

Submission to the Productivity Commission Inquiry into the Workplace Relations Framework Phase II

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The Freedom Partnership
End Modern Slavery



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Information on Submitting Agencies

Federation of Ethnic Communities' Councils of Australia (FECCA)

The Federation of Ethnic Communities' Councils of Australia (FECCA) is the national peak body representing Australia's culturally and linguistically diverse (CALD) communities and their organisations. FECCA provides advocacy, develops policy and promotes issues on behalf of its constituency to Government and the broader community. FECCA supports multiculturalism, community harmony, social justice and the rejection of all forms of discrimination and racism so as to build a productive and culturally rich Australian society. FECCA's policies are developed around the concepts of empowerment and inclusion and are formulated with the common good of all Australians in mind.

The Salvation Army, Freedom Partnership to End Modern Slavery

The Freedom Partnership to End Modern Slavery is a special project of The Salvation Army dedicated to building a national movement to end human trafficking, forced labour, and other slavery-like practices in Australia. The Freedom Partnership does this by providing services to victims and by engaging survivors, service providers, communities, corporations, and all levels of government to seek and implement solutions to end slavery. Human trafficking is one of the world's most lucrative criminal enterprises, and it is the fastest growing. As such, The Freedom Partnership promotes policies that uphold protections for workers most vulnerable to severe forms of exploitation in the global economy, particularly migrant workers.

Introduction

The Productivity Commission's draft report (the draft report) acknowledges that temporary workers are more vulnerable to exploitation. It also acknowledges that workers in breach of the *Migration Act 1958* (Cth) (Migration Act) are particularly vulnerable because they are not protected under the *Fair Work Act 2009* (Cth) (FW Act). While its recommendations are well intended to reduce this vulnerability, the evidence indicates these proposed measures will not be sufficiently effective.

There are two primary problems with the draft report's arguments and recommendations:

- (1) The first is that they do not appear to be based on empirical evidence and are not consistent with the literature on behavioural change, crime prevention in migrant communities, or human trafficking;
- (2) The second is that they are too narrowly-focused on a handful of interventions where a more holistic suite of protections are required;

Citing a variety of submissions, including those made by the authors of this submission, the draft report accepts that temporary migrant workers experience particular challenges to operationalising their rights due to: limited English language skills, weak support networks, lack of awareness of their rights in the workplace and a reluctance to challenge their employers for fear of losing their sponsorship¹ Yet, the report's two formal recommendations do not directly address or minimise these vulnerabilities.

Taking steps to discourage employers from doing the wrong thing is an appropriate intervention, but it only addresses one actor in the employment relationship and is only one piece of a suite of protections required to ensure people have appropriate and timely support to address workplace violations.

Additionally, these protections must be nuanced to address the complex reasons why some individuals are motivated to tolerate exploitative work. While the draft report makes an informal recommendation to improve information on workplace rights, it only recommends this information be delivered prior to or at the beginning of employment—which is likely to be before any problems surface. Based on the vulnerabilities recognised in the report, awareness is not enough to effect behavioural change; ongoing engagement with migrant workers is required to empower them to operationalise their rights.

A final concern is the potentially negative impact of the draft report's recommendations on Australia's implementation of the anti-trafficking framework. In its initial submission to this inquiry, The Salvation Army cited research from the Australian Institute of Criminology (AIC) on labour trafficking,² which concluded that "The areas of life and work where...unlawful conduct occurs are potential breeding grounds for more serious forms of exploitation. As such, a focus on unlawful conduct against migrant workers ...can be considered a legitimate response to concerns about more serious forms of exploitation, including labour trafficking." Thus, as compliance and integrity operations stand to be a primary detection method, they must be designed and conducted in a manner that is evidence based and reflects international best practice in identifying victims of modern slavery. Failing to address the vulnerabilities of migrant workers undermines Australia's commitments in its National Action Plan to Combat Human Trafficking in Slavery.³

¹ Draft Report p744.

² David, F. (2010). *Labour Trafficking*. Research and Public Policy Series no. 108. Canberra: Australian Institute of Criminology.

