



5 December 2022

## Submission: Review of the *Modern Slavery Act 2018* (Cth)

We welcome the opportunity to make a submission in relation to this the *Modern Slavery Act 2018* (Cth) (**MS Act**).<sup>1</sup>

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.

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

The Migrant Justice Institute welcomes this review of the MS Act and recognises the potential for the MS Act to play a significant role in addressing the exploitation of migrant workers in Australia and globally.

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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.

Numerous studies<sup>2</sup> have identified significant shortcomings in the current MS Act. We broadly support many of the recommendations in submissions by the Human Rights Law Centre (HRLC) and the RMIT University's Business and Human Rights Centre and the University of Liverpool Management School (ULMS), UK (RMIT BHRC and ULMS) to this review, and we commend these submissions to the review team.

Our submission focusses on the linkages between migrant worker exploitation, including wage theft, and modern slavery. It sets out several reforms to the MS Act, as well as additional measures that must be implemented alongside the MS Act, to effectively prevent, detect and remedy modern slavery. In particular, we propose amendments to the *Migration Act 1958* (Cth) and *Fair Work Act 2009* (Cth) that should accompany reforms to the MS Act. Many of these give effect to existing government commitments to implement the recommendations of the Migrant Workers' Taskforce. These complementary measures are critical to address the systemic drivers of exploitation that can foster conditions of modern slavery and forced labour. This includes strengthening the detection and remediation of workplace exploitation and modern slavery.

Our submission is set out in two parts. **Part One** focuses on specific changes required to be made to the MS Act itself. **Part Two** of our submission addresses further measures outside of reforms to the MS Act that are essential to addressing modern slavery.

### Detection of modern slavery relies on robust systems that enable detection of other forms of exploitation, including wage theft

It is widely accepted that systemic exploitation of migrant workers creates the conditions for forced labour and modern slavery. Modern slavery exists on a continuum which 'ranges from decent work to serious criminal exploitation'.<sup>3</sup> As noted in the Explanatory Guide, while wage theft and substandard working conditions do not always constitute modern slavery, these practices may 'escalate into modern slavery if not addressed'.<sup>4</sup>

As the Salvation Army Freedom Partnership has previously observed,

*Problems dwell at the intersection of anti-slavery, immigration and workplace policy, where temporary lawful and unlawful workers are reluctant to complain about exploitative conditions for fear of losing the opportunity to work in Australia or, in severe cases, of retaliation by the employer. Because labour exploitation and trafficking exist on the same spectrum, policies targeting the former will have an impact on the latter, for better or*

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<sup>2</sup> See for example Human Rights Law Centre, *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act* (February 2022); Human Rights Law Centre, *Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act* (November 2022).

<sup>3</sup> Department of Home Affairs, [Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities](#).

<sup>4</sup> Department of Home Affairs, [Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities](#).

worse.<sup>5</sup>

In other words, the absence of effective measures to prevent, detect and remedy workplace exploitation in Australia will render business and government even less likely to prevent, detect and remedy modern slavery or forced labour in Australia.

Among workers in Australia, temporary migrants (about 7% of our workforce)<sup>6</sup>, and undocumented workers in particular, are at greatest risk of modern slavery. Our research, which was cited in the Migrant Workers' Taskforce Report, evidences the high prevalence of exploitation among these workers, including wage theft. In our 2016 survey of 4332 temporary visa holders, at least a third reported wages of less than half the casual minimum wage.<sup>7</sup> A second survey of over 5000 temporary visa holders revealed that the proportion of migrant workers experiencing severe wage theft had not improved by 2019.<sup>8</sup> Nine in ten underpaid migrant workers suffered wage theft in silence and took no action to report or seek remediation.

The overwhelming majority of migrant worker exploitation goes undetected. Many temporary migrant workers stay silent because current immigration settings discourage them from taking action. They may fear that to come forward would put their visa and stay in Australia at risk, or jeopardise a future visa. When migrant workers reach the end of their stay and could potentially safely pursue a labour claim without risk to their job or visa, they are required to swiftly return home.

Migrant workers also may make the rational decision to refrain from reporting exploitation or bringing a claim against their employer because current labour enforcement systems do not routinely deliver remedies. Judicial processes are inaccessible and lengthy. Government regulators are inaccessible to migrant workers and undertake limited proactive investigation and enforcement activities compared to the prevalence of exploitation. As a result, it is difficult for lead firms to detect exploitation in their supply chains, even when acting in good faith. Those unwilling to invest the time or resources to conduct proper due diligence will almost certainly detect very little non-compliance. Suppliers, therefore, may choose to engage in wage theft and other exploitation with impunity, knowing they are unlikely to be held to account and that workers are unlikely to report to the government, or a lead firm.

Given these structural barriers to migrant workers lodging labour claims or using corporate grievance mechanisms in relation to non-criminal forms of exploitation, the Government sets an almost impossible challenge for the business community when it requires businesses to identify

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<sup>5</sup> The Salvation Army Freedom Partnership, in *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (Joint Standing Committee on Foreign Affairs, Defence and Trade, December 2017).

