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LIGERTWOOD BUILDING
THE UNIVERSITY OF ADELAIDE
SA 5005
AUSTRALIA

Dr Joanna Howe
Associate Professor in Law
Adelaide Law School
University of Adelaide
M:0413 219 590
E: joanna.howe@adelaide.edu.au

Submission

Exposure Draft – *Migrant Amendment (Protecting Migrant Workers) Bill 2021*

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Associate Professor Joanna Howe

I welcome the opportunity to make a submission on the exposure draft of the *Migrant Amendment (Protecting Migrant Workers) Bill 2021.* [1] The Government is to be commended for its intention of addressing the exploitation of temporary migrants in the Australian labour market. This is a worthwhile and important task. **However, this submission argues that the Bill will not ameliorate the vulnerability of temporary migrants to wage theft and other forms of exploitation and will have some adverse, unintended consequences. Although the Bill appears to substantially increase the protection of temporary migrants in the workplace, its substantive effect in this respect will be negligible.** To develop these arguments, this submission is structured in three parts. Part A addresses the flawed assumption which underpins the Bill. Part B critiques the new provisions in the Bill and explains how these are likely to be ineffective and may exacerbate existing vulnerabilities. Part C proposes alternative, key reforms which are fundamental to protecting temporary migrant workers in the Australian labour market.

PART A: A Critique of the Assumption underneath the Bill

The Bill is underpinned by a fundamentally incorrect assumption that 'a small number of employers engage in exploitative behaviours'.[2] This assumption misconceives the extent of the problem of migrant worker exploitation and the scale of the regulatory challenge. As a result, the regulatory changes proposed in the Bill to enhance existing penalty, compliance and enforcement frameworks are wholly insufficient.

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[1] Hereafter 'the Bill'.

[2] *Migration Amendment (Protecting Migrant Workers) Bill 2021*, Exposure Draft-Context Paper, p2.

The controversy around the extent of migrant worker exploitation in the labour market has a long pedigree but there is a growing body of evidence which points to substantial exploitation of certain groups of migrant workers in the labour market.

It is well understood that there is a large black market of underpaid international students in the Australian economy, particularly in industries such as hospitality.[3] The phenomenon of underpaid temporary migrants is not limited to Australia, but is a feature of temporary labour migration throughout the world.[4] In the Australian context, the extensive empirical work of Laurie Berg and Bassina Farbenblum has been critical to shedding light on the extent and nature of the exploitation of temporary migrants and in particular international students, and their striking failure to access legal remedies.[5] It has also become clear that, in the vast majority of cases, international students 'suffer in silence' and do not approach the national labour regulator, the Fair Work Ombudsman ('FWO'), or take other action to address their underpayment.[6] This is true despite growing awareness of their workplace rights and entitlements under the law.

Exploitation of international students has been the subject of prominent media reports[7] and academic inquiry[8] for several years. In 2018, the Commonwealth Migrant Workers' Taskforce report stated that a significant number of international students were exploited at

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[3] *Report of the Migrant Workers' Taskforce* (Report, March 2019) 108 <https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf> ('*Report of the Migrant Workers' Taskforce*'); Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016) ch 8, 201, 203 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report> ('*A National Disgrace*'); Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (Report, June 2020) 8–9 ('*International Students and Wage Theft*'); Fair Work Ombudsman (Cth), *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (Report, April 2016) 7–8.

[4] See, eg, Jane Hardy, 'Migration, Migrant Workers and Capitalism' (2009) 122 (Spring) *International Socialism* <http://isj.org.uk/migration-migrant-workers-and-capitalism/>.

[5] Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (Report, October 2018) 6, 29 ('*Wage Theft in Silence*'). See further: <https://www.mwji.org/publications>.

[6] Ibid.

[7] See, eg, Sam Langford and Marty Smiley, '"They Told Me That They Could Pay Me $12": Chinese Student Speaks Out about Wage Theft', *SBS News: The Feed* (online, 17 October 2019) <https://www.sbs.com.au/news/the-feed/they-told-me-that-they-could-pay-me-12-chinese-student-speaks-out-about-wage-theft>; Michael Koziol, '"It's Just Abusive": Experts Issue Warning over Nepalese Student Surge', *The Sydney Morning Herald* (online, 22 December 2019) <https://www.smh.com.au/national/it-s-just-abusive-experts-issue-warning-over-nepalese-student-surge-20191219-p53lhm.html>. See also Samuel Yang, '"Rogue Landlords" Prey on International Students in the "Wild West" of Australia's Rental Market, Report Finds', *ABC News* (online, 4 December 2019) <https://www.abc.net.au/news/2019-12-04/landlords-prey-on-international-students-in-australia:study/11759672> in relation to international student exploitation in the housing market.

[8] See, eg, Iain Campbell, Martina Boese and Joo-Cheong Tham, 'Inhospitable Workplaces: International Students and Paid Work in Food Services' (2016) 51(3) *Australian Journal of Social Issues* 279 ('Inhospitable Workplaces'); Stephen Clibborn, 'Multiple Frames of Reference: Why International Student Workers in Australia Tolerate Underpayment' (2018) *Economic and Industrial Democracy* 143831:1–19; Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* 1035 ('Remedies for Migrant Worker Exploitation in Australia').

their workplace and this has been a feature of some sectors in the Australian labour market for years.[9] Widespread underpayment of international students' wages and entitlements in certain industries has been documented by parliamentary inquiries, FWO investigations and academic studies, including food services,[10] commercial cleaning,[11] hospitality,[12] horticulture,[13] and various franchises.[14] These sectors are also associated with casual work, low rates of unionisation and cash payment of wages.[15]

Enforcement of labour laws is especially difficult in these industries where there is the structural reality of non-compliance.[16] As far back as 2005, a major empirical study found that 58% of working international students interviewed were earning less than the legal minimum wage.[17] More recently, Clibborn found that of 1,400 international students at one university, 60% were paid below the federally mandated minimum wage.[18] The scale of unremedied underpayment of migrant workers in Australia is vast: 7-Eleven's internal

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9 *Report of the Migrant Workers' Taskforce* (n 3) 37.

