

“Ending migrant worker exploitation”
Migration Institute of Australia National Conference 2016
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Introduction

Good morning everyone. Thank you for inviting me to speak to you today. My name is Natalie James and I am the Fair Work Ombudsman.

I would like to begin by acknowledging the Traditional Custodians of this land upon which we meet. I would also like to pay respect to their elders both past and present and extend that respect to other Indigenous Australians who are present.

You may know about the Fair Work Ombudsman because you have heard about some of our higher profile enforcement work, like our Inquiry into 7-Eleven ... or perhaps Baiada Poultry producers of Lilydale and Steggles chicken ... or our Inquiry into 417 visa holders. Or perhaps you have heard about our work with growers, backpackers and communities on the harvest trail. All of which have exposed serious cases of worker exploitation, particularly of migrant workers. These sorts of cases are quick to make the headlines. There should be serious and visible consequences for those who engage in exploitative work practices.

As the national workplace regulator, taking strong and visible enforcement action is a critical part of our work. But we do a lot more than this; like providing advice and education to workers and employers throughout Australia on all aspects of the national Fair Work system.

Last financial year we received over 15 million visits to our website, fairwork.gov.au, almost four hundred thousand calls to our Fair Work Infoline and Small Business Helpline, and there were over five million calculations on our pay calculator. Most people who come into contact with the Fair Work Ombudsman do so because they want help understanding rates of pay or the rules for annual leave, not because they have deliberately done the wrong thing and ended up in Court.

For any of you who follow me on twitter, you will know that migrant workers are a focus for my agency. Dealing with concerns about the mistreatment of visa holders has been a growing area of work for us over the last five years. More and more, we find that your clients are becoming our clients. And like you, our role is to help people to navigate a complex, foreign system of laws; in our

case, a workplace relations system that can be complicated, especially for the newly arrived, and is almost certainly quite different to the system they are used to in their home country.

For migrant workers and business operators, even the basics – like finding what someone's entitled to be paid – are challenging. We hear time and time again the myth that migrant workers are not entitled to the same wages as Australian citizens. Everyone working in Australia is entitled to the same minimum wages, irrespective of their nationality or visa status.

So while my agency is helping migrants understand a complex employment system, you are guiding them through a complex visa and immigration system. However, I suspect migrants are not just looking to you for help with visa forms. You represent their interests and they trust you in a way that they might not trust government officials. You may be the person they ask about other things, like how to navigate Australia's written and unwritten rules – both the law and the cultural norms. And you help them tackle the barriers they face in the workplace.

Today I'd like to talk about these barriers, how my agency is working to address them and how you can help. If, like me, you are concerned by the steady stream of stories emerging about the exploitation of migrant workers and want to support their fair treatment in Australia, it is so important for us to work together.

So what do we know about the migrant experience in our workplaces?

The migrant worker experience in Australia

Firstly, learning about Australian workplace rights may not be the first priority for migrant workers when they arrive in Australia. They are most likely first thinking about more immediate issues like finding a place to live. Or a place to eat and socialise. Or perhaps enrolling in subjects at university and purchasing books.

Their attention is split between these concerns all while adjusting to life in Australia.

We also know that visa settings can affect their decisions, including the regions they work in, the type of work they undertake and the number of hours they are allowed to work. And we know that migrant workers can be very focussed on retaining or extending their opportunity to remain in Australia.

This contributes to a number of tensions – tensions between needing to earn enough to live, wanting to forge and retain cultural ties and, perhaps most vital in their minds, avoiding any activity that would risk their visa.

The result is that migrant workers can find themselves in exploitative working arrangements where their visa is used as leverage against them by unscrupulous businesses. Limited English language proficiency, limited work experience and limited or no knowledge of their workplace rights can further contribute to a dynamic where they feel they have little option but to put up with unlawful and unacceptable arrangements.

It is also not uncommon for visa holders to work for businesses run by other recent arrivals, sometimes of the same nationality, perhaps a relative or family friend to whom they feel strong loyalty. We find that these business operators may not understand their obligations under the law and often bring cultural norms and work customs from overseas.

It's particularly concerning to us when my Inspectors, investigating serious underpayments, hear migrant business people tell us that they 'rang around' to find out the 'market rate' for Korean or Chinese workers. Rates that are inevitably well below the minimum wage of \$17.70 an hour.

While the Courts consider the situation of the business as well as the worker when deciding what orders to make, including the size of any monetary penalty, they have also taken a dim view of those who do not familiarise themselves with Australian laws. And judges haven't shown a lot of sympathy for migrant businesses that have been the beneficiary of advice or warnings from us and then have continued to pay rates as low as 12 or 15 dollars an hour. In one recent case, a judge suggested that such migrant businesses have an even greater responsibility to do the right thing by vulnerable visa workers.

There is no 'market rate' for different nationalities of workers. Australia's minimum wages must be paid to all workers. Including workers on visas. Irrespective of their visa conditions.

