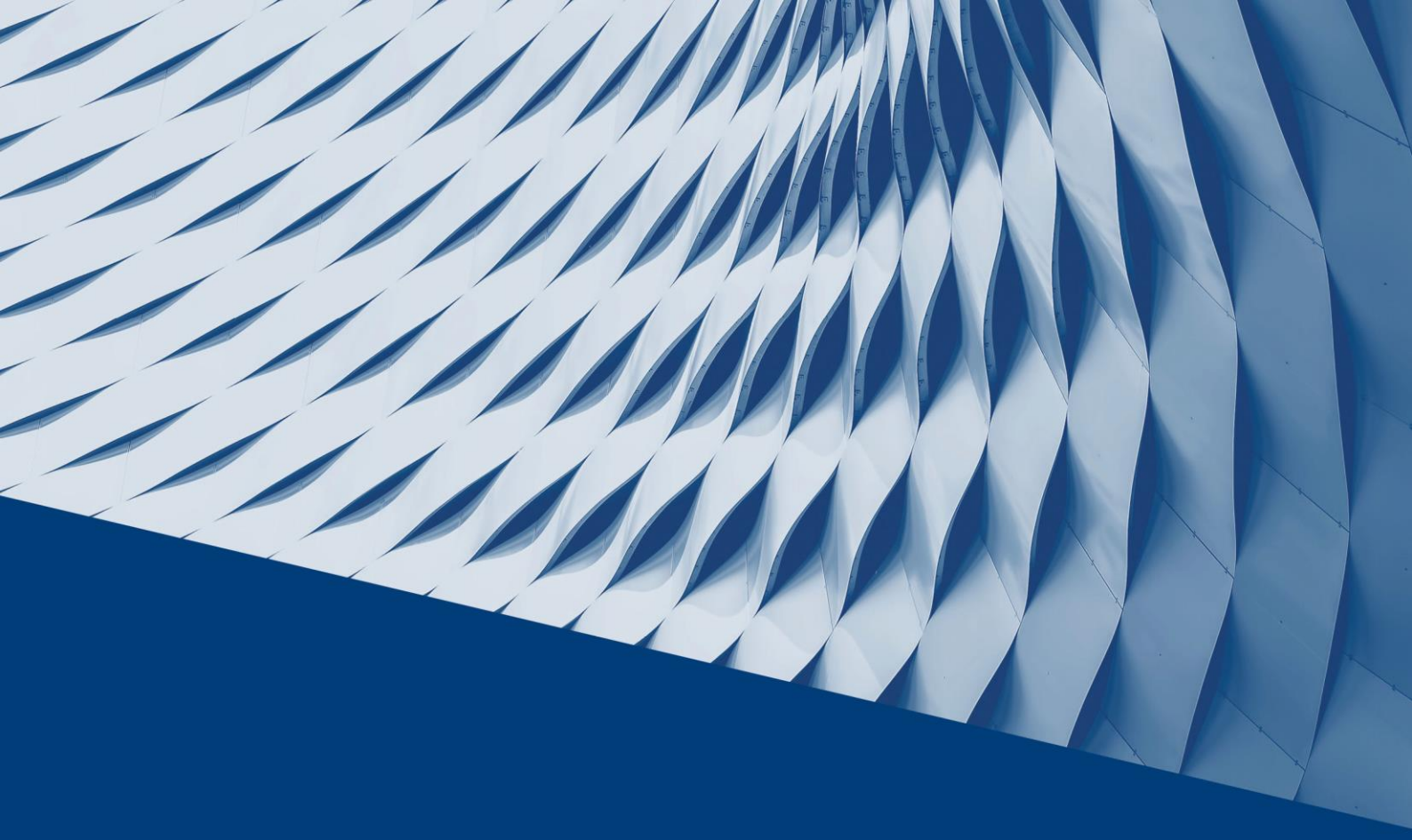

ACTU response to Migrant Amendment (Protecting Migrant Workers) Bill 2021

ACTU Submission in response to the Migrant Amendment (Protecting Migrant Workers) Bill 2021

ACTU Submission, September 2021
ACTU D. No 51/2021

ACTU
australian council of trade unions

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Summary

Australia has an underclass of exploited temporary visa holders and a temporary skilled visa system that is currently driven by the interests of business rather than the interests of the Australian people. We need to transform Australia's visa system by putting Australia's workers first, ending the exploitation of temporary visa holders and prioritising permanent migration

The ACTU is pleased to have the opportunity to make a submission on the exposure draft of the Migrant Amendment (Protecting Migrant Workers) Bill 2021. 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 increase the protection of temporary migrants in the workplace, its substantive effect in this respect will be negligible.

- **The Bill is underpinned by a fundamentally incorrect assumption that 'a small number of employers engage in exploitative behaviours'**.

- **Exploitation is widespread**; 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 - 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

- **The new offences will be unlikely to be effective as there is no protection for migrant workers in reporting exploitation.** The Bill does not improve the inadequate protection given to migrant workers who make a complaint of exploitation to the FWO or to a union.

- **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. 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.

- **We need comprehensive reform of the entire migration system.** This Bill is not ft for purpose. Reforms the Government are making elsewhere such as the introduction of the

new Agriculture Visa will expand the number of potentially exploited migrant workers and exploitation will increase not decrease due to the Governments approach.

We look at these issues in more detail below.

The exploitation of migrant workers is systemic and widespread

The Bill is underpinned by a fundamentally incorrect assumption that 'a small number of employers engage in exploitative behaviours'1. 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.

Exploitation in Horticulture

There is significant evidence of substantial wage underpayments in horticulture, particularly among WHMs, in academic research[2], parliamentary inquiries and in publications from the FWO[3]. 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[4]. 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.

As esteemed academics such as Joanna Howe have made clear 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. Strengthening these by enhancing existing penalty, compliance and enforcement frameworks is insufficient. A completely new approach is

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

[2] 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').

[4] Laurie Berg and Bassina Farbenblum, Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey (Report, November 2017) 30

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.

Addressing the rampant exploitation of temporary Migrants:

The Government has done very little to deal with the rampant exploitation on other visas such as students and Working Holiday Maker visa holders. Exploitation of working holiday workers in the farm sector includes cases of underpayment, provision of substandard accommodation, debt bondage, and employers demanding payment by employees in return for visa extensions.

A new report from the Migrant Workers centre and NSW Unions entitled 'Working for $9 a day Wage Theft & Human Rights abuses on Australian farms[5]' found an alarming majority of fruit and vegetable pickers in Australia were victims of wage theft, with nearly 80 per cent of 1300 horticulture industry workers reporting experiences of underpayment. The survey, conducted by Unions NSW and the Migrant Workers Centre in Victoria, was the latest to expose the inhumane treatment of the workforce, which was accused of systematically exploiting vulnerable overseas workers on temporary visas (we have attached a copy of the report for members perusal).

Recent evidence released from the Fair Work Ombudsman has also revealed the systemic exploitation of working holiday makers where 28% did not receive payment for work undertaken and 35% stated they were paid less than the minimum wage. In addition, over the past few years we have witnessed a seemingly endless wave of stories of serious worker exploitation and intimidation in a number of well-known franchises, including 7-Eleven, Pizza Hut, Caltex, Domino's Pizza and United Petroleum.

We review some of the academic literature on the exploitation of migrant workers and modern slavery below. These academic articles provide empirical evidence on the need for widespread change of the migration system.

[5] 'Working for $9 a day Wage Theft & Human Rights abuses on Australian farms', Unions NSW, 2021

Underpayments on the Harvest Trial is both severe and widespread

A recent article in the Journal of Australian Political Economy, published in 2020, entitled 'Harvest labour markets in Australia: Alleged labour shortages and employer demand for temporary migrant workers', by Iain Campbell has revealed the extensive level of underpayments on the Harvest Trial. Campbell notes:

> *'Harvest labour, as lower-skilled work conducted under casual conditions, has long been associated with labour insecurity and low wages.[32] But what is startling about recent studies and media reports is the mounting evidence of employer non-compliance with minimum labour standards, centring on illegal underpayments.'*

Campbell goes on to note that it is clear that underpayments for seasonal workers in horticulture have become both 'severe and widespread'. He assesses the recent empirical evidence:

> *'the National TMW Survey suggest that fruit and vegetable picking and packing stands out from other TMW jobs for the severity of underpayments (Berg and Farbenblum 2017: 5, 21). With respect to incidence, most studies conclude that underpayments in horticulture are 'endemic' or 'rife' (FWO 2018; Howe et al. 2019; see also MWTF 2019; Senate 2017: 59).[33] The most compelling data come from an online survey of harvest workers, where effective hourly wage rates were estimated and disaggregated according to the channel of recruitment (direct employment or contracting) and mechanism of payment (piece rates or hourly pay) (Underhill and Rimmer 2016: 619; Underhill et al. 2018: 684-5). The survey was conducted at a time when the minimum wage rate under the Horticulture Industry Award 2010 was $21.09 for casual employees. Data for 233 TMWs suggest a wide range of levels of payment, including even some cases of hourly rates above the award minimum (Table below). At the bottom end, however, wage rates were very low, especially in cases of payment by piece rates, whether by a farmer or a contractor.'*

Table: Average hourly earnings (AUD$) for harvest workers

	Median	Minimum	Maximum
Paid by the hour			
Employed by farmer (96)	19.0	7.0	28.85
Employed by contractor (35)	15.0	5.0	22.20
Paid by output (piece rates)			
Employed by farmer (72)	12.0	3.30	30.0
Employed by contractor (30)	8.0	2.0	17.0

Underhill et al. 2018: 685.

Note: The data here refer just to TMW harvest workers. The survey also attracted responses from a small number of Australian harvest workers, whose wage rates did not vary significantly from those reported by the TMW workers (personal communication 12 July 2019).

All four categories of employment distinguished in the Table above have median hourly wages that are well below the minimum hourly rate of $21.09. This indicates that, though some workers might receive the legal rate (or more), the majority of harvest workers in the survey was underpaid. It further suggests, consistent with results of recent FWO investigations of employer non-compliance (2018: 26), that the majority of growers and contractors was engaged in underpayment.

Though all workforce groups are at risk of underpayment, it seems that underpayment is almost universal for undocumented workers (Segrave 2017), widespread for working holiday-makers (Berg and Farbenblum 2017; FWO 2016; Tan and Lester 2012), and increasingly common for participants in the SWP (Forsyth 2016: 301-4; JSCFADT 2017; Petrou and Connell 2018).'

It is clear from the above review of the empirical evidence that there are endemic levels of wage theft across the Harvest trail amongst various visa types. This is not a few unscrupulous employers that have made mistakes but rather a business model that become common place and normalised. There is an underclass of agriculture workers in Australia who are regularly exploited.

New offences for employer coercion will be ineffective as there is no incentive for temporary migrants to come forward

Part 1 of the Bill introduces new criminal offences and related civil penalty provisions. These prohibit employer coercion of temporary migrants. 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.

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. Put simply migrant workers are scared to come forward when exploitation occurs due to a fear of being deported.

Secondly, the new offences and civil penalty counterparts appear to be a piecemeal response in circumstances where the scale and severity of exploitation suggests a belts and braces approach is required. Whilst the proposed civil penalty in section 245AAA may contribute to improved outcomes in the sector in the event it were enforced, there are clearly a multitude of scenarios where a prosecuting authority would have doubts as to whether it could in fact prove coercion or undue influence in the face of the denials of the defendant even if the complainant were capable of being persuaded to give evidence, given the "one on one" contest this is likely to involve. An approach which could conceivably make a greater contribution to arresting the behaviours at issue would involve supplementing (not replacing) that proposed civil penalty with two further ones: One which seized on an *intent* to coerce the non-citizen to enter into an arrangement that breached (or would breach) a work-related condition (coupled with a statutory presumption of intent of the type found in section 361 of the *Fair Work Act*); and another which expanded the liability in section 245AC beyond "allowing" or "continuing to allow" work in breach of a work-related condition to liability for offering work in breach of such a condition. Similarly, the prospect of punishing behaviours sought to captured by the proposed civil penalty in section 245AAB might be increased if a further penalty were introduced for engaging in conduct that misleads or is likely to mislead a non-citizen in relation to a work-related visa requirement.

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

The Bill does not improve the inadequate protection given to migrant workers who make a complaint of exploitation to the FWO or to a union. Because the Department has enormous discretion when choosing which migrant workers to deport 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. 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.

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

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'. 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.

The provisions concerning "prohibited employers" are unwieldy

Whilst we accept that the provisions of Part 2 of the Bill represent an effort to respond to recommendation 20 of the of the Report of the Migrant Workers' Taskforce, we are concerned that they will be unworkable in practice.

Firstly, it is unclear why contraventions of Part 3-1 of the Fair Work Act 2009 (which include such matters such as misleading an employee in relation to their workplace rights, dismissing them for making a complaint or exercising their workplace rights, sham contracting and freedom of association) are not included among the contraventions which would render an employer subject to potential "prohibition".

Secondly, it is not appropriate in our view for the Minister to be the decision maker in the proposed process in which the only person entitled to be heard is the employer who faces prohibition. Whilst the Minister's decision is proposed to be reviewable by the AAT, it seems from proposed subsection 245AYD(11) that it is only a decision to declare an employer as prohibited which is examinable - not a decision to decline to do so. Given the public interest issues at play, there is merit in a broader, transparent and more accountable application based process (for example with standing given to workers, regulators and registered organisations) at first instance. The Fair Work Commission would be a suitable Tribunal to determine such applications.

Thirdly, the requirement that a relevant employer be subject to an order of a Court in relation to the matters dealt with in proposed subsections 245AYD(4)(d) and 245AYD(10) ignore the reality

that the overwhelming majority of workplace issues are dealt with other than by final determination of a Court. A more appropriate response would be to allow the employer to be prohibited where the decision maker (ideally the Fair Work Commission as above) was satisfied that the relevant provisions were contravened, on the basis of all available evidence (including evidence previously produced to the FWO or obtained by an officer or employee of a registered organisation exercising entry rights. A secondary power of "prohibition" could be given to Courts when making orders about relevant Fair Work Act contraventions in the matters that are before them.

Fourthly, the Bill specifies in relation to civil penalties for work-related provisions in the Migration Act that an employer must be subject to a civil penalty order of a Court to be amenable to prohibition, yet at the same time it diverts the enforcement of those work-related provisions away from the Courts by way of compliance notices and enforceable undertakings. It would be far more coherent if the failure to comply with a compliance notice issued or enforceable undertaking entered into in relation to a work-related provision were also triggers for the prohibition power.

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 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. This will exacerbate the vulnerability of temporary migrants in the labour market and could lead to more exploitation not less.

In depicting the 'fissured workplace'6, David Weil, former head of the Wages and Hours Division in the Obama administration, explains how employers reduce labour costs through practices such

[6] 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.

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 labourer is from the ultimate beneficiary of that labour, the greater the chance for violation or exploitation. Violations tend to be greatest where margins are slimmest.7'*

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.

Some employers used non-compliant labour hire intermediaries to facilitate substantial levels of wage theft and exploitation. 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 noncompliant 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.

The new Agriculture Visa will lead to more exploitation of migrant workers despite this Bill

Despite this bill it is clear the Government is making changes to the visa system that will lead to more exploitation not less. The new Agriculture Visa is a case in point. The ACTU has profound concerns surrounding the new agriculture visa.

To date there has been no consultation with the ACTU or affiliated unions regarding this new scheme. We are concerned that there will be less worker protections than other seasonal visa's such as the Seasonal Worker Program for the Pacific (SWP) and fear this could lead to significant levels of migrant worker exploitation and underpayment.

The new scheme would undermine the SWP, which is the centrepiece of the flagship Pacific Step-up. This visa is not simply an agriculture visa given the industry coverage not only includes

[7] 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

agriculture but meat processing, forestry and fishing. The arbitrary inclusion of specific industries is without foundation.

We are concerned that without effective and enforced labour market testing workers in Australia will miss out on job opportunities. The community needs to be assured that employers and others will not use this new visa as an instrument of wage suppression or exploiting vulnerable temporary overseas workers who are unaware of their rights or not in a position where they feel able to exercise those rights.

The recent expose of extreme exploitation of migrant workers in the meat processing industry is illuminating. The graphic images of Chinese meatworkers enduring workplaces injuries that was seen in the Sydney Morning Herald[8] is testament to what unions have been saying for years. We fear an expansion of temporary migrant workers, with less workplace protections, in this and other sectors will lead to further exploitation. Unfortunately, neither the ACTU nor our affiliated unions have been consulted on the need for, design or implementation of the new agriculture visa.

We need comprehensive reform of the whole migration system. This Bill is not fit for purpose

This 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. This submission recommends the federal government should introduce reforms which are more comprehensive in nature to address exploitation of migrant workers and systematically change the migration program.

1. **There needs to be an easy, cost effective and simple way to resolve wage theft -**
   A straightforward cost-benefit theory explains why so few temporary migrant workers try to recover unpaid wages. That is, when the low likelihood and quantum of a successful outcome are weighed against the time, effort, costs and risks to immigration and/or employment status, it is rational that individual temporary migrant workers are not seeking remedies even if they are being significantly underpaid. A simple, cost effective and easy way to recover wages is crucial in dealing with systemic wage theft and exploitation.

8 https://www.smh.com.au/national/chinese-meatworkers-bear-the-scars-of-mistreatment-in-australia-s-visa-factories-20210826-p58m51.html

2. **A national system of labour hire licencing;** 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 licensing and through placing obligations on both the intermediary and the putative employer.

3. **Employer registration and union pre-departure and arrival briefings are essential for all temporary migrant visa classes**; 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.

4. **A complete firewall between the Department of home affairs and the FWO;** A guarantee to migrant workers who report exploitation that there will be no immigration-related consequence for reporting workplace exploitation. 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

5. **There needs to be additional measures to further address Modern Slavery ;** There is no globally recognised definition of 'modern slavery', however the term is used to describe a range of exploitative practices including, but not limited to, slavery, servitude, forced labour, child labour, forced marriage, bonded labour and other slavery-like practices[9]. This covers a wide spectrum of crimes, but the common thread is any situation of exploitation where a person cannot refuse or leave because of threats, violence, coercion, abuse of power or deception.

The Australian Modern Slavery Act 201810 defines modern slavery as conduct which would constitute:

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[9] *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, Joint Standing Committee on Foreign Affairs, Defence and Trade (2017), p.1.
[10] https://www.legislation.gov.au/Details/C2018A00153

(a) an offence under Division 270 or 271 of the *Criminal Code*[11]; or
(b) an offence under either of those Divisions if the conduct took place in Australia; or
(c) trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27); or
(d) the worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of
Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38).[12]

Modern slavery occurs on a continuum of abuses of workers' rights that can begin with violations such as wage theft and excessive recruitment fees paid to labour hire companies. More than 40 million people globally are living and working in slave-like conditions, according to the International Labour Organisation. Of these, the 2018 Global Slavery Index estimates that 15,000 are living in Australia[13].

In recent years the existence of modern slavery in Australia has come to light through multiple cases of exploitation of migrant workers, who are particularly vulnerable to modern slavery. The risk of slavery in the apparel and textile sector is well known, but recent research by the Australian Council of Superannuation Investors (ACSI) identified a further five ASX200 sectors with high exposures to modern slavery[14]:

- financial services
- mining
- construction and property
- food, beverages and agriculture
- healthcare.

The report of the Joint Standing Committee on Foreign Affairs, Defence and Trade parliamentary inquiry into establishing a Modern Slavery Act in Australia noted that migrant workers on temporary visas were particularly at risk of labour exploitation and modern slavery:

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[11] Divisions 270 and 271 cover the following types of offences: slavery, servitude, forced marriage, forced labour, deceptive recruiting, trafficking in persons, debt bondage, organ trafficking, offences involving non-citizens working in Australia without the correct visa.
[12] For examples of the various types of modern slavery, see the Government's Guidance for Reporting Entities https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf
[13] https://www.globalslaveryindex.org/2018/findings/country-studies/australia/
[14] https://www.acsi.org.au/images/stories/ACSIDocuments/generalresearchpublic/ACSIModernSlaveryGuide2019_1Nov.pdf

> The Committee…heard evidence linking visa conditions, leveraged by unscrupulous employers to exert control, to an increased likelihood of vulnerability to modern slavery offences and exploitation.[15]

Governments around the world, including Australia, have committed to eliminating modern slavery by 2030, through UN Sustainable Development Goal target 8.716. While we acknowledge the Australian government is taking steps in this space, internationally through its involvement in Alliance 8.7 (a global multi-stakeholder partnership to support governments in achieving target 8.7), and domestically through its adoption of a Modern Slavery Act in 2018, more action is needed if we are to eliminate modern slavery in the next ten years.

The strengthening and enforcement of labour rights is crucial to eliminating modern slavery. As the Joint Standing Committee on Foreign Affairs, Defence and Trade noted in the modern slavery act inquiry:

> The Committee agrees that addressing labour exploitation is an integral part of Australia's response to combatting modern slavery. While there is an important distinction between labour exploitation and the more serious crimes of forced labour and slavery, the Committee recognises that these crimes exist on the same spectrum of exploitation.[17]

So we cannot address modern slavery without addressing labour exploitation. The recommendations made in this submission to strengthen labour law, strengthen union's ability to enforce laws and collective agreements, and move our migration system away from precarious temporary visas and to stable, permanent visas must be implemented if we are to go anyway towards addressing the drivers of modern slavery.

The Commonwealth Modern Slavery Act 2018 (the Act) requires entities with a consolidated revenue of at least $100 million over an annual accounting period to make annual modern slavery statements describing the risks of modern slavery in their operations and supply chains, and actions taken to address those risks.

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[15] *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, Joint Standing Committee on Foreign Affairs, Defence and Trade (2017), p. 269.
[16] Target 8.7: Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and the use of child soldiers, and by 2025 end child labour in all its forms.
[17] *Ibid.,* p. 279.

The Act is an important move towards eliminating modern slavery, but it has some serious weaknesses, including no independent oversight (such as a Commissioner) to ensure companies comply with the Act; no penalties for companies failing to disclose and act on modern slavery; and no requirement for the Commonwealth to withhold government procurement contracts from companies who have failed to report or failed to show they are taking action on eliminating modern slavery from their supply chains.

Recommendations on Modern Slavery

The Modern Slavery Act 2018 must be strengthened to include:

- Introducing penalties for companies that fail to report, provide false, incomplete or insufficiently detailed reports, or fail to prevent or act on modern slavery in their supply chains;
- Withholding Commonwealth procurement contracts from companies who have failed to report or act on modern slavery in their supply chains;
- Introducing independent oversight of the Act in the form of an Anti-Slavery Commissioner, with inspection powers, to promote compliance;
- Making available on a public register a list of companies required to report under the Act;
- Lowering the annual turnover threshold to capture all large Australian businesses;
- Covering public procurement by requiring all Government Departments and levels of Government to report under the Act;
- Requiring companies to show they have genuinely engaged with unions in their operations and supply chains regarding improving workers' rights and tackling modern slavery;
- Introducing due diligence requirements for companies ensuring they identify risks of modern slavery, put in place a system to prevent them, and provide an effective remedy when they occur;
- Introducing provisions for the Act to apply extra-territorially so Australian companies operating are required to disclose the risks in their supply chains both domestically and overseas;
- Introducing import bans on products made or suspected to be made using forced labour;
- Amending the Criminal Code Act 1995, which is the legal source for defining forced labour in the Modern Slavery Act 2018, be amended to adequately capture and prohibit

forced labour, including forced labour in shipping, fishing, textile, food production, domestic work, and other high-risk sectors.

More widely we need extensive and systemic changes to the Migration system

Australian Unions have a long-standing view that the migration system should preference permanent, rather than temporary migration in Australia. We believe the current trend towards temporary employer-sponsored migration is effectively outsourcing decisions about our national migration intake to employers and their short-term needs, over the national interest and a long term vision for Australia's economy and society. This shift should not be blindly accepted as some inevitable, inexorable trend that must continue. Instead, it should be subject to critical questioning and debate. Unions continue to have concerns with a skilled migration program that relies excessively on temporary employer-sponsored migration, as is the case with the current system.

The current visa system needs reform. Any further changes to the temporary skilled visa system must not:

1. Lead to an expansion of the temporary work-related visa system where there are more temporary overseas workers, who are at significant risk of exploitation, operating in areas in which genuine skilled labour market shortages do not exist;

2. Continue to operate without adequate labour market testing, thereby compromising the integrity of the visa system and undermining employment opportunities for local workers;

3. Enable employers to avoid their responsibilities to first invest in domestic training and look to the local labour market for local workers before employing temporary overseas workers;

4. Facilitate the continual abuse of the visa system in which temporary visa holders are purportedly in Australia to fill a particular skills shortage yet actually work in different position to that specified, including in lower skilled positions;

5. Allow for the undermining of local wages, workplace rights and local work-related standards, such as health and safety;

6. Allow for exploitation of overseas workers, including affording overseas workers fewer workplace protections, compared to Australian workers. Australian unions have well documented concerns with the operation of our temporary visa program, but it is clear to us

that the problems extend to a range of different visa types where overseas workers can find themselves in vulnerable situations.

The wider community needs to be assured that employers and others are not using the temporary skilled migration programme as an instrument of wage suppression or exploiting vulnerable temporary overseas workers who are unaware of their rights or not in a position where they feel able to exercise those rights.

Unfortunately, the evidence available from our affiliated unions and other sources is that both Australian and overseas workers are being disadvantaged on a regular basis under the current policy and program settings that govern temporary work visas.

It is time now for a fundamental reassessment of a skilled migration program that places such emphasis on temporary and employer-sponsored forms of migration without due recognition of the inherent flaws and dangers in the present system.

We set out below a package of recommendations to help address these issues and ensure that the temporary work visa program, to the extent that it is required, operates in the best interests of all workers.

- **Recalibrating the balance of the skilled migration program toward permanent, independent migration**

The current weighting of Australia's skilled migration program towards temporary and employer-sponsored pathways should be re-evaluated, with greater emphasis given to the permanent, independent stream as the 'mainstay' of the skilled migration program.

- **The process for determining the lists of skilled occupations for the TSS is flawed and needs to be revised**

The current process for determining the skilled occupations is flawed.

There is a difference between a 'recruitment difficulty', which can be resolved through training local workers or raising wages, and a genuine skilled shortage. Wages need to rise to stimulate increased labour supply before a skills shortage can be deemed to exist. Situations where employers are not willing to raise wages in order to attract more potential candidates should not

be regarded as a true labour shortage. Many occupations on the list are not reflective of genuine skills shortages and should be removed.

- **Improved labour market testing**

The ACTU recommends more rigorous evidentiary requirements for labour market testing to be incorporated into legislation and associated program guidelines to ensure the intent of the legislation is achieved and Australian employment opportunities are protected. The recent weakening of labour market testing for the SWP and the PLS is not appropriate and should be reversed.

- **Address the prevalence of an exploited underclass of migrant workers**

There are important policy measures that should be introduced to better protect temporary migrant workers from exploitation. These include, but are not limited to, the recommendations in the Senate inquiry report 'A National Disgrace: the Exploitation of Temporary Work Visa Holders'. Some crucial reforms include:

- Regulating high risk areas. For example, by establishing a national licensing regime for labour hire firms.
- Providing equal workplace rights for temporary migrant workers. For example, breaches of the Migration Act should not result in a loss or reduction of protection under the Fair Work Act.
- The reforms should help enable temporary migrant workers to effectively enforce their workplace rights. For example, the government should ensure that temporary visa holders are provided information about their workplace rights and entitlements, including the right to access and join a union to exercise that right by appropriate resourcing.

- **Labour agreements should be abolished**

Labour agreements create pools of exploitable workers., There are currently 348 agreements with thousands of workers employed under them with no evidence employers are taking any steps to train Australian workers in the necessary skills or adequately test the local labour markets.

