Uniting Church in Australia
SYNOD OF VICTORIA AND TASMANIA

Exposure Draft Migration Amendment (Protecting Migrant Workers) Bill 2021

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Our commitment to inclusion

The Salvation Army Australia and the Uniting Church of Australia Synod of Victoria and Tasmania acknowledge the Traditional Owners of the land on which we meet and work and pay our respect to Elders, past, present and future.

We value people of all cultures, languages, capacities, sexual orientations, gender identities and/or expressions. We are committed to providing programs that are fully inclusive. We are committed to the safety and wellbeing of people of all ages, particularly children.

Our values are:

- Integrity
- Compassion
- Respect
- Diversity
- Collaboration

Learn more about our commitment to inclusion:
salvationarmy.org.au/about-us

The Salvation Army is an international movement and our mission is to preach the gospel of Jesus Christ and to meet human needs in his name without discrimination.

About The Salvation Army

The Salvation Army is an international Christian movement with a presence in 128 countries. Operating in Australia since 1880, The Salvation Army is one of the largest providers of social services and programs for people experiencing hardship, injustice and social exclusion.

The Salvation Army Australia provides more than 1,000 social programs and activities through networks of social support services, community centres and churches across the country. Programs include:

- Financial counselling, financial literacy and microfinance
- Emergency relief and related services
- Homelessness services
- Youth services
- Family and domestic violence services
- Alcohol, drugs and other addictions
- Chaplaincy
- Emergency and disaster response
- Aged care
- Employment services

As a mission-driven organisation, The Salvation Army seeks to reduce social disadvantage and create a fair and harmonious society through holistic and person-centred approaches that reflect our mission to share the love of Jesus by:

- Caring for people
- Creating faith pathways
- Building healthy communities
- Working for justice

We commit ourselves in prayer and practice to this land of Australia and its people, seeking reconciliation, unity and equity.

Further Information

The Salvation Army would welcome the opportunity to discuss the content of this submission should any further information be of assistance. Further information can be sought from Major Paul Hateley, National Head of Government Relations, at government.relations@salvationarmy.org.au or on 0413 830 201.

About The Uniting Church in Australia, Synod of Victoria and Tasmania

The Synod of Victoria and Tasmania is part of the Uniting Church in Australia, the country's third largest Christian denomination. The Uniting Church in Australia was formed in 1977, when three congregations – the Methodist Church of Australasia, the Presbyterian Church of Australia and the Congregational Union of Australia – came together.

We are one of six Synods, comprising 600 congregations and more than 60,000 members. We also have 12 schools. We worship every week in more than 40 languages. Through worship, sharing the story of Jesus, and service in the community, we witness to the belief that life is most fully found in God.

Through UnitingCare, the Uniting Church in Australia is the largest non-government provider of community services in Australia, employing more than 70,000 Australians.

We have formal partnerships with 32 churches in Asia and the Pacific and have also been instrumental in pioneering interfaith relationships, including other Christian denominations

We have a strong sense of social justice and actively campaign on a range of issues, including the environment, modern slavery, asylum seekers, fair work and gambling.

We have campaigned against modern slavery in seafood production and processing from Thailand, garment production in India, cotton production out of Uzbekistan, palm oil production from Malaysia and on Australian farms.

Introduction

The Salvation Army and the Uniting Church of Australia (**UCA**) Synod of Victoria and Tasmania welcome the Government's action to further progress recommendations made by the Migrant Workers' Taskforce.

We support several of the proposed measures in this bill, particularly those expanding offences to address abuse of migration status to coerce people into exploitative working conditions. We see this as a necessary complement to the *Migration Amendment (Charging for a Migration Outcome) Act 2015*, which we think fails to recognise the disproportionate leverage migrant workers experience in the employment relationship.

We also support extending current prohibition provisions for breaches of the *Fair Work Act 2009* (Fair Work Act).

While we are generally supportive of the bill as a whole, we are concerned that it does not adequately address some of the key contextual factors contributing to the broader problem of worker exploitation, including:

- The prevalence of exploitation far exceeds the level of law enforcement resources available to address it;
- There continue to be barriers for people who have been exploited to come forward, report the exploitation and assist in the subsequent investigation and prosecution of the employer;
- There continues to be a need for greater support for people who have reported exploitation, so they are able to support an effective prosecution; and
- Authorities need to be able to apply sanctions on employers engaged in illegal exploitation in a timely manner.

More specifically, we see the following potential challenges to the effective and full implementation of proposed reforms:

1. In addressing the problem of people not coming forward to report illegal exploitation, an emphasis on penalties does not resolve the many reasons why migrant and temporary workers do not come forward to reveal workplace non-compliance. Given the proposed new offences will certainly rely on workers both coming forward and also providing corroborating evidence to substantiate that an offence has occurred, greater worker safeguards are required to achieve better detection and enforcement.

   To reduce the reliance on survivor-supported prosecutions, we recommend greater application of sanctions that do not require the participation of survivors. For example, where there is insufficient evidence to prosecute an employer for illegal exploitation of workers, it might be possible to sanction them for employing people in breach of visa restrictions, which is likely to be easier to prove and does not rely on witness testimony. For such prosecutions to be effective, the available sanction needs to be of an adequate level.

