IARC and Unions NSW Submission

Exposure Draft Migration Amendment (Protecting Migrant Workers) Bill 2021

20 August 2021

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Introduction

1. Unions NSW is the peak body for trade unions and union members in New South Wales with 48 affiliated trade unions and Trades and Labour Councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce in both the public and private sectors. Unions NSW and its affiliated unions have a proud history of engaging in the parliamentary process to protect and represent the interests of union members. Unions NSW frequently makes submissions to inquiries involving industrial relations and other issues which may impact members. The plight of temporary migrant workers is one such issue, and one with which this organisation has a deep and ongoing engagement.

2. IARC is a not-for-profit community legal centre that provides free immigration advice to migrants experiencing vulnerability. IARC's practice focuses on providing immigration advice and assistance to people on visas experiencing family violence, people applying for family stream visas, people seeking asylum and people facing workplace exploitation.

3. Both IARC and Unions NSW welcome the opportunity to make submissions on the exposure draft of the *Migration Amendment (Protecting Migrant Workers) Bill 2021* (**Bill**). We understand that the Bill seeks to protect migrant workers from unscrupulous employers by enhancing the existing penalty, compliance, and enforcement framework within the *Migration Act 1958* (Cth) (**Act**). IARC and Unions NSW support changes that will protect migrant workers in Australia, including measures that seek to deter unscrupulous employers such as those set out in the Bill, but have a number of concerns and recommendations to ensure the efficacy of the Bill.

4. Both IARC and Unions NSW have extensive experience in engaging with migrant communities and advocating for the rights of migrant workers, who constitute 11% of our workforce and represent the second largest migrant workforce in the world.[1]

5. IARC in partnership with Unions NSW has developed a project called "Visa Assist", which is currently in its third year of operation. Visa Assist was created to address the growing need for immigration advice for migrant workers facing workplace exploitation. Unions NSW has observed a reluctance for migrant workers to enforce their workplace rights where they were on a visa as they were concerned about the implications for their visa. Visa Assist provides free, confidential legal advice and assistance to union members in relation to

[1] Organisation for Economic Cooperation and Development, *International Migration Outlook 2019* (online edition, 2019) Chapter 3.

migration issues and promotes a fairer immigration system through community education, law reform and advocacy on behalf of temporary migrants.

6. Since its inception, Visa Assist has provided almost 1200 legal services to more than 550 union members. A large number of these services relate to unscrupulous employer behaviour and workplace exploitation towards migrant workers by using the threat, perceived or otherwise, of the loss of their visa and lawful status in Australia should they complain.

7. Please note this submission is intended to compliment and not supersede any submission from an affiliate union of Unions NSW.

8. This submission is accompanied by the following Unions NSW publications:

   - Annexure A: "Lighting Up the Black Market: Enforcing Minimum Wages";
   - Annexure B: "Wage Thieves: Enforcing Minimum Wages";
   - Annexure C: "Wage Theft: The Shadow Market";
   - Annexure D: "Wage Theft: The Shadow Market, Part Two: The Horticultural Industry"; and
   - Annexure E "Working for $9 a day: Wage Theft and Human Rights Abuses on Australian Farms".

9. This submission will explore the merits and flaws of the Bill while also suggesting further, and more effective avenues the Department of Home Affairs **(the Department)** and Federal Government can pursue to effectively combat the exploitation of migrant workers.

Recommendations

In respect of this submission, IARC and Unions NSW makes the following recommendations:

(1) The Department to consider altering discretionary provisions to vest courts with powers to make additional enforcement orders including adverse publicity orders and banning orders prohibiting employers from employing migrant workers and people under the age of 25 for a fixed term following a finding of non-compliance.

(2) Create a process to grant visa extensions to migrant workers who have proceedings on foot in relation to an employment matter. This will be on par with the current provisions for victims of crime to remain in Australia whilst their matter is heard.

(3) Better Government regulation of migration agents and increased funding to community legal centres with the expertise and a history of successfully dealing with these issues, such as IARC.

(4) Additional funding to expand the current union migration law program, Visa Assist run by Unions NSW and IARC. Currently, Visa Assist provides free immigration advice and legal services to any union member in NSW who requires it, but with an increase in funding the program could be expanded nationally.

(5) Place requirements upon universities and colleges to provide international students with information about their workplace rights and encourage them to join their relevant union.

(6) Remove the 40-hour fortnightly work limit on international students to empower workers to report more instances of exploitation.

