



11 November 2022

## Submission: *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth)*

We welcome the opportunity to make a submission regarding the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth)* (**Bill**).<sup>1</sup>

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

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

### Introduction

This submission focusses on elements of the Bill that can address migrant worker exploitation, and additional measures that are required.

The government has committed to implementing the recommendations of the 2019 Migrant Workers' Taskforce' (MWT).<sup>2</sup> The MWT Report recognised that exploitation of migrant workers in

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<sup>1</sup> We would like to acknowledge the excellent research assistance and editing of Natasha Grant, and thank her for her assistance in preparing this submission.

<sup>2</sup> [Jobs and Skills Summit – Outcomes Paper](#), 4; ALP Policy, [Pacific Australia Labour Mobility](#).

Australia is widespread and endemic in numerous industries. Our 2016 survey of over 4000 temporary visa holders, cited in the MWT Report, found at least a third earned less than \$12 an hour.<sup>3</sup> Nine in ten underpaid migrant workers suffered wage theft in silence and took no action because immigration and labour laws do not encourage these workers to come forward and do not routinely deliver just remedies when they do. Our 2019 survey of over 5000 temporary visa holders revealed similar prevalence of severe wage theft. Exploitation not only harms temporary migrant workers (about 7% of our workforce<sup>4</sup>), it also drives conditions down for Australian workers and undercuts businesses who are doing the right thing. Systemic exploitation of migrant workers also creates conditions for forced labour and modern slavery.

We commend the Government's commitment to boosting bargaining, improving job security and strengthening protections for workers (as set out in the Explanatory Memorandum<sup>5</sup>), and we welcome many of the reforms contained in the Bill, including increased access to collective bargaining, which will improve conditions for all workers including migrant workers. We also welcome the provisions of the Bill which implement MWT Report Recommendation 4 (prohibiting advertisements of wages below the legal minimum), and the small changes to the small claims process (the subject of a much broader Recommendation 12).

We understand that broader reforms are expected next year to fulfill the Government's commitment to implementing the MWT Recommendations. Nevertheless, in our view, this Bill presents a missed opportunity to introduce stronger protections for migrants and other vulnerable workers to address the drivers of exploitation and give effect to a broader range of MWT Recommendations.

This submission proposes amendments to the provisions in the Bill that would reduce exploitation and improve working conditions for migrant workers and other vulnerable workers. **Part One** focuses on our recommendations to strengthen the proposed amendments in the Bill, including in relation to the objects of FW Act, the small claims process, and the prohibition on advertisements that contravene the FW Act. **Part Two** focuses on further straightforward amendments to the FW Act that should be introduced in this Bill, and that are required to give effect to the MWT Recommendations. In particular, we recommend that the FW Act be amended to (1) confirm that it applies regardless of undocumented immigration status, (2) require that workers be provided with a statement of their terms and conditions when commencing employment, and (3) strengthen accessorial liability provisions.

In addition to these amendments, further reforms must be introduced in the Government's

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

<sup>4</sup> Will Mackey, Brendan Coates and Henry Sherrell, *Migrants in the Australian Workforce: A Guidebook for Policy Makers* (Grattan Institute, May 2022) 155.

<sup>5</sup> Bill, Explanatory memorandum, iii.

second tranche of reforms in 2023<sup>6</sup> in order to give effect to the MWT Recommendations and address the broader structural drivers of migrant worker exploitation. These should include introducing whistleblower protections and other immigration settings that reduce exploitation;<sup>7</sup> establishing a fair, fast and effective mechanism to resolve worker wage claims; reforms to the Fair Work Ombudsman (**FWO**), including increased resourcing to establish a wage calculation service and dedicated support for migrant workers, and a trial scheme of binding determinations; establishing a national licensing scheme for labour hire; and establishing meaningful commercial consequences for employers that continue to exploit workers. We are currently preparing detailed Policy and Research Briefs on these measures, and particular Briefs can be prioritised upon request. A short description of these reforms is set out in **Annexure 1** to this submission.

We look forward to working with the Government over the coming months to ensure that its further amendments<sup>8</sup> effectively curb exploitation and provide meaningful protection for migrant workers, and in turn, all workers.

## Summary of Recommendations

### Part 1: Amendments to current Bill provisions

- **Recommendation 1**

**Objects of the Act:** In addition to promoting secure work and gender equity, amendments to the objects of the FW Act should include the promotion of decent work and eliminating exploitation of vulnerable workers (including by ensuring that, where possible, remediation should extend beyond penalties and individual compensation to address the systemic causes of non-compliance).

- **Recommendation 2**

**Small claims reform:** In addition to enabling successful claimants to recover filing fees as costs, successful claimants should be able to recover their legal costs.

- **Recommendation 3**

**Advertisements:** To ensure that the proposed prohibition captures the ways that many employers 'advertise' jobs, a legislative note should confirm that prohibited advertising includes any written communication by employers to potential employees, including via online apps and social media.

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<sup>6</sup> Minister Burke, Second Reading speech, 27 October 2022, 9: 'This bill is just the start of the government's reform of workplace relations, with a second tranche next year.'

<sup>7</sup> Migrant Justice Institute, *Breaking the Silence: A proposal for whistleblower protections to enable migrant workers to address exploitation* (November 2021).

<sup>8</sup> Minister Burke, Second Reading speech, 27 October 2022, 4.

