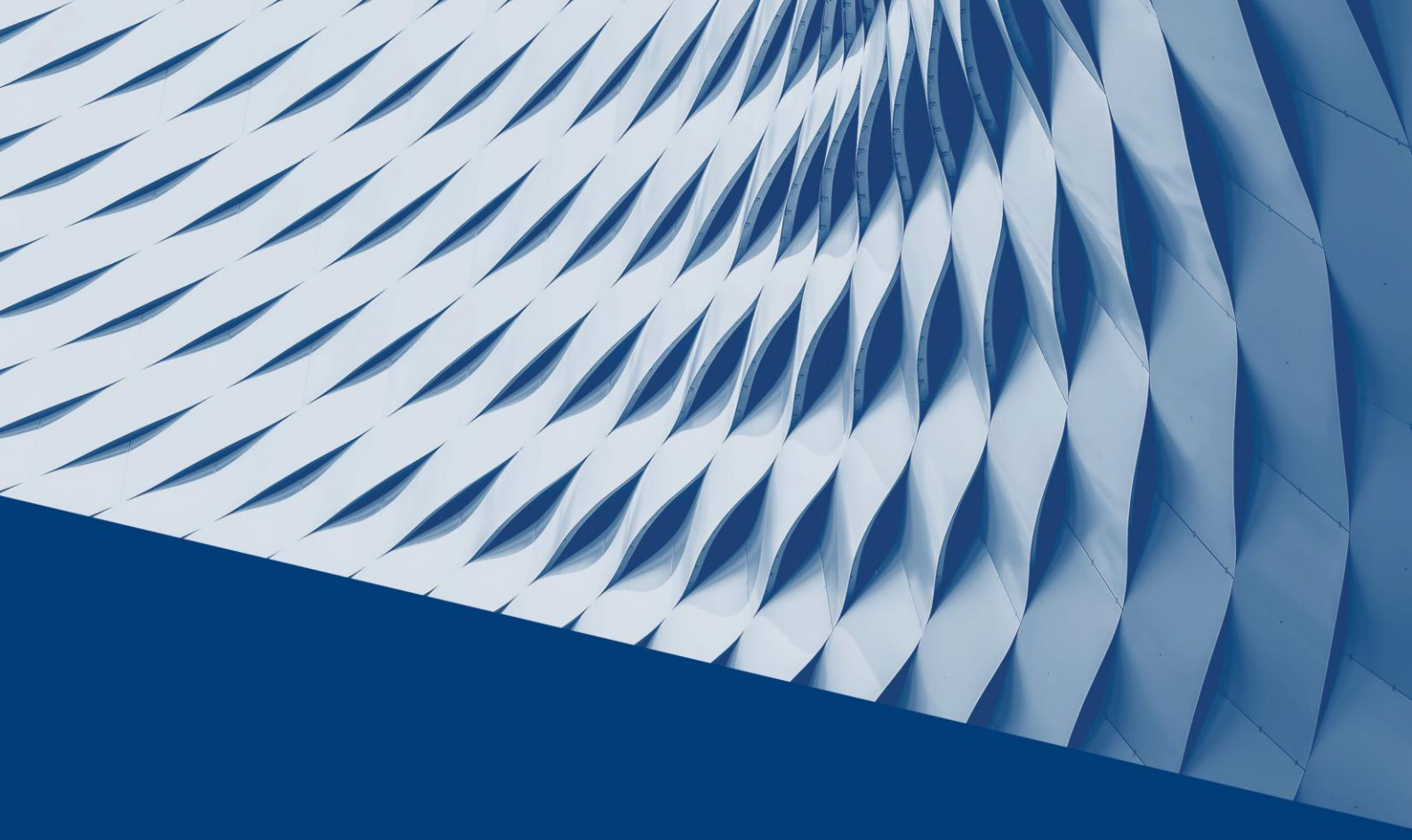

Migration Amendment (Protecting Migrant Workers) Bill 2021

Submission by the Australian Council of Trade Unions to the Senate Legal and Constitutional Affairs Committee inquiry

ACTU Submission, 28 January 2022
ACTU D. No 03/2021

ACTU
australian council of trade unions

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Introduction

The Australian Council of Trade Unions (ACTU) is the peak trade union body in Australia, with 43 affiliated unions and state and regional trades and labour councils, representing approximately 2 million workers across the country.

