Away', above n 14 (Peter Hockings).

<sup>253</sup> See Section 3.7 on geographical isolation.

<sup>254</sup> ABC, 'Slaving Away', above n 14 (Eve, WHM).

<sup>255</sup> ABC, 'Slaving Away', above n 14 (Ada, WHM).

<sup>256</sup> ABC, 'Slaving Away', above n 14 (Winnie, WHM).

<sup>257</sup> TC Beirne School of Law, *Labour Trafficking in Australia*, The University of Queensland <<http://www.law.uq.edu.au/labour-trafficking-in-australia>>.

<sup>258</sup> *Ibid*.

<sup>259</sup> TC Beirne School of Law, above n 257, citing AAP, 'Boss Who Hit Worker With Hammer Jailed', Nine News (online), 29 Nov 2007; 'Boss Blinded Me, Tells Worker', *The Daily Telegraph* (Sydney), 21 May 2007. See also David, above n 164, 30.

<sup>260</sup> *Singh, Surinder* [2002] MRTA 5982, [31] (James Ferguson).

<sup>261</sup> *Ibid* [32] (James Ferguson).

<sup>262</sup> Fair Work Ombudsman, *Visa Holders and Migrant Workers - Workplace Rights and Entitlements*, Australian Government <<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/rights-andobligations/visa-holders-and-migrant-workers-workplace-rights-and-entitlements>>. 457 visa holders are protected by State and Commonwealth anti-discrimination and workplace laws: Australian Human Rights Commission, 'Submission to the Visa Subclass 457 Integrity Review', above n 251, [11].



#### 4.5.1 Discrimination

Under Australian workplace laws, unlawful workplace discrimination occurs when an employer takes adverse action<sup>263</sup> against an employee or prospective employee because of their race, colour, national extraction, social origin or other protected grounds.<sup>264</sup> All workers who are part of the Fair Work system<sup>265</sup> are protected by the *Fair Work Act* discrimination provisions and can make a complaint via telephone or online to the FWO, or to the FWC.<sup>266</sup> Workers who have been dismissed for a discriminatory purpose must lodge an application to the FWC within 21 days.<sup>267</sup> These workplace-specific discrimination protections operate concurrently with the *Racial Discrimination Act* which prohibits unfair treatment because of a migrant workers' 'race, colour, descent, national or ethnic origin'<sup>268</sup> or immigrant status<sup>269</sup> in various areas of public life including employment.<sup>270</sup> Standing to lodge a complaint is not affected by a person's immigration status, and consequently, an unauthorised worker should, in principle, be able to lodge a complaint.<sup>271</sup>

Common problems faced by 457 visa holders alleging discrimination include not being paid overtime, working longer hours than non-visa employees, limited access to sick leave, dismissal for taking sick leave, dismissal because of pregnancy, overcharges on rent or other expenses organised by the employer, and sexual harassment.<sup>272</sup>

International students have reported racial discrimination including experiencing difficulties in securing jobs due to their name, manner of speaking or appearance, and 'overt bigotry' while at work.<sup>273</sup> However, some have attributed unfriendliness in the workplace to other structural factors.<sup>274</sup> Some international students also perceive discrimination relating to temporary residence status, reporting the assignment of 'hard' jobs to foreigners and 'easy', 'good' jobs for locals.<sup>275</sup> There are also examples of clear discrimination in wages between local and foreign workers. For example at a cucumber farm in Queensland, Taiwanese and Hong Kong WHM visa workers were paid \$12 to \$14 an hour, while an Australian worker performing the same tasks earned over \$20 an hour.<sup>276</sup>

#### 4.5.2 Unfair Dismissal

Under the *Fair Work Act*, a worker can file a claim for unfair dismissal with the Fair Work Commission if they were dismissed in a harsh, unjust or unreasonable manner.<sup>277</sup> The Australian Human Rights Commission ('AHRC') can also receive discrimination complaints for unfair dismissal, and has received a number of complaints from 457 visa workers that include dismissal for taking sick leave.<sup>278</sup> For example, one migrant worker was made to work after breaking a wrist and was dismissed for taking sick leave, while another was only given four-weeks' notice after informing his employer of his cancer diagnosis.<sup>279</sup>

Australian tribunals have on occasion been flexible in their interpretation of the minimum employment period for bringing a claim, recognising the precarious and vulnerable status of migrant workers.<sup>280</sup> In *Usman Ali v Industries Services Training Pty Ltd*,<sup>281a</sup>

<sup>263</sup> Adverse action includes the doing, threatening or organising by an employer of: dismissing an employee, injuring an employee, altering an employee's position to their detriment, discriminating between employees, refusing to employ a prospective employee and discriminating against a prospective employee on the terms and conditions in the offer of employment: *Fair Work Act 2009* (Cth) s 342(1).

<sup>264</sup> *Fair Work Act 2009* (Cth) s 351(1). See also *Fair Work Act 2009* (Cth) ss 340, 341. *The Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth), *Sexual Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth) also protect against discrimination in employment, but with a focus on unfavourable treatment rather than adverse action.

<sup>265</sup> See footnote 25 of this issues paper and associated text.

<sup>266</sup> Fair Work Ombudsman, Workplace Discrimination, Australian Government <<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/rights-and-obligations/workplacediscrimination>>.

<sup>267</sup> *Fair Work Act 2009* (Cth) s 366(1)(a). See also *Fair Work Act 2009* (Cth) s 365.

<sup>268</sup> *Racial Discrimination Act 1975* (Cth) s 9(1).

<sup>269</sup> Australian Human Rights Commission, *Complaints Under the Racial Discrimination Act*, Australian Government <<https://www.humanrights.gov.au/complaints/complaint-guides/making-complaint/complaints-under-racial-discrimination-act>>.

<sup>270</sup> *Racial Discrimination Act 1975* (Cth) s 9(1). Migrant workers who have been dismissed in breach of the *Racial Discrimination Act* can lodge an application to the Australian Human Rights Commission within 12 months of the discrimination occurring: *Australian Human Rights Commission Act 1986* (Cth) s 46P.

<sup>271</sup> A 'person aggrieved by the allegedly unlawful discrimination' may lodge a complaint: See *Australian Human Rights Commission Act 1986* s 46P.

<sup>272</sup> Australian Human Rights Commission, 'Submission to the Visa Subclass 457 Integrity Review', above n 251, [8].

<sup>273</sup> Nyland et al, above n 206, 8.

<sup>274</sup> *Ibid* 12.

<sup>275</sup> *Ibid* 10.

<sup>276</sup> ABC, 'Slaving Away', above n 14 (Mao and Kennis).

<sup>277</sup> *Fair Work Act 2009* (Cth) s 385(b). Whether an employee has been dismissed in this manner will depend on factors including whether there was a valid reason for dismissal, whether there was notification of that reason and whether the worker was given the opportunity to respond: *Fair Work Act 2009* (Cth) s 387. Workers must have been employed for at least six months before they can apply which is extended to a minimum of 12 months if they have been dismissed by a small business: *Fair Work Act 2009* (Cth) s 383.

<sup>278</sup> See Section 4.5.1 on discrimination.

<sup>279</sup> See, eg, Natalie Sikora, 'Men Forced to Work with Broken Hands, Arm', *Herald Sun* (online) 18 June 2008; Australian Council of Trade Unions, Response to Discussion Paper: *Business (Long Stay) Subclass 457 and Related Temporary Visa Reforms* (2008) 8-9, cited in Berg, above n 7, 84.

<sup>280</sup> See Section 3 on structural factors pertaining to vulnerability.

<sup>281</sup> [2011] FWA 9177, cited in Berg, above n 7, 83.

457 visa worker who had been in Australia for less than six months was held to qualify, as the tribunal counted the additional time worked overseas for the Australian employer into his minimum employment period.

Although an application for an unfair dismissal remedy must be made within 21 days of the dismissal,<sup>282</sup> tribunals may accept late applications in exceptional circumstances.<sup>283</sup> In *Anthony Emurugat and Utilities Management Pty Ltd*,<sup>284</sup> the Australian Industrial Relations Commission allowed a late application because the applicant had been misled by his employer to believe he had no way of challenging his employment termination.<sup>285</sup> Similarly, the FWC accepted a late application where lodging was delayed in an effort to preserve a positive relationship with the employer to maintain employment and thus visa rights.<sup>286</sup> Late application decisions in relation to migrant workers have however been somewhat inconsistent,<sup>287</sup> and there have been instances of late application rejection where subclass 457 visa holders have highlighted language difficulties and unfamiliarity with Australian industrial protections.<sup>288</sup> Because unsuccessful applicants have often been ordered to pay their employers' costs,<sup>289</sup> this uncertainty may act as a strong deterrent against migrant workers filing unfair dismissal claims where delay was attributable to factors related to their migrant status.

Migrant workers also face a further set of obstacles in making unfair dismissal claims that render unfair dismissal protections for migrant workers 'largely illusory'.<sup>290</sup> Most significantly, migrant workers may face removal at the conclusion of the work relationship before the worker can file a claim. There have been instances in which 457 visa holders have been unfairly dismissed and removed before having the opportunity to pursue their rights,<sup>291</sup> though this has been somewhat ameliorated by the extension of time between termination and visa cancellation to 90 days.<sup>292</sup> In general, the Fair Work Commission may order reinstatement and/or compensation.<sup>293</sup> As a matter of law, 457 visa workers are disadvantaged in their access to unfair dismissal remedies because although compensation may be awarded, reinstatement to the original position is not available to 457 visa workers upon termination of the employer sponsorship.<sup>294</sup> International students are also particularly vulnerable because breaching their 40 hour fortnightly limit may lead to the invalidity and unenforceability of their employment contracts, and possible loss of common law and statutory rights,<sup>295</sup> including unfair dismissal rights.<sup>296</sup> Workers in an irregular status may be unable to bring unfair dismissal claims.<sup>297</sup> See Section 3.11 ('Further Barriers to Accessing Remedies') above for discussion of enforceability of employment rights for workers in an irregular status.

