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PERSPECTIVES ON WORKING CONDITIONS OF TEMPORARY MIGRANT WORKERS IN AUSTRALIA

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The author is executive director of workplace relations policy and education for the Fair Work Ombudsman. Here he describes the Ombudsman's role in promoting compliance with workplace laws in settings where temporary migrant workers are employed.

This paper describes the Fair Work Ombudsman's experience in the enforcement of labour standards for foreign workers and some of the inherent challenges attached to this activity. The vast majority of foreign workers who are a party to one of our investigations are lawful non-Australian citizens who hold a valid visa to work in Australia. Most of them are in Australia on subclass 457 visas.

The Fair Work Ombudsman also investigates the workplace conditions of foreign workers in illegal or unlawful working arrangements. In fact, Fair Work Inspectors have interviewed a number of workers detained at the Villawood detention centre to ensure that they have received their full entitlements under Australian workplace laws. Before pursuing these issues further, it is appropriate to provide some background information about the Fair Work Ombudsman.

INTRODUCTION TO THE FAIR WORK OMBUDSMAN

The Fair Work Act replaced the Workplace Relations Act on 1 July 2009. At this time, the former Workplace Ombudsman and the former Workplace Authority combined to become the Fair Work Ombudsman.

The Fair Work Ombudsman is a Commonwealth independent statutory authority that has three main functions in workplace relations regulation—these are to provide education, advice and compliance services

to employees, employers and their representatives across Australia.

The Fair Work Ombudsman is responsible for ensuring that those in the regulated community both comply with their workplace obligations and are afforded their workplace rights. This includes enforcing rights and obligations relating to industrial action, freedom of association and wages and entitlements derived from industrial instruments and statutes.

The Fair Work Ombudsman has approximately 800 staff located in 26 offices across Australia and approximately 300 of these staff are appointed as Fair Work Inspectors. There are also 200 Fair Work Inspectors working out of 33 state government partner agency offices as part of the referral of state workplace relations powers to the Commonwealth late last year.

We estimate that we are now responsible for providing workplace relations advice, education and compliance services to more than 90 per cent of all employees and workplaces around the country. Those that remain outside of our jurisdiction are in the building industry and those subject to the workplace relations laws of Western Australia.

Since March 2006, the Fair Work Ombudsman and its predecessors have:

- recovered more than \$107 million for employees
- investigated approximately 83,000 complaints
- commenced over 250 legal proceed-

ings securing almost \$5.5 million in court penalties against parties who have contravened workplace laws

- conducted about 21,000 proactive compliance audits of businesses around the country.¹

FAIR WORK OMBUDSMAN AND FOREIGN WORKERS

The Fair Work Ombudsman has been active in the area of enforcement of workplace rights of foreign workers in Australia. The vast majority of this work has concerned wages and entitlements—but not all.

Since March 2006 inspectors have conducted approximately 1,700 investigations into minimum workplace entitlements owed to foreign workers and recovered more than \$2.7 million in underpayments.² In conducting these investigations, our inspectors have identified that most matters have involved underpayment or non-payment of wages and overtime, unlawful deductions from wages and non-compliance with record-keeping obligations. A higher proportion of complaints are received from the Accommodation and Food Services, Manufacturing, and Retail industry sectors.

VULNERABILITY OF FOREIGN WORKERS

In determining the appropriate compliance response to identified contraventions that involve employee entitlements, the Fair Work Ombudsman takes into account, among other matters, the nature and circumstances of the employees involved. To this end, the Fair Work Ombudsman identifies certain groups of workers as ‘vulnerable’ and who might require more specific support or protection than other workers. Employees that fall into this category include young workers, workers with disabilities, workers in precarious employment arrangements and foreign workers.³ The Fair Work Ombudsman recognises that

these categories of workers have special needs from a compliance perspective. Fair Work Inspectors are conscious of the challenges that are inherent to investigations involving foreign workers. These include:

- language and cultural barriers—the workers are often from non-English-speaking backgrounds and some have a distrust of government officials and other authorities
- the workers have limited knowledge of Australian workplace laws and are unsure how to access government or union services
- there is an increased likelihood that the workers will be targeted for exploitation or that they drift into employment arrangements that are unlawful
- there are often precarious visa arrangements in place
- the workers hold concerns about being deported and sometimes fear for the safety of friends and relatives in their country of origin.

Reasonably, these factors can lead a foreign worker to be reluctant to approach the Fair Work Ombudsman for help, or to lodge a complaint or to fully assist an investigation.

To work towards addressing these issues, the Fair Work Ombudsman has developed a set of services to assist foreign workers, including:

- access to translators at no cost to the workers
- publication of a range information on our website in 26 languages⁴
- media activity about Fair Work Ombudsman services through non-English-speaking radio broadcasts and other media⁵
- developing linkages with community organisations that work with migrant workers⁶
- running confidential investigations, where the complainant is not identified

- conducting proactive targeted audits of businesses in identified regions and industries that employ significant numbers of foreign workers (for example, 7/11 convenience store workers).⁷

In addition to this, the Fair Work Ombudsman brings matters of non-compliance involving foreign workers before the courts. This is to give life to both specific and general deterrence against the exploitation of foreign workers.

