

Senate Select Committee on Temporary Migration
Attorney-General's Department

Hearing date: 10 September 2020
Question date: 28 September 2020
Question type: Written

Senator Raff Ciccone asked the following question:

1. Your submission (at pages 9-10) refers to the Government's industrial relations consultations, specifically the 'strengthening penalties paper' and 'compliance and enforcement paper'. What is the status of these consultations? When do you expect these consultations to be completed?
2. Your submission (at page 9) outlines that the Department has responsibility for implementing a number of recommendations from the Migrant Workers' Taskforce report. Can you provide an update on the implementation of these recommendations?
3. Recommendation 6 from the Migration Workers' Taskforce states that criminal sanctions be introduced for the most serious forms of exploitative conduct. Your submission (at page 10) states that the drafting of this legislation has commenced but has been delayed due to the COVID-19 pandemic. Are you able to provide an update on the status of this legislation?
4. Your submission (at pages 5-6) outlines that workplace rights and protections of temporary visa holders are covered through a workplace protections framework. Are you able to elaborate on this framework given that many submissions received to the committee highlighted concerns with workplace rights and conditions of temporary migrants?
5. Your submission (at page 8) states that 'the small claims process for the recovery of unpaid entitlements is designed to be quick, cheap and informal'. However, submitters to this inquiry have raised concerns about this process noting that it is complex, time consuming and expensive. What is the process for reclaiming underpayments through the small claims process?
 - a. How many small claims are processed in a year?
 - b. What is the average processing time?

The response to the Senator's questions are as follows:

1. Consultation on the first discussion paper, *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance*, closed in October 2019. Fifty public submissions were received.

Consultation on the second discussion paper commenced in February 2020, *Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework*, and was paused in March 2020 due to disruptions caused by the COVID-19 pandemic and stakeholder requests to focus exclusively on COVID-19 related matters.

Stakeholder views received on the discussion papers were considered, and further consultation conducted, through the industrial relations reform working group process announced by the Prime Minister, the Hon Scott Morrison MP, on 26 May 2020 as part of the Government's JobMaker Plan. The Compliance and Enforcement Working Group was one of five working groups established by the Attorney-General and Minister for Industrial Relations, the Hon Christian Porter MP, for this purpose. The working group process concluded in September 2020, and the Government is considering what reforms may be taken forward.

2. The Attorney-General's Department is leading work in response to 15 of the 22 recommendations of the Migrant Workers' Taskforce, all of which were accepted in principle by the Government. While some of these recommendations have been implemented already, consultation on implementation of the vast majority has either commenced already through public discussion papers released in 2019 and 2020 and the Compliance and Enforcement Working Group (see response to Question 1), and / or is the subject of ongoing consultation with government departments and external stakeholders. The final form and timing of any proposed legislative amendments is a matter for Government.

3. The Attorney-General's Department has engaged in confidential consultations on draft legislation to criminalise the most serious forms of wage underpayments with states and territories; the Committee on Industrial Legislation; and the Compliance and Enforcement Working Group. Timing for the introduction of the Bill is a matter for Government.

4. The workplace protections framework comprises the National Employment Standards (NES) and employee protections in the *Fair Work Act 2009*, and work health and safety and workers' compensation laws.

NES

Temporary visa holders with work rights are entitled to the same basic rights and protections as Australian citizens and permanent residents under the federal workplace relations system, which includes the NES. The NES is ten minimum standards of employment that apply to employees, including temporary visa holders, covered by Australia's national workplace relations system. The NES minimum standards cannot be displaced by an award, an employment contract or registered agreement with conditions that are less than the national minimum wage or the NES.