10 See Joo-Cheong Tham and Judy Fudge, 'Unsavoury Employer Practices: Understanding Temporary Migrant Work in the Australian Food Services Sector' (2019) 35(1) *International Journal of Comparative Labour Law and Industrial Relations* 31; Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the* Fair Work Act 2009 (Report, September 2017) ch 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report> ('*Corporate Avoidance*'); *A National Disgrace* (n 1) ch 8; Campbell, Boese and Tham, 'Inhospitable Workplaces' (n 42) 279.

11 See Fair Work Ombudsman (Cth), *An Inquiry into the Procurement of Cleaners in Tasmanian Supermarkets: A Report by the Fair Work Ombudsman under the* Fair Work Act 2009 (Report, February 2018) <https://www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets>; Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft: The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (Report, November 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Report>.

12 *Corporate Avoidance* (n 10) 59.

13 Diane van den Broek et al, 'Pro-Market Governance, Migration Status and Worker Vulnerability: The Case of Australian Horticulture' (2019) *Economic and Industrial Democracy* 0143831X1986175: 1–21, 1.

14 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Fairness in Franchising* (Report, March 2019) xiv.

15 See Joo-Cheong Tham, Iain Campbell and Martina Boese, 'Why Is Labour Protection for Temporary Migrant Workers So Fraught: A Perspective from Australia' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, 2016) 173 ('Why Is Labour Protection for Temporary Migrant Workers So Fraught'); Ann Arnold, 'The New Black: The Overworked, Underpaid, Cash-in-Hand Worker Is Becoming Increasingly Common', *The Monthly* (online, February 2017) <https://www.themonthly.com.au/issue/2017/february/1485867600/ann-arnold/new-black>.

16 Joanna Howe et al, 'A Critical Examination of the Relationship between Labour Hire Intermediaries and Growers in the Australian Horticulture Industry' (2019) 32(1) *Australian Journal of Labour Law* 83; Tham, Campbell and Boese, 'Why Is Labour Protection for Temporary Migrant Workers So Fraught' (n 15) 173.

17 Chris Nyland et al, 'International Student-Workers in Australia: A New Vulnerable Workforce' (2009) 22(1) *Journal of Education and Work* 1, 7.

18 Clibborn (n 8) 7.

wage repayment program alone repaid over $150 million in unpaid wages to its mostly international student workforce.[19]

A second core site of migrant worker exploitation in the Australian labour market is the horticulture sector. Here the exploitation is largely of temporary migrants in the Working Holiday Maker program and undocumented migrants. There is significant evidence of substantial wage underpayments in horticulture, particularly among WHMs, in academic research,[20] parliamentary inquiries[21] and in publications from the FWO.[22] A FWO report found that 39 per cent of horticulture employers were non-compliant with labour standards.[23] The FWO's Harvest Trail Inquiry recovered over a million dollars in wages but its report indicated the FWO's belief that 'the full extent of underpayments … is significantly higher than this'.[24] In 2016, another FWO report, following a two-year inquiry into the performance of work by WHMs, found that more than one-third of WHMs surveyed were paid less than the minimum wage, 14 per cent had to pay to secure regional work and six per cent had to pay an employer to 'sign off' on their regional work requirement.[25]

Berg and Farbenblum's survey conducted in 2016 of 4,322 temporary migrants in Australia found that the worst paid jobs were in fruit and vegetable picking, where 15 per cent of respondents said they had earned $5 an hour or less and 31 per cent had earned $10 an hour or less.[26] A three-year study investigating the conditions of work in the Australian horticulture industry found that 'non-compliance is endemic and multi-faceted' and that the employment of WHMs typically involved substantial wage underpayments, with the lowest wage reported being $1 an hour.[27]

The presence of undocumented workers, which the *National Agriculture Workforce Strategy* posits is between 60,000 to 100,000 workers,[28] is the dark underbelly of the horticulture sector. The three-year study, '*Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*', found that the horticulture industry had a 'structural reliance' on undocumented workers as a key source of farm labour.[29] As the *National Agriculture Workforce Strategy* notes, 'undocumented workers are at highest

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19 Berg and Farbenbelum, 'Remedies for Migrant Worker Exploitation in Australia' (n 8) 1035.

20 Elsa Underhill and Malcolm Rimmer, 'Layered Vulnerability: Temporary Migrants in Australian Horticulture' (2016) 58(5) *Journal of Industrial Relations* 608.

21 Senate Education and Employment References Committee (n **Error! Bookmark not defined.**); Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (Report, December 2017).

22 Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (Report, October 2016) ('*Inquiry into the 417 Visa Program*').

23 Fair Work Ombudsman, *Horticulture Industry Shared* Compliance *Program 2010* (Final Report, November 2010) 1.

24 Fair Work Ombudsman, *Harvest Trail Inquiry* (n **Error! Bookmark not defined.**) 4.

25 Fair Work Ombudsman, *Inquiry into the 417 Visa Program*.

26 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, November 2017) 30 <static1.squarespace.com>.

27 Howe et al, *Towards A Durable Future.*

28 National Agricultural Labour Advisory Committee, 206.

29 Howe et al, *Towards a Durable Future*.

risk of exploitation, due to the fact that they are unlikely to report mistreatment for fear of losing their visa and ability to stay in Australia'.[30]

It is important to briefly acknowledge that migrant worker exploitation is not limited to international students, WHMs and undocumented migrants. Exploitation also exists within the skilled migration program, within the Seasonal Worker Program and with respect to asylum seekers on safe haven visas and bridging visas.