(7) Amend Schedule 8 to the *Migration Regulations 1994* (Cth) (**Regulations**) so visa holders will not have breached a work-related condition where there is a credible claim of workplace exploitation or unscrupulous conduct by their employer.

(8) Update Departmental policy around cancellation of visas under s 116 of the Act, to ensure workplace exploitation and unscrupulous employer conduct is an express factor against visa cancellation.

(9) Create a firewall between the Fair Work Ombudsman and the Department so vulnerable workers feel they can seek assistance and take action against those who

have exploited them, without the additional fear of visa cancellation or removal from Australia.

(10) Abrogate the 88 days' farm work required for Working Holiday visa (**WHV**) holders to secure their second-year visa.

(11) Abolish the visa condition preventing WHV holders from working for one employer for longer than six months.

(12) Amend Schedule 2 to the Regulations to allow certain skilled visas to still be granted in cases of workplace exploitation (where the applicant would otherwise be ineligible due to loss of employment). This could be drafted similarly to the Family violence provisions for Partner visas.

(13) The creation of a new substantive temporary visa subclass for people who have experienced workplace exploitation that has no visa application charge and can be applied for even if a visa has been refused or cancelled due to workplace exploitation.

(14) The creation of a permanent residency pathway whereby holders of Subclass 457 visas or Temporary Skill Shortage visa (subclass 482) working in their nominated occupation for a period of 3 years or more are automatically eligible to apply for a subclass 189 or 190 visa (without having to be invited to apply after lodging an expression of interest). This will negate the need for ongoing sponsorship by an employer.

New Employer Sanctions

10. IARC and Unions NSW note the Federal Government accepted Recommendation 7 of the Migrant Workers' Taskforce to give courts specific power to make additional enforcement orders, including adverse publicity orders and banning orders, against employers who underpay migrant workers, the main feature of migrant worker exploitation. [2]

11. While the proposed Bill introduces new criminal offences for coercion, it additionally merely empowers the Minister to use their discretion to make such banning orders, in the form of 'prohibitions'. Reliance on ministerial guidelines to provide a framework for the exercise of discretion overlooks the need for legislated clarity on measures to truly protect migrant workers from exploitation. Already workers and their unions have little faith in the ability of government to effectively police or prevent exploitation. Relying on ministerial guidelines will not be sufficient to alleviate these concerns and clear precise regulation/s should be included in the legislative framework.

12. New criminal offences introduced in ss 245AAA and 245AAB serve as a possible deterrence mechanism from employers hiring temporary migrants in what would be a breach of their visa conditions. However, ultimately, such penalties do nothing to prevent the exploitation of migrant workers if employers and labour hire companies are not being monitored and in the case of labour hire companies licenced.

13. There is evidence to suggest that, in the case where exploitation is mostly committed by corporations rather than individuals (who are more difficult to prosecute), increasing the severity of penalties are not effective deterrents. Orthodox deterrence theory suggests rational entities will weigh up the costs and gains of compliance when deciding whether to comply or make an active decision not to comply with relevant laws.[3]

14. As Purse and Dorian highlight, there is growing evidence "employers do not gauge general deterrence in accordance with cost-benefit calculus presumed by traditional deterrence theory".[4] Hardy and Howe confirm, in their study of Australian hairdressing and restaurant sectors, there is no particular connection between increased risk perception and more compliance. That is, an increase in penalties, did not increase compliance. They instead

[2] Migrant Workers Taskforce, Commonwealth of Australia, Report of the Migrant Workers' Taskforce (2019) 9.
[3] John Howe and Tess Hardy 'Creating Ripples, Making Waves: Assessing the General Deterrence Effects of Enforcement of the Fair Work Ombudsman' (2017) 39(4) Sydney Law Review 471, 474.
[4] Keith Purse and Jillian Dorrian, 'Deterrence and Enforcement of Occupational Health and Safety Law' (2011) 27(1) International Journal of Comparative Labour Law and Industrial Relations 23, 99.

found the “perceived risk of detection, not the severity of the sanction” is more likely to increase compliance.[5]

15. As such, the Department must implement effective enforcement strategies to increase the risk of detection of breach of the new provisions and be consistent in its application of s.245AYA, that is, the declaration of “Prohibited Employers”.

16. **Recommendation:** The Department to consider altering discretionary provisions to vest courts with powers to make additional enforcement orders including adverse publicity orders and banning orders prohibiting employers from employing migrant workers and people under the age of 25 for a fixed term following a finding of non-compliance.

[5] Howe and Hardy (n1).