³ Action Item 11: Support initiatives which reduce the vulnerability of groups at risk of trafficking and slavery. <http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Australiasresponsetohumantrafficking.aspx>

Clarifications of issues raised in draft report

‘Migrant workers’

Chapter 21 of the draft report conflates a number of different categories of migrants under the category of ‘migrant workers’:

- Permanent migrants, who are now Australian citizens or permanent residents; and
- Temporary migrants, including those on 457 skilled migrant visas, 417 working holiday visas, and international students

The circumstances of these different categories of migrants are very different. Permanent migrants do not risk being in employment that breaches their visa conditions because they are either permanent residents or Australian citizens, thus falling within the scope of the FW Act. For the purposes of the Productivity Commission’s report, we suggest that workers in this category are not considered ‘migrant workers’. This will provide better clarity on the particular circumstances of the category of workers to which the Commission is referring.

FECCA’s original submission to the Inquiry highlighted issues relating to workers from culturally and linguistically diverse (CALD) backgrounds who fall within the scope of the FW Act, including barriers to workers gaining employment, the prevalence of low incomes for this constituency, and the particular circumstances of CALD women and those with disabilities. Many of the issues raised in this submission also relate to migrant workers on temporary visas, for example the vulnerability of workers. However, it should be noted that the issues raised will affect temporary workers in different ways to CALD workers who are permanent residents or Australian citizens due to the applicability of the FW ACT.

Response to draft report recommendations on migrant workers

Compliance monitoring

Chapter 21 of the draft report recommends that **the Fair Work Ombudsman (FWO) should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers** (including those in breach of the Migration Act) on the basis that such resources would allow the FWO to “hire more workplace inspectors or enhance information sharing with other Departments. This would improve the likelihood of discovering instances of exploitation.”⁴

In another section, the report reads:

[One] remedy is to provide additional resources to the Fair Work Ombudsman to strengthen its existing risk-based approach to monitoring employers. This would allow the Ombudsman to enhance information sharing with other departments and conduct more investigations and audits.⁵

With no evidence cited, this recommendation appears to rely on the assumption that a risk-based, compliance-driven approach is the most effective way to prevent fraud and exploitation, and thus, will act as a protective framework for vulnerable workers. It also assumes no conflict in placing dual responsibilities of immigration monitoring and workplace regulation on FW inspectors. Ultimately, the underlying logic is that compliance monitoring minimises fraudulent and/or exploitative behaviour in the workplace. However, despite the popularity of the idea⁶, this logic is untested and, as the evidence indicates, likely to have the opposite effect to the anticipated outcomes above.

Crime prevention in migrant communities

The literature on crime prevention in migrant communities resoundingly affirms the need, indeed the reliance on, strong relationships of trust to secure positive policing outcomes.⁷ In the U.S., community policing has been “redefined” to prioritise meaningful collaboration between law enforcement and the communities they serve. This collaboration involves strategic engagement in problem analysis and identifying and evaluating solutions with the explicit aim of building trust in police.⁸ Evidence indicates that where a relationship of trust breaks down, migrant communities can become socially isolated, withdrawn from police, and in fact experience higher rates of crime, where criminals know poor relationships with police result in low crime reporting.⁹

A prime example of this is the impact of one U.S. state’s passage of a law requiring local and state police to regulate immigration status in addition to standard policing duties of protecting and serving the public. Arizona Senate Bill (SB) 1070, or *The Support Our Law Enforcement and Safe Neighborhoods Act* (2010) was quickly and almost entirely overturned by the U.S. Supreme Court. However, similar laws

⁴ Draft Report page 746

⁵ Draft Report page 43

⁶ It is our observation that government agencies as well as civil society argue for increased resourcing for the Fair Work Ombudsman’s compliance activities, although this may be for different reasons.

⁷ Gallagher, Anne. (2015). "Exploitation in Migration: Unacceptable but Inevitable" *Journal of International Affairs* 68.2, pp 64-69; Community Oriented Policing Services (COPS). (2010). *Enhancing Community Policing with Immigrant Populations*, US Department of Justice; Office for Victims of Crime (OVC), US Department of Justice. (2008). *First Response to Victims of Crime: A Guidebook to Law Enforcement Officers pp38-41, 59*; United National Office on Drugs and Crime (2008) *Toolkit to combat trafficking in persons*, p.273, Vienna: United Nations.

⁸ Community Oriented Policing Services (COPS), US Department of Justice. (2014).