2. The prevalence of illegal exploitation of people on temporary visas means the Fair Work Ombudsman (**FWO**) only has the resources to deal with a limited portion of such cases. The Australian Border Force (**ABF**) can provide additional enforcement efforts, if targeted appropriately and sensitively. This requires a change to the manner and appearance of ABF compliance activities in the community. It also requires an active culture of not cancelling visas or removing people where there is a risk those people have been subjected to illegal exploitation.

   Existing perceptions amongst the temporary visa holders that ABF will cancel their visas and remove them, even when they have been subjected to illegal exploitation, may inhibit the ability of the new offences in the Bill to be applied. In our view, there needs to be a more aligned and balanced effort between the FWO and ABF to address exploitation of people on temporary visas where both share a culture in which the exploitation of temporary visa holders is prioritised over any potential breach of their visa conditions. We are not suggesting that this be ignored entirely, but that it be weighed against more serious and systemic criminal activity. Exploited people need assurance that the ABF response will not be to remove them from Australia for visa breaches, but rather to support them to obtain compensation from their employer.

   Recognising the need for strong cooperation between immigration and labour regulators, we submit that it makes more sense for the FWO to be the primary place where people on temporary visas go to report exploitation. Concurrently, a joint, pro-active strategy gathering intelligence and targeting high-risk employers will prevent resources being drawn away from policing the worst employers who have been able to intimidate their employees into not making reports.

3. We have reservations that the Minister should hold responsibility for prohibiting employers for contravention of the Fair Work Act. As discussed under Part 2, we recommend this power sits more naturally under the FWO and we propose several strategies to enhance the enforceability of this mechanism. For the avoidance of doubt, we would support the power sitting with the Minister rather than omitting it altogether.

4. The current threshold for non-compliance, and consequently, timing for enforcing proposed penalties in Part 2 may not serve as a strong deterrent. We base this on criminological evidence that deterrence is greater when the sanction imposed happens immediately after detection of the offence and before non-compliant behaviour becomes entrenched.

We suggest consultations around this exposure draft provide an opportunity to look beyond incremental reforms to how the broader system can be improved; and how it may be more responsive to the factors preventing swift detection and effective deterrence. As such, this submission provides specific responses to proposed amendments to the Migration Act as well as recommendations for more systemic and structural reform.

Part I – New employer sanctions

245AAA and 245AAB

We support, in principle, the introduction of the proposed offences on the basis that they *should* enable authorities to address the use of coercion to manipulate people into substandard or exploitative working conditions without having to prove restriction of movement or forced labour.

To effectively and fully apply these offences, workers will require greater safeguards to warrant reporting their employers and effectively exposing themselves to potential penalties, including fines and removal. We respectfully submit that the Assurance Protocol is not, in itself, an adequate measure to provide vulnerable workers with sufficient confidence that they will not face negative consequences. This is based on anecdotal evidence and findings of the Migrant Workers' Taskforce that while workers who have used the Protocol have received positive outcomes, their number remains comparatively small. The low uptake is likely to be the result of a range of issues, including confusion about the process, general feelings of disempowerment and fear—all of which the Department can address.

In addition to reporting, safeguards are also essential for effective cooperation with criminal justice authorities. In our experience supporting survivors of trafficking and slavery-related crimes, support must include social and legal assistance, as well as a migration pathway through which a person maintains the right to work, support themselves and in many cases, remit wages to family overseas. The evidence shows that the desire and, indeed the need, to work almost always outweighs any concerns about sub-minimum wages or poor working conditions.[1] Without these safeguards, workers will be reluctant to report breaches, cooperate with authorities, and provide corroborating evidence to prove 'undue influence' has occurred.

Proposed Safeguards

1. Review and improve the Assurance Protocol

The current language describing how the Assurance Protocol works on the Fair Work Ombudsman Migrant Worker webpage - "*Home Affairs usually won't cancel your visa if you have breached your visa conditions because of workplace exploitation*"[2] – does not provide an adequate level of certainty and may appear contradictory to the intent and message of the proposed legislation. Recognising these challenges, the Migrant Workers' Taskforce called on the government to "review the Assurance Protocol to assess its effectiveness and whether further changes are needed to encourage migrant workers to come forward with workplace complaints."[3] There needs to be much

[1] Segrave, Marie (2018). Exploited and illegal: Unlawful migrant workers in Australia. Monash University. https://doi.org/10.26180/5bb43a86b84f9.
[2] Fair Work Ombudsman. Migrant Workers. https://www.fairwork.gov.au/horticulture-showcase/migrant-workers#protection.
[3] Commonwealth of Australia. (2019). Report of the Migrant Workers' Taskforce. https://www.ag.gov.au/industrial-relations/publications/report-migrant-workers-taskforce. Recommendation 21.

clearer and definitive language that, where a worker believes they have been tricked, coerced or forced into breaching their visa conditions, that they will not suffer repercussions.