#### 4.6 Housing, Living Conditions and Cost

The precarious and vulnerable status of migrant workers outlined in Section 3 ('Structural Factors') make them susceptible to conditions that constitute an inadequate standard of living. Certain categories of migrant workers are commonly dependent on their employer or labour-hire contractor for housing. For instance, WHMs in Australia's agricultural industry are increasingly being employed through labour-hire contractors, who reap the financial benefits of paying workers less in return for finding them a job, providing 'crammed housing' and organising transport to and from the workplace.<sup>298</sup> At the extreme end, these workers have been forced to live in slums, horse stables and sleep on dog beds.<sup>299</sup> In 2015, the FWO conducted an inquiry into a major

<sup>282</sup> *Fair Work Act 2009* (Cth) s 394(2)(a).

<sup>283</sup> *Fair Work Act 2009* (Cth) s 394(3). For the leading explanation on the meaning of 'exceptional circumstances', see *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

<sup>284</sup> [2008] AIRC 247.

<sup>285</sup> *Anthony Emurugat and Utilities Management Pty Ltd* [2008] AIRC 247 [14].

<sup>286</sup> *Vadhan v Night Owls Pty Ltd T/A Fernree Print* [2014] FWC 5329 [37].

<sup>287</sup> See, eg, *Robert Lim v Downer EDI Mining* [2009] FWA 457 for an example where language difficulties and unfamiliarity with Australian law did not excuse the migrant worker's late application (which was late by two days): Berg, above n 7, 86-7.

<sup>288</sup> See, eg, Berg, above n 7, 86, citing *Mrs Q, Mr J and Mrs S and the Employer* [2007] AIRC 695; [2007] AIRC 457; *Purvi Sudani and Ashishkumar Sudani v HealthWise Management (Aust) Pty Ltd T/A HealthWise Pharmacies Group* [2011] FWAFB 1022; *Raymond Cordero Pagkaliwangan v Siganto & Stacey Pty Ltd* [2010] FWA 9104; *Rajeev Prasad v Alcatel-Lucent Australia Ltd* [2011] FWAFB 1515.

<sup>289</sup> *Ibid.*

<sup>290</sup> Tham, 'Submission 3 to Senate Standing Committees on Education and Employment', above n 94, 10.

<sup>291</sup> Berg, above n 7, 83-4. Indeed, 'the very structure of Australia's new temporary migrant labour scheme raises questions as to the effectiveness of the protective schema': Mary Crock, Sean Howe, Ron McCallum, 'Conflicted Priorities? Enforcing Fairness for Temporary Migrant Workers in Australia' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press, 2014) 422, 425.

<sup>292</sup> See Section 2.2 of this issues paper.

<sup>293</sup> *Fair Work Act 2009* (Cth) s 390.

<sup>294</sup> *Mr L and the Employer* [2007] AIRC 457, [23]; *Mr Luke Webster v Mercury Colleges Pty Ltd* [2011] FWA 1807, [47], cited in Human Rights Council of Australia, Submission 43 to Senate Standing Committee on Education and Employment, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 3 May 2015, 9. Compensation may be awarded under s 390 of the *Fair Work Act 2009* (Cth).

<sup>295</sup> There has been no judicial consideration of whether students working beyond their work entitlements can enforce statutory or common law rights. Although it is clear that once a work condition is breached, the contract of employment is illegal, it remains unclear whether the student loses all statutory and common law protections: see Reilly, above n 77, 194.

<sup>296</sup> *Ibid.* 192.

<sup>297</sup> *Chen v Allied Packaging Co* (1997) 73 IR 53, cited in Reilly, above n 77, 193.

<sup>298</sup> Howe, 'Turn Spotlight on Labour Hire Contractors', above n 183.

<sup>299</sup> *Ibid.*

poultry processing plant's labour procurement processes. In a group comprised mostly of WHMs, 30 workers were housed in a six bedroom house with only two bathrooms.<sup>300</sup> Rent of \$100 per week was unlawfully deducted from workers' wages.<sup>301</sup> In the horticultural industry, eight WHMs each paid \$450 per fortnight to live in a four-bedroom house with up to eight other workers.<sup>302</sup> These workers experienced cramped conditions, lack of privacy, unreasonably high rent and discomfort from the odour of a nearby fertiliser factory.<sup>303</sup> As a result of this investigation the workers will be receiving \$30,000 for unlawful wage deductions.

#### 4.7 Access to State-Provided Services

Australia has a robust social protection framework governed by a variety of laws.<sup>304</sup> However, temporary migrant workers in Australia are frequently denied social services that are available to permanent residents. The ACTU has argued against differential access to services for temporary migrant workers unless government can establish a compelling public case in support of it.<sup>305</sup>

##### 4.7.1 Health Care

Temporary migrant workers are excluded from the Australian public health care system, Medicare.<sup>306</sup> In addition, children of temporary migrant workers cannot access free immunisations.<sup>307</sup> Instead, temporary residents including international students and 457 visa holders are required to obtain private health insurance which may subsidise vaccination costs.<sup>308</sup> This may result in the postponement or non-eventuality of children's immunisations.<sup>309</sup> Some temporary migrants are able to access reciprocal health benefits.

##### 4.7.2 Education and other Social Services

Temporary migrant workers' children are excluded from free public education in New South Wales, the Australian Capital Territory and Western Australia.<sup>310</sup>

Temporary migrant workers are excluded from family tax concessions,<sup>311</sup> rent assistance and the National Disability Insurance Scheme.<sup>312</sup> International students are also generally not entitled to transport concessions available to permanent residents, although there have been recent reforms to remedy this situation in some states.<sup>313</sup>

Temporary visa holders have no access to unemployment benefits.<sup>314</sup>

#### 4.8 Forced Labour and Human Trafficking

A number of the harms outlined in this section result in migrants performing work under coercion that may under certain circumstances give rise to, or constitute, forced labour or human trafficking. An overview of Australia's response to forced labour and human trafficking is set out in Appendix C, and briefly described here. Exploitation of temporary migrant workers is rarely addressed as crimes of forced labour or trafficking in Australia, and there have been few reported cases.<sup>315</sup> There have, however, been significant legislative and policy developments in this area in recent years that have sought to move beyond the focus

<sup>300</sup> Fair Work Ombudsman, 'Baiada Report', above n 212, 19-20.

<sup>301</sup> This is in breach of ss 325(1) and 326(1) of the *Fair Work Act 2009* (Cth). For more examples of similar situations (unlawful deductions for rent, cramped conditions), see David, above n 164, 34.

<sup>302</sup> Fair Work Ombudsman, 'Overseas Nursery Workers to Get Back \$30,000 Unlawfully Deducted From Their Wages for Rent' (Media Release, 12 July 2015) <<http://www.fairwork.gov.au/about-us/news-and-mediareleases/2015-media-releases/july-2015/20150712-quito-eu-presser>>.

<sup>303</sup> *Ibid*.

<sup>304</sup> This includes the *Health Insurance Act 1973* (Cth), *National Health Act 1953* (Cth), *Social Security Act 1991* (Cth), *Social Security (Administration) Act 1999* (Cth), *Carer Recognition Act 2010* (Cth), *Aged Care Act 1997* (Cth), *Paid Parental Leave Act 2010* (Cth), and *Safety, Rehabilitation and Compensation Act 1988* (Cth).

<sup>305</sup> Australian Council of Trade Unions, 'Submission 48 to Senate Standing Committees on Education and Employment', above n 158, 72.

<sup>306</sup> Berg, above n 7, 87; *ibid* 71.

<sup>307</sup> Mares, 'Submission 2 to Senate Standing Committees on Education and Employment', above n 87, 4. For an overview of the 'gap' that exists between migrants and citizens, see generally NHMRC Centre of Research Excellence in Population Health Research, 'Protecting Australia - Closing the Gap in Immunisation for Migrants and Refugees: Proceedings from a Stakeholder Workshop' (UNSW, 9 August 2013).

<sup>308</sup> Mares, 'Submission 2 to Senate Standing Committees on Education and Employment', above n 87, 4-5.

<sup>309</sup> *Ibid*.

<sup>310</sup> Exceptions for hardship may apply. See Berg, above n 7, 88. See also Mares, 'Submission 2 to Senate Standing Committees on Education and Employment', above n 87, 6.

<sup>311</sup> Including a Federal 'Schoolkids Bonus' for school-aged children: Department of Social Services, *Schoolkids Bonus*, Australian Government <<https://www.dss.gov.au/our-responsibilities/families-and-children/benefitspayments/schoolkids-bonus>>.

<sup>312</sup> Berg, above n 7, 87-88.

<sup>313</sup> For example, Victoria this year introduced the 'iUSE' pass scheme to allow international undergraduate students half-price fares: Public Transport Victoria, *International Tertiary Students*, Australian Government <<http://ptv.vic.gov.au/tickets/concessions/international-students/>>. For information on the other states and territories, see: Future Unlimited - Study in Australia, *Transport Concessions*, Australian Government <<https://www.studyinaustralia.gov.au/global/live-in-australia/transport>>.

<sup>314</sup> Australian Council of Trade Unions, 'Submission 48 to Senate Standing Committees on Education and Employment', above n 158, 71.

<sup>315</sup> David, above n 164, xii.

within trafficking on sex trafficking to address the criminalisation of labour exploitation. In particular, in 2013 Australia introduced an amendment to the *Criminal Code Act 1995* (Cth) ('Criminal Code')<sup>316</sup> that established an offence of forced labour, defined as:

'the condition of a person (the victim) who provides labour services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free: (a) to cease providing the labour or services; or (b) to leave the place or area where the victim provides the labour or services.'<sup>317</sup>

The amendment also broadened the trafficking offences to include a range of offences involving non-sexual exploitation,<sup>318</sup> such as Division 217 of the Criminal Code which addresses the connection between trafficking in persons and debt bondage. Recognising that victims of trafficking may be unauthorised workers subject to removal upon detection, in 2004 Australia introduced three visa categories that enable victims to stay in Australia to assist with prosecutions.<sup>319</sup> It also introduced Australia's National Action Plan to Combat Trafficking and Slavery 2015-19, building on the Support for Trafficked People program detailed below in Section 5.2.1.

