Submission to the review of the National Employment Standards under the *Fair Work Act 2009* (Cth)

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1 Introduction

1.1. The Migrant Workers Centre (MWC) welcomes the opportunity to contribute to the Standing Committee on Employment, Workplace Relations, Skills and Training's Inquiry into the operation and adequacy of the National Employment Standards (NES) under the *Fair Work Act 2009* (Cth) (FWA).

1.2. The MWC is a community legal service that empowers migrant workers in Victoria to understand and enforce their workplace rights. Our activities include free employment law services, education programs to raise awareness of workplace rights, and an advocacy program to amplify and support migrant workers' voices through research and policy development. Since we were established in 2018, we have been working closely with government, unions, and civil society organisations to advance the rights of migrant workers in Australia.

1.3. The NES have not been comprehensively reviewed since 2012. Since then, the range and scope of entitlements have incrementally expanded. As statutory minimum standards, the NES can only be amended by Parliament. In the absence of legislative reform, ambiguity has emerged in the operation of certain entitlements, exposing gaps and inconsistencies in their interpretation. Responsibility for addressing these ambiguities has largely fallen to the judiciary, which may clarify meaning but is necessarily confined to established principles of statutory interpretation.[1] Scholars have also observed that a number NES provisions lack substance, diminishing their coverage and protective value, particularly for workers with limited bargaining power.[2]

1.4. A clear, accessible, and enforceable statutory floor of standards is particularly important for migrant workers, who are over-represented in insecure sectors such as hospitality, cleaning, security, aged care, warehousing, and disability support.[3] Many are also engaged in award-free or agreement-free employment, labour hire arrangements, or small workplaces with limited human resources oversight. These structural features contribute to precarious work arrangements that are strongly associated with underpayment and other workplace

[1] See, for example, *NSW Nurses and Midwives' Association v Anglican Care* [2014] FCCA 2580, [35]–[42].
[2] Iain Campbell and Sara Charlesworth, 'The National Employment Standards: An Assessment' (2020) 33 *Australian Journal of Labour Law* 41.
[3] Christine Eastman, Sara Charlesworth and Elizabeth Hill, *Markets, Migration and the Work of Care, Fact Sheet 1: Migrant Workers in Frontline Care* (Fact Sheet, RMIT University, UNSW, University of Sydney and University of Toronto).

violations. In sectors with a high concentration of migrant workers, such non-compliance often reflects entrenched, systemic practices rather than isolated incidents. While all precarious work generally carries an elevated risk of exploitation, migrant workers face heightened exposure due to language barriers, limited awareness and knowledge of workplace rights, and visa-related insecurity, which constrains their ability to assert and enforce those rights.[4] Where monitoring and enforcement are weak, breaches are less likely to be detected or remedied, reducing deterrence and allowing systemic non-compliance to persist.

1.5. Australia's employment law system is largely complaints-driven, with workers responsible for identifying and reporting breaches. Where the law is unclear, this burden falls most heavily on those least equipped to challenge non-compliance. This, in turn, undermines the function of the NES as a statutory safety net. Accordingly, we endorse the submission of the **Australian Council of Trade Unions** (ACTU) and support its recommendations in full. This submission complements the ACTU's analysis by focusing on the adequacy and operation of the NES as a safety net for migrant workers.

2 The adequacy and operation of the NES

2.1 Any assessment of the adequacy of the NES must examine how key entitlements function in practice. We refer to the ATCU's submission, which identifies gaps and ambiguities in key entitlements, including:

2.1.1 annual leave (particularly the definition of "shift worker" and the meaning of "regularly");
2.1.2 public holiday leave deductions;
2.1.3 accrual of leave during periods of workers' compensation;
2.1.4 accrual of leave during protected industrial action, and
2.1.5 medical certificate requirements for personal leave.

2.2 For workers who are structurally positioned at the margins of the labour market, gaps in these entitlements can have disproportionate impacts. In particular, migrant workers are over-represented in insecure, shift-based, low-wage, labour-intensive, and contractor-heavy sectors, and are more likely to:

2.2.1 work irregular or weekend-heavy rosters;[5]
2.2.2 rely on penalty rates and loadings as a substantial portion of income;[6]
2.2.3 experience injury in high-risk sectors (care, cleaning, warehousing, hospitality);[7] and
2.2.4 experience exploitation, including sham contracting arrangements.[8]

[4] Brendan Coates, Trent Wiltshire, and Tyler Reysenbach, *Short-Changed: How to stop the exploitation of migrant workers in Australia* (Report, Grattan Institute, May 2023).
[5] Guilherme Primo Matias, Gabrielle Ribeiro Rodrigues da Silva and Fabio Emanuel Farago, 'Precarization of Work and Migration: A Review of the International Literature' (2020) 15(1) *Internext* 19.
[6] Ibid.
[7] Sally Hargreaves, 'Occupational Health Outcomes among International Migrant Workers: A Systematic Review and Meta-Analysis' (2019) 7(7) *The Lancet global health* e872.
[8] Bodean Hedwards, Hannah Andrevski, and Samantha Bricknell, *Labour exploitation in the Australian construction industry: risks and protections for temporary migrant workers* (Report, Australian Institute of Criminology, 2017).