⁹ Theodore, N. (2013). *Insecure Communities: Latino perceptions of police involvement in immigration enforcement*.

were either proposed or passed in over 30 additional states; and despite facing similar legal challenges, much of the damage had already been done amongst immigrant communities across America.

In 2012, the Police Executive Research Forum (PERF) convened a roundtable of police chiefs from impacted states to discuss concerns about the impacts of the laws and share strategies for mitigating those impacts. Chiefs from across Arizona expressed concerns that laws like SB 1070 erode trust in police among immigrant communities and “immigrants who are witnesses to or victims of crime are increasingly hesitant to come forward and provide information to the police”.¹⁰ The following comments illustrate the chiefs’ concerns about conflating immigration enforcement with protection responsibilities¹¹:

“If you have a legal right to be here, you should not have to worry,” said Tucson Chief Roberto Villaseñor. “But because of SB 1070, immigrants who are in the country legally are worried.”

“SB 1070, isn’t just about the Latino community,” said Phoenix Chief Daniel Garcia. “Members of the Asian community in my jurisdiction are also very concerned about SB 1070. SB 1070 affects many non-English speaking communities.”

“SB 1070 has definitely taken a toll on my department’s relationship with the community,” said Chief Villaseñor. “And although I can’t prove it, I do believe that it has made Hispanics less likely to come forward to report crime.”

The PERF also met with the Tucson-based Inter-faith Community Group, to hear the views of the community about SB 1070. Members of the clergy reported a decrease in attendance at worship services as a result of the law, reportedly due to fears of harassment or being detained by police. The Group expressed particular concern about the impacts of the law on crime reporting among the immigrant community. Citing cases of domestic violence where undocumented victims felt they had no choice but to go underground, members stated that “if victims and witnesses are afraid to come forward, crime in immigrant communities will be underreported. Not only does this mean that crimes will go unsolved and unprosecuted, but it also means that the police...will be placed at a disadvantage in terms of community policing and crime prevention efforts”.¹²

The 2012 study *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, surveyed over 2000 Latinos across four U.S. states and confirmed concerns that police involvement in immigration enforcement “significantly heightened”¹³ fear of police and would result in lowered crime reporting by Latino communities. Key findings¹⁴ included:

- 44 percent of Latinos surveyed reported they are less likely to contact police officers if they have been the victim of a crime because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status or that of people they know;
- 45 percent of Latinos stated that they are less likely to voluntarily offer information about crimes, and 45 percent are less likely to report a crime because they are afraid the police will ask them or people they know about their immigration status;

¹⁰ Police Executive Research Forum (PERF). (2014). *Local police perspectives on state immigration policies*, p22, Washington DC: PERF.

¹¹ PERF (2014), p22

¹² PERF (2014), p 24

¹³ Theodore (2013), p 18

¹⁴ Theodore (2013), p i.

- 70 percent of undocumented immigrants reported they are less likely to contact law enforcement authorities if they were victims of a crime;
- Fear of police contact is not confined to immigrants. For example, 28 percent of US-born Latinos said they are less likely to contact police officers if they have been the victim of a crime because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status or that of people they know.

The report concluded:

The findings presented here indicate that the greater involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police, contributing to their social isolation and exacerbating their mistrust of law enforcement authorities. This fear, isolation and mistrust, in turn, have led to a reduction in public safety, a serious negative consequence of the involvement of police in immigration enforcement.¹⁵

At the conclusion of the PERF conference, police chiefs confirmed as best practice: the need to adhere to the central mission of protecting and serving all members of the community; to engage immigrant communities to maintain trust and respect; to collect data and evaluate the impact of the laws; and to concentrate limited resources on undocumented immigrants who commit serious crimes rather than all undocumented immigrants.

Interestingly, the police chiefs also recommended a common strategy to circumvent the policy at its most problematic end. Phoenix Police Chief Garcia publicly announced police would not enquire about the immigration status of a victim or witness of a crime. Where a public position was legally not possible, other police agencies quietly advise trainees to avoid any immigration enquiries that would “hinder an investigation.” One chief stated: “One of the most powerful things that we can talk about is how, if enforced as written, these SB 1070- type laws will have an impact on victims. “We need to continue to beat this drum”.¹⁶

Fair Work inspectors are not state employees and they are not police, but they do carry the primary responsibility of ensuring workers are treated fairly, in accordance with Commonwealth workplace laws. Given this role in monitoring workplace welfare, it is reasonable to conclude the impacts of adding immigration enforcement to police in the U.S. (who are also charged with aspects of public welfare) could have similar impacts on FW inspectors in Australia.

