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Submission

Consultation, reform or review details

Title: **Redfern Legal Centre Submission to the Attorney-General on improving protections of employees' wages and entitlements: strengthening penalties for non-compliance**

Date of submission: 1 November 2019

Your details

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Submission: Redfern Legal Centre Submission to the Attorney-General on improving protections of employees' wages and entitlements: strengthening penalties for non-compliance

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Thank you to Jennifer Wilson of KPMG for her assistance in the preparation of these submissions.

Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent community legal centre providing access to justice for disadvantaged individuals in the Redfern area and across NSW. RLC has a particular focus on human rights and social justice, with specialised practices in employment, discrimination, domestic violence, tenancy, credit and debt, and complaints about police and other governmental agencies. RLC runs the International Students Service NSW and is a part of the Migrant Employment Legal Service.

The Migrant Employment Legal Service (MELS) is a joint initiative of RLC, Marrickville Legal Centre, Inner City Legal Centre and Kingsford Legal Centre to provide Culturally and Linguistically Diverse (CALD) clients across New South Wales with free employment law advice and representation. The MELS aims to address and remove the systemic barriers that allow for the exploitation of migrant workers across New South Wales.

Endorsements

These submissions are endorsed by Marrickville Legal Centre and Community Legal Centres NSW.

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Executive Summary

Thank you for the invitation to make these submissions in relation to improving protections of employees' wages and entitlements: strengthening penalties for non-compliance (the Inquiry).

In its response to the *Report of the Migrant Worker's Taskforce*, (MWT Report) the Australian Government stated:

> *By adding criminal sanctions to the suite of penalties available to regulators for the most egregious forms of workplace conduct, the Government is sending a strong and unambiguous message to those employers who think they can get away with the exploitation of vulnerable employees.*[1]

The Inquiry reflects the recommendation to criminalise wage theft made in the MWT.[2] Given this context, and RLC's expertise in providing employment law advice to migrant workers, we have confined our submissions to addressing the Attorney General's criminal sanctions proposals and the effect they will have on migrant workers.

RLC supports law reform initiatives that empower workers to reclaim their workplace entitlements, improve access to justice and deter employers from exploiting their employees. We support the proposal to criminalise wage theft (the criminalisation reforms) insofar as they encourage employers to maintain lawful workplace conditions and reduce opportunities to exploit vulnerable workers.

However, RLC is concerned that the criminalisation reforms do not go to the heart of the issue, and without further structural reform addressing why migrants are exploited at work, will not effectively diminish the culture of wage theft by employers.

Introducing the criminalisation reforms will not remove significant barriers for migrant workers or address the conditions that allow for their exploitation. RLC recommends a comprehensive approach to workforce regulation that addresses the multi-faceted causes of migrant worker exploitation in addition to the introduction of the criminalisation reforms.

Many migrant workers simply accept wage theft. For those that do seek to enforce their rights, in RLC's experience, their aim is wage recovery. Academics Berg and Fardenblum report, *"In the absence of broader union membership or more accessible redress pathways, individual remedies remain beyond the reach of most exploited migrant workers in Australia."*[3] We have concerns that the criminalisation reforms fail to displace the onus on workers that want to recover their unpaid wages, putting the burden on employees to initiate civil action through complicated and risky redress pathways. Many RLC clients have indicated that they are unwilling to expose their visa position in a complicated and lengthy legal process with an uncertain outcome. While the criminalisation reforms send a clear message to employers that wage theft is unacceptable, the key issues for underpaid migrant workers remains the need for access to justice with the likelihood of resolve.

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[1] Australian Government, *Australian Government Response: Report of the Migrant Workers' Taskforce*, March 2019, https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/government_response_to_the_migrant_workers_taskforce_report.pdf 3 ('MWT Report').
[2] Ibid 2
[3] Laurie Berg and Bassina Farbenblum, Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia, 2018 https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5bd26f620d9297e70989b27a/1540517748798/Wage+theft+in+Silence+Report.pdf, 5.8 ('Wage Theft in Silence Report').

Summary of recommendations

Recommendation 1

Criminal penalties for wage theft should be introduced, accompanied by mechanisms that address the underlying vulnerabilities that allow the workplace exploitation of temporary visa holders, that are outlined in our further recommendations.

Recommendation 2

The Department of Home Affairs should stop holding migrant workers strictly liable for breaches of visa work conditions and instead adopt a decision-making protocol where workers can be issued with a warning instead of having their visas cancelled.

Recommendation 3

The assurance protocol between the Fair Work Ombudsman and the Department of Home Affairs should be strengthened to provide stronger protection from visa cancellation for workers with genuine exploitation complaints, and publicised in more detail to remove ambiguity about when the assurance can or cannot be relied upon.

Recommendation 4

The Department of Home Affairs assurance protocol should be extended to underpayment claims progressed through the courts.

Recommendation 5

A new wage theft tribunal should be established, facilitating individual wage recovery via mediation and enforceable orders, based on the applicant-led model for bringing unfair dismissal claims at the Fair Work Commission.

Recommendation 6

The jurisdictional limit of the small claims procedure at the Fair Work Division of the Federal Circuit Court of Australia should be increased from $20,000 to $30,000.

Recommendation 7

Additional funding should be provided to FWO to assist employees calculate underpayment claims.

Recommendation 8

The Australian Border Force should initiate more enforcement activities for employer breaches of migration law, such as clawbacks of sponsorship costs or income paid to workers.

Recommendation 9

The eligibility requirements of the Fair Entitlement Guarantee should be expanded to include migrant workers.

Recommendation 10

The *Migration Regulations 1994* (Cth) should be amended to remove condition 8105, which currently requires international students to limit their work hours to 40 hours per fortnight when their course is in session.