<sup>6</sup> Will Mackey, Brendan Coates and Henry Sherrell, *Migrants in the Australian Workforce: A Guidebook for Policy Makers* (Grattan Institute, May 2022) 155.

<sup>7</sup> Laurie Berg and Bassina Farbenblum, [Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey](#) (Migrant Justice Institute, 2017).

<sup>8</sup> Bassina Farbenblum and Laurie Berg, [International Students and Wage Theft in Australia](#) (Migrant Justice Institute, 2019).

and remediate *modern slavery*.

Business' efforts to detect modern slavery in supply chains in Australia will remain ineffective as long as such stark structural barriers persist to migrant workers reporting and seeking to remediate other forms of workplace exploitation.

This is especially the case because businesses up a supply chain know they cannot be held legally responsible for remedying exploitation in their supply chain even if it were detected. For businesses to take their obligations in relation to modern slavery seriously, at a minimum there must be legal responsibility and consequences for businesses that fail to take appropriate action within their Australian supply chains where exploitation is systemic, foreseeable and detectable and risks of modern slavery are high.

We therefore propose reforms that expand the scope of the MS Act to include other forms of labour exploitation and also encourage broader reforms of the labour law framework to complement and support the policy objectives of the MS Act. These include a specific focus on improving detection of modern slavery by enabling migrant workers to report exploitation.

## Summary of Recommendations

### Part One: Amendments to the MS Act

#### Recommendation 1

**Reporting criteria** should be expanded beyond risks of 'modern slavery', and actions taken to assess and address those risks, to encompass risks of exploitation, and actions taken to assess and address risks of exploitation, which should be defined to include non-minor breaches of employment standards in Australia. To increase the consistency and quality of modern slavery statements, the reporting criteria should be made more prescriptive, including identifying the mechanisms through which workers can report exploitation, the number of worker complaints made, quantum/remedy sought, remedies provided and timeframes for resolution.

#### Recommendation 2

**Enforcement (including a Commissioner):** To ensure the MS Act is effectively enforced, we support the HRLC's recommendation to introduce penalties and other administrative sanctions for companies that do not comply with reporting obligations. We also support the appointment of an independent Anti-Slavery Commissioner. To ensure that the Commissioner's office and enforcement measures are accessible and effective for migrant workers, we recommend various measures including adequate resourcing and collaboration with trusted legal service

providers, unions and community organisations.

### **Recommendation 3**

**Mandatory due diligence:** We support the HRLC's recommendation to implement a mandatory duty to prevent modern slavery which requires reporting entities to undertake human rights due diligence to identify, prevent and address modern slavery risks in their operations and supply chains.

### **Recommendation 4**

**Further review of the Act:** To ensure continual improvement and efficacy of the MS Act, we support the HRLC's recommendation for a further evidence-based review of the MS Act in 3 years.

## **Part Two: Measures that must accompany the Modern Slavery Act in order for it to achieve its stated objectives**

### **Recommendation 5**

**Whistleblower protections:** Our research reveals that many migrant workers do not report exploitation (or modern slavery) due to concerns that complaining will impact their visa. As set out in our widely endorsed Research and Policy Brief *Breaking the silence: A proposal for whistleblower protections to enable migrant workers to address exploitation*, we recommend amendments to migration laws and policy that enable migrant workers to safely report exploitation without risking their visa. These include protections against visa cancellation for migrant worker whistleblowers who report exploitation and seek to hold the responsible employer to account and a new short-term visa to enable migrant workers to remain in Australia to report exploitation and pursue meritorious labour claims against their employer at the conclusion of their stay.

### **Recommendation 6**

**Legal protection for all workers:** To remove employer impunity for exploitation of undocumented workers, the Migration Act must be amended to confirm that workplace protections apply regardless of undocumented immigration status.

### **Recommendation 7**

**Information and transparency:** Without information about their employing entity and rights at work, many workers are unable to bring a claim or complaint about exploitation or modern slavery. To address this, the FW Act should be amended to require employers to provide each worker with a statement of specific working conditions (Award, wage rates, hours etc.) and employer contact details (including address for service) upon commencement, and to

itemise deductions on payslips.

### **Recommendation 8**

**Effective enforcement of labour laws:** Without an accessible and effective regulator, vulnerable workers will not complain about workplace exploitation or modern slavery. In line with Migrant Worker Taskforce recommendations 9 and 10, we recommend various measures to ensure effective detection and compliance activities by the Fair Work Ombudsman including systemic deterrence and individual outcomes for exploited migrant workers. This includes a comprehensive review of FWO's resources, purpose and effectiveness with a particular focus on vulnerable workers; the establishment of a dedicated migrant worker support unit including a wage calculation service for vulnerable workers; strengthened administrative sanctions; and consideration of a trial scheme whereby FWO can make binding determinations on labour hire firms based on their licensing conditions within a new federal labour hire licensing scheme (drawing on the Australian Financial Complaints Authority model).

