Workplace Rights
for Non-Citizen Residents in Australia

Are They Working?

The aim of this article is to look briefly at the state of workplace rights for non-citizens living and working in Australia, and how the position for these workers might be improved.

What Sort of Rights?

There are two categories of rights relevant here:

- Employee/workplace rights (for all employees) (under the *Fair Work Act 2009* (FWA)); and
- The right to work while on a visa (under the *Migration Act 1958*).

The second must be granted before a non-Australian can take up employment in Australia. Once he/she has taken up employment, workplace rights (under the Fair Work Act) will then apply to the employee, regardless of their immigration status.

Employee Rights: What Does the Law Say?

Fair Work Act 2009 - Section 3: Object of this Act

> "...to provide ... for all Australians by:
> (a) providing workplace relations laws that are fair to working Australians..."

This contrasts with The National Employment Standards (NESs) in Part 2.2 of the Act, which cover:

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

The NESs make no distinction between an Australian and a non-Australian employee. They are as follows:

1. **Maximum weekly hours**: 38 hours unless more are reasonably required;
2. **Flexible work**: Parents' right to request flexible working arrangements;
3. **Parental leave**: Up to 12 months unpaid parental leave plus right to request further 12 months of such 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**: A paid day off on a public holiday, except where the employee is reasonably expected to work;
9. **Notice of termination/ redundancy pay**: An employer can't dismiss employees on a whim (unless there has been serious misconduct). Employees must be given reasonable notice of dismissal: 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** (which explains the rights and entitlements of employment): Employees have the right to receive this on being employed.

The Act also provides for:

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

Rules on Sham Contracting

Section 357 of the FWA prohibits a person misrepresenting a proposed employment relationship as an independent contracting arrangement. This is enforceable under Pt 4-1 of the FWA. The Courts may impose a penalty on the employer; grant an injunction; and/or reinstate the employee.

Where an employer has wrongfully treated an employee as a contractor, the employer can be fined, and made to compensate for lost entitlements (*FWO v Land Choice Pty Ltd* [2009][1]).

How successful has the FWA been in protecting the rights of non-citizens?

Consider: The Fair Work Act – came into force 2009. Since then there has been a stream of cases showing serious breaches of the law.

- **The *7-Eleven* Franchise Scandal in 2015[2]:**
  An investigation by the Fair Work Ombudsman (FWO), disclosed very high levels of non-compliance with the FWA by franchisees, including instances of deliberate manipulation of records to disguise underpayment of wages.

  Notably, Professor Allan Fels, the head of the independent panel commissioned to consider underpayment claims, expressed a view that the franchise operating model itself, was problematic:

[1] FMCA 1255: 3.20.

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

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

- **The Baiada Group Inquiry 2015[3]:**
  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 Dominos workers had been underpaid by a total of $1,978;
  - Domino's record-keeping breaches;
  - unauthorized deductions;
  - that Dominos had not paid workers delivery allowances, leave entitlements and additional hours worked; and
  - 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 2016[5]:**
  An 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.

  The enquiry also found instances of sham independent contracting of its employees, who were mostly international students and working holiday visa holders.

[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.

- **The Woolworths Trolley Collection Inquiry 2014[6]:**
  An inquiry found high instances of non-compliance with Australian workplace laws.

- **The Caltex Inquiry 2018[7]:**
  Again, an inquiry found high instances of non-compliance with Australian workplace laws including issues with award rates, penalty rates, record-keeping and payslips.

The above are but small sample of the volume of cases emerging from the FWO.

Most of these cases included serious instances of:

- under payment or non-payment of wages to workers;
- threatening or inappropriate behaviour by employers towards workers; and
- exploitation of workers.

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

So how successful has the FWA been in protecting vulnerable sections of the working population in Australia?

Consider a Hypothetical Situation

Carla

- "I work part time as a waitress:
- I do 20 hours per week;
- I get paid $15/hour in cash (regardless of what day);
- I'm paid weekly;
- No pay-slip is given to me;
- No Fair Work Statement was provided to me;
- Sometimes my employer forgets to pay me;
- I've heard other staff being threatened with the sack / reduced hours, when they've questioned their hourly rate;
- I'm also not comfortable with the manager's inappropriate behaviour toward me;
- I'm an international student from Kenya in Australia on a 2 year student visa (which allows me to work 40 hours per fortnight)."