Recommendation 11

The Department of Home Affairs should introduce and publicise details of an amnesty to the 60 day limit for a temporary work (skilled) visa holder to find a new sponsor where the worker raises allegations of workplace exploitation.

Recommendation 12

An effective labour-hire licensing regime should be established to more effectively regulate employers of working holiday makers.

Recommendation 13

Funding for FWO should be increased to enable it to conduct inspections of employers of working holiday makers and ensure compliance with minimum working conditions.

Recommendation 14

The *Migration Act 1958 (Cth)* should be amended to ensure that only employers who can demonstrate compliance with the law are able to employ working holiday makers.

Recommendation 15

Criminal prosecutions should not create any impediment to individual wage recovery using the civil process.

Recommendation 16

Police and other relevant bodies should be adequately resourced to ensure timely and strategic prosecutions for wage theft.

Recommendation 17

FWO should receive additional funding to allow greater targeting of industry specific non-compliance with the *Fair Work Act 2009* (Cth), with a particular focus on the hospitality, horticulture and retail industries.

Recommendation 18

FWO's litigation team should receive additional funding to pursue greater numbers of employers suspected of serious contraventions, as defined under section 557A of the *Fair Work Act 2009* (Cth).

Recommendation 19

Community Legal Centres should be provided additional funding to increase representation services to employees whose employers are suspected of serious *Fair Work Act 2009* (Cth) contraventions.

Recommendation 20

The multiple grouping penalty provision of the *Fair Work Act 2009* (Cth) should be amended to extend employers' liability to pay penalties.

1. Criminal sanctions as part of the enforcement framework

RLC supports law reform initiatives that function to rectify the power imbalance between exploitative employers and vulnerable employees. RLC welcomes the criminalisation of wage theft for the most egregious and systematic underpayments of workers.

RLC recommends that the underpayment of wages should attract criminal penalties at the same time that other measures are introduced that go to addressing the culture of exploitation and the reasons individuals do not recover wages.

1.1 Examining the reasons for a culture of exploitation

RLC has found many clients simply accept their poor working conditions, or think that by agreeing to a certain low hourly wage, they have to accept that rate. The 2017 *Wage Theft in Australia: Findings from the National Temporary Migrant Work Survey* (the Survey) found that of the 4,322 temporary migrants who were surveyed, 30% reported earning $12 an hour or less.[4] A crucial finding of the Survey was that many migrant workers knew they were being underpaid but they did not expect to receive the minimum wage while on their visa.[5]

A significant problem that needs to be addressed is the culture of exploitation around migrant workers for both the employee and employer. The 2018 *Wage Theft in Silence Report* (Wage Theft Report) elucidates the barriers to migrant workers' accessing assistance to recover unpaid wages as including:[6]

- lack of knowledge about process (42%);
- recovery being too much work (35%);
- immigration concerns (25%); and
- pessimism about the outcome (20%).

Of the 2,258 participants in the Wage Theft Report who acknowledged they had been underpaid, 91% had not tried to recover their unpaid wages.[7] These findings indicate that knowledge of underpayment issues is only part of the problem.

Migrant workers' acceptance of exploitation, their perception of the hurdles of recovering stolen wages, their ongoing fears of removal, coupled with their anticipation of a poor outcome mean that criminalisation reforms do not address the issue at hand – accessing justice with the likelihood of resolve.

Of particular concern is the significant exploitation of working holiday makers and international students who together make up 88% of Australia's migrant work force.[8] These workers predominantly work in horticulture and food services which share the structural characteristics of low union saturation; extensive casual employment; subcontracting; intense commercial competition; and labour cost-minimisation as a dominant business strategy.[9] It is imperative that along with the

[4] Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, November 2017 <https://apo.org.au/sites/default/files/resource-files/2017/11/apo-nid120406-1162971.pdf> 6.
[5] Ibid.
[6] Ibid 8.
[7] Ibid 20.
[8] Ibid 19.
[9] Clibborn and Wright, above n **Error! Bookmark not defined.**, 212.

criminalisation reforms, these aspects of systemised exploitation for migrant workers are addressed in equal weight. Further, and critically, where visa outcomes are linked to work performance and compliance, there remains an insurmountable risk to the migrant worker – strict liability for breaches of visa conditions resulting in removal or permanent bans from Australia.

1.2 The vulnerabilities of temporary migrant workers

Temporary migrant workers are vulnerable to wage theft. They are often from culturally and linguistically diverse backgrounds. They may not have a working knowledge of their legal rights at work, or the Australian legal system, or an understanding of where they can go for support if they have a legal issue at work or otherwise. Many workers are isolated and do not know who to ask for help. Many are under considerable financial stress. They have trouble getting work and are at risk of losing their jobs if they complain about pay conditions. They are effectively dispensable in the saturated labour market of their low wage industries where collective employee bargaining is limited.[10]

As temporary migrants, the short-term nature of employment itself is a barrier to solving wage theft. Migrant workers may not have enough time left on their visa to initiate court proceedings. The combination of these vulnerabilities with strict visa regulations means that migrant workers are susceptible to being exploited without legal redress.[11] The factors that make temporary migrant workers vulnerable need to be considered when creating an effective regulatory compliance and redress framework.

Wage theft is rife among the employers of working holidaymakers and international students.[12] Underpayments come in a variety of forms. RLC sees many clients who have been underpaid or not paid their hourly rate, overtime, penalty rates, annual leave, shift loadings, holiday loading and under-classified in their role. In this way, many clients are being exploited in ways they are not even aware and it is not until they seek advice that they realise the extent of the underpayment. However, despite the high monetary value of some underpayment claims, many of our clients express a reluctance to proceed with their claims.

> **Recommendation 1**
> Criminal penalties for wage theft should be introduced, accompanied by mechanisms that address the underlying vulnerabilities that allow the workplace exploitation of temporary visa holders, that are outlined in our further recommendations.

