

Professor Allan Fels AO
Chair, Migrant Worker Taskforce
By email: MigrantWorkersTaskforce@employment.gov.au

27 September 2017

Dear Professor Fels,

Key reforms to address employer exploitation of temporary migrant workers

We were grateful to have the opportunity to meet with you at the roundtables hosted by the Migrant Worker Taskforce and write to recommend key reforms essential to address employer exploitation of migrant workers on temporary visas (temporary migrant workers).

It is now abundantly clear that there is systemic non-compliance by employers who engage these workers. The Commonwealth Government should be acknowledged for recognizing this societal problem and taking steps by forming the Migrant Worker Taskforce and introducing new laws, such as the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 and measures to deal with illegal phoenixing activity.

Much more, however, is needed in order effectively address this problem, with significant reforms necessary across various areas of law, public policy and practice. In our view, these reforms should be underpinned by seven central goals. We identify these goals below together with the key reforms they give rise to.

We will be grateful if you could circulate this letter to members of the Migrant Worker Taskforce. We are also happy to meet to discuss our proposed reforms if that will be helpful.

Yours sincerely,

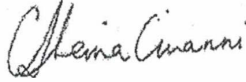


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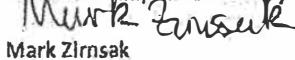
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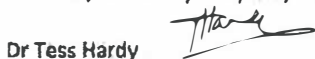
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1. *Reduce the vulnerability of temporary migrant workers*

The vulnerability of temporary migrant workers is a significant cause of their exploitation and their reluctance to take action when exploited. Immigration laws and practices are a key source of such vulnerability: unlike permanent migrants, temporary migrant workers experience vulnerability from their 'temporariness', including the prospect of removal from this country. Essential reforms to reduce this vulnerability include:

- Phasing out the option of a second 12-month visa for working in specified industries and regions offered under Visa Subclasses 417 and 462 working holiday programs;
- Providing workers on temporary skill visas (including 457 and Temporary Skill Shortage visas) with at least 90 days to find another sponsor in the event of termination of their employer sponsorship;
- Providing greater mobility amongst employers for Seasonal Worker Program workers;
- Instituting a proportionate system of penalties applying to visa breaches that does not allow for visa cancellation for all breaches; and
- Putting in place a 'firewall' between the Fair Work Ombudsman and the Department of Immigration and Border Protection that prevents the provision of information from the Ombudsman to the Department except to facilitate the prosecution of employers for exploitation of their employees.

2. *Provide equal workplace rights to temporary migrant workers*

Temporary migrant workers are workers – and like all workers are entitled to equal workplace rights. To give effect to this principle:

- The *Fair Work Act 2009* (Cth) (*Fair Work Act*) should explicitly state that it applies to all workers – including migrant workers who have breached their visas or worked without a valid visa;
- Migrant status – including temporary visa status – should be explicitly prohibited as a ground of discrimination under the *Fair Work Act* and the *Race Discrimination Act 1975* (Cth); and
- The Fair Entitlements Guarantee should be made available to all temporary migrant workers.

3. *Enable temporary migrant workers to effectively enforce their workplace rights*

Legal rights are of little value if they cannot be effectively enforced. For temporary migrant workers, this requires much more than the provision of information. To be empowered to enforce their rights, these workers require the ability to collectively organize (especially in unions); easy access to support and effective and affordable enforcement avenues; and an enforcement authority dedicated to protecting their rights, working in concert with other organisations. Key measures include:

- The provision of information concerning their workplace rights that is tailored to their employment circumstances (e.g. country of origin, job, industry and key award conditions) including through the use of apps and social media;