- The ACTU's position on Labour Agreements is clear: Enterprise Migration Agreements (EMAs), Designated Area Migration Agreements (DAMA), Infrastructure Facilitation Agreements and other labour agreements should be abolished.

- **TSMIT needs to be recalibrated to a higher rate**

There is now a gap of more than A$26 000 between the salary floor for temporary skilled migrant workers and annual average salaries for full-time Australian workers.

We need to lift the Temporary Skilled Migration Income Threshold immediately to a minimum of at least $80,000 with a view to lifting this rate higher to reflect genuine market-based skilled wages.

- **400 Visa series needs to be reformed**

The 400 visa series visa category has become a "new frontier for unscrupulous employers" looking to exploit cheap foreign labour at the expense of Australian workers.

The 400 visa series needs to be reformed so that employers are not circumventing the TSS visa rules and regulations surrounding labour market testing.

- **Misuse of ABN's is prevalent amongst temporary visa holders. The ABN system must be reformed**

Limiting situations in which temporary visa holders can obtain an ABN and making certain visa types ineligible or subject to special case by case exemptions determined by a relevant tripartite authority.

- **Labour market testing should not be removed through free trade agreements and the definition of contractual service provider should be reviewed**

Review and determine a single consistent definition of Contractual Service Provider including looking at all the "Temporary Entry of Business Persons" provisions in FTA's and not just the narrowly defined meaning in ChAFTA for example.

With the Australia – U.K. FTA the Australian Government has yet again entered into a free trade agreement where it has removed the obligation on employers to conduct labour market testing

before temporary overseas workers are employed. The Government should not support an agreement that removes this basic protection in support of Australian jobs.

- Significantly strengthen the skills assessment process

Significantly strengthen the skills assessment processes and ensure testing is by the appropriate industry body and not by immigration officials ensuring that training and licensing obligations for skilled trades must be maintained with skills testing required for particular industries and professions. Workers who currently require an occupational license must successfully complete a skills and technical assessment undertaken by a TRA approved RTO before being granted a visa.

The skills assessment processes must be significantly strengthened by:

- ensuring all testing is performed by an appropriate industry body and not by immigration officials;
- guaranteeing that workers who currently require an occupational license must successfully complete a skills and technical assessment undertaken by a TRA approved RTO before being granted a visa;
- introducing a risk-based approach to assess and verify workers are appropriately skilled in occupations that don't require an occupational licence; and
- introduce a minimum sampling rate of visa's issued to verify migrant workers are actually performing the work the employer has sponsored them to perform.

- Working Holiday Maker Visa needs to be reformed

The Department of Home Affairs should conduct a public assessment and review of the potential impact the additional labour supply from this visa program has on employment opportunities, as well as wages and conditions, for Australian citizens, particularly on young Australians in lower-skilled parts of the labour market. The review should be conducted with the oversight of a tripartite body.

Governments impose quotas or cap working holiday visa numbers and exercise that option where labour market conditions require it. Given the current state of the labour market, now is such a time for a cap to be imposed. An annual quota for the visa should be determined based on advice

from the tripartite Ministerial Advisory Council for Skilled Migration and taking into account the labour market conditions for young Australians.

The Department of Home Affairs should provide consolidated and publicly available information on the working patterns of working holiday visa holders. This should include the number of working holiday visa holders that do exercise their work rights, the duration of their employment, the number of employers they work for, their rates of pay, and the locations, industries, and occupations they work in. If this information is not currently able to be produced, then HA should report to the Ministerial Advisory Council for Skilled Migration on how this data can be collected.

Job ads that advertise only for working holiday visa holders or that use the inducement of a second working holiday visa be banned.

The second and third year working holiday visa be abandoned altogether.

Remodel the work rights attached to the working holiday visa so that it operates as a genuine holiday visa with some work rights attached, rather than a visa which in practice allows visa holders to work for the entire duration of their stay in Australia.

- **Ensure that temporary visa holders are provided information about their workplace rights and entitlements**

Ensure that temporary visa holders are provided information about their workplace rights and entitlements, including the right to access and join a union to exercise that right.

Require all companies who employ workers on any form of temporary visa (including via a labour hire company) to register on a publicly available registry.

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