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Why undocumented immigrant workers should have workplace rights

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Abstract
There exists a gap at the intersection of Australia's immigration and employment laws that has serious implications for employees, employers and policy. Australia is host to a large and growing population of immigrants working without authorisation, described as the most significant problem facing Australian immigration authorities. These undocumented workers are often exploited by employers through wage theft, sexual harassment and unsafe working conditions. Yet, they are not entitled to protection under Australia's employment laws. In addition to the implications for workers, there are broader policy concerns arising from the current system of regulation that effectively rewards employers who are equally in breach of immigration law. Left uncorrected, current regulation may in fact be encouraging a 'race to the bottom' for employment standards and increasing undocumented immigrant work. As well as highlighting the inadequacy of the existing regulatory framework, potential avenues for addressing this are explored.

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Keywords
Employment conditions, industrial/employment relations policy, informal economy, low-paid workers, migrant workers

Introduction

There exists a gap at the intersection of Australia's immigration and employment laws. It effectively leaves undocumented immigrant workers[1] with no right to the minimum employment standards enjoyed by the rest of the workforce and may actually be

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encouraging more unauthorised immigrant work and exploitation of those workers. Policy-makers can, and should, close the gap through some straightforward reforms that the current Productivity Commission[2] inquiry into Australia's workplace relations framework has the opportunity to recommend.

The presence and regulation of undocumented immigrant workers remain in issue in many developed economies – in particular, whether to grant access to employment rights for undocumented workers differs between countries. For instance, Australia shares an approach with the United Kingdom and Ireland, excluding them from employment law, while the United States, Canada and Europe allow employment rights to varying degrees regardless of migration status. This article argues that Australia's experiment with the exclusionary approach is failing and exposing undocumented workers and the wider workforce to harm.

Australia is host to a large and growing population of undocumented immigrant workers. They are either in Australia without authorisation (by entering without visas or by overstaying the terms of visas) or they are working contrary to the conditions of otherwise valid visas. The Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007 estimated the number of undocumented workers in Australia to be at least 50,000 and possibly in excess of 100,000 (Howells, 2011) and described non-citizens working without permission as 'in simple numerical terms … the most significant problem facing Australian immigration authorities' (Howells, 2011: 12).

The numbers of visa overstayers and total temporary visa holders are large and increasing, so the estimate of undocumented workers in Australia is likely to be conservative. In their most recently released data, the Department of Immigration and Border Protection (DIBP) reported a total of 62,700 visa overstayers, having increased 7.4% during the year to June 2012 and a further 3% to June 2013 (DIBP, 2014). The pool of temporary visa holders, who are authorised to perform either no work or restricted work and who therefore may also be performing undocumented work, has also been growing significantly. For example, during the decade to June 2013, the number of visitor visas granted annually (allowing no work) increased 7.5% to 3,728,879, working holiday visas (allowing up to 6 months of work with any one employer) increased 175% to 258,248 and student visas (allowing up to 40 hours of work each fortnight) increased by 51% to 259,278 (DIBP, 2014). The Secretary of the DIBP predicts that in 2015, the Department will issue more than 5 million visas for the first time (Garnaut, 2015).

Little is known about the composition of the undocumented immigrant workforce in Australia. What we do know, based on statistics released by the DIBP (2014) is that the largest proportions of visa overstayers are from China (12.3%) and Malaysia (10.2%) followed by the United States (8.3%), United Kingdom (6.0%), India (5.5%) and Indonesia (4.4%). Most have overstayed visitor visas (71.5%) followed by student visas (17.1%). The vast majority are well within working age, with 78% of visa overstayers between 21 and 60. The most common industries for undocumented work are agriculture, forestry and fishing; construction; and accommodation and food services (Department of Immigration and Citizenship, 2013).

Strict penalties apply to both employers and employees breaching Australia's migration laws. It is an offence under the Migration Act 1958 (Cth) to perform work that is not permitted under the terms of a particular visa (Section 235). A person doing so, if detected

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by the DIBP, may be fined, detained and deported. Similarly, any person or business allowing an 'unlawful non-citizen' to work may receive penalties including fines and, potentially, criminal sanction (s.245AB). But of course, despite these risks, many immigrants are working without authorisation, so the question of their rights under Australia's employment laws is important.

