



14 April 2023

## **Submission: *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (Cth)***

The Migrant Justice Institute uses strategic research, advocacy and legal action to achieve fair treatment and justice for migrant workers globally, and in Australia. Our research uncovers the reality of migrant worker exploitation and the operation of laws and systems in practice. We seek to drive systemic change by governments and business by charting evidence-based pathways to reform, grounded in migrants' experiences. We closely collaborate with migrant communities, civil society organisations and trade unions to amplify migrants' voices and support migrant worker empowerment.

The Migrant Justice Institute is led by law professors at UTS and UNSW. Incorporated in late 2021, it has grown out of a five-year collaboration between the two universities and retains close connections with both institutions.

We welcome the opportunity to make a submission regarding the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (Cth)* (**Bill**).<sup>1</sup>

### **Acknowledgment of country**

The Migrant Justice Institute acknowledges the Traditional Owners and Custodians of the lands on which we work, including the Wurundjeri people of the Kulin Nation, and the Gadigal and Bedegal people of the Eora Nation. We acknowledge that sovereignty was never ceded.

### **Introduction**

This submission focusses on elements of the Bill that address migrant worker exploitation, as well as additional measures that are required to adequately do so.

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<sup>1</sup> We would like to acknowledge the excellent research assistance and editing of Natasha Grant and thank her for her assistance in preparing this submission.

We strongly support the passage of the Bill in its current form. However, in our view further amendments to the *Migration Act 1958* (Cth) (**Migration Act**) and *Fair Work Regulations 2009* (Cth) (**FW Regulations**) are required to achieve its objective to robustly protect worker entitlements. In addition, further reforms are urgently required to implement the remaining recommendations of the 2019 Migrant Workers' Taskforce' (**MWT**).<sup>2</sup>

The government has committed to implementing the recommendations of MWT.<sup>3</sup> The MWT Report recognised that exploitation of migrant workers in Australia is widespread and endemic in numerous industries. Our 2016 survey of over 4000 temporary visa holders, cited in the MWT Report, found at least a third earned less than \$12 an hour.<sup>4</sup> Nine in ten underpaid migrant workers suffered wage theft in silence and took no action because immigration and labour laws do not encourage these workers to come forward and do not routinely deliver just remedies when they do. Our 2019 survey of over 5000 temporary visa holders revealed that the prevalence of severe wage theft had not diminished three years later. Exploitation not only harms temporary migrant workers (about 7% of our workforce<sup>5</sup>), it also drives conditions down for Australian workers and undercuts businesses who are doing the right thing. Systemic exploitation of migrant workers also creates conditions for forced labour and modern slavery.

We commend the Government's commitment to implementing MWT Report Recommendation 3 by ensuring that the *Fair Work Act 2009* (Cth) (**FW Act**) protects all workers, 'regardless of immigration status' (as set out in the Explanatory Memorandum<sup>6</sup>). However, complementary amendments to the Migration Act are required to ensure this reform extends to labour protections beyond the FW Act. We also welcome the provisions of the Bill which enable employees to pursue their entitlement to superannuation under the NES. However, we are concerned that the Bill's proposal to allow employees to authorise deductions that vary over time, without safeguards, serves to undermine, rather than protect, worker entitlements.

**Part One** of this submission focuses on our support of key aspects of the Bill, along with recommendations to amend the Migration Act and FW Regulations to strengthen provisions of the Bill. **Part Two** focuses on further straightforward amendments to the FW Act that could be introduced in this Bill (or in the next tranche of reforms later this year), and that are required to robustly implement MWT Recommendations. In particular, we recommend that the FW Act be amended to (1) require that workers be provided with a statement of their terms and conditions when commencing employment, and (2) provide for an equal access costs model, and (3) strengthen

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<sup>2</sup> Migrant Workers' Taskforce, [Report of the Migrant Workers' Taskforce](#) (Commonwealth of Australia, 7 March 2019).