Since 2004, the Australian Federal Police has operated Human Trafficking Teams in several major Australian cities.<sup>320</sup> These teams investigate trafficking and slavery matters both proactively and through referrals from other government agencies, industry, unions or NGOs.<sup>321</sup> For example in 2013 the AFP partnered with the Victorian Police to investigate a Korean syndicate allegedly involved in deceptive recruitment and debt bondage, which resulted in the arrest of five principal suspects.<sup>322</sup>

The FWO also plays a role in investigating allegations and securing industrial remedies for trafficked people,<sup>323</sup> often on referral from victims' lawyers.<sup>324</sup> These remedies are sometimes not available to workers in an unauthorised status who may not be covered by employment laws. Because the trafficking and forced labour framework focuses solely on criminal offences and does not address the enforcement of employment entitlements,<sup>325</sup> unauthorised workers who have been exploited but are not identified by the AFP as victims of trafficking usually cannot access employment-related remedies.<sup>326</sup> The FWO has had success in securing remedies for employment-related harms for unauthorised workers by investigating and settling with employers, or by pursuing remedies in courts without drawing attention to workers' immigration status.<sup>327</sup>

The new offences are also limited in the protections they offer to temporary migrant workers because although they criminalise coercion amounting to forced labour, they fail to acknowledge that coercion can occur by virtue of migrant workers' precarious visa situation even absent explicit employer threats.<sup>328</sup> As discussed in Section 3 above ('Structural factors'), migrant workers can be forced into unsatisfactory conditions by their temporary immigration status and other vulnerabilities without any specific effort by employers to exploit them.

## 5 INSTITUTIONS AND PROGRAMS IN PLACE TO PROTECT LOW-WAGE MIGRANT WORKERS

### 5.1 Government Institutions

There are a number of state, territory and federal government institutions with responsibilities relating to one or more categories of temporary migrant workers. The most significant are outlined below.

#### 5.1.1 Fair Work Ombudsman

The Fair Work Ombudsman is a Commonwealth body that provides services to employees and employers covered by the Fair Work system.<sup>329</sup> The FWO has three key functions – educate key participants about their workplace rights and responsibilities, investigate misconduct, and bring claims on behalf of mistreated workers.

<sup>316</sup> *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

<sup>317</sup> *Criminal Code Act 1995* (Cth), s 270.6. The law also expanded the existing trafficking offence to address labour trafficking, including introduction of a range of slavery-like practices within the definition of "exploitation". See Appendix C for further details.

<sup>318</sup> *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

<sup>319</sup> For more information on these visas refer to Appendix B.

<sup>320</sup> The Human Trafficking Working Group, *Government Agencies*, <<http://www.law.uq.edu.au/ht-governmentagencies>>.

<sup>321</sup> *Ibid.*

<sup>322</sup> Interdepartmental Committee on Human Trafficking and Slavery, Commonwealth, *Trafficking in Persons, The Australian Government Response* (2014) iii.

<sup>323</sup> Berg, above n 7, 266.

<sup>324</sup> *Ibid.*

<sup>325</sup> *Ibid* 260.

<sup>326</sup> The Salvation Army and Walk Free Foundation, above n 25, 7.

<sup>327</sup> Stephen Clibborn, 'Why Undocumented Immigrant Workers Should Have Workplace Rights' (2015) 26 *Economic and Labour Relations Review* 467-468.

<sup>328</sup> Berg, above n 7, 254-5.

<sup>329</sup> See footnote 25 of this issues paper and associated text above.

The FWO has recognised the importance of educating migrant workers to prevent mistreatment,<sup>330</sup> including offering publications in 23 languages, running non-English speaking radio broadcasts and developing materials for community groups in regular contact with migrant workers.<sup>331</sup> It also publishes community presentation packages to be used by community organisations to educate workers about their rights at work and fact sheets designed for international students, 457 visa holders and seasonal workers<sup>332</sup> in addition to running workplace rights presentations and seminars.<sup>333</sup>

The FWO conducts investigations and reviews into the wages and conditions of migrant workers in Australia, either at the FWO's instigation or in response to a received complaint which can be lodged by post or in person.<sup>334</sup> Though there is recognition that the FWO has been playing 'an increasingly prominent role as a front-line aid to migrant workers who believe they are being exploited at work',<sup>335</sup> scholars have acknowledged the limited reach of the FWO compared with the number of workers needing assistance, underscoring the need for additional funding to ensure effective enforcement of the *Fair Work Act* for vulnerable workers.<sup>336</sup>

In addition to its investigative functions, the FWO assists migrant workers by representing them in legal proceedings<sup>337</sup> when their rights under the *Fair Work Act* have been violated. Decisions to commence proceedings are based on the Guidance Note on Litigation Policy which includes a consideration of the employee's status as a 'vulnerable worker'.<sup>338</sup> On this basis the FWO has commenced 51 legal proceedings involving the underpayment of migrant workers totalling more than \$3.8 million.<sup>339</sup> The largest penalty that has been awarded in these cases is \$343,860.<sup>340</sup> Practitioners note the limited number of proceedings that the FWO commences each year as evidence of its limited reach, and the difficulties individual employees face in gaining substantive assistance from the FWO due to its limited resources and the FWO declining to exercise its prosecution function.<sup>341</sup>

Links between the FWO and immigration enforcement by the DIBP present a significant threat to the FWO's protection function, especially in relation to unauthorised workers.<sup>342</sup> For example, since 2013, FWO inspectors have had dual responsibilities for investigating breaches of the *Fair Work Act* and compliance with 457 visa conditions on behalf of the DIBP.<sup>343</sup> Also, s 198 of the *Migration Act* requires the removal of non-citizens without a valid visa 'as soon as practicable', so the DIBP is legally incapable of deprioritising removal in order to achieve other objectives such as industrial relations matters. At the practical level, information sharing has increased between the two departments in an effort to locate and identify workers in an irregular status for the purpose of cancelling their visas.<sup>344</sup>

### 5.1.2 Fair Work Commission

The Fair Work Commission is an independent national workplace relations tribunal that is responsible for establishing minimum wage and working conditions. It also hears unfair dismissal and unlawful termination claims, handles bullying complaints and makes decisions about industrial action and union activity.<sup>345</sup>

### 5.1.3 Department of Immigration and Border Protection ('DIBP')

The DIBP is responsible for enforcing Australian immigration laws, including detection, visa cancellation and removal of temporary migrants who breach their visa conditions such as through unauthorised work. The DIBP is also responsible for overseeing Australia's Migration Programme.<sup>346</sup>

<sup>330</sup> Fair Work Ombudsman, 'Fair Work Ombudsman to Review Entitlements', above n 117.

<sup>331</sup> Berg, above n 7, 80. Fair Work Ombudsman, 'Workplace Regulator Helps Migrants Achieve Fair Deal' (Media Release, 30 April 2009) <<http://www.fairwork.gov.au/about-us/news-and-media-releases/2009-mediareleases/april-2009/20090430>>.

<sup>332</sup> Fair Work Ombudsman, *Language Help*, Australian Government <<http://www.fairwork.gov.au/contactus/language-help>>.

<sup>333</sup> These include, for, eg, those aimed at international students during universities' orientation week: see Fair Work Ombudsman, 'Fair Work Inspectors Join O-Week to Help University Students Understand Workplace Rights' (Media Release, 14 February 2011), <<http://www.fairwork.gov.au/about-us/news-and-media-releases/2011-media-releases/february-2011/20110211-o-week-2011>>.

<sup>334</sup> Fair Work Ombudsman, *Protections at Work*, Australian Government <<http://www.fairwork.gov.au/aboutus/policies-and-guides/fact-sheets/rights-and-obligations/protections-at-work>>.

<sup>335</sup> Berg, above n 7, 64-65; Clibborn, above n 327, 467.

<sup>336</sup> Clibborn, above n 327, 467-468.

<sup>337</sup> Reilly, above n 77, 197.

<sup>338</sup> Berg, above n 7, 80; Fair Work Ombudsman, *Guidance Note 1: Litigation Policy of the Office of the Fair Work Ombudsman* (4th ed, 3 December 2013).

<sup>339</sup> Fair Work Ombudsman, 'Fair Work Ombudsman to Review Entitlements', above n 117.

<sup>340</sup> *Ibid.*

<sup>341</sup> Interview with Maria Nawaz, Employment solicitor, Kingsford Legal Centre (4 September 2015).

<sup>342</sup> Clibborn, above n 327, 468.

<sup>343</sup> *Ibid.*

<sup>344</sup> Berg, above n 7, 11, 271.

<sup>345</sup> Fair Work Ombudsman, *The Fair Work Commission and Us – What's the Difference?*, Australian Government <<http://www.fairwork.gov.au/about-us/the-fair-work-commission-and-us-whats-the-difference>>.

<sup>346</sup> Department of Immigration and Border Protection, *Fact Sheet - Australia's Migration Programme*, Australian Government <<https://www.border.gov.au/about/corporate/information/fact-sheets/01backgd>>.

