

# **Productivity Commission Inquiry into the Workplace Relations Framework**

## **Post-Draft Submission by**

**Dr Stephen Clibborn**  
**The University of Sydney Business School**  
**Discipline of Work & Organisational Studies**

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I thank the Productivity Commission for the opportunity to make this submission in response to the Commission's draft report. This submission relates to the section of the draft report entitled, "Migrant Workers" and refers to my initial submission to the Commission (Clibborn, 2015a). I respectfully commend the Productivity Commission for addressing the issue of exploitation of vulnerable migrant workers.

### **1) Response to recommendations in the Productivity Commission's draft report**

I support the Productivity Commission's draft report recommendation to increase funding for the Fair Work Ombudsman (FWO) for the reasons stated in my initial submission (Clibborn 2015a. See also Clibborn 2015b).

However there are a number of the Productivity Commission's draft recommendations that raise concerns.

First, the draft recommendation (Productivity Commission, 2015:748) to increase cooperation between the FWO and the Department of Immigration and Border Protection (DIBP), including FWO inquiring about workers' visa status, is likely to lead to further underreporting of exploitation of workers and consequently increased exploitation. Cooperation between the departments should be decreased for the reasons outlined in my initial submission.

Second, the draft recommendation (Productivity Commission, 2015:748) to impose an additional fine on any employer of an undocumented worker equal to the underpayment of wages to that worker is flawed for the following reasons:

1. It does not address the core issue of exploitation of vulnerable migrant workers. Rather, it transfers the reward for exploiting workers from the unscrupulous employer to the government. The government should not receive the benefit of wages, initially stolen by employers, while the people who performed the work and earned the wages have no prospect of payment.
2. Enforcement of the fines will be impractical. Undocumented workers who come to the attention of the DIBP may be required to leave the country within 28 days or may be removed. Therefore the main witnesses in any

proceedings will be unavailable to give evidence in prosecutions of employers except at great expense to the government. Further, if such workers are never able to recover their unpaid wages they will have no motivation to cooperate in proceedings.

3. Penalties for employers breaching the Migration Act have been increased a number of times in recent years and they currently include criminal sanctions, yet employers continue to exploit vulnerable workers. I suggest that a large part of the issue is not with the quantum of available penalties but with employers' low risk of being caught and prosecuted. To correct this problem requires not only a better resourced FWO but also a workforce that is not fearful of utilising the FWO. In addition to a substantial increase in the FWO's funding, it is time for a more fundamental rethink of how to ensure that employers comply with the Fair Work Act.

Third, the draft recommendation (Productivity Commission, 2015:747) to amend the Fair Work Act to clarify that it does not apply to undocumented workers would, if followed, be a dangerous step for the reasons I have detailed previously (Clibborn 2015a, Clibborn 2015b). The following section also addresses this issue.

## **2) Employment Rights of Undocumented Workers**

I refer to my initial submission to this inquiry, addressing the gap at the intersection of Australia's migration and employment laws, and I reiterate my call to amend legislation to ensure that undocumented workers have the same minimum employment rights as Australian citizens. Based on the weight of court and Fair Work Commission decisions, undocumented workers are currently very unlikely to be successful in proceedings to recover unpaid wages or to enforce other employment rights.

It is encouraging, but impractical from a policy perspective, that some academics have identified legal arguments that are theoretically available for an undocumented worker to present in an attempt to enforce potential rights. For example, Orr (2006) suggested that an undocumented worker could argue, in a claim for underpaid wages, that the principle of unjust enrichment prevents a culpable employer from profiting. Further, in their post-draft submission to this inquiry, Stewart and colleagues (2015) point to authority that might prevent an employer from denying liability in the event that they knowingly employed a person in breach of the Migration Act. Indeed, these arguments might prove to be useful for a well-funded or well-supported undocumented worker who is prepared to pursue uncertain rights in court despite the associated risks of detention, removal and lost chances of completing studies or earning permanent residency. Until that brave and well-funded or well-connected person steps forward and successfully litigates their case in an appeal court, this issue will remain uncertain at best, and the population of workers who have performed any undocumented work will remain in the shadows, suffering continued exploitation. In any event, I note Stewart and colleagues' recommendation,

consistent with my initial submission, that the 'FW Act should be amended to allow a court or tribunal to disregard the illegality of an employment arrangement in proceedings brought under the Act.' (Stewart et al, 2015:25)

While the employment rights of undocumented workers are uncertain at best, the weight of caselaw suggests that they do not have these rights. I encourage the Productivity Commission to read Berg's (2016) comprehensive analysis of court decisions that have considered the employment rights of undocumented workers. Berg's analysis confirms the difficulties that these workers will have should they choose to litigate.