Enforcement and Regulation of Employers

17. A further issue with the introduction of the proposed offences of coercion, as well as listing of "Prohibited Employers" is neither the Bill nor context paper make reference to, or propose effective enforcement strategies that take into account the unique plight of migrant workers. It is not evident how the Department will enforce such new criminal offences, whether there will be further resources allocated to assess compliance with the Bill and culturally competent staff to conduct investigations who will be able identify breaches in a range of contexts.

18. Page 2 of the explanation of the exposure draft correctly identified that as per the Migrant Workers' Taskforce, many temporary migrant workers "have poor knowledge of their workplace rights, are young and inexperienced, may have low English language proficiency…" which makes them particularly vulnerable to exploitation. The new offences and related civil penalty provisions proposed do not serve to protect such migrants from exploitation by virtue of their passage through law, nor does it make provision to empower migrant workers to enforce their rights.

19. The National Temporary Migrant Work Survey showed 42% of participants would not try to recover wages from their employer because they "don't know what to do", whilst 16% responded "the forms are too complicated", demonstrating this group had attempted to start the process but were deterred by the inherent difficulty posed by the accessibility of the current processes.

20. Lengthy court processes and visa limitations (see paragraph 35) create a disincentive for migrant workers to enforce their rights. Workers who have been exploited and had their wages stolen should not have their claims limited by their ability to remain in the country.

21. Visa holders pursuing workplace entitlements should be granted a temporary visa option allowing them to remain and work in Australia until their claim has been settled (see recommendations 2 and 9). A similar safeguard already exists for witnesses or complainants in criminal law cases[6], providing them with the right to temporarily remain in the country, for the period needed to assist with the case. No equivalent alternative is available for victims of workplace exploitation.

[6] Migration Act 1958 (Cth) ss155 –161.

22. Without the appropriate resources the Department will not only be unable to "inform potential migrant workers"[7] about the risks of exploitation but will also be unable to effectively enforce and prosecute the proposed offences.

23. **Recommendation:** Create a process to grant visa extensions to migrant workers who have proceedings on foot in relation to an employment matter. This will be on par with the current provisions for victims of crime to remain in Australia whilst their matter is heard.

24. **Recommendation:** Better Government regulation of migration agents and increased funding to community legal centres operating in this space, such as IARC.

25. **Recommendation:** Additional funding to expand the current union migration law program, Visa Assist run by Unions NSW and IARC. Currently, Visa Assist provides free immigration advice and legal services to any union member in NSW who requires it, but with an increase in funding the program could be expanded nationally.

Compliance Notices and Enforceable Undertakings

26. In explaining the Bill's introduction of enforceable undertakings and compliance notices, page 8 of the context paper cites the need to emulate responses taken by the Fair Work Ombudsman to "drive behavioural change without the need to prosecute all cases through the courts". The Department assumes such measures effectively support "higher levels of voluntary compliance". However, the proposed Bill fails to take into account the ineffectiveness of the Fair Work Ombudsman's enforcement regime, in many cases by the Ombudsman's own admission.

27. The exploitation of migrant workers is predominately caused by the enormous opportunity for employers to take advantage of workers in order to cut costs with very little chance of being caught. A disproportionate number of migrant workers are subjected to these systematic illegal practices.

28. We understand the Ombudsman has approximately 177 inspectors conducting workplace investigations under the current system of auditing.[8] This equates to approximately one inspector for every 72,000 employed people in Australia and is obviously not enough to protect and enforce the rights of workers effectively.[9] Presently, the chance of an employer

[7] Page 4 context paper
[8] David Marin-Guzman, 'Employer groups should police underpayments: unions', The Australian Financial Review (online), 5 March 2020 .
[9] Australian Government, Industry Information (3 February 2020) Labour Market Information Portal .

getting caught for underpaying staff and other exploitative practices is attractively low for those seeking to exploit migrant workers.

29. The annexed Unions NSW reports include audits of job advertisements perpetuating Wage Theft and wider exploitation of temporary migrant workers. With three-quarters of the advertised jobs reviewed by Unions NSW offering rates of pay below the Award minimum, there is clearly a systematic practice of underpayment and exploitation within certain sectors of the economy.

30. To address this issue a culture of disincentivising exploitation with increased oversight by the Department should be introduced rather than persisting in emulating the failed sporadic investigative approach overseen by the Fair Work Ombudsman who seeks to take enforcement action in no more than 1 in 10 requests for assistance".[10] The Department cannot seek to emulate such a model and expect any increase in protections for migrant workers or any improvement in compliance.