1.3 Visa cancellation - strict liability for breaches of visa conditions

If a migrant worker is found to have breached any of their work conditions on their visa, the Department of Home Affairs (DHA) may cancel their visa.[13] Visa cancellation can not only remove a workers' right to study in Australia, but can restrict the type of visa they can use to stay in or re-enter

[10] Ibid 215.
[11] Ibid.
[12] Ibid.
[13] *Migration Act 1958* (Cth)(Migration Act) s.116.

Australia,[14] ban them re-entering Australia,[15] result in them being placed in immigration detention,[16] or removed from Australia.[17]

For migrant workers, visa cancellation can take place automatically through the DHA serving them with a cancellation notice.[18] This cancellation can only be revoked if the worker can establish that there was no breach, or that the breach was due to 'exceptional circumstances' beyond their control.[19] There is a high evidentiary bar to establish exceptional circumstances.

If a migrant worker breaches conditions of their visa, the DHA does not have the discretion to impose an alternate penalty, such as a warning or the imposition of a civil penalty. Even a minor visa condition breach could require an international student to leave Australia without finishing an expensive degree or course. The Senate Report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, released in March 2016, addressed this issue at [8.45]:

> *"The severity of the consequences was seen as a structural incentive for an employer to entice or coerce a temporary visa worker into breaching a condition of their visa in order to gain leverage over the worker".*[20]

RLC regularly deals with workers who face serious exploitation at work but are constrained from taking legal action due to the risk of visa cancellation. International student clients tell us that unscrupulous employers have threatened to report actual or fabricated breaches of their work conditions to the DHA to silence their complaints about underpayments and stop them from taking legal action to enforce their legal rights.

RLC's experience advising migrant workers confirms the work of Berg and Farenblum who conclude that *"It is rational for most migrant workers to stay silent. The effort and risks of taking action aren't worth it, given the slim chance they'll get their wages back."*[21]

1.4 Alternative to visa cancellation to allow migrant workers to enforce their legal rights

Migrant workers currently risk visa cancellation and removal if they breach the work conditions on their visas. RLC migrant worker clients have told us that they would take action against wage theft if the DHA could give them assurances that they would not have their visas cancelled for a first-time breach of their visas.

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[14] Migration Regulations sch 4-5.
[15] Migration Act ss.48, 501E and Migrations Regulations sch 4 cl 4013-4014, sch 5 cl 5001-5002, 5010.
[16] Migration Act s.189.
[17] Ibid s.198.
[18] Ibid s.137J and *Education Services for Overseas Student Act 2000* (Cth)(**ESOS Act**) s.20.
[19] Migration Act ss.137K-137L and ESOS Act s.20.
[20] Senate Standing Committees on Education and Employment, Parliament of Australia, *A National Disgrace: the Exploitation of Temporary Work Visa Holders*, Final Report, March 2016, available at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report>.
21 UNSW Sydney, *New report claims 'broken system' fails migrant workers suffering wage theft,* 29 October 2018 < https://newsroom.unsw.edu.au/news/social-affairs/new-report-claims-broken-system-fails-migrant-workers-suffering-wage-theft>.

In 2017, RLC proposed that the Migrant Worker Taskforce recommend the removal of strict liability for student visa breaches, and for the adoption of a decision-making protocol by the DHA to follow a more nuanced approach to visa breaches and cancellation. In most situations where an international student breached their visa, this protocol would provide for the DHA to issue a first and final warning to the visa holder instead of cancelling their visas. Students would then be able to stay in Australia and access legal protections against workplace exploitation while continuing with their studies.[22]

RLC Case Study: Employer threatening employee with Department of Home Affairs complaint

Tamara* was on a student visa and employed by Helping Kidz Pty Ltd as a physical therapist for children with disabilities. Tamara came to RLC when she was terminated by Helping Kidz Pty Ltd after she asked why she hadn't been paid for 3 weeks. When Tamara met with the RLC team, it was also discovered that she was misclassified as a contractor when she was a casual employee and underpaid in accordance with a Modern Award.

RLC assisted Tamara to make a general protections application to the Fair Work Commission and represented her at the conciliation conference. Tamara had good evidence of adverse action being taken against her in breach of the *Fair Work Act* in the form of a message firing Tamara because her boss *'did not want workers who are unmotivated and complain about delayed salaries'.* This boss also made veiled threats that she would report Tamara to the Department of Home Affairs for *'doing the wrong thing'*. Tamara had always been very careful and never breached her work conditions and found the whole situation incredibly stressful and became quite depressed.

Tamara settled for 11 weeks wages. She was happy with this outcome as she had not been able to find appropriate work since her dismissal.

**names changed for confidentiality*

Recommendation 2
The Department of Home Affairs should stop holding migrant workers strictly liable for breaches of visa work conditions and instead adopt a decision-making protocol where workers can be issued with a warning instead of having their visas cancelled.

1.5 Visa barriers to legal action: FWO & Department of Home Affairs' 'assurance protocol'

Without a clear commitment from the Australian Government that employees will not be punished for breaching conditions of their visa, only limited numbers of migrant workers will initiate legal action to recover underpayments. It is RLC's experience that clients perceive the potential risk of a visa cancellation as too high when factoring in the uncertain prospects of success of recovering wages.

[22] In 2017, RLC made recommendations on this issue in submissions to the Migrant Workers Taskforce. It was proposed that this decision making protocol be issued in the form of a Ministerial Direction as made under section 499 of the Migration Act. These submissions are available in full here: https://rlc.org.au/sites/default/files/attachments/S499%20Proposal%20brief.pdf.