<sup>3</sup> [Jobs and Skills Summit – Outcomes Paper](#), 4; ALP Policy, [Pacific Australia Labour Mobility](#).

<sup>4</sup> Laurie Berg and Bassina Farbenblum, [Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey](#) (Migrant Justice Institute, 2017).

<sup>5</sup> Will Mackey, Brendan Coates and Henry Sherrell, [Migrants in the Australian Workforce: A Guidebook for Policy Makers](#) (Grattan Institute, May 2022) 155.

<sup>6</sup> Bill, Explanatory memorandum, iv.

accessorial liability provisions.

In addition to these amendments, further reforms must be introduced in the Government's second tranche of reforms in 2023 in order to robustly implement MWT Recommendations and address the broader structural drivers of migrant worker exploitation. These should include introducing whistleblower protections and other immigration settings that reduce exploitation;<sup>7</sup> establishing a fair, fast and effective mechanism to resolve worker wage claims; reforms to the Fair Work Ombudsman (FWO), including increased resourcing to establish a wage calculation service and dedicated support for migrant workers, and a trial scheme of binding determinations; and establishing meaningful commercial consequences for employers that continue to exploit workers. A short description of these reforms is set out in **Annexure 1** to our [submission](#) to the Senate Standing Committee on Education and Employment's inquiry into the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth).

We look forward to working with the Government over the coming months to ensure that its anticipated reforms<sup>8</sup> effectively curb exploitation and provide meaningful protection for migrant workers, and in turn, all workers in Australia.

## Summary of Recommendations

### Part 1: Amendments related to current Bill

- **Recommendation 1**

**FW Act coverage:** We strongly support the Bill's proposed amendment to clarify that FW Act coverage extends to all workers, regardless of immigration status. To ensure that workers are not excluded from other workplace laws such as Workers Compensation and anti-discrimination laws, a further amendment to the Migration Act is required.

- **Recommendation 2**

**Superannuation:** We support the inclusion of superannuation in the National Employment Standards.

- **Recommendation 3**

**Deductions:** To ensure that workers are able to understand how much has been deducted from their pay and for what purpose (especially in the case of multiple deductions), the FW Regulations must be amended to require that employers itemise deductions on payslips.

<sup>7</sup> Migrant Justice Institute, [Breaking the Silence: A proposal for whistleblower protections to enable migrant workers to address exploitation](#) (November 2021).

<sup>8</sup> Minister Burke, Second Reading speech, 27 October 2022, 4.



**Part 2: The Bill should include further amendments to the FW Act:**

- **Recommendation 4**

**Information and transparency:** To implement **MWT Rec 2** (in part) and ensure that workers are aware of their specific rights and entitlements and able to identify their employing entity if they wish to bring a claim, the FW Act should be amended to require employers to provide each employee with a statement of specific working conditions (Award, wage rates, hours etc.) and employer contact details (including address for service) upon commencement.

- **Recommendation 5**

**Equal access costs model:** To implement **MWT Rec 12** (in part) and make the small claims jurisdiction more accessible for vulnerable workers, we recommend the introduction of an equal access costs model, whereby a worker is entitled to recover their legal costs if their claim is successful, but will not be required to pay costs if their claim is unsuccessful (except in limited circumstances, for example where a claim is vexatious).

- **Recommendation 6**

**Legal responsibilities for individuals & supply chains:** **MWT Rec 11** proposes that the government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws. This can be achieved by strengthening existing accessorial liability and responsible franchisor provisions, extending the responsible franchisor provisions to apply more broadly to supply chain and subcontracting arrangements, and introducing a positive duty to provide and maintain a working environment that complies with the FW Act. We recommend that this Bill strengthen the accessorial liability provisions and extend coverage to responsible supply chain entities.

## **PART 1**

### **FW Act coverage**

We strongly support the Bill's proposed amendment to clarify, in a new s 40B, that FW Act coverage extends to all workers, regardless of any effect of the Migration Act. To ensure that workers are not excluded from other workplace laws such as Workers Compensation and anti-discrimination laws, a further amendment to the Migration Act is required.