The issues

Under current caselaw, Australia's employment laws do not apply to undocumented workers. In 2014, in the case of Smallwood v Ergo Asia Pty Ltd (2014) FWC 964, the Fair Work Commission[3] dismissed an unfair dismissal application brought by a person against an employer other than her 457 visa sponsor. In the decision, Commissioner Bissett applied the 2004 Queensland Court of Appeal decision in the workers compensation case of Australian Meat Holdings v Kazi (2004) QCA 147, finding that an employment contract entered contrary to the Migration Act is 'invalid and unenforceable'. The effect of this is as if the employment contract never existed. If one follows these decisions through to their logical conclusion, no undocumented immigrant worker can receive the benefit of the Fair Work Act 2009 (Cth) provisions based on employment including minimum wage, modern awards, National Employment Standards and unfair dismissal provisions (for excellent reviews of the caselaw up until the Australian Meat Holdings case, see Guthrie, 2004; Guthrie and Quinlan, 2005). Orr (2006) posits that an undocumented worker might argue, in a claim for underpaid wages, that the principle of unjust enrichment prevents a culpable employer from profiting, but it remains a practically difficult argument for an undocumented immigrant worker to make.

Immigrant workers are vulnerable to exploitation by unscrupulous employers. The Fair Work Ombudsman (FWO), the independent statutory office established by the Fair Work Act to educate workers and employers about their rights and to ensure compliance with the Act, among other roles, has identified overseas workers as particularly vulnerable to exploitation even when they have valid visas. More than 10% of all complaints received by the FWO were from visa holders, and the FWO recovered more than AUD1.1 million on behalf of those workers in 2013–2014 (James, 2014). The FWO's media releases for just the first 11 days of February 2015 reveal numerous examples of employers underpaying immigrant workers who held valid working visas: a Melbourne cafe paid international students only AUD8.00 per hour, underpaying 22 casual workers a total of AUD83,566 during a 19-month period (FWO, 2015a); a Brisbane retail store allegedly underpaid a visa holder AUD21,298 during a 13-month period (FWO, 2015b); a Darwin cafe allegedly underpaid two workers on 417 working holiday visas AUD3667 during a 1-month period (FWO, 2015c); and a Sydney sushi bar underpaid a person on a 417 working holiday visa by more than AUD5000 during an 11-week period (FWO, 2015d).

These examples of underpaid visa holders are indicative of the working experience for undocumented immigrant workers – except that, without employment rights, they cannot seek the FWO's assistance to recover their lost wages. They are also less likely to notify the FWO at all given the risk of deportation. Empirical research in Australia (Segrave, 2009) and overseas (e.g. Bernhardt et al., 2009; Capps et al., 2007; Cunningham-Parmeter, 2008) has found that undocumented immigrant workers are subject to wage theft in the

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form of below minimum wages, flat rate payment with no overtime or penalty rates, as well as sexual harassment and unsafe working conditions. In particular, Bernhardt et al.'s (2009) report of their survey of workers in low-wage industries in New York, Chicago and Los Angeles is compelling. They found that while 21.3% of authorised immigrant workers surveyed had been paid less than the minimum wage, the proportion increased to 37.1% for undocumented workers. Furthermore, 67.2% of authorised immigrant workers had suffered overtime violations compared to 84.9% of undocumented workers (Bernhardt et al., 2009: 42–44).

Remedies

The *Fair Work Act* should be amended to ensure that undocumented immigrant workers benefit from the same minimum employment standards and protections as Australian citizens. Maintaining the status quo is unacceptable for many reasons, including: it rewards one of the parties in breach of the Migration Act while punishing the other; it may have the effect of increasing the undocumented immigrant workforce; it risks facilitating a 'race to the bottom' for employment standards; and the Fair Work Act is failing to meet its stated aims. Each of these arguments will now be examined in more detail.

First, Australia's migration laws combine with the doctrine of illegality (as applied in the Smallwood and Australian Meat Holdings cases) to give employers a considerable advantage over their undocumented immigrant employees. Those employers and their employees are equally in breach of the Migration Act, yet the employers are allowed to benefit from the breach as their employees cannot enforce employment rights. While the workers face the risk of deportation, unscrupulous employers will calculate the savings from long-term exploitation of undocumented workers against the risk of detection and penalty. The workers, on the other hand, will of course never be entitled to access or enforce minimum employment rights, the avoidance of which inflated their employers' profit margins.

