

# Keynote Address 1



**Dr Laurie Berg**

*Associate Professor, Faculty of Law, University of Technology Sydney  
Co-Executive Director, Migrant Justice Institute*

The challenges faced by migrant workers, especially women, and how the Australian community and government continue to strengthen systems to safeguard migrant workers from labour exploitation, modern slavery, and human trafficking.

# Challenges faced by migrant workers: How to strengthen systems to safeguard migrant workers from labour exploitation and modern slavery

*Australian Catholic Migrant and Refugee Office  
National Conference*

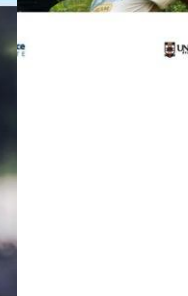
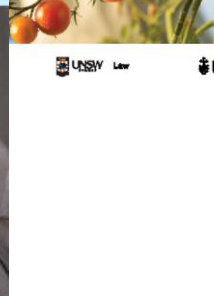
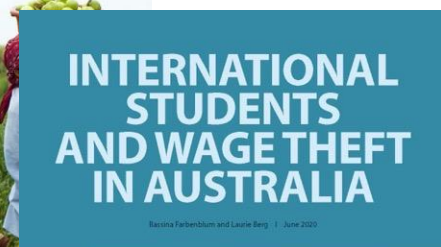
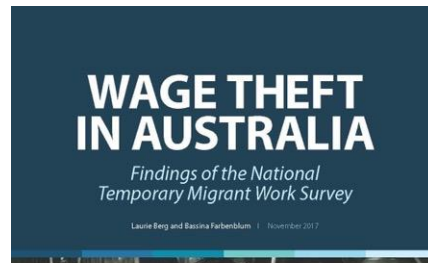
A/Prof. Laurie Berg

18 July 2024



# About Migrant Justice Institute

*Leaders in strategic research and policy development to end exploitation and ensure safe and fair working conditions for international students and other migrants in Australia and globally.*



# Presentation overview

- Exploitation and barriers to access to justice for migrant workers in Australia: the evidence
- Historic legislative reforms
- Work still to do to address migrant workers' fears of reporting
- New federal pilot of visa protections drawing from our proposal
- Benefits to businesses, government and communities committed to addressing modern slavery
- Critical to extend this and other reforms to PALM workers
- Upcoming research



# Our research findings on systemic exploitation

We surveyed 15,000+ migrant workers from 2016 to 2020. These include international students, backpackers, Pacific Islanders on PALM, sponsored workers and refugees and asylum seekers on temporary visas. We found:

- One in four were paid less than half the casual minimum wage
- Passport confiscation (3%)
- Threats to report to immigration (3%)
- Payment to obtain job (5%)
- Over three quarters believed many or most migrant workers on their visa are paid below the legal minimum
- Most knew the basic minimum wage, and knew they were underpaid (though fewer knew casual wages).



# Research findings on access to justice

- Among those who knew they had been underpaid, 9 in 10 took no action to recover wages.
- More than one in three international students stayed silent for fear of jeopardizing their visa
- Among those who contacted the Fair Work Ombudsman, most recovered none of their wages. Only one worker went to court and recovered nothing.
- The majority of workers who knew they were underpaid said they would be willing to address underpayment.
- Migrant workers' silence is a rational calculus that the potential benefit of reporting does not outweigh the significant risks and burdens of taking action.



# Why migrant workers suffer in silence: the evidence

- The remote benefits of reporting do not outweigh the risks and costs
- Among the 1 in 10 who took action against underpayment, the vast majority recovered none of their wages. Wage recovery systems in Australia do not work well.
- Undocumented workers may even have lacked employment protections altogether.
- Many indicated it was because they feared jeopardising their current visa or future migration pathway.
- Many visa holders hold critical misconceptions that prevent them from addressing underpayment and other exploitation
  - 4 in 5 migrants wrongly believed they may have broken the law by agreeing to an underpayment (eg taking a job that pays \$18/hour)
  - Around 70% of migrants wrongly believed they may have broken the law by accepting wages in cash
  - 82% international students wrongly believed that their visa could be cancelled for failure to pay rent or other tenancy breaches