The Immigration Minister also has a significant industrial relations enforcement function: it may apply to an eligible court for a civil penalty order against employer-sponsors of 457-visa holders who fail to satisfy their sponsorship obligations.<sup>347</sup> This occurred for only the second time in June 2015, when the Minister succeeded against Choong Enterprises in the Federal Court concerning the largest civil penalty ever imposed for a breach of sponsor obligations to 457 visa workers under the *Migration Act*. In addition to a \$176,200 fine for breach of sponsor obligations, Choong Enterprises was ordered to pay \$125,956 to reimburse underpaid Filipino workers, \$26,460 in tax and \$6400 to the workers for the migration agent costs that had been illegally deducted from their wages.<sup>348</sup>

#### 5.1.4 Migration and Refugee Division of the Administrative Appeals Tribunal

The Migration and Refugee Division of the AAT is a statutory body that reviews decisions made by officers of the DIBP to refuse or cancel visas<sup>349</sup> and reviews decisions relating to approval and cancellation of sponsorship and nomination.<sup>350</sup> Although it considers cases afresh and can change the decision under review,<sup>351</sup> it has no power to make exceptions on equitable grounds.<sup>352</sup> An applicant must pay \$1673 to seek review, though this can be reduced in cases of severe financial hardship<sup>353</sup> and the Tribunal refunds 50 per cent of the full fee upon finding in favour of the applicant.<sup>354</sup>

Applicants may be represented by a migration agent<sup>355</sup> at their own expense, and can be assisted by the government-provided Translating and Interpreting Service.<sup>356</sup> A number of support organisations provide information, assistance or referrals for applicants and are outlined in Sections 5.1.8 ('Legal Aid'), 5.2.2 ('Immigration Advice and Application Assistance Scheme') and 5.2.4 ('Other Services').

#### 5.1.5 Department of Employment

The Department of Employment is responsible for national policies and programs that assist Australians in obtaining employment in a safe, fair and productive workplace. Its functions include setting employment policy, assisting job seekers and providing services to employers looking for staff.<sup>357</sup>

The Department oversees the Seasonal Worker Programme as outlined in Section 2.4 ('Seasonal Workers Programme'), by processing applications by employers on behalf of the Australian Government.<sup>358</sup> It works with the DIBP and the FWO in determining whether employers meet the requisite criteria.<sup>359</sup> The Department also reviews recruitment plans submitted by approved employers and facilitates training of seasonal workers through the Add-on Skills Training program.<sup>360</sup>

#### 5.1.6 Department of Education and Training

Australia's national education policies and programs are determined by the Department of Education and Training. The Department has undertaken several surveys of international students in order to obtain information about their living and educational experience in Australia.<sup>361</sup> It has played a limited role concerning the employment conditions of international students.

<sup>347</sup> *Migration Act 1958* (Cth) s 140K. See also *Migration Act 1958* (Cth) ss 140H, 140HA.

<sup>348</sup> 'Immigration: Darwin Company Fined \$175,000 for 457 Visa Rule Breaches' (30 April 2015) <<http://www.theguardian.com/australia-news/2015/apr/30/immigration-darwin-company-fined-175000-for-457-visa-rule-breaches>>.

<sup>349</sup> The average time taken from lodgment to decision for reviews made between 1 January 2015 and 30 June 2015 was 301 days for temporary work visas, 484 for skill linked visas, 122 for cancellation of student visa cases and 368 days for nomination/sponsor approval visas: Administrative Appeals Tribunal, *How Long Will the Process Take?* <<http://www.mrt-rrt.gov.au/Steps-in-a-review/How-long-will-the-process-take.aspx>>.

<sup>350</sup> Administrative Appeals Tribunal, *Migration & Refugee Division* (20 August 2015) Australian Government <<http://www.mrt-rrt.gov.au/>>.

<sup>351</sup> Administrative Appeals Tribunal, *Migration Review Process* (July 2015) Australian Government <<http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=6b5f37ae-081f-4ecd-9ac1-389565cea8bb>>.

<sup>352</sup> Administrative Review Tribunal, *What Is a Merits Review?* (1 July 2015) Australian Government <<http://www.mrt-rrt.gov.au/Applying-for-a-review/What-is-a-merits-review.aspx>>.

<sup>353</sup> To request a fee reduction, applicants must lodge a 'Request for Fee Reduction' form, attaching supporting evidence: Administrative Appeals Tribunal, *How Much Will it Cost?*, Australian Government <<http://www.mrt-rrt.gov.au/Steps-in-a-review/How-much-will-it-cost.aspx>>.

<sup>354</sup> Administrative Appeals Tribunal, *Migration Review Process* (July 2015) Australian Government <<http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=6b5f37ae-081f-4ecd-9ac1-389565cea8bb>>.

<sup>355</sup> *Migration Act 1958* (Cth) s 280(1). Exceptions include: parliamentarians *Migration Act 1958* (Cth) s 280(2); lawyers *Migration Act 1958* (Cth) s 280(3); officials *Migration Act 1958* (Cth) s 280(4); individuals giving immigration assistance under s 276(2A): *Migration Act 1958* (Cth) s 280(5).

<sup>356</sup> Administrative Appeals Tribunal, *Can I Get Help With My Review Application?*, Australian Government <<http://www.mrt-rrt.gov.au/Steps-in-a-review/Can-I-get-help-with-my-review-application.aspx>>.

<sup>357</sup> Department of Employment, *Department of Employment Service Charter*, Australian Government <[http://docs.employment.gov.au/system/files/doc/other/departement\\_of\\_employment\\_-\\_client\\_service\\_charter\\_-\\_final.pdf](http://docs.employment.gov.au/system/files/doc/other/departement_of_employment_-_client_service_charter_-_final.pdf)>.

<sup>358</sup> Australian Government, *Information for Employers on How to Recruit Seasonal Workers* <<https://employment.gov.au/information-employers-how-recruit-seasonal-workers>>.

<sup>359</sup> Department of Employment, *Department of Employment Service Charter* <[http://docs.employment.gov.au/system/files/doc/other/departement\\_of\\_employment\\_-\\_client\\_service\\_charter\\_-\\_final.pdf](http://docs.employment.gov.au/system/files/doc/other/departement_of_employment_-_client_service_charter_-_final.pdf)> 12.

<sup>360</sup> Department of Employment, *Department of Employment Service Charter*, <[http://docs.employment.gov.au/system/files/doc/other/departement\\_of\\_employment\\_-\\_client\\_service\\_charter\\_-\\_final.pdf](http://docs.employment.gov.au/system/files/doc/other/departement_of_employment_-_client_service_charter_-_final.pdf)> 19.

<sup>361</sup> Department of Education and Training, *Commonwealth of Australia, International Student Survey 2014: Overview Report* (April 2015) 1 <<https://internationaleducation.gov.au/research/researchpapers/Documents/ISS%202014%20Report%20Final.pdf>>.

## 5.1.7 Australian Human Rights Commission

The Australian Human Rights Commission is an independent statutory organisation which is responsible for resolving complaints of discrimination, harassment and bullying within Australia, including those of migrant workers.<sup>362</sup> Complaints can also be made for unfair treatment at work on the basis of race, colour, descent, national or ethnic origin or immigrant status under the *Racial Discrimination Act*, including being refused employment, dismissed, denied a promotion or transfer, given less favourable terms or conditions of employment, being denied equal access to training opportunities or being harassed.<sup>363</sup> These complaints are investigated by a delegate of the President of the Commission who endeavours to resolve the complaint through conciliation (an informal process that allows both parties to discuss the issues and try to resolve the matter).<sup>364</sup> Where complaints cannot be resolved through conciliation, complainants may commence proceedings in the Federal Court or Federal Magistrates Court.

## 5.1.8 Legal Aid

Legal aid commissions in each Australian state and territory provide legal assistance services in criminal, family and civil law matters. Brochures, information sessions and telephone legal advice are available at no cost to everyone, including migrant workers. Workers wishing to be legally represented through a grant of legal assistance must satisfy the means and merits test, as well as the state/territory-specific guidelines of their legal aid commission.<sup>365</sup>

Immigration services of each legal aid commission differ in their scope and coverage. Legal Aid NSW provides free advice on visas and immigration status, assistance with visa applications and representation.<sup>366</sup> Legal Aid WA provides 'limited assistance' in immigration matters, and has one registered migration agent.<sup>367</sup> Legal Aid Queensland works with the Refugee and Immigration Legal Service to provide a legal advice clinic.<sup>368</sup> Victoria Legal Aid provides free information and advice about immigration issues.<sup>369</sup>

## 5.2 Government Programs

There are a number of government programs available to assist migrant workers. Some key examples are detailed below.

### 5.2.1 Support for Trafficked People Program

Through the Support for Trafficked People Program, Australia provides individually case-managed support services to suspected trafficking victims, including migrant workers. The Program is delivered nationally by the Australian Red Cross. Support services include secure accommodation, income support, medical treatment,<sup>370</sup> counselling, legal and migration advice, skills development training<sup>371</sup> and social support.<sup>372</sup> Suspected trafficking victims with dependent children may be supported in their arrangement of childcare, schooling, counselling and medical support if necessary.<sup>373</sup> They can also receive assistance in parenting support or education as needed.<sup>374</sup>

Between 2004 and June 2014, the Program assisted 235 suspected trafficking victims.<sup>375</sup> It is intended to implement Australia's obligations as a party to the United Nations Convention against Transnational Organised Crime (since 2004) and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (since 2005).<sup>376</sup>

<sup>362</sup> Australian Human Rights Commission, *Information for People Making Complaints*, Australian Government <<https://www.humanrights.gov.au/complaints/complaint-guides/information-people-making-complaints>>.

<sup>363</sup> Australian Human Rights Commission, *Complaints About Discrimination in Employment and Occupation*, Australian Government <<https://www.humanrights.gov.au/complaints/complaint-guides/what-you-can-complain-about/complaints-about-discrimination-employment>>.

<sup>364</sup> Australian Human Rights Commission, *Information for People Making Complaints*, Australian Government <<https://www.humanrights.gov.au/information-people-making-complaints>>.

<sup>365</sup> Australian Government, *Legal Aid* <<http://www.australia.gov.au/content/legal-aid>>.

<sup>366</sup> Legal Aid New South Wales, *Immigration Service*, Australian Government <<http://www.legalaid.nsw.gov.au/what-we-do/civil-law/immigration-service>>.

<sup>367</sup> Legal Aid Western Australia, *Immigration Services*, Australian Government, <<http://www.legalaid.wa.gov.au/LegalAidServices/specialist/Pages/ImmigrationServices.aspx>>.