CASE STUDIES

To this end, we have had some successes. For example, in a recent Victorian Magistrates' Court decision a penalty of more than \$180,000 was imposed against a restaurant owner in Box Hill who had underpaid three foreign workers by about \$70,000.⁸ We have also secured a penalty of \$240,000 against an Adelaide-based cleaning company that underpaid two recent migrants to Australia \$4,000.⁹ These penalties highlight how seriously the courts take the underpayment matters brought before them by the Fair Work Ombudsman involving foreign workers.

Another case involves a proceeding we brought against a training provider that underpaid several Chinese employees in the aged care industry. While this case and investigation is now a couple of years old, it highlights the often-complex arrangements that foreign workers can find themselves in and how they can be exploited. The case is *Inspector Komiatz vs Employment Training and Education Australia*, heard before the Victorian Magistrates Court in September 2008.¹⁰ In this case there were two related corporate entities involved in the contraventions. The first was Employment Training and Education Australia P/L (ETA) and the second Nursebank, a related nurse placement/labour hire agency. The background to the case can be summarised as follows.

Following an application and as-

essment process conducted by the Australian-based ETA in China the company selected eight Chinese nationals to come to Australia to complete a Nurse Educator Program (Certificate Level 4) under the Occupational Trainee Subclass 442 visa scheme. The Nurse Educator Program had been developed by ETA which was an accredited training provider in Victoria. Each of the Chinese nationals spoke limited English but had some form of Chinese nursing or caring qualification. The objective of the program was to provide the Chinese nationals with Australian qualifications in aged care, together with training and assessment skills. The Chinese nationals were required to pay ETA for the benefit of this training. ETA put to the court that they had originally intended that, on achievement of their qualifications, the workers would return to China to train other potential students, hence expanding ETA's training operations into China.

The 12-month Nurse Educator Program was supposed to involve about 30 per cent classroom-based training and about 70 per cent supervised clinical placement. During the program, the trainees were required to be employed by ETA and to be paid a training wage for the supervised work experience they were involved in (in this case about \$439 per week). Instead, after completing their classroom-based training, the students were placed at various health care facilities by the related company, Nursebank, where they were charged-out and worked unsupervised as qualified health care workers. Although the health care facilities paid Nursebank at a rate higher than the qualified hourly rate under the Health and Allied Services Award—the workers continued to receive only \$439 per week (the training wage) for all hours worked.

The court found that the employer directed the Chinese nationals to work for the labour hire company outside their 'in-

class' hours. That is, they were directed to work for more hours than were necessary for them to obtain their qualifications. In some cases they worked up to 68 hours per week. They were not paid for all hours worked, did not receive the minimum rate and were not paid penalties, shift allowances or loadings. The employer also made unlawful deductions from the workers' wages for tax, health insurance, commission and a security bond. In a little over 10 months the workers were underpaid by \$70,000. As a result of the intervention of the Workplace Ombudsman, as it then was, the underpayments were reluctantly made good. Nonetheless, the Workplace Ombudsman commenced proceedings against the employer given the nature of the underpayments and the circumstances of the employees involved. The court imposed a penalty of \$40,000 against ETA for four contraventions of the Award. The court emphasised that the temporary visa-holders were at a distinct disadvantage against employers. The Magistrate remarked that:

It is important that the Court demonstrate that the community will not tolerate the exploitation of employees such as these who are most in the need of protection of the safety net and other Workplace Relations laws.¹¹

As is evident in this case, foreign workers are often at a disadvantage when they are at the mercy of exploitative employers. In my view, it is critical that the Fair Work Ombudsman, and other organisations with prosecutorial standing, continue to take decisive action against employers who exploit foreign workers. Strong and persistent messages need to be sent to the regulated community that both deter this type of behaviour from taking place, and reinforce the fact that exploitative practices will not be tolerated. To this end, I recognise that the FWO and other like

government bodies have further educative and compliance work to do in this space to decrease the instances of exploitation of foreign labour.

COOPERATION WITH OTHER GOVERNMENT AGENCIES

Finally, I want to briefly comment on the Fair Work Ombudsman's relationships with other government agencies and departments that have specific responsibilities in this area.

For example, the Fair Work Ombudsman is working with Department of Immigration and Citizenship (DIAC) to ensure that foreign workers receive the full protections of the Worker Protection Act. We also have an operational relationship with the Australian Federal Police (AFP). If we identify behaviour in the course of our investigations that could amount to trafficking, we refer our evidence to the AFP and, in other circumstances such as the abuse of visa arrangements to DIAC. The sharing of information between agencies provides us with information on matters involving foreign workers that we may not have otherwise received. We intend to grow our interaction with other government agencies over the coming months and years to better support foreign workers in this country.

CLOSING COMMENTS

In closing, I would like to reiterate that the Fair Work Ombudsman is committed to its role of enforcing Australia's labour standards for foreign workers in this country, and we are keen to continue to be involved in, and assist, the development of public policy and debate on this issue.

Acknowledgement

The author acknowledges Jess Berenyi, Senior Policy Officer, for her valuable research and contribution to the preparation of this article.

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