# Historical legislative reforms, effective 1 July

- *Migration Amendment (Strengthening Employer Compliance) Act 2024*
  - Crime of undocumented work has been repealed
  - Undocumented workers are now protected by all workplace laws – minimum wages, sexual harassment, discrimination, injury
  - Now a crime for employers to use threats of immigration consequences to coerce international students to breach their visa or accept bad working or living conditions
  - Businesses that exploit international students may be added to a new Prohibited Employer List for hiring visa holders

## **But more is still required to make it rational for migrant workers to report underpayment, other workplace violations and criminal exploitation and modern slavery**

- New mobility scheme for Temporary Skilled Shortage visa-holders. They now can leave their sponsor and remain in Australia for up to 180 days while finding an alternative sponsor (previously 60 days), work for any employer in any industry in Australia during that transition period (or choose to not work) and transition again, for a total of up to 365 days during the course of their visa.

*Migration Amendment (Work Related Visa Conditions) Regulations 2024*



# Previous interventions

## Replacing ineffective FWO/DHA Assurance Protocol with new visa protections

An innovative approach but clearly ineffective – used by only 94 migrants since 2017 (DHA: as of 17/1/24)

Shortcomings include:

- The FWO does not pursue most complaints
- Many migrant workers won't approach the FWO
- The FWO's remit does not extend to workplace health and safety, sexual harassment
- The Protocol unavailable for private legal action against an employer or collective action through a union
- The Protocol is unreliable, not enshrined in law or policy
- A visa could still be cancelled if the non-compliance means that a sponsor has breached *their* obligations and the sponsorship is terminated

MWT recommended a review



# Our blueprint

## for new visa protections based on extensive research and consultation

Global examples – mostly focus on portability to allowed sponsored workers to leave exploitative employers (NZ, Canada)

Need for new global best practice for migrants to leave exploitative work but also to enforce their labour rights without visa risk

Protections must extend to:

- Workers who wish to pursue private legal action or collective action through a union, and do not approach the FWO
- Other labour claims beyond underpayment
- Protection against cancellation available as a guarantee

This will not only encourage migrant workers to report but will expand the ecosystem of labour enforcement beyond Fair Work Inspectors



RESEARCH AND POLICY GUIDE SERIES

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

February 2023

# Endorsements

40+ community organisations and unions



# Pilots for two world-first visa protections

New world-first visa protections commencing 1 July based on our research – new global best practice:

- **Protection from visa cancellation** - for international students who have breached their visa and pursue claims to enforce workplace rights
- **Short-term visa** – at the end of a student visa or graduate visa, to pursue labour claims



# Proposal: visa cancellation protection

## For migrant workers who have breached their visa but take action to address workplace exploitation

- Guarantee that current visa will not be cancelled and nor will any future visa applications or migration pathways be affected
- International students must know they will have the protection before they make contact with government agencies
- Must not be dependent on the government taking up a case, Should be available where a trusted non-government lawyer certifies that the migrant has a claim for a breach of their workplace rights e.g. university legal services, community legal centres
- Must be available to enforce rights and entitlements under all Australian workplace laws, e.g. underpayment, injury, sexual harassment
- Should be available for PALM workers



# Proposal: Workplace Justice Visa

**For visa holders who have reached the end of their visa and need to stay for a short period to take action to enforce their workplace rights**

- Should be at least 6-12 months
- Must have unlimited work rights
- Similar to the protection against visa cancellation, available through certification by trusted non-government lawyers, to enforce rights and entitlements under all Australian workplace laws
- Substantive visa that allows transition to other visas
- Should be available for PALM workers and undocumented workers (including separated PALM workers)



# DHA Visa Protections Pilot Co-Design Process

- Evidence-based policy
- Tripartite consultations, ongoing dialogue and iterative policy development
- DHA aiming to deliver practical programs with involvement of third parties and a client perspective

## *Migration Amendment (Workplace Justice Visa) Regulations 2024*

A new Workplace Justice Visa will be available to a worker who can produce a prescribed certificate by government or another eligible certifier that they are undertaking a 'workplace justice activity' as prescribed by the Minister. A legislative instrument will soon set out the details for the certification that will underpin the WJ visa pilot.



