



RESEARCH AND POLICY GUIDE SERIES

# **BREAKING THE SILENCE**

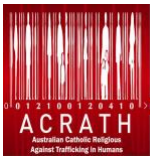
## **A proposal for whistleblower protections to enable migrant workers to address exploitation**

November 2022

In collaboration with

Human  
Rights  
Law  
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Dr James Cockayne,  
NSW Anti-slavery  
Commissioner





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## I. Introduction

Exploitation of migrant workers is pervasive and entrenched in workplaces across Australia and has been well-documented for years. To date, the vast majority of unlawful employer conduct has gone unchecked, in part because very few migrant workers report it and/or assert their rights.

Migration settings impede reporting and remedying exploitation in two key ways. First, many migrant workers are unwilling to address exploitation during their stay for fear of putting their visa and stay in Australia at risk, or jeopardising a future visa. In 2017, the Federal Government attempted to address this issue by implementing an Assurance Protocol between the Department of Home Affairs (**DHA**) and the Fair Work Ombudsman (**FWO**). This measure has been largely ineffective and used by only 76 migrant workers in five years.

Second, when migrant workers reach the end of their stay and could potentially safely pursue a labour claim without risk to their job or visa, most swiftly return home. All intelligence about exploitative employers is lost, the worker never recovers the wages they are owed, and the employer is never held to account. There is no visa that enables temporary migrants to remain in Australia in order to assert their employment rights against an unscrupulous employer.

Enhanced mechanisms are needed to address exploitation by ensuring government can gather intelligence about employer non-compliance and migrant workers who wish to pursue their rights are protected. This Research and Policy Guide proposes two new whistleblower reforms to enable migrant workers to safely take action against employers that violate Australian labour laws. These include (1) stronger legislative safeguards against visa cancellation for whistleblowers during a migrant worker's stay and (2) a new short-term visa to enable migrant workers who are at the end of their stay to remain in Australia to pursue a civil labour claim against their employer.

These proposals include safeguards to ensure these protections are only available for migrant workers who are taking action to address meritorious and non-trivial breaches of their workplace rights, which have been vetted and certified by a government agency, court, or specialist legal professional in a union or non-profit legal service provider. While it is not possible to entirely eliminate risks of misuse of the protections or other undesired outcomes, the prospect of making genuine systemic inroads into labour non-compliance in Australia justifies the mitigated risks. In the absence of these robust visa protections, labour enforcement in Australia will continue to be seriously compromised and exploitation of migrant workers will remain rampant as employers rely on migrant workers' silence.

## II. The Problem: Why migrant workers suffer exploitation in silence and employers cannot be held to account

Wage theft and other forms of exploitation of migrant workers in Australia are widespread and endemic in industries with large migrant worker populations. Migrant Justice Institute's 2016 survey of 4,322 temporary visa holders found at least a third earned less than \$12 an hour.<sup>1</sup> A subsequent large-scale survey by Migrant Justice Institute in 2019 produced similar findings.<sup>2</sup> It is clear that current measures to address exploitation are not working, and systemic exploitation continues to flourish because employers know they are unlikely to get caught.

The vast majority of migrant workers who experience wage theft and other forms of exploitation do not report it or seek remedies against their employer. During the term of the visa, they do not come forward because they fear they will jeopardise their visa and stay in Australia or put future visas at risk. When migrant workers reach the end of their visa and there are no longer risks associated with reporting exploitation, they immediately leave Australia, and it is almost impossible for them to pursue a claim overseas. Migrants' unwillingness and inability to come forward compromises the ability of government regulators like the FWO, Labour Hire Licensing Authorities, federal and state police and others to bring actions since they rely heavily upon self-reporting to obtain intelligence and identify cases of exploitation. This in turn creates a breeding ground for forced labour and modern slavery which remain undetected for the same reasons.

This brief presents reform proposals that overcome (1) barriers to reporting exploitation during a worker's stay in Australia, and (2) barriers to pursuing a claim at the end of the migrant worker's stay, prior to leaving Australia. To address these barriers, these reforms would implement Migrant Worker Taskforce recommendation 21 ('review the Assurance Protocol to assess its effectiveness and whether further changes are needed to encourage migrant workers to come forward with workplace complaints'). We propose an expanded and stronger Assurance Protocol and a new Workplace Justice visa to enable a worker to remain in Australia to pursue a claim. If implemented, these reforms would allow, and encourage, far greater numbers of migrant workers to report exploitation and obtain remedies, including recovering wages they are owed. In turn, exploitative employers in Australia would no longer be able to rely on migrant workers' silence. Government would be far better placed to strategically hold offending employers to account and drive compliance with Australian law, while ensuring migrant workers recover the wages they are owed and obtain just redress for exploitation.

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<sup>1</sup> Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (2017), 5.

<sup>2</sup> Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (2020), 8.

Further reforms are needed to ensure labour laws are enforced if whistleblower reforms are introduced and migrant workers become willing to report exploitation and pursue claims for wage theft and other contraventions. Future Research and Policy Guides will consider reforms needed in relation to labour law protections, wage claims forums, and enforcement processes to enable migrant workers to successfully pursue claims. As recognised by the Migrant Worker Taskforce, both sets of reforms are critical to addressing migrant worker exploitation.