The ACTU welcomes the opportunity to make a submission on the *Migration Amendment (Protecting Migrant Workers) bill 2021* (hereafter, 'the Bill'), following on from our submission to the Exposure Draft of the Bill. Australia has an underclass of exploited temporary visa holders, and a temporary skilled visa system that is driven by the interests of business rather than the interests of the Australian people. Fundamental transformation of Australia's visa system is required to end the exploitation of temporary visa holders, prioritise permanent migration, and ensure local workers have opportunities.

Unfortunately, this Bill falls short. Despite some minor improvements to this Bill from the Exposure Draft, we remain of the view that this Bill is not sufficient to protect temporary migrant workers from exploitation, and may have some adverse, unintended consequences. This Bill does not address the systemic factors that lead to migrant worker exploitation and is fundamentally flawed: it relies on vulnerable migrant workers coming forward to report exploitation and cooperate in an investigation, without providing them with any incentive or protection to do so. This could expose migrant workers to adverse immigration consequences, including the cancellation of their visa, or not meeting the requirements for visa renewal along with facing victimisation by their employers. Because this Bill does nothing to address the barriers to reporting abuse that migrant workers face, it is unlikely to have any impact on reducing exploitation.

The Australian Union movement believes that much stronger action is needed to protect migrant workers, particularly as the Morrison Government is currently rolling out a new visa scheme – the Agriculture Visa – which will expose even more vulnerable workers to exploitation. This Bill must be strengthened and coupled with comprehensive reforms to Australia's migration and workplace laws aimed at preventing and addressing migrant worker exploitation.

This submission explores the weaknesses of the Bill, proposes some recommendations for reforming the Bill, and canvasses recommendations for broader reforms that the Australian Government must implement to stop migrant worker exploitation.

Recommendations

Recommendation 1: Assurance that workers who report exploitation will not face immigration-related consequences must be legislated. The Bill should be amended to include a guarantee that temporary visa holders with a credible claim of workplace exploitation or unscrupulous conduct by their employer will not have breached a work-related condition and suffer immigration consequences. This must include whistle-blower protections to protect workers from making complaints and providing evidence to an investigation, an amnesty for workers who make a complaint to stay in Australia while their case is heard, and an extension or bridging arrangement to enable workers for whom employer sponsorship is a requirement of their visa to find a new sponsor.

Recommendation 2: Implement a firewall between the Department of Home Affairs and the Fair Work Ombudsman that prevents the provision of information from the Ombudsman to the Department, except to facilitate the prosecution of employers for exploitation of their workers.

Recommendation 3: Abolish the 88-day work requirement for Working Holiday Visas.

Recommendation 4: Amend section 245AYD to provide that a person is also subject to a migrant worker sanction if;

(a) the Fair Work Commission is satisfied (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) that the provisions referred to in section 245AYE were contravened by the person.

(b) if the person fails to comply with a compliance notice issued or enforceable undertaking entered into in relation to a work-related provision.

Recommendation 5: The Minister should not be the decision maker in the process to declare an employer prohibited. Instead, the Fair Work Commission should determine such applications, based on all available evidence, including evidence previously produced to the FWO or obtained by an officer or an employee of a registered organisation exercising entry rights.

Recommendation 6: The exception to prohibited employers engaging migrant workers if they are 'merely incidental to a business of the person or the body corporate' in Sections 245AYH and 245AYJ must be deleted.

Recommendation 7: Recalibrate the balance of the skilled migration program toward permanent, independent migration.

Recommendation 8: Abolish the Australian Agriculture Visa.

Recommendation 9: Conduct union pre-departure and arrival briefings for all temporary migrant visa classes.

Recommendation 10: Reform a number of linked policy areas to prevent and address migrant worker exploitation, including:

- Introduce a simple, quick and accessible way to resolve wage theft
- Introduce a robust national labour hire licensing scheme
- Reform the ABN system to end sham contracting
- Strengthen the *Modern Slavery Act 2018*, including through the introduction of penalties and independent oversight in the form of a commissioner with inspection powers.