How will the law protect Carla?

Issues

1. **Breach of her work place rights**
   - Below award/minimum wage: Set by the *Hospitality Industry (General) Award 2010* – at

[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.

$19.47 /hour[8];

- Irregular wage payment – Carla never gets a pay-slip as required by the *Fair Work Regulations 2009* – Reg. 3.46;
- Exercising a workplace right: A person must not take adverse action against another person exercising a workplace right (FWA s.340(1)(a)(iii));
- Coercion: A person must not take any action with intent to coerce another person not to exercise a workplace right (s.343).

2. Breaches of NESs

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

3. Human Rights breaches

Sexual harassment – remedies available under the *Sex Discrimination Act 1984.*

Will Carla raise these issues with her employer?

This may be very difficult for her, especially given her recent arrival in Australia, and her lack of familiarity with Australian workplace laws.

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 a sexual harassment claim under the Sex Discrimination Act?

Certainly, these are options. But she'll lose her job in the meantime, and her income will stop.

or…

Carla may just think it's easier to stay quiet and not create any trouble. And, she's probably terrified at the prospect of her manager calling Immigration.

This is the very core of the issue: Because of this fear, Carla may choose not to exercise her rights at all.

<u>Recent Case Law</u>

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 by terminating employment for the reason that the employee had sought to enforce a workplace right regarding:
    - the right to receive minimum entitlements;
    - the right to inquire about entitlements;

[8] See n8 above, 20.1 General.

- made false or misleading representations regarding employee's workplace rights;

The owner was penalised $20,366, and the company penalised $51,830. Note that the staff member was a visa holder, who spoke limited English.

Effect of Golden Vision Case

Employers may be severely penalised for breaching their workplace obligations (see the judicial comments below):

> 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."*

However, still the question remains: will employees in Carla's position stand up for their rights and make a complaint to the Fair Work Ombudsman? If no, how can this be changed?

Collective Action

There are currently, a number of student bodies which provide legal rights assistance to international students. These include the Council of International Students Australia (CISA), and the international student union on each Australian campus. What can these bodies do?

- **The Council of International Students Australia**
  CISA has standing to make representations to the Federal Government on international student matters.
- **Student Unions, eg, University of Melbourne Student Union International**
  Article 4 of the UMSUI Regulations state its object as to:
  > 4.*2 promote, protect, develop and assist the interests of International Students ….*

  UMSUI can provide advice and advocacy across a range of student issues such as sexual harassment, discrimination and course assessment disputes.

Representation for Work Visa Holders in General

While international students have access to some level of collective representation, what of the case for work visa holders in general? This broader group also needs recognition and representation. More needs to be done to enable all working visa holders, to enforce their rights through collective action. Examples may arise in the form of an incorporated association or a workers union specifically created to represent working visa holders.

Franchise Model Rules – Should they be Modified?

To revisit Professor Fels' comment in relation to the *7-Eleven* franchise cases:

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

What does this tell us about the rules for franchise arrangements? Does government need to step in, to expressly prohibit the on-selling or licensing of business models which assume the underpayment of staff? How could this be implemented?

In 2016, the senate Education and Employment References Committee (EERC) looked into the issue of exploitation of foreign workers. In its report: *A National Disgrace: The Exploitation of Temporary Work Visa Holders,* the Committee recommended:

> [The] *review* [of] *the Franchising Code of Conduct with a view to assessing the respective responsibilities of franchisors and franchisees regarding compliance with workplace law and whether there is scope to impose some degree of responsibility on a franchisor…*

Subsequently, in March 2018 the Australian Senate referred an inquiry to look specifically into the operation of the Franchising Code of Conduct, to a Parliamentary Joint Committee. The Committee is due to report in February 2019. However it remains to be seen how the government will respond to its recommendations.

Fair Entitlements Guarantee Act 2012– A Case of Authorised Racism?
Employees who lose their job due to liquidation or bankruptcy of the employer, may be entitled to compensation Under the Fair Entitlements Guarantee Act 2012 (FEGA). Notably, temporary work visa holders were excluded from eligibility under this Act.