## Part 2: The Bill should include further amendments to the FW Act:

- **Recommendation 4**

**Legal protection for all workers:** To effectively implement **MWT Rec 3**, the FW Act must be amended to confirm that it applies regardless of undocumented immigration status.

- **Recommendation 5**

**Information and transparency:** To implement **MWT Rec 2** (in part) and ensure that workers are aware of their specific rights and entitlements and able to identify their employing entity if they wish to bring a claim, the FW Act should be amended to require employers to provide each worker with a statement of specific working conditions (Award, wage rates, hours etc.) and employer contact details (including address for service) upon commencement, and to itemise deductions on payslips.

- **Recommendation 6**

**Legal responsibilities for individuals & supply chains:** **MWT Rec 11** proposes that the government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws. This can be achieved by strengthening existing accessorial liability and responsible franchisor provisions, extending the responsible franchisor provisions to apply more broadly to supply chain and subcontracting arrangements, and introducing a positive duty to provide and maintain a working environment that complies with the FW Act. We recommend that this Bill strengthen the accessorial liability provisions and extended coverage to responsible supply chain entities, with the introduction of a positive duty to follow in future amendments.

## PART 1

### Objects of the FW Act

As the Explanatory Memorandum explains, the Bill proposes amendments to 'introduce the promotion of job security and gender equity into the objects of the FW Act' to 'place these considerations at the heart of the FWC's decision-making, and support the Government's priorities of delivering secure, well-paid jobs and ensuring women have equal opportunities and pay'.<sup>9</sup>

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<sup>9</sup> Bill, Explanatory memorandum, [6], [333].

The objects provisions of the FW Act critically inform statutory interpretation, and shape institutions' performance of their daily functions and exercise of their legal powers, including in dispute resolution.<sup>10</sup> As the Victorian Equal Opportunity and Human Rights Commission notes in respect of the objects provisions of the *Equal Opportunity Act 2010* (Vic) (**EOA**), objectives are 'not merely aspirational statements. Rather, they are important tools...'.<sup>11</sup> One anti-discrimination law expert has concluded that the Act's objectives have influenced the interpretation of discrimination and substantive equality in Victorian caselaw.<sup>12</sup> In particular, this has been done through amendments to the objects clauses which specify the degree to which discrimination is to be eliminated (to the greatest possible extent) and focus on the progressive realisation of equality.<sup>13</sup>

We welcome this Bill's proposed changes to the objects clause in the FW Act, but strongly recommend further amendments which are necessary in order to give effect to the Government's commitment to "tackl[ing] the exploitation and mistreatment of temporary migrant workers".<sup>14</sup> This includes expanding the proposed amendments to the objects clause of the FW Act to include: the promotion of decent work; eliminating exploitation of vulnerable workers to the greatest extent possible; and ensuring remediation addresses the systemic causes of non-compliance beyond penalties and individual compensation (**Recommendation 1**). These objects recognise that a core function of labour law is to address the power imbalance between workers and employers. In addition, a level playing field among employers requires elimination of widespread and systemic non-compliance with the FW Act.

Informed by the objects of the Victorian EOA, we recommend that the objects of the FW Act be further amended to:

- **promote decent**<sup>15</sup> **work**. A new FW Act object should be inserted as follows:

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

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

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<sup>10</sup> Bill, Explanatory memorandum, [334].

<sup>11</sup> Victorian Equal Opportunity and Human Rights Commission, 'Explainingthisresource', *AustLII Communities* (10 September 2019) <<https://austlii.community/foswiki/VicDiscrimLRes/Explainingthisresource>>.

<sup>12</sup> Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the "Equal Opportunity Act 2010" (Vic)' (2021) 44(2) *Melbourne University Law Review* 459, 497.

<sup>13</sup> *Ibid*, 478-479.

<sup>14</sup> ALP Policy, [Pacific Australia Labour Mobility](#).

<sup>15</sup> Decent work could be defined in accordance with recognised ILO principles of decent work including a fair income, job security and equality of opportunity. See for example 'Decent Work', *International Labour Organization* <<https://www.ilo.org/global/topics/decent-work/lang-en/index.htm>>.

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

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

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

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

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

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

For completeness, sample drafting is set out at the end of this document.

## Proposed small claims reforms

The vast majority of migrant workers cannot pursue wage claims against an employer in court because each stage of the judicial process is stacked against them. **MWT Rec 12** recommends that the government consider how the FW Act small claims process can more effectively deliver wage recovery to a large number of underpaid migrant workers.

We welcome the Bill’s proposed increase to the monetary cap on small claims matters, as well as the amendment which permits an applicant to recoup their filing fee from their employer if their claim is successful. However, much more needs to be done to ensure fair, fast and effective remediation of worker wage claims.

In the context of this Bill’s amendment to costs, we recommend that the Court be empowered to order as ‘costs’ not only a reimbursement of filing fees but also legal costs incurred by a worker. As set out in the Explanatory Memorandum, the ability for a worker to ‘apply to get any filing fees they have paid to the court back from the other party (as costs)’ seeks to ‘ensure they are not initially deterred from bringing small claims proceedings due to cost, and they keep more of any

compensation that the court awards to them.<sup>16</sup> This measure only goes a small way towards achieving the stated policy objective of removing cost-based deterrents from litigation.