### **Recommendation 9**

**Fair and fast and effective resolution of worker wage claims:** The facilitation by government of effective wage recovery processes is critical to lead firms' ability to detect and remedy exploitation in Australia, and therefore identify risks of more serious exploitation and modern slavery. To ensure that workers receive just remediation, to give other workers the confidence to report exploitation and modern slavery, and to increase deterrence value, it is essential that dispute resolution processes provide swift remediation. To implement Migrant Worker Taskforce Recommendation 12, we recommend that the Government immediately reform the small claims process and establish a taskforce to identify the best model for an accessible forum that facilitates efficient and effective remediation of wage claims in the longer term. Options for reform include further changes to the current system, the establishment of a new Fair Work Court in tandem with the Fair Work Commission and/or the establishment of broader jurisdiction in the FWC to resolve underpayment disputes.

### **Recommendation 10**

**Legal responsibilities for individuals & supply chains:** The Government has committed to implementing Recommendation 11 of the Migrant Worker Taskforce which 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 provide and maintain a working environment that complies with the FW Act.

## PART ONE: MS ACT REFORM

### Reporting criteria

This section responds to the following Inquiry questions:

*8. Does the Modern Slavery Act appropriately define 'modern slavery' for the purpose of the annual reporting obligation?*

*10. Are the mandatory reporting criteria in the Modern Slavery Act appropriate – both substantively and in how they are framed?*

Under section 16 of the MS Act, a modern slavery statement must address the following mandatory criteria:

*(1) A modern slavery statement must, in relation to each reporting entity covered by the statement:*

- (a) identify the reporting entity; and*
- (b) describe the structure, operations and supply chains of the reporting entity; and*
- (c) describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls; and*
- (d) describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes; and*
- (e) describe how the reporting entity assesses the effectiveness of such actions; and*
- (f) describe the process of consultation with:
  - (i) any entities that the reporting entity owns or controls; and*
  - (ii) in the case of a reporting entity covered by a statement under section 14—the entity giving the statement; and**
- (g) include any other information that the reporting entity, or the entity giving the statement, considers relevant.*

*Example: For paragraph (d), actions taken by an entity may include the development of policies and processes to address modern slavery risks, and providing training for staff about modern slavery.*

### Low levels of compliance with reporting criteria

A number of studies of modern slavery statements lodged to date, have found that compliance with the reporting criteria is inconsistent, and the quality of many modern slavery statements is

low.<sup>9</sup> The Human Rights Law Centre conclude in their submission to this review that:<sup>10</sup>

*Compliance with the mandatory reporting criteria remains patchy and, with a few notable exceptions, the quality of reporting in many companies' statements remains poor. Even after two years of reporting, many companies are still not identifying obvious modern slavery risks in their supply chains or taking meaningful action to address them. Of particular concern to us is the fact that the legislation does not appear to be driving changes in the areas that matter most for tackling modern slavery, such as efforts to address recruitment fees or undertake due diligence on suppliers, improve purchasing practices or lift supply chain working conditions.*

This raises two interrelated concerns. First, are the criteria themselves sufficiently clear and prescriptive? Secondly, are the obligations under the MS Act effectively enforced? In relation to the first concern, we welcome the question in the Issues paper regarding the definition of modern slavery for the purposes of reporting.

### **Expansion of reporting criteria to encompass workplace exploitation in supply chains in Australia, in addition to modern slavery in Australia and abroad**

The reporting criteria in section 16 relate to 'modern slavery' under the MS Act. For the purposes of reporting and risk minimisation in relation to supply chains in Australia, these reporting criteria are too narrow. We recommend that reporting criteria be extended to require companies to report on the prevention, detection and remediation of workplace exploitation in Australia, in addition to modern slavery in Australia and abroad.

We do not suggest that the definition of modern slavery itself be broadened, since the bulk of workplace exploitation does not rise to the level of modern slavery. However, narrow reporting criteria that focus on modern slavery alone encourage businesses to turn a blind eye to systemic wage theft and other forms of exploitation that are the breeding ground for forced labour and modern slavery. Moreover, detection of modern slavery is strongly linked to measures to prevent, detect and remedy wage theft and other forms of workplace exploitation. The MS Act will go much further to preventing and addressing modern slavery if businesses are required to document in their modern slavery statements measures used to assess and address risks of labour law non-compliance in addition to risks of modern slavery. Workplace exploitation should be defined as a 'non-minor breach of employment standards' in Australia (similar to the NZ

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<sup>9</sup> Human Rights Law Centre, *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act* (February 2022); Human Rights Law Centre, *Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act* (November 2022).