- Access to organisations that support these workers – particularly unions - including being put in contact with these organizations at the pre-departure and post-arrival stages;
- Adequate and long-term funding for these organisations (including for an integrated referral system and face-to face programs aimed at effective representation and building trust and knowledge amongst migrant worker communities);
- Effective enforcement of the provisions of the *Fair Work Act* protecting the ability of workers to join, participate in and act through trade unions;
- Extending unions’ right of entry to all workplaces where breaches of the *Fair Work Act* is reasonably suspected (including the ability to inspect documents related to these breaches); and
- Extending the small claims jurisdiction under the *Fair Work Act* to enable worker enforcement of non-monetary obligations under the Act (including obligations relating to Fair Work Information Statement, record-keeping and pay slips and Chapter 3 of the Act);
- The Fair Work Ombudsman being responsible for enforcement of sponsorship obligations relating to working conditions under the *Migration Act 1958* (Cth) rather than the Department of Immigration and Border Protection; and
- Specific measures for workers at risk of removal from Australia for working without a visa or in breach of visa conditions (including an obligation on the Department of Immigration and Border Protection to put them in contact with the Fair Work Ombudsman and assistance by the Ombudsman to these workers in enforcing their workplace rights and recovering unpaid entitlements in a timely manner).

4. Regulate ‘high risk’ areas

The exploitation of temporary migrant workers is concentrated in ‘cash-in-hand’ jobs. It is also particularly acute with contracting and labour-hire arrangements and situations where employment is bound up with the provision of accommodation (as is the case with many Working Holiday visa workers). The higher penalties for breaches of pay-slip and record-keeping obligations provided by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (*Protecting Vulnerable Workers Act*) are welcome here. Further measures to deal with these ‘high risk’ areas should include:

- Stronger provisions to guarantee that the protection of the *Fair Work Act* apply to all workers who are not genuine independent contractors;
- A national licensing scheme for labour-hire agencies;
- Stronger regulation of providers of accommodation to Working Holiday visa workers (including accommodation standards and regulation of employment-related representations).

5. Prevent employers profiting from law-breaking

The *Fair Work Act* presently allows some employers to profit from breaching the Act due to the low likelihood of being caught and the inadequate penalties that apply if they are caught (especially in relation to pay-slip and record-keeping obligations). The increased penalties provided by the *Protecting Vulnerable Workers Act* go some way to addressing these gaps. So do its provisions reversing the onus of proof when the

employer has breached its pay-slip and record-keeping obligations. The latter provisions, however, open up a potential loophole for employers to defeat the legitimate claims of workers by not reversing the onus where there is a 'reasonable excuse'. Rather:

- The onus of proof should be reversed when the employer has breached its pay-slip and record-keeping obligations in all circumstances.

6. *Ensure that beneficiaries of work are accountable when they are able to influence employment practices*

The *Fair Work Act* principally seeks to mitigate the power imbalance between workers and employers, thereby largely imposing legal responsibility on employers. While this focus is appropriate for simple bilateral relationships between employers and employees, it is ill-adapted to work relationships where entities other than the employer have significant power (main contractors; labour-hire agencies; franchisors; platform providers; accommodation providers), allowing dominant market actors to be free from legal responsibility for the employment practices they shape, and at times control. The principle here should be that those who benefit from work performed (beneficiary entities) should be legally responsible according to their level of influence over employment practices. This principle could be implemented by:

- Extending the provisions enacted by the *Protecting Vulnerable Workers Act* dealing with responsible franchisor entities and holding companies to beneficiary entities more generally; or
- Extending section 550 of the *Fair Work Act* (accessorial liability) to beneficiary entities with responsibility being commensurate to the level of influence that the entity exercises over employment practices.

7. *Recognise that with the passage of time temporary migrant workers can become settled members of Australian society*

There are strong reasons to prefer permanent to temporary migration not least because of Australia's deep tradition as a country of permanent settlement and the distinctive vulnerability experienced due to 'temporariness'. Greater efforts should, however, be made to recognize long-term temporary migrants as members of Australian society. While many temporary migrant workers remain in Australia for just a few months or years, others are only 'temporary' in the sense they hold a temporary visa. Often they will have lived in Australia for five or more years as they renew visas or transition from one visa type to another. These 'temporary' migrants contribute to Australian society in myriad ways such as building the economy, increasing government revenues and enlivening the culture. In short, over time they become settled residents. This implies that there should be a threshold number of years after which:

- Long-term temporary migrant workers have access to the same services as Australian permanent residents; and
- There is a secure pathway to permanent residence and eventual citizenship.

These measures will assist in combating exploitation of temporary migrant workers as social marginalization often contributes to exploitation.