It is widely accepted that the vast majority of vulnerable workers cannot bring a claim without legal assistance. Even with the simplified processes of the small claims jurisdiction, the procedural requirements for an applicant (identifying the legal entity of their employer, serving the application, determining legal pay rate, calculating underpayments, filling out a claim form etc.) are impossible for most. Without assistance from an employment lawyer, union or a community service, these workers are unable to enforce their rights. In a no-costs jurisdiction, there is no financial incentive for private lawyers to support this essential enforcement work. Even if a worker is successful in pursuing a claim, they incur great financial and nonfinancial cost simply to recover what they were entitled to in the first place. From this, the worker must deduct the cost of legal representation if they engage a private lawyer, which, given the resource-intensive work of calculating and pursuing wage claims, is often prohibitively expensive. This is especially the case in the small claims jurisdiction, where the amounts sought are relatively low and there is no opportunity to seek or receive general damages or penalties.

To be clear, we propose a one-way cost shifting - not a shift to costs following the event in small claims (or any FW Act) matters. The potential for an adverse costs order would prevent many vulnerable workers from taking action at all.<sup>17</sup> A one-way costs shifting<sup>18</sup> or 'equal access model' to costs which takes an 'asymmetric approach'<sup>19</sup> is the most appropriate way to make the small claims jurisdiction accessible for vulnerable workers.

In the United States, the Fair Labor Standards Act requires the employer to pay a worker's attorney's fees and costs where the worker is successful.<sup>20</sup> If a worker is unsuccessful each party will bear its own costs.<sup>21</sup> In this context, one-way fee-shifting has been recognised as a means to encourage greater private enforcement of worker rights as important societal interests:<sup>22</sup>

*Congress has acknowledged the important societal role these statutory protections provide and has created incentives to encourage private enforcement of public goods through statutory fees, shifting costs, and statutory penalties. For example, the statutory*

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<sup>16</sup> Bill, Explanatory memorandum, [115].

<sup>17</sup> As noted by Associate Professor Tess Hardy, one-way costs shifting can ensure that 'the prospect of having an adverse costs order awarded claimants does not inhibit access to justice': Tess Hardy, [Submission 85](#) to the Inquiry into Unlawful underpayment of employees' remuneration, 13.

<sup>18</sup> See for example, Associate Professor Tess Hardy, [Submission](#) to the Senate Standing Committee on Economics Unlawful Underpayment of Employees' Remuneration Inquiry, February 2020, [37].

<sup>19</sup> Melanie Schleiger, Victoria Legal Aid, in '[Jenkins defends "cost neutral" harassment cases](#)', *Workplace Express*, 2 November 2022.

<sup>20</sup> Bassina Farbenblum and Laurie Berg, [Migrant Workers' Access to Justice for Wage Theft: A global study of promising initiatives](#). (Migrant Justice Institute, 2021), 31; *Fair Labour Standards Act of 1938*, 19 USC §216(b).

<sup>21</sup> *Ibid*.

<sup>22</sup> Nantiya Ruan, '[Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers](#)' (2010) 63(3) *Vanderbilt Law Review* 727.

*regime relies upon plaintiffs' attorneys to act as "private attorneys general" to vindicate important societal interests by allowing one-way fee-shifting in order to encourage prosecution of these rights.*

In the D.C. area, fee shifting has been paired with statutorily enshrined lawyer fees. It is reported that this approach has greatly improved access to justice for workers, particularly those with smaller claims:<sup>23</sup>

*According to worker-side employment lawyers in the D.C. area, this fee-shifting provision has expanded access to legal representation by making a broader range of cases financially feasible. As Michael Amster, a partner at a local employment law firm, explains, the law "allow[s] us to take cases that we otherwise wouldn't take. It allows us to be able to justify taking smaller cases. Because frankly, in a lot of these cases you're dealing with people who are making very little money and sometimes what is owed to them is not that much." Those smaller cases are now more viable because the law has created a higher return for lawyers.*

One-way cost-shifting for small claims would not open litigation floodgates because the worker still risks a costs order against them if they bring a claim vexatiously or without reasonable cause, in addition to the investment of significant time and effort required to pursue a claim.<sup>24</sup>

Accordingly, we propose the following amendment to the Bill:

*653 At the end of section 548*

*Add:*

*Costs for filing fees paid in relation to the proceedings*

*(10) If the court makes an order (the small claims order) mentioned in subsection (1) against a party to small claims proceedings, the court may make an order as to costs against the party for any filing fees paid to the court or legal fees paid by the party that applied for the small claims order.*

Finally, we welcome the allocation of funding in the Budget to review and improve the small claims process to better support the recovery of unpaid entitlements more broadly and identify further reform opportunities.<sup>25</sup>

We look forward to working with the Government on this review and have developed evidence-based recommendations to improve the small claims process and resolution of worker wage

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<sup>23</sup> Matthew Fritz-Mauer, 'The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm' (2021) 54(3) University of Michigan Journal of Law Reform 735, 762.

<sup>24</sup> *Fair Work Act 2009* (Cth), s 570.

<sup>25</sup> Portfolio Budget Statements 2022-23, [Employment and Workplace Relations Portfolio](#), 15.



claims more generally, some of which are set out at a high level in **Annexure 1**.

## Advertisements

We welcome the implementation of **MWT Rec 4** to prohibit advertisements with pay rates that would contravene the FW Act.

However, to be effective, the proposed prohibition must clarify that ‘advertise’ includes the common ways that employers informally promote jobs to migrant workers, particularly via online apps (such as WhatsApp and WeChat) and social media (such as Facebook). This could be achieved by defining ‘advertise’ to include posting job information on online apps and social media (or through a legislative note to the same effect).

