

Overview

This submission focuses on one particular issue arising from the Productivity Commission's Draft Report released on 4 August 2015: section 21 (Migration Workers) and recommendation 21.1:

The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the *Migration Act 1958* (Cth)).

The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.

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1 Introduction

This submission takes recommendation 21.1 and the inquiry as an opportunity to re-examine the relationship between labour law and migration law in Australia in relation to unauthorised migrant workers. It argues for the Productivity Commission to recommend legislative change, in response to existing legal uncertainty, which takes a ‘full protection’ approach, discouraging unauthorised migrant labour while guaranteeing the labour and human rights of the workers that sustain it.¹ What may seem paradoxical can in fact be reconciled, starting with the recognition that enforcing immigration law need not, and should not, subject unauthorised migrant workers to poor conditions of work.² This is the approach that the Productivity Commission should incorporate into recommendation 21.1, and take through additional, important changes in its final report, highlighted below.

1.1 The situation of unauthorised migrant workers and the draft recommendation

Despite all efforts to secure the contrary, irregular or unauthorised migrants remain a feature of Australia’s labour landscape.³ These workers, sitting beyond the realm of any regulation, are especially vulnerable to exploitation by unscrupulous employers through unpaid wages, harassment and unsafe workplace conditions.⁴ Without substantial protections and avenues for redress, their legal position is characterised by its sheer ‘precariousness’.⁵ And yet, policy reviews, recommendations and legislative changes continue to run parallel to, but separate from their plight. This is reflected in the draft Workplace Relations Inquiry report (**‘Workplace Relations Report’**).⁶ The report includes a two-pronged recommendation (21.1) in relation to migrant workers that is short, but its implications are far from sweet. At first blush, the changes seem to be a step in the right direction: they disincentivise unauthorised migrant labour through increased sanctions on employers, while bolstering protections for unauthorised workers by better-resourcing the Fair Work Ombudsman (**‘FWO’**) to investigate employers suspected of underpaying them. However, on closer examination, it becomes apparent that recommendation 21.1 risks simply adding to the tension and uncertainty between migration law and labour law without any positive, meaningful impact on the vulnerability of migrant workers through their protection.

2 Australia's current position and the need for change

For virtually all countries, the allocation of labour rights is first and foremost a matter of domestic law.⁷ In Australia, it has historically come second to immigration priorities. These priorities, in turn, have been guided by the belief that 'rights for illegal migrants [against] prevention of illegal migration' are irreconcilable concepts.⁸ Ensuring that the legal framework is appropriate for the growing phenomenon of migrant labour (authorised or otherwise) must involve a review and reversal of that belief. The Productivity Commission can take this opportunity to lead that change to resolve uncertainty in the right direction.

2.1 The current direction

The dominant approach of both the courts and policy-makers in Australia has been to prioritise migration law and superimpose it onto the labour law framework.⁹ This is characteristic of what Elaine Dewhurst terms the 'non-protective' approach to the basic labour rights of unauthorised migrant workers.¹⁰ From this control-based perspective, any protection of unauthorised migrants' rights may incentivise coming to and working in Australia unlawfully.¹¹ Protection has, for that reason, been firmly avoided. This is echoed in the Workplace Relations Report, with the Productivity Commission dismissing any 'guarantee of appropriate pay and conditions associated with enhanced workplace rights' for unauthorised migrant workers on those grounds.¹²

2.2 Pinpointing the legal uncertainty

Access to most of the labour entitlements under the *Fair Work Act 2009* (Cth) ('**FW Act**') is reserved for 'national system employees', with the term 'employees' given its ordinary meaning and typically requiring a valid and enforceable employment contract.¹³ The operation of the *Migration Act 1958* (Cth) ('**Migration Act**'), in its present form under s 235 (offences in relation to work), denies these rights to 'unlawful non-citizens'¹⁴ as well as those migrants that are lawfully present, but working without entitlements in their visa to do so.¹⁵ This is because, while the High Court of Australia is yet to directly address the issue, lower-level courts have

increasingly denied the legality of employment contracts that are made in breach of s 235.¹⁶ Most recently, the Fair Work Commission in *Smallwood v Ergo Asia Pty Ltd*¹⁷ applied the finding in *Australian Meat Holdings v Kazi*¹⁸ that an employment contract is invalidated if entered in breach of s 235.¹⁹ This approach stands in contrast to *Nonferral (NSW) Pty Ltd v Taufia*,²⁰ where neither the object nor the intention of the predecessor to s 235 was found to have required the employment contract to be invalid; a penalty alone sufficed.²¹ Although the court in *Kazi* had rejected this on the basis of changes in the provision,²² it is worth noting that the higher threshold for illegality in *Taufia* continues to enjoy support from several scholars who are likely to prefer its reasoning to that in *Kazi* and *Smallwood*.²³ This adds to the impetus for legislative change to clarify the issue, while demonstrating that there is considerable support for a full-protection approach even for the courts. Nevertheless, under the dominant application of the illegality doctrine, no unauthorised migrant worker could access the rights and protections in the FW Act including the minimum wage, the National Employment Standards and unfair dismissal.²⁴ The FWO could also offer no assistance in enforcing such rights to, for example, recover unpaid wages.²⁵ The courts have enlivened the non-protective elements of s 235 and with it, illuminated the vulnerability of unauthorised migrant workers under existing legislation.