Some have voiced concern over this exclusion. In its 2016 report, the Education and Employment References Committee made recommendations that the FEGA be amended to make temporary visa holders eligible for entitlements under the Fair Entitlements Guarantee.

Similarly, a number of legal rights organisations have offered persuasive submissions regarding the right to foreign worker eligibility under the Act. In its 2017 submission, *Job Watch*, stated:

> *It does not understand why most foreign employees, e.g. 457 and student visa workers, are ineligible for the [Fair Entitlements Guarantee] FEG. Foreign employees pay PAYG tax, are entitled to superannuation contributions and have all of the protections of the Fair Work Act… yet these employees, being some of the most vulnerable and exploited workers, such as cleaners, are not eligible from FEG assistance because of their nationality…*
>
> *The exclusion of foreign employees from the FEG scheme simply amounts to authorized race and/or national extraction discrimination without justification…*[9]

To date, the FEGA has not been amended.

[9] *Jobwatch* – Employment Rights Legal Centre: Report – *Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme* © Job Watch Inc. June 2017.

Anti-Slavery Movement
The good news is that corporate Australia is realising that it's in their best business interests to be proactively anti-abuse, by prohibiting such abuse in their supply chains. Specifically, many organisations are putting their suppliers on notice of the consequences of abuse (*i.e.* putting the onus on suppliers to check for instances of employee enslavement). New anti-slavery provisions are also quickly becoming the norm in supply chain management contracts. Below, is a recent example:

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

This new corporate awareness should be a powerful driver on side with employees: no large or well-known organization should want to be visibly associated with this level of employee abuse or exploitation.

Anti-Slavery Legislation
In February 2013, the Australian Government passed the *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013 (Cth).* This amended the Criminal Code by:

- Adding new offences of forced marriage and forced labour;
- Broadening the definition of servitude beyond sexual servitude; and
- Expanding the definition of coercion.

Last year, the Federal Parliament passed the *Modern Slavery Act 2018 (Cth)*, which introduces a new statutory modern slavery reporting requirement for larger companies (annual turnover of over $100 million) operating in Australia. The new law will put the onus on corporations to be aware of and report any slavery practices within their supply chains.

However, the new Commonwealth Act has been criticized as toothless tiger, with no real sanctions for breach. Two controversial omissions from the legislation include: no penalties for breach, and the absence of an independent review body.

By contrast, the New South Wales legislation, the *Modern Slavery Act 2018 (NSW) does* impose penalties for non-compliance (up to $1.1 million), and applies to organisations with a NSW operation, with at least $50 million in annual turnover.

Notably, the NSW obligations won't apply to corporations which are also subject to the Commonwealth Act (i.e. $100 million plus companies). Here's the irony: the more a company earns, the less it is exposed to penalties!

It will be interesting to see how these new regimes work out in the coming year.

The Contribution that Student Visa Holders make to Australia
It cannot be stated strongly enough, that international students in Australia on student visas form a vital part of the Australian community. 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[10].

From this, it is immediately clear there are huge economic benefits stemming from the presence of international students in our community. They are therefore entitled to dignity and respect.

Other Work Visa Holders

The same applies to temporary work visa holders in general. A cursory glance around a city restaurant or kitchen, will tell any observer that the hospitality industry runs significantly off foreign labour. Similar observations can be made of the aged-care, and cleaning industries. What does this tell us of the labour landscape in Australia? Is this a reality which is unlikely to change? And how will these industries respond to the new anti-slavery legislation?

Whatever the view, those foreign workers should also be recognised for the value they contribute to Australian society, and should be free to stand up against exploitation or abuse by their employers, just as Australian workers are.

Summary

- On the face of it, Australia has a robust employee/workplace rights regime in the Fair Work Act.
- However, the volume of FWO cases suggests that non-citizen employees are still particularly vulnerable to abuse in the work place.
- Collective bodies, such as international student unions and visa worker associations, need be the voice for non-citizen workers, so that the rights of this vulnerable group can be enforced.
- Both Federal and State governments will need to continue to hone their anti-abuse legislation into workable and effective human rights tools, which can stamp out unscrupulous employer behaviour within small-business and corporate Australia.
- Those governments will also need the political courage to legislate in a manner which does not perpetuate discrimination within Australian society.
- The Fair Go should be available to everyone in Australia.

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