We note that the Explanatory Memorandum says that the ‘prohibition is not limited to any particular advertising mediums (e.g. print, broadcast, outdoor, digital etc). However, informal communications made outside a business context are unlikely to involve advertising, as that term is ordinarily understood (e.g. word of mouth).’<sup>26</sup> This is not sufficiently clear to capture the myriad of ways that employers share information about jobs and rates of pay and creates a loophole that will simply divert more recruitment into underpaid jobs into these channels.

## PART 2

A number of further amendments are required to give effect to the MWT Recommendations. This part of the submission focuses on three key amendments that can readily be included in this Bill. As noted above, we propose that several further critical measures be introduced in the government’s foreshadowed legislative reform package in 2023 (see **Annexure 1**).

## Legal protection for all workers

There is conflicting caselaw as to whether undocumented workers are entitled to protections of the *Fair Work Act 2009* (Cth), state workers compensation legislation and other workplace laws including anti-discrimination laws.<sup>27</sup> This has created a loophole through which employers can freely exploit and underpay undocumented workers and evade paying compensation for workplace injuries in relation to those workers.

Working without permission under the *Migration Act 1958* (Cth) (**Migration Act**) - whether as a visa overstayer, or working in breach of a visa condition on an otherwise valid visa – is a criminal offence, set out in s 235 of the Migration Act. Generally, in caselaw across multiple states, the pre-eminent approach has been to hold an employment contract performed in breach

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<sup>26</sup> Bill, Explanatory memorandum, [1110].

<sup>27</sup> *WorkCover Corporation v Da Ping* (1994) 175 LSJS 469; *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312; *Australia Meat Holdings v Kazi* [2004] QCA 147; *Lal v Biber* [2021] FCCA 959.

of the statutory s 235 offence void for illegality and therefore unenforceable. This means not only that an undocumented worker would not be entitled to remuneration for work performed under the contract, but also that they would be ineligible for statutory protections under the FW Act, which extend only to employees defined as those who hold valid contracts of employment (s 11). **MWT Rec 3** recommends that the FW Act be amended to confirm that it applies regardless of undocumented immigration status.<sup>28</sup> This amendment should be included in the current Bill.

In addition to implementation of this MWT recommendation, s 235 of the Migration Act should itself also be amended to clarify that commission of this offence does not render protections under other federal or state statutes unenforceable. An amendment to the Migration Act is preferable to an amendment to the FW Act alone because it would provide certainty that commission of this offence does not nullify a worker's entitlements across numerous state and federal labour laws, including workers' compensation and anti-discrimination laws, as well as the FW Act. Nevertheless, for avoidance of doubt and for the important signal it sends, the FW Act should also be amended to clarify that it applies to workers regardless of immigration status and regardless of any contraventions of the Migration Act.

## Information and transparency

Many migrant workers (and other vulnerable employees) are impeded from pursuing underpayment claims against an employer because they cannot identify the applicable Award or enterprise agreement, or their minimum rate of pay, or whether any wage deductions were lawful. If they overcome these obstacles, many cannot identify the legal identity of their employing entity, or how to serve court documents on them, especially when employers engage vulnerable workers through complex commercial arrangements and trusts. There are straightforward amendments that could be included in this Bill to address these barriers to migrant workers enforcing their rights.

**MWT Recs 2 and 15-18** recommend improved education and information for international students. For a start, the FW Act should be amended to require employers to provide each worker with a tailored statement of working conditions upon commencement of employment. As suggested by Charlesworth and Campbell,<sup>29</sup> this 'Statement of Terms and Working Conditions' should include 'job title (and classification), wage rates, working-time conditions including applicable premia for overtime and unsocial hours of work, type of employment and the name of the relevant regulatory instrument (e.g., award, enterprise agreement)'. It should also include the name, ABN and address for service of the employing entity. Similar obligations exist already in New Zealand, the UK and EU countries.<sup>30</sup>

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<sup>28</sup> Migrant Workers Taskforce, [Final Report](#) (7 March 2019), Recommendation 3.

<sup>29</sup> Iain Campbell and Sara Charlesworth, *The National Employment Standards: An Assessment* (2020) 33 AJLL 36.

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

In New Zealand, under the Employment Relations Act 2000, a written employment agreement must be provided to employees and must include certain terms including the names of the employee and employer, a description of the work to be performed and wages payable. Failure to provide such an agreement can result in an action brought by the Labour Inspector or a penalty.<sup>31</sup>

*Good employment relationships start with a good recruitment process so that the employee and employer have the same expectations about the role and working conditions.*

*A well written employment agreement helps the employee and employer to know what is expected from them and what they're entitled to. This means misunderstandings are less likely to happen and if a problem does come up then the employee and employer can go to the employment agreement to clarify things.*

The EU Directive on Transparent and Predictable Working Conditions requires EU Member states to implement national laws placing obligations on employers to provide information regarding essential terms and conditions of employment.<sup>32</sup>

*'The most essential terms, such as the identity of the contractual parties, remuneration, and working hours, must be provided within the first seven days of employment. The remaining terms (described below) should be communicated within the first month. In Germany, some information, such as the employer's (legal) name and address, the remuneration, and the agreed-upon working hours, even must be provided by the first day of employment at the latest.'*

In the UK, there is a longstanding requirement under s 1 of the UK Employment Rights Act 1996 that employees are given a 'written statement of employment', which must contain certain terms. Recent changes to the law have extended this obligation to provide a statement to all workers – not just employees, as well as requiring that the statement include information about paid leave entitlements in addition to other details of employment.<sup>33</sup> This came in the wake of a major review of modern work practices in 2017 which found that greater transparency of rights, delivered through an expanded and accessible 'written statement of employment', would improve clarity, certainty and understanding for the most vulnerable workers.<sup>34</sup>

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<sup>31</sup> Employment Relations Act 2000 s 65; 'Employment Agreements', Employment New Zealand (23 September 2021) <<https://www.employment.govt.nz/starting-employment/employment-agreements/>>.