To encourage reporting of exploitation and violations of workplace rights, temporary migrant workers must be afforded the same legal protections as their Australian coworkers. The situation in the U.S. suggests that placing immigration compliance monitoring responsibilities on FW inspectors undermines equal access to justice. Thus, to effectively address the exploitation of temporary migrant workers, immigration compliance monitoring must be separate from workplace regulation or there will be no grounds on which to build a relationship of trust with workers. The U.S. case also indicates that building a relationship of trust and meaningfully engaging migrant communities in problem-solving will yield an increase in reporting violations. In the area of human trafficking, there is evidence to suggest that this can lead to successful prosecutions of slavery-related offences.¹⁷

¹⁵ Theodore (2013), p 18

¹⁶ PERF (2014), p 35

¹⁷ David, F. *Labour Trafficking*, (2010:37); Gallagher, A. (2015:64-69). "Exploitation in migration: Unacceptable but inevitable"; Gallagher, Anne. (2009). *Prosecuting and adjudicating trafficking in persons cases in Australia: Obstacles and opportunities*, p2; Office for the Special Representative and Co-ordinator for Combatting Trafficking

Potential impacts of immigration compliance monitoring on victims of modern slavery

As illustrated, there is significant evidence that immigrant communities are less likely to report crime than their native-born counterparts¹⁸ out of fear, mistrust and social isolation resulting from discrimination.¹⁹ In turn, this makes them more vulnerable to crime²⁰ and, in the workplace, more easily manipulated by unscrupulous employers. The consequences of this are particularly dire for the most exploited workers—victims of modern slavery.

The Recommended Principles and Guidelines on Human Rights and Human Trafficking developed by the United Nations Office of the High Commissioner for Human Rights (UN OHCHR) state: “A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place.”²¹ The UNHCHR also recommends ensuring that trafficked persons are not detained or prosecuted for immigration offences or for the activities they are involved in as a direct consequence of their trafficking situation.

Yet there is both international and domestic evidence to suggest that where enforcement law places workers’ immigration status as tantamount to, or more important than, crimes committed against them, victims may not be identified and inadvertently deported. In the UK, the Anti-slavery Monitoring Group observed:

Where a lack of understanding prevails, the trafficked person’s immigration status can also become the focus of enforcement rather than the exploitation they experienced...It appears that some authorities put greater weight on immigration status rather than on the crime committed against the trafficked person. In one case an exploited domestic worker left her employer and wanted to report the abuse to the police, and ‘although she had a completely legitimate visa, the police officer’s response was...’she’s moved employers now and therefore she ought to be deported because the visa is no longer valid’ which was an incorrect application of the law...but the response of the officer was to look at the immigration issues.

Similarly, Australia’s reliance on immigration compliance activities may be resulting in the detention and deportation of potential victims of trafficking.²² Indeed, the annual US Trafficking in Persons (TIP) Report has recommended that Australia reduce its reliance on immigration compliance monitoring as a means to detect exploitation and trafficking.²³

in Human Beings (OSCE) and United Nations Global Initiative to Fight Human Trafficking (UN.GIFT). (2011). *Analysing the business model of trafficking in human beings to better prevent crime*, pp67-68.

¹⁸ COPS. (2010); Gallagher, A. (2015); OVC-USDOJ. (2008).

¹⁹ Migration Council Australia (MCA). *More than Temporary: Australia’s 457 Visa Program*. “Some 18.4 per cent of 457 visa holders from non-English speaking backgrounds indicated that they had faced discrimination because of their skin colour, ethnic origin, or religious beliefs (p 5).”

²⁰ United Nations Office on Drugs and Crime (2008). Toolkit to Combat Trafficking in Persons.

²¹ United Nations High Office of the High Commissioner for Human Rights (UN OHCHR). (2002). *The Recommended Principles and Guidelines on Human Rights and Human Trafficking* E/2002/68/Add. 1. Guideline 2, p 4.