Second, the effects of this imbalance in rights may already be increasing the demand for, and consequently increasing the supply of, undocumented immigrant labour to meet that demand. No accurate figures exist of the total number of undocumented immigrant workers in Australia, but the increasing numbers of visa overstayers and temporary visa holders highlight a growing issue. The United Nations recognised the impact of workplace regulation on demand for undocumented workers in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, although neither Australia nor any other western industrialised country has ratified the convention. The Convention's preamble states, 'recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized' (United Nations General Assembly, 1990). Continued failure to recognise fundamental rights for all workers in Australia will have the opposite effect of encouraging recourse to undocumented work (see also Quinlan, 2012; Wilson and Ebert, 2013 on the impacts of precarious work on society).

Third, if Australia's policy-makers continue to allow employers to pay below minimum requirements, Australia risks a 'race to the bottom' for employment standards that spreads beyond undocumented work to the formal labour market. The prevalence of

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exploitation of visa holders discovered by the FWO indicates that this may already be happening. This suggests a failure of the current system that was, as noted by Orr (2006), intended to protect those authorised to work in Australia by affording undocumented workers no employment rights. Instead, the current scheme continues its focus on encouraging voluntary compliance with the Migration Act by businesses and, where necessary, imposing sanctions (Commonwealth of Australia, 2012). The current Productivity Commission's Issues Paper noted, 'no nation aspires to be a low-wage economy' (Productivity Commission, 2015). Yet, if a sector of the workforce is not entitled to the benefit of employment laws, it establishes perfect conditions for employers, price-taking contractors and other middlemen and women to drive the price of labour down.

Fourth, for the reasons outlined above, the Fair Work Act is failing to meet its stated objects of being fair, enforceable, non-discriminatory and accessible (Section 3). Current legislation and caselaw have created a separation of rights between two distinct groups of workers, discriminating against one. The inaccessibility and unenforceability of minimum employment standards, by what are already arguably the most precarious members of the workforce, have rendered them even more vulnerable to exploitation.

The *Fair Work Act* should be amended now. This is a public policy issue, and to wait for courts to correct the issue would maintain current problems indefinitely and likely be futile. This problem has arisen in the courts' interpretation of the Migration Act and it could potentially be resolved by an alternative interpretation by an appeal court. However, from a policy perspective, the correct result is not guaranteed and, in any event, undocumented immigrant workers are unlikely to commence proceedings in the context of current law and the likelihood of deportation.

Australia is not alone in excluding undocumented immigrant workers from its employment laws, but this is far from a universal phenomenon. The United Kingdom and Ireland take a similar approach to Australia, while most European Union member countries grant undocumented workers access to employment laws but with likely consequence of immediate enforcement of migration laws including deportation (Dewhurst, 2014). In Canada, undocumented workers benefit from some employment laws but are excluded from others such as workers compensation (Magalhaes et al., 2010). The United States, on the other hand, applies almost all[4] of its employment laws equally to all people working within its borders regardless of immigration status (Dewhurst, 2014). Nonetheless, undocumented workers in the US still suffer wage theft and unsafe working conditions at the hands of their employers. This can be partly explained by the sheer number of undocumented immigrants in the United States. Moreover, it highlights the importance of effective enforcement mechanisms.

In addition to granting undocumented immigrant workers access to protections in the Fair Work Act, the laws need to be practically enforceable. The mechanisms available under the Fair Work Act to enforce employment rights require a worker to have sufficient awareness of rights and to lodge an individual claim. For these most precarious workers, possessing the fewest resources and with the most vulnerable employment and immigration status, the role of the FWO in enforcement is paramount. Yet, the FWO is insufficiently resourced to provide effective enforcement support for all of Australia's vulnerable workers. The FWO currently has 250 inspectors of whom (excluding management and ancillary staff) 93 are responsible for ensuring compliance with the Fair Work Act, 70 are responsible for early intervention and alternative dispute resolution and 30–40 are in the 'campaigns' team (FWO,

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personal communication, 2015). These inspectors serve up to 11.6 million workers in Australia's 2.1 million workplaces (Productivity Commission, 2015: 1 citing Australian Bureau of Statistics (ABS), 2014a, 2014b). The FWO must be allocated sufficient funding to ensure effective enforcement of the Fair Work Act for all vulnerable workers including undocumented immigrant workers. Funding should be sufficient to allow the FWO to continue its promising proactive, strategic enforcement activities and still have sufficient resources for reactive enforcement in response to public referrals.