All of this creates a dynamic where the workers are less likely to seek assistance from agencies like the Fair Work Ombudsman. Many of these issues were at play at 7-Eleven.

The case of 7-Eleven and protecting student visa holders

We recently commenced proceedings against another 7-Eleven franchisee, S & A Enterprises (QLD) Pty Ltd and its director, Avinash Pratap Singh, for allegedly paying its student visa holder workforce flat rates of pay of around \$15 per hour. This is our ninth court action against a 7-Eleven franchisee.

As in previous matters, we also allege that the employer created false and misleading records. In this case, we allege that the business misused 7-Eleven's payroll technology. A lack of records meant we had to confine the alleged underpayment to a narrow period of time and rely on cash register logins to establish when the employees were working.

This is why, in addition to seeking penalties, we are asking the Court to order the franchise to audit the business, report to the Fair Work Ombudsman on other breaches of the law and to fix any such issues promptly.

False records has been a theme throughout our work with 7-Eleven, where we have seen a troubling pattern of employers not keeping accurate records or running two sets of books.

Other dynamics at play that we uncovered in our broader Inquiry into 7-Eleven go to the leveraging of workers' vulnerabilities over their visa status. As I am sure you know, people on student visas may only work 20 hours a week when they are attending classes. However, in reality, we found visa holders working many more hours than this. There are a range of reasons that this might occur, but breaching their visa conditions makes them vulnerable to threats from storeowners to report them to the Department of Immigration.

This type of conduct is deliberate and calculated on the part of storeowners and it poses challenges for Government.

And of course our court action also results in penalties being imposed, in addition to business having to correct the underpayments. The total penalties imposed on 7-Eleven franchisees as a result of our proceedings is \$929,518 to date. In one of our 7-Eleven matters, the court imposed a record penalty of \$408,348 and said the 7-Eleven franchisee in question had shown "contemptuous disregard" for Australian workplace laws and had sought to deceive the Fair Work Ombudsman.

In litigating these sorts of matters, we have become concerned that international students, despite being the largest group of visa holders with work rights in the country, are well behind people in other visa categories in terms of coming to us for help. I suspect they are underreporting concerns about their work situation.

To address this, my Agency is developing an International Student Strategy to educate and engage the international student community. We will work across Government, and with education institutions and International student representatives, to raise awareness of the Fair Work Ombudsman amongst international students. By building awareness we hope to make our agency more approachable and overcome barriers faced by international students who need assistance. This is something we hope you may be able to help us with.

A shared responsibility for migrant workers

We know that, while migrant workers may have limited social connections to wider mainstream Australia, they are very strongly connected to other migrant workers in their own ethnic or cultural groups. They are strong users of social media, where workers can exchange stories about their time in Australia. We've recovered back pay in situations where workers have contacted us after leaving Australia and discovering they were not paid correctly. We've also had local Asian media cover our matters and discuss the action taken by the Fair Work Ombudsman on behalf of the employees.

Reports of worker exploitation affect Australia's reputation. I am sure this is as concerning for you as it is for any of us. The social and economic benefits of migration are shared by everyone and so too the effects of behaviour that seeks to exploit the system. We all have a stake in getting this issue right.

At June 2015, there were 5700 migration agents registered in Australia. You operate in a competitive market. I'm sure you want to see the pool of potential overseas workers continue to grow. Working with us to support migrant workers to understand the rules and to weed out those operators that deliberately exploit the migration system is good for you in your profession. And of course, it's the right thing to do to ensure that vulnerable migrants have access to fairly paid work.

I am conscious that many of you here wear two or more hats – you may be working as an accountant, solicitor or other type of business adviser, as well as operating as a migration agent. In your role as advisers, you are a crucial conduit of information to visa holders and to their employers.

In addition to providing expert advice about migration law, your clients no doubt rely on your expertise to help them with other challenges. They trust you.

Do your clients ask you for help with employment issues, such as finding the correct pay rate or reviewing a contract of employment? And have you thought about the benefits of building your

awareness of the basics of the workplace relations framework and the type of help my agency can provide?

In a competitive market, like yours, networks and word of mouth are important. Your capacity to guide your clients through something as fundamental as the work situation can only enhance the quality of your service. And good contacts in the Fair Work Ombudsman and an understanding of our services, especially those designed for people from culturally and linguistically diverse backgrounds, will help you with this.

Better you inform yourself than run the risk of taking a stab in the dark on questions of workplace relations. Because it is a complex world, even for those of us who were born here, and we are here to assist. My agency stands ready to help.

Our tools and resources - your portal to the fair work system

The Fair Work Ombudsman's website www.fairwork.gov.au should always be your first port of call. It has a range of free resources designed around the kinds of questions we know people need the answer to. It is home to our Pay and Conditions Tool, which allows employers and employees to check rates of pay.