<sup>10</sup> Freya Dinshaw and Keren Adams, Human Rights Law Centre Draft Submission to the Modern Slavery Act 2018 (Cth) review (November 2022) (**HRLC submission**).



approach)<sup>11</sup>

### Inclusion of more prescriptive reporting criteria

In addition to broadening the reporting criteria, we recommend that the criteria be more prescriptive, with specific data reporting requirements, to ensure meaningful, consistent and comparable data is recorded by all companies. Others have recommended that this could include requiring companies to report on whether the company maintains evidence of mapping of supply chains,<sup>12</sup> and whether the company documents processes for ensuring workers are not charged recruitment fees (and, if so, to include the documentation).<sup>13</sup> Mandatory reporting on the level and means of consultation with workers and their representatives is also critical.<sup>14</sup>

### Best practice case study – outworker provisions in the *Fair Work Act*

The outworker provisions of the *Fair Work Act* demonstrate how a considered legal framework, coupled with detailed reporting requirements and effective enforcement, can bring about real change in supply chains that are reliant the labour of vulnerable workers:

The [\*Fair Work Amendment \(Textile, Clothing and Footwear Industry\) Act 2012 \(Cth\)\*](#) introduced a new Part 6-4A into the *Fair Work Act* regarding textile, clothing and footwear (TCF) workers (**Outworker Provisions**). The objectives of Part 6-4A include seeking to ‘eliminate exploitation of outworkers in the textile, clothing and footwear industry, and to ensure that those outworkers are employed or engaged under secure, safe and fair systems of work’.<sup>15</sup> These provisions operate alongside the *Textile, Clothing, Footwear and Associated Industries Award 2020 (TCF Award)* and other codes, which together mandate specific processes to enable a worker to report underpayment and receive remediation.

The legislative framework contains four important elements which could be considered in strengthening MS Act reporting criteria. This framework also provides a useful guide for businesses who wish to implement best practice approaches to eliminating exploitation and modern slavery from their supply chains:

- 1) **Workers entitled to protection and afforded minimum standards:** Under this scheme, all TCF outworkers are deemed to be employees (rather than independent contractors) and are therefore entitled to *Fair Work Act* protections.<sup>16</sup> These provisions guard against sham contracting, whereby employers require vulnerable workers, who are actually

<sup>11</sup> See the recommended scope of modern slavery due diligence: <https://www.mbie.govt.nz/business-and-employment/employment-and-skills/plan-of-action-against-forced-labour-people-trafficking-and-slavery/modern-slavery/>.

<sup>12</sup> Shelley Marshall and Bruce Pinnington, Submission to Modern Slavery Act Review (21 November 2022), 2-3 (**Marshall and Pinnington submission**).

<sup>13</sup> HRLC submission 6-7.

<sup>14</sup> Marshall and Pinnington submission, 14.

<sup>15</sup> FW Act s 789AC.

<sup>16</sup> FW Act ss 789BA, 789BB, 789BC.

employees in law, to obtain an ABN and purport to contract them as independent contractors (who lack entitlement to minimum employment terms and conditions).

- 2) **Obligation for all businesses in a supply chain to remedy unpaid wages, with reverse onus:** Under the scheme, each 'indirectly responsible' entity in a supply chain is liable to remedy underpayment of a worker. If there is more than one indirectly responsible entity in a supply chain, all entities are jointly and severally liable for repayment. TCF outworkers may recover unpaid remuneration from any indirectly responsible entity for work performed, in addition to their direct employer.<sup>17</sup> And indirectly responsible entity is defined as follows:

*If there is a chain or series of 2 or more arrangements for the supply or production of goods produced by TCF work performed by a person (the worker), the following provisions have effect:*

*(a) the work is taken to be performed directly for the person (the direct principal) who employed or engaged the worker (and the direct principal is taken to have arranged for the work to be performed directly for the direct principal);*

*(b) the work is taken to be performed indirectly for each other person (an indirect principal) who is a party to any of the arrangements in the chain or series (and each indirect principal is taken to have arranged for the work to be performed indirectly for the indirect principal).<sup>18</sup>*

If a worker demands repayment from an indirectly responsible entity which fails to remedy the underpayment, the worker can bring a legal claim against that entity from 14 days after the demand was first made.<sup>19</sup> A reverse onus applies such that, if a demand is made and not paid, a Court will make an order for repayment to the worker, unless the indirectly responsible entity satisfies the Court that it is not liable.<sup>20</sup>

- 3) **Detailed record-keeping requirements:** Schedule F of the TCF Award sets out detailed record keeping requirements for businesses, including:
- a. Principals must be registered by the board of reference;<sup>21</sup>
  - b. Upon making any work arrangement, a principal must make and retain a written record containing the principal's key contact details, board of reference registration number, the name and address of the person to whom the arrangement applies, the addresses of where work is to be performed, the time and date for commencement and completion of work, a description of the nature

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<sup>17</sup> FW Act s 789CB.

<sup>18</sup> FW Act s 17A.

<sup>19</sup> FW Act s 789CC.

<sup>20</sup> FW Act s 789CD(4).