Therefore, there is now a body of evidence to suggest that migrant worker exploitation does not involve a 'small number of employers' but in certain occupations and industries is endemic and widespread. It is not being effectively addressed through current regulatory approaches and mechanisms so as Part B establishes, strengthening these by enhancing existing penalty, compliance and enforcement frameworks is insufficient. A completely new approach is required. There needs to be a wholesale rethink of how to tackle the endemic and systematic exploitation of temporary migrants in the labour market, a subject to which I will return in the final part of this submission.

PART B: A Critique of the New Provisions in the Bill

1. New offences for employer coercion

Part 1 of the Bill introduces new criminal offences and related civil penalty provisions. These prohibit employer coercion of temporary migrants. In theory, these are useful provisions but in practice, as I will demonstrate below, they are incapable of widespread enforcement and will rarely be used.

1.1 **The primary reason these new offences will be ineffective in protecting temporary migrant workers is that there is no incentive for temporary migrants to come forward and participate in enforcement activities as the Bill does not provide workers with any benefit or incentive for reporting exploitation.**

Temporary migrants are already far less likely to report workplace exploitation and access legal remedies than local workers. There are a range of reasons why temporary migrants do not report workplace exploitation. These include structural, social and practical barriers to seeking help or bringing a claim against an underpaying employer.

Structural barriers are the most prohibitive. There are distinct, regulatory aspects of different visa categories which provide a substantial *disincentive* to making a complaint and reporting exploitative work to a government agency such as FWO or ABF.

- For migrants on a sponsored visa such as a subclass 482 visa or a subclass 403 visa, reporting exploitation comes with the risk of losing their employment and thus their employer-sponsor. This jeopardises their visa pathway and ability to remain in Australia. For example, subclass 482 visa holders are subject to visa condition 8107 which requires them to find another employer willing to sponsor them within 60 days of losing their original employer-sponsor. A failure to do this within the specified time limit will lead to the cancellation of their visa. Additionally, with respect to subclass 403 visa holders, these workers from the Pacific often seek to

[30] National Agricultural Labour Advisory Committee, 190.

return for subsequent harvest seasons and are reluctant to report exploitation as they need to rely on their employer to sponsor them in the future.

- For migrants on an international student visa, reporting exploitation comes with the risk of losing their employment, their ability to remain in Australia if they are in breach of the fortnightly work hours requirement (visa condition 8105) and removes their capacity to gain Australian work experience, a critical component of entry into the sponsored skilled visa program. Of all groups of temporary migrants on visas with work rights, international students are the least likely to make a complaint to the FWO.[31] The overwhelming majority (90%) of international student participants in the National Temporary Migrant Work Survey who acknowledged that they were underpaid took no action to recover their unpaid wages.[32]

- For migrants on a Working Holiday Maker (WHM) visa, reporting exploitation comes with the risk of losing their employment. For WHMs undertaking 88 days of specified work to earn a visa extension, there is an incentive to *not* report exploitative work because of the need to complete an 88-day period in order to earn a visa extension. For example, the report *Towards A Durable Future* found that WHMs regularly acquiesced to exploitative farm work in order to gain a visa extension.[33]

- For undocumented migrant workers,[34] it is highly improbable that this group will report exploitation. As the *National Agriculture Workforce Strategy* notes, 'undocumented workers are at highest risk of exploitation, due to the fact that they are unlikely to report mistreatment for fear of losing their visa and ability to stay in Australia'.[35]

For all these visa categories, when the performance of work is tied to a migration condition or migration incentive, this creates a strong incentive to remain in exploitative work and an even stronger disincentive to reporting the employer to the FWO or ABF. Without the prospect of employees reporting exploitation and coercion by their employer, it is highly unlikely that these will be detected. Additionally, for FWO and

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[31] See Alexander Reilly et al, *International Students and the Fair Work Ombudsman* (Report, March 2017) <https://www.fairwork.gov.au/ArticleDocuments/1160/International-students-and-the-fair-work-ombudsman-report.pdf.aspx?Embed=Y>.

[32] Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (Report, October 2018) 20.

[33] For example, a WHM reported to the research team, "For 10 hours, I got $10. $1 an hour…We had no choice as well…because we need to get 88 days first…We do anything because there's no choice."

[34] In this submission, 'undocumented migrant workers' refers to migrants working in Australia without an entitlement to work. These include: migrants on visas without work rights such as tourists, migrants whose visas have expired, and migrants with a valid visa with work rights but who work in breach of a condition of their visa.

[35] National Agricultural Labour Advisory Committee, *National Agricultural Workforce Strategy: Learning to Excel* (Commonwealth of Australia, December 2020) 190.

ABF to investigate and prosecute employers who are in breach of the proposed employer coercion provisions, they will require employee cooperation. It is difficult to see how employer coercion can be established without an employee agreeing to attest to this. Thus, although the new criminal offences appear strong on paper as they are aimed at preventing employers from coercing temporary migrants to accept exploitative work, they are unlikely to be used in practice by enforcement agencies. The effect of these provisions is likely to be negligible in protecting temporary migrants from exploitation.