There is currently conflicting caselaw as to whether undocumented workers are entitled to

protections of the FW Act. Working without permission under the Migration Act - whether as a visa overstayer or working in breach of a visa condition on an otherwise valid visa – is a criminal offence, set out in s 235. Generally, in caselaw across multiple states, the pre-eminent approach has been to hold an employment contract performed in breach of the statutory s 235 offence void for illegality and therefore unenforceable.<sup>9</sup> This has meant that an undocumented worker is not entitled to remuneration for work performed under the contract and is ineligible for statutory protections under the FW Act and other statutory protections such as Workers Compensation, which extend only to employees defined as those who hold valid contracts of employment (e.g. s 11 FW Act).

This has created a loophole through which employers can freely exploit and underpay undocumented workers and evade paying compensation for workplace injuries in relation to those workers. **MWT Rec 3** recommends that the FW Act be amended to confirm that it applies regardless of undocumented immigration status.<sup>10</sup>

We welcome this proposed amendment in the current Bill and commend the Government for introducing this much-needed and overdue clarification. However, in addition to implementation of this MWT recommendation, the Migration Act must also be amended to clarify that commission of this offence, or other offences by the employer under the Migration Act, does not render worker protections under other federal or state statutes unenforceable (beyond the FW Act). The proposed amendment in the FW Act does not provide worker protections to migrants under numerous state and federal labour laws, including workers' compensation and anti-discrimination laws, beyond the FW Act. For instance, in 2004, the Queensland Court of Appeal ruled against a Bangladeshi man, Mainuddin Kazi, who had injured his knee falling over a conveyor belt in a meatworks factory in which he was working, as he had overstayed a visitor visa. The Court ruled that he was not entitled to workers' compensation on the basis that his employment constituted an offender under s 235 of the Migration Act. The amendment to the FW Act, proposed in this Bill, would not address the gap in labour protections raised by this case.

Further analysis and explanation of the reforms we propose are available in our brief on this issue.<sup>11</sup>

## Superannuation

We support the proposed introduction of a right to superannuation in the National Employment Standards. Many vulnerable migrant workers are not only denied their minimum wage, but do not receive any superannuation. Without access to individual recourse, many workers never recover their superannuation. They may complain to the ATO, but we understand that, in many cases, no action is taken, and the worker is left without any enforcement options. The amendment proposed

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<sup>9</sup> *WorkCover Corporation v Da Ping* (1994) 175 LSJS 469; *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312; *Australia Meat Holdings v Kazi* [2004] QCA 147; *Lal v Biber* [2021] FCCA 959.

<sup>10</sup> Migrant Workers Taskforce, [Final Report](#) (7 March 2019), Recommendation 3.

<sup>11</sup> Laurie Berg and Bassina Farbenblum, [Protecting the underclass: A proposal for workplace protections for all workers in Australia](#) (Migrant Justice Institute, 2022).

will more effectively enable vulnerable workers to recover their superannuation.

## Deductions

The Bill proposes an amendment to s 324 which would allow an employee to authorise their employer to make regular deductions for amounts that vary from time to time provided that the deductions are not for the direct or indirect benefit of the employer. The stated aim of this amendment is to remove an 'administrative burden' from employers, who are currently required to ensure that employees provide a new authority each time the amount of a deduction varies.<sup>12</sup>

Employees should be entitled to know how much they are being paid, and what deductions are being taken from their lawful minimum entitlement and for what purpose. We are very concerned that this proposed amendment will make it more difficult for employees to identify unlawful deductions. This amendment could also lead to more frequent misunderstandings between employers and employees about deductions, leading to increased disputes between parties.