<sup>21</sup> TCF Award, cl F.3.1.

of the work required and garments/materials to be worked on, the number of garments, articles of materials, the time required for the work on each garment, article or material, and the price to be paid for each garment.<sup>22</sup>

- c. A principal must make a retain a list containing the name and address of each person with which it makes an arrangement and provide a copy of this list to the relevant State Branch of the Union quarterly.<sup>23</sup>
- d. A principal is required to provide signed a written agreement to each worker, expressed clearly and simply in a language the worker understands, which sets out that worker's terms and conditions of work.<sup>24</sup>

This information is critical for unions to be able to undertake effective enforcement work.

- 4) **Enabling enforcement through union right of entry:** Unions are given power to enter TCF workplaces without notice and inspect records of both union members and other workers.

A number of studies have found the Outworker Provisions highly effective in delivering justice to workers who may otherwise never have reported exploitation:

*The approach adopted in the TCF sector has arguably been the most effective, utilising a combination of federal and state legislation, the industry award and both mandatory and voluntary codes to 'enable hidden workforces to be made visible and enable monitoring and enforcement of legal liability and responsibility for fair working conditions'.<sup>25</sup>*

The TCF provisions have been described as a powerful example of how 'governments can regulate the contracting practices of effective business controllers'.<sup>26</sup> The scheme is also considered scaleable and able to be applied to other industries. For example, Tess Hardy has observed:<sup>27</sup>

*These expanded rights of recovery are a critical component for guarding against 'phoenix' behaviour and ensuring that workers are not deprived of key benefits as a result of the direct employer or contractor being wound up or put into liquidation. However, in the event that the direct employer remains solvent, the TCF scheme expressly states that the lead firm may rely on any relevant indemnification for the loss suffered/damages paid as a result of contraventions committed by the direct employer...*

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<sup>22</sup> TCF Award, cl F.3.2.

<sup>23</sup> TCF Award, cl F.3.3.

<sup>24</sup> TCF Award cl F.4.2, F.4.3, F.4.4.

<sup>25</sup> Anthony Forsyth, '[The Identity of the "Employer" in Australian Labour Law: Moving Beyond the Unitary Conception of the Employer](#)' (2020) 13(1) *Italian Labour Law e-Journal* 13, 25.

<sup>26</sup> Michael Rawling, 'Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations' (2015) 27(3) *Australian Journal of Labour Law* 191, 211; Igor Nossar et al, *Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness* (November 2017) 16-17.

<sup>27</sup> Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2018) 29 *Australian Journal of Labour Law* 78, 93-5.

*Indeed, there are compelling arguments for extending key provisions (if not the whole TCF scheme) to the full spectrum of industries and corporate forms. For example, the reversal of the relevant onus of proof is especially appealing — particularly in light of the evidentiary hurdles facing claimants in cases like those involving 7-Eleven and the Baiada Group. There appears to be no obvious reason why this provision alone could not be applied to other sectors. The regulatory merits of the TCF regime more generally — and its potential expansion to other sectors and production networks — is further underlined by the fact that there are a number of similarities between this statutory scheme and important developments in the US and elsewhere.*

We commend the TCF Outworker Provisions to the review team, and suggest that the MS Act reporting criteria could be amended to include elements of this scheme. For instance, reporting requirements in relation to risks of modern slavery and/or exploitation and actions taken to address these might include identification of the mechanisms through which workers can report wage theft, exploitation or modern slavery, the number of worker complaints made, the quantum and/or remedy sought, the remedies provided and timeframes for resolution.

#### **Recommendation 1**

**Reporting criteria should be expanded beyond risks of ‘modern slavery’, and actions taken to assess and address those risks, to encompass risks of exploitation, and actions taken to assess and address risks of exploitation, which should be defined to include non-minor breaches of employment standards in Australia. To increase the consistency and quality of modern slavery statements, the reporting criteria should be made more prescriptive, including identifying the mechanisms through which workers can report exploitation, the number of worker complaints made, quantum/remedy sought, remedies provided and timeframes for resolution.**

#### **Enforcement (including a Commissioner)**

We broadly support the recommendations of the HRLC, RMIT BHRC and ULMS to introduce financial penalties and other administrative consequences for corporate noncompliance with reporting obligations.<sup>28</sup> We also support the recommendation of HLRC and others to appoint an independent Anti-Slavery Commissioner.

Our research on the gaps in the Fair Work Ombudsman’s capacity to systemically deliver access to justice to underpaid migrant workers may be instructive in relation to the effective design and development of the office of the Anti-Slavery Commissioner.<sup>29</sup> Our analysis of FWO’s data on

<sup>28</sup> Marshall and Pinnington submission, 15.

<sup>29</sup> See for example, Laurie Berg and Bassina Farbenblum, ‘The Role of the Fair Work Ombudsman in Migrant Workers’ Access to Justice in Australia’ (2017) 23(3) *Australian Journal of Human Rights*; Laurie Berg and Bassina Farbenblum, [Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey](#) (Migrant Justice Institute, 2017); Laurie Berg and Bassina Farbenblum, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (Migrant Justice Institute, 2018).

treatment paths and remedies resulting from migrant workers' Requests for Assistance highlight migrants' reluctance to engage with the FWO, and low wage recovery rates for those who do lodge a claim with the regulator. We conclude that the structural drivers of barriers to access and successful outcomes for migrant workers are numerous and multi-layered, they are not inevitable. On request, we can provide a number of recommendations to achieve a migrant-centred approach that reduce risks and costs to migrant workers of seeking assistance, and increase the likelihood of migrant workers obtaining a satisfying outcome.