The FWO offers migrant workers an 'assurance protocol' or 'amnesty' from visa cancellation for workers that have breached their work conditions, to support workers in coming forward to request assistance from the FWO and provide evidence or information about exploitation.[23] The FWO has an arrangement with the DHA that a person's temporary visa will 'generally' not be cancelled if they:

- were entitled to work;
- believe they have been exploited at work;
- have reported their circumstances to FWO; and
- actively assist FWO in an investigation.[24]

The migrant worker must commit to abide by visa conditions in the future and there must be no other basis to cancel the worker's visa.

Further details of the agreement between FWO and the DHA are unknown. The assurance protocol requires the FWO to share information about a client's breach of visa conditions with the DHA in order for the DHA to give the client an exemption from cancelling their visa. RLC clients have told us that they are uncomfortable with the FWO sharing information with the DHA about them breaching visa conditions.[25] Other clients have concerns that they will not be protected against visa cancellation where they report workplace exploitation, but no action is taken by the FWO.[26] While, to our knowledge, no CLC clients' visas have been cancelled due to making a report of exploitation to the FWO, many RLC clients have expressed reluctance to report to the FWO without a guarantee or 'something in writing' that they will not have their visa cancelled.

RLC Case Study: Visa insecurities

Sanjeev* is an international student and refugee and had a $240,000+ underpayment claim, accrued while working at a convenience store for 6 years. RLC calculated the full scope of his underpayment, briefed counsel on a pro bono basis, and drafted relevant initiating application to the general division of the Federal Circuit Court.

After some delay, in response to our initial letter of demand, the employer threatened to report Sanjeev to police for stealing from the store. We organized for Sanjeev to receive criminal law and migration law advice and even though the allegations made by his employer were fraudulent and retaliatory, he decided not to pursue the claim due to the risk of having his citizenship revoked. This was an unfortunate situation and highlights the vulnerability of migrant workers to bring claims even when on permanent visas.

**names changed for confidentiality*

[23] Australian Government: Fair Work Ombudsman, *Visa Holders and Migrants* (Web Page) <https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>.
[24] Ibid.
[25] Recommendations were made to the Migrant Workers' Taskforce that an information 'firewall' be created between the DHA and FWO to address the reluctance of migrant workers to report exploitation: The MWT Report, above n 1.
[26] Ibid: The Migrant Workers' Taskforce has indicated that FWO and the DHA are conducting further analysis to consider whether visa holders participating in a broader range of FWO services can access the assurance protocol.

Recommendation 3
The assurance protocol between the Fair Work Ombudsman and the Department of Home Affairs should be strengthened to provide stronger protection from visa cancellation for workers with genuine exploitation complaints, and publicised in more detail to remove ambiguity about when the assurance can or cannot be relied upon.

Recommendation 4
The Department of Home Affairs assurance protocol should be extended to underpayment claims progressed through the courts.

1.6 Access to justice

Limited services for migrant workers

The Wage Theft Report indicated that migrant workers are interested in enforcing their employment rights and that the primary reason they fail to do so is they do not know how.[27] Due to vulnerability to visa cancellation because of work conditions on their visas, many migrant workers require legal assistance to take any action against such conduct.

There are limited services available to help migrant workers with their legal problems at work, or more generally. FWO commenced 35 matters in court in 2017-18.[28] Workers may obtain advice from their local community legal centre (CLC), the newly established Migrant Employment Legal Service (MELS), RLC's International Students Service NSW, their union or the FWO. The capacity of the CLC sector to advise and represent migrant workers in underpayment complaints is limited. Reports indicate that migrant workers do not join their union and that despite the FWO's significant efforts to engage with this cohort, relatively few contact the agency, through its Infoline or otherwise.[29]

Effective redress pathway

RLC supports efforts to help employees bring wage recovery action against their employer and initiatives to facilitate cultural change so that employers will stop underpaying workers. The legal pathways to wage recovery are costly, require significant effort and are risky for the migrant worker's visa status.[30] There is no current, effective pathway providing access to justice for individual migrant workers to recover their wages that is timely, affordable and easy to understand.

The small claims procedure in the Fair Work Division of the Federal Circuit Court has the benefit of a court process that is quicker, cheaper and more informal than regular court proceedings. However, the process of completing the relevant forms, performing complex underpayment calculations and self-representing in court for persons of CALD backgrounds can still be prohibitively complicated. Claims in this division are also capped at $20,000 and employers cannot be ordered to pay penalties.

[27] In the context of taking action on wage theft. Farbenblum and Berg, above n 3, 7-8.
[28] Australian Government: Attorney General's Department, *Industrial Relations Consultation (website)* <https://www.ag.gov.au/Consultations/Pages/industrial-relations-consultation.aspx> 4.
[29] Ibid
[30] Berg and Fardenblum, above n 4, 6.

RLC solicitors and volunteers regularly spend days calculating how much a single client has been underpaid. RLC does not have the capacity to represent every client that we advise, and so our services often end with some clients having to calculate their underpayment, prepare and file their matters themselves, with varying levels of success.

Due to visa concerns and the assurance protocol between FWO and the DHA, (see heading Visa barriers to legal action: FWO & Department of Home Affairs' 'assurance protocol' the only suitable pathway for some of our clients to pursue is a FWO complaint. However, that is not always an avenue for the individual recovery of wages. The FWO is concerned with overall workplace compliance and is not an advocate for complainants.[31] FWO cannot guarantee the recovery of wages, disincentivising workers from making complaints. The Wage Theft Report states that *"for every 100 underpaid migrant workers, only three went to the Fair Work Ombudsman. Of those, well over half recovered nothing."*[32]

Recommendation 5

A new wage theft tribunal should be established, facilitating individual wage recovery via mediation and enforceable orders, based on the applicant-led model for bringing unfair dismissal claims at the Fair Work Commission.

Recommendation 6

The jurisdictional limit of the small claims jurisdiction of the Fair Work Division of the Federal Circuit Court of Australia should be increased from $20,000 to $30,000.