2.3 These structural features mean that ambiguity within the NES does not operate neutrally; it has differential impacts across cohorts of workers. For workers in insecure work, interpretive gaps can materially reduce income and access to entitlements. Employers are also afforded greater scope for misapplication and avoidance. They may adopt narrow interpretations of statutory terms, structure work arrangements to fall just outside entitlement thresholds, or rely on technical ambiguities to avoid their obligations. These effects are amplified by power asymmetries in the employment relationship. Migrant workers, in particular, may be deterred from asserting their rights due to visa insecurity and the risk of employer retaliation, including reduced hours, dismissal, or adverse impacts on future visa pathways.[9] Many are also unfamiliar with Australia's workplace system and face language barriers that make it difficult to understand the terms of their employment. These barriers weaken enforcement and contribute to entrenched patterns of non-compliance in sectors with high concentrations of migrant workers.

2.4 These structural and enforcement barriers mean that migrant workers do not enjoy equal or effective access to the NES. As noted above, we support the recommendations put forward by the ACTU. Notwithstanding the inherent limitations of the NES,[10] the ACTU's recommendations would materially improve the certainty, consistency and enforceability of the statutory safety net for migrant workers.

Recommendation 1. Implement the recommendations of the ACTU's submission in full.

3 Right to information about employment

3.1 Migrant workers experience significant barriers to understanding and enforcing their workplace rights, including language barriers, unfamiliarity with Australia's regulatory system, limited access to independent advice, and visa-related insecurity.[11] As aforementioned, where workers lack knowledge of their rights, breaches are less likely to be identified or reported, weakening deterrence and allowing non-compliance to persist.

3.2 There is scope for reform to address this under Division 12 of the FWA, which requires employers to provide all new employees with the Fair Work Information Statement (FWIS) and, where applicable, the Casual Employment Information Statement (CEIS). The FWIS is a short, general information document that provides a broad overview of the workplace relations system, including the NES. It is largely informational in nature and does not equip employees with a practical understanding of the specific terms, classification, pay rates, or entitlements applicable to their own employment.

3.3 While some of this information may be set out in an employment contract, such documents are often complex, drafted in technical language, and difficult to navigate. In many low-

[9] Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover their Unpaid Wages in Australia* (Report, Migrant Worker Justice Initiative, October 2018) 7.
[10] Campbell and Charlesworth (n 2).
[11] Migrant Workers Centre (MWC), *Insecure by Design: Australia's migration system and migrant workers' job market experience* (Report, March 2023).

wage sectors, workers receive little more than verbal understandings of their conditions, reinforced by workplace custom rather than clear written documentation. The absence of accessible, job-specific information contributes to misunderstanding and confusion, undermines confidence in asserting rights, and facilitates non-compliance, including systemic underpayment. The impact of this is particularly pronounced for migrant workers.[12]

3.4 We support the proposal advanced by Campbell and Charlesworth (2020)[13] to replace the existing FWIS with a mandatory Statement of Terms and Working Conditions, requiring employers to provide clear, written, job-specific information at commencement of employment and periodically thereafter. The Statement should be provided in plain English and, where reasonably practicable, in a relevant community language (e.g., in workplaces with a high concentration of workers who speak that language).

3.5 As Campbell and Charlesworth argue, this is a modest reform that would impose minimal additional regulatory burden on employers, particularly if supported by a government-issued template. Comparable provisions exist in similar jurisdictions, including New Zealand. These existing models can guide implementation. Such reform would operate as a complementary measure to organising and community-based education initiatives, strengthening migrant workers' capacity to understand and enforce their rights.

Recommendation 2. Amend the *Fair Work Act 2009* (Cth) to introduce a new Statement of Terms and Working Conditions, requiring employers to provide clear, written, job-specific information in plain language at commencement of employment and periodically thereafter, supported by a government-issued template designed to improve accessibility and reduce regulatory burden.

[12] Ibid.
[13] Campbell and Charlesworth (n 2).