The FWO takes the view that the Fair Work Act applies to employees working in Australia regardless of visa status (FWO, 2015). The FWO appears to rely on the DIBP exercising its discretion should any undocumented worker come to the department's attention. While it is commendable that the FWO does not ask workers about their migration status (although they do undertake investigations regarding 457 visas on behalf of the DIBP) reliance on the DIBP to exercise discretion in favour of those exploited at work will not affect their lack of legal rights and is unlikely to placate the fears of undocumented workers.

The reality for the many people who have worked in breach of their visa conditions is that they will never attempt to recover unpaid wages or other basic employment entitlements due to fear. Fear of removal from Australia will prevent workers from seeking the FWO's assistance or seeking to recover unpaid wages through any other means.

It would be dangerous for the Productivity Commission to now make an assumption regarding undocumented workers' employment rights based on FWO's internal policy and the identification of some potential legal arguments that have not yet been tested in cases relating to undocumented workers.

The common law is a wholly inadequate means to resolve this important policy issue. Legislation must be amended to confirm that undocumented workers have the same minimum employment rights as citizens. To do otherwise would leave a large sector of the workforce vulnerable to exploitation. The potential repercussions of this will be widespread (Clibborn 2015a, Clibborn 2015b). The recommendation in my initial submission was to amend the Fair Work Act to confirm that it applies to undocumented workers. There is an alternative solution, in light of the concern expressed in the Productivity Commission's draft report that such an approach would require 'broader legislative changes' (Productivity Commission 2015:747). Parliament could simply amend section 235 of the Migration Act to clarify the intention that undocumented workers' common law and statutory employment law rights remain enforceable despite having worked contrary to visa conditions or with an expired visa (Berg 2016, Reilly 2012).

### **3) Department of Immigration and Border Protection Amnesty**

In the time since my initial submission to this inquiry, there has been significant media coverage of alleged exploitation of temporary migrant workers including undocumented workers (e.g. Australian Broadcasting Corporation 2015a and 2015b). The most recent cases involving international students in 7-Eleven stores, many of whom have apparently worked in excess of the hours allowed under their visas, are currently subject to an internal company investigation and Senate inquiry. Unsurprisingly, according to reports (Ferguson et al 2015), workers are reluctant to speak to the inquiries or to seek repayment for unpaid wages due to fear of having their visas cancelled or of removal. Lawyers seeking to represent 7-Eleven employees have repeated the leader of 7-Eleven's internal inquiry, Alan Fells', Labor Senator Deborah O'Neill's, Greens MP Adam Bandt's and the Shop, Distributive and Allied Employees Association's calls (Ferguson and Danckert 2015) for the DIBP to grant an amnesty for 7-Eleven workers so that they may claim unpaid wages without fear of visa cancellation or removal (Ferguson et al 2015). An amnesty for these workers would be a positive move, necessary to ensure justice in that case, but it should only be the first step.

An amnesty should be offered more broadly than to just workers in 7-Eleven stores (Clibborn, 2015c). If the allegations against 7-Eleven are correct, it is just one of many Australian businesses underpaying international student workers. Australia's international student visa holders are particularly vulnerable to exploitation at work as they are generally young, inexperienced, away from support networks, financially insecure and unaware of employment rights and enforcement institutions. In my recent survey of international university students living and working in Sydney, 19 per cent of the 1433 respondents were working at the time of the survey, most commonly in restaurants, cafes, fast food and retail shops. Following is a snapshot of some of the data from the survey that reveals the extent of exploitation of international students at work:

- 60 per cent of the student workers were paid less than the \$17.29 national minimum hourly wage;
- Almost one third of workers was paid \$12 per hour or less;
- Some workers were paid as little as \$8 per hour;
- Over one third of workers had felt threatened or unsafe at work;
- Only half of the workers received a pay slip;
- Only 25 per cent of employers contributed to a superannuation fund.

These data are consistent with my interview data from workers, community centres, unions and government institutions.

Additionally, an amnesty should be offered more broadly than just to international students. As noted in my initial submission to this inquiry (Clibborn 2015a, and also Clibborn 2015b), all temporary migrants are potentially susceptible to exploitation at work. It is likely that some of them have worked in breach of their visa conditions, which would make them more vulnerable to exploitation and less likely to seek to enforce their workplace rights.

An amnesty from visa cancellation and removal is an important short term step but more fundamental change is required to ensure that the interaction of our migration and employment laws ceases to exacerbate the vulnerability of temporary migrant workers. This fundamental change involves closing the gap created by these laws, confirming that employment laws apply to all employees regardless of migration status and ensuring a well-funded, accessible FWO.

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