Furthermore, if the FWO is to be a practically effective enforcer of the Fair Work Act's minimum standards for undocumented immigrant workers it must be, and be seen to be, independent of the DIBP. That is, an institutional firewall should be established between the enforcement of immigration laws and employment laws (Carens, 2008; Costello, 2015). Since 2013, FWO inspectors have carried dual responsibilities for investigating breaches of the Fair Work Act and compliance with 457 visa conditions on behalf of the DIBP (under the Migration Amendment (Temporary Sponsored Visas) Act 2013). If allowed to continue, this arrangement will build mistrust of the FWO by undocumented immigrant workers, discouraging them from reporting breaches of the Fair Work Act. The FWO should cease investigations on behalf of the DIBP. Furthermore, the FWO and DIBP should formally and publicly establish independence from each other as far as inspection and enforcement of their respective legislation, and cease sharing information about the immigration status of workers. Such an arrangement functions effectively between the United States Department of Labor and Department of Homeland Security, formalised in a memorandum of understanding (United States Department of Labor, 2011). This would also be more consistent with the International Labour Organization's Labour Inspection Convention (International Labour Organization (ILO), 1947), ratified by Australia, requiring that additional duties given to labour inspectors should not 'interfere with the effective discharge of their primary duties' nor prejudice inspectors' impartiality necessary for their relations with workers.

Conclusion

In summary, the federal government should make the following changes: first, amend the Fair Work Act to ensure that undocumented immigrant workers may access the same employment rights as Australian citizens; second, allocate adequate funding to the FWO to ensure effective enforcement of the Fair Work Act for all vulnerable workers including undocumented immigrant workers; and third, cease the FWO's inspection role for, and reporting responsibilities to, the DIBP and implement a memorandum of understanding between the FWO and the DIBP to ensure their operational independence.

These recommendations are necessary to ensure fairness for the individual workers involved as well as for all citizens of Australia at risk from the social and economic problems that may flow from the current treatment of the considerable and growing undocumented immigrant workforce. If this gap in Australia's workplace laws is allowed to remain, the government opens itself to the criticism that it is regulating to maintain an underclass of easily exploited low-paid labour. Peck and Theodore (2012) call this establishing 'localized enclaves of economic exploitation' reflecting 'a reworked, if unstable, labor market settlement, which is systematically skewed against the interests of labor' (p. 743). The concerns and aims expressed in the current Productivity Commission inquiry's Issues Papers suggest that this is not the government's intention, so the

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Commission's recommendations are keenly anticipated. If Australia does not take these steps we run the real risk of passing the tipping point, crossed by the United States many years ago, where exploitation of a large undocumented immigrant workforce becomes the norm in some sectors and an intractable social, political and economic problem.

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Notes

1. The term 'undocumented immigrant worker' is in common use and is used here instead of the popular 'illegal worker' used by the Department of Immigration and Border Protection and often found in the Australian media. Much negative meaning is carried by a term such as 'illegal worker' and there are numerous reasons not to use it. In particular, it is legally inaccurate to refer to a person as illegal; there are not illegal people but illegal acts committed by people. One who breaches migration legislation by performing the otherwise legal act of working should not be called illegal (see also Platform for International Cooperation on Undocumented Migrants (PICUM), n.d.).
2. The Productivity Commission is 'the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians' (Productivity Commission, n.d.). It conducts public inquiries as directed by the federal government and reports its recommendations to the government.
3. The Fair Work Commission is the industrial tribunal responsible for maintaining the minimum employment standards under the Fair Work Act among other functions. It replaced the Australian Industrial Relations Commission with the commencement of the Act in 2009.
4. While undocumented immigrant workers possess many of the same workplace law protections as citizens and authorised immigrant workers, minor exceptions remain. For example, the United States Supreme Court's (2002) decision in *Hoffman Plastic Compounds Inc v NLRB* (55 US 137) prevents undocumented workers from receiving reinstatement or 'back pay' in a case of unfair dismissal. In this context, 'back pay' relates to the period from termination of employment to court decision.

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