<sup>368</sup> Legal Aid Queensland, *Legal Aid Queensland Works With Refugee and Immigration Legal Service*, Australian Government <<http://www.legalaid.qld.gov.au/publications/head-note/archives/default/pages/legalaid-queensland-works-with-refugee-and-immigration-legal-service.aspx>>.

<sup>369</sup> Victoria Legal Aid, *Get Help With Migration*, Australian Government <<https://www.legalaid.vic.gov.au/find-legal-answers/migration/get-help>>.

<sup>370</sup> Through Medicare (Australia's public healthcare system) and the Pharmaceuticals Benefits Scheme (as part of the Australian Government's broader National Medicines Policy, which aims to provide 'timely, reliable and affordable access to necessary medicines for Australians': Department of Health, *About the PBS*, Australian Government <<http://www.pbs.gov.au/info/about-the-pbs>>), or as otherwise approved.

<sup>371</sup> Including English-language classes and vocational guidance: Department of Social Services, *Anti-Human Trafficking Strategy*, Australian Government <<https://www.dss.gov.au/our-responsibilities/women/programsservices/reducing-violence/anti-human-trafficking-strategy>>.

<sup>372</sup> Department of Social Services, *Anti-Human Trafficking Strategy*, Australian Government <<https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/anti-humantrafficking-strategy>>.

<sup>373</sup> *Ibid.*

<sup>374</sup> *Ibid.*

<sup>375</sup> Interdepartmental Committee on Human Trafficking and Slavery, Commonwealth of Australia, *Trafficking in Persons: The Australian Government Response 1 July 2013 - 30 June 2014* (2014) 30.

<sup>376</sup> Department of Social Services, *Anti-Human Trafficking Strategy*, Australian Government <<https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/anti-humantrafficking-strategy>>.

## 5.2.2 Immigration Advice and Application Assistance Scheme

The Immigration Advice and Application Assistance Scheme ('IAAAS') gives free migration advice and visa application assistance to disadvantaged, lawfully arrived migrants. Registered migration agents are contracted through the IAAAS to assist with immigration matters, visa applications, liaison and visa decision outcome explanations. The IAAAS does not, however, assist with review applications, or those seeking judicial review or ministerial intervention. There are 19 IAAAS providers in Australia, ranging from commercial migration advice businesses to legal aid offices. This scheme is separate from government-funded legal aid and pro bono services.

To qualify for the IAAAS, a person must be a non-citizen on a valid visa who is in financial hardship and disadvantaged due to language, youth or other cultural issues, illiteracy in the main language of their country of origin, geographical remoteness, physical or psychological disability or physical or psychological harm.<sup>377</sup> Due to financial limitations and budget considerations, the IAAAS may refuse to assist a person who meets hardship requirements.<sup>378</sup> The IAAAS services cease once a person has been given information and advice, and no longer requires assistance in completing their visa application.<sup>379</sup>

## 5.2.3 Seasonal Worker Programme Add-on Skills Training

The Seasonal Worker Programme Add-on Skills Training component allows seasonal workers to access government funded basic training opportunities.<sup>380</sup> First time seasonal workers can receive training in basic English literacy and numeracy, information technology skills and first aid.<sup>381</sup> Returning seasonal workers 'may be able to access Recognition of Prior Learning towards a Certificate I or II' in their industry of employment.<sup>382</sup> Training is provided by Registered Training Organisations in partnership with approved seasonal worker employers.<sup>383</sup>

## 5.2.4 Other Services

Australia has a public healthcare system, free public education framework and support for tax, rent, transport, disability-related and work compensation matters.<sup>384</sup> However, temporary migrant workers are frequently excluded from their operation, as detailed in Section 4.7 ('Access to State-Provided Services').

The Australian government has initiated Mental Health in Multicultural Australia to provide advice and support to service providers and governments to improve access to services, disseminate resources, promote mental health and prevent suicides in culturally and linguistically diverse communities.<sup>385</sup>

## 5.3 Non-government Programs

In addition to government services and programs, trade unions, community legal centres and civil society groups provide varying forms of workplace, legal, mental health and other assistance to migrant workers in Australia. Some of the key non-government programs are outlined in Appendix D.

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<sup>377</sup> Department of Immigration and Border Protection, *Fact Sheet - Immigration Advice and Application Assistance Scheme (IAAAS)*, Australian Government <<https://www.border.gov.au/about/corporate/information/fact-sheets/63advice>>.

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

<sup>380</sup> Department of Employment, *Seasonal Worker Programme: Add-On Skills Training*, Australian Government <[http://docs.employment.gov.au/system/files/doc/other/06-15\\_seasonal\\_worker\\_programme\\_aost\\_factsheet.pdf](http://docs.employment.gov.au/system/files/doc/other/06-15_seasonal_worker_programme_aost_factsheet.pdf)>.

<sup>381</sup> Ibid.

<sup>382</sup> Ibid.

<sup>383</sup> Ibid.

<sup>384</sup> See Section 4.7 on access to state-provided services.

<sup>385</sup> Mental Health in Multicultural Australia, *Home* <<http://www.mhima.org.au/>>.



## APPENDIX A

### International Human Rights Treaties and ILO Covenants Ratified by Australia

Australia has agreed to be bound by the following key international human rights treaties which are relevant to the protection of the rights of migrant workers:

- International Covenant on Civil and Political Rights<sup>386</sup>
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of all forms of Racial Discrimination
- Convention on the Elimination of all forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment<sup>387</sup>
- Convention on the Rights of the Child<sup>388</sup>
- Convention on the Rights of Persons with Disabilities

Australia has ratified the following ILO Conventions:

- Forced Labour Convention 1930 (No 29)
- Freedom of Association and Protection of Right to Organise Convention 1948 (No 87)
- Right to Organise and Collective Bargaining Convention 1949 (No 98)
- Equal Remuneration Convention 1951 (100)
- Abolition of Forced Labour Convention 1857 (No 105)
- Discrimination (Employment and Occupation) Convention 1958 (No 111)
- Minimum Age Convention 1973 (No 138)

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<sup>386</sup> Australia has also ratified the *First Optional Protocol to the International Convention on Civil and Political Right on the submission of complaints by individuals*, opened for signature and entered into force 23 March 1976, General Assembly resolution 2200A (XXI), and the *Second Optional Protocol to the International Convention on Civil and Political Rights, aiming at the abolition of the death penalty*, adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

<sup>387</sup> Australia has ratified the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006).

<sup>388</sup> Australia has ratified the *Optional Protocol to Convention on the Rights of the involvement of children in Armed Conflict*, opened for signature 25 May 2000, General Assembly Resolution A/RES/54/263 (entered into force 12 February 2002) and the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, opened for signature 25 May 2000, General Assembly resolution A/RES/54/263 (entered into force 18 January 2002).

## APPENDIX B Further Visa Categories

### 1. Former students

Since 2008, international students have been eligible for the subclass 485 Temporary Graduate Visa.<sup>389</sup> Since 2013, this visa has comprised two streams.<sup>390</sup> The 'Graduate Work stream' grants work rights for 18 months to graduates with Australian qualifications less than a bachelor degree, who are qualified in a Skilled Occupation List occupation, and pass the skills assessment.<sup>391</sup> The 'Post-Study Work stream' renders graduates with a bachelor qualification or higher eligible for a two-year work visa, and those with a master's by research or doctoral degree eligible for a three or four year work visa across all occupations.<sup>392</sup> However, international students' work opportunities are not 'unlimited' in practice. Research suggests that many employers in professional fields do not accept applications from international graduates without permanent residency status.<sup>393</sup>

As of December 2014, there were 19,506 Subclass 485 visa holders in Australia.<sup>394</sup> There is no barrier to permanent residency for these visa-holders. However, the DIBP asserts that students can only access the 485 as a primary applicant once.<sup>395</sup>

### 2. Bridging Visa A

The Bridging Visa A ('BVA') grants temporary lawful status to substantive visa holders during their application process for another substantive visa. This extends to any merits or judicial review throughout the process. Generally, BVAs grant individuals with the same conditions they held on their previous substantive visa.<sup>396</sup> A major cohort of temporary workers who are BVA holders are former international students previously on 485 visas. These former students were granted BVAs while the government attempted to process a major backlog of tens of thousands of applications for residence with the number yet to be processed in 2014 still at 10,361.<sup>397</sup>

### 3. Trafficking victims

The visa framework for implementing Australia's obligations under the UN Trafficking Protocol<sup>398</sup> includes three visas: Bridging F visa ('BVF'), the Criminal Justice Stay visa (CJSV) and the Witness Protection (Trafficking) (Permanent) visa ('WPTV').<sup>399</sup> To be granted a BVF, an unlawful non-citizen must be identified by the Australian Federal Police or by state or territory police as a 'suspected victim of trafficking'.<sup>400</sup> The BVF allows a suspected trafficked person to remain in Australia legally for 45 days in order to receive initial support and decide whether to cooperate with any criminal prosecution or investigation.<sup>401</sup> A second BVF for a further 45 days may be granted if the person is willing to assist police but is temporarily unable to do so due to their mental, physical or emotional state.<sup>402</sup> The Attorney-General's Department notes that the BVF carries no work rights, but states that holders receive intensive support through the Support for Victims of People Trafficking Program.<sup>403</sup> Between 2004 and 2011, the maximum number of BVFs granted per year was 34.<sup>404</sup>

<sup>389</sup> Berg, above n 7, 94–5.

<sup>390</sup> *Migration Legislation Amendment Regulation 2013 (No. 1)* (Cth).

<sup>391</sup> Berg, above n 7, 94–5.

<sup>392</sup> *Ibid.*

<sup>393</sup> Jill Blackmore et al, *Australian International Graduates and the Transition to Employment* (Deakin University, 2014) 18.

<sup>394</sup> Department of Immigration and Border Protection, 'Student Visa and Temporary Graduate Visa Programme Quarterly Report', above n 47, 8.

