



**WEstjustice**



20 July 2022

The Hon Tony Burke MP  
PO Box 156  
Punchbowl NSW 2196  
**By email:** [Tony.Burke.mp@aph.gov.au](mailto:Tony.Burke.mp@aph.gov.au)

Dear Minister

## **ALP'S COMMITMENT TO SUPPORTING DISADVANTAGED MIGRANT WORKERS**

Congratulations on the Australian Labor Party's election to Federal Government. We would also like to congratulate you on your appointment as the minister for employment and workplace relations and as the minister for the arts.

### **Our Work**

WEstjustice, South-East Monash Legal Service (**SMLS**), and JobWatch are Community Legal Centres providing free employment law advice to some of the most disadvantaged and precarious workers in Australia. Together, we deliver the International Students Employment and Accommodation Legal Service (**ISEALS**) — a free and confidential legal service for international students in Victoria experiencing exploitation in their work or housing.

We provide free legal advice, representation, education, community development, and advocacy support to international students who are often in exploitative work arrangements. Our clients are frequently underpaid, denied basic employment rights, and subjected to unsafe work. Being in insecure and precarious work makes it even more difficult for them to speak up about breaches of their basic rights at work. We are looking forward to working with your Government on a range of issues important to the international student community.

Since 2016, we have supported over 1,150 international students to understand and enforce their work rights and responsibilities. We have recovered more than \$867,000 in unpaid entitlements and compensation for our clients.

### **Secure Australian Jobs Plan**

As community lawyers working on the front line supporting disadvantaged workers, we strongly support the ALP's Secure Australian Jobs Plan. **We call on you to implement the Secure Australian Jobs Plan as a matter of priority.**

The ALP's Secure Australian Jobs Plan foreshadows a range of progressive reforms that are likely to benefit workers experiencing disadvantage by making their employment conditions fairer and strengthening their workplace rights. The proposed reforms include:

- enshrining secure work as an objective of the *Fair Work Act 2009* (Cth) (**FW Act**);
- enabling the Fair Work Commission (**FWC**) to make orders for minimum standards for new forms of work (such as gig work);
- including superannuation as an entitlement in the National Employment Standards;
- legislating a fair, objective test for casual employment; and
- ensuring pay parity for labour-hire workers.

We welcome these proposed changes and congratulate you and your Government for promoting job security, especially on behalf of workers experiencing disadvantage.

### **Further Reforms**

While the ALP's Secure Australian Jobs Plan is a positive step, in some respects, it falls short of addressing the needs of some of the most disadvantaged workers. In the 2014–15 period, the Australian Bureau of Statistics valued exports from international education at \$18.8 billion; this made it Australia's third largest export.<sup>1</sup> This export revenue from international students was estimated to support over 130,700 Full-Time Equivalent (**FTE**) employees in the 2014–15 period, accounting for 1.3% of Australia's total employment.<sup>2</sup>

It is vital that we take steps to ensure that international students continue to choose Australia for their education needs and that international students perceive Australia to be a great place to live, work, and study.

We consider there are further steps that your Government can take to ensure that international students and our most disadvantaged workers are protected and not left behind. We call on your Government to publicly announce your support for the following key reforms without further delay.

### **Wage Theft**

A key issue that we observe with our clients with the Victorian experience is that a complaint to the Wage Inspectorate Victoria does not provide a clear avenue to recover underpayments. We understand that the ALP has indicated that it will consult widely prior to proceeding with the Commonwealth legislation. In this context, we urge you to consider the experiences of the community sector in Victoria. For our clients from disadvantaged socio-economic backgrounds, the ability to recover underpayments is very important and recovery of their employment entitlements needs to be prioritised.

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<sup>1</sup> <https://internationaleducation.gov.au/research/research-papers/Documents/ValueInternationalEd.pdf>, page 1.

<sup>2</sup> <https://internationaleducation.gov.au/research/research-papers/Documents/ValueInternationalEd.pdf>, page 1.

Moreover, we call on your Government to implement the following changes to improve access to justice:

- Provide a regulator, such as the Fair Work Ombudsman, with the authority to take enforcement action against employers and accessories where there has been a judgment obtained in favour of a worker. Even where our clients have successfully obtained a judgment in their favour, often it is difficult for them to enforce the judgment against recalcitrant employers.

#### **Case Study: Recovering Underpayments**

Jorgio (not his real name) is an international student working as a cleaner on weekends. He was offered work as an independent contractor by Betty to clean a shopping centre. Betty directed Jorgio's work timetable and provided him with a uniform and cleaning equipment. Jorgio came to us for legal assistance because he had not been paid at all for 10 weeks' work. Before that, he had only been paid intermittently. Jorgio did not understand that there was a minimum wage, or that there was a difference between contractors and employees. Ultimately, Jorgio stopped working for Betty and was employed directly by the shopping centre as an employee. With our assistance, Jorgio brought an underpayment claim against Betty and won his case in the Federal Circuit Court. However, Betty ignored the judgment and disappeared. Jorgio was never paid his outstanding entitlements.

