

Productivity Commission Inquiry into the Workplace Relations Framework

Submission by

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I thank the Productivity Commission for the opportunity to make this submission that addresses a gap at the intersection of Australia's migration and employment laws. This gap may be inadvertently encouraging more unauthorised immigrant work as well as exploitation of those workers and can be remedied by three simple actions which I outline below.

Australia is host to a large and growing population of undocumented immigrant workers.¹ These people are either in Australia without authorisation (either by entering without a visa or by overstaying the term of their valid visa) or they are working contrary to the conditions of their visa (e.g. student visa holders working in excess of 40 hours per fortnight). In 2011 the number of undocumented workers in Australia was estimated to be at least 50,000 and possibly in excess of 100,000 from a potential population of visa overstayers as well as the hundreds of thousands of non-citizens on student, holiday and other visas (Howells, 2011). The Department of Immigration and Border Protection (DIBP) estimates that there was a 7.4% increase in visa overstayers alone during the year to June 2012 and a further 3% increase to June 2013 to 62,700 (DIBP, 2014). The Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007 described non-citizens working without permission as "in simple numerical terms ... the most significant problem facing Australian immigration authorities" (Howells, 2011:12).

Under current caselaw, employment laws do not apply to undocumented workers. In 2014, in the case of *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964, the Fair Work Commission dismissed an unfair dismissal application brought by a person working for an employer other than her 457 visa sponsor. In the decision Commissioner Bissett, applying the 2004 Queensland Court of Appeal decision in the workers compensation case of *Australian Meat Holdings v Kazi* [2004] QCA 147, found that an employment contract entered contrary to the Migration Act 1958 (Cth) is "invalid and unenforceable". The effect of this is as if the employment contract never existed. If one follows these two decisions through to their logical conclusion, no undocumented immigrant worker can

¹ The term "undocumented immigrant worker" is in common use and I choose to use it instead of the popular "illegal worker" used by the Department of Immigration and Border Protection and often found in the media. Much negative meaning is carried by a term such as "illegal worker" and there are numerous reasons not to use it. In particular, it is legally inaccurate to refer to a person as illegal; there are not illegal people but illegal acts committed by people. One who breaches migration legislation by performing the otherwise legal act of working should not be called an illegal person. See also:

http://picum.org/picum.org/uploads/file_/TerminologyLeaflet_reprint_FINAL.pdf

receive the benefit of the *Fair Work Act 2009* (Cth)(FW Act) including minimum wage, modern awards, National Employment Standards, unfair dismissal and anti-bullying provisions.

Without access to minimum employment standards, undocumented immigrant workers are subject to exploitation. Current research by me in the United States and Australia, as well as by others in Australia (Segrave, 2009) and overseas (e.g. Bernhardt et al, 2009, Capps et al. 2007, Cunningham-Parmeter, 2008) has found that undocumented immigrant workers are subject to wage theft, in the form of below minimum wages, flat rate payment with no overtime or penalty rates, as well as sexual harassment and unsafe working conditions. Undocumented immigrant workers are unlikely to seek redress for such exploitation at the hands of their employers, subject as they are under the Migration Act to detention and deportation and the unsupportive nature of employment laws. Examining the Fair Work Ombudsman's (FWO's) media releases for just the first 11 days of February 2015 reveals numerous cases of underpayment of immigrant workers who held valid working visas:

- Melbourne café paid international students only \$8.00 per hour, underpaying 22 casual workers a total of \$83,566 during a 19-month period (FWO, 2015a);
- Brisbane retail store allegedly underpaid a visa holder \$21,298 during a 13 month period (FWO, 2015b);
- Darwin café allegedly underpaid two workers on 417 working holiday visas \$3,667 during a one-month period (FWO, 2015c);
- Sydney sushi bar underpaid a person on a 417 working holiday visa by more than \$5,000 during an 11-week period (FWO, 2015d).

My research suggests that these examples for visa holders are indicative of normal treatment of undocumented immigrant workers except that they cannot recover their lost wages with the FWO's assistance in this way.

I recommend that the FW Act be amended to ensure that undocumented immigrant workers benefit from the same minimum employment standards and protections as Australian citizens.