## A. Many migrant workers suffer exploitation in silence to avoid jeopardising their immigration status

The overwhelming majority of migrant workers suffer wage theft and other forms of exploitation in silence. In Migrant Justice Institute's 2016 survey, 91% of underpaid migrant workers took no action.<sup>3</sup> Migrant Justice Institute's 2019 survey of 5,968 international students found that 38% of those who experienced a problem at work did not seek help because they did not want 'problems that might affect my visa'.<sup>4</sup> For international students, and workers on some other temporary visas, this is generally due to fear that detection of a visa breach will lead to cancellation of their current visa, or refusal of a future visa application on the basis that they have a record of non-compliance with visa conditions.

In many instances, migrant workers' visa breaches occur in the context of workplace exploitation. International students breach their visa if they work more than the 40 hours per fortnight permitted under visa Condition 8105 while their course is in session<sup>5</sup> (currently suspended, to be reinstated mid-2023). These students are frequently underpaid and work additional hours to make up the minimum wage. Employers of international students also often demand students work additional hours, and students risk losing their job if they refuse. If detected by the DHA, the student's visa may be cancelled under s 116(b) of the *Migration Act 1958* (Cth) (the **Migration Act**).<sup>6</sup>

Other migrants may breach their visa by working while holding a visa with a 'No Work' condition 8101, including Sponsored Parent visa-holders, Visitor visa-holders, and Bridging Visa C and E-holders. These workers are highly vulnerable to exploitation because reporting it will result in detection of their work and can lead to visa cancellation and removal.

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<sup>3</sup> Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (2018), 2.

<sup>4</sup> Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (2020), 10.

<sup>5</sup> Secondary visa-holders are subject to Condition 8104 which is similar.

<sup>6</sup> Where the breach is sustained and ongoing, there may alternatively be grounds for cancellation under subsections 116(1)(a) or (fa) of the *Migration Act*, on the grounds that the grant of the visa was based on facts or circumstances which no longer exist, or its holder is not likely to be a 'genuine student'.

Unless the risk of visa cancellation and future consequences is removed for international students and these workers on visas with 'No Work' conditions, most will remain unwilling to report exploitation or pursue remedies against their employer during their stay in Australia regardless of information or assistance provided to them.

It is important to note that fear of immigration consequences is so acute that it is not confined to those who have actually breached their visa and are liable for visa cancellation. Migrant Justice Institute's research reveals that fear of contact with immigration authorities is so pervasive that it impacts the decisions of temporary migrants across all domains, even among temporary visa holders who have not breached their visa conditions. For example, Migrant Justice Institute's survey of 6,105 temporary visa holders, investigating experiences during the national COVID-related lockdown in 2020, found that close to a third (29%) of those who reported financial distress indicated they did not seek emergency support because they were worried that it might affect their visa.<sup>7</sup> In Migrant Justice Institute's 2019 survey of 5,968 international students, 82% wrongly believed that their student visa could be cancelled for failure to pay rent or other tenancy breaches.<sup>8</sup>

## **B. When migrant workers have nothing to lose at the end of their stay and could potentially safely pursue a labour claim, they return home and all intelligence is lost**

The only time when many migrant workers feel safe to report exploitation and pursue a claim against their employer without jeopardising their job or their visa is when they are nearing, or have reached, the end of their stay in Australia. However, when a migrant worker's visa comes to an end, they are required to swiftly leave Australia and have no opportunity to pursue a claim. Migrant Justice Institute's research in Australia, and other jurisdictions, has confirmed that it is virtually impossible for a migrant worker to pursue a legal claim against an employer once they have returned home.<sup>9</sup>

Legal service-providers generally consider the fact that the employee is no longer in Australia to be a serious practical hurdle to running their case.<sup>10</sup> Unions have also

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<sup>7</sup> Laurie Berg and Bassina Farbenblum, *As If We Weren't Humans: The Abandonment of Temporary Migrants in Australia during COVID-19* (2020).

<sup>8</sup> Laurie Berg and Bassina Farbenblum, *Living Precariously: Understanding International Students' Housing Experiences in Australia* (2019).

<sup>9</sup> Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* 1035, 1073; Bassina Farbenblum, *Migrant Workers' Access to Justice at Home: Nepal* (Open Society Foundations, 2014); Bassina Farbenblum, Eleanor Taylor-Nicholson and Sarah Paoletti, *Migrant Workers' Access to Justice at Home: Indonesia* (Open Society Foundations 2013).

<sup>10</sup> Interview by Laurie Berg and Bassina Farbenblum with Kingsford Legal Centre Lawyers (Sydney, 5 February 2016); Interview by Laurie Berg and Bassina Farbenblum with Legal Aid NSW Lawyers (Sydney, 8 February 2016).



experienced great difficulties advocating for workers who have returned home.<sup>11</sup> This is especially the case for sponsored migrant workers, because a complaint against their employer can easily lead them to lose their job and sponsorship (and they have only 60 days to find alternative employer sponsorship or leave the country).<sup>12</sup>

For some visa holders, employer noncompliance can jeopardise the worker's ability to qualify for a further visa. For example, for Working Holiday Makers, labour noncompliance can result in their noncompletion of the 88-day requirement for a second-year visa (or 6 months for a third year).