<sup>395</sup> Department of Immigration and Border Protection, *Temporary Graduate Visa (Subclass 485)*, Australian Government <<https://www.border.gov.au/Trav/Visa-1/485-#>>.

<sup>396</sup> However, certain conditions such as 8106 pertaining to the type of work permitted do not apply, and visas such as the Graduate-Skilled (Temporary) visa provide full work rights regardless of previous work restrictions. (Immigration Advice & Rights Centre Inc, *Bridging Visas* (2012), <<https://iarc.worldsecuresystems.com/immigration-kit/7-2-bridging-a-visa-subclass-010>>).

<sup>397</sup> For discussion of how government has put thousands of valid applications for permanent residency on indefinite hold, see Peter Mares, 'Living at the Wrong End of the Queue', *Inside Story*, 7 April 2015, <<http://insidestory.org.au/living-at-the-wrong-end-of-the-queue>>.

<sup>398</sup> United Nations Treaty Collection, *12 A Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en>](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en>).

<sup>399</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade (Human Rights Sub-Committee) *Trading Lives: Modern Day Human Trafficking* (Parliament of Australia, 2013) [5.3]. Between 1 July 2013 and 30 June 2014, DIBP granted 224 BVFs, 202 CJSVs and 110 WPTVs: Interdepartmental Committee on Human Trafficking and Slavery, Commonwealth of Australia, *Trafficking in Persons: The Australian Government Response 1 July 2013 - 30 June 2014* (2014) 34. This was as part of the Support for Trafficked People Program, detailed in Section 5.2.1.

<sup>400</sup> *Migration Regulations* 1994 (Cth) sch 1 item 1306.

<sup>401</sup> *Ibid* sch 2 cl 060.511.

<sup>402</sup> Attorney-General's Department, Submission 8 to Parliamentary Joint Committee on Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Slavery, Slavery-like conditions and People Trafficking*, 28 September 2012, 6, cited in *Trading Lives: Modern Day Human Trafficking*, above n 399, [5.4].

<sup>403</sup> *Ibid* [Attorney General Submission]; see also Howells, above n 13, 28.

<sup>404</sup> Anti-Human Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response 1 July 2010 - 30 June 2011* (Commonwealth of Australia, 2011) 30.

Once the BVF expires, the Minister for Immigration has discretion to issue a Commonwealth Criminal Justice Stay Visa ('CJSV') Visa where the Attorney General has issued a Commonwealth Criminal Justice Stay Certificate stating that the person's presence is required for the administration of justice.<sup>405</sup> A holder of this visa is allowed to work, receive support under the Justice Support Stream of the Support Program, and has access to Special Benefits, Rent Assistance and assistance in obtaining employment and training, amongst other support services.<sup>406</sup> Between 2004 and 2011, the maximum number of CJSVs granted was 30.<sup>407</sup> Given that the CJSV is not only used for trafficking victims but is also used for others who need to stay in Australia for other matters relating to judicial proceedings, it is unclear how many were granted to victims of trafficking.

#### 4. Domestic workers who work for diplomats

Visa subclass 403 comprises the Government Agreement, Foreign Government Agency, Domestic Worker (Diplomatic or Consular) and Privileges and Immunities streams.<sup>408</sup> While the 403 does not require any sponsorship or nomination, it often requires a letter of support from a relevant organisation. The criteria for application, as for all visa applications, are set out in Schedule 2 to the Migration Regulations.<sup>409</sup> For example, the applicant must genuinely intend to stay in Australia to carry out the occupation or activity, and must have sufficient means to support themselves. Although little research has been published regarding this visa class, there have been calls for more robust monitoring of 403 holders' work conditions.<sup>410</sup>

#### 5. Domestic workers employed by 457 visa holders

Visa 401, Domestic Worker (Executive) Stream allows individuals to come to Australia to work full time in the household of certain senior foreign executives who are on the 457 visa. The visa requires sponsorship by a long-stay activity sponsor, which can be an organisation, government agency or foreign government agency. The visa holder can stay for a maximum of two years, and cannot extend this term.<sup>411</sup> As noted above with regards to the 403 visa, the Salvation Army has noted that there is no established means to monitor conditions of employment faced by domestic workers on the 401 visa.<sup>412</sup> The Salvation Army has recommended a requirement that 401 visa holders report at regular intervals to the DIBP to allow for monitoring and access to help if needed.<sup>413</sup> There were approximately 2500 Temporary Work (Long Stay Activity) holders in Australia on 31 March 2014, which includes not only those under the Domestic Workers Stream, but also those on the Exchange, Sports and Religious Worker Streams.<sup>414</sup>

#### 6. New Zealanders

Special Category Visa (visa 444) allows New Zealand citizens to visit, work and study in Australia for an indefinite period.<sup>415</sup> The only requirements to hold this visa are that the person remains a New Zealand citizen, holds a New Zealand passport, and meets specific health and character requirements.<sup>416</sup> New Zealand citizens arriving in Australia since 1 September 1994 are given the Special Category Visa once they have completed the incoming passenger card on arrival. New Zealanders who had already been living in Australia before 1 September 1994 'in general' automatically became Special Category holders.<sup>417</sup>

The number of visa 444 holders in Australia on 31 March 2014 was 644,890.<sup>418</sup> With regards to New Zealanders working in Australia, of those who indicated to the DIBP they had an occupation, almost 60 per cent were skilled, 20 per cent semi-skilled, and 20 per cent were either unskilled or believed to be employed but provided inadequate information to classify their occupation.<sup>419</sup>

<sup>405</sup> *Migration Act 1958* (Cth) s 147(1)(b)(iii); see also Berg, above n 7, 233.

<sup>406</sup> Anti-Human Trafficking Interdepartmental Committee, above n 399, 28.

<sup>407</sup> *Ibid* 30.

<sup>408</sup> Immigration Advice & Rights Centre Inc, *Temporary Workers* (2013), <<https://iarc.worldsecuresystems.com/immigration-kit/18-6-sanctions-for-breach-of-sponsorship-obligations>>; Department of Border Protection (Cth), *Temporary Work (International Relations) visa (subclass 403)*, <<https://www.border.gov.au/Trav/Visa-1/403->>.

<sup>409</sup> *Migration Regulations 1994* (Cth) sch 2.

<sup>410</sup> Salvation Army, Submission 16 to Senate Standing Committees on Education and Employment, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 1 May 2015, 10.

<sup>411</sup> DIBP, (Cth), *Temporary Work (Long Stay Activity) visa (subclass 401)*

<sup>412</sup> The Salvation Army, above n 410, 12.

<sup>413</sup> *Ibid*, 17.

<sup>414</sup> DIBP, *Temporary entrants in Australia on 31 March 2014*, 21, <<https://www.border.gov.au/ReportsandPublications/Documents/statistics/temp-entrants-newzealandmar14.pdf>>.

<sup>415</sup> DIBP, *Fact sheet - New Zealanders in Australia*, <<http://www.border.gov.au/about/corporate/information/fact-sheets/17nz>>.

<sup>416</sup> *Ibid*.

<sup>417</sup> *Ibid*.

<sup>418</sup> DIBP, above n 414.

<sup>419</sup> DIBP, above n 415.

## 7. Seafarers/cruise ship workers

Non-citizens without Australian visas are allowed to be employed on offshore projects in Australia's exclusive economic zones ('EEZ'). As confirmed by the introduction of the Migration Amendment (Offshore Resources Activity) Repeal Bill 2014 (Cth), these individuals fall outside the operation of the *Migration Act*.<sup>420</sup> As a result, they are not covered by the *Fair Work Act*, and do not enjoy National Employment Standards, modern awards or enterprise agreements.<sup>421</sup>

On 25 June, 2015 the government introduced the Shipping Legislation Amendment Bill 2015 which is currently under examination by the Senate Rural and Regional Affairs and Transport Legislation Committee. Among other things, the bill establishes that migrant workers employed on foreign flagged ships in Australia are not entitled to minimum wages and other Australian industrial relations protections if the ship is in Australia for less than 183 days per year.<sup>422</sup>

## 8. Oil rig workers

Migrant workers on resource installations, including vessels, movable floating structures and fixed structures or rigs, require either a 457 visa (described above at Section 2.2, 'Skilled Temporary Workers Program') or a Subclass 400 Temporary Work (Short Stay Activity) visa.<sup>423</sup> The latter visa is for highly specialised and non-ongoing work. The period of stay can vary, with a maximum of a 6 month stay.<sup>424</sup> Applicants may need a letter of job offer or to include their employment contract as part of their application, but unlike the 457 visa, applicants for the 400 visa do not need sponsorship or nomination.<sup>425</sup> The job offer or employment contract should show evidence that the employment conditions satisfy Australian workplace standards.<sup>426</sup>

There was limited mention of issues faced by migrant oil rig workers in submissions to the Senate Standing Committee Inquiry into Australia's temporary visa program. The submission by the Australian Institute of Marine and Power Engineers noted that maintaining Australian wage and condition standards in the marine industry sector has been difficult due to workers signing agreements where the laws of other countries apply.<sup>427</sup>

<sup>420</sup> *Migration Amendment (Offshore Resources Activity) Repeal Bill 2014* (Cth).

<sup>421</sup> Salvation Army, Submission 16 to Senate Standing Committees on Education and Employment, *The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders*, 1 May 2015, 10; *MUA v Assistant Minister for Immigration and Border Protection* [2014] FCA 993.

<sup>422</sup> See [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5495](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5495) for the current status of the bill.

<sup>423</sup> DIBP, *Working in Australia's offshore oil and gas industry*, <<http://www.border.gov.au/Trav/Work/Visa#>>.

<sup>424</sup> DIBP, *Temporary Work (Short Stay Activity) visa (subclass 400)*, <<http://www.border.gov.au/Trav/Visa-1/400->>>.