# Benefits of the proposal

1. Changing employer behaviour by increasing the likelihood that exploitation will come to light and they will be held to account
2. Substantially expand enforcement beyond the limited capacity of government agencies by enabling more employment lawyers and unions to pursue claims on behalf of migrant workers who would not otherwise come forward
3. Prevention of modern slavery and key indicators: suppliers will be discouraged from underpaying migrant workers or engaging in modern slavery because of increased prospects of detection
4. Increasing detection of exploitation among federal and state government agencies by requiring reporting of claims to those regulators

# Benefits of the visa protections for businesses committed to addressing modern slavery

- Improved intelligence concerning suppliers – early detection and mitigation of risks of modern slavery and its key indicators
- Identification of opportunities to effectively strengthen auditing and due diligence processes
- Evaluation of the uptake and effectiveness of visa protections will yield important insights into the use of commercial grievance mechanisms



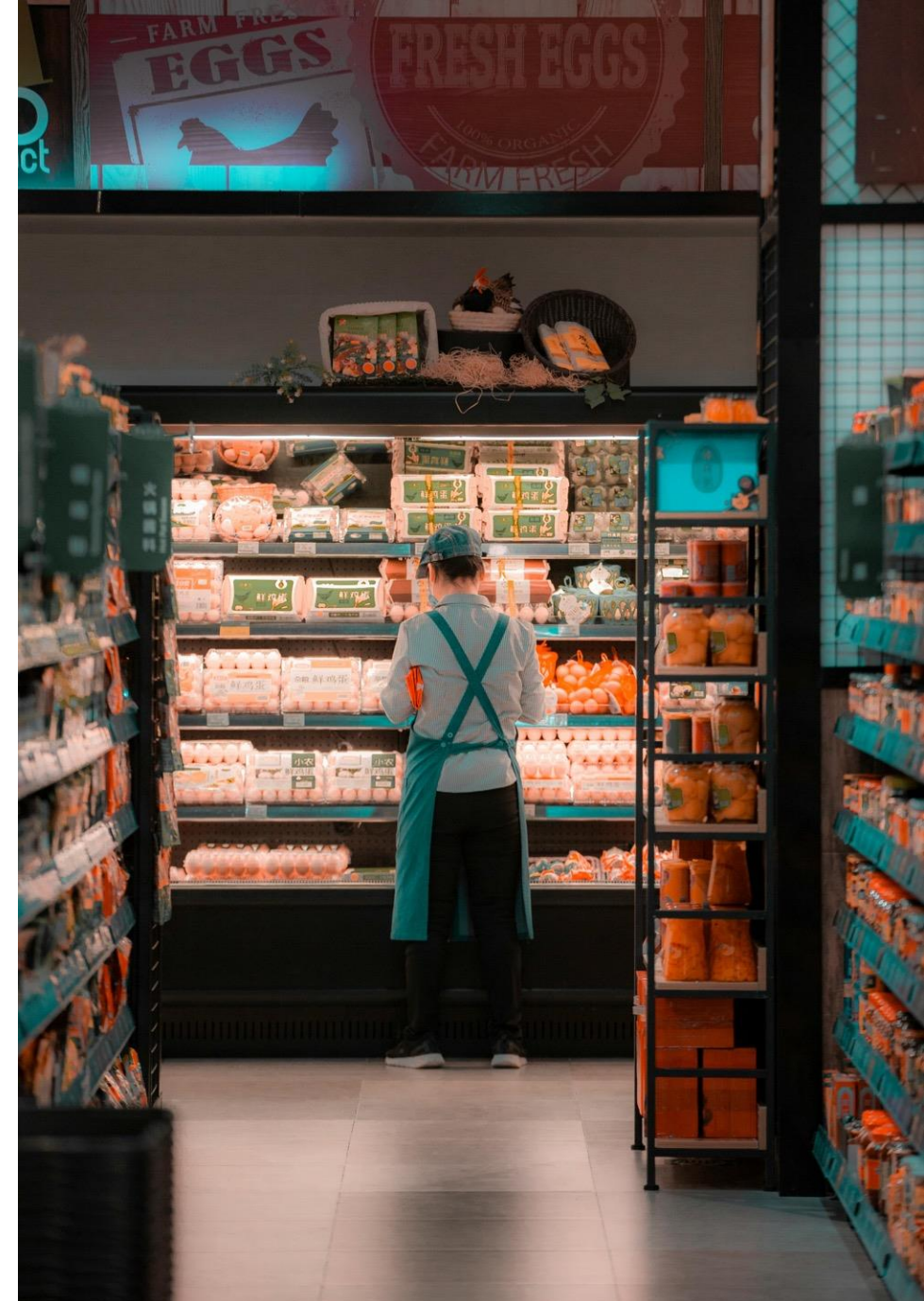
# Further work

## to ensure success of the visa protections pilot

First, it is critical that PALM workers and undocumented workers are able to access these protections. If these workers are not included in the first iteration of the pilot they must not remain excluded for long

Also there will be a need for:

- Information materials for migrant workers and frontline service providers on the new protections
- Video content with migrant workers who have successfully used the protections
- Evaluation of the pilot to support iterative improvements and ensure that all vulnerable migrants can access the protections to enforce their rights at work and hold unscrupulous employers to account



# The impact of research on policy development

Large-scale data on migrant workers' experience and decision-making + technical expertise and consultation on evidence-driven policy proposals + collaborative engagement with government => impact. For example:

- 2016 wage theft survey -> NSW govt establishes **new statewide employment law service for international students** and other migrants in response to gap identified