Undocumented workers, who are the most vulnerable to exploitation, do not bring claims because they fear detection by the DHA, triggering their immediate detention<sup>13</sup> and removal from Australia as soon as reasonably practicable.<sup>14</sup>

When an undocumented worker is detected by DHA, it is not possible for them to bring a claim against an employer prior to their removal and the DHA does not have any process for screening for labour claims upon detection. As a result, all intelligence in relation to exploitation of undocumented workers, and potential related forced labour and modern slavery offences, is lost with their removal from Australia.

Unless measures are introduced to allow exploited workers to remain in Australia for a short period in order to pursue a complaint or legal action against their employer, the vast majority will leave without ever reporting their experience or recovering the wages they are owed. As a result, their employers will continue to exploit a new cohort of migrant workers.

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<sup>11</sup> ACTU, *Submission No 48 to Senate Education and Employment References Committee, Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (1 May 2015), 76.

<sup>12</sup> Employer-sponsored visa-holders face visa cancellation under conditions of employer noncompliance in a number of scenarios: a) The worker's breach of a work-related visa condition. This may include receipt of salary below the Temporary Skilled Migration Income Threshold for Temporary Skills Shortage visa-holders, working in an occupation other than the nominated occupation, or providing payment to obtain employer sponsorship; b) The employer terminates the employment relationship or sponsorship arrangement in retaliation for the worker's complaint against their employer; or c) The worker has lost their employer sponsorship because it has been terminated by the DHA as a result of the employer's breach of its sponsorship obligations (including paying less than the market rate for entitlements, accepting payment in return for sponsorship, and others).

<sup>13</sup> *Migration Act*, s 189.

<sup>14</sup> *Migration Act*, s 198.

### III. Current interventions are ineffective

#### A. The Assurance Protocol between the Fair Work Ombudsman and the Department of Home Affairs has had almost no impact on worker reporting

In 2017, the Coalition Government sought to address migrant workers' unwillingness to report workplace exploitation to the FWO by introducing an Assurance Protocol between the FWO and DHA. The Protocol was intended to provide security to temporary visa holders by indicating that if they cooperated with the FWO, DHA would exercise its discretion to not cancel their visa due to their breach of a work-related condition, provided other conditions were met.

In principle, the Assurance Protocol was an innovative approach to migrant worker protection, acknowledging the need for visa safeguards to enable migrant workers to report exploitation. In practice, however, it has had virtually no impact. Between 2017 and 2021, it was used by only 77 temporary visa holders.<sup>15</sup>

Its ineffectiveness stems from several key shortcomings:

- It is not enshrined in law or policy, rather it is detailed on the FWO and DHA's websites and is set out in a Memorandum of Understanding between the agencies that is not available to the public, lawyers or migration agents.
- The Assurance Protocol extends only to temporary visa holders with work rights and excludes those who work on temporary visas without work rights (including Parent visa holders) as well as undocumented workers who are the most vulnerable to exploitation.
- Until recently, it has not been clear whether the Protocol protects against not only loss of the workers' current visa but also ineligibility for future visas (including permanent residency).
- It is available only to workers who are 'helping [the FWO] with [their] inquiries'.<sup>16</sup> It is therefore, apparently, not available for exploited workers in relation to whom the FWO is not making further inquiries due to inadequate evidence (especially for workers underpaid in cash), lack of agency resources or other reasons. As a result, availability of the Protocol is speculative and largely outside the worker's control. The Protocol is also not available to workers who wish to approach other agencies to report or seek assistance in relation to other workplace harms, including workplace

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<sup>15</sup> Information provided by DHA pursuant to a Freedom of Information Request, FA 21/12/00662, 14 February 2022.

<sup>16</sup> Fair Work Ombudsman, 'Visa Protections – the Assurance Protocol' (accessed 17 October 2022) <https://www.fairwork.gov.au/find-help-for/visa-holders-migrants/visa-protections-the-assurance-protocol>.

health and safety breaches, sexual harassment or bullying, breaches of licensing conditions by labour hire firms, breaches of immigration laws or other abuses.

- Visa protections are not available to workers who seek to address their exploitation through union action or a legal claim in a court or the Fair Work Commission.
- No protections are available for a visa holder whose employer reports the visa breach to DHA in retaliation against the worker's complaint or claim.

Expansion and formalisation of the Assurance Protocol can address these workers' reluctance to take action against exploitation due to fear of visa cancellation or future ineligibility for a further visa, on the basis of their breach.

## Case study

The inconsistent application of the Protocol by the FWO is evident from two case studies provided by Redfern Legal Centre (RLC). RLC assisted an international student named Fang,<sup>1</sup> who was working up to 60 hours a week, sometimes overnight as a receptionist for a 24-hour business and was paid a flat rate of \$20 per hour. Fang sought assistance from the FWO and the protection of the assurance protocol because she had breached visa condition 8105 and worked more than 40 hours a week while on a subclass 500 Student visa. Fang participated in the FWO's investigation and provided extensive evidence of her work patterns, although Fang's employer had not provided payslips. The Fair Work Inspector determined that they could not form a reasonable belief that a contravention of a modern award occurred, i.e. that Fang was underpaid because she could not provide a complete record of her work hours, including a roster with start and finish times or payslips. The matter was closed and the FWO confirmed that Fang was not eligible to receive protection through the Assurance Protocol because no determination was made. Information about the Assurance Protocol on the FWO website does not indicate that a determination is required for workers to be eligible for the amnesty. Fang is now more vulnerable to visa cancellation than before reporting the non-compliance to the FWO.