As a result, we support the proposed amendment to s 324 only if it is accompanied by a further amendment to the FW Regulations to require employers to itemise deductions on each payslip. This is particularly important in relation to Pacific Australia Labour Mobility (**PALM**) scheme workers; service-providers have described workers often being confused and concerned about deductions from their pay, as set out in the submission to this inquiry by the Synod of Victoria and Tasmania, Uniting Church in Australia. Currently, under reg 3.46(2) of the FW Regulations, if 'an amount is deducted from the gross amount of the payment, the pay slip must also include the name, or the name and number, of the fund or account into which the deduction was paid'. However, for many workers, more than one deduction is made, but one total amount is listed, and it is unclear what the various deductions are made for, or how much each deduction is. If employers were required to itemise deductions, misunderstandings could be more easily resolved and unlawful deductions could be more easily identified.

We urge that any amendment to s 324 be accompanied by an amendment to reg 3.46(2) which states:

*If an amount is deducted from the gross amount of the payment, the payslip must also include the name, or the name and number, of the fund or account into which the deduction was paid, a description of what the deduction was made for, and if deductions are made for more than one reason, an itemised list of each deduction and the amount deducted for each item.*

## PART 2

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<sup>12</sup> Bill, Explanatory Memorandum, [115].

A number of further amendments to the FW Act are required to give effect to the MWT Recommendations. This part of the submission focuses on three key amendments that can readily be included in this Bill. As noted above, we propose that several further critical measures be introduced in the Government's foreshadowed legislative reform package in 2023.

## Information and transparency

Many migrant workers (and other vulnerable employees) are impeded from pursuing underpayment claims against an employer because they cannot identify the applicable Award or enterprise agreement, their minimum rate of pay, or whether any wage deductions made were lawful. If they overcome these obstacles, many cannot identify the legal identity of their employing entity, or how to serve court documents on them, especially when employers engage vulnerable workers through complex commercial arrangements and trusts. There are straightforward amendments that could be included in this Bill to address these barriers to migrant workers enforcing their rights.

**MWT Recs 2 and 15-18** recommend improved education and information for international students. For a start, the FW Act should be amended to require employers to provide each worker with a tailored statement of working conditions upon commencement of employment. As suggested by Charlesworth and Campbell, this 'Statement of Terms and Working Conditions' should include 'job title (and classification), wage rates, working-time conditions including applicable premia for overtime and unsocial hours of work, type of employment and the name of the relevant regulatory instrument (e.g., award, enterprise agreement)'.<sup>13</sup> It should also include the name, ABN and address for service of the employing entity. Similar obligations exist already in New Zealand, the UK and EU countries.<sup>14</sup> In New Zealand, under the Employment Relations Act 2000, a written employment agreement must be provided to employees and must include certain terms including the names of the employee and employer, a description of the work to be performed and wages payable.<sup>15</sup> Failure to provide such an agreement can result in an action brought by the Labour Inspector or a penalty. As stated on the Employment New Zealand website:<sup>16</sup>

*Good employment relationships start with a good recruitment process so that the employee and employer have the same expectations about the role and working conditions.*

*A well written employment agreement helps the employee and employer to know what is expected from them and what they're entitled to. This means misunderstandings are less likely to happen and if a problem does come up then the employee and employer can go to the employment agreement to clarify things.*

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<sup>13</sup> Iain Campbell and Sara Charlesworth, *The National Employment Standards: An Assessment* (2020) 33 AJLL 36.

<sup>14</sup> Ibid.

<sup>15</sup> Employment Relations Act 2000 s 65

<sup>16</sup> 'Employment Agreements', Employment New Zealand (23 September 2021) <<https://www.employment.govt.nz/starting-employment/employment-agreements/>>.



