

Workers' Rights **for Non-Citizen Residents in Australia**

Are They Working?

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Purpose of this paper:

My aim in this paper is to:

- Review and evaluate the state of workers' rights for non-citizens living and working in Australia;
- Look at how the position for these workers can be improved; and
- Suggest a better way for enabling foreign workers to be free of exploitation and abuse.

Important Note

There are two categories of rights relevant here:

- Employee/workplace rights (for all employees) (under the Fair Work Act); and
- Rights to work on a visa (under the Migration Act).

The second must occur before a non-Australian can take up employment in Australia.

Once they have taken up employment, workplace rights under the Fair Work Act will apply to the employee regardless of their nationality.

Employees: What Does the Law Say?

Fair Work Act 2009

This introduces a set of 10 National Employment Standards (NES):

1. Max weekly hours;
2. Flexible work;
3. Parental leave;
4. Annual leave;
5. Personal / carer's / compassionate leave;
6. Community service leave;
7. Long service leave;
8. Public holidays;

9. Notice of termination / redundancy pay; and
10. Fair Work Info Statement.

The Act also provides for:

- Minimum and Award wages;
- General Protections from:
 - Coercion/undue employer pressure;
 - Sham arrangements (false independent contracting);
 - Unfair dismissal;
- Right to industrial action;
- Enforcement:
 - Civil remedies;
- Jurisdiction of the Courts;
- Fair Work Ombudsman.

Rules on Sham Contracting

This is a big issue for many non-citizen employees in Australia (see some of the FWA cases mentioned later in paper). Section 357 of the Act prohibits a person misrepresenting a proposed employment relationship as an independent contracting arrangement. This is enforceable under Pt 4-1 FWA. The Courts may impose a penalty on the employer; injunction; and/or reinstate employee.

In fact, where an employer has wrongfully treated an employee as a contractor, it's likely the employer will be fined, and made to compensate for lost entitlements (FWO v Land Choice Pty Ltd [2009]¹).

Are these Laws Working?

Consider:

The Fair Work Act – came into force 2009.

Since then:

- **The 7-Eleven Scandal in 2015²:**
 - Investigations by FWO disclosed very high levels of non-compliance with the Fair Work Act 2009 and Fair Work Regulations 2009, including instances of deliberate manipulation of records to disguise underpayment of wages.
 - Independent panel was commissioned to consider underpayment claims from staff of 7-Eleven franchises. Commissioner Professor Fels was interviewed as part of the Four

¹ FMCA 1255: 3.20.

² FWO Statement on 7-Eleven, 9 April 2016.

Corner's program and expressed a view that the franchise operating model was problematic:

- 'It seems to me that the business model will only work for the franchisee if they underpay or overwork employees.'

- **The Baiada Group Inquiry 2015³:**

- In its inquiry, the FWO found Baiada was exploiting a labour pool comprised predominantly of overseas workers in Australia on 417 working holiday visas.
- It found instances of:
 - Significant underpayments;
 - Extremely long hours of work;
 - High rents for overcrowded and unsafe worker accommodation;
 - Discrimination; and
 - Misclassification of employees as contractors.

- **The Dominos Pizza Inquiry 2018 (ongoing)⁴:**

- FWO inspectors found that, during a one-month period, 20 out of 874 workers had been underpaid by a total of \$1,978;
- Domino's record-keeping breaches;
- Unauthorized deductions;
- Not paying workers delivery allowance, leave entitlements and additional hours worked;
- The investigation also found that the pizza chain employs a large number of vulnerable workers — with three-quarters being under 25 years old, and almost half of them being foreigners on visas.

- **The Hotel Housekeepers Inquiry 2016⁵:**

- Inquiry into the procurement of housekeeping services within 3 major hotel chains;
- Found employers failing to:
 - Pay applicable penalty rates;
 - Reimburse employees for cost of specialist clothing;
 - Apply accrual of leave entitlements;
 - Maintain proper records of employment; and
 - Accurately record hours worked;
- Also found instances of sham independent contracting of employees;

³ FWO Statement of Findings, 18 June 2015.

⁴ FWO 2018 media releases: FWO Audits 33 Domino's Stores, 7 September 2018.

⁵ FWO 2016 media releases: Statement on outcome of Inquiry into the housekeeping services of 4 and 5-star hotels, 26 May 2016.

- Employees - mostly international students and 417 working holiday visa holders.
- **The Woolworths Trolley Collection Inquiry 2014⁶:**
 - High instances of non-compliance with Australian workplace laws.
- **The Caltex Inquiry 2018⁷:**
 - High instances of non-compliance with Australian workplace laws; and
 - Issues found with award rates, penalty rates, record-keeping and payslips.

Most of these cases included serious instances of:

- Under payment / non-payment of wages to workers;
- Threatening/ inappropriate behaviour by employers towards workers; and
- Exploitation of workers.