[10] Fair Work Ombudsman, Commonwealth of Australia, Annual Report 2018-19 (2019) 11.

Safeguards for migrant workers' visas

31. We believe migrant workers' visa status needs to be protected in order to ensure the efficacy of the Bill. By safeguarding a migrant worker's visa this will ensure they are secure in the knowledge if they report unscrupulous employers their visa will not be cancelled or refused. This, enables the Department to be more effective in taking enforcement action and penalties against employers engaging in illegal practices to deter such conduct as the Bill intends.

32. The Bill (and the Act) in its current form results in migrant workers risking their own lawful status in Australia by reporting workplace exploitation to the Department. This is due to the fact that the reporting of an unscrupulous employer by a visa holder may also alert the Department to:

    a. a visa holder breaching a condition of their visa, which can lead to visa cancellation; and

    b. a visa applicant being unable to meet the requirements of a subsequent visa leading to the refusal of their visa application.

33. If their visa is cancelled or refused it may also mean they are unable to lodge further substantive visa applications to remain in Australia.

Visa conditions

34. Most temporary visas are subject to certain conditions the visa holder must comply with during the term of their visa. If a visa holder does not comply with their visa conditions the visa holder is liable to have their visa cancelled under s 116 of the Act. It is a discretionary power where the Minister "may" cancel someone's visa. While Departmental policy provides guidance to decision makers regarding factors that may be considered when contemplating cancelling a person's visa, we note workplace exploitation and unscrupulous employers do not expressly form part of that same consideration.

35. In Unions NSW and IARC experience, in situations where a visa holder is being exploited in their workplace, it is likely the visa holder will also be breaching a condition of their visa. For example:

    a. Condition 8105 – imposed primarily on Student visa subclass 500. This condition imposes a limitation of 40-hour work fortnights on students while their course is in

session. However, students often work in excess of the 40-hours imposed by this condition due to severe underpayments by employers. Employers then threaten to report students' non-compliance and possible visas cancellation if the student reports their experience of workplace exploitation (see below paragraphs 36 -44).

b. Condition 8607(6) – imposed on Temporary Skill Shortage (**TSS**) visas subclass 482. This condition imposes a requirement for a visa holder to remain employed with their employer in their nominated occupation or to find a new sponsor within 60 days of losing their employment. TSS visa holders will often refrain from reporting unscrupulous employers for fear of losing their employment and ultimately their visa. TSS visa holders who lose their employment due to unscrupulous practices often find it difficult to find a new sponsor as a result of the tight 60-day requirement caused by their employer's behaviour.

Student visas

36. Current visa restrictions placed on international students compound experiences of exploitation and require reform. International students are restricted to working 40 hours per fortnight during their course and unlimited hours during course breaks. Research has shown large numbers of international students regularly work over these restrictions.[11] The low, often below Award rates of pay, mean many temporary migrant workers are forced to work additional hours in order to earn a living wage.

37. Although the Department has announced a temporary relaxation of working hours in a number of sectors, there is no indication that this "flexible approach" will continue following the COVID-19 pandemic, or beyond such a time as the Department sees fit.[12]

38. The 40-hour work restriction drives international students into the cash economy exposing them to further exploitation and this undermines the integrity of this visa subclass as a result.

39. Given the 'off the books' nature of these employment relationships, migrant and student workers rarely, if at all, receive payslips for their work which creates an evidentiary issue when workers seek to recoup unpaid wages.

[11] Laurie Berg and Bassina Farbenblum, 'Wage theft in Australia: Findings of the National Temporary Migrant Work Survey' (20 November 2017) 17.

[12] https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500/temporary-relaxation-of-working-hours-for-student-visa-holders

40. There is also confusion around the application of the 40-hour working limit to independent contractors, particularly those who work in transport services like taxi driving and gig economy food delivery. For these workers, although they are only earning money while driving a passenger or delivering food, waiting time between jobs is still counted as 'work'.[13] For food delivery riders, considering the time between jobs, the hourly rate of pay can be as low as $6.67 per hour.[14]

41. The aim of the 40-hour work restriction is to ensure international students are genuinely studying while in Australia on a student visa. However, Unions NSW and IARC believes the intent of the restrictions is not achieving the intended goal. Instead the restriction is contributing to the exploitation and underpayment of workers acting as a powerful push factor towards the need for international students to work additional hours to simply afford to live in Australia.