The *Fair Work Act 2009* provides ten minimum standards (NES):

- maximum weekly hours
- requests for flexible working arrangements
- parental leave and related entitlements
- annual leave
- personal/carer's leave, compassionate leave and unpaid family and domestic violence leave
- community service leave
- long service leave
- public holidays
- notice of termination and redundancy pay, and

- Fair Work Information Statement (FWIS) – the FWIS provides employees with information about their conditions of employment, including the NES and workplace rights. Employers are required to provide a copy of the FWIS to each new employee before, or as soon as possible after, they commence work.

There are 121 industry and occupation based modern awards that provide minimum terms and conditions of employment, and supplement the NES. These include entitlements like minimum wages, hours of work, rosters, breaks, allowances, penalty rates and overtime.

Temporary visa holders with questions about their workplace entitlements and the NES can seek the assistance of the FWO. In addition to [information about the NES on its website](#), which can be translated into 36 languages, the FWO also offers a telephone interpreter service and an online reporting tool for employees to seek information and report issues anonymously and in languages other than English.

General protections and unfair dismissal

The unfair dismissal and general protections provisions of the *Fair Work Act 2009* provide important protections for employees in Australia.

Unfair dismissal remedies are available to employees where a dismissal has been harsh, unjust or unreasonable. Employees are protected from unfair dismissal if they meet certain eligibility requirements, including having served the minimum employment period (12 months for small businesses with less than 15 employees and six months for businesses with 15 or more employees). There are no eligibility requirements related to visa status in order to access the unfair dismissal remedies.

The general protections provisions prohibit adverse action (including dismissal and loss of shifts) by an employer against its employees for discriminatory reasons, including national extraction, race, colour or social origin. These protections apply to all employees, including those under a probation period.

Temporary visa holders who are concerned that they have been unfairly dismissed or discriminated against at work can seek the assistance of the FWO. Unfair dismissal and general protections applications can also be made directly to the Fair Work Commission.

Work health and safety and workers' compensation laws

All employees regardless of visa status are covered by work health and safety (WHS) laws in Australia. The Commonwealth, States and Territories are each responsible for implementing, regulating and enforcing WHS laws in their jurisdiction.

Under model WHS laws adopted by the Commonwealth and most jurisdictions, a person conducting a business or undertaking ('PCBU') owes the same duties to employees on temporary visas as they do to all Australian citizens and permanent residents – that is, to ensure the health and safety of employees so far as is reasonably practicable.

Similarly, workers' compensation in Australia is primarily the responsibility of the states and territories. Each jurisdiction is responsible for their own workers' compensation legislation and arrangements. There are also a number of Commonwealth workers' compensation schemes, including the Comcare scheme, which applies to employees of the Commonwealth, Commonwealth authorities and licensed corporations. A person, including a temporary visa holder, may be eligible for workers' compensation if they are, or are deemed to be, a 'worker' or an 'employee' as defined in the relevant workers' compensation legislation.

Safe Work Australia has published [guidance for migrant workers](#), and [information sheets on working safely in Australia](#) which provide migrant workers and others with information on WHS and workers' compensation in Australia in English as well as other languages.

5. The *Fair Work Act 2009* allows for employees seeking to recover underpayments or other entitlements to utilise a 'small claims process' in the Federal Circuit Court (FCC) or a state or territory magistrates' court, for claims up to \$20,000 of unpaid wages and entitlements from an employer. Under the small claims process, the courts are not bound by formal rules of evidence and may act without regard to legal forms and technicalities.

The FWO provides a range of assistance services for small claims matters. Detailed information on the small claims process for both employers and employees, including advice on how to complete court forms, is available on the FWO's website:

www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/taking-legal-action-in-the-small-claims-court.

Small claims filings in the Federal Circuit Court

	2016-17	2017-18	2018-19
FCC	407	442	496

Source: FCC. State and territory data unavailable.

Timeframes (in months) to resolve in the Federal Court Circuit

	2016-17	2017-18	2018-19
Filings	407	442	496
Finalised	374	404	413
Average age	4.3	4.8	5.6
First hearing	2.8	2.5	2.2

Source: FCC. State and territory data unavailable.