The vulnerability of temporary migrants to exploitation and employer coercion is illustrated in a case involving three international student cleaners who continued to work for their employer despite never being paid.[36] Collectively they worked for 331 hours without receiving any of the $7,083.36 they were entitled to for this period. As is often the case for temporary migrants who do not usually have the resources and knowledge to initiate their own legal proceedings, their case was advanced by the FWO in the Federal Court and significant penalties were awarded against the employer. The Court noted that these international students were 'particularly vulnerable' because of their lack of knowledge of Australian workplace standards and because English was not their first language.[37] The Court also observed the substantial challenges involved in the detection, investigation and prosecution of cases involving vulnerable workers unfamiliar with Australian law and dispute resolution processes.[38]

Tellingly, the Court also noted that it is possible for employers to have a business model built on gross exploitation of temporary migrants because of the unlikelihood of detection. In awarding a penalty, the Court observed the following:

> The respondent has given no pay whatsoever to three vulnerable employees. That amounts to gross exploitation. *The fact that the respondent treated three employees in the same way over a period of about six months shows that his conduct was deliberate and part of a modus operandi to advantage himself financially at considerable cost to others.* The respondent has shown no remorse, has failed to take corrective action even after being ordered to do so by the court and has failed to cooperate in the investigation or in these court proceedings.[39]

1.2 The new offences will be unlikely to be effective as there is no protection for migrant workers in reporting exploitation.

Given the presence of prohibitive structural factors inherent in their visa's regulatory design and the absence of an incentive to report exploitation, most migrant workers will not report exploitation to a government agency. This is compounded by the fact that the Bill does not improve the inadequate protection given to migrant workers who make a complaint of exploitation to the FWO.

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36 See *Fair Work Ombudsman v Terrence Cyril Thomas* [2013] FCCA 536.

37 Ibid [30] (Judge Riley).

38 Ibid [48] (Judge Riley).

39 Ibid [53-54] (Judge Riley).

In February 2017, a new Australian government policy was introduced to aid the interpretation of the visa cancellation and deportation powers under the Migration Act 1958 (Cth). This new policy applies to all visa holders with a work entitlement attached to their visa (not just international students) who make a complaint to the authorities about exploitation at work. This policy clarifies that the Department of Home Affairs will not cancel a visa if the visa holder commits to abiding by visa conditions in the future and if there was no other basis for visa cancellation, such as on grounds of national security, character, health or fraud.[40] Despite pressure from some quarters, the government chose not to introduce a new employment justice visa for migration law for visa holders who have breached a work entitlement in their visa in the course of being exploited by their employer. It was argued that this was unnecessary because the Department of Home Affairs 'has ample discretion to take the full range of factors that have impacted upon these people into account in any dealings with them'.[41]

However, the clear deficiency in a discretionary approach to deciding which migrant workers to deport for breach of a visa condition is that there is no certain protection for this group.[42] This provides a disincentive to report workplace exploitation in situations where an employer has coerced a temporary migrant to work in breach of a visa condition or simply taken advantage of a migrant worker's vulnerability and susceptibility to accepting exploitative work.[43] In effect, the discretionary approach means that most migrant workers will not report exploitation to FWO. Instead there should be a 'complete firewall' between Home Affairs so that the FWO has the necessary 'formal public independence' to properly deal with the exploitation of migrant workers by guaranteeing these workers that there will be no immigration-related consequence for reporting workplace exploitation.[44] There also needs to be enhanced visa security for migrant workers who are assisting a FWO or ABF investigation and/or pursuing remedies through the Fair Work Act, or other causes of action for unpaid wages and other breaches of law. The Criminal Justice visa provides a ready template for the creation of an Employment Justice visa, and either the Fair Work Ombudsman or the Federal Circuit Court may be

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[40] M. Cash and P. Dutton, 'Turnbull Government Welcomes Action from the Migrant Workers' Taskforce' (Joint Media Release, 15 February 2017).

[41] L. Bourke, '7-Eleven Pay Scandal: Visa Reprieves to be Decided Case by Case: Peter Dutton', The Sydney Morning Herald, 28 September 2015 http://www.smh.com.au/federalpolitics/ political-news/7eleven-pay-scandal-visa-reprieves-to-be-decided-case-by-case-peterdutton- 20150928-gjwcuh.html (accessed 11 June 2018).

[42] See further, the Freedom of Information request made by Unions NSW to the Department of Home Affairs, which reveals that the agreement between the FWO and Home Affairs is a non-binding agreement and that the FWO has no control over Home Affairs exercising its discretion over whether to deport a visa holder; A. Gartrell, 'Migrant Workers Left Exposed by Workplace Watchdog Amnesty Promise', The Sydney Morning Herald, 2 April 2018 https://www.smh.com.au/politics/federal/migrant-workers-left-exposed-by-workplace-watchdogamnesty-promise-20180402-p4z7d8.html (accessed 11 June 2018).

[43] For example, in 2014–15 requests for assistance made by international students accounted for 0.6% of all requests made to the FWO during this year and only 5% of requests by visa holders, despite being the largest group of visa holders in Australia; A. Reilly et al, 'International Students and the Fair Work Ombudsman' (Report, Fair Work Ombudsman, 2017) 32–3.

[44] S. Clibborn, 'Why Undocumented Immigrant Workers Should Have Workplace Rights' (2015) 26 *Economic and Labour Relations Review* 465; See also, B. Farbenblum and L. Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23 *Australian Journal of Human Rights* 310, 311–2.

empowered to issue a 'temporary stay certificate' certifying that a worker's ongoing presence in Australia is required for the conduct of their proceedings.[45]

1.3 The new offences will be unlikely to be effective as they will not address the ongoing failure by enforcement authorities (FWO and ABF) to detect workplace exploitation of migrant workers. Additionally, the reported level of enforcement activity is not able to address the scale of exploitation of migrant workers.

Part A provides evidence of the scale of the enforcement challenge by detailing empirical research which has uncovered substantial exploitation of migrant workers. I will not revisit this here, except to say that ABF and FWO are only scratching the surface of the problem. This is particularly the case in relation to the detection of undocumented migrants – a subject to which I now turn.