<sup>32</sup> Christin Dunkel and Hanno Timmer, '[New Requirements for Employment Agreements in Europe](#)', Lexology (6 October 2022).

<sup>33</sup> Ibid.

<sup>34</sup> Matthew Taylor, '[Good Work: The Taylor Review of Modern Working Practices](#)' (Department for Business, Energy & Industrial Strategy, United Kingdom, 11 July 2017) 116, 39.

Campbell and Charlesworth recommend that template documents be introduced to reduce the regulatory burden imposed by a compulsory statement.<sup>35</sup> These could be prepared and maintained by the FWO.

To ensure compliance with the new provision, we recommend that failure to provide a Statement be a civil remedy provision. Such failure should also lead to a reverse onus of proof if a worker brings a claim in court, such that if an employer fails to provide a statement, they will bear the burden of disproving an employee's allegations.<sup>36</sup>

The FW Act should also be amended to require employers to itemise deductions on each payslip, this is particularly important for PALM scheme workers. Currently, under subsection 2 of regulation 3.46 of the *Fair Work Regulations 2009* (Cth) (**FW Regulations**), if 'an amount is deducted from the gross amount of the payment, the pay slip must also include the name, or the name and number, of the fund or account into which the deduction was paid'. However, for many workers, more than one deduction is made, but one total amount is listed and it is unclear what the various deductions are made for, or how much each deduction is. If employers were required to itemize deductions, misunderstandings could be more easily resolved and unlawful deductions could be more easily identified. We propose an amendment to subsection 2 which states

*If an amount is deducted from the gross amount of the payment, the payslip must also include the name, or the name and number, of the fund or account into which the deduction was paid, a description of what the deduction was made for, and if deductions are made for more than one reason, an itemised list of each deduction and the amount deducted for each item.*

## Legal responsibilities for individuals & supply chains

The FW Act is no longer fit for purpose because it focuses primarily on regulating the direct employer-employee relationship. Businesses have few responsibilities for workers they do not directly employ and can easily establish business arrangements that evade liability.<sup>37</sup> The

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<sup>35</sup> Iain Campbell and Sara Charlesworth, *The National Employment Standards: An Assessment* (2020) 33 AJLL 36, 51.

<sup>36</sup> This proposal is modelled on the existing reverse onus that exists in relation to record keeping (see section 557C of the FW Act). Further drafting would be needed to consider how the record keeping and Statement provisions interact (for example, if an employer keeps records as required under section 535, but fails to provide a Statement), however the exception that currently exists under ss 557C(2) states that the reverse onus does not apply if an employer has a 'reasonable excuse' for non-compliance, and this would continue to ensure that employers are not penalised unfairly.

<sup>37</sup> Associate Professor Tess Hardy notes that 'it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions', Tess Hardy,

Government must introduce measures that establish legal responsibilities for individuals and entities with decision-making or commercial leverage to prevent and remedy contraventions.

**MWT Rec 11** proposes that the government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws. This can be achieved by strengthening existing accessorial liability and responsible franchisor provisions, extending the responsible franchisor provisions more broadly to supply chain and subcontracting arrangements, extending the successful outworker provisions to certain high-risk industries, and establishing a positive duty to identify and reduce the risks of FW Act non-compliance.

We have developed detailed recommendations in relation to each of the above reforms which should be introduced in the Government's second tranche of reforms in 2023. An overview of these reforms is contained in **Annexure 1**, and further details can be provided upon request. For the purposes of this Bill, we recommend that the accessorial liability provisions in section 550 be reformed as a matter of urgency.

To be held accountable for contraventions in relation to non-direct employees under current accessorial liability provisions, relevantly, a person must be found to be 'knowingly concerned in or party to the contravention'.<sup>38</sup> That is, a person must have *actual knowledge* of a contravention. This perversely incentivises businesses and individuals to evade liability by deliberately failing to take reasonable steps to detect and prevent exploitation and remain 'in the dark' – all the while profiting from cheap labour and unlawful conduct.

We recommend amendments to section 550 to close this loophole. Proposed reforms will remove the tension that currently exists between the general accessorial liability provisions in section 550 (which reward wilful blindness), and the responsible franchisor provisions in section 558B (which encourage responsible franchisors to take proactive steps to detect and address non-compliance). As Hardy notes:<sup>39</sup>

*while a proactive stance may save [franchisors] from liability under s 558B, this same conduct may expose them to possible liability under s 550 of the FW Act. This further complicates an already difficult strategic choice for franchisors, namely whether to prioritise brand protection or liability minimisation. More importantly, it is not yet clear how the regulator, and the courts, will look to resolve this tension.*

We suggest that in addition to existing accessorial liability provisions, the law should clarify that individuals and entities will be held liable as accessories if they knew or could reasonably be

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Submission No 62 to Senate Inquiry, The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, 8.