The Bill seriously underestimates the scale of the problem

The Bill is premised on the assumption, as noted in the Exposure Draft Context Paper, that 'a small number of employers engage in exploitative behaviours.'[1] This is demonstrably false: there is a strong body of evidence that shows that migrant workers face exploitative practices such as wage theft that are endemic and widespread[2] and are not being effectively addressed through the current regulatory approaches and mechanisms. This points to the need for a rethink of how to tackle this systematic exploitation of migrant workers – simply enhancing existing penalty, compliance and enforcement frameworks is not enough given the prevalence of exploitation. Moreover, the Bill only deals with the symptoms of the problem, after the exploitation has already occurred – urgent reforms are needed to deal with the causes of migrant worker exploitation.

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[1] Department of Home Affairs, 'Migration Amendment (Protecting Migrant Workers) Bill 2021 Exposure Draft – Context Paper', p. 2 https://www.homeaffairs.gov.au/reports-and-pubs/files/exposure-draft-bill/exposure-draft-migration-amendment-protecting-migrant-workers-bill-2021/migration-amendment-context-paper.pdf

[2] See for example, L Berg and B Farbenbum, 'Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey', UNSW Law, Sydney and University of Technology Sydney, 2017 https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf ; S Martin, '88 days a slave: backpackers share stories of farm work exploitation', The Guardian, 26/9/19, https://www.theguardian.com/australia-news/2019/sep/26/88daysaslave-backpackers-share-stories-of-farm-work-exploitation; I Campbell, 'Harvest Labour Markets in Australia: Alleged Labour Shortages and Employer Demand for Temporary Migrant Workers', *Journal of Australian Political Economy*, No. 84, pp. 46-88; Unions NSW and Migrant Workers Centre, 'Working for $9 a day: wage theft and human rights abuses on Australian farms', 2021, https://www.unionsnsw.org.au/wp-content/uploads/2021/06/piece-rates-report.2-2.pdf

Greater worker safeguards are needed

The Bill introduces new offences for using a person's migration status to exploit them in the workplace and introduces a mechanism to prohibit employers that have engaged in serious or repeated non-compliance from accessing temporary migrant workers for a period of time. The primary way employer breaches are likely to be identified is through migrant workers reporting exploitation, however the Bill does nothing to support or encourage migrant workers to come forward and report exploitation and provide evidence to substantiate that an offence has occurred. Temporary migrant workers face substantial barriers to coming forward and reporting exploitation: when the performance of work is tied to a migration condition or migration incentive (such as the 88-day work requirement for Working Holiday Makers to be eligible for a second-year visa), the worker is unlikely to report exploitation for fear of being deported or being unable to secure a visa in the future.

Currently, if a worker brings an issue with their employer to the Fair Work Ombudsman that reveals migration law breaches, the Department of Home Affairs may be informed, leaving the worker vulnerable to deportation for breach of their visa conditions. Under s116(1)(b) of the *Migration Act,* the Minister may cancel a visa where they are satisfied that its holder has not complied with the conditions of the visa – meaning that if a visa holder was to report a breach of the coercion-related conditions in this Bill which involve a breach of their visa conditions, they could risk their visa being cancelled.

These issues are dealt with under the 'Assurance Protocol' between the Fair Work Ombudsman and the Department of Home Affairs, however the detail of the protocol is not made public. The only information we have is from a public fact sheet which states: 'We usually won't cancel your visa if you have breached your work-related visa conditions because of workplace exploitation.'[3] This offers no reassurance whatsoever to exploited workers. It must be noted that the result of visa cancellation on a migrant worker is incredibly dire: the visa holder is rendered an unlawful non-citizen, and they are only eligible to apply for a Bridging E visa which does not allow them to work or study, while they make arrangements to leave the country. If the person experiences financial hardship, they may be compelled to work without authorisation, making them even more vulnerable to exploitation. Workers in exploitative working situations must weigh up this potential grave outcome with the benefits of reporting exploitation and having the issue addressed. As it