It also contains extensive information, tools and resources to help you, migrant employers and employees understand the rights and obligations of people working in Australia. This includes our online learning courses and guides to hiring new employees or starting a new job. We also provide in-language resources. The in-language section of our website is specifically tailored for migrant workers. Here you will find our videos about 'Working in Australia', as well as translated guides and fact sheets.

You could also sign up to MyAccount – an authenticated online space that will allow you to save tailored information and submit written enquiries to us. And of course, there is the Fair Work Infoline. If you can't find the answer on our website, you can call 13 13 94 to speak to one of my expert workplace advisers. We also offer a free translation service to ensure that everyone can access this help.

I urge you to look to our website for definitive information about workplace rights and obligations. You can also pick up a copy of some of the resources I have mentioned today or watch the 'Working in Australia' video by visiting my staff at the Fair Work Ombudsman's stall at the convention.

We are currently updating and reviewing our in-language resources to provide more information to our migrant customers. So, while visiting my staff, if you have used any of our resources or passed them onto your clients, we are keen to hear what you think of them. Or if there are things that your clients would find useful that we don't yet provide, we want to know what it is. You are a critical voice for migrant workers and their employers.

There is still work to do

We need your help to get the word out because, unfortunately, we are seeing more and more stories of visa workers not receiving their lawful entitlements. There are around 660,000 temporary visa holders with work rights in Australia.¹ While just over seven per cent of the total Australian workforce, visa workers are overrepresented in our dispute form lodgements, accounting for 13 per cent in 2015-16.

The amount we are recovering for visa holders is also increasing, from \$1.6 million in 2014-15 to over \$3 million in 2015-16.

On the one hand, this might indicate that visa workers are becoming more aware of the Fair Work Ombudsman and that we are here to help them. But we also saw last financial year, visa holders were involved in 76% of the matters my agency took to court – some of the most troubling matters – so this is a worrying upward trend that shows the seriousness of the conduct we are seeing.

And despite the appalling way they are treated by unscrupulous operators, visa holders often don't want to engage with us. There are complex dynamics at play here. Informed by 7-Eleven and our other experiences, we have and will continue to take steps to reassure workers that they can and should come forward – if not to us, to someone else they trust to help them ensure they are receiving their lawful entitlements.

Firstly, we want to make it clear that when workers come to us for help, we aren't in the business of cross examining them about their visa or dobbing them in to other parts of the Government. We do not need to know about any issues with their visa situation. They are entitled to minimum wages and we are here to make sure they receive them irrespective of their visa rules or visa status. Your clients should be aware of this. We can help them to decide what to do.

¹ This based on the methodology used by the Productivity Commission in Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p.916.

Secondly, a migrant worker's first line of defence is knowing their rights, so we are investing heavily in raising awareness of the Fair Work Ombudsman's role and services. We want to increase their confidence in reporting issues to us. This includes developing accessible and relevant material and distributing it through networks that we know migrant workers and employers use, like yours.

Thirdly, we are connecting with workers and businesses through their communities. As part of our Chinese Community Engagement strategy, we have enlisted the help of businesses and community leaders. We are raising the profile of the Fair Work Ombudsman through Chinese media and social media, and we have translated materials about workplace rights in both traditional and simplified Chinese. We are now establishing something similar in the Korean community.

Fourthly, we are coordinating across government to disrupt business models that promote the exploitation of migrant workers - the newly created Migrant Worker Taskforce is part of this.

We also coordinate with other enforcement agencies through Taskforce Cadena to take action against the organisers of illegal work, visa fraud and exploitation of foreign workers in Australia.

And finally, we have developed an anonymous tip off form on our website where migrant workers can let us know if something's not right about their work situation. We've had a great response to the tool so far - receiving over 4000 reports since its launch in April 2016 with visa holders featuring strongly in these reports.

If you have information about non-compliance, I'd encourage all of you to report that to us as well, either formally or anonymously through this channel.

We have more to come. We know we need to work harder to engage with migrant communities and we will continue to work with organisations like the Migration Institute of Australia to help us reach vulnerable workers.

So help us to address migrant worker issues

The value of decent work is important not just for the wage it provides but for the social and support networks it brings. This is especially important for migrant workers as a foundation on which to build connection to language and culture in our country.

I believe it is incumbent on those with power, those who can access information and support, those who can help visa workers understand the rules, people like you and I, to act.

By working together, you and I – and others in Government and the community – can change things for the better. We can stamp out the dodgy operators making money out of visa workers' vulnerabilities. And we can build a culture of compliance around the treatment of migrant workers in our community.

This is about long term, sustainable change. Not just tomorrow's headline.

Stopping migrant worker exploitation is not the responsibility of a single business or a single union or a single regulator. Nor will it be fixed overnight. But I firmly believe you can help us to reach and support these workers – and help yourself at the same time. Your active engagement with this problem and with us will help deliver the best outcomes for Australia's migrant community.

Thank you.