<sup>425</sup> DIBP, *Temporary Work (Short Stay Activity) visa (subclass 400) document checklist* <[https://www.border.gov.au/visas/Pages/Temporary-Work-\(Short-Stay-Activity\)-visa-\(subclass-400\)-document-checklist.aspx](https://www.border.gov.au/visas/Pages/Temporary-Work-(Short-Stay-Activity)-visa-(subclass-400)-document-checklist.aspx)>.

<sup>426</sup> *Ibid.*

<sup>427</sup> Australian Institute of Marine and Power Engineers, Submission 17 to the Senate Standing Committee on Education and Employment, *The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders*, 1 May 2015, 6.

## APPENDIX C

### Australia's Response to Forced Labour and Human Trafficking

A summary of the situation regarding forced labour and human trafficking in Australia is set out in Section 4.8 above. This Appendix contains further information on Australia's response to forced labour and human trafficking.

Human trafficking and forced labour in Australia are not typically imposed through the traditional methods of seizure of passports and physical restraint.<sup>428</sup> Rather, coercion is exercised through threats of violence, obligations to repay debt, isolation and unauthorised immigration status. A common situation experienced by those affected by trafficking and forced labour upon arriving in Australia involves working long hours, being subjected to coercive threats by employers to report them to immigration if they refuse to work or complain, and not being paid the wages to which they are entitled.

The people most likely to be subject to forced labour and trafficking are workers at the lower end of the skilled occupations for the 457 program, domestic workers and holders of bridging visas.<sup>429</sup> Industries such as cleaning, agriculture, and hospitality are frequently mentioned in discussions about labour trafficking in Australia because they are heavily reliant on foreign workers who are more willing to work in physically demanding low-paid jobs that cannot be filled by domestic employees.<sup>430</sup>

#### 1. Incidence, Reporting and Prosecution

The extent of forced labour and trafficking in Australia remains unknown, with only a small number of reported cases.<sup>431</sup> Each financial year the AFP receives between 15 and 70 new allegations of trafficking in persons, the majority of which involve women.<sup>432</sup> The Australian Institute of Criminology has found reporting to be low, with the Fair Work Ombudsman more often coming across these cases when investigating complaints about hours and wage matters.<sup>433</sup> The legal confusion between employment with substandard conditions and criminal exploitation also creates difficulties in identifying and prosecuting the people responsible for forced labour.<sup>434</sup>

#### 2. The Situation of Migrant Domestic Workers

As overall numbers of domestic workers have increased due to demand and migration patterns, so have the number of domestic workers subjected to forced labour and human trafficking.<sup>435</sup> According to the Salvation Army, these women can be subject to deprivation of food, physical abuse, threats, denial of medical care, excessive work and little or no pay.<sup>436</sup>

Domestic workers subjected to forced labour tend to enter Australia on tourist visas, student visas or other visas that are not subject to employer compliance monitoring and can often be in an irregular status. This inhibits prevention and identification of illegal conduct.<sup>437</sup> Further, the absence of an employment contract for domestic workers who are in a position of forced labour undermines their ability to seek remedies, compounding their ineligibility for protection under the *Fair Work Act*.<sup>438</sup>

#### 3. The Legal and Governmental Framework

Australian policies on forced labour and human trafficking have been a relatively recent development.<sup>439</sup> Since 2003, the Australian government has spent more than \$100 million on anti-trafficking initiatives.<sup>440</sup> This includes specialist AFP investigation teams, legislation to criminalise trafficking and related activities.<sup>441</sup>

<sup>428</sup> Berg, above 7, 232. Forced labour and trafficking is potentially in breach of the following international rights under instruments to which Australia is a party: article 8.3(a) of the ICCPR (which guarantees freedom from forced labour); freedom from slavery and servitude and compulsory labour (ICCPR Article 8,(1) & (2); ILO C029 Forced Labor Convention, 1930, Abolition of Forced Labor Convention, 1957 C105, Fundamental Principle- Elimination of all forms of forced or compulsory labour, Art. 1 C105 - Abolition of Forced Labour Convention, 1957 (No. 105), Art. 1, C029 Forced Labor Convention); The right to liberty and security of person (ICCPR Article 9.1). Forced labour and trafficking is also potentially in breach of the following international rights under instruments to which Australia is not a party: freedom from slavery and servitude and compulsory labour (Migrant Workers' Convention Article 11 (1)); The right to liberty and security of person (Migrant Workers' Convention Article 16.1).

<sup>429</sup> Salvation Army, Submission 16 to Senate Standing Committees on Education and Employment, The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, 1 May 2015, 6.

<sup>430</sup> The Human Trafficking Working Group, Labour Trafficking in Australia <<http://www.law.uq.edu.au/labour-trafficking-in-australia>>.

<sup>431</sup> David, above n 164, xii.

<sup>432</sup> Human Trafficking Working Group, Statistics and other Data, <<http://www.law.uq.edu.au/humantrafficking-statistics>>.

<sup>433</sup> David, above n 164, 24.

<sup>434</sup> University of Technology Sydney, Modern-Day Slavery (20 June 2013), <<http://newsroom.uts.edu.au/news/2013/06/modern-day-slavery>>.

<sup>435</sup> The Salvation Army and Walk Free Foundation, above n 25, 5.

<sup>436</sup> Ibid 2.

<sup>437</sup> Ibid 9.

<sup>438</sup> Ibid 10.

<sup>439</sup> Human Trafficking Working Group, Australia's policies in trafficking in persons, <<http://www.law.uq.edu.au/ht-policies>>.

<sup>440</sup> Ibid.

<sup>441</sup> Ibid.

### (a) The Criminal Code 1995 (Cth)

The Criminal Code governs the criminal laws relating to forced labour and trafficking and includes offences for human trafficking and slavery.<sup>442</sup> It also criminalises slavery-like practices such as forced labour and deceptive recruiting. These provisions were amended in February 2013 by the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) which introduced an offence for forced labour<sup>443</sup> and expanded the definition of exploitation to include a range of slavery-like practices.<sup>444</sup>

Until recently labour trafficking, as distinct from sex trafficking, has been neglected by Australian counter-trafficking efforts.<sup>445</sup> Instead, there has been a focus on the sex industry though this is likely a reflection of the efforts and priorities of governments.<sup>446</sup> The new scheme addressed this issue by capturing the broadest range of exploitative behaviour including all forms of servitude and deceptive recruitment.<sup>447</sup> It also expanded offences involving sexual exploitation to include non-sexual exploitation and established a greater range of offences related to trafficking.<sup>448</sup>

### (b) The Migration Act and Visa Programs

Australia also has a range of employer sanction offences which aim to reduce instances of illegal work. The *Migration Act* has offences for allowing an unlawful non-citizen to work and aggravated offences if the worker is being exploited such as in situations of forced labour or debt bondage.<sup>449</sup> It is common for individuals who are involved in forced labour and human trafficking to be in Australia without a visa or in breach of their visa conditions, and therefore once discovered they are subject to removal before there is any opportunity to investigate or prosecute those involved. To address this issue, in 2004 the Australian Government introduced three visa categories, namely the Bridging Visa F, the Criminal Justice Stay Visa, and the Witness Protection (Trafficking) (Permanent) visa, as detailed above in Section 2 and Appendix B ('5. Trafficking Victims').

### (c) Australian Government Initiatives

The Commonwealth Government established Australia's National Action Plan to Combat Trafficking and Slavery 2015-19 which provides the strategic framework for Australia's response to human trafficking and slavery.<sup>450</sup> Key initiatives involved in this project include a victim support program, specialist immigration officers posted in key countries to aim to prevent trafficking and regional engagement and capacity building in the Asia-Pacific.<sup>451</sup> The Interdepartmental Committee on Human Trafficking and Slavery ('IDC') has also been formed, and each year tables an annual report in the Parliament which details Australia's developments and future strategies related to human trafficking.

### (d) The Federal Police

The Australian Federal Police is tasked with playing a prominent role in policing human trafficking and forced labour, as detailed in Section 4.8 ('Forced Labour and Human Trafficking').

### (e) The Fair Work Ombudsman

The Fair Work Ombudsman has a significant role in securing industrial remedies for trafficked people.<sup>452</sup> Often victims' lawyers refer their clients to the Ombudsman who then undertake an investigation and represent the individual in proceedings.<sup>453</sup> See Section 5.1.1 for further information on the Fair Work Ombudsman.

<sup>442</sup> See *Criminal Code 1995* (Cth) Division 270 and 271. For example, Division 270 creates an offence for slavery with universal jurisdiction such that it applies whether or not the conduct occurred in Australia, and whether or not the victim or offenders are Australian citizens: Australian Government, *National Action Plan to combat human trafficking and slavery 2015-19* (2014) 8.

<sup>443</sup> The offence for forced labour is set out in section 270.6A of the *Criminal Code 1995* (Cth) and includes both causing a person to enter into or remain in forced labour and conducting a business involving forced labour.

<sup>444</sup> Australia's Federal Prosecution Service, *Human Trafficking and Slavery* <<http://www.cdpp.gov.au/crimeswe-prosecute/human-trafficking-and-slavery/>>.

<sup>445</sup> Berg, above n 7, 234.

<sup>446</sup> *Ibid* 235.

<sup>447</sup> *Ibid* 226, 249.

<sup>448</sup> *Ibid* 226.

<sup>449</sup> Australian Government, 'Trafficking in persons, the Australian Government Response 1 July 2013 – 30 June 2014', (Report No 6), 16-17.

<sup>450</sup> Australian Government, Attorney-General's Department, 'Australia's response to human trafficking', <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Australiasresponsetohumantrafficking.aspx>>.

<sup>451</sup> Australian Government, 'National Action Plan to combat human trafficking and slavery 2015-19' (2014), 8, 15.

<sup>452</sup> Berg, above n 7, 266.

<sup>453</sup> *Ibid*.

## APPENDIX D

### Non-Government Support to Migrant Workers in Australia

A range of non-government organisations provide support to migrant workers in Australia. Examples within three key groups of organisations are outlined below.