²² *Alleged illegal farm workers to be deported after police raids in Shepparton*, Herald Sun 1 June 2015, <http://www.heraldsun.com.au/news/law-order/alleged-illegal-farm-workers-to-be-deported-after-police-raids-in-shepparton/story-fni0fee2-1227377066577>;

Numerous charges after WA operation targets organised crime, ABC Online News 5 May 2014, <http://www.abc.net.au/news/2014-05-05/ten-charged-after-carabooda-raids-uncover-foreign-workers/5429852>;

²³ US Department of State. (2014) Trafficking in Persons Report. Washington DC: http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm?utm_source=NEW+RESOURCE:+Trafficking+in+Persons+Report+2014&utm_campaign=2014.07.16+NEW+RESOURCE:+Trafficking+in+Persons+Report+2014+&utm_medium=email

What we don't know can cause harm: deficiencies in a risk-based approach

Summarising the evidence thus far, immigration compliance monitoring is not supported by the research on effective community policing amongst migrant communities or human trafficking prevention. When examined against its intended outcomes in Australia, there is little evidence to assert it is equally or more effective in reducing exploitation than other models.

Very little is known about the prevalence and nature of migrant worker exploitation in Australia; the data is virtually non-existent, which has resulted in at least two problems: (1) policies designed to address exploitation have not been sufficiently evidence based; and (2) crime prevention remains risk-based rather than intelligence-led. Without this evidence, we cannot determine the extent to which compliance monitoring effectively uncovers cases of exploitation.

While compliance activities have identified some fraud and exploitation, the draft report acknowledges that only a small proportion of employers are audited. For example, the draft report cites data from the Department of Immigration and Border Protection (DIBP) indicating that of 1000 high-risk employers audited in 2014, one fourth were reported to DIBP for noncompliance. This data alone is insufficient to conclude that no exploitation is occurring in the remaining three fourths; it only indicates that no exploitation was found. We still know nothing about the balance of audited employers where no violations were found or those who are not audited.

Additionally, the data does speak to the extent of exploitation amongst the 650 000²⁴ temporary migrants whose visas are not subject to the monitoring system. This is a particularly salient point in light of last week's reports of significant exploitation of international students in 7-Eleven franchises across Australia.²⁵

In sum, without better information about the nature and scope of exploitation of migrant workers, risk-based compliance monitoring does not speak to the actual size of the problem or to the efficacy of the detection method. More importantly, there is insufficient evidence to comfortably assume compliance monitoring reduces exploitative behaviour as opposed to driving it further underground.

At minimum, we strongly assert that continued or increased reliance on immigration compliance monitoring as a key method to detect exploitation requires two things:

(1) A test of whether this responsibility betrays the independence of FW inspectors, thereby withdrawing a neutral source of support from workers who might otherwise report workplace violations; and

(2) A test of whether compliance monitoring is as or more effective in detecting exploitation and fraud when compared to other models.

²⁴ DIBP 2014a, Australia Migration Trends 2013-14, Canberra. As cited in Productivity Commission draft report, p 741.

²⁵ Australia Broadcasting Corporation, Four Corners, *7-Eleven: The price of convenience*, 31 August 2015.

Behavioural theory

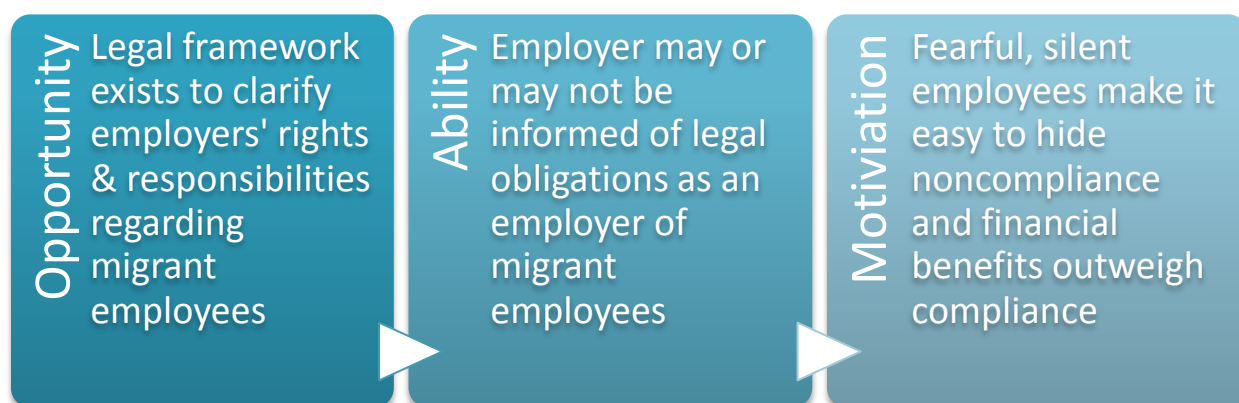
Behavioural theory may provide the strongest argument against compliance monitoring as it is currently designed. Drawing again from the trafficking literature, an analysis of applying behavioural theory to trafficking prevention programs explains where interventions targeting behavioural change go wrong.²⁶ The author states: “few prevention interventions have been objectively proven as effective [due to] limited evidence; insufficiently clear objectives; limited evaluation of outcomes and impacts; and the fact that many prevention activities have been isolated rather than a part of a strategic package of interventions.”