In another matter, RLC acted for a client where a Fair Work Inspector also did not reach a reasonable belief that a contravention had occurred under the Fair Work Act 2009 (Cth) (FW Act). However, in this case, the Assurance Protocol was enlivened.

These two matters reflect the FWO inspectorate's inconsistent application of the Protocol. Yet no appeal is available, nor are clear definitions provided of the terms of the Protocol, in part because its legal status as a webpage is unclear.

## **B. There is no suitable visa that enables migrant workers to remain in Australia to report or seek redress against exploitation**

At present, there is no visa specifically available to workers who wish to seek redress against their employer for labour noncompliance but are at the end of their stay in Australia.

Visa holders at the end of their visa validity period and looking to extend their time in Australia are eligible for Bridging 'E' visas. For a number of reasons, the Bridging 'E' visa is not a suitable mechanism to preserve the visa status of workers seeking to pursue redress against their employers.

Firstly, Bridging 'E' visas can only be granted on the confined grounds set out at Schedule 2 to the *Migration Regulations 1994* (Cth) – such as the holder making arrangements to depart the country, to apply for a visa or to remain in the country while that visa application is processed. The eligibility grounds do not extend to the commencement of legal proceedings against a current or former employer. Even if the grounds for eligibility were extended, there are further difficulties with the use of Bridging 'E' visas in these circumstances. Bridging 'E' visas are typically granted with 'no work' condition 8101 – grant of the visa precludes workers finding another employer or supporting themselves while they pursue their claim against their exploitative employer or while they pursue other visa options. Provision of a visa with no work rights would afford workers no viable path to accessing justice. Furthermore, the grant of a Bridging 'E' visa precludes the possibility of making a further visa application in Australia. That is because most visas – importantly including Student, Temporary Skills Shortage or Employer Nomination Scheme visas – require the applicant to hold either a substantive visa or Bridging visa A, B or C.

In other words, the grant of a Bridging 'E' visa to a worker would prevent them from applying for any further visa and would thus deprive them of future visa security as a result of coming forward.

The only other visa option for workers experiencing exploitation is the Criminal Justice visa.<sup>17</sup> However, the grant of that visa is limited to persons assisting in a criminal prosecution and is subject to a number of onerous requirements. The applicant must be issued with a 'criminal justice certificate' by a relevant prosecuting agency, which must also undertake to pay all costs associated with their stay, and they must demonstrate a 'history of compliance with immigration laws'. Criminal Justice visas are granted at the 'absolute discretion' of the Minister or his delegate, for a limited period (typically of several weeks) and are similarly subject to the 'no work' condition.

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<sup>17</sup> *Migration Act*, s 161.

Criminal Justice visas are not available for workers pursuing civil redress against their employers. Only a small minority of workers will be involved in prosecutions against their employers, and the visa does not provide these workers a sufficiently secure framework to come forward. The grant period is limited to what is required by the prosecuting agency, rather than being determined based on the interests of the applicant, and the 'no work' condition prevents the holder from supporting themselves independently or finding alternative employment while assisting the investigation or supporting the prosecution.

## IV. Proposals for reform

### A. Effective protections against visa cancellation for whistleblowers who pursue a meritorious labour claim

Given the seriousness of the risk of visa cancellation for migrant workers, they will only come forward against their employers if there are strong, express protections against visa cancellation and future adverse consequences. As such, the Assurance Protocol must be formalised into a protection against visa cancellation.

Protections against visa cancellation and future visa ineligibility should extend to migrant workers who pursue legitimate claims against an employer through a range of avenues beyond the FWO. It should be applied where:

1. A migrant worker has breached their work-related visa condition in connection with work for a specific employer;<sup>18</sup>
2. There are reasonable grounds to suspect that that employer has committed a non-trivial contravention of labour or immigration law in relation to that worker; and
3. The worker is a 'whistleblower', i.e. the worker has taken steps to address the contravention. This includes assisting a relevant government agency's investigation of the employer, engaging with a union in relation to the employer's alleged contravention or having retained a lawyer to pursue a legal claim.

The protections against visa cancellation and future visa ineligibility must be strong and clearly communicated. An assurance expressed only in policy may not provide migrant workers with the certainty they need to come forward.

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<sup>18</sup> It should not be necessary to demonstrate that the worker's visa breach was directly connected with, or caused by, the employer's labour violation as this would often be impossible. The purpose of the protections is to encourage migrant workers to report exploitation without fear of visa cancellation.

The most appropriate mechanism for the assurance is by way of Regulations issued pursuant to s 116(2) which provides that:

*The Minister is not to cancel a visa under subsection (1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.*

The Regulations do not currently prescribe circumstances in which a visa is not to be cancelled, pursuant to s 116(2). Regulations may be issued, prescribing that a visa is not to be cancelled in circumstances where a worker has become a 'whistleblower,' in the circumstances described above.

## **Eligibility for protection against cancellation**

An argument against strengthening the cancellation protections is that doing so may create an incentive to bring unmeritorious claims. This concern can be addressed by conditioning access to the protection against cancellation on:

1. Specified forms of evidence of the bona fides of the allegation against the employer;
2. Restricting protections to alleged contraventions by employers that are non-trivial; and
3. Specified forms of evidence that the visa-holder is a whistleblower.