<sup>38</sup> *Fair Work Act 2009* (Cth), s 550(2)(c).

<sup>39</sup> Hardy, Tess, 'Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks' (2019) 32(1) *Australian Journal of Labour Law* 62, 77.

expected to have known that the contravention (or a similar contravention) may occur. A defence would be available to those that can establish that they took reasonable steps to prevent the contravention. Accessories should be held liable if they became aware of a contravention but failed to rectify it.

This reform will incentivise proactive compliance with the laws and a proactive approach to risk minimization, sending a strong message to those with leverage that they will not escape liability by turning a blind eye.

Sample drafting is set out **below**. We propose that further changes to responsible franchisor provisions, changes to specifically cover responsible supply chain entities, and the introduction of a positive duty, be introduced next year.

## Conclusion

Thank you for the opportunity to comment on this Bill.

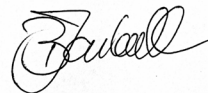
Our evidence-based amendments and additions will strengthen the impact of the Bill for migrant workers, and offer straightforward mechanisms to implement MWT recommendations.

We would welcome the opportunity to discuss this submission and our further recommendations with the Committee, and look forward to working with the government to develop further reforms in 2023.

Sincerely,



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## Sample drafting - objects

| FW Act Section | Proposed changes (marked up)   |
|----------------|--|
| 3              | <p>Object of this Act</p> <p>The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:</p> <p>(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and</p> <p><u>(b) promoting and facilitating the progressive realisation of secure and decent work, as far as reasonably practicable, including by recognising that—</u></p> <p style="padding-left: 40px;"><u>(i) insecure and indecent work can cause social and economic disadvantage and that access to secure and decent work is not equitably distributed throughout society; and</u></p> <p style="padding-left: 40px;"><u>(ii) vulnerable workers (who may include those in low-paid industries, from culturally and linguistically diverse and/or non-English speaking backgrounds, those who have difficulty reading or writing, those on temporary visas, and young workers) face additional barriers and needs in accessing secure and decent work.</u></p> <p><del>(b)</del> <u>(c) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders, and eliminating exploitation of vulnerable workers and non-compliance with such minimum terms and conditions to the greatest possible extent; and</u></p> <p><del>(c)</del> <u>(d) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and</u></p> <p><u>(e) encouraging the identification and elimination of systemic causes of exploitation and non-compliance with minimum terms and conditions; and'</u></p> <p><del>(d)</del> <u>(f) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and</u></p> <p><del>(e)</del> <u>(g) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and</u></p> |

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|--|--|
|  | <p><del>(f)</del> (h) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and</p> <p><del>(g)</del> (i) acknowledging the special circumstances of small and medium-sized businesses.</p> |
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## Sample drafting – accessorial liability

| FW Act Section | Proposed changes (marked up)  |
|----------------|---|
| 550            | <p><b>550 Involvement in contravention treated in same way as actual contravention</b></p> <p>(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.</p> <p>Note: If a person (the <b>involved person</b>) is taken under this subsection to have contravened a civil remedy provision, the involved person’s contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).</p> <p>(2) A person is <b>involved in</b> a contravention of a civil remedy provision if, and only if, the person:</p> <ul style="list-style-type: none"> <li>(a) has aided, abetted, counselled or procured the contravention; or</li> <li>(b) has induced the contravention, whether by threats or promises or otherwise; or</li> <li>(c) has been in any way, by act or omission, directly or indirectly, <del>knowingly</del> concerned in or party to the contravention; or</li> <li>(d) has conspired with others to effect the contravention.</li> </ul> <p><u>(3) For the purposes of paragraph (2)(c), a person is concerned in a contravention if they:</u></p> <ul style="list-style-type: none"> <li><u>(a) knew; or</u></li> <li><u>(b) could reasonably be expected to have known, that the contravention, or a contravention of the same or a similar character would or was likely to occur; or</u></li> <li><u>(c) became aware of a contravention after it occurred, and failed to take reasonable steps to rectify the contravention.</u></li> </ul> <p><u>(4) For the purposes of paragraph 3(b), a person will not be taken to be reasonably expected to have known that the contravention, or a contravention of the same or a similar character would or was likely to occur if, as at the time of the contravention, the person had taken reasonable steps to prevent a contravention of the same or a similar character.</u></p> <p><u>(5) For the purposes of subsection (4), in determining whether a person took reasonable steps to prevent a contravention of the same or a similar character, a</u></p> |



court may have regard to all relevant matters, including the following:

(a) the size and resources of the person;

(b) the extent to which the person had the ability to influence or control the contravening person's conduct in relation to the contravention or a contravention of the same or a similar character;

(c) any action the person took directed towards ensuring that the contravening person had a reasonable knowledge and understanding of the requirements under this Act;

(d) the person's arrangements (if any) for assessing the contravening person's compliance with this Act;