42. Unions NSW and IARC believe the Federal Government should remove the 40-hour limit on international students and instead rely on visa condition 8202 (Meet course requirements)[15] which already places obligations on international students in respect of attendance and academic performance requirements. This provides sufficient means to ensure students are genuinely studying and complying with their visa requirements.

43. Removing the 40-hour fortnightly work limit on international students will enable these workers to seek jobs which are compliant with legal requirements from employers paying the appropriate legal entitlements, rather than pursuing exploitative environments by necessity. It will also ensure those students who work in various sectors of the gig economy will not risk being penalised for breaching their visa conditions when their non-active waiting time is counted as "work".

Case Study 1

Julie arrived in Australia on a Student visa subclass 500 to study a Bachelor of Psychology. She thought she had saved enough money to stay in Australia without having to work much. However, after a few months she discovered that Sydney was much more expensive than her

[13] *Verma v Minister for Immigration & Anor* [2017] FCCA 69 at 15.
[14] Transport Workers Union, *Snapshot: on demand food delivery riders* (2018).
[15] Department of Home Affairs, *Check visa details and conditions* (13 December 2019) Immigration and citizenship <https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/seeyour-visa-conditions#>.

home country. She applied for many jobs but no one wanted to hire someone on a Student visa due to the 40-hour fortnight work condition on her visa.

Eventually she found a job at a local café that didn't seem to care that she was on a Student visa. They originally offered her $12.06 an hour, which she accepted having already struggled to find a job. This soon dropped to $8.06 per hour as the owner said they were struggling (although they seemed quite busy to her) and that he would "make it up to her". She also had to start working additional shifts to make up for the lost money to make ends meet.

After a few months, she had become tired of the exploitative situation and her studies were starting to be affected by the extra work. She approached her union and received advice that she was being significantly underpaid and that this was illegal in Australia. Her union was happy to help her approach her employer and request that she be paid appropriately and receive backpay but she was nervous about her visa.

She eventually decided to approach her employer, thinking that it may cause less issues for her if she had an informal chat with him. When she tried to raise the underpayments with her employer, he told her if she tried to report him, he would report her for breaching her Student visa conditions and he had other employees sent home before for similar reasons but he's still here. She stayed in the job another 8 months due to the fear of being reported to the Department and losing her visa.

Case study 2

Cindy arrived in Australia with her husband and two young children on a TSS visa to work as a registered nurse in a local medical practice. For the first few months she seemed to get on with her employer and things were going well. However, soon after this, her employer started acting differently towards her. He would get angry at her for no reason and was constantly late paying her. He would also threaten her physically at work.

Things started escalating when she started receiving death threats to her home and one time discovered her tyre had been punctured with a knife. She called the police but that didn't seem to go anywhere. She didn't feel safe at home and at work.

She approached HR at the medical practice and was told they would investigate – but nothing happened. Eventually, she left her employer as she couldn't take it anymore. She tried to find another employer but could barely leave her home due to the past trauma.

She received a notice of intention to cancel her visa from the Department of Home Affairs as she was no longer with her sponsor and had not found another sponsor in time. She wrote to them telling them about what had happened to her. The Department proceeded to cancel her visa as she could not provide "sufficient evidence" to support her claim and her employer "denied all allegations".

Unions NSW and IARC recommend additional changes be made to ensure visa holders are able to report unscrupulous employers without putting their visa at risk of cancellation. This will ensure the Bill is able to achieve its aim to deter exploitative practices by employers and protect migrant workers.

44. **Recommendation:** Place requirements upon universities and colleges to provide international students with information about their workplace rights and encourage them to join their relevant union.

45. **Recommendation:** Remove the 40-hour fortnightly work limit on international students to empower workers to report more instances of exploitation.

46. **Recommendation:** Amend Schedule 8 to the Regulations so that visa holders will not have breached a work-related condition where there is a credible claim of workplace exploitation or unscrupulous conduct by their employer.

47. **Recommendation:** Update Departmental policy around cancellation of visas under s 116 of the Act, to ensure that workplace exploitation and unscrupulous employer conduct is an express factor against visa cancellation.

48. **Recommendation:** Create a firewall between the Fair Work Ombudsman and the Department so vulnerable workers feel they can seek assistance and take action against those who have exploited them, without the additional fear of visa cancellation or deportation.