Recommendation 7

Additional funding should be provided to FWO to assist employees calculate underpayment claims.

1.7 Limited enforcement of employer obligations

All Australian employers have obligations under the *Migration Act 1958* (Cth) such as not employing a worker in breach of a work-related visa condition,[33] or prohibitions on 'clawing back' or recovering costs from workers associated with obtaining sponsorship registration or income paid to workers (see

Paying for sponsorship costs and cashbacks for annual market salary **rate** below).[34] As strict liability offences, it does not matter if an employer is unaware of their obligations, or whether or not an individual is not allowed to work in Australia. Unless employers have taken reasonable steps to verify that the person is allowed to work, they are in breach of these laws.

In response to breaches, the Australian Border Force (ABF) applies a tiered framework of compliance and enforcement tools according to the frequency and seriousness of the breaches.[35] These tools include issuing administrative penalties, infringement notices, civil penalties and criminal penalties.

[31] Australian Government: Fair Work Ombudsman, About us – Our Purpose (website), <https://www.fairwork.gov.au/about-us/our-purpose>.
[32] UNSW Sydney, above n 21.
[33] Migration Act div 12 sub-div C.
[34] 2.62J Migrations Regulations
[35] MWT Report, above n 1, 69.

In 2017- 2018, the Migrant Workers' Taskforce encouraged the ABF to increase its focus on non-compliant employer and sponsors. In that period, the ABF issued 19 infringement notices to employers and 2 briefs of evidence were accepted by the Commonwealth Director of Public Prosecution (CDPP).[36] The CDPP conducted no prosecutions against employers for breaches of offences in relation to work by migrant workers in the period.[37] While we welcome this increase in upholding and enforcing employer obligations by the ABP and CDPP, there are still limited legal consequences for employers exploiting their employees under migration law.

> **Recommendation 8**
> The Australian Border Force should initiate more enforcement activities for employer breaches of migration law, such as clawbacks of sponsorship costs or income paid to workers.

1.8 Length of legal proceedings

The MWT Report indicates that in 2016-2017 the average small claims matter in the Fair Work Division of the Federal Circuit Court took 4.3 months from lodgement to finalisation.[38] The 2017 - 2018 Federal Circuit Court Report estimates the median time for trial in the general division is 15.2 months, a figure not specific to the Fair Work Division. For working holiday makers who complete a 6 month farm stay, the wait required to pursue a claim, particularly in the General Division, may extend past the length of their stay.

RLC has found that migrant workers sometimes do not initiate legal proceedings because they know they will not be in the country long enough to see the end of their court process. Legal proceedings are too long to allow them to recover their underpaid entitlements.

1.9 The Fair Entitlements Guarantee

Even when migrant workers do decide to initiate legal action, they sometimes then face the significant problem of their employers entering into liquidation before entitlements are recovered. Sometimes these businesses then re-emerge as new entities that cannot be legally pursued. Such behaviour is known as 'illegal phoenix activity' and is estimated to cost $1,660 million to the Australian Government each year.[39] The cost to employees in owed wages and entitlements is estimated to be between $31 million to $298 million.[40] Phoenixing is all too common in the building, cleaning, cafés and restaurants, horticulture, and childcare services industries,[41] all areas that rely heavily on migrant labour.

If an Australian citizen, permanent resident or New Zealand citizen employee has been employed by one of these companies, they are able to apply to the Fair Entitlements Guarantee (FEG) to recover:

- unpaid wages – up to 13 weeks;
- unpaid annual leave and long service leave;

[36] Ibid 71.
[37] CDPP, *Prosecution Statistics* (Web Page, 2018) <https://www.cdpp.gov.au/statistics/prosecution-statistics>.
[38] MWT Report, above n 1, 94.
[39] Australian Government: Australian Tax Office, *The economic impact of potential illegal phoenix activity* (website) <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/The-economic-impact-of-potential-illegal-phoenix-activity/>
[40] Ibid.
[41] Ibid.

- payment in lieu of notice—up to five weeks; and
- redundancy pay—up to four weeks per full year of service.[42]

Migrant workers are not eligible to access their entitlements under the *Fair Entitlement Guarantee Act 2012* (Cth).[43] Considering all migrant workers pay income tax (including working holiday makers who earn below $37,000 taxed at 15%), it is RLC's position that migrant workers should be able to recover unpaid wages from the FEG. Recommendation 13 in the MWT Report supports the amendment of FEG to include migrant workers but at the time of writing this has not been implemented.[44]

> **Recommendation 9**
> The eligibility requirements of the Fair Entitlement Guarantee should be expanded to include migrant workers.

1.10 Visa conditions creating vulnerabilities

Students visa (subclass 500) (International Students)

International students on a subclass 500 or 574 student visa[45] are subject to visa condition 8105,[46] which prohibits them from working more than 40 hours per fortnight when their course is in session. If an international student is found to have breached this condition, the DHA may cancel their visa.[47]

If the employment visa condition was removed, international students would be able to work in the same way as local students. These students would not need to risk breaching their visas in order to support themselves financially. Other conditions on their visas would still require students to focus on the object of their visa: their studies. These conditions require students to attend 80% of their classes, and achieve satisfactory course results.[48]

The elimination of condition 8105 would remove an obstacle to international students taking legal action against wage theft. Employers would no longer be able to use the threat of visa cancellation over international students who complain of such conduct at work as a way of avoiding liability for wage theft.

> **Recommendation 10**
> The *Migration Regulations* 1994 (Cth) should be amended to remove condition 8105, which currently requires international students to limit their work hours to 40 hours per fortnight when their course is in session.