[3] https://immi.homeaffairs.gov.au/visas/working-in-australia/work-rights-and-exploitation

stands, this Bill does nothing to assure the migrant worker that reporting exploitation will not lead to a negative immigration outcome. To increase the confidence of migrant workers to report exploitation, there must be a clear, legislated guarantee that temporary visa holders will not face immigration-related consequences for reporting exploitation. This must include whistle-blower protections to protect workers from making complaints and providing evidence to an investigation, and an amnesty for workers who make a complaint to stay in Australia while their case is heard. Workers for whom employer sponsorship is a requirement of their visa, such as employers on Temporary Skill Shortage (TSS) visa subclass 482 who are required to remain with their employer or find a new sponsor within 60 days of losing their employment, must be granted an extension or bridging arrangement to enable them to find a new sponsor. Moreover, there must be a firewall between the Department of Home Affairs and the Fair Work Ombudsman that prevents the provision of information between the Ombudsman and the Department (except to facilitate the prosecution of employers for worker exploitation) to guarantee that migrant workers who report exploitation will not face immigration-related consequences.

The focus on penalties in this Bill without measures to protect and encourage migrant workers to come forward and report exploitation is likely to mean that this Bill will do little to stop migrant worker exploitation. We note that the Explanatory Memorandum for this Bill provides a number of examples illustrating that dodgy employers may use the threat of reporting the worker to ABF for a breach of visa conditions as a source of leverage over workers, for example an employer that coerces an international student into working more than 40 hours a fortnight in breach of their visa conditions. The examples cited in the Explanatory Memorandum[4] show that in this situation an employer could be contravening the new sections relating to coercing a non-citizen to breach work-related visa conditions and coercing a non-citizen by using migration rules. We welcome these new offences and penalties as measures to stop migrant worker exploitation, however we argue that they are unlikely to be effective if international students are not protected from immigration-related consequences if they report exploitation.

While targeting employer behaviour, the Bill does nothing to address the conditions in particular visas that can lead to workers accepting exploitative working conditions, rather than coming forward to report employer contraventions. If a worker on a Working Holiday Maker visa was to come forward and report exploitation, then the exploited worker would be forced within a limited timeframe to seek out another employer to complete their remaining work experience to fulfil the

[4] Box 'New subsection 245AAA(1) – illustrative example', p. 10 and box 'New subsection 245AAB(1) – illustrative examples', p. 15

88-day work requirement to be eligible for another visa. It is far more likely the worker would persist with an exploitative arrangement with their current employer to meet the requirements for their next visa, rather than disrupt that process. There is no incentive for Working Holiday Makers or other temporary visa holders seeking to meet requirements for another visa to seek out ABF involvement or cooperate with an investigation. Providing some flexibility or waiving the 88-day work requirement altogether for exploited workers would provide some incentive to report and cooperate with an investigation, however if the Morrison Government is serious about *preventing* exploitation from occurring in the first place, then they will immediately abolish the 88-day work requirement for all Working Holiday Makers, which has been shown time and again to be a driver of exploitation for this cohort of migrant workers.[5]

Recommendation 1: *Assurance that workers who report exploitation will not face immigration-related consequences must be legislated. The Bill should be amended to include a guarantee that temporary visa holders with a credible claim of workplace exploitation or unscrupulous conduct by their employer will not have breached a work-related condition and suffer immigration consequences. This must include whistle-blower protections to protect workers from making complaints and providing evidence to an investigation, an amnesty for workers who make a complaint to stay in Australia while their case is heard, and an extension or bridging arrangement to enable workers for whom employer sponsorship is a requirement of their visa to find a new sponsor.*

Recommendation 2: *Implement a firewall between the Department of Home Affairs and the Fair Work Ombudsman that prevents the provision of information from the Ombudsman to the Department, except to facilitate the prosecution of employers for exploitation of their workers.*

Recommendation 3: *Abolish the 88-day work requirement for Working Holiday Visas.*

[5] See for example: J Howe, S Clibborn, A Reilly, D van der Broek & C Wright, 'Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry', University of Adelaide, 2019 https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf

Penalties alone will not effectively deter employers from exploiting migrant workers

While we welcome new criminal offences, an employer prohibition, and increased penalties for employers that have exploited migrant workers, these alone will not deter employers from exploiting migrant workers. We can see this from the underutilisation of the existing employer sanction regime, which was introduced in 2013. In the six years since these provisions were introduced, a total of 1060 employer sponsors have been sanctioned for breaches of employment-related sponsorship obligations[6] – for context, in that same period the Department of Home Affairs granted 270,241 employer-sponsored skilled visas.[7] This demonstrates the need to address the fundamental issues around providing workers with protection and assurances to encourage them to report exploitation, and the need to address the ongoing failure of enforcement authorities to detect migrant worker exploitation and sanction employers. Detection efforts in the horticulture industry in particular have been a failure, so much so that undocumented workers have grown to become a key and significant part of the sector's workforce.

Academics John Howe and Tess Hardy also note in their study of the hairdressing and restaurant sectors that there is no particular connection between increased risk perception and more compliance. They instead found that the perceived risk of detection, not the severity of the sanction is more likely to increase compliance.[8] Moreover, given litigation can take years, the delay in imposing a sanction on an employer is even less of a deterrent. This demonstrates that simply introducing new penalties is not enough – much more needs to be done to increase detection and enforcement.

The prohibited employer provisions must be improved

While we support a framework to prohibit employers with a record of migrant worker exploitation from engaging migrant workers, there are a number of changes that must be made to ensure this aspect of the Bill is workable.

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[6] https://www.abf.gov.au/about-us/what-we-do/sponsor-sanctions/register-of-sanctioned-sponsors
[7] https://www.homeaffairs.gov.au/research-and-stats/files/temp-res-skilled-rpt-summary-300621.pdf
[8] Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman', Sydney Law Review 39(1), February 2018

First, the definition of a Migrant Worker Sanction at Section 245AYD, which requires a relevant employer be subject to an order of a Court in order for *Fair Work Act* 2009 contraventions to be used as a ground for prohibition, ignores 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) 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 on the matters that are before them (akin to the power to award compensation referred to in section 545(2) of that Act).

Secondly, the Bill likewise 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. However, Parts 5 and 6 of the Bill are directing to divert 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.

Thirdly, it is not appropriate for the Minister to be the decision maker in respect of prohibition of employers nor is it appropriate that the only person entitled to be heard in deciding those matters is the employer who faces prohibition. Given the public interest issues at play, there is merit in a broader, transparent, and more accountable process with standing given to workers, regulators and registered organisations. If an employer has systematically breached minimum employment standards, it is likely that unions will be aware of more breaches that may not be known to the Home Affairs Minister when making the decision, so it is crucial unions are given the opportunity to provide this evidence. As such, we propose that the Fair Work Commission is the appropriate tribunal to declare a person to be a prohibited employer – not the Minister.

The Bill proposes that once the Minister has declared a person as a prohibited employer, the decision may be reviewed by the Administrative Appeals Tribunal (AAT) – only the decision to declare a person as a prohibited employer is reviewable by the AAT, however, not a decision to decline to do so. This is a function of the decision making power being vested in the Minister at first instance as an exercise of executive or administrative power affecting only the subject of that power, rather than being more sensibly conceived of as a regulatory compliance action being taken in the public interest and impacting or engaging the interests of a class of persons beyond just the

subject of the power. Whilst it would be possible to provide the AAT with a power to examine decisions of the Minister to not declare an employer prohibited, a better solution would be to vest the decision in first instance in the Fair Work Commission as we have suggested, complete with a right to Appeal to a Full Bench thereof.

Section 245AYH prevents prohibited employers from allowing additional migrant workers to begin work, however provides for an exception if the work is 'merely incidental to a business of the person or the body corporate.' The same exception applies in section 245AYJ in relation to additional reporting obligations for the prohibited employer. The Explanatory Memorandum gives examples of where a prohibited employer may have to engage the services of a non-citizen temporarily or on an ad-hoc basis as an independent contractor, for example to provide occasional catering or undertake repairs. This is a highly uncertain exception. It is unclear how services such as cleaning would be classified, for example. This is a large loophole that must be avoided.

Recommendation 4: *Amend section 245AYD to provide that a person is also subject to a migrant worker sanction if;*

(c) the Fair Work Commission is satisfied (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) that the provisions referred to in section 245AYE were contravened by the person.