However, the process for adducing this evidence and determining eligibility should be sufficiently simple that it is not a bar to migrant workers applying for protection, and not too resource-intensive or lengthy for the DHA and other government agencies to administer.

## **Evidence that whistleblower is pursuing a meritorious claim or complaint**

Forms of acceptable evidence of the merits of the worker's allegation, and evidence that the worker is taking steps to seek redress, should be set out in an instrument, akin to the Family Violence provisions. Acceptable evidence should include:

1. Certification by a relevant enforcement agency that it is conducting inquiries or pursuing compliance measures in relation to the visa-holder's employment;
2. A court, tribunal or commission issuing a 'temporary stay certificate' certifying that a worker's ongoing presence in Australia is required for the conduct of its proceedings; or
3. Certification by an employment law practitioner who holds specialist accreditation from their relevant society or is employed in a government-funded legal service, pro bono practice in a commercial firm, or a union. The legal practitioner must certify that there are reasonable grounds to suspect that a worker's employer has contravened a relevant workplace law in relation to the visa-holder's employment, and that the

worker is pursuing a legal remedy in relation to an alleged workplace contravention through negotiation with the employer or a legal application to an appropriate forum.

Relevant enforcement agencies should include the FWO, DHA, workplace health and safety authorities, the Australian Federal Police, state policing agencies, the Pacific Labour Facility, the Department of Employment and Workplace Relations, state Labour Hire Licencing agencies, and the Australian Human Rights Commission.

Accepting evidence from a range of enforcement agencies and courts is a substantial departure from the current operation of the Assurance Protocol, which is available only by referral from the FWO. Given the small number of investigations or inquiries into workplace exploitation undertaken by the FWO relative to migrant workers who seek the regulator's assistance, and the slow and cumbersome FWO processes for addressing complaints, it is not appropriate for the FWO to be designated the sole avenue for proof of a bona fide claim. In addition, restricting eligibility to those assisting FWO inquiries substantially limits the forms of exploitation which may trigger visa protections since the FWO's jurisdiction extends only to certain contraventions of the *FW Act* and not, for example, occupational health and safety violations or sexual harassment.

In addition to government bodies, we recommend that certain expert employment legal practitioners be able to provide certification of the bona fides of the complaint or evidence that the worker is pursuing legal action. Prescribing a broader range of acceptable evidence, including from union lawyers, ensures that government agencies' resources, including the FWO's, are not depleted by a large number of requests for certification by workers who wish to benefit from this protection against visa cancellation.

Several integrity safeguards should be introduced to guard against false or inadequately substantiated certifications. First, eligibility for certification should be restricted to lawyers with current practising certificates who are subject to professional disciplinary oversight. Second, to avoid any possibility that lawyers bring unsubstantiated claims and to prevent inadvertent certification of unmeritorious claims, eligibility may be restricted to lawyers who hold accredited specialisation from their respective law societies or are employed by pro bono practices of commercial firms, in government-funded practices or in unions.

Expanding the range of actors who may certify a worker's pursuit of a legal remedy can substantially increase the government's access to intelligence to inform its enforcement activities. To ensure this is the case, where the visa-holder is relying on a certification from an expert employment lawyer, the Procedures Advice Manual (**PAM3**) should require the visa-holder to evidence that they have also reported the noncompliance to a relevant government authority.

## Types of employer contraventions that trigger protection

A Ministerial Direction should specify a list of workplace contraventions that give rise to protection against cancellation. These should include a range of civil remedy provisions under the *FW Act*, as well as contraventions of the *Migration Act*, workplace health and safety laws, labour hire licensing provisions, and laws proscribing sexual harassment and bullying, among others.

To ensure that these protections are available only to workers who have experienced non-trivial contraventions, the PAM3 or Ministerial Direction should also set out the threshold for 'non-trivial' contraventions. For instance, allegations of underpayment could amount to at least \$2,000 in aggregate per worker.

### **B. A new Workplace Justice visa to enable a migrant worker with a legal claim against their employer to remain in Australia to pursue justice**

Many employers enjoy impunity for exploitation of migrant workers because the worker leaves the country before they can report or pursue a claim against their employer and it is virtually impossible to pursue a claim from offshore. To substantially increase detection of exploitation and ensure employer accountability and workers' access to justice, migrant workers must be given an opportunity to pursue a claim before they leave. The Senate Select Committee on Temporary Migration recognised the need for bridging arrangements and recommended that 'temporary visa-holders have their visas extended until their small claims matters are concluded'.<sup>19</sup>

We recommend that the best way to achieve this short-term stay is through a new Workplace Justice visa subclass. This would enable a temporary visa-holder or undocumented worker to remain in Australia for a short period to pursue a meritorious labour claim or complaint, or participate in an investigation by relevant authorities, in relation to their employer's labour or immigration contravention. This visa should be available to workers whose visa would expire or be cancelled before their claim is resolved, or who are undocumented.

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<sup>19</sup> See Senate Select Committee on Temporary Migration, *Final Report* (September 2021), xvii Recommendation 31.



## International precedents

A number of foreign jurisdictions have introduced visas to address migrant worker exploitation but have done this in a partial way that does not effectively encourage a broad range of migrant workers to address exploitation at work.