Detection of undocumented workers has been largely ineffective and failed to address the horticulture sector's structural reliance on undocumented workers. It is important to acknowledge that these detection efforts have failed for over two decades. As far back as 1999 the Department of Immigration and Multicultural Affairs found substantial numbers of undocumented workers and recommended increased penalties on employers, although horticulture industry associations opposed this on the basis that 'it was not always possible to attract sufficient legal workers during the harvest'.[46] Since then, despite the deployment of considerable resources and the development of a special taskforce in 2015, these detection efforts have been so futile that undocumented workers have grown to become a key and significant part of the sector's workforce.

Undocumented workers have an incentive to remain invisible to authorities because they risk deportation if detected. Evidence from the *Towards A Durable Future* study suggests that undocumented workers tend to be located in more isolated areas and keep to themselves. As one local representative in Wide Bay Burnett reported, '[a] lot of people in town may not even see them. They sleep. They work. They sleep. They go back to Bundy and get supplies, they come back. Yeah, they're very quiet'.[47] A representative of the FWO reported, 'we hear about all these illegal workers, but [when we visit farms] we just don't see them'.[48]

It seems that undocumented workers are adept at avoiding detection and have sophisticated, well-developed strategies in the event of a Border Force raid. In *Towards A Durable Future*, an officer from the Stanthorpe police force observed that during a raid, 'it's like mice abandoning the ship',[49] with a former undocumented worker describing the need to

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45 Migration Act, s 156. See further: B. Farbenblum and L. Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23 *Australian Journal of Human Rights* 310.

46 Department of Immigration and Multicultural Affairs, *Review of Illegal Workers in Australia: Improving Immigration Compliance in the Workplace* (Report, 1999) 27.

47 Howe et al, *Towards a Durable Future,* 40.

48 Ibid.

49 Ibid.

respond quickly upon the arrival of enforcement authorities, '[s]omeone just shouts, 'Immigration!' And that's it, forget about your harvesting, and everything, and your lunchbox and fssht! Whoa! ... I've been running for almost 5 years'.[50]

This is consistent with media reports indicating that undocumented workers shout code words to alert other undocumented workers in the same row that a raid is occurring,[51] and also with the opening anecdote of a 2006 Senate Committee inquiry report into harvest labour:

> when [inquiry] members [were] touring an isolated farm just north of Euston on the Murray River, suddenly came across a team of grape pickers hard at work. Taking fright at our unexpected appearance, they fled down the vine rows toward the other end of the field. The committee had been mistaken for immigration officers conducting a raid on illegal workers.[52]

Undocumented workers are also difficult to detect because of their tendency to be housed in private dwellings (usually share houses), often owned or leased by their contractor. As one labour hire contractor reported in *Towards A Durable Future*, '[t]hey [undocumented workers] just hide. Like let's say, you rent a house and something like that and you can hide easy'.[53] A former undocumented worker described how contractors are vigilant in ensuring undocumented workers do not make local connections and remain concealed, describing how 'the contractor will just sleep in the car outside [the houses of undocumented workers] and watch them. So no-one walks outside'.[54]

The ABF is charged with the responsibility of detecting undocumented workers. In 2015 the government established a specialist multi-agency taskforce, known as Taskforce Cadena, to target and disrupt the organisers of visa fraud, illegal work and the exploitation of foreign workers. There is only one mention of Taskforce Cadena's work in the 2017–18 and 2018–19 annual reports of the Department of Home Affairs.[55] The former report states that the Taskforce has completed 17 operations and executed 24 warrants to investigate visa fraud, illegal work and the exploitation of foreign workers.[56] The 2018–19 report refers to 'the execution of a combination of 50 Migration Act and Crimes Act warrants, issuing of 40 Illegal Worker Warning Notices and the referral of 25 matters to partner agencies including allegations of human trafficking'.[57] Additionally, the annual reports of

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50 Ibid.

51 Emma Field, 'Illegal Malaysian Farm Labourer Told About "Kangaroo Call" When Starting Work', *The Weekly Times* (online, 5 August 2015) <https://www.weeklytimesnow.com.au/news/national/illegal-malaysian-farm-labourer-told-about-kangaroo-call-when-starting-work/news-story/eb02f7037082803af6ced386775540d6>.

52 Senate Standing Committee on Employment, Workplace Relations and Education, *Perspectives on the Future of the Harvest Labour Force* (Report, October 2006) vii.

53 Howe et al, *Towards a Durable Future,* 40.

54 Ibid.

55 Department of Home Affairs, *Annual Report 2017-18* (2018) 29; Department of Home Affairs, *Annual Report 2018-19* (2019) 22.

56 Department of Home Affairs, *Annual Report 2017-18,* 29.

the Department of Home Affairs suggest a steady decline in compliance activity targeting the location of undocumented workers and employers who employ these workers despite the number of such workers and employers being at record levels.[58]

Therefore, it is highly unlikely that this reported level of enforcement activity is able to address the scale of undocumented work in the horticulture labour market.