(d) if the person fails to comply with a compliance notice issued or enforceable undertaking entered into in relation to a work-related provision.

Recommendation 5: *The Minister should not be the decision maker in the process to declare an employer prohibited. Instead, the Fair Work Commission should determine such applications, based on all available evidence, including evidence previously produced to the FWO or obtained by an officer or an employee of a registered organisation exercising entry rights.*

Recommendation 6: *The exception to prohibited employers engaging migrant workers if they are 'merely incidental to a business of the person or the body corporate' in Sections 245AYH and 245AYJ must be deleted.*

Comprehensive reforms are needed

Preventing and addressing the exploitation of migrant workers requires comprehensive change of the migration system and strengthening of workers' rights. The Morrison Government must make

the following reforms to the migration system in order to tackle the problem of migrant worker exploitation:

Recommendation 7: *Recalibrate 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 backbone of the skilled migration program.*

Recommendation 8: *Abolish the Australian Agriculture Visa. The ACTU is deeply concerned about the Morrison Government's new Agriculture Visa, which will not have the same levels of worker protection as the Pacific Australia Labour Mobility (PALM) programmes. There is nothing in the new visa to address the high rates of exploitation that exist under the current visa schemes, which is particularly concerning given the prevalence of exploitation in the horticulture and meat industries. As has been outlined in this submission, because this Bill does nothing to address the barriers to reporting exploitation that migrant workers face, it is unlikely this Bill will result in any additional protections for migrant workers in practice.*

Recommendation 9: *Conduct union pre-departure and arrival briefings for all temporary migrant visa classes. Workers must be provided with information about their workplace rights and entitlements, including the right to access and join a union.*

Reforms are also required in a number of linked policy areas:

- Introduce a simple, quick and accessible way to resolve wage theft: Few temporary migrant workers take action to recover unpaid wages: a 2018 study of international students and backpackers in Australia found fewer than 1 in 10 took action to recover the wages they were owed.[9] Simple cost-benefit theory explains why this is the case – when the low likelihood and quantum of a successful outcome is weighed against the time, effort, costs and risks to immigration and/or employment status, it is rational that migrant workers are not seeking to recover their wages. An easy, cost-effective, and accessible means for workers to pursue wage theft claims in a timely manner must be established through an Industrial Court co-located with the FWC to deal with wage and superannuation theft claims.

[9] Bassina Farbenblum and Laurie Berg, 'Wage Theft in Silence: why migrant workers do not recover their unpaid wages in Australia', 2018 https://www.migrantjustice.org/survey

- Introduce a robust national system of labour hire licensing: The ability of employers to evade their legal employment and migration obligations through the use of labour hire intermediaries must be addressed through introducing a robust national system of labour hire licensing that places obligations both on the labour hire company and end user or host.
- Reform the ABN system: temporary migrant workers are at greater risk of exploitation through the misuse of ABNs, or 'sham contracting'. Many are compelled by their employers to hold ABNs to disguise the employment relationship and shift more risk and costs onto the worker. Workplace law must be reformed to prevent such sham contracting including by limiting the situations in which employers can require temporary visa holders to use an ABN and make certain visa types ineligible or subject to special case-by-case exemptions as determined by a relevant tripartite authority.
- Strengthen of the *Modern Slavery Act 2018*: the *Modern Slavery Act* must be strengthened in a number of ways, including introducing penalties for companies that fail to report or fail to provide sufficiently detailed reports, or fail to act on modern slavery in their supply chains; withholding of Commonwealth procurement contracts from companies who have failed to report or act on modern slavery; introducing independent oversight of the Act in the form of a Commissioner with inspection powers to promote compliance.

Recommendation 10: *Reform a number of other policy areas to prevent and address migrant worker exploitation, including:*

- *Introduce a simple, quick and accessible way to resolve wage theft*
- *Introduce a robust national labour hire licensing scheme*
- *Reform the ABN system to end sham contracting*
- *Strengthen the Modern Slavery Act 2018, including through the introduction of penalties and independent oversight in the form of a commissioner with inspection powers.*

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