## **Recommendation 2**

**To ensure the MS Act is effectively enforced, we support the HRLC's recommendation to introduce penalties and other administrative sanctions for companies that do not comply with reporting obligations. We also support the appointment of an independent Anti-Slavery Commissioner. To ensure that the Commissioner's office and enforcement measures are accessible and effective for migrant workers, we recommend various measures including adequate resourcing and collaboration with trusted legal service providers, unions and community organisations.**

## **Mandatory due diligence**

We support the HRLC's recommendations to introduce a 'duty to prevent' modern slavery that requires entities to undertake human rights due diligence to identify and address modern slavery risks.

## **Recommendation 3**

**We support the HRLC's recommendation to implement a mandatory duty to prevent modern slavery which requires reporting entities to undertake human rights due diligence to identify, prevent and address modern slavery risks in their operations and supply chains.**

## **Further review of the MS Act**

We also support the HRLC's recommendation to conduct a further review of the MS Act in 3 years.

As the Migrant Worker Taskforce has pointed out, effective policy reforms must be based on data and evidence.<sup>30</sup> Research and analysis concerning the experiences and perspectives of migrant workers is critical, including first-hand data on those who attempt to make claims or complaints of modern slavery, and the vast majority of migrant workers who endure exploitation in silence. In any reform processes affecting migrant workers, migrant workers and the organisations working with them should have a seat at the table. We commend to the review a new report by Anti-Slavery Australia about the need for survivor engagement to ensure the

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<sup>30</sup> Migrant Workers Taskforce, [Final Report](#) (7 March 2019), Recommendation 2.

experiences and expertise of victim-survivors of modern slavery informs the development of policy in this area.<sup>31</sup>

#### Recommendation 4

**To ensure continual improvement and efficacy of the MS Act, we support the HRLC's recommendation for a further evidence-based review of the MS Act in 3 years.**

## PART TWO: FURTHER MEASURES

This Part recommends amendments to immigration and labour laws that are essential to address modern slavery. These complementary measures are critical to reverse the systemic drivers of exploitation that can also foster conditions of modern slavery and forced labour. In addition, without introducing reforms to address the substantial barriers which prevent the detection and remediation of migrant worker exploitation, even greater barriers will persist to the detection and remediation of modern slavery.

### Whistleblower protections and other immigration settings that reduce exploitation

Our research reveals that many migrant workers do not report exploitation or modern slavery due to concerns that complaining will impact their visa. For example, in our survey of over 5,000 international students in Australia, 38% did not seek information or help for a problem at work because they did not want 'problems that might affect my visa'.<sup>32</sup>

Our Policy and Research Brief, *Breaking the Silence: A Proposal for Whistleblower Protections to Enable Migrant Workers to Address Exploitation* to be released this year, recommends new measures that enable migrant workers to safely report exploitation and modern slavery without risking their visa. These include legislative protections against visa cancellation for migrant worker whistleblowers who address exploitation and a new short-term visa to enable migrant workers to remain in Australia to report exploitation and pursue meritorious labour claims. The proposal has been endorsed by over 40 organisations and the NSW Anti-Slavery Commissioner. This underscores the broad acceptance among unions, legal service providers, settlement agencies and peak ethnic affairs and other national organisations that nothing short of these protective measures will be adequate to give migrant workers the confidence to report exploitation, including modern slavery, without fear of ramifications for their current or future visa. The Migrant Worker Taskforce Recommendation 21 (a review of the Assurance Protocol including consideration of additional measures) supports the widely held view that current mechanisms are insufficient to encourage migrant worker reporting. We also propose increased portability of employer sponsored workers (including a longer period to find an alternative

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<sup>31</sup> Frances Simmons and Jennifer Burn, *Beyond Storytelling: towards survivor-informed responses to modern slavery*, University of Technology Sydney (Report September 2022).

<sup>32</sup> Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (2020) 10.

sponsor).

The Brief will be available at [www.migrantjustice.org](http://www.migrantjustice.org) by 24 December 2022, and a confidential copy is attached with this submission.