All of these cases involved **non-Australian workers** as victims.

The Fair Work Act:

Object

s3: "...to provide ... for **all Australians**
(a)... Fair to working Australians...

So, its statutory object has a **clear meaning: to protect Australian workers**

This raises the question: What is an Australian worker?

- A citizen employee only?
- A permanent resident employee? Or
- Any worker in Australia?

Contrasts with:

The National Employment Standards, which cover:

“All employees in the national workplace relations system, regardless of the award, agreement or employment contract that applies.”

⁶ FWO 2016 media releases: Woolworths trolley collection services, 25 June 2016.

⁷ FWO 2018 media releases: FWO Report finds three quarters of Caltex sites breaching workplace laws, 5 March 2018.

The NES make no distinction between an Australian employee and a foreign employee.

They are all covered by these statutory provisions.

Let's have a closer look at those 10 National Employment Standards:

1. **Max weekly hours** -38 hours unless more reasonable;
2. **Flexible work:** parents' right to request flexible working arrangements;
3. **Parental leave;** Up to 12 months unpaid leave plus right to request further 12 mths plus maternity/paternity/adoption-related leave;
4. **Annual leave:** 4 weeks paid leave per year, plus additional week for certain shift workers;
5. **Personal / carer's / compassionate leave:** 10 days paid personal/carer leave per year; 2 days unpaid carers leave as needed, 2 days compassionate leave (unpaid for casuals) as needed;
6. **Community service leave:** unpaid leave for voluntary/emergency management activities; leave for jury service; plus limited compensation for lost wages;
7. **Long service leave:** limited entitlement for those subject to the pre-Fair Work awards;
8. **Public holidays:** paid day off on public holiday, except where reasonably expected to work;
9. **Notice of termination/ redundancy pay:** up to 5 weeks notice of termination, based on length of service, and up to 16 weeks' severance pay on redundancy; and
10. **Fair work information statement:** right to receive this on being employed.

How Relevant or Enforceable are the NES?

Relevance

- **NES 1:** Is intended to protect an employee from being overworked (Note: student visa holders must not generally, work more than 20 hours per week on their student visa).
- **NES 2:** Very important for parent employees: this is the right to flexible working arrangements where they need to care for children.
- **NES 3-7:** Leave provisions – relevant to those who have worked 12 months full time for an employer, so may not be relevant to a short term/casual employee.
- **NES 8:** Public Holidays: Very Important: Full time employees are entitled to a paid day off on a public holiday; An employee who works is entitled to penalty rates:
 - Example: The Hospitality Industry (General) Award 2010⁸:
32.1 An employee performing work on the following days will be paid the following percentage of the minimum wage rate in clause 20—Minimum wages for the relevant classification:

⁸ FWO: Hospitality Industry (General) Award 2010.

	Full-time and part-time employees %	Casual employees (inclusive of 25% loading) %
Monday to Friday	100	125
Saturday	125	150
Sunday 1 July 2017 –30 June 2018	170	175
1 July 2018 –30 June 2019	160	175
From 1 July 2019	150	175
Public holiday	225	250

- **NES 9:** Termination Notice: Very relevant to all employees: Employer can't sack you on a whim (unless there has been serious misconduct). Employees must be given notice.
- **NES 10:** Very Important: All employees must be given this statement which outlines their rights as an employee, and the remedies for breach of those rights.

Now Consider a Real World Situation

Hypothetical Case – Carla

- Carla works part time as a waitress;
- 20 hours per week;
- Gets paid \$15/hour in cash (regardless of what day);
- Paid weekly;
- No pay-slip;
- No Fair Work Statement provided to her;
- Sometimes employer forgets to pay;
- She's also not comfortable with the manager's inappropriate behavior toward her;
- She's an international student from Kenya in Australia on a 2 year student visa;

How Will the Law Protect Her?

Issues

1. Breach of her work rights

- Below award/minimum wage: Set by the Hospitality Industry (General) Award 2010 – at **\$19.47 /hour⁹**;
- Irregular wage payment – Carla never gets a pay-slip: *Fair Work Regulations 2009 - Reg 3.46*;

⁹ See n8 above, 20.1 General.

- Protection: A person must not take adverse action against another person exercising a workplace right (s.340(1)(a)(i));
- Coercion/harassment (see ss343 and 344).

2. Also breach of Human Rights

Sexual harassment - *Sex Discrimination Act 1984*.

3. Breaches of NES

- No penalty rates paid to her for working on public holidays;
- No pay-slip or Fair Work Statement.

Will Carla raise these problems with her employer?

This may be very difficult for her, so she needs support.

How might the employer respond?

“well don’t work here then...”

or worse:

“then I’ll just call Immigration ...”

What can Carla do?