In Canada the Vulnerable Worker Open Work Permit (**VWOWP**) program was introduced in 2019. The VWOWP is available for employer-sponsored workers who are, or are at risk of, being abused in relation to their job.<sup>20</sup> Abuse includes a range of physical harms or threats to safety at work as well as financial abuse including non-payment or underpayment of wages, among others. The VWOWP may be issued for up to 12 months, with work rights, and permits unlimited work in Canada so that the worker can leave their employer and find a new sponsoring employer. Assistance with government authorities' investigations is not required.

However, the program has been subject to criticism. Analysis by one migrant rights organisation of the written reasons given by immigration officers for grants and refusals of VWOWPs has revealed the application of inconsistent standards about what constitutes sufficient evidence of abuse and the scope and level of abuse which is considered sufficient for a grant of this visa.<sup>21</sup> Advocates also point to the complexity of demonstrating exploitation in order to obtain the VWOWP and the resulting drain on the resources of community-based legal service providers and unions supporting these workers.<sup>22</sup> In addition, workers are ineligible for the Open Work Permit when their sponsored visas have become invalid because they have already left their exploitative employer sponsor.<sup>23</sup>

New Zealand introduced the Migrant Exploitation Protection Work visa in 2021.<sup>24</sup> It is available for employer-sponsored workers who wish to quickly leave exploitative employment. In order to be eligible for this six-month visa, a worker must report their exploitation to Employment New Zealand and obtain a Report of Exploitation Assessment letter, which the agency usually provides within a couple of weeks.<sup>25</sup> Immigration New Zealand applies a low threshold for evaluating the claim, which must only be 'credible'. The visa is not available to workers who claim 'minor or insignificant breaches of labour

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<sup>20</sup> Government of Canada, 'Open Work Permit for Vulnerable Foreign Workers who are Victims of Abuse' <https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/permit/temporary/vulnerable-workers.html>.

<sup>21</sup> Amanda Aziz, *A Promise of Protection? An Assessment of IRCC Decision-Making under the Vulnerable Worker Open Work Permit Program* (Migrant Workers Centre and the Law Foundation of British Columbia, 2022), 16.

<sup>22</sup> Ibid 12.

<sup>23</sup> The VWOWP is available only to workers who currently hold a valid employer-specific work permit.

<sup>24</sup> Immigration New Zealand, 'Information about: Migrant Exploitation Protection Work Visa' <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/migrant-exploitation-protection-visa>.

<sup>25</sup> Interview with New Zealand Ministry of Business, Innovation and Employment (19 October 2022).

standards that are un-sustained and easily remedied' (including inadvertent miscalculation or short-term failure to implement a statutory increase in minimum wage).

The inclusion of unlimited work rights in the New Zealand and Canadian visas is critical to their effectiveness and uptake. However, these visas are fundamentally designed to increase portability for employer-sponsored workers, enabling them to leave their jobs when they experience exploitation. They do not specifically encourage these workers to pursue claims or otherwise hold their exploitative employer to account. They do not protect workers other than those on employer-sponsored visas (e.g. they are not available for international students or Working Holiday Makers), nor any worker who participates in union action to address the exploitation.

In Hong Kong migrant domestic workers (who have only two weeks at the completion of their employment contract to find an alternative sponsoring employer or leave the country) may seek an extension of stay if they are pursuing a claim in the Labour Tribunal.<sup>26</sup> This extension is typically given for up to one month; it must be repeatedly renewed if the worker is to remain in Hong Kong long enough to attend a Labour Tribunal proceeding, which lasts around six months on average.<sup>27</sup> As this visa extension does not carry work rights, it is practically available to a very small number of workers, because the vast majority are unable to support themselves in Hong Kong without income, and humanitarian assistance for these workers is extremely limited.

In Malaysia, migrant workers may apply for a 'Special Pass' - a temporary pass issued to a person who wishes to remain in Malaysia 'for any special reason', including filing a wage claim against their employer.<sup>28</sup> The permit is valid for one month and may be extended at the immigration officer's discretion up to a maximum of three months. In 2019, a Memorandum of Understanding entered into force between Nepal and Malaysia regarding migrant workers, which included a special arrangement requiring the Malaysian Government to provide Nepali workers, who they have filed a complaint, a Special Pass which regularises their stay until the labour dispute is settled.<sup>29</sup> This may be of limited utility to migrant workers wishing to recover unpaid wages because the Special Pass is both limited in time and does not authorise employment, while court processing of wage claims may last 6

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<sup>26</sup> See New Condition of Stay, 1987.

<sup>27</sup> Amnesty International, *Hong Kong SAR: Submission to the United Nations Committee on the Elimination of Discrimination Against Women* (Report, 2014), 11.

<sup>28</sup> *Immigration Regulations 1963*, reg. 14. Apparently, the phrase 'for any special reason' has been interpreted to include bringing a legal claim against an employer: see Michael Gay and Craig Bosch, *Report on Review of Malaysia's Labour Dispute Resolution System* (Report, March 2020) 73. See also Sabrina Kouba and Nilim Baruah, *Access to the Labour Market for Admitted Migrant Workers in Asia and Related Corridors* (Report, 2019), 32; ILO, *Access to Justice for Migrant Workers in South-East Asia* (Report, 2017).