## Recommendation 5

**We recommend amendments to migration laws and policy that enable migrant workers to safely report exploitation without risking their visa. These include protections against visa cancellation for migrant worker whistleblowers who report exploitation and seek to hold the responsible employer to account and a new short-term visa to enable migrant workers to remain in Australia to report exploitation and pursue meritorious labour claims against their employer at the conclusion of their stay.**

## Legal protection for all workers

Undocumented workers are at greatest risk of forced labour and modern slavery in relation to their work in Australia. This is because they are the least likely to report exploitation or modern slavery for fear of detection and deportation, and there is uncertainty as to whether they are even covered by Australian labour law. Caselaw across Australia is currently unclear as to whether these workers are covered by the *Fair Work Act* and other workplace protections including workplace health and safety and workers' compensation laws.<sup>33</sup> The lack of certainty as to whether undocumented workers are entitled to these fundamental workplace protections creates a loophole through which unscrupulous employers can freely underpay and exploit undocumented workers in dangerous jobs while evading any legal liability for exploitation or workplace injury. It is these workplaces in Australia that are most likely to be sites of modern slavery for migrant workers.

This line of cases relies on the fact that a migrant working without permission under the *Migration Act 1958* (Cth) (***Migration Act***) - whether as a visa overstayer, or working in breach of a visa condition on an otherwise valid visa – commits a criminal offence (set out in s 235). Judgments across multiple states have held an employment contract performed in breach of the statutory s 235 offence void for illegality and therefore unenforceable. This renders undocumented workers not only ineligible for remuneration for work performed, but also for statutory protections under the *Fair Work Act*, workers compensation laws and other laws affording workplace protections, since these extend only to employees defined as those who hold valid contracts of employment (eg, s 11 of the *Fair Work Act*). The Migrant Worker Taskforce recommended that the FW Act be amended to confirm that it applies regardless of undocumented immigration status.<sup>34</sup>

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<sup>33</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>34</sup> Migrant Workers Taskforce, [Final Report](#) (7 March 2019), Recommendation 3.



In addition, s 235 of the *Migration Act* should itself be amended to clarify that commission of this offence (of unauthorised work) does not render protections under other federal or state statutes unenforceable. An amendment to the *Migration Act* is preferable to an amendment to the *Fair Work Act* alone because it would provide certainty that commission of this offence does not nullify a worker's entitlements across not only the *Fair Work Act* but other state and federal labour laws. Nevertheless, for avoidance of doubt and for the important signal it sends, the *Fair Work Act* should also be amended to clarify that it applies to workers regardless of immigration status and regardless of any contravention by the worker of the *Migration Act*.

The possibility that undocumented workers work outside of the protective scope of employment law render these vulnerable workers at even greater risk of modern slavery. Our recommended amendments to the *Migration Act* and relevant labour laws, including the *Fair Work Act*, would send an important signal that the law does not sanction exploitation of these workers and if investigated, those businesses could be held to account.

## Recommendation 6

**To remove employer impunity for exploitation of undocumented workers, the *Migration Act* must be amended to confirm that workplace protections apply regardless of undocumented immigration status.**

## Information and transparency

Many migrant workers (and other vulnerable employees) are impeded from pursuing labour claims against their employer, including for serious exploitation, because they are unable to identify the applicable Award or enterprise agreement, or their minimum rate of pay, or whether any wage deductions were lawful. Migrant workers who overcome these obstacles may be unable to identify the legal identity of their employing entity, or how to complete service of court documents, especially when employers engage vulnerable workers through complex commercial arrangements and trusts.

Straightforward amendments to the *Fair Work Act* can address these barriers to migrant workers enforcing their rights and reporting exploitation and even modern slavery. These include a new requirement for employers to provide each worker with a tailored statement of working conditions upon commencement of employment. As suggested by Charlesworth and Campbell,<sup>35</sup> 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,

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<sup>35</sup> Iain Campbell and Sara Charlesworth, 'The National Employment Standards: An Assessment' (2020) 33 *Australian Journal of Labour Law* 36.



enterprise agreement)'. 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>36</sup>

The *Fair Work Act* should also be amended to require employers to itemise deductions on each payslip. This is particularly important for PALM scheme workers. Currently, if 'an amount is deducted from the gross amount of the payment, the pay slip must include the name, or the name and number, of the fund or account into which the deduction was paid'.<sup>37</sup> However, frequently more than one deduction is made while only a total amount is listed, leaving the purpose and amount of individual deductions unknown. Requiring employers to itemise deductions would assist in the identification of unlawful deductions, which in extreme cases can underpin debt bondage, forced labour and modern slavery.

## Recommendation 7

**Without information about their employing entity and rights at work, many workers are unable to bring a claim or complaint about exploitation or modern slavery. To address this, the FW Act should be amended to require employers to provide each worker with a statement of specific working conditions (Award, wage rates, hours etc.) and employer contact details (including address for service) upon commencement, and to itemise deductions on payslips.**

## Effective enforcement of labour laws

A national labour regulator that is accessible to and trusted by migrant workers is critical to encouraging vulnerable workers to seek assistance in relation to workplace exploitation, forced labour and modern slavery. Legal practitioners and anti-slavery service providers report that clients often present with wage claims in the first instance, later revealing more serious and complex allegations such as sexual harassment or even forced labour once trust is gained. As discussed above, it is clear that, in relation to wage theft, much less more serious forms of exploitation and modern slavery, the Fair Work Ombudsman (FWO) is inaccessible to the vast majority of migrant workers. In recognition of this, the Migrant Worker Taskforce recommended that 'the Government consider whether the Fair Work Ombudsman requires further resourcing, tools and powers to undertake its functions under the *Fair Work Act*, with specific reference to whether vulnerable workers could be encouraged to approach the Fair Work Ombudsman more than at present for assistance'.<sup>38</sup>

In implementing this Migrant Worker Taskforce recommendation, we suggest consideration of various measures to improve the effectiveness of the FWO's detection and compliance activities in relation to migrant workers. These include a comprehensive review of the FWO's resources, purpose and effectiveness with a particular focus on vulnerable workers; the establishment of a

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<sup>36</sup> Ibid.