Ideally, the Assurance Protocol would be extended to create a firewall, a policy mechanism that effectively separates immigration enforcement activities from public service provision so that people can access basic services and protections without fear of immigration-related repercussions, such as arrest, detention and removal. Former UN Special Rapporteur for the Rights of Migrants, Francois Crépeau, documented the broad societal benefits that firewalls deliver, including advancing meaningful protection for migrants, promotion of rights for all, and supporting prosperous communities.[4] He noted that "meaningful firewalls recognize that other legitimate interests, such as fundamental rights, public health concerns, fighting crime, legal certainty, as well as social policy considerations should also be taken into account when enforcing immigration law."

In addressing the consequences of not having firewalls, he observed:

> *"While policies and activities which erode firewall protections are often justified on the basis that they are necessary to effectively enforce and enhance immigration laws, this state objective – even if it assume that it is met through the policies and activities described – comes at a significant costs not just for irregular migrants, but for the wider communities in which they reside. In addition, despite claims that allowing access to basic services, without fear of denunciation, increases irregular migration, statistics do not appear to support this."*

Other researchers have observed that a legitimate concern about firewalls is the potential to hamper the ability of agencies to communicate about illegal activity; however, they also observe that this "does not invalidate the utility of a firewall [and] merely calls for it to be appropriately balanced."[5]

2. Clarify and simplify advice to migrant workers who make complaints

We suggest that the advice provided to migrant workers on making a complaint could be improved. While this information currently sits on the Fair Work Ombudsman website, the content relies on agreement with the Department. Information could more directly address key questions that workers who are considering making a complaint will have. For example, we refer the Department to the Employment New Zealand Migrant Worker webpage which directly responds to the question of whether a worker will get in trouble if they complain. We submit that this language is less ambiguous and more encouraging.

[4] Crépeau, François and Hastie, Bethany, (2015). The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights 2-3, European Journal of Migration and Law (EMIL), 157-183, https://ssrn.com/abstract=2780641.
[5] Stringer, Christina and Michailova, Snejina. (2019). Addressing the Exploitation of Temporary Migrant Workers: Developments in Australia, Canada, and the United Kingdom: Report prepared for the New Zealand Ministry of Business, Innovation and Employment, 41. https://www.mbie.govt.nz/dmsdocument/7111-addressing-the-exploitation-of-temporary-migrant-workers-developments-in-australia-canada-and-the-united-kingdom.

Will I get in trouble if I complain?

Some employers know that migrant workers may be afraid to make a complaint, especially if they are working unlawfully or are worried they may be deported.

Some employers use this fear to take advantage of migrant workers. This is wrong. The New Zealand Government wants to stop employers from exploiting migrants. We want you to report any exploitation at work.

Do not be afraid to ask for help. We will treat you fairly. We can take action against the employer.

3. Establish temporary migration relief so workers can safely and quickly leave exploitation

For workers who face the potential loss of their visa and work rights, again we refer the Department to New Zealand's approach, where workers can now access unique, temporary migration relief to enable prompt departure from exploitative situations, maintain legal status, and the ability to work. While the text specifies that Employment New Zealand evaluates and works with Immigration New Zealand, the language focuses on the employer rather than the worker. It also states that workers will receive help connecting with advice, information and support services where necessary.[6]

Importantly, the changes will be supported by a substantial increase in funding for compliance and enforcement through Employment New Zealand and Immigration New Zealand to help ensure departments are better resourced to respond to reports of exploitation and take action.[7]

[6] Employment New Zealand, Migrant Worker Exploitation webpage. https://www.employment.govt.nz/resolving-problems/types-of-problems/migrant-exploitation/. Accessed 05/08/2021.
[7] Employment New Zealand. (2 July 2021). Government announces support to better protect migrants from exploitation, https://www.employment.govt.nz/about/news-and-updates/support-to-better-protect-migrants-from-exploitation/.

What happens when you make a complaint

Employment New Zealand will consider your complaint.

If you agree to be contacted, we aim to contact you within 3 working days. We will confirm the information you gave us and let you know how we can help.

MBIE has introduced the Migrant Exploitation Protection Visa, which will ensure migrants can quickly leave exploitative situations and remain lawfully in New Zealand. The visa is valid for up to 6 months and will be available to those who are holding employer supported work visas, have had their report of exploitation assessed by Employment New Zealand, and have been given a Report of Exploitation Assessment Letter.

Migrant exploitation – Immigration New Zealand

We evaluate all complaints and work with Immigration New Zealand to decide what action should be taken against the employer. This can include educating the employer or taking enforcement action against them.

We can also provide you with help, such as advice, information and connection to the support services necessary for your everyday life in New Zealand, where it is suitable.

245AAA(1) and 245AAB(1)

On a final point, we note that the proposed language "*arrangement in relation to work*' in subsections 245AAA(1) and 245AAB(1) is quite vague and recommend that it be clarified to be broad enough to cover known conditions to which many migrant and temporary workers have been subjected. This includes, for instance, where working holiday makers are made to submit to sexual harassment or sexual acts, as well as sub-standard accommodation and withholding of passports, to receive their employer's sign-off for 'specified work'.