- 2016 wage theft survey -> 2019 whole-of-government **Migrant Worker Taskforce** relied on our research and adopted many of our evidence-based reform recommendations
- 2020 COVID survey -> demonstration of widespread deprivation underpinned **reversal of exclusion of international students and migrants from Jobkeeper**



# 2024 national survey:

## New research to drive lasting change

National survey of international students and other temporary visa holders in July-Aug 2024:

- Critical need for **current large-scale data** to **understand problems at work** and drive evidence-based policy reforms and tailored support programs based on the differentiated needs of all international student cohorts. .
- Basis for new areas of research and evidence-based policy development
- Contribute to business's commitments to take measurable, reportable steps to prevent Modern Slavery.
- Primarily for temporary visa holders and undocumented workers other than PALM workers
- More on survey: [www.migrantjustice.org](http://www.migrantjustice.org)



# 2024 Survey topics

- Underpayment of wages and entitlements and whether and how students sought to recover wages (and if not, why not).
- Illness and injury in the workplace (including unsafe conditions, access to medical care)
- Sexual harassment, employer coercion and modern slavery indicators
- Problems in accommodation linked to the job or employer.
- For all problems, whether migrant workers seek help, where they go, the outcome of help-seeking, and if they did not seek help, the barrier that prevented them from doing so.
- Knowledge of rights, common misconceptions

# Survey of PALM workers August-September

- **Funded by the International Labour Organisation (ILO) with a focus on grievance processes, where PALM workers go for assistance or to report problems, and resolution of problems**
- **With Sophia Kagan, Office of the Anti-Slavery Commissioner and Dr Matthew Withers and Dr Julie Cunningham, ANU**
- **Drive effective evidence-based policy reforms and tailored support programs.** These policies and programs need to be informed by the voices of those to whom they are targeted, and informed by lived experience
- **If you would like to learn more about, or become involved in, this study please let us know! [laurie@migrantjustice.org](mailto:laurie@migrantjustice.org)**