<sup>37</sup> Required by regulation 3.46(2) of the *Fair Work Regulations 2009* (Cth).

<sup>38</sup> Migrant Workers Taskforce, [Final Report](#) (7 March 2019), Recommendation 10.

dedicated migrant worker support unit including a wage calculation service to assist vulnerable workers to recover unpaid wages; strengthened administrative sanctions; and consideration of a trial scheme whereby FWO can make binding determinations on labour hire firms based on their licensing conditions within a new federal labour hire licensing scheme (drawing on the Australian Financial Complaints Authority model).

## Recommendation 8

**We recommend various measures to ensure effective detection and compliance activities by the FWO including systemic deterrence and individual outcomes for exploited migrant workers. This includes a comprehensive review of FWO's resources, purpose and effectiveness with a particular focus on vulnerable workers; the establishment of a dedicated migrant worker support unit including a wage calculation service for vulnerable workers; strengthened administrative sanctions; and consideration of a trial scheme whereby FWO can make binding determinations on labour hire firms based on their licensing conditions within a new federal labour hire licensing scheme (drawing on the Australian Financial Complaints Authority model).**

### Fair, fast and effective resolution of worker wage claims

A dispute resolution process which is accessible to migrant workers and swiftly and effectively delivers remedies to underpaid workers is also necessary to ensure migrant workers' claims of wage theft are ventilated, along with more serious forms of exploitation. The facilitation by government of effective wage recovery processes is critical to lead firms' ability to detect and remedy exploitation in Australia, and therefore identify risks of more serious exploitation and modern slavery.

Recognising that the *Fair Work Act* small claims process is inaccessible to most migrant workers, the government has recently announced a review into its effective operation, implementing a recommendation of the Migrant Worker Taskforce.<sup>39</sup> We welcome this review and elsewhere propose a number of immediate reforms to make this process a more effective avenue for wage redress for migrant workers.

We also recommend the establishment of a taskforce to identify the best model for an accessible forum that facilitates efficient and effective remediation of wage claims in the longer term to incentivise a far greater number of migrant workers to report workplace exploitation and pursue remedies. Options for reform include further changes to the current system, the establishment of a new Fair Work Court in tandem with the Fair Work Commission (**FWC**) and/or the establishment of broader jurisdiction in the FWC to resolve underpayment disputes.

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<sup>39</sup> Migrant Workers Taskforce, [Final Report](#) (7 March 2019), Recommendation 12.

## Recommendation 9

The facilitation by government of effective wage recovery processes is critical to lead firms' ability to detect and remedy exploitation in Australia, and therefore identify risks of more serious exploitation and modern slavery. To ensure that workers receive just remediation, to give other workers the confidence to report exploitation and modern slavery, and to increase deterrence value, it is essential that dispute resolution processes provide swift remediation. We recommend that the Government immediately reform the small claims process and establish a taskforce to identify the best model for an accessible forum that facilitates efficient and effective remediation of wage claims in the longer term. Options for reform include further changes to the current system, the establishment of a new Fair Work Court in tandem with the FWC and/or the establishment of broader jurisdiction in the FWC to resolve underpayment disputes.

### Legal responsibilities for individuals and supply chains

Finally, it is our view that mandatory reporting under the MS Act is insufficient to ensure that those with commercial leverage effectively prevent, detect and remedy exploitation and modern slavery in their supply chains. In addition to due diligence requirements, labour laws must also be amended to attribute legal liability and responsibility to remedy.

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>40</sup> The Government must introduce measures in the FW Act that establish legal responsibilities for individuals and entities with decision-making or commercial leverage to prevent and remedy exploitation, particularly in supply chains where exploitation is systemic, foreseeable and detectable and risks of modern slavery are high.

The Government has committed to implementing Recommendation 11 of the Migrant Worker Taskforce which 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 industrial relations reforms in 2023.

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<sup>40</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.

We can provide an overview of these reforms upon request.

## Recommendation 10

The Government has committed to implementing Recommendation 11 of the Migrant Worker Taskforce which 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 provide and maintain a working environment that complies with the *Fair Work Act*.

## Conclusion

Thank you for the opportunity to comment on the MS Act.

We would welcome the opportunity to discuss this submission with the review team, and look forward to working with the government to develop further reforms in 2023.

Sincerely,



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