The status quo is unacceptable for many reasons, the most notable of which are: a) It rewards one of the parties in breach of the Migration Act while punishing the other; b) it may be having the effect of increasing the undocumented immigrant workforce; c) it risks a 'race to the bottom' for employment standards; and d) the FW Act is failing to meet its stated aims.

- a. Australia's migration laws, combined with the doctrine of illegality (as applied in the *Smallwood* and *Australian Meat Holdings* cases) give an enormous advantage to employers over their undocumented immigrant employees. Such employers and employees are equally in breach of the

Migration Act yet the employers are allowed to benefit from the breach. If detected by the Department of Immigration and Border Protection (DIBP), such employers are subject to penalties including fines, while the employees' penalties may include detainment and deportation. Unscrupulous employers will calculate the savings from long-term exploitation of undocumented workers against the risk of detection and penalty. The workers, on the other hand, will of course never be entitled to recover wages, the underpayment of which allowed the employers to increase their profit margins.

- b. The effects of this imbalance in rights may already be increasing the demand for, and, consequently, increasing the supply of, undocumented immigrant labour to meet that demand. In this way, denying undocumented workers employment rights might actually increase the amount of undocumented work performed.
- c. Australia is risking a 'race to the bottom' for employment standards if we continue to allow employers to pay below minimum requirements. The Productivity Commission's Issues Paper 1 noted that "no nation aspires to be a low-wage economy". Yet, if a sector of the workforce is not entitled to the benefit of employment laws it establishes perfect conditions for employers, price-taking contractors and other middlemen and women to drive the price of labour down.
- d. For the reasons outlined above, the FW Act is failing to meet its stated aims of being fair, enforceable, non-discriminatory and accessible (FW Act, s.3).

Once the FW Act is amended and undocumented immigrant workers have access to the FW Act laws, the laws also need to be practically enforceable. The FWO currently has 93 inspectors responsible for ensuring compliance with the FW Act and 70 responsible for early intervention and alternative dispute resolution. These inspectors serve up to 11.6 million workers in Australia's 2.1 million workplaces (Productivity Commission, 2015:1). The FWO must be allocated sufficient funding to ensure effective enforcement of the FW Act for all vulnerable workers including undocumented immigrant workers. Funding should be sufficient to allow the FWO to continue its promising proactive, strategic enforcement activities and still have sufficient resources for reactive enforcement in response to public referrals.

Further, if the FWO is to be a practically effective enforcer of the FW Act for undocumented immigrant workers it must be, and be seen to be, independent of the DIBP. At present FWO inspectors carry dual responsibilities for investigating breaches of the FW Act and compliance with 457 visa conditions on behalf of the DIBP. If allowed to continue, this arrangement will build mistrust of the FWO by undocumented immigrant workers and discourage them from reporting breaches of the FW Act. I recommend that the FWO and the DIBP enter a memorandum of understanding establishing independence from each other as far as inspection, enforcement of their respective legislation and confirming no sharing of information about the immigration status of workers. Such a memorandum was entered between the United States Department of Labor and

Department of Homeland Security (United States Department of Labor, 2011) and functions effectively.

Summary of Changes Needed

In summary, I recommend the following changes:

- i. Amend the FW Act to ensure that undocumented immigrant workers benefit from the same employment rights as Australian citizens.
- ii. Allocate adequate funding to the FWO to ensure effective enforcement of the FW Act for all vulnerable workers including undocumented immigrant workers
- iii. Cease the FWO's inspection role for, and reporting responsibilities to, the DIBP and implement a memorandum of understanding between the FWO and the DIBP to ensure their operational independence.

Conclusion

The issues described and changes recommended in this submission are important to ensure fairness for the individual workers involved as well as for all citizens of Australia at risk from the social and economic problems that may flow from the current treatment of the considerable and growing undocumented immigrant workforce. If this gap in Australia's workplace laws is allowed to remain, the government opens itself to the criticism that it is regulating to maintain an underclass of easily exploited low-paid labour. The concerns and aims raised in the Productivity Commission's Issues Papers clearly suggest that this is not the government's intention so I welcome the Commission's due consideration of this submission. If Australia does not take these steps we run the real risk of passing the tipping point that the United States passed many years ago where exploitation of a large undocumented immigrant workforce becomes the norm in some sectors and an intractable social, political and economic problem.

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