If a regulator had statutory powers to assist Jorgio with enforcing the judgment, Jorgio may have received a better outcome.

- Extend the Fair Entitlements Guarantee to all employees, including those on temporary visas, and ensure it includes superannuation.

#### **Case study: Fair Entitlements Guarantee**

Sona (not her real name) was underpaid when working with five other international students at a coffee shop in a busy Melbourne suburb. Sona told us "I'm worried [my boss] is going to close the business and return to [her home country] to avoid paying us". Unfortunately for Sona, her worries were well-founded. Despite paying the taxes that fund the Fair Entitlements Guarantee, if her employer went into liquidation, she would have very limited means of recovering her unpaid wages.

### ***Insecure and precarious work***

Many of our workers are engaged in insecure and precarious work with no guarantee of a minimum wage. Our clients lack the bargaining capacity to negotiate with employers and are vulnerable to exploitation. The recent decisions of the High Court in *ZG Operations Australia Pty Ltd v Jamsek* and *CFMMEU & Anor v Personnel Contracting Pty Ltd* confirmed that the bargaining capacity of each of the parties and the reality of the working relationship are no longer relevant considerations in determining whether a worker was an independent contractor or an

employee. This is likely to have an impact on some of the most disadvantaged workers. We recommend the following reforms to protect workers engaged in insecure and precarious work:

- Prevent sham contracting and unlawful unpaid internships, by amending the *FW Act* to include a statutory definition of an employee. The statutory definition should presume workers are employees unless they are genuinely running their own business or on vocational placements.
- Reform the *Independent Contractors Act 2006 (Cth)* to:
  - make it unlawful to pay contractors, whose work is otherwise covered by an award, a rate of pay that is below the minimum wage under the award.
  - Introduce a better, accessible forum, such as a tribunal, to challenge unfair terms in contracts.

#### Case study: sham contracting

Alina (not her real name) was an international student who worked night shifts cleaning the building of a major energy retailer. She had only recently arrived in Australia. This was her first job. She found the job through a friend, who saw an ad on gumtree. When she met Joe, her boss, he initially offered her \$17 an hour but increased the offer to \$20 an hour when Alina complained. When Alina started work she was given a 13-page 'contract for services' document to sign. Despite the words in the contract, she was told what hours to work, given a uniform, and provided with all tools and cleaning equipment. She worked in a team of other 'contractors', all wearing the uniform of her boss' company. She wasn't allowed to delegate her work and certainly didn't feel like she was running her own business. Joe provided Alina with template invoices and told Alina she must get an ABN. Alina provided invoices and completed time sheets after each shift. When Alina had worked for several weeks and not received any payment since starting the job, she contacted her boss about the issue and was ultimately terminated for making enquiries about her pay.

A clear, statutory definition of an employee would assist clients like Alina.

#### Other Key Issues

Our clients often come from non-English speaking backgrounds and do not have a thorough understanding of their employment law rights or the legal system in Australia. The following key reforms identified below would better protect the rights of our clients:

- Remove the 21-day timeframe to bring dismissal-related claims and replace it with a 12-month discretionary limit (based on the model in the *Equal Opportunity Act 2010 (Vic)*), except in cases where the employee seeks reinstatement. The strict timeframe prejudices clients who are unaware of their rights and are unfamiliar with the Australian legal system.
- Permit lawyers from community legal centres to represent clients at the FWC without there being a requirement to seek leave. Currently, industrial advocates and paid agents can represent clients before the Fair Work Commission without being required to seek leave

whereas all lawyers, including lawyers from community legal centres that represent a significantly disadvantaged group of clients, are required to seek to leave to appear.

- Amend the *FW Act* and the *Racial Discrimination Act 1975 (Cth)* to include protection from discrimination based on nationality and visa status. The current use of 'race' is narrow and out of step with modern human rights-based protections against racial discrimination of all forms. We further consider that the limitation period for a claim for all forms of discrimination, including racial discrimination, should be extended to align with the 24-month period that is now applicable for claims of sex discrimination.

**Case Study: Racial Discrimination**

Saiful (not his real name) worked as a cleaner. His boss was always late paying his wages. Saiful was called 'dirty Indian' and directed to clean in unsafe places. Whenever Saiful asked about his unpaid wages, his boss always promised he would be paid 'soon'. When Saiful sent a text message saying he was going to a lawyer to get advice about his unpaid wages, he was fired.

Workers like Saiful would benefit from improved protection against racial discrimination.

We are available to work with you on these and other reforms to protect the workers experiencing disadvantage, and support safe, secure, and decent work for all. We have a history of collaborating with community organisations and unions to deliver culturally accessible, free, and confidential legal assistance to disadvantaged workers. We encourage the Albanese Government to further support ongoing funding of employment law services in the community legal sector to better enable us to address the needs of disadvantaged workers.

We would be delighted to discuss any of the matters in this letter. If you would like to set up a time to talk, please contact us on the details below.

Yours sincerely,



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