The EU Directive on Transparent and Predictable Working Conditions requires EU Member states to implement national laws placing obligations on employers to provide information regarding essential terms and conditions of employment:<sup>17</sup>

*The most essential terms, such as the identity of the contractual parties, remuneration, and working hours, must be provided within the first seven days of employment. The remaining terms (described below) should be communicated within the first month. In Germany, some information, such as the employer's (legal) name and address, the remuneration, and the agreed-upon working hours, even must be provided by the first day of employment at the latest.*

In the UK, there is a longstanding requirement under s 1 of the UK Employment Rights Act 1996 that employees are given a 'written statement of employment', which must contain certain terms. Recent changes to the law have extended this obligation to provide a statement to all workers – not just employees, as well as requiring that the statement to include information about paid leave entitlements in addition to other details of employment.<sup>18</sup> This came in the wake of a major review of modern work practices in 2017 which found that greater transparency of rights, delivered through an expanded and accessible 'written statement of employment', would improve clarity, certainty and understanding for the most vulnerable workers.<sup>19</sup>

Campbell and Charlesworth recommend that template documents be introduced to reduce the regulatory burden imposed by a compulsory statement.<sup>20</sup> These could be prepared and maintained by the FWO.

To ensure compliance with the new provision, we recommend that failure to provide a Statement be a civil remedy provision. Such failure should also lead to a reverse onus of proof if a worker brings a claim in court, such that if an employer fails to provide a statement, they will bear the burden of disproving an employee's allegations.<sup>21</sup>

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<sup>17</sup> Christin Dunkel and Hanno Timmer, '[New Requirements for Employment Agreements in Europe](#)', Lexology (6 October 2022).

<sup>18</sup> Ibid.

<sup>19</sup> Matthew Taylor, [Good Work: The Taylor Review of Modern Working Practices](#) (Department for Business, Energy & Industrial Strategy, United Kingdom, 11 July 2017) 116, 39.

<sup>20</sup> Iain Campbell and Sara Charlesworth, *The National Employment Standards: An Assessment* (2020) 33 AJLL 36, 51.

<sup>21</sup> This proposal is modelled on the existing reverse onus that exists in relation to record-keeping (see s 557C of the FW Act). Further drafting would be needed to consider how the record-keeping and Statement provisions interact (for example, if an employer keeps records as required under s 535, but fails to provide a Statement), however, the exception that currently exists under ss 557C(2) states that the reverse onus does not apply if an employer has a 'reasonable excuse' for non-compliance, and this would continue to ensure that employers are not penalised unfairly.



## Equal access costs model

The vast majority of migrant workers cannot pursue wage claims against an employer in court because each stage of the judicial process is stacked against them. **MWT Rec 12** recommends that the government consider how the FW Act small claims process can more effectively deliver wage recovery to a large number of underpaid migrant workers.

We welcomed the increase to the monetary cap on small claims matters in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Secure Jobs Act)*, as well as the amendment which permits an applicant to recoup their filing fee from their employer if their claim is successful. However, much more needs to be done to ensure fair, fast and effective remediation of workers' wage claims.

Building on that Act, we recommend that the Court be empowered to order as 'costs' not only a reimbursement of filing fees but also legal costs incurred by a worker. As set out in the Secure Jobs Act's Explanatory Memorandum, the ability for a worker to 'apply to get any filing fees they have paid to the court back from the other party (as costs)' seeks to 'ensure they are not initially deterred from bringing small claims proceedings due to cost, and they keep more of any compensation that the court awards to them'.<sup>22</sup> This measure only goes a small way towards achieving the stated policy objective of removing cost-based deterrents from litigation.

It is widely accepted that the vast majority of vulnerable workers cannot bring a claim without legal assistance. Even with the simplified processes of the small claims jurisdiction, the procedural requirements for an applicant (identifying the legal entity of their employer, serving the application, determining their legal pay rate, calculating underpayments, filling out a claim form, etc.) are impossible for most. Without assistance from an employment lawyer, union or a community service, these workers are unable to enforce their rights. In a no-costs jurisdiction, there is no financial incentive for private lawyers to support this essential enforcement work. Even if a worker is successful in pursuing a claim, they incur great financial and nonfinancial cost simply to recover what they were entitled to in the first place. From this, the worker must deduct the cost of legal representation if they engage a private lawyer, which, given the resource-intensive work of calculating and pursuing wage claims, is often prohibitively expensive. This is especially the case in the small claims jurisdiction, where the amounts sought are relatively low and there is no opportunity to seek or receive general damages or penalties.