3 Why protect unauthorised migrant workers' rights?

This submission advances the widely-held belief that any incentive effect promoted by the non-protective approach is still not enough to deny to unauthorised workers what have been classified as basic human rights.²⁶ Instead, it advocates for Australia to move to Dewhurst's 'full protection' approach, and extend labour protections to unauthorised migrant workers on the basis of equality and non-discrimination.²⁷

3.1 Australia's international obligations and standards for best practice

The international human rights framework mandates the equal protection of fundamental rights for citizens and non-citizens alike, irrespective of their residency status.²⁸ A notable tenet of this is in the *International Covenant on Economic, Social and Cultural Rights* (ratified by Australia),²⁹ which makes no distinction between

individuals based on their immigration status, when it grants them the right to ‘just and favourable conditions of work’ such as fair wages,³⁰ and other related rights.³¹ This is echoed by several United Nations committees, which have pushed for an end to inequality between authorised and unauthorised migrant workers.³²

A similar push is found in the *Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*³³ which extends the protection of equal treatment in respect of remuneration, hours of work, health and safety, and other employment conditions to unauthorised workers, and provides that their employers should be relieved of any contractual obligations because of any irregularity.³⁴ While not ratified by Australia, this can still provide guidance on how the law should be developed.³⁵ Ratified or not, when taken together these norms provide an indication of how migration labour law will develop, and to some extent already has developed, around the world. This was seen when the Inter-American Court of Human Rights found that rights such as fair working conditions and freedom of association were inalienable and possessed by all workers ‘irrespective of their migratory status’,³⁶ and had to be guaranteed once an employment relationship was established.³⁷ The opinion is of particular relevance to Australia as the court went further, and found that the principles of equality and non-discrimination enjoyed *jus cogens*³⁸ status as peremptory human rights norms, imposing obligations on all states (including Australia).³⁹

Extending these rights to unauthorised migrants in Australia requires removing the discrimination between classes of workers (lawful and unlawful) that the current legislation perpetuates.⁴⁰ Increasing employer sanctions (as in recommendation 21.1) is a positive step, because it furthers the principle of unjust enrichment that Professor Graeme Orr has identified as a potentially useful but practically difficult argument for an unauthorised worker to make in a claim against its employer.⁴¹ However, by having those wages and entitlements go to the government, not the worker, the law would continue to prioritise migration law and policy over important labour law protections including the right to unpaid wages - the most basic of all labour rights.⁴² It is surprising that the recommendation ends here, particularly in light of similar changes in other jurisdictions - for example, the European Union and the United States - that impose penalties on employers engaging unauthorised migrant workers but make them liable to pay any unpaid wages *to the unauthorised worker*.⁴³ Denying

remuneration suggests that Australia ‘effectively abandons [its] responsibility to prevent [unauthorised migrant workers] from being robbed’ of their basic human right to receive pay.⁴⁴ The simple proposition here is that migrants working without official authorisation still work and, by that, still deserve key employment rights.⁴⁵ In line with this, several commentators have suggested that the FW Act extend to unauthorised migrant workers the same minimum employment standards and protections given to national system employees, including temporary migrant workers under the subclass 457-visa scheme.⁴⁶ For these reasons, s 235 should be amended to clarify that employment rights remain enforceable under a valid contract despite a breach of the Migration Act, so that unauthorised workers are not precluded from obtaining statutory benefits.⁴⁷ While the Federal Government has migration law within its strict preserve,⁴⁸ it shares the responsibility for employment and industrial laws with State Governments.⁴⁹ In light of this as well as the case law on the illegality doctrine, s 235 provides the best option to effect change and ensure that *unauthorised* migrant workers will still be given the protections of employment law as arising from the FW Act.⁵⁰

3.2 Reducing the pull factor and containing negative spill over

There may be some concern about the negative spill over effects of extending employment protections to unauthorised migrant workers, on the rest of the workforce. And yet, it is increasingly recognised that denying basic employment rights to migrant workers inevitably lowers the standards by which local or authorised workers are employed.⁵¹ There is also little to substantiate the claim that labour rights and protections will motivate unauthorised migrants to move to and seek work in another state.⁵² Instead, overly restrictive migration laws are known to incentivise unauthorised employment, with the continued denial of labour protection to unauthorised workers adding to their vulnerability.⁵³ On the other hand, recognising the ‘fundamental human rights of all migrant workers’ is often seen as an important step towards discouraging it.⁵⁴ Affording unauthorised migrant workers the employment protections that they would have if they were authorised offers a further disincentive to employers and reduces the pull factor drawing in unauthorised workers in the first place.⁵⁵