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[42] Australian Government: Attorney General's Department, *Fair Entitlements Guarantee (FEG)*, (website) https://www.ag.gov.au/industrial-relations/fair-entitlements-guarantee/Pages/default.aspx.
[43] *Fair Entitlements Guarantee Act 2012* (Cth), Part 2 Division 1sub-division A para 10(1)(g) Special category visa holders are New Zealanders.
[44] MWT Report, above n 1, 13.
[45] We have only considered subclass 500 (student) visa in this report, for visa applications made after 1 July 2016.
[46] *Migrations Regulations 1994* (Cth) (Migration Regulations) sch 8 cl 8105.
[47] Migration Act s.116.
[48] Migration Regulations, sch 8 cl 8202.

Temporary Skill Shortage visa (subclass 482)

While employees on Temporary Work (Skilled) visas may be professionals with a higher level of education than other migrant workers, they are still vulnerable to exploitation. The Wage Theft Report found that of all participants in the survey, 7% were on a Temporary Work (Skilled) visa, subclass 457 (now 482) when paid their lowest wage while working in Australia.[49] RLC considers that the onerous visa conditions specific to the 482 visa exposes these visa holders to exploitation. The 482 visa (and residual 457 visa) holders are uniquely vulnerable because their ability to live in Australia is effectively determined by their employer.[50]

The 482 visa can be a pathway to permanent residency for visa holders if certain conditions are met. Many subclass 457 and 482 visa holders apply to become permanent residents through the Employer Nomination Scheme (subclass 186) visa program.[51] A migrant's ability to qualify for the subclass 186 permanent visa is conditional on an employer agreeing to continue to sponsor the migrant and the migrant performing skilled work that is approved by the DHA. The migrant must also satisfy other visa eligibility requirements, which includes a work experience requirement (that generally requires a migrant to work for the employer for 3 years), amongst other criteria.

482 visa holders must maintain full-time, employment with their sponsoring employer,[52] and should only work in the occupation that their sponsor has nominated them to perform. If employment ends for whatever reason, these visa holders have only 60 days to obtain another sponsor, or depart Australia.[53] Further, if a subclass 482 visa holder wishes to change employers, the new proposed employer must be approved by the DHA as a sponsor, and must seek DHA approval to nominate the visa holder to perform a nominated occupation. The visa holder cannot commence work with the new employer until the new nomination has been approved.

These visa conditions create disincentives for employees from complaining about conditions at work, as they fear the negative visa ramifications of losing their job, leaving employers to act with impunity. RLC clients on 482 visas who have partially completed their three years of sponsored employment have reported staying with their employer despite being unfairly exploited or underpaid, due to the requirements for receiving a permanent pathway, and the 60 day time limit restricting their ability to secure another employer.

Our understanding is that in practice the DHA does not enforce the 60 day limit in instances where the visa holder has lodged a complaint of unpaid wages with the FWO. Formalising this practice and providing guidance of how this amnesty is applied would increase the visa holder's ability to find alternate work and seek redress without risking visa cancellation, removal and any future opportunities to live and work in Australia.

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[49] Berg and Fardenblum, above n 3, 19.

[50] Senate Standing Committees on Education and Employment, Parliament of Australia, The impact of Australia's temporary work visa programs on the Australian labour market an on the temporary work visa holders: Chapter 6, (17 March 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report/c06>.

[51] Australian Government: Department of Home Affairs, Employing and Sponsoring Someone (website) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-skill-shortage-482/labour-agreement-stream#Eligibility; https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/employer-nomination-scheme-186/temporary-residence-transition-stream>

[52] Visa condition 8607 – Migration Regulations, Schedule 8

[53] Australian Government: Department of Home Affairs, Employing and Sponsoring Someone (website) <https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/see-your-visa-conditions?product=482-67#>

Recommendation 11

The Department of Home Affairs should introduce and publicise details of an amnesty to the 60 day limit for a temporary work (skilled) visa holder to find a new sponsor where the worker raises allegations of workplace exploitation.

Paying for sponsorship costs and cashbacks for annual market salary rate

As part of the 482 visa holders' employer obligations, the minimum salary that may be paid to a 482 visa holder is $53,900.00.[54] RLC clients commonly report that an employer pays them correctly on payslips or through electronic transfer, but then a manager takes them to an ATM and forces them to withdraw cash and hand it over. Again, given the ramifications to a worker's ability to stay in Australia, there is little incentive to complain about these practices. This practice is not limited to 482 visa holders and we have seen clients similarly underpaid under a modern award.

It is common for RLC's clients to advise us that they have had to pay for their employer's sponsorship costs and, in some cases, even pay for the advertising of the role to satisfy the government's genuine skills shortage requirement. While these payments are unlawful for both employees and employers,[55] they are a common occurrence. The continuation of this practice effectively creates bonded labour and promotes the practice of underpayments and cash backs for the security of remaining on a sponsored visa. The ABF should better enforce these regulations so that employers are deterred from asking employees to pay back the costs (See 0).

Working Holiday Makers visa (subclass 471/162)

Underpayment is especially prevalent in food services, and in fruit and vegetable picking.[56] Holidaymaker visa holders (417/462 subclass) wishing to extend their stay in Australia by a year must satisfy a compulsory three month, or 88 calendar day, agricultural stint or 'farm work' period typified by fruit and vegetable picking and other agricultural cultivation. This extension is also called a second working holiday visa. The compulsory 88 days of work, along with the remoteness of the work itself, creates a particularly precarious situation for employees removed from services and beholden to the threat of removal from Australia.[57] These working conditions have led to the creation of the social media movement #88daysaslave. Examples from this campaign corroborates these concerns of vulnerability with some working holiday makers documenting extremely harsh working conditions and payments as low as $4 per hour.[58]

Third working holiday visa

Recently, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs David Coleman heralded the remote work component for certain temporary visas as a success for the

[54] Australian Government: Department of Home Affairs, Employing and Sponsoring Someone (website) < https://immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/sponsoring-workers/nominating-a-position/salary-requirements>.
[55] Australian Government: Department of Home Affairs, Cost of Sponsoring (website) <https://immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/sponsoring-workers/learn-about-sponsoring/cost-of-sponsoring>.
[56] MWT Report, above n 1, 33.
[57] The Guardian, *#88daysaslave: backpackers share stories of farm work exploitation*, 26 September 2019, <https://www.theguardian.com/australia-news/2019/sep/26/88daysaslave-backpackers-share-stories-of-farm-work-exploitation>.
[58] Ibid.

Australian workforce saying, "*We are giving regional businesses the immigration settings to help them fill those roles*".[59] As of 1 July 2019, the government extended a visa opportunity for people to stay in Australia by introducing an option for a third working holiday visa to be satisfied by six months of specified work in a specified regional area during their second year.[60] Owing to the option for a second, six month component of farm work under the working holiday visa holder program and the reports of 'slave-like conditions' by visa holders, RLC has significant concerns that the exploitation of workers will increase, including instances of underpayments, sexual harassment and sexual assault.[61]

A 2019 report on Labour Challenges in the Australian Horticulture Industry by the University of Adelaide found the horticultural industry is reliant on non-compliant labour hire contractors which control the supply of labour to farms.[62] The report also found that the link between migration outcome and work performance means contractors are free to exploit visa holders against a framework of inadequate compliance and regulation.[63]

RLC Case Study: Working Holiday Maker experiencing exploitation

Minh* attended RLC for an unpaid wages and entitlements matter. Minh, a UK national, was in Australia on a working holiday visa. He replied to an advertisement on Facebook and started work in a vineyard as a farm hand. The vineyard promised him 8 hours work a day for $20/hour, as well as free accommodation and meals. However, one week later, the employer paid him $8/hour and insisted that Minh pay for the use of a car and washing facilities. After Minh raised this underpayment with the vineyard, they agreed to comply with the Wine Industry Award 2010, which required Minh be paid $23.19/hour. However, the vineyard did not honour their commitment and at the time Minh approached RLC for advice, he had not been paid for hundreds of hours of work, overtime or penalty rates. The vineyard was also inappropriately trying to claim money from Minh to repair a broken farm vehicle.

RLC assisted Minh by calculating how much he had been underpaid and helping him draft a letter of demand to his employer. When the vineyard refused to pay, RLC helped Minh draft an application to claim his unpaid employment entitlements in the Federal Circuit Court. This was successful and the Court ordered the vineyard pay Minh his employment entitlements. Despite having a court order, the employer refused to pay Minh and RLC gave Minh advice about how to take enforcement action against the vineyard to recover his entitlements.

**name changed for confidentiality*

[59] Ibid.
[60] Australian Government: Department of Home Affairs, Working Holiday Maker (WHM) program, (website) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417/specified-work>.
[61] The Guardian, above n 57; Australian Broadcasting Commission, *'Sleep with me ... or I rape you': Backpackers speak out ahead of working visa change,* 16 June 2019, <https://www.abc.net.au/news/2019-06-16/calls-to-regulate-backpacker-work-ahead-of-federal-visa-changes/11186178>.
[62] Joanna Howe, Stephen Clibborn, Alexander Reilly, Diane van den Broek & Chris F Wright, 'Towards a durable future: tackling labour challenges in the Australian horticulture industry' (*University of Adelaide,* January 2019) <https://sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf> 5.
[63] Ibid 5.

RLC is concerned that the criminalisation reforms will not address the ongoing exploitation of working holiday makers. Working holiday visa holders are only eligible to stay in Australia for one to two additional years after satisfying their farm work obligations and may not be in the country long enough to bring legal action. Working holiday makers are highly vulnerable, and RLC recommends the additional regulation of farm employers to prevent the ongoing exploitation of migrant workers.

We support the introduction of effective national and NSW-based labour-hire licencing regimes supported by strong enforcement to prevent sham contracting (where businesses treat workers as contractors to avoid their obligations to pay lawful minimum employee entitlements). We also support additional resourcing for the FWO to monitor employer compliance for working holiday makers. We further recommend changes to the visa subtype itself, where only employers who can demonstrate their compliance with the law would be able to access the program.

Recommendation 12

An effective labour-hire licensing regime should be established to more effectively regulate employers of working holiday makers.

Recommendation 13

Funding for FWO should be increased to enable it to conduct inspections of employers of working holiday makers and ensure compliance with minimum working conditions.

Recommendation 14

The *Migration Act 1958 (Cth)* should be amended to ensure that only employers who can demonstrate compliance with the law are able to employ working holiday makers.

2. Unintended consequences

While RLC generally welcomes the criminalisation reforms, we recognise the practical hurdles that may exist in the enforcement of the sanctions. We recommend that commensurate resources are provided to investigate and prosecute underpaying employers. It is imperative that the proposed criminal sanctions are enforced for the criminalisation reforms to effectively act as a deterrent.

Of particular relevance to RLC's clients is the difficulty in attributing liability to labour hire employment webs and recovering wages from phoenixing businesses that enter into liquidation to avoid paying accrued employee entitlements. We regularly face hurdles finding employers or directors to name in court applications or find that, at the end of a long court process, workers are unable to recover their court ordered entitlements because businesses have entered into administration and directors have become bankrupt. Adequate provisions need to be in place to prosecute these kinds of employment arrangements.

It has been suggested that any criminal investigation could postpone a civil pursuit of remedies.[64] If this was the case, RLC is concerned that the pursuit of criminal sanctions may act as a further deterrent for clients to seek redress. Criminal sanctions should not compromise the recovery of individual underpayments. We recommend this specific concern be addressed in the legislative drafting.

Recommendation 15

Criminal prosecutions should not create any impediment to individual wage recovery using the civil process.

Recommendation 16

Police and other relevant bodies should be adequately resourced to ensure timely and strategic prosecutions for wage theft.

[64] Sydney Morning Herald, *Employers could face jail over wage theft under new laws*, 24 July 2019 <https://www.smh.com.au/politics/federal/employers-could-face-jail-over-wage-theft-under-new-laws-20190724-p52ad5.html>.

3. Current enforcement activities and their effect on employer behaviour

Underpayment enquiries have become a significant issue for RLC's client base, with advice on wage theft making up almost half of our employment advices in 2018-2019. At a national level, FWO's 2018 National Compliance Monitoring Report found that only 62% of employers were completely compliant with their workplace obligations when they were re-audited.[65] Up to one in four employers continue to underpay their staff, despite education and the threat of FWO's enforceable outcomes (compliance notices, enforceable undertakings etc.).

RLC recognises the difficulties in changing industry-wide underpayment practices. In 2017-2018, FWO made the hospitality industry, an industry dominated by migrant workers, a key focus of their compliance operations.[66] In doing so, FWO secured a 56% increase in court ordered penalties for this period.[67] We encourage and support the industry focused crackdown on non-compliance and recommend it be extended to other dominant migrant worker industries including horticulture and retail.

Recommendation 17

FWO should receive additional funding to allow greater targeting of industry specific non-compliance with the *Fair Work Act 2009* (Cth), with a particular focus on the hospitality, horticulture and retail industries.

[65] Australian Government: Fair Work Ombudsman, *National compliance monitoring #2*, November 2018, downloadable from: https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/november-2018/20181108-final-national-compliance-monitoring-campaign-report-media-release.

[66] Ibid.

[67] Ibid.

4. The deterrent effect of the 'serious contravention' category in the FWA

The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* introduced reforms (the Vulnerable Workers Reforms) to the FWA that increased maximum civil penalties for certain serious contraventions of the Act. To establish a 'serious contravention' requires knowledge that an employer was contravening a civil remedy provision as part of a systematic pattern of conduct.[68]

FWO's first litigated outcome using the Vulnerable Workers Reforms was finalised in August 2019. It is possible that more time needs to pass for the serious contravention reforms to have a sufficient deterrent effect, however RLC is concerned that these amendments will offer limited practical relief for temporary migrant workers against underpaid wages. RLC has not seen a decrease in migrant workers reporting wage theft since the Vulnerable Workers Reforms were enacted: in fact, RLC is seeing more underpayment claims than ever before.

Structural inequalities currently limit the ability of workers to complain and pursue complaints against offending employers (see above). Increasing the penalties for serious contraventions does not systematically address the causes and prevalence of the underpayment of temporary migrants. The onus still lies with the vulnerable worker to seek redress and risk their personal visa status for the duration of any legal claim.

RLC migrant worker clients have taken the first step by coming to us for legal advice, but many have indicated to us that they are reticent to follow through with their enquiry. Research has shown that only one in ten migrant workers are likely to take steps to recover their unpaid wages.[69] Unscrupulous employers are able rely on migrant worker inaction in seeking legal advice about their rights at work or bringing legal claims. The increase in penalties for serious contraventions is unlikely to encourage migrant workers to bring legal claims against their employers while other significant barriers remain. Further, the new maximum penalty is only applicable when an employer 'knowingly' and 'systematically' underpays[70], requiring a high evidentiary burden to satisfy the Court of the contravention.

The deterrence aspect of the Vulnerable Worker Reforms are weakened by the limited capacity of the FWO and CLCs to take on litigation against employers. It is easy to see how employers might take a calculated risk that they will not be litigated against, under the serious contraventions section of the FWA or otherwise.

Recommendation 18

FWO's litigation team should receive additional funding to pursue greater numbers of employers suspected of serious contraventions, as defined under section 557A of the *Fair Work Act 2009* (Cth).

Recommendation 19

Community Legal Centres should be provided additional funding to increase representation services to employees whose employers are suspected of serious *Fair Work Act 2009* (Cth) contraventions.

[68] ss 557(1)(a); S 557(1)(b) *Fair Work Act 2009* (Cth) ('FWA').
[69] Berg and Fardenblum, above n 3, 3.
[70] S 557A(1) FWA

5. The grouped provisions in the FWA

Currently, the FWA provides that a court may 'group' a series of contraventions of certain provisions together if they arose out of an employer's 'course of conduct'. [71] An example is 20 employees doing bar work are all paid a flat rate of $15/hour. In underpaying each worker, the employer may have breached 5 separate terms of the Hospitality Industry (General Award) 2010. These 100 contraventions will be grouped so that the employer is taken to have contravened 5 times and is only liable to pay one penalty. Similarly, even if an employer has failed to pay a convenience store worker overtime on many occasions over the 2 years they have worked there, the court will treat these contraventions as a single contravention for the purposes of civil penalties.

RLC recognises the difficult balancing act between punishing businesses committing breaches of the FWA, facilitating wage recovery for exploited employees and avoiding onerous punishments that may exist for businesses who have made honest mistakes. However, for large companies who commit widespread breaches of the FWA against multiple employees or a number of contraventions against one employee, 'grouping' breaches reduces businesses' exposure to liability and therefore the deterrent effect of penalty provisions. The use of underpayments as a business model will continue to be profitable while the grouped provisions are in force.[72] RLC supports the Government's proactive response in relation to Recommendation 5 of the MWT Report.

Recommendation 20

The multiple grouping penalty provision of the *Fair Work Act 2009* (Cth) should be amended to extend employers' liability to pay penalties.

[71] s 557(1) FWA.

[72] McKell Institute Victoria, *Ending Wage Theft: Eradicating Underpayment in the Australian Workforce,* March 2019, available at:<https://mckellinstitute.org.au/app/uploads/McKell-Ending-Wage-Theft.pdf> 28.