As discussed earlier, the draft report’s first recommendation does not cite evidence to substantiate its recommendations, nor does it clearly articulate its objectives, though it may be inferred that the objective of increasing compliance monitoring is to decrease fraudulent and/or exploitative behaviour. Also discussed is the lack of independent evaluation of compliance monitoring for both positive and negative impacts and for efficacy in achieving its implied goal. On the final point, because compliance monitoring is a stand-alone, isolated intervention, it has limited capacity to address the diverse and complex factors that drive human behaviour in this context.

Marshall suggests that applying the Opportunity, Ability, Motivation (OAM) framework can help assess whether a proposed intervention is likely to address the external and internal factors that impact behaviour. He states: “In simple terms, adopting/maintaining a behaviour may be approached from the perspective of the target group or individual by asking: do I have the opportunity to do it? Am I able to do it? Do I want to do it?”²⁷

Applying the OAM framework to the recommendation to employers as the target, we identify the following problems:

GOAL: Decrease employers’ fraudulent/exploitative behaviour by increasing compliance monitoring.



By this analysis, the first two elements are present, but the employer lacks the motivation to change behaviour. Employers have the opportunity to behave legally and ethically by virtue of Australia’s workplace and migration laws. They may not have the ability to exercise those obligations if they do not

²⁶ Marshall, P. with Asian Development Bank and United National Inter-agency Project on Human Trafficking. (2011). *Re-thinking trafficking prevention: A guide to applying behaviour theory*, p 6.

²⁷ As cited in Marshall (2011:9) “OAM is widely used in the fields of marketing and social marketing to explain behaviours among target populations.”

understand requirements for employing migrant workers. However, where information is readily available from the FWO and other resources, there is little excuse. The third factor is the most complex as compliance monitoring may or may not address hidden incentives for exploiting workers and, as will be explained below, the disincentives workers have to complaining to authorities.

While a framework for compliance is in place, workers may or may not be aware of their rights and if not, are unable to exercise those rights. As above, this model touches on just a few of the possible reasons why an employee may willingly tolerate exploitative work and remain complicit in withholding information about noncompliance from inspectors.

GOAL: Decrease employees' fraudulent behaviour by increasing compliance monitoring.



We note the draft report does make an informal recommendation to provide information on workplace rights to workers at the time of their visa grant.²⁸ However, an approach which focuses only on providing such information at the visa-approval stage is vastly inadequate. Marshall states: “behavioural theory and evidence highlights that we cannot assume that increasing a person’s knowledge and understanding about a particular risk will lead them to take action to avoid that risk.”²⁹ Marshall explains the many reasons why “greater knowledge” may not yield the behavioural change sought, including “failure to personalise the risk; willingness to take the risk; actually not being able to practice the safer behaviour, and seeing the safer behaviour as personally unachievable.”

In other words, simply providing information once to a migrant worker before commencing employment will not address thoughts that he or she is not vulnerable or that the risk is simply worth taking. Nor does information enable a migrant worker to get help when needed or resist economic pressures from home.

Information about rights and entitlements should target migrant workers throughout their time in Australia and be disseminated by linking migrant workers with organisations and experienced service providers who can impart information on rights, systems, and services, and provide assistance and advocacy where necessary to help workers address workplace violations.