Table 1: Undocumented Worker Compliance Activity[59]

	2016-17	2017-18	2018-19	2019-20
Location of undocumented workers	2,269	2,394	1,617	994
Unlawful worker warnings to employers	402	323	314	184
Removal of unlawful non-citizens	14,785	14,065	12,985	10,505

As Abul Rizvi points out, the removals in the above table are mainly people who have overstayed for a short period and leave Australia voluntarily. Very few relate to enforcement activity pertaining to undocumented migrants who are detected and detained. Therefore, the imposition of higher penalties for employers as envisaged under the Bill is unlikely to be effective given the scale of the enforcement challenge and the steady decline in compliance activity targeting the location of undocumented workers and employers who employ them. It is unlikely that stronger enforcement can address this issue and the author supports the recommendation of the National Agriculture Labour Advisory Committee to introduce a one-off status resolution process for undocumented migrant farm workers.[60]

Although this section of the submission has focussed on critiquing the Bill in relation to undocumented migrants, it must also be acknowledged that these proposed higher penalties are unlikely to be effective for other groups of migrant workers. The existing employer sanction provisions which were introduced in 2013 with respect to employer-sponsored skilled visas have been rarely utilised. In the six years since these provisions were introduced to target exploitation of temporary migrants, a total of 1060 employer sponsors have been sanctioned for breaches of employment-related sponsorship obligations as a result of ABF enforcement action.[61] To put this number in context, in that

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57 Department of Home Affairs, *Annual Report 2018-19,* 22.

58 Department of Home Affairs, *Annual Report 2018-19* and Department of Home Affairs, *Annual Report 2019-2020.* See further: https://independentaustralia.net/politics/politics-display/peter-duttons-legacy--australias-biggest-labour-trafficking-scam,14954.

59 This table is compiled by Abul Rizvi, former deputy secretary of the Department of Immigration. See further: https://independentaustralia.net/politics/politics-display/peter-duttons-legacy--australias-biggest-labour-trafficking-scam,14954.

60 National Agricultural Labour Advisory Committee, *National Agricultural Workforce Strategy: Learning to Excel* (Commonwealth of Australia, December 2020) 190 (‘*National Agricultural Workforce Strategy*’).

61 See https://www.abf.gov.au/about-us/what-we-do/sponsor-sanctions/register-of-sanctioend-sponsors#.

same period, the Department of Home Affairs has granted 270,241 employer-sponsored skilled visas.[62] **This demonstrates the low-level of enforcement activity and points to the need to directly incentivise migrant workers to report exploitation and cooperate with agency investigations.**

2. Extension of the verification requirement

Part 3 of the Bill proposes a new positive obligation for employers to check a non-citizen's visa status and conditions using relevant departmental systems. Hereafter referred to as the 'verification requirement', this reform seeks to build on VEVO's long-established role as the *'single source of truth when checking visa status and conditions for visa holders'*.[63]
This submission asserts that the proposed verification requirement will do little to deter the employment of unlawful non-citizens or workers in breach of a visa condition. Neither will it improve the protection of temporary migrants from wage theft and others form of exploitation in the Australian labour market. This is for two main reasons, which are explored below.

2.1 The verification requirement will be ineffective in deterring the employment of unlawful non-citizen workers.

The verification requirement is a weak requirement that bolsters an existing expectation that employers use VEVO to check the immigration status of a prospective employee. This expectation is supported by existing offences and civil penalty provisions in the Migration Act in relation to any person (i.e. an employer) who allows a non-citizen to work either in breach of work-related visa conditions or as an unlawful non-citizen.[64] The transformation of this expectation into a positive, legal obligation will not deter employers who deliberately choose to avoid compliance with the current offences and civil penalty provisions. These employers will calculate the risk of detection that they have failed to check their employee's visa status and conditions with the greater profits that can be made from employing vulnerable migrant workers and conclude that the benefits of the latter are too great. This is because there is nothing in the Bill that will increase the risk of detection for non-compliant employers, a subject which is explored in more detail earlier in the submission.

2.2 The verification requirement will encourage employers to use labour hire intermediaries to employ temporary migrants which will exacerbate the vulnerability of temporary migrants in the labour market.

It is concerning that the Bill will have the unintended consequence of encouraging employers to use labour hire contractors to acquit their responsibilities under it. This is because the easiest way for employers to acquit their responsibility to check whether a

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[62] See https://www/homeaffairs.gov.au/research-and-stats/files/temp-res-skilled=rpt-summary-300621.pdf.

[63] *Migration Amendment (Protecting Migrant Workers) Bill 2021*, Exposure Draft-Context Paper, p6.

[64] These offences are set out in sections 245AB (Allowing an unlawful non-citizen to work) and 245AC (Allowing a lawful non-citizen to work in breach of a work-related condition). The Migration Act also includes comparable offences for third-party providers who refer a non-citizen for work in sections 245AE and 245AEA.

prospective worker is a lawful non-citizen and that they are employed in compliance with their visa's work conditions is to outsource this verification requirement to a third-party. The Department has outlined three broad options for employers. Option 1 enables an employer to use VEVO directly to verify a prospective worker's immigration status. Option 2 provides that an employer can obtain information from a third-party provider that provides evidence that a VEVO verification check has occurred. Option 3 allows an employer to accept an automatically generated email from the Department via VEVO provided to them by the prospective employee.

Although all three options ostensibly impose the same onus on an employer, Option 2 provides an opportunity for employers to circumvent the verification requirement through outsourcing it to a third party. This is a dangerous inducement to use labour hire intermediaries given that the academic literature clearly establishes that labour hire intermediaries are seen as enabling employers to avoid labour standards associated with direct employment.[65] In relation to non-citizen workers, the use of an intermediary to organise labour hire arrangements produces a situation where the precarious nature of labour hire work is combined with the precarious position of temporary migrant work.[66]

Canadian scholar Judy Fudge notes that both agency work and temporary migrant work deviate from the normative model of employment and produce precarious employment where norms encompass insecure and unstable work.[67]

In depicting the 'fissured workplace',[68] David Weil, former head of the Wages and Hours Division in the Obama administration, explains how employers reduce labour costs through practices such as subcontracting, franchising and the use of the supply chain, each of which involve or result in the worker being denied employment security and status. In these situations, Weil argues:

> Typically, the further away the laborer is from the ultimate beneficiary of that labor, the greater the chance for violation or exploitation. Violations tend to be greatest where margins are slimmest.[69]

In the Australian context, Weil's analysis accurately depicts the Australian horticulture industry with its complex supply chain, tight profit margins and a largely invisible workforce located far away from metropolitan centres where most fresh fruit and vegetables are purchased. Labour hire intermediaries in the horticulture industry are heterogeneous in function — ranging from individual contractors 'with a van and mobile

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65 See, eg: J Fudge and K Strauss (Eds), *Temporary Work, Agencies, and Unfree Labour: Insecurity in the New World of Work*, Routledge, 2015.