#### 1. Trade Unions

Every worker or employee in Australia, including a temporary migrant worker,<sup>454</sup> is entitled to join one of almost 100 unions in Australia.<sup>455</sup> The Australian Council of Trade Unions is the peak body for 46 affiliated unions, representing almost two million Australian workers and their families.<sup>456</sup> Since 2009, trade unions have been able to apply to the FWC for 'Registered Organisation' status, allowing them to support and advise both employers and employees.<sup>457</sup> Trade unions are providing increasing support to temporary migrant workers in Australia. To take a recent example, the Shop Assistants Union has established a hotline for 7-Eleven workers in response to the recent uncovering of the chain's 'systemic wage fraud' against employees, including significant numbers of international students.<sup>458</sup>

It is unlawful in Australia for an employer to take adverse action, such as dismissal against an employee for engaging in lawful industrial activities or for non-membership of a particular trade union.<sup>459</sup>

#### 2. Community Legal Centres

Community Legal Centres ('CLCs') are independent not-for-profit, community based organisations that provide free legal assistance to the public, particularly disadvantaged individuals,<sup>460</sup> including migrant workers. CLCs provide either general or specialised services in areas such as immigration, discrimination and employment. They may also engage in community legal education which can include holding seminars and producing educational materials.<sup>461</sup> CLCs also play an important role in law reform and policy work in Australia by contributing insights about their experience of how the law affects their clients.

Several Australian CLCs have an employment law focus, including the Employment Law Centre of Western Australia, which provides free legal advice to vulnerable Western Australian employees through its telephone advice line.<sup>462</sup> The Employment Law Service<sup>463</sup> in Melbourne provides free employment law advice, information, advocacy and referral to newly arrived migrants.<sup>464</sup> JobWatch, a Victorian employment rights legal centre, also provides a telephone advice and referral service, as well as representation and assistance for disadvantaged workers through its casework practice.<sup>465</sup> Additionally, a number of CLCs provide free immigration advice and assistance to qualifying disadvantaged migrants, including temporary migrants.<sup>466</sup>

Although several Australian CLCs have dedicated employment and discrimination law services, these are only available to workers within their respective catchment areas.<sup>467</sup> Workers falling outside these areas, or within catchment areas of CLCs that do not provide these services, must therefore be redirected to their state or territory legal aid provider or other specialist services.<sup>468</sup> In addition, not all Australian CLCs have registered migration agents and are thus unable to advise on the migration law aspects of a migrant worker's situation.<sup>469</sup> Workers with multifaceted legal problems involving immigration, employment and possibly other further areas of law face barriers to accessing holistic advice.<sup>470</sup> For migrant workers, these barriers are

<sup>454</sup> See, eg, Birmai Ghosh, *Elusive Protection, Uncertain Lands: Migrants' Access to Human Rights*, (2003), 15.

<sup>455</sup> Australian Workers Union, *What is a Union?*, <<http://www.awu.net.au/what-union/>>.

<sup>456</sup> Australian Workers Union, *About the ACTU*, <[http://www.australianunions.org.au/about\\_actu/](http://www.australianunions.org.au/about_actu/)>.

<sup>457</sup> Under the *Fair Work (Registered Organisations) Act 2009* (Cth).

<sup>458</sup> Workplace Info, 7-Eleven stores accused of 'systemic wage fraud' (31 August 2015), <<http://workplaceinfo.com.au/payroll/payroll-management/news/7-eleven-stores-accused-of-systemic-wagefraud#.Vefhq0Ypoil>>; <http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm>>.

<sup>459</sup> *Fair Work Act 2009* (Cth) s772(1)(c) and s 346.

<sup>460</sup> National Association of Community Legal Centres, *Community Legal Centres*, <[http://www.naclc.org.au/cb\\_pages/clcs.php](http://www.naclc.org.au/cb_pages/clcs.php)>.

<sup>461</sup> Australian Pro Bono Centre *Community Legal centres and Indigenous legal organisations*, <<http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=10>>.

<sup>462</sup> Employment Law Centre of WA, *About The Employment Law Centre of WA*, <<http://elcwa.org.au/about-theemployment-law-centre-of-wa/>>.

<sup>463</sup> The ELS is part of the Footscray CLC Employment Law Project.

<sup>464</sup> Migrants must be of a non-English speaking background and must have been in Australia for less than 10 years. It also provides these services to refugees and asylum seekers: See, Footscray Community Legal Centre, *Employment Law Service*, <<http://www.footscrayclc.org.au/employment-law-service/>>.

<sup>465</sup> JobWatch, <<http://www.jobwatch.org.au/>>.

<sup>466</sup> In Victoria, all Refugee & Immigration Legal Centre solicitors are also registered migration agents and in Queensland, the Mackay Regional CLC houses two volunteer migration agents to offer one-off migration advice and assistance. See, Mackay Regional Community Legal Centre, *Services*, <<http://mrclc.com.au/services/>>.

<sup>467</sup> Interview with Maria Nawaz, above n 341.

<sup>468</sup> *Ibid*.

<sup>469</sup> Only a registered migration agent can provide migration advice: *Migration Act 1958* (Cth) s 280(1); Interview with Maria Nawaz, above n 341.

<sup>470</sup> Interview with Maria Nawaz, above n 341.

exacerbated by the vulnerabilities discussed in the Section 3 ('Structural Factors').<sup>471</sup> Some CLCs have attempted to remedy these gaps by providing community legal education on employment law to remote communities, or communities with a higher proportion of migrant workers.<sup>472</sup> Significantly, the underfunding of Australian CLCs systemically inhibits their ability to provide services in key legal areas. The Productivity Commission of Australia has recommended funding to CLCs be increased to close the 'justice gap'.<sup>473</sup>

### 3. Civil Society and NGOs

There are a range of civil society organisations in Australia that provide various services to assist migrant workers including: ethnic and nationality based community groups such as members of the Federation of Ethnic Communities' Councils of Australia and nongovernment organisations<sup>474</sup> that provide mental health support<sup>475</sup> and lead specific initiatives and programs such as the Salvation Army - Freedom Partnership to End Modern Slavery;<sup>476</sup> the Australian Red Cross - Migration Support Programs;<sup>477</sup> the Support for Trafficked People Program<sup>478</sup> and Immigration Advice Centres.<sup>479</sup>

Although most migrant workers are eligible for services they may not actively use them due to the reasons outlined in Section 3 ('Structural Factors').

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<sup>471</sup> Ibid.

<sup>472</sup> See, eg, Kingsford Legal Centre's 'Asian Women at Work' project, in which the Centre reached out to Auburn, Hurstville and Cabramatta areas: Kingsford Legal Centre, *Women at Work Factsheets*, University of New South Wales (19 December 2012) <<http://www.klc.unsw.edu.au/news/2012/12/kingsford-legal-centreannual-report-2013>>.

<sup>473</sup> Productivity Commission, 'Access to Justice Arrangements' (Report No 72, September 2014, Commonwealth) 30.

<sup>474</sup> The Federation of Ethnic Communities' Councils of Australia is the peak, national body representing Australians from culturally and linguistically diverse backgrounds: Federation of Ethnic Communities' Councils of Australia, *Who We Are* <<http://fecca.org.au/about/who-we-are/>>.

<sup>475</sup> There are many organisations in Australia that provide support and services to those in situations of violence and crisis, and those suffering from mental illness including 1800 RESPECT, Lifeline and BeyondBlue which provide crisis counselling online and by telephone. These services are available to all migrant workers, including those non-English speakers who can access an immediate phone interpreting service: see Lifeline Australia <<https://www.lifeline.org.au/>>; 1800RESPECT <<https://www.1800respect.org.au/>>; BeyondBlue, About Us <<https://www.beyondblue.org.au/about-us>>; Department of Immigration and Border Protection, *Immediate Phone Interpreting* <<https://www.tisnational.gov.au/Non-English-speakers/Help-using-TIS-Nationalservices/Immediate-telephone-interpreting-for-non-English-speakers>>.

<sup>476</sup> In July 2014, the Salvation Army launched 'The Freedom Partnership', which uses online tools and social media to engage Australians to fight against slave-like practices in Australia. The Salvation Army also operates a Safe House for women who have experienced trafficking in Australia, as well as providing accommodation, outreach support and case management to men, women and children who have been exposed to slavery and trafficking: The Salvation Army, *Trafficking and Slavery Safe House* <<http://endslavery.salvos.org.au/gethelp/the-safe-house-for-trafficking-slavery/>>. Salvos Legal are also able to provide legal advice and assistance to those who have experienced trafficking or slavery: Salvos Legal, *Free Legal Advice*, <[http://www.salvoslegal.com.au/our\\_services/humanitarian](http://www.salvoslegal.com.au/our_services/humanitarian)>.

<sup>477</sup> This program provides services to refugees, asylum seekers and immigration detainees who are in need of help and protection: Australian Red Cross, *Migration Support* <<http://www.redcross.org.au/migrationsupport.aspx>>.

<sup>478</sup> The STP provides specific information and services to trafficked people such as income support, emergency housing, access to health care and arranging independent legal advice for trafficked persons referred to the Red Cross by the Australian Federal Police. It also gives trafficked people a 45 day reflection period when deciding whether to assist the AFP with their investigations, as well as ongoing support for those whose circumstances are being investigated: see, Australian Red Cross, *Support for Trafficked People* <<http://www.redcross.org.au/support-for-trafficked-people.aspx>>; Australian Red Cross, *Support for People Who Have Been Trafficked to Australia* <[http://www.redcross.org.au/files/ARC\\_Trafficking\\_English.pdf](http://www.redcross.org.au/files/ARC_Trafficking_English.pdf)>.

<sup>479</sup> Such as the New South Wales Immigration Advice & Rights Centre, which has five registered migration agents who provide free legal assistance in immigration matters: Immigration Advice and Rights Centre Inc, *About Us* <<http://www.iarc.asn.au/AboutUs>>.