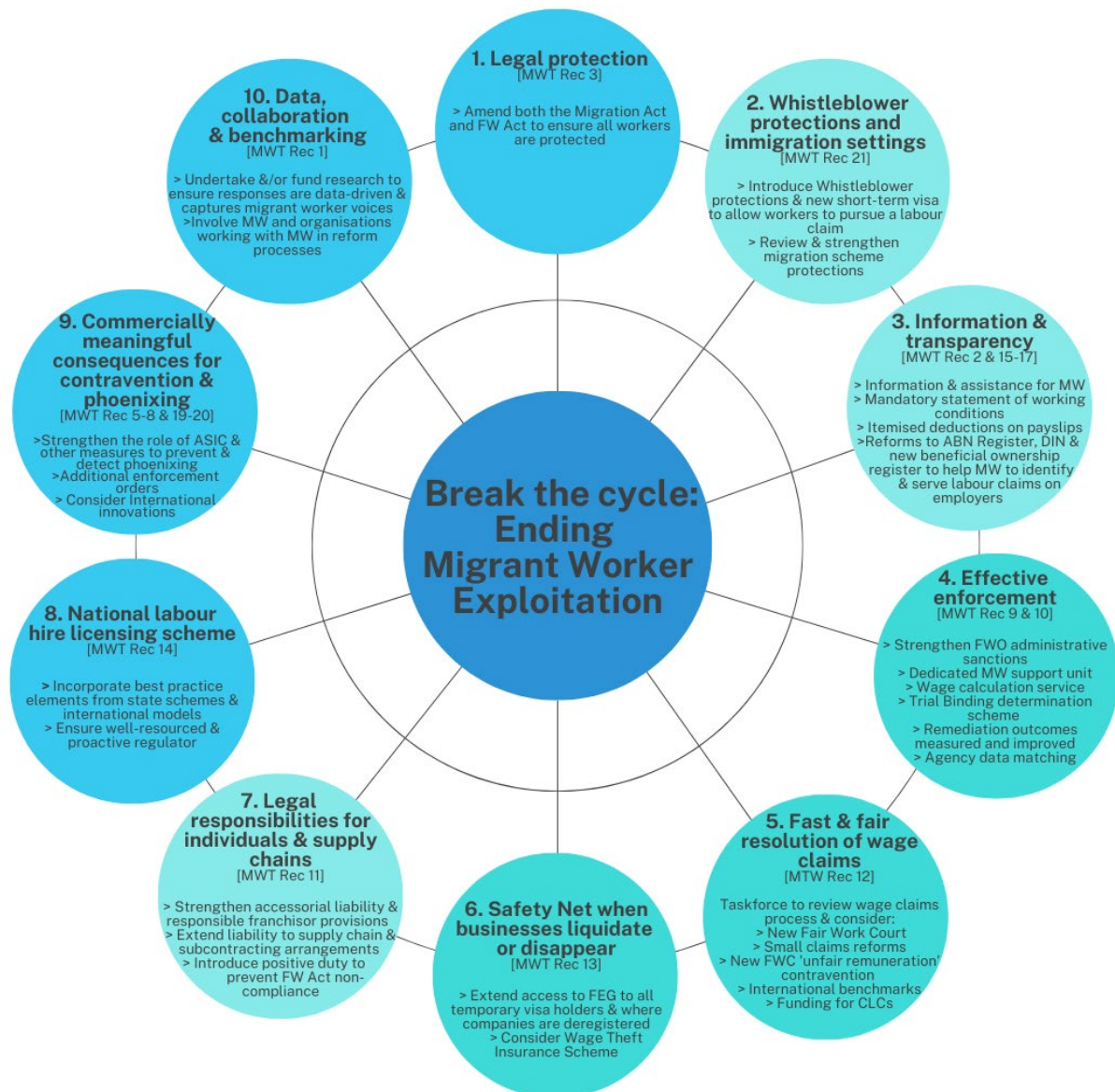
(e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this

Act;

(f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening person encourage or require the contravening person to comply with this Act or any other workplace law.

# Annexure 1: Further reforms needed to implement MWT recommendations and effectively address migrant worker exploitation.

Beyond our proposed changes to the Bill, this Annexure summarises further reforms needed to implement MWT recommendations and effectively address migrant worker exploitation. Further details, including Research and Policy Briefs, can be provided upon request.



## Whistleblower protections and other immigration settings that reduce exploitation

As set out in our widely endorsed Policy and Research Brief, to implement **MWT Rec 21** (a review of the Assurance Protocol including consideration of additional measures), we recommend new protections against visa cancellation for migrant worker whistleblowers who address exploitation<sup>40</sup> and a new short-term visa to enable migrant workers to remain in Australia to pursue meritorious labour claims. We also propose increased portability of employer sponsored workers (including a longer period to find an alternative sponsor) and a review and strengthening of temporary migration scheme protections.

## Effective enforcement

To implement **MWT Recs 9 & 10**, we recommend various measures to ensure effective detection and compliance activities by the Fair Work Ombudsman (**FWO**) including systemic deterrence and individual outcomes for exploited migrant workers. This includes a comprehensive review of FWO's resources, purpose and effectiveness with a particular focus on vulnerable workers; the establishment of a dedicated migrant worker support unit including a wage calculation service for vulnerable workers; strengthened administrative sanctions; and consideration of a trial scheme whereby FWO can make binding determinations on labour hire firms based on their licensing conditions within a new federal labour hire licensing scheme (drawing on the Australian Financial Complaints Authority model).

## Fair, fast and effective resolution of worker wage claims

To implement **MWT Rec 12**, we recommend that the Government immediately reform the small claims process (beyond the limited changes proposed in this Bill) and establish a taskforce to identify the best model for an accessible forum that facilitates efficient and effective remediation of wage claims in the longer term. Options for reform include further changes to the current system, the establishment of a new Fair Work Court in tandem with the Fair Work Commission (**FWC**) and/or the establishment of broader jurisdiction in the FWC to resolve underpayment disputes through a new 'unfair remuneration' contravention in the FW Act.

## A safety net when businesses liquidate or disappear

**MWT Rec 13** proposes the Fair Entitlements Guarantee (**FEG**) be extended to all workers in Australia regardless of immigration status.<sup>41</sup> This extension should be implemented without delay, along with amendments that ensure FEG is available where an employing entity is

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<sup>40</sup> Detailed proposals are contained in our recent Research and Policy Brief (endorsed by over 35 organisations): Migrant Justice Institute, *Breaking the silence: A proposal for whistleblower protections to enable migrant workers to address exploitation*, November 2022.

<sup>41</sup> Migrant Workers Taskforce, (7 March 2019), Recommendation 13 (recommends extending access to FEG following consultation, but the exclusion of people who have deliberately avoided taxation obligations); Senate Standing Committees on Economics, [Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration](#) (March 2022), Recommendation 15.

deregistered or insolvent but no liquidator is appointed. In addition to extending the FEG, the Government should explore the viability of a mandatory Wage Theft Insurance Scheme which would provide an accessible and efficient forum for workers who are unable to recover their outstanding wages from their employer.

### Legal responsibilities for individuals & supply chains

The FW Act is no longer fit for purpose because it focuses primarily on regulating the direct employer-employee relationship. Businesses have few responsibilities for workers they do not directly employ and can easily establish business arrangements that evade liability.<sup>42</sup> To be held accountable for contraventions in relation to non-direct employees under current accessorial liability provisions, a person must have ‘actual knowledge’ of a contravention. By failing to take reasonable steps to detect and prevent exploitation, businesses and individuals can evade liability by remaining ‘in the dark’ – all the while profiting from cheap labour and unlawful conduct. The Government must introduce measures that establish legal responsibilities for individuals and entities with decision-making or commercial leverage to prevent and remedy contraventions.

**MWT Rec 11** proposes that the government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws. This can be achieved by strengthening existing accessorial liability and responsible franchisor provisions in several ways. As set out in our submission, in relation to accessorial liability provisions, the current requirement for individuals and entities to have ‘actual knowledge’ of a contravention should be changed. Instead, individuals and entities should be held liable as accessories if they knew or could reasonably be expected to have known that the contravention (or a similar contravention) may occur. A defence would be available to those that can establish that they took reasonable steps to prevent the contravention. However, accessories should be held liable if they became aware of a contravention but failed to rectify it.

Further to this, the responsible franchisor provisions should also be extended beyond the franchise context and apply more broadly to supply chain and subcontracting arrangements. Where there is a chain of 2 or more arrangements for the supply of goods or services, responsible supply chain entities must be held liable for any contraventions occurring in their chain that they knew about, or could reasonably be expected to have known about (or a similar contravention), unless they can prove a reasonable steps defence. In addition, the successful outworker provisions could be extended to certain high-risk industries. These provisions establish an explicit obligation to remedy contraventions within contracting arrangements and supply chains, including payment of outstanding wages and entitlements.

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<sup>42</sup>Associate Professor Tess Hardy notes that ‘it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions’: Tess Hardy, Submission No 62 to Senate Inquiry, The impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holders, 8.

Finally, the government should introduce a positive duty to identify and reduce the risks of FW Act non-compliance.<sup>43</sup> Similar to workplace health and safety legislation, this duty could apply to persons conducting a business or undertaking (PCBU) and require that they provide and maintain a working environment that complies with the FW Act (so far as is reasonably practicable). To ensure compliance, PCBUs must eliminate contraventions of the FW Act so far as reasonably practicable, or reduce risks of a contravention occurring where it is not reasonably practicable to eliminate a risk.

We have developed detailed recommendations in relation to each of the above reforms which should be introduced in the Government's second tranche of reforms in 2023. Details of these recommendations can be provided upon request.

### A national labour hire licensing scheme

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

### Commercially meaningful consequences for contravention and phoenixing

The government should establish commercially meaningful consequences for individuals and entities that break the law including **MWT Recs 5** (increased penalties), **6** (criminal penalties), **7** (adverse publicity and banning orders), **8** (model provisions for enforceable undertakings and injunctions), **19** (coercion offence), and **20** (employment restraints). In addition, we propose the government improve accountability for corporate phoenixing by strengthening the role of ASIC to prevent and detect phoenixing, including through integration with the FWO to pursue those with outstanding employee claims. Creative approaches in foreign jurisdictions should be considered, such as the ability to pursue wage debts against entities other than the employer which have substantially the same directors (or their relatives) and run substantially the same business. Government should also revisit reforms proposed during Treasury's consultation on anti-phoenixing measures.<sup>44</sup>

### Data, collaboration and benchmarking

In accordance with **MWT Recs 1** (whole of government response) and **22** (build an evidence base), all reforms should be based on data and evidence. Where this is unavailable, research and analysis should be undertaken, especially concerning the experiences and perspectives of

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<sup>44</sup> See measures proposed in the [Combatting Illegal Phoenixing Consultation Paper](#), September 2017.

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migrant workers. This includes collecting first-hand data on those who attempt to make claims, and the vast majority of migrant workers who endure exploitation in silence. In any reform processes affecting migrant workers, migrant workers and the organisations working with them should have a seat at the table.

### Other measures

- Same job same pay: minimum entitlements for all vulnerable workers, including migrants
- Government leadership and incentives for businesses that do the right thing
- Safe, inclusive and harassment-free workplaces