Part 2 – Prohibition on certain employers employing additional non-citizens

245 AYA

We support creating a framework to prohibit certain employers from employing additional non-citizens. We also support creating a mechanism to exclude employers who have been convicted by a court under a civil remedy provision of the Fair Work Act, which we note was a recommendation of the Migrant Workers' Taskforce.[8] We do, however, have three key concerns about how the Department is seeking to implement these reforms, which are principally about positioning them under the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the enforceability of the proposed ban [or prohibition] and whether the ban should be limited to court-ordered provisions as opposed to compliance or infringement notices.

Positioning

Fighting labour exploitation requires strong cooperation between immigration and employment regulators and we recognise these reforms as steps the Minister is taking to uphold his Department's duty to migrant and temporary workers in Australia. We recommend this policy reform would sit better under the Fair Work Ombudsman's jurisdiction, however, we would rather see the measure implemented than delayed on the basis that it needs to be legislated under an alternative portfolio.

In contrast to this proposed Bill, New Zealand's employer stand-down list is "maintained by the Labour Inspectorate and provided to Immigration New Zealand as part of a wider strategy to combat migrant exploitation."[9] Currently operating similar to Australia's sanctioned employers list, the stand-down list is the responsibility of the Labour Inspectorate because the non-compliance is being detected primarily through the Inspectorate's enforcement activities.[10]

In our experience, migrant and temporary workers who have breached their visa conditions as a result of coercion and who may be experiencing exploitation or harassment are more likely to disclose their situation to labour inspectors. This point has been substantiated in numerous reports[11], including the Migrant Workers' Taskforce Report—and is certainly not unique to Australia.

[8] Commonwealth of Australia. (2019).
[9] Immigration New Zealand, 'Employment Law', https://www.immigration.govt.nz/employ-migrants/explore-your-options/your-responsibilities-and-obligations/law-immigration-employment/employment-law. Accessed 5/8/2021.
[10] New Zealand Ministry of Business, Innovation and Employment. (2016). Briefing: Restricting access to migrant workers for employers not compliant with minimum employment standards. Received via personal communication 6/8/2021. A copy is available on request.
[11] Senate Education and Employment References Committee. (2016). A National Disgrace: The Exploitation of Temporary Work Visa Holders, Canberra https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report; and Joint Standing Committee on Foreign Affairs, Defence and Trade. (2018). Hidden in Plain Sight, Canberra, https://www.aph.gov.au/Parliamentary_Business /Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Final_report.

This exposure draft provides an opportunity to look beyond incremental reforms to how the system is and is not working; and how it may be more responsive to the factors preventing swift and effective detection. The benefit to a Fair Work Ombudsman-led approach is that the ABF will still be able to enforce compliance with the Migration Act, and may actually be more empowered to do so. Through information provided by FWO inspectors, ABF will be able to target employers more directly and efficiently, which would likely free up resources to leverage existing penalties under employer sanctions provisions under the Migration Act, of which the Migrant Workers' Taskforce report noted there has been little use.[12]

We suggest as a way forward, that the Department consider a formal mechanism to bridge the two regulatory frameworks whereby each authority determines and publishes a list of employers who have been temporarily stood down or prohibited under their respective legislation. We further suggest that repositioning this responsibility will enable the proposed provisions to prohibit certain employers from employing additional non-citizens, discussed further in the following section.

Enforceability

The Migrant Workers' Taskforce Report asserted that "Action should be able to be taken against any employer who coerces an employee into breaching a condition of their visa, whether the employee is on a sponsored visa arrangement or not."[13] Encouraging a New Zealand-style 'banning scheme', the report also recommended that Australia should "desirably go beyond the New Zealand scheme in covering employers of non-sponsored as well as of sponsored migrant workers." In responding to this, we make two points.

First, New Zealand's 'Banning Orders' are a separate policy instrument to the employer stand-down list—the nearest equivalent to Australia's sanctioned employers list. A banning order is imposed by the Employment Court and means that the person named can no longer employ people for a period of time specified by the court, nor can they hold a role in another company where they manage employees. It does not relate to visas.[14]

Secondly, if the Department was to extend the current sanctioned employers list to include employers prohibited from hiring additional non-citizens already in Australia, enforcement would require monitoring of the employer to ensure they comply. Such monitoring could be implemented by an enforceable undertaking where the employer is required to pay for independent monitoring of their compliance. Enforcement was the primary reason why New Zealand did not extend the stand-down provisions to "foreign nationals with open work conditions", stating: "Immigration New Zealand does not have any control over the employer these people work for."[15]

Some additional avenues to progress this policy aim are:

[12] Commonwealth of Australia. (2019), 123.
[13] Commonwealth of Australia. (2019), 123.
[14] New Zealand Ministry of Business, Innovation and Employment, personal communication, 5/6/2020.
[15] New Zealand Ministry of Business, Innovation and Employment. (2016).

1. Repeal legislation that made the Working Holiday Maker Employer list confidential,[16] thereby enabling working holiday makers and members of the public to confirm their employer's identity and tax compliance status. This register should be linked to a public, prohibited employers list to empower workers to verify whether their employer is fit and proper;
2. Include a provision in relevant legislation whereby the Fair Work Ombudsman notifies current employees of prohibited employers to make them aware of their employer has been placed on the ban list. While this would not necessarily prevent employers from hiring additional non-citizens, it would empower workers to make informed decisions and to notify authorities when employers are ignoring prohibition orders;

3. Returning to New Zealand's approach, we submit that the Fair Work Ombudsman is better placed to manage a list, inform employees of decisions made against their employer and receive further communication with those employees; and

4. Finally, the Australian Government should introduce a mechanism similar to a Banning Order, whereby employers engaged in *serious, repeated* non-compliance are unable to hire any employees, including vulnerable Australian workers. This mechanism would be one of last resort and would likely be used sparingly but would provide a natural escalation for employers who defy earlier interventions. Similar to director disqualification, which we have recommended in past inquiries and consultations[17], Banning Orders targeted at individuals would help to prevent seriously non-compliant employers from phoenixing and setting up new companies through which to continue to break the law. We note, however, that once a company or director is banned, further action is required to prevent them from looting the assets of the business and avoiding paying employee entitlements and creditors. Under Section 461 of the *Corporations Act 2001* the company can be wound up by a court who will appoint an administrator to avoid the looting of the remaining assets. Sections 590 and 592 also make it an offence for the directors to have entered into arrangements to fraudulently conceal or shift assets out of the company. We recommend that both these safeguards would be necessary if a banning power was introduced. Again, this responsibility is best positioned with the Fair Work Ombudsman, who has oversight of and clearer visibility into the labour market.

An adequate threshold for non-compliance

With specific regard to subsection 245AYA(2)(d) and 245AYD(4)(d) we are concerned that the threshold for non-compliance is too high and will mean that a comparatively few number of non-compliant employers will be added to the list.

Firstly, while litigation typically involves the most serious of matters, only a small proportion reach that stage. In 2019-20, the Fair Work Ombudsman initiated 54 litigations, with three related to serious contraventions, while the majority of non-compliance matters were managed through other

[16] *Treasury Laws Amendment (Working Holiday Maker Employer Register) Act 2018.* https://www.legislation.gov.au/Details/C2018A00125.
[17] The Salvation Army and Uniting Church of Australia Synod of Victoria and Tasmania. (2020). Joint Submission to the Industrial Relations Secretariat Industrial Relations Reform Working Groups, (Formerly 'Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework'). A copy is available on request.

mechanisms, including 603 Infringement Notices and 952 Compliance Notices.[18] We note it appears to be the same under Migration Act work-related offences.[19]

Secondly, litigation is already a last resort and can take years. As we discuss further under Part 4, the criminological literature demonstrates that delayed sanction is less of a deterrent. We submit that adopting New Zealand's approach, where employers may be stood down not just by a penalty ordered by the court but also when an infringement notice is issued by a Labour Inspector or a penalty is ordered by the Employment Relations Authority would enable authorities to prevent non-compliant behaviour from becoming entrenched. We note there is some complexity with provisions under the Fair Work Act where, if a compliance matter is resolved, the contravention is taken to have not occurred. To the extent that this would prevent an employer from being stood-down on the basis of a Compliance Notice, some amendment to the Fair Work Act may be required.

Finally, it is our view that the provisions set out in 245AYA(2) and 245AYD(4), provide sufficient grounds to declare an employer as 'prohibited' in the first instance and that employers may appeal that decision once declared—not before. Regardless of any changes made to the threshold, employers should not be able to continue to hire additional non-citizens while challenging their prohibition. Referring again to the New Zealand model, employers who have challenged their penalties and consequent placement on the stand-down list remain on the list until the outcome of their challenge.

A representative of the Ministry of Business, Innovation and Employment acknowledged to us that their system, including all the provisions discussed above, is a deliberate strategy to incentivise resolution of disputes, to deter repeat, serious non-compliance, and ultimately reduce the need for costly and onerous court proceedings.[20] Additionally, when asked about the effectiveness of their approach, Ministry staff cited feedback from stood down employers that "they would rather have a large penalty imposed on them than be put on the stand-down list"[21].

245 AYB

We do not support the proposed exclusion of employment in a 'domestic context'. While we understand this is intended to separate personal from professional conduct, we suggest the language be clarified to apply to certain circumstances involving work in a domestic context. There is extensive evidence that home-based workers, including au pairs, nannies, NDIS and domestic workers, are particularly vulnerable to exploitation and potentially forced labour.[22] Many of these workers are on sponsored visas, thus the legislation should apply here.

[18] Fair Work Ombudsman. (2020). Annual Report. https://www.fairwork.gov.au/about-us/accountability/annual-reports.
[19] Department of Home Affairs. (2020). Annual Report, 26 and 239. A total of 184 Illegal Worker Warning Notices were issued in 2019-20. The report does not provide detailed information on specific outcomes achieved by Operation Battenrun or penalties issued under employer sanctions provisions. https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/home-affairs-annual-report-2019-20.pdf.
[20] New Zealand Ministry of Business, Innovation and Employment, personal communication, 6/8/2021.
[21] New Zealand Ministry of Business, Innovation and Employment, personal communication, 5/6/2020.
[22] Berg, Laurie and Meagher, Gabrielle. (2018). *Cultural Exchange or Cheap Housekeeper? Findings of a National Survey of Au Pairs in Australia*. Sydney: Macquarie University. https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5bfcd3040ebbe858997ee1f7/1543295760802/UTS0001+Au+Pairs+in+Australia+Report_final.pdf; Moore, Heather. (2019) Service or Servitude: A Study of Trafficking for Domestic Work in Australia. Mercy Foundation and The Salvation Army. https://www.mercyfoundation.com.au/wp-content/uploads/2019/08/Service-or-Servitude-Domestic-Servitude-in-Australia-Report.pdf.

We accept the need for an exclusion that would allow someone to pay trades people for isolated work tasks in their place of residence or other residential properties they may own. In such circumstances, the banned person should not be allowed to be the direct employer of the person conducting the work. The person conducting the work should either be employed by an unrelated employer or be a sole-trader.

Part 3 – Use of computer system to verify immigration status

We welcome Part 3 of the exposure draft to strengthen the requirements to use the Visa Entitlement Verification Online (VEVO) system to verify that a person is allowed to work under their visa. As highlighted by the Migrant Workers' Taskforce, people who end up working in breach of their visa are highly vulnerable to being abused through exploitation, as noted in the Context Paper.[23] There is a need to ensure that the ultimate employer is held to account for the employment of people on temporary visas in breach of their visa conditions unless they can demonstrate they took all reasonable steps to try and ensure the person had the legal rights to work in the employment in question.

Our own experience is that too many employers have attempted to use labour-hire businesses and other intermediaries to knowingly or recklessly establish plausible deniability that they did not know people were employed in breach of their visa conditions. Establishing required system users will allow individuals and industries with the highest risk of non-compliance to be required to use the VEVO system and be unable to try and shift blame for any non-compliance onto other intermediaries.

[23] Department of Home Affairs, 'Migrant Amendment (Protecting Migrant Workers) Bill 2021. Exposure Draft – Context Paper', 2021, 2.

Part 4 – Aligning and increasing penalties for work-related breaches and Part 6 – Compliance notices for work-related breaches

We support the increased penalties in Part 4 and the introduction of compliance notices for work-related breaches in Part 6.

Allowing law enforcement bodies, a more comprehensive range of powers will enable them to tailor enforcement and sanctions more effectively to drive compliance from the regulated entities. We refer to arguments from the criminological literature that the availability of criminal law and high penalties is important—not because of their deterrence impact, but because of their moral implications in legitimating and substantiating content of the message about compliance at the bottom of the regulatory pyramid.[24]

Light Touch Sanctions and Deterrence

There is a need for some caution about using light touch sanctions. The standard regulatory pyramid results typically in the lightest touch intervention by the law enforcement agency being used in response to a first detected breach of the law for many of the crimes associated with the exploitation of people on temporary visas. For example, the Department of Home Affairs *The Administration of the Immigration and Citizenship Programs* notes that only 22 infringement notices were issued to employers for not meeting sponsorship obligations from 1 July 2020 to 31 March 2021.[25] However, work by behavioural economist Dan Ariely suggests greater deterrence is needed on the first offence. In a range of tests around dishonesty, he concluded that it is important to counteract the first time someone is dishonest as once a person starts being dishonest, it can lead to other acts of dishonesty over time:

> *The first act of dishonesty might be particularly important in shaping the way a person looks at himself and his actions from that point on – and because of that, the first dishonest act is the most important one to prevent.*[26]

We suspect that the first time many breaches of the law are detected concerning exploitation of people on temporary visas, it will be after the person breaking the law has done it many times. It is likely that for most people breaking the law concerning the exploitation of people on temporary visas, the pattern in their behaviour has already been established by the time their illegal activities are first detected. Further, it will take the imposition of meaningful consequences and follow-up to change that pattern.

[24] Hardy, Tess. (2021). 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement', *Industrial Law Journal,* 139-140.
[25] Department of Home Affairs. (2021), 52. https://immi.homeaffairs.gov.au/programs-subsite/files/administration-immigration-program.pdf.
[26] Ariely, Dan. (2012). 'The (Honest) Truth about Dishonesty', HarperCollins Publishers, London, 137.

In this context, there is a danger in the use of compliance notices that it may reinforce in the offender's mind that the illegal activities they are engaged in are not seen as serious and lead to further offending when the opportunity arises. We note that the penalty for non-compliance with a compliance notice is currently a fine of just over $10,000, which could reasonably be regarded as a modest penalty given the level of profit that can be made from exploiting people on temporary visas.

Against those concerns, it has been argued that the initial deployment of 'softer' forms of social control later legitimises the regulator's use of more punitive sanctions. Such an approach is argued to have positive compliance effects in that regulation perceived as more procedurally fair tends to strengthen commitments to comply.[27]

Need for sanctions to be imposed promptly

Nonetheless, evidence shows that deterrence is greater when the sanction imposed happens immediately after detection of the offence. Delayed sanction is far less effective as a deterrent. Where it is impossible to impose a sanction immediately, a sanction regime can increase its deterrent effect by signalling to an offender that their violation has been detected and the sanction might be delayed but will be inevitable.[28] The immediacy of infringement notices has been found to have a more significant deterrent effect than might be expected based on the size of the fine in question.[29]

Need to hold individuals to account in addition to legal entities

There is a need to hold the individuals behind illegal activity to account for the decisions they have made and not allow them to hide behind corporate entities. It has been recognised that where a company is fined, rather than the individuals involved, the penalty fails to act as a general deterrent to the illegal behaviour. Associate Professor Soltes gives an example:

> *For instance, the day after settling criminal charges with federal prosecutors for helping wealthy individuals evade taxes, executives at Credit Suisse held a conference call to reassure analysts that the criminal conviction would have "no impact on our bank licenses nor any material impact on our operational or business capabilities." And, ironically, fines levied on offending firms are ultimately paid by shareholders rather than by executives or employees who actually engaged in the misconduct. Without the spectre of the full justice system hanging over them, as is the case with individual defendants, labelling firms as criminal often has surprisingly weak, or even misdirected, effects.*[30]

[27] Hardy, Tess. (2021), 139.
[28] Hardy, Tess. (2021), 145.
[29] Hardy, Tess. (2021), 146.
[30] Soltes, Eugene. (2016). 'Why they do it', Public Affairs, USA, 325.

Need to properly resource detection

Criminological research has demonstrated that increasing penalties alone cannot substitute the need to resource the law enforcement body properly. Some of the criminological literature points to the ability to get away with criminal activity, such as the theft of employees' wages, is a far more important determinant of such activity than the level of penalty that may result if there is a successful prosecution. There is also a critique of the regulatory pyramid in that its graduated or accommodative response may not be suitable or effective where inspections and audits are infrequent.[31]

Accurate cost-benefit assessments are rarely feasible for those engaged in financial crimes. Also, those involved in financial crime often pay little attention to penalty information, and they frequently underestimate their chances of getting caught.[32]

Counter to that, there is evidence that some people who engage in crimes that provide them with financial profit do weigh up the cost-benefit trade-off of their actions. For example, Gregg Ritchie, one of KPMG's senior tax partners in the US, broke the law when he advised his firm not to register a tax shelter with the International Revenue Service. In a memo to colleagues, he stated, "Firstly, the financial exposure of the firm is minimal. Based on our analysis of the applicable penalty sections, we conclude that the penalties would be no greater than $14,000 per $100,000 in KPMG fees." He also argued it was simply the industry norm “There are no tax products marketed to individuals by our competitors which are registered.”[33] He concluded:

> *Any financial exposure that may be applicable can easily be dealt with by setting up a reserve against fees collected. Given the relatively nominal amount of such potential penalties, the Firm’s financial results should not be affected by this decision…. The rewards of successful marketing of [the tax structure] product (and the competitive disadvantages which may result from registration) far exceed the financial exposure to penalties that may arise.*[34]

The criminological literature on effective crime deterrence demonstrates that there is substantial evidence that the increased visibility of law enforcement personnel and allocating them in ways that materially heighten the perceived risk of apprehension can deter crimes.[35] This literature finds that perceived certainty of punishment is associated with reduced intended offending.[36] The conclusion is that certainty of apprehension and not the severity of the legal consequences ensuing from apprehension is the more effective deterrent.[37]

In contrast, a 2016 review of state-based wage theft legislation in the US found that most wage theft laws had no statistical effect on the rates of wage theft. The one state where there was a statistical

[31] Hardy, Tess. (2021), 139.
[32] Hardy, Tess. (2021), 137.
[33] Soltes, Eugene. (2016), 90.
[34] Soltes, Eugene. (2016), 90.
[35] Nagin, Daniel S. (2013). ‘Deterrence in the Twenty-First Century’, *Crime and Justice* Vol. 42, No. 1, 201.
[36] Nagin, Daniel S. (2013), 201.
[37] Nagin, Daniel S. (2013), 202.

decline in wage theft imposed the highest penalty, being three times the damage caused, but backed by adequate levels of enforcement.[38]

The 2012 work by behavioural economist Dan Ariely, *The (Honest) Truth About Dishonesty: How We Lie to Everyone--Especially Ourselves* found that people generally cheat if they think they can get away with it. They cheat up to the level they feel they can justify (for most people, that is a small amount of cheating). Most people who would consider themselves honest will cheat for personal gain if they are given the opportunity.[39]

Ariely found that people have a basic capacity to be morally flexible and reframe situations and actions that reflect positively on themselves. Culture influences dishonesty in two main ways: "It can take particular activities and transition them into and out of the moral domain, and it can change the magnitude of the fudge factor that is considered acceptable for any particular domain"[40]. The 'fudge factor' refers to how dishonest a person can be and still see themselves as honest.

Targeted crackdown periods only have transitory effects, meaning they must be regularly repeated to have a sustained deterrent effect. There is a decline in deterrent response from a crackdown or blitz operation as potential offenders learn through trial and error that they had overestimated the certainty of getting caught at the beginning of the crackdown, leaving a residual deterrence. The crime suppression effect that extends beyond the intervention lasts until the offender learns by experience or word of mouth that it is once again safe to break the law.[41] What is critical in building compliance is the perception of the regulated population of businesses that non-compliance will be detected and subjected to meaningful sanction.[42]

Conclusion of what works for general deterrence

Meta-analysis of what works to deter businesses from breaking the law found that a combination of enforcement strategies worked best, rather than the over-reliance on just one approach.[43] A combination of law, regulatory policy and punitive sanctions was found to have a significant deterrent effect on businesses breaking the law. Inspections had the most effective deterrent impact on companies willing to break the law.[44] The researchers concluded:

> *It makes sense to focus on regulatory policies at the middle level of the [regulatory] pyramid where persuasion is generally most needed to achieve compliance. Specifically, our findings indicate that policies may be more successful when industry has some input and policies are coupled with education and consistent inspections. More severe strategies (regulatory*

[38] Hardy, Tess. (2021), 144.
[39] Ariely, Dan. (2009). 'Predictably Irrational', Harper, London, 197-201, http://danariely.com/2012/06/10/women-men-and-math-problems/.
[40] Ariely, Dan. (2012), 242.
[41] Nagin, Daniel S. (2013), 215.
[42] Hardy, Tess. (2021), 145.
[43] Schell-Busey, Natalie, Simpson, Sally, Rorie Melissa and Alper, Mariel. (2016). 'What Works? A Systematic Review of Corporate Crime Deterrence', *Criminology and Public Policy* Vol. 15 No. 2, 401.
[44] Schell-Busey, Natalie, Simpson, Sally, Rorie Melissa and Alper, Mariel. (2016), 404.

investigations, penalties, civil suits and arrest/jail time) should be added where compliance has been difficult to achieve.[45]

Further:

Results offer support for a model of corporate regulatory enforcement that blends cooperation with punishment –the type and amount of enforcement response to be determined by the behaviour of the manager/ company (i.e., responsive regulation). Thus, at the top and even middle levels of the enforcement pyramid, multiple "levers" may need to be pulled to achieve compliance.[46]

In conclusion, we recognise that work-related offences concerning the exploitation of people on temporary visas have been an area where it has been difficult to achieve compliance, and thus more substantial penalties, backed by greater certainty of detection and imposition of the sanctions is warranted.

[45] Schell-Busey, Natalie, Simpson, Sally, Rorie Melissa and Alper, Mariel. (2016), 406.
[46] Schell-Busey, Natalie, Simpson, Sally, Rorie Melissa and Alper, Mariel. (2016), 408.

Part 5 – Enforceable undertaking for work-related breaches

We support the introduction of enforceable undertakings in Part 5. Though there has been little evaluation of the deterrent effect of enforceable undertakings, there is some emerging promising evidence that they can be effective if designed and coupled with other mechanisms for corrective action.

A pilot research project conducted for the Australian Security and Investments Commission (ASIC) found that enforceable undertakings for financial crimes improve compliance behaviour in competitor businesses.[47]

A limitation of this study was that the finding was based on interviews with people in companies in the same business segment as businesses subjected to enforceable undertakings. The assessment was not made by studying the actual behavioural change of other firms in the same business segment. Thus, the assessment drew its conclusions on what interviewers said the impact of the enforceable undertakings had been rather than an assessment of the actual behavioural change across businesses in the same sector. The researchers indicated that they had been unable to find any previous research into the general deterrence effect of enforceable undertakings.[48]

A recent paper by Associate Professor Tess Hardy found that enforceable undertakings can have the advantage of requiring the business or individual in question to have to make systemic changes to their business model, which may far outweigh any available civil penalty. Requirements to repair or rebuild systems may have a more substantial specific deterrence impact on a business than a one-off fine.[49] They might also be backed up with independent monitoring.

Associate Professor Hardy further noted that the effectiveness of enforceable undertakings as a tool for general deterrence is undermined if they take years to negotiate and are not made public.[50]

In conclusion, we recommend an enforceable undertaking should be allowable grounds for an employer to be added to the ban list, at the Minister's or Fair Work Ombudsman's discretion.

[47] Nehme, Marina, Anderson, Jessica, Dixon, Olivia and Kingsford-Smith, Dimity. (2018). 'The General Deterrence Effects of Enforceable Undertakings on Financial Services and Credit Providers', Centre for Law, Markets and Regulation, 4.
[48] Nehme, Marina, Anderson, Jessica, Dixon, Olivia and Kingsford-Smith, Dimity. (2018), 11.
[49] Hardy, Tess. (2021), 152-157.
[50] Hardy, Tess. (2021), 147.