- Make a complaint to FWO?
- Bring an action for constructive dismissal (complex argument to raise)?
- Bring a sexual harassment claim under the Sex Discrimination Act?

Certainly, all of these are options but she’ll lose her job in the meantime; so her income will stop.

or

Think that it’s easier just to leave and not rock the boat, as she’s terrified at the prospect of her manager calling Immigration.

This is the Very Core of the Issue

Carla may not wish to use her rights under the Fair Work Act, or any other human rights.

Issues:

- Improper behaviour by employer;

- Threats – arguable coercion/undue influence;
- Underpayment:
 - Under minimum wage;
 - No penalty rates paid;
- No payslips;
- No FWSs.

What laws will protect Carla?

The relevant FWA provisions for these issues:

1. Underpayment:

Non- Award Employees: Minimum wage set by FWA each year (s285(2)(c))
 Failure to comply: Breach of civil remedy provisions (s293)

Award Employees: Minimum wage set by Award.

2. No Payslip: Breach of Reg 3.46

3. General Protection against (wrongful treatment) Pt 3-1, (includes protection from harassment).

These apply to Carla as with any other employee in Australia.

Case Law

FWO v Golden Vision Food and Beverage Services Pty Ltd & Anor [2017] FCCA 534

The court found that Golden Vision had:

- Paid staff member beneath the award;
- Breached Fair Work Act termination provisions:
 - Terminating employment for the reason that the employee had sought to enforce a workplace right;
 - Right to receive minimum entitlements;
 - Right to inquire about entitlements;
- Made false or misleading representations regarding employee’s workplace rights.

Outcome

The owner was penalised \$20,366, and the company penalised \$51,830.

Effect of Golden Vision Case

Employers will be severely penalized for breaching their workplace obligations:

Judge Jarrett: *“the penalties should serve as a warning to others that similar conduct can have serious consequences and ought not to be repeated.”*

Fair Work Ombudsman – Michael Campbell: *“Australia’s minimum pay rates apply to everyone including visa holders... they are not negotiable.”*

Still the Issue Remains:

Will employees stand up for their rights / make a complaint to the Fair Work Ombudsman?

Carla?

Carla needs to be confident to report workplace abuse to the FWO.

How can Carla get confidence?

Fair Work Hours App

The Fair Work Ombudsman has devised an online system which encourages employees to record their working hours independently. See link below:

<https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/record-my-hours-app>

The *Record My Hours* app makes it quick and easy for employees to record and store the hours they work, plus other information about their employment.

We advise all workers to make use of this app.

Enforcing Rights through Student Solidarity

Students like Carla need solidarity. The strongest form of solidarity for students is in the form of Student Unions. Unions share the common experience/difficulties of all individuals in this situation. They are strong and visible.

Also, organizations like CISA, are vital:

- To educate students on their rights;
- To support them;
- To engage student advocates:
 - ...willing to take this matter to the employer;
- To encourage group thinking.

Broader Issue – Worker Exploitation Also Affects Australian Workers

If employers are permitted to exploit foreign workers, this will discourage them from hiring Australian workers, who are aware of and may be prepared to stand on their rights.

So the concern of exploitation impacts the whole of society: it creates a business model for abuse.

The Contribution that International Students make to Australia

It cannot be stated strongly enough that international students form a vital part of the Australian community. They are therefore, entitled to dignity and respect.

In raw monetary terms, the international education industry contributes an estimated \$19 Billion a year into the Australian economy. This sector creates 130,000 employees. So the economic benefits from the presence of international students in our community are huge¹⁰.

Anti -Slavery Movement

The good news is that Corporate Australia is learning that it is not a good look to be associated with worker abuse. It is perceived as in their best business interests to:

- Be proactively anti abuse;
- Prohibit such abuse in their supply chains; and
- Put suppliers on notice of such.

New contractual provisions to ensure corporate responsibility, are quickly becoming the norm: e.g

- *You must not allow people in your supply chain to tolerate slavery/servitude.*

This is a powerful driver on side with the vulnerable worker: No large or well known organization wants to be associated with worker abuse/exploitation.

Summary

- Workers' rights must be accessible to all.
- But this can only be achieved if individuals stand up for their rights.
- The prescriptive laws will only go so far: They won't create action.
- **Solidarity** among vulnerable workers is the key.

¹⁰ Deloittes 2014/15 report, *The Value of International Education to Australia*.

- It is worker groups such as the international student unions who can be the voice of the foreign worker.
- Everyone deserves a “fair go” in Australia.

Disclaimer:

Please note – this is a research paper on the general position of workplace rights in Australia but does not constitute legal advice. David Harvey will not be responsible for any loss suffered by a person seeking to rely on this document alone.

We urge anyone with a workplace issue, to contact my office to receive individual legal advice on that issue.