²⁸ “Ideally, all migrant workers should be given information about their workplace rights upon receiving their approved visa. This could be, for example, in the form of a leaflet if a visa is approved in person or by mail, or through online correspondence if a visa is approved online” (p746).

²⁹ Marshall, P. (2011), p7.

Direct engagement is important as word of mouth is a primary source of information for many migrant workers. Other mediums, including ethnic radio and print media, should also be utilised to circulate information to workers. To assist individuals who may have limited English language proficiency, any written materials (including websites) should include information about how to access the government's Translating and Interpreting Service. This information should be easy to find and understand.

Direct engagement may begin at the time that a worker is granted a visa, and continue throughout their time in Australia. The Government recently launched a family safety pack to provide information on family violence visa provisions and available support for women coming to Australia on a partner visa. A link to the pack will be included in all partner visa grant letters issued by the Department of Immigration and Border Protection. A similar pack should be developed about workplace rights for individuals granted working visas.

While it is the authors' experience that these interventions are more likely to impact positively on employees' ability and motivation to report abuse, we accept that there may still be factors left unaddressed. That said, a more robust and dynamic approach built on sustained engagement with workers is certainly more supported by the literature than compliance monitoring.

Employer fines

The second recommendation in Chapter 21 of the draft report asserts that channelling the unpaid wages of unlawful workers to the Government will achieve the dual outcome of increasing penalties for unscrupulous employers and discouraging workers from working illegally. Similar to the first recommendation, the underlying assumption is unsubstantiated and flawed and the strategy is incomplete. If one applies principles of behaviour theory, this recommendation is likely to have the reverse effect.

While it is logical to assume that an increased financial penalty could “reduce the circumstances under which it may be beneficial to exploit migrant workers,”³⁰ it does not address factors that enable an employer to evade detection, which is directly related to the motivations of employees. As written, the recommendation has little bearing on the behaviour of an unlawful worker who may be tolerating exploitative work for a variety of complex reasons, and how this can be used as a lever to maintain the same, or perhaps more, control over a worker’s behaviour.

In other words, it does not alleviate the power an employer has over an undocumented employee, where it is well known that any employees found to be in breach of their visa conditions are not covered by the FW Act and are subject to immediate detention and deportation.³¹ While some groups, like victims of trafficking are entitled to protection³², the flaws in the detection model cast doubt over the extent to which they are successfully identified.

Citing no evidence, the draft report asserts that [unpaid wages] could not...be given to the [unlawful] workers as compensation, as this would only strengthen any incentives for the worker to work in breach of their visa conditions. Applying the OAM framework, the proposal does not address the diverse range of motivations amongst the target group, in this case, workers. To the contrary, the proposal appears to assume that all unlawful workers have the same motivation for not complaining: that they are willingly working in breach of the law to escape the confines of their visa (eg limited hours, type of work, tax obligations).

In reality, we know very little, if anything, about the proportion of workers deliberately defrauding the system or why they do it. We also don’t know how many exploited workers have been forced or induced into unlawful status because the nature of the compliance-driven response is to remove unlawful persons as quickly as possible. This is a particularly significant problem for victims of forced labour or trafficking, where it is a common control tactic to induce a person into unlawful status through force, fraud, or coercion. **As a result, concentrating so heavily on the unknown proportion of workers who are deliberately rorting the system is putting those most vulnerable at risk.**

As Dr. Clibborn discussed in his first submission to this inquiry, there is a strong argument that providing basic employment protections to all migrant workers eliminates the power dynamic between an employer and an undocumented employee. He also cited the International Convention on the

³⁰ Draft Report p 748

³¹ *Media Release: Immigration detains 37 in NSW and VIC*, Senator Hon Michaelia Cash 18 March 2015, <http://www.minister.immi.gov.au/michaeliacash/2015/Pages/immigration-detains-37-nsw-vic.aspx>
Media Release: 39 illegal workers nabbed at Barooga, Senator Hon Michaelia Cash 12 February 2015, <http://www.minister.immi.gov.au/michaeliacash/2015/Pages/39-illegal-workers-nabbed-at-Barooga.aspx>
Illegal workers caught, Sunraysia Daily 16 December 2014, <http://www.sunraysