Retail Supply Chain Alliance

Submission on Migration Amendment (Protecting Migrant Workers) Bill 2021

28 January 2022

The Retail Supply Chain Alliance welcomes the opportunity to contribute to the Legal and Constitutional Affairs Legislation Committee's inquiry on the Migration Amendment (Protecting Migrant Workers) Bill 2021 (the Amendment Bill).

The Retail Supply Chain Alliance (the RSCA) represents and advocates for the rights of workers across the horticulture supply chain in Australia.

The Alliance is a coalition of trade unions that represent workers in each facet of the horticulture supply chain.

The Transport Workers' Union (TWU), the Australian Workers' Union (AWU), and the Shop Distributive and Allied Employees Union (SDA) are worker representatives who have formed the Retail Supply Chain Alliance, which together have coverage across the full spectrum of the horticulture industry supply chain.

The Alliance was formed in 2019 in an attempt to advance the cause for workers' rights and end the systemic exploitation across the horticulture supply chain in Australia.

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Recommendations

RECOMMENDATION 1: The power to issue prohibition orders and to enforce new offences should be dealt with by bodies with specialist employment law expertise: the Fair Work Ombudsman, Fair Work Commission, and for criminal matters on referral to the Australian Federal Police and Commonwealth Department of Public Prosecutions.

RECOMMENDATION 2: When an application to review the decision to declare a person a prohibited employer is made, the AAT should notify the Australian Council of Trade Unions to permit unions to provide the AAT with further relevant information.

RECOMMENDATION 3: The Amendment Bill should cover workers on contracts for domestic services, as they are highly vulnerable to exploitation. The exemption in s. 245AYC(2)(b) should exclusively apply to essential trades on a non-ongoing and non-residential basis.

RECOMMENDATION 4: The new offences created in Section 4 of the Amendment Bill (proposed new sections 245AAA and 245AAB) should apply only to employers and labour hire firms.

RECOMMENDATION 5: Assurance that workers who report exploitation will not face visa cancellation should be legislated, rather than left to the non-public 'Assurance Protocol'. This will give workers confidence about their protections when reporting exploitation.

RECOMMENDATION 6: The Pacific Australia Labour Mobility program, and its current standards for approved employer standards and access for unions and pastoral care providers, should form the minimum standard of Australia's temporary migration program for workers on Australian farms.

1 Exploitation is the norm in the horticulture sector

Over the last decade Australia's horticulture industry has arguably become the most exploitative in the country. At the same time, it has become the most reliant sector on overseas migrant workers, and incidentally an international chronicle for obscene and inhumane workplace abuse and acts of modern slavery.

The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) found that the average horticulture farm employs 40-50 per cent of its workforce from the local permanent resident market. This means that a worker in the horticulture industry is most likely to be on an overseas visa, or their work status is unknown. As a comparison to other regional industries, wheat or dairy farms typically comprise 90 per cent of permanent residents. This leaves horticulture uniquely dependent on migrant workers, which the FWO identify as causative of worker exploitation.

The extent of exploitation in the horticulture industry is undeniable, uncovered empirically by countless parliamentary inquiries, government taskforce reports, and media reporting.

- Unions NSW research released in 2021 found that almost all growers who use piece rates pay below the national minimum wage of $19.84, and substantially below the minimum hourly rate specified in the Award of $24.80.[1]
- In its Harvest Trail Inquiry, the FWO found that 67% of all growers surveyed were employing overseas workers. Further, it reported that temporary visa holders are more vulnerable to exploitation due to a higher incidence of cultural and language barriers, low awareness of workplace rights and barriers to accessing assistance. It also recognises that the anchoring of visa status to employment means that workers can be made to feel 'captive' to their employer.

[1] Most recently, Unions NSW, "Wage Theft, The Shadow Market. Part Two: The Horticultural Industry," March 2021, https://www.unionsnsw.org.au/wp-content/uploads/2021/03/Wage-Theives-Horticulture-Report-online.pdf; Fair Work Ombudsman, "Harvest Trail Inquiry," 2018.

- The final report of the Federal Government's Migrant Worker Taskforce also noted the inextricable link between the increasing number of temporary visa holders and the systemic spread of underpayment and risk of exploitation.

Despite research and reporting that cannot be ignored, exploitation in the sector continues to go unanswered, with the obvious policy responses being ignored and side-lined year-on-year as more evidence is revealed and exploitation worsens. In fact, governments appear to have moved in the opposite direction, seeking further opportunities to increase precarious migrant labour supply in the sector.

Several factors beyond reliance on overseas workers contribute to exploitation in the sector:

- Australia's horticulture industry sources 37-56% of its labour from labour hire firms, depending on the specific type of produce. This compares to 3 to 12% in other agriculture industries such as in cotton, broadacre and dairy. Whilst the use of labour hire contracting is not itself a means for exploitation, a significant dependency on it can obfuscate the recruitment process, disaggregate the employee-employer relationship and increase the risk for exploitation. In addition, when several contract labour firms are used to service a single farm or operating entity, supply-chain complexity can nurture a culture of non-compliance.
- Failure to comply with legal obligations in relation to pay and conditions are common in the sector. In its Harvest Trail Inquiry, the FWO investigated 638 employers, equating to 4 per cent of all employers in the horticulture industry. It was found that more than 55% of employers investigated had failed to comply with Australian workplace laws (including both monetary and non-monetary breaches).

Unlike other industries, the horticulture industry demands high-volumes of work in acute time frames, compensates on piecework, is regionally located and has a high-degree of non-monetary compensation associated with employment.

Over time, bad policy planning has meant that the industry has become structurally dependent on a migrant labour workforce, controlled by systemic and complex labour hire contract arrangements, and undetectable by workplace standard compliance and enforcement agencies.

Nefarious employment practices have become so commonplace that any employer attempting to be compliant becomes uncompetitive in the marketplace. Exploitation and illegality are now a focal cost-setting function of the horticulture industry.

The RSCA is actively working to end the exploitation of migrant workers in the horticultural industry. Most recently, the AWU successfully fought for amendments to the Horticulture Award 2020 to end exploitation of the piece rates mechanism, guaranteeing every worker on every farm is entitled to take home the minimum casual rate of pay, currently $25.41 per hour. The RSCA is also working with the major supermarket chains, as the largest buyers of fresh produce, to cooperate on reducing exploitation throughout their supply chains.

2 Provisions of the Amendment Bill

The Amendment Bill proposes a number of reforms with the aim of reducing exploitation of migrant workers:

- creating offences and civil penalty provisions for coercing or unduly influencing/pressuring a non-citizen into breaching or failing to satisfy a work-related visa condition
- creating a prohibition order scheme whereby the Minister can declare a person who has contravened relevant provisions of the Migration Act or Fair Work Act to be a “prohibited employer” who cannot employ non-citizens
- requiring employers to take positive steps to verify immigration status of prospective employees using an online government system (VEVO)
- increasing penalties for work-related breaches
- new compliance tools for the ABF.

Although the RSCA welcomes belated efforts by the Australian Government to stamp out exploitation, the Amendment Bill still raises a number of concerns and leaves room for exploitation to take place. The RSCA provided feedback during the Department of Home Affairs' exposure draft consultation on the Amendment Bill, but not all of our concerns have been addressed. The below sections outline remaining issues with the Amendment Bill.

2.1 The Fair Work Ombudsman is the appropriate authority for labour-related offences and orders

The proposed Bill gives new statutory powers to prohibit employers, or to investigate and enforce new offences, to the Minister of Home Affairs and the Department of Home Affairs respectively. This is in contrast to other labour and industrial relations offences in Australia, which are enforced by the Fair Work Ombudsman, Fair Work Commission and courts.

The Fair Work Ombudsman and Commission have a deep knowledge and understanding of employment law issues, with specialist staff and Commissioners to make these assessments. By contrast, the Department and Minister of Home Affairs has no real expertise or knowledge in industrial relations or labour protection. Further, the involvement of the Minister will politicise their decisions and leave them exposed to lobbying – given that these decisions go to the enforcement of minimum standards for the sector, it is most appropriate that they are made by impartial decisionmakers rather than politicians.

This is already the case in New Zealand, where employers who breach employment standards are already restricted from hiring migrants. Under the New Zealand system, the Labour Inspectorate (equivalent to Australia's Fair Work Ombudsman) can immediately issue a 6-month 'stand-down' restriction to employers for a single breach of employment standards. In more serious cases, the Employment Relations

Authority and Employment Court can impose longer stand-down restrictions and pecuniary penalties.[2]

Accordingly, we recommend that all new powers in this legislation are enforced apolitically by the Fair Work Ombudsman, Fair Work Commission, and for criminal matters on referral to the Australian Federal Police and Commonwealth Department of Public Prosecutions.

RECOMMENDATION 1: The power to issue prohibition orders and to enforce new offences should be dealt with by bodies with specialist employment law expertise: the Fair Work Ombudsman, Fair Work Commission, and for criminal matters on referral to the Australian Federal Police and Commonwealth Department of Public Prosecutions.

2.2 Prohibition orders

2.2.1 Notice must be given to unions

The new 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). Prohibited employers will have the ability to seek review by the AAT if, for example, there are aspects of their conduct that they believe have not been properly considered in the decision to declare them prohibited.

The RSCA, and other unions, represent thousands of migrant workers across the country. If an employer has systematically breached minimum employment standards, chances are that unions will be aware of more breaches – including those not known to the Home Affairs Minister when making their decision. This information is likely to be useful to the AAT in considering any review of a prohibition order.

[2] https://www.employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/employers-who-have-breached-minimum-employment-standards/

In its response to the RSCA's submission on the Exposure Draft, the Department of Home Affairs indicated that it would "look at providing a mechanism by which interested parties are able to alert the Departnent of employers who might be considered for the prohibition". However, in its current form, the Amendment Bill does not require notification of cases actively being considered at the AAT to trade unions – the only point in the process where unions may make a meaningful contribution to the determination about whether employers should be prohibited.

Accordingly, unions should be notified when an application is made, permitting them to provide the AAT with further relevant information and avoid an unjust outcome.

Given that migrants work in every Australian industry, the RSCA considers the Australian Council of Trade Unions (ACTU) the appropriate body to be notified when an application to review a prohibition order is made.

RECOMMENDATION 2: When an application to review the decision to declare a person a prohibited employer is made, the AAT should notify the Australian Council of Trade Unions to permit unions to provide the AAT with further relevant information.

2.2.2 There is no sound reason to exclude the provision of domestic services under contract

One of the main tools used by employers across all industries to exploit workers is to engage workers under a 'contract for services' rather than as employees. This prevents workers from accessing the fundamental rights of employees such as the minimum wage, leave, superannuation and award entitlements. The Amendment Bill rightly recognises in s. 245AYC(2)(b) that exploitation happens under contracts for services and includes workers engaged on contracts under the proposed prohibition order scheme.

However, workers under contracts for services for domestic services can still be employed by a prohibited employer. Domestic services are precisely one of the areas where exploitation is rife, arguably reaching lows that put them in the category of modern slavery. Au pairs, for example, are almost always migrant workers, and are engaged for as little as $7 per hour (before tax) without the protections of Australia's employment regulations.3 Even with the provision of board and meals, this relationship leaves workers highly prone to exploitation: many are compelled to do tasks outside of the terms of their engagement and some experience grave verbal abuse and even sexual harm.4

The Explanatory Memorandum suggests that this exclusion is to ensure individuals who are prohibited employers can still engage non-citizens for contracting services such as plumbing, electrical work and cleaning. These workers do not face the same arrangements as migrant workers who would be excluded (for example, they would not be expected to live on site). However, au pairs would very clearly fit into this category and are arguably some of the most-exploited workers in the country, facing a very similar set of difficulties to farm labourers.

Governments have chosen not to regulate the 'grey area' of au pairs and other migrant domestic service workers, for fear of disturbing the families that rely on them. Given that, excluding domestic services from an even greater ranging of compliance mechanisms will serve only to entrench the risks of exploitation in the sector. Any exemption must be strict enough to cover only essential trades on a non-ongoing and non-residential basis.

RECOMMENDATION 3: The Amendment Bill should cover workers on contracts for domestic services, as they are highly vulnerable to exploitation. The exemption in s. 245AYC(2)(b) should exclusively apply to essential trades on a non-ongoing and non-residential basis.

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[3] https://thenewdaily.com.au/news/national/2018/08/31/au-pair-exploitation/
[4] https://research.qut.edu.au/centre-for-justice/wp-content/uploads/sites/304/2020/10/Briefing-paper-series-October-2020-Issue-9.pdf

2.3 New offences must be targeted at employers

The Amendment Bill would create a number of criminal offences and civil penalty provisions for coercing or using undue influence or pressure to encourage a non-citizen:

- To breach work-related visa conditions (for example, by accepting longer hours of work)
- By using migration rules (for example, attempting to breach the rights of a non-citizen worker by threatening visa requirements).

The title of the relevant section of the Amendment Bill suggest that these offences are targeted at employers. However, the provisions of the Amendment Bill suggest that these offences apply to any person. Given the far reach of exploitation in the horticulture workforce, responsibility must lie with the labour hire firms and employers that create and benefit from schemes to avert migration laws. An individual worker participating in a broken system should not be face any risk of prosecution.

In its response to the RSCA's submission on the Exposure Draft, the Department of Home Affairs agreed that "the intention of [the] new prohibition mechanism is to target employers who have done the wrong thing", and said it was "reviewing the clauses relevant to the prohibition to ensure that it captures and targets groups effectively". However, neither the Amendement Bill nor the Explanatory Memorandum explicitly limit the reach of the clause to employers only. The examples provided in the Explanatory Memorandum would be suggestive of a focus on employers; however, this still leaves excessive ambiguity that should not be left to prosecutors of the new offences and the courts to resolve. It can be easily resolved by limiting the scope of these offences.

RECOMMENDATION 4: The new offences created in Section 4 of the Amendment Bill (proposed new sections 245AAA and 245AAB) should apply only to employers and labour hire firms.