To be clear, we propose a one-way cost shifting - not a shift to costs following the event in small claims (or any FW Act) matters. The potential for an adverse costs order would prevent many

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<sup>22</sup> Bill, Explanatory memorandum, [115].

vulnerable workers from taking action at all.<sup>23</sup> A one-way costs shifting<sup>24</sup> or 'equal access model' to costs which takes an 'asymmetric approach'<sup>25</sup> is the most appropriate way to make the small claims jurisdiction accessible for vulnerable workers.

In the United States, the Fair Labor Standards Act requires the employer to pay a worker's attorney's fees and costs where the worker is successful.<sup>26</sup> If a worker is unsuccessful, each party will bear its own costs.<sup>27</sup> In this context, one-way fee-shifting has been recognised as a means to encourage greater private enforcement of worker rights as important societal interests:<sup>28</sup>

*Congress has acknowledged the important societal role these statutory protections provide and has created incentives to encourage private enforcement of public goods through statutory fees, shifting costs, and statutory penalties. For example, the statutory regime relies upon plaintiffs' attorneys to act as "private attorneys general" to vindicate important societal interests by allowing one-way fee-shifting in order to encourage prosecution of these rights.*

In the D.C. area, fee shifting has been paired with statutorily enshrined lawyer fees. It is reported that this approach has greatly improved access to justice for workers, particularly those with smaller claims:<sup>29</sup>

*According to worker-side employment lawyers in the D.C. area, this fee-shifting provision has expanded access to legal representation by making a broader range of cases financially feasible. As Michael Amster, a partner at a local employment law firm, explains, the law "allow[s] us to take cases that we otherwise wouldn't take. It allows us to be able to justify taking smaller cases. Because frankly, in a lot of these cases you're dealing with people who are making very little money and sometimes what is owed to them is not that much." Those smaller cases are now more viable because the law has created a higher return for lawyers.*

One-way cost-shifting for small claims would not open litigation floodgates because the worker still risks a costs order against them if they bring a claim vexatiously or without reasonable cause, in

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<sup>23</sup> As noted by Associate Professor Tess Hardy, one-way costs shifting can ensure that 'the prospect of having an adverse costs order awarded claimants does not inhibit access to justice': Tess Hardy, [Submission 85](#) to the Inquiry into Unlawful underpayment of employees' remuneration, 13.

<sup>24</sup> See for example, Associate Professor Tess Hardy, [Submission](#) to the Senate Standing Committee on Economics Unlawful Underpayment of Employees' Remuneration Inquiry, February 2020, [37].

<sup>25</sup> Melanie Schleiger, Victoria Legal Aid, in '[Jenkins defends "cost neutral" harassment cases](#)', *Workplace Express*, 2 November 2022.

<sup>26</sup> Bassina Farbenblum and Laurie Berg, [Migrant Workers' Access to Justice for Wage Theft: A global study of promising initiatives](#). (Migrant Justice Institute, 2021), 31; *Fair Labour Standards Act of 1938*, 19 USC §216(b).

<sup>27</sup> *Ibid.*

<sup>28</sup> Nantiya Ruan, '[Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers](#)' (2010) 63(3) *Vanderbilt Law Review* 727.