A full-protection approach thus both protects fundamental human rights, and acts as a disincentive to employers by making it easier for workers to enforce those rights.⁵⁶ This, in turn, addresses state concern over unauthorised migrant labour more effectively than the present approach, and better resolves the ‘jurisprudential uncertainty’ around those workers’ rights.⁵⁷

4 Better and smarter enforcement

The courts, and the broader policy debate, assume worker agency in unauthorised labour. However, as Berg has stated, the state has a significant role in ‘constructing the conditions of precariousness within which workers exercise agency’⁵⁸ if at all. These conditions are shaped by the enforcement mechanisms available to unauthorised migrant workers, and any reforms introduced to better protect those workers will continue to depend on enforcement for their effectiveness.

4.1 The need for institutional independence

In recent years, the promotion and enforcement of minimum employment standards in Australia has moved away from conciliation and arbitration to focus instead on the FWO.⁵⁹ The Productivity Commission notes, in the Workplace Relations Report, that closer co-operation between the Department of Immigration and Border Protection (‘DIBP’) and the FWO would be beneficial by avoiding a duplication of efforts, and securing financial savings where investigation duties could be shared. Accordingly, it recommends that the FWO ask about workers’ visa statuses ‘in the course of their investigations into the payment of wages and the provision of conditions’ as a matter of efficiency.⁶⁰ This recommendation may undermine any protection of vulnerable unauthorised workers that the inquiry may otherwise achieve. This submission agrees with Stephen Clibborn that the FWO should operate independently of the DIBP.⁶¹ At present, FWO inspectors act under a dual mandate: to investigate breaches of the FW Act; and to investigate breaches of subclass 457 temporary worker visa conditions.⁶² It is well established that unauthorised migrants’ fear of detection is heightened when countries impose duties on service providers (here, the FWO inspectors) to report such migrants to immigration authorities.⁶³ This fear, in turn, disincentivises unauthorised migrants from seeking protection. The continued link between the FWO

and the DIBP means that any rights cannot be enforced without consequences such as deportation.⁶⁴ This position sits between a non-protection approach on the one hand and a full-protection approach on the other, guaranteeing only ‘protection with consequences’ that limits unauthorised migrant workers’ ability to enforce their rights, and undermines any incentives under the protectionist approach.⁶⁵ Where a fear of deportation prevents them from asserting their rights, migrant workers’ right to judicial protection is violated.⁶⁶ The fear of visa cancellation,⁶⁷ deportation and sanctions under the Migration Act will continue to discourage unauthorised workers from pursuing the legal protections and remedies they are entitled to, as a matter of basic human rights.⁶⁸ Unauthorised migrant workers should have access to remedies to access their pay without exposure to immigration authorities, to allow them to realise their basic human right to that pay.⁶⁹

It is also worth noting Australia’s international legal obligation to ensure that ‘any further duties which may be entrusted to labour inspectors shall not...interfere with the effective discharge of their primary duties’ as well as their authority and impartiality.⁷⁰ This is jeopardised when FWO inspectors are tasked with monitoring migration compliance as it negatively impacts their protective (primary) function for unauthorised workers that are exploited. An increase in resources for the FWO (as in recommendation 21.1) is a positive step to improve enforcement, but institutional independence will let that enforcement be smarter, more effective and fundamentally more protective. Separating the operations of the DIBP from those of the FWO recognises the need for a balance to be struck between the restrictive tendencies of migration law, and labour law’s protective tendencies.⁷¹ This does not mean that the two frameworks of migration law and labour law are discrete and incompatible; rather, as this submission has shown, their connection is one that a ‘fully protective’ approach can foster more strategically to both protect workers and better discourage their cause.⁷²

5 Conclusion

Recommendation 21.1 suggests legislative changes that would alone not further the policy objective of reducing unauthorised migrant labour as they would in tandem with the other changes identified in this submission. The Productivity Commission accepts that ‘...broader legislative changes would be required to reconcile the

[Migration Act and FW Act].’⁷³ Indeed, this report provides an opportunity to carefully begin just that. The changes to the law at the intersection of migration and labour can and should be more prospective, and be more principled in their approach for the future position of migration labour in Australia.⁷⁴ The recommendation to increase sanctions rightly targets the pull factors of unauthorised immigration,⁷⁵ but it should be directed at remedying breaches of unauthorised migrant workers’ general labour and human rights. Fully protecting these workers, and improving the enforcement options available to them is likelier to achieve the policy objective of current immigration law, while respecting Australia’s human rights-based obligations to all migrants, irrespective of their migration status.

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