2.4 Information-sharing between FWO and DHA

The Amendment Bill relies on identifying employers who have breached defined civil and criminal penalties under the Fair Work Act 2009 (Cth) to define prohibition orders. However, this exacerbates the imbalance of power between an exploited migrant worker and their employer. Presently, 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.

Dodgy employers should be penalised for their exploitation, not vulnerable workers caught up in their actions.

Presently, where a worker is at risk of deportation for reporting workplace exploitation, these issues are dealt with under the 'Assurance Protocol' between the Fair Work Ombudsman and the Department of Home Affairs. However, no parts of the Assurance Protocol are made public, or set out in regulations or legislation. A public fact sheet says that 'eligible' workers who 'meet the conditions' of the Assurance Protocol will 'usually' not face their visa being cancelled because of workplace exploitation.5 This offers no reassurance to exploited workers who cannot assess the risk of deportation from reporting breaches.

Assurance that workers who report exploitation will not face visa cancellation should be legislated, rather than referred back to an opaque inter-agency process with no defined timelines or processes.

RECOMMENDATION 5: Assurance that workers who report exploitation will not face visa cancellation should be legislated, rather than left to the non-public 'Assurance Protocol'. This will give workers confidence about their protections when reporting exploitation.

[5] https://www.fairwork.gov.au/find-help-for/visa-holders-migrants

3 Broader policy settings enable exploitation of migrant workers

While the RSCA welcomes efforts to crack down on exploitation of migrant workers, the Amendment Bill only comes into play when exploitation has already taken place. Migrant workers are highly vulnerable, many arriving in Australia without local connections, English language skills or a ready understanding of their rights under employment law. The Amendment Bill merely deals with the symptoms rather than the underlying causes of migrant worker exploitation.

The RSCA believes that the parameters of Australia's agricultural workforce migration program fundamentally allow exploitation in plain sight. The risks and effects of this exploitation have been thoroughly documented.6

Given that exploitation has become entrenched in the sector, the RSCA believes that, in the long-run, a transition to an approved employer program is necessary (rather than an exclusion program as anticipated by the Amendment Bill). Such a program operates effectively in Australia already under the Pacific Australia Labour Mobility (PALM) program.

This program was developed with greater safeguards than other sources of temporary migrant labour:

- Employers have to be approved in advance.
- Employers are subject to site visits and audits.
- Employers have to provide an induction for workers and invite the FWO and unions.
- Employers can be suspended from the SWP for non-compliance.
- Employers are responsible for arranging pastoral care and accommodation.
- Employers are subject to monitoring by the FWO.[7]

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[6] Most recently, Unions NSW, "Wage Theft, The Shadow Market. Part Two: The Horticultural Industry," March 2021, https://www.unionsnsw.org.au/wp-content/uploads/2021/03/Wage-Theives-Horticulture-Report-online.pdf; Fair Work Ombudsman, "Harvest Trail Inquiry," 2018.

[7] https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf

The RSCA believes that these protections should form the basic standard of Australia's temporary migration program.

Unfortunately, the Australian Government has moved in the opposite direction, looking to create new forms of vulnerable labour supply for growers. For example, the United Kingdom has rightly rejected the long-standing requirement under the Working Holiday Maker (WHM) visa for 88 days of farm work, observing widespread exploitation of visa holders.

While the RSCA welcomed the end of exploitation for UK backpackers, growers lobbied for a 'substitute' form of cheap, exploitable labour. The Government responded to this lobbying by establishing the framework for an agriculture visa and beginning diplomatic talks with a number of South East Asian nations.

Unsurprisingly, governments of these countries are unwilling to allow their citizens to take up the shocking conditions present for many migrant farm workers. Regrettably, the Agriculture Minister has scapegoated the Australian Workers' Union (an RSCA member) countless times across regional newspapers and radio for his own government's failure to protect migrant workers. Given the horticultural industry's horrific track record, exposed in report after report, the RSCA still has serious concerns that any new workers would be mistreated by their employers.

The Alliance also remains deeply concerned that eroding conditions for farm workers will hurt Pacific farm workers, with dire consequences for our strategic relationships in the region. The Government claims that Pacific labour mobility is the 'centrepiece' of Australia's 'Pacific step-up' and a fundamental part of our development assistance to these countries, yet will do anything to undermine the pay and conditions they can seek on farms. Maintaining the integrity of Australia's agricultural workforce requires that no new visas are introduced which undercut the core protections for PLS and SWP workers.

RECOMMENDATION 6: The Pacific Australia Labour Mobility program, and its current standards for approved employer standards and access for unions and pastoral care providers, should form the minimum standard of Australia's temporary migration program for workers on Australian farms.