Ineligibility for further visas

49. If a migrant worker on a temporary visa reports their employer for unscrupulous conduct, they may also limit their options for future visa opportunities and even permanent residency. For example:

    a. holders of TSS visas may need their current employer to sponsor them for permanent residency (e.g. under the Temporary Residence Transition stream for the subclass 186 Employer Nomination Scheme visa);

    b. in order for Working Holiday visa (**WHV**) holders to obtain subsequent WHVs they need to have completed a certain amount of regional work which is suitably evidenced (see below paragraphs 51 – 57);

    c. if a visa is refused, people may not be able to apply for further visas while they remain in Australia (i.e. due to the operation of s 48 of the Act).

50. In the experience of Unions NSW and IARC, TSS visa holders endure severe workplace exploitation due to the prospect of the employer sponsoring them for permanent residency (which often doesn't come into fruition). We have experienced employers withholding documents required to complete subsequent visa applications (i.e. payslips for subsequent WHV applications) for no valid/lawful reason.

Case Study 3

In 2014, 7 women were sponsored on subclass 457 visas from Thailand as massage therapists. When they arrived in Australia, they were subject to severe exploitation by their employer including:

- • being forced to sleep on the floor in the sponsor's accommodation (all in the same room);
    - working 6 days a week for over 12 hours each day;
    - restricted in leaving the home, what they could eat and drink and forming any relationships; and
    - being significantly underpaid and being forced to pay back certain "costs" to their employer from their already low wage.

If they breached any rules set by their sponsor, they were threatened with their visas being cancelled and they would be removed from Australia and their families killed.

They were eventually sponsored for permanent residency by their employer. After which, they managed to escape and seek help from the Salvation Army and eventually a union. The employer

then had its nomination of the women refused by the Department (in part due to the treatment of the women). This in turn meant that the women's permanent residency applications were also refused at the Department stage and on appeal at the Administrative Appeals Tribunal. This refusal meant that the 7 women were unable to apply for almost all other visas while in Australia.

Case study 4

Sunil arrived in Australia on a Training visa. He came to Australia to follow his lifelong passion to be a chef and to learn about the culinary diversity of Australia. He started working at a hotel as part of his training and felt welcomed by his colleagues. However, when he received his first pay he realised substantial deductions were being taken from his pay which he never agreed to. The deductions were for:

- accommodation, which was a tiny room in the Hotel with a shared bathroom; and
- meals, which included leftovers from the hotel's breakfast buffet (if there were any) and a lunch and dinner he or his colleagues would make themselves.

After lodging a complaint about his treatment, he was terminated from his traineeship, evicted from his accommodation, and forced to live in a hostel. His employer also reported him to the Department who wrote to him about cancelling his Training visa.

Sunil then applied for a Student visa in an attempt to continue his culinary training in Australia. That Student Visa was refused by the Department as they did not believe he was a "genuine student" given the pending cancellation of his Training visa (which they later decided not to cancel) and the inference "if he was serious about becoming a chef, he would have stayed with his employer on his Training visa". The Department also called all of his allegations regarding his former employer "hearsay" and refused to give any weight to them.

Case study 5

Li arrived in Sydney, Australia on a Working Holiday visa. He wanted to extend his stay and to do so he would need to work regionally for 88 days. He arranged his farm work through a phone number he got on a Working Holiday visa group on Facebook. He was told the employer could

arrange accommodation, food and equipment and pay him a fair wage. The employer told him he had many Working Holiday visa holders before.

Unfortunately, when he arrived at the farm his experience was very different. He was told he would be paid based on the amount of fruit he picked, piece rates. He would also have to pay for his own bucket to put the fruit in and his accommodation and food would come out of his pay.

By the end of the 88 days the farmer told Li he owed him money and he would not sign anything or give him any payslips until he paid him back. Li was concerned he would have to go through this all again so he paid the employer the money. He is still waiting on the payslips he was promised and is unable to apply for another Working Holiday visa.

Working Holiday Visa Holders

51. The requirement for Working Holiday visa holders to undertake 88 days of regional work to receive a second-year visa creates an exploitative vulnerability for temporary migrant workers. An additional visa condition preventing WHV holders from working for one employer for longer than six months severely limits employment opportunities creating another barrier for reporting exploitation.[16]

52. The underpayment of WHV holders is a standard practice among many employers. The *National Temporary Migrant Work Survey* highlighted 32% of WHV holders were paid $12 per hour or less[17] which is consistent with the findings of the Unions NSW report which is **Annexure B:** Wage Thieves: Enforcing Minimum Wages, to this submission.

53. The six-month employment restriction on WHV holders limits their employment opportunities[18] as employers are reluctant to invest time in training employees which in turn restricts workers to casual or temporary employment. WHV holders who have worked for an employer for more than six months are violating their visa requirements and face the prospect of visa cancellation. This is a similar scenario to international

[16] Visa subclasses 417 and 462.
[17] Laurie Berg and Bassina Farbenblum, 'Wage theft in Australia: Findings of the National Temporary Migrant Work Survey' (20 November 2017) 26.
[18] United WHY, *Vulnerabilities of Working Holiday Makers and Policy Recommendations* (2016) 9.

students working in excess of 40 hours per fortnight; for both, an additional barrier is created to taking action against recalcitrant employers to recoup stolen wages.

54. As discussed previously, the Ombudsman – in conducting inquiries – has found a continued level of exploitation of WHV holders associated with the requirement for them to perform 88 days of regional work. Various inquiries have also found the 88 days of regional work has led to increased exposure of visa workers to:

- unsafe situations[19];
- longer working hours[20];
- hazardous work environments, discrimination; and
- sexual harassment. [21]

55. Since December 2015, WHV holders seeking a second-year visa have had to provide pay slips to the Department evidencing wages earned during their 88 days of regional work are consistent with Award minimums.[22] While the purpose of this regulation was to reduce exploitation, in practice it has accentuated the dependence of WHV holders on employers providing pay slips[23] in order to remain in the country and reducing the preparedness of workers to make formal complaints.

[19] Fair Work Ombudsman, Commonwealth of Australia, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (2016) 6.
[20] Ibid.
[21] Senate Education and Employment References Committee, Commonwealth of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016) 167.
[22] Department of Home Affairs, *Specified subclass 462 work* (17 January 2020) Working Holiday Maker (WHM) program < https://immi.homeaffairs.gov.au/what-we-do/whm-program/specified-work-conditions/specifiedwork-462>.
[23] Fair Work Ombudsman, Commonwealth of Australia, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (2016) 43.

56. Below are several examples of social media advertisements which demonstrate common Wage Theft conditions experienced by WHV holders seeking to satisfy their visa requirements:

Vietnamese job ad for a nail technician offering $10 an hour.[13]

Tìm nữ phụ dọn dẹp trong shop và làm việc linh tinh trong shop Nails

Ngày đăng: Thứ bảy, ngày 29/02/2020 **Lương:** 10$/Hour
Khu vực: Haymarket, NSW (Inner Sydney)

Tìm nữ phụ dọn dẹp trong shop và làm việc linh tinh trong shop Nails

Cần tìm 1 bạn nữ 18 tuổi-25 tuổi

Không cần kinh nghiệm sẽ được traing

Lương : thỏa thuận

Vui lòng liên hệ qua số điện thoại để biết thêm thông tin chi tiết

Thông tin liên hệ

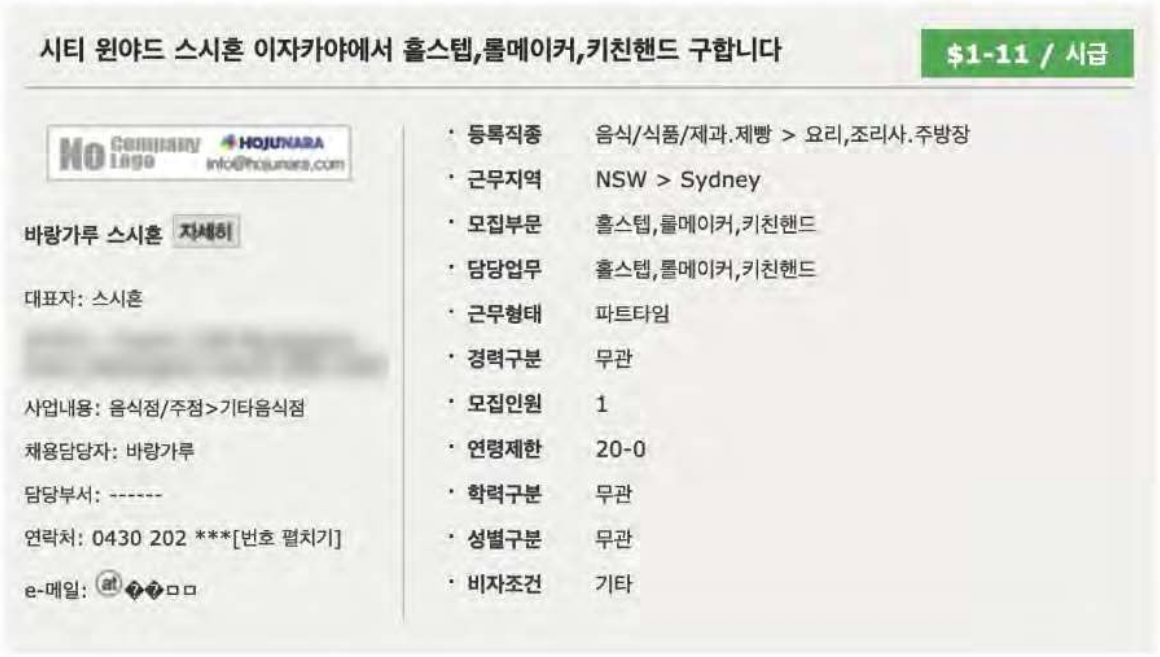
Liên hệ: [redacted]
Mobile: [redacted]
Email: [redacted]
Địa chỉ: Haymarket

Lưu ý: Khi bạn gọi điện liên hệ với người đăng tin này, xin vui lòng nói cho họ biết bạn biết được thông tin này trên website "http://nguoiviettaiuc.com" (Người Việt Tại Úc.COM). Xin chân thành cám ơn!

Thông tin bài đăng

Khu vực: Haymarket, NSW (Inner Sydney)
Lĩnh vực: Cleaner & Housekeeper
Mã tin: [redacted]
Ngày cập nhật: 29/02/2020
Ngày kết thúc: 29/03/2020
Loại tin: Tin thường

Korean ad advertising jobs in hospitality, with an hourly rate of $11.[11]



시티 윈야드 스시혼 이자카야에서 홀스텝,롤메이커,키친핸드 구합니다 **$1-11 / 시급**

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- 근무지역 NSW > Sydney
- 모집부문 홀스텝,롤메이커,키친핸드
- 담당업무 홀스텝,롤메이커,키친핸드
- 근무형태 파트타임
- 경력구분 무관
- 모집인원 1
- 연령제한 20-0
- 학력구분 무관
- 성별구분 무관
- 비자조건 기타

57. Despite the Department and Fair Work Ombudsman's knowledge of the abuse and exploitation of WHV holders and temporary migrants few proactive actions have been implemented to effectively protect these workers or to reduce exploitation. Arguably, the proposed Bill does nothing to practically protect vulnerable workers or to significantly penalise those engaged in systematic exploitation.

58. Unions NSW and IARC recommend further changes be made to ensure visa holders are eligible for current and future visa options where there has been workplace exploitation. This enables the Bill to be effective in deterring exploitative practices by employers while allowing employees to report practices without fear of losing future visa opportunities.

59. **Recommendation:** Abrogate the 88 days' farm work required for WHV holders to secure their second-year visa. By the Ombudsman's own admission, this requirement facilitates backpackers working for less than minimum wage.[24]

60. **Recommendation:** Abolish the visa condition preventing WHV holders from working for one employer for longer than six months.

61. **Recommendation:** Amend Schedule 2 to the Regulations to allow certain skilled visas to still be granted in cases of workplace exploitation (where the applicant would otherwise be ineligible due to loss of employment). This could be drafted similarly to the Family violence provisions for Partner visas.

62. **Recommendation:** The creation of a new substantive temporary visa subclass for people who have experienced workplace exploitation that has no visa application charge and can be applied for even if a visa has been refused or cancelled.

63. **Recommendation:** The creation of a PR pathway created whereby holders of Subclass 457 visas or TSS visas working in their nominated occupation for a period of 3 years or more are automatically eligible to apply for a subclass 189 or 190 visa (without having to be invited to apply after lodging an expression of interest). This will negate the need for ongoing sponsorship by an employer.

[24] Fair Work Ombudsman, Commonwealth of Australia, Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program(2016) 30.

Conclusion

64. IARC and Unions NSW believe the exploitation of migrant workers is predominately caused by the enormous opportunity which exists for employers to take advantage of their workers in order to cut costs with very little chance of being caught. The vulnerability to exploitation faced by migrant workers does not occur in a vacuum and is a direct result of the current visa system making them reliant on their employers.

65. In its current form, the Act and general immigration system facilitates exploitation by creating an additional dependency by the employee on the employer, where the employee is completely reliant on their employer. Only an overhaul of this system in line with the above recommendations would begin to adequately address the constructed detrimental dependency of migrant workers on employers.

66. It is only through the development of a regime that promotes compliance by enabling and empowering migrants to report exploitation by employers without consequences to their visa status will migrant workers be effectively protected from workplace exploitation.