<sup>29</sup> Matthew Fritz-Mauer, 'The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm' (2021) 54(3) *University of Michigan Journal of Law Reform* 735, 762.

addition to the investment of significant time and effort required to pursue a claim.<sup>30</sup>

Accordingly, we propose the following amendment to the FW Act:

*At the end of section 548 add:*

*Costs for filing fees paid in relation to the proceedings*

*(10) If the court makes an order (the small claims order) mentioned in subsection (1) against a party to small claims proceedings, the court may make an order as to costs against the party for any filing fees paid to the court or legal fees paid by the party that applied for the small claims order.*

## Legal responsibilities for individuals & supply chains

The FW Act is no longer fit for purpose because it focuses primarily on regulating the direct employer-employee relationship. Businesses have few responsibilities for workers they do not directly employ and can easily establish business arrangements that evade liability.<sup>31</sup> The Government must introduce measures that establish legal responsibilities for individuals and entities with decision-making or commercial leverage to prevent and remedy contraventions.

**MWT Rec 11** proposes that the government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws. This can be achieved by strengthening existing accessorial liability and responsible franchisor provisions, extending the responsible franchisor provisions more broadly to supply chain and subcontracting arrangements, extending the successful outworker provisions to certain high-risk industries, and establishing a positive duty to identify and reduce the risks of FW Act non-compliance.

We have developed detailed recommendations in relation to each of the above reforms which should be introduced in the Government's second tranche of reforms in 2023. Further details can be provided upon request. For the purposes of this Bill, we recommend that the accessorial liability provisions in s 550 be reformed as a matter of urgency.

To be held accountable for contraventions in relation to non-direct employees under current accessorial liability provisions, relevantly, a person must be found to be 'knowingly concerned in or party to the contravention'.<sup>32</sup> That is, a person must have *actual knowledge* of a contravention. This perversely incentivises businesses and individuals to evade liability by deliberately failing to take reasonable steps to detect and prevent exploitation and remain 'in the dark' – all the while profiting

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<sup>30</sup> *Fair Work Act 2009* (Cth), s 570.

<sup>31</sup> Associate Professor Tess Hardy notes that 'it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions', Tess Hardy, Submission No 62 to Senate Inquiry, The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, 8.

<sup>32</sup> *Fair Work Act 2009* (Cth), s 550(2)(c).

from cheap labour and unlawful conduct.

We recommend amendments to s 550 to close this loophole. Proposed reforms will remove the tension that currently exists between the general accessory liability provisions in s 550 (which reward wilful blindness), and the responsible franchisor provisions in s 558B (which encourage responsible franchisors to take proactive steps to detect and address non-compliance). As Hardy notes:<sup>33</sup>

*while a proactive stance may save [franchisors] from liability under s 558B, this same conduct may expose them to possible liability under s 550 of the FW Act. This further complicates an already difficult strategic choice for franchisors, namely whether to prioritise brand protection or liability minimisation. More importantly, it is not yet clear how the regulator, and the courts, will look to resolve this tension.*

We suggest that in addition to existing accessory liability provisions, the law should clarify that individuals and entities will be held liable as accessories if they knew or could reasonably be expected to have known that the contravention (or a similar contravention) may occur. A defence would be available to those that can establish that they took reasonable steps to prevent the contravention. Accessories should be held liable if they became aware of a contravention but failed to rectify it.

This reform will incentivise proactive compliance and a proactive approach to risk minimization, sending a strong message to those with leverage that they will not escape liability by turning a blind eye.

## Conclusion

Thank you for the opportunity to comment on this Bill.

Our evidence-based amendments and additions will strengthen the protective scope of the Bill for migrant workers and offer straightforward mechanisms to implement MWT recommendations.

We would welcome the opportunity to discuss this submission and our further recommendations with the Committee and look forward to working with the government to develop further reforms.

Sincerely,

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<sup>33</sup> Hardy, Tess, 'Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks' (2019) 32(1) Australian Journal of Labour Law 62, 77.



Associate Professor Laurie Berg  
UTS Faculty of Law  
Co-Executive Director, Migrant Justice  
Institute

Associate Professor Bassina Farbenblum  
UNSW Faculty of Law & Justice  
Co-Executive Director, Migrant Justice  
Institute

Catherine Hemingway  
Legal Director, Migrant Justice Institute