66 On the precarity of temporary migrant work, see L Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour*, Routledge, London, 2016.

67 J Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comp Lab L & Pol'y J* 95 at 98.

68 D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, Cambridge, 2014.

69 D Weil, 'Afterword: Learning from a Fissured World — Reflections on International Essays Regarding *The Fissured Workplace*' (2015) 37 *Comp Lab L & Pol'y J* 209 at 211.

phone, known only by their first name(s)', to accommodation providers such as 'working hostels' to sophisticated and publicly recognised large labour hire firms providing a comprehensive on-hire service. Australian scholars Elsa Underhill and Malcolm Rimmer categorise labour hire intermediaries involved in the Australian horticulture industry into three types, but suggest that most labour hire operators are in the 'meso' type, which encompasses larger, privately-owned labour hire firms to solo contractors, intermediary websites and working hostels.[70]

In our three-year study of labour challenges in the Australian horticulture industry, we found that some employers used non-compliant labour hire intermediaries to facilitate substantial levels of wage theft and exploitation.[71] In some cases this occurred through a deliberate choice by the employer to turn a blind eye to non-compliance. In other cases the myriad pressures on an employer meant that a suspicion that an intermediary was non-compliant was not investigated because of a more immediate need to source labour at times when the harvest was at its peak and labour was scarce. For example, as one grower explained 'so when you're really, really busy and there's a shortage of pickers they [the intermediaries] will start bringing anybody in and of course those pickers don't get the amount they're entitled to', or as another grower stated, 'I can't prove if they [the intermediary] have 80 or 70 and whether the other 10 were illegals'.[72] A requirement for a labour hire intermediary to show verification information to an employer will mean that an employer can satisfy this requirement even when the information has been knowingly falsified by the intermediary.

The proposed verification requirement will also fail to address a common practice of 'substitution' by non-compliant labour hire intermediaries in the horticulture industry. In our study we found multiple reports of intermediaries who would provide evidence on the first day that workers had a right to work in Australia but who would provide a different workforce composition on subsequent days. For example, one grower reported:

> We don't know the status of the worker brought to us by the labour hire contractor — so we cannot be 100 per cent sure the worker is legal. What's even more hard is that if I want 40 workers tomorrow, with the first delivery they give me 40 with a list of all the visa numbers and everything is okay for the first time but later on they change which workers they bring. They don't give me the same 40 workers throughout all of the days. They change the workers but they don't change the list.[73]

In this scenario, the proposed verification requirement could be circumvented because of a practice of workforce substitution by the intermediary.

3. Increased civil penalty provisions

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70 Underhill et al, above n 20.

71 *Towards A Durable Future.*

72 *Towards A Durable Future,* Focus group with growers (Orange, 28 June 2018).

73 *Towards A Durable Future,* Focus group with Vietnamese growers (Wanneroo, 12 March 2018).

Part 4 of the Bill substantially increases the pecuniary penalties across the work-related civil penalty provisions and related offences in the Migration Act. The rationale for this increase is that it will increase their deterrent effect. The context paper for the Bill states:

> For financial penalties to have a deterrent effect, they must be set at a level that actually deters people from contravening and offending. These increased civil penalties reflect the severity of the impact of a contravention on the individual migrant worker directly affected by the act, but also the significant damage that the actions of a few unscrupulous employers or labour hire intermediaries can have on Australia's reputation as a destination of choice.[74]

However, increasing these penalties will have very little deterrent effect if there is almost no prospect of detecting non-compliance with the Fair Work Act or the Migration Act. As for the reasons outlined above, temporary migrants have been given no incentive or protection for reporting exploitation in the Bill and in fact, have a strong disincentive to reporting exploitation based on structural barriers related to the regulatory design of their visa.

Without self-reporting, enforcement authorities such as ABF and FWO will find it very difficult to apply these new provisions in practice.

PART C: Alternative reform proposals

This submission argues that the Bill is not fit for purpose and instead should be replaced with new reforms which will be more effective in protecting vulnerable temporary migrants in the Australian labour market. These proposed reforms, briefly elaborated below, are drawn from the author's research and other scholarly research in this field. Copies of the author's papers and reports can be provided on request.

This submission recommends the federal government should introduce reforms which:

- **Introduce a one-off status resolution process for undocumented migrant farm workers**.[75] This will incentivise this substantial group of unlawful non-citizens to come forward and regularise their immigration status. This will protect them from exploitation in the labour market by prevent employers from relying on their unlawful status to coerce them to accept lower wages and exploitative conditions. This reform should be accompanied by renewed and robust efforts to detect and disrupt the criminal networks which exploit prospective migrants in their home countries and lure them into undocumented work in Australia.

- **Address the ability of employers to evade employment and migration obligations under the *Fair Work Act 2009* (Cth) and the *Migration Act 1968* (Cth)** through the use of labour hire intermediaries by introducing a national system of labour hire

[74] *Migration Amendment (Protecting Migrant Workers) Bill 2021*, Exposure Draft-Context Paper, p8.