<sup>29</sup> *Memorandum of Understanding between the Government of Nepal and the Government of Malaysia on the Recruitment, Employment and Repatriation of Workers*, signed 29 October 2018 art 6 [https://www.ceslam.org/uploads/backup/GoN\\_2018\\_MoUNepalAndMalaysia.pdf](https://www.ceslam.org/uploads/backup/GoN_2018_MoUNepalAndMalaysia.pdf).

months or more. This places migrants at risk of having to leave Malaysia before their case has concluded, being held in detention centres, and having to live without a regular income over this period. It is not known whether applications for the Special Pass are in fact being made or granted.

Our proposal builds on these overseas initiatives to provide a framework for a visa available to a broad range of migrant workers to address exploitation at work before they are required to depart Australia.

## **Eligibility requirements mirror protections against visa cancellation**

Visa conditions should clearly incentivise workers to seek help and lodge complaints when they have a meritorious claim of non-trivial workplace non-compliance. Like the protection against visa cancellation, determination of applications for the visa must be swift and straightforward in order to be taken up by migrant workers. A short determination process will also remove any incentive to lodge unmeritorious applications in order to remain in Australia during the visa determination process. The basic eligibility criteria for this visa should mirror the framework for protection against cancellation:

1. Available by application by a worker who is taking action to address a **non-trivial breach** of labour law or assist with an immigration compliance action against an employer - the definition for which may be provided in Regulations, instrument or policy, to mean a repeated or systemic breach, resulting in damage or loss over a particular threshold (e.g. \$2,000, in the case of underpayment);
2. Evidence that the worker has a **meritorious claim** that a contravention has occurred and is taking action to address it. This can be demonstrated by:
  - a. Certification by a government enforcement agency that it is conducting inquiries in relation to the visa-holder's employment;
  - b. A court, tribunal or commission issuing a 'temporary stay certificate' certifying that a worker's ongoing presence in Australia is required for the conduct of its proceedings; or
  - c. Certification by an employment law practitioner who holds specialist accreditation from their relevant society, or is employed in a union, a government-funded legal service or a pro bono practice in a commercial firm. The legal practitioner must certify that there are reasonable grounds to suspect that a worker's employer has contravened a relevant workplace law in relation to the visa-holder's employment, or that the worker is pursuing a legal remedy in relation to an alleged workplace contravention through negotiation with the employer or a legal application to an appropriate forum.

The applicant is also required to evidence that they have reported the contravention to a relevant government authority.

## **Visa structure, duration and conditions**

The Workplace Justice visa should be a substantive visa with the following features:

1. The validity period should be 6-12 months, at the delegate's discretion depending on the form, quality and content of evidence of the merits and progress of the investigation, complaint or claim. This enables a worker to participate fully in an enforcement action, union action or file a legal claim and remain present through the hearing. In 2020-21, 52% of cases in the Federal Circuit Court were finalised in more than six months.<sup>30</sup> One government authority shared that a period of no less than 12 months is required for a migrant worker's effective participation in an enforcement action. The visa should remain valid for the approved period regardless of whether a worker has settled a legal matter, because conditioning visa validity on the matter remaining on foot may discourage settlement. Policy should state that, if the delegate has concerns about the bona fides of the settlement, the delegate may require certification of the bona fides of the settlement from an employment law practitioner who holds specialist accreditation from their relevant society, or who is employed in a union, a government-funded legal service or a pro bono practice in a commercial firm.
2. The visa-holder may apply for a subsequent Workplace Justice visa if they can demonstrate that a legal process or investigation remains on foot (a higher threshold than for the initial visa). This is critical because providing access to this visa only once would enable an unscrupulous employer to unduly extend a negotiation or legal proceedings until the expiry of the visa, forcing the worker to depart without remedy.
3. The visa-holder is permitted to work. Without income obtained through work rights, most migrant workers would be unable to remain in Australia in order to pursue a claim. This would result in the visa either having very limited take-up (as has been the case with Malaysia's Special Pass), or visa holders would engage in unauthorised work to support themselves, thus compounding the problem which the visa is intended to address.
4. Condition 8516 should apply ('[t]he holder must continue to be a person who would satisfy the primary or secondary criteria, as the case requires, for the grant of the visa'). Policy should clarify that this Condition ensures that the visa-holder does not abandon the claim or cease to cooperate with authorities. This Condition ensures that the visa holder and employer are not complicit in labour contraventions to facilitate a worker's stay in Australia. However, the visa remains valid where the worker settles the claim (because the contrary position would disincentivise swift settlement of

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<sup>30</sup> Productivity Commission, *Report on Government Services* (2022), Part C, Section 7. The proportion of such cases for state Magistrates courts was between 20% and 67% in the same period.

claims). If DHA believes the settlement could not reasonably be considered genuine, this could be construed as abandonment of the claim.

5. Where a migrant worker transitions from a substantive visa to a Workplace Justice visa, the Workplace Justice visa should have the same visa pathways as the previous substantive visa.

## **Availability of the visa to undocumented workers, including upon detection**

The visa should be available to an applicant whose previous visa has been cancelled,<sup>31</sup> as well as those who have been detected by DHA as in breach of their visa or who are subject to removal. We recognise this aspect of the proposal carries potential concerns. These include the potential for meritorious claims to be brought in order to avoid removal and the related need for legal services to support a potentially significant number of meritorious time-sensitive claims. The availability of the visa post-detection might also be said to carry the potential for unmeritorious claims to be brought as an advance-planned defensive move against removal by unscrupulous agents, with the further possibility of a worker abandoning the claim and disappearing again.

There are several responses to these concerns. First, as set out above, the visa requirements involve a level of integrity assurance and it is highly unlikely that unscrupulous operators would be able to collate the evidence required readily or in advance. Secondly, and perhaps more importantly, undocumented workers are the most vulnerable to serious forms of exploitation and coercion and are therefore most unlikely to pursue remedies against their employers while undocumented.

This cohort is especially vulnerable to forced labour and modern slavery. If government wants to receive information from workers that enable it to prosecute wage theft, forced labour, modern slavery, and other offences, it must create the possibility and incentives for these workers to come forward – regardless of their motivation for doing so. Over time, increased intelligence and enforcement in relation to these employers (and the increased prospect of this occurring) will disincentivise and reduce employment, and exploitation, of undocumented workers.

Though it could be argued that these workers ought to apply for the visa prior to detection, many would likely be unaware of the visa and would only learn of it upon detection. Others may be too afraid to pursue action against their employer while still working, particularly if they are in coercive situations or indebted and beholden to unscrupulous agents.

Encouraging these workers to pursue claims upon detection can bring further unlawful or criminal activity to light and can supplement government's enforcement resources.

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<sup>31</sup> In other words, reg 2.12 should be amended to ensure that the s 48 bar does not apply to this visa.

On balance, if government is serious about breaking the cycle of migrant worker exploitation and detecting and prosecuting forced labour and modern slavery, hypothetical concerns about potential misuse of the visa are far outweighed by the significant systemic benefit of enabling undocumented workers to remain in Australia for a short period to bring claims upon detection. The potential for misuse can also be mitigated in several ways.

First, to address the risk of undocumented workers abandoning a claim, shorter initial stay periods (say 3 rather than 6 months) might be utilised. Second, the integrity safeguards discussed in the next section would mitigate against any concerns that might exist regarding false or fraudulent applications.

## **V. Ensuring integrity of these reform measures and mitigating downsides and risks**

The proposed reforms contain a range of measures to protect the integrity of the migration system and minimise risks of misuse of the protections or other undesired outcomes. In addition to those discussed in relation to undocumented workers in the previous section, these include responses to the following downsides and risks:

1. False or unmeritorious claims brought to take advantage of protection from visa cancellation or obtain a short-term visa.

Eligibility criteria for protection against cancellation and the Workplace Justice visa are stringent with multiple layers of potential consequences for falsified or unmeritorious claims. These include: requirement of certification by a lawyer subject to professional discipline; restriction of eligible certifying lawyers to employment law experts in non-profit contexts (unions, government-funded lawyers, pro bono practices) with no financial incentive to bring claims; restriction of claims to non-trivial breaches with minimum threshold requirements; and for the visa, a condition that the claim is not abandoned, and the duration of the visa is contingent on the strength of evidence of pursuit and progress of a claim.

2. Large numbers of valid claims brought to obtain protection from visa cancellation in order to extend a worker's stay, which may exacerbate DHA visa processing backlogs.

If the objective of the immigration protections is to increase reporting of employer exploitation by migrant workers (and forced labour and modern slavery), the primary motivation for migrant workers bringing meritorious claims is irrelevant, and the government will benefit from incentivising more workers to come forward.

There are natural constraints on the number of migrant workers that will seek to engage the proposed protections. These include: the stringent eligibility criteria and certification requirements; the restriction to non-trivial contraventions; the difficulty and work involved in substantiating and pursuing an employment complaint or claim; the short period of validity of the visa; and the risk that the DHA may not grant the worker the immigration benefit they are seeking.

3. Immigration benefits may incentivise workers to enter into, or stay in, exploitative work in order to establish a claim that can provide an immigration benefit.

For the reasons set out in (1) and (2), it is unlikely that migrant workers would subject themselves to non-trivial contraventions in order to obtain these immigration benefits. To the extent that this is hypothetically possible, the mitigation strategies for this prospect are outlined in the previous section.

4. Advance collusion between migrant workers and employers to manufacture a claim and either prolong the process or settle claims in order to manipulate immigration benefits.

There is a natural strong disincentive to an employer acting in this way: a condition of the immigration benefits is that the employer's contravention is reported to the relevant authorities. The safeguard against a prolonged process is the short duration of the visa and certification of the merits of the claim either by a government agency, a court or an expert employment lawyer with no financial incentive to pursue a protracted or unmeritorious claim.

It is not possible to completely eliminate risks. However, given the pervasive, entrenched nature of migrant worker exploitation, the prospect of making genuine systemic inroads into labour non-compliance in Australia justifies the mitigated risks outlined above. New incentive structures are necessary to reverse the strong incentives currently in place for migrant workers to stay silent.

Current visa settings (including the operation of cancellation powers, the weakness of the Assurance Protocol and the lack of a purpose-built visa that enables a worker to stay in Australia to pursue a complaint) ensure that most labour noncompliance remains undetected. The Bridging visa E is currently the only avenue available to a worker to regularise their stay, but this does not provide sufficient security of stay to incentive reporting.<sup>32</sup>

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Alternatives would include the undesirable improper use of the Medical Treatment visa or the Protection visa process.

In the absence of the robust whistleblower protections we propose, labour enforcement in Australia will continue to be seriously compromised and employers will reasonably expect migrant workers to remain silent in the face of systemic exploitation.