[75] Joanna Howe, *Out of the Shadows: A Case for Status Regularisation for Undocumented Migrant Farm Workers* (Report, 2021).

licensing and through placing obligations on both the intermediary and the putative employer.[76]

- **Remove the fortnightly work hours restriction on international students by abolishing visa condition 8105.**[77] This restriction is unnecessary because visa condition 8202 requires students to make satisfactory course progress and attendance. As I have demonstrated in an article in the *Industrial Law Journal,* visa condition 8105 substantially increases the deportability and vulnerability of international students in the labour market and has been repeatedly used by unscrupulous employers to exploit workers. In a welcome move, due to border restrictions because of the Covid-19 pandemic, the Australian government relaxed the fortnightly work hours limit in certain sectors such as aged care, hospitality, tourism and agriculture where there is an established labour market need. This has been established as a temporary measure and the Department of Home Affairs has undertaken to refrain from cancelling the visas of students who work over forty hours in the prescribed sectors. This reform should be extended after the pandemic.

- **Introduce employer registration and mandatory worker education for all temporary migrant visa classes.**[78] The Seasonal Worker Program has both components in its regulatory design which render it a more effective program in protecting workers from exploitation. There are still improvements which can be made to this program, including encouraging SWP visa holders to report exploitation by providing incentives for them to do so and through giving them an automatic right of return. Nonetheless, the SWP's rigorous pre-approval process and the mandatory worker induction involving the FWO and unions are key worker-protective attributes of this program which have been fundamental to its success.

- **Introduce an independent, transparent, accountable and evidence-based approach to identifying labour shortages in the economy in order to determine which industries and jobs should be eligible for temporary and/or permanent**

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[76] Joanna Howe, '"Predatory Princes", "Migration Merchants" or "Agents of Development"? An Examination of the Legal Regulation of Labour Hire Migration Intermediaries' in John Howe, Anne Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, 2017) 192-205;

Joanna Howe, Alexander Reilly, Chris F Wright, Diane van den Broek and Stephen Clibborn, 'A Critical Examination of the Relationship between Labour Hire Intermediaries and Growers in the Australian Horticulture Industry' (2019) 32 *Australian Journal of Labour Law* 83-102.

[77] Joanna Howe, 'A Legally Constructed Underclass of Workers? The Deportability and Limited Work Rights of International Students in Australia and the United Kingdom' (2019) 48(3) *Industrial Law Journal* 416-446.

[78] Joanna Howe, 'How effective are legal interventions for addressing precarious work? The case of temporary migrants in the Australian horticulture industry' (2020) 44(2) *New Zealand Journal of Employment Relations* 35-50.

Joanna Howe, Alexander Reilly, Stephen Clibborn, Diane van den Broek and Chris F Wright, 'Slicing and Dicing Work in the Australian Horticulture Industry: Labour Market Segmentation within the Temporary Migrant Workforce' (2020) 48(2) *Federal Law Review* 247-271.

Joanna Howe, Diane van den Broek, Alexander Reilly and Chris F Wright, 'A Tale of Two Visas: Interrogating the Substitution Effect between Pacific Seasonal Workers and Backpackers in Addressing Horticultural Labour Supply Challenges and Worker Exploitation' (2018) 31 *Australian Journal of Labour Law* 209-242.

labour migration.[79] Although labour market analysis is undertaken within government, this submission prefers the approach outlined in the government's own independent inquiry report *Robust New Foundations*[80] which suggests that an independent labour market testing model is a better mechanism for determining labour shortages.[81]

- **Provide a guarantee to migrant workers who report exploitation that there will be no immigration-related consequence for reporting workplace exploitation.**[82] There should be a 'complete firewall' between the Department of Home Affairs so that the FWO has the necessary 'formal public independence' to properly deal with the exploitation of migrant workers.[83]

- **Introduce enhanced visa security for migrant workers who are assisting the FWO or ABF in an investigation and/or pursuing remedies through the Fair Work Act, or other causes of action for unpaid wages and other breaches of law.** The Criminal Justice visa provides a template for the creation of a new Employment Justice visa, and either the Fair Work Ombudsman or the Federal Circuit Court may be empowered to issue a 'temporary stay certificate' certifying that a worker's ongoing presence in Australia is required for the conduct of their proceedings.[84]

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[79] Joanna Howe, 'Is the Net Cast Too Wide? An Assessment of Whether the Regulatory Design of the 457 Visa Meets Australia's Skill Needs' (2013) 41(3) *Federal Law Review* 443-469.

Joanna Howe, 'Regulation of Australia's Labour Migration Program: Is there a Case for Including Fairness?' (2016) 29 *Australian Journal of Labour Law* 58-77.

Joanna Howe, 'Accountability and Transparency under the Subclass 457 Visa Program: Is there Cause for Concern' (2014) 21 *Australian Journal of Administrative Law* 139-144.

[80] <https://www.homeaffairs.gov.au/reports-and-pubs/files/streamlined-responsive-457-programme.pdf>.

[81] Joanna Howe, 'Regulation of Australia's Labour Migration Program: Is there a Case for Including Fairness?' (2016) 29 *Australian Journal of Labour Law* 58-77.

Joanna Howe, 'Is the Net Cast Too Wide? An Assessment of Whether the Regulatory Design of the 457 Visa Meets Australia's Skill Needs' (2013) 41(3) *Federal Law Review* 443-469.

[82] Joanna Howe, 'A Legally Constructed Underclass of Workers? The Deportability and Limited Work Rights of International Students in Australia and the United Kingdom' (2019) 48(3) *Industrial Law Journal* 416-446.

[83] S. Clibborn, 'Why Undocumented Immigrant Workers Should Have Workplace Rights' (2015) 26 *Economic and Labour Relations Review* 465; See also, B. Farbenblum and L. Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23 *Australian Journal of Human Rights* 310, 311–2.

[84] See further: B. Farbenblum and L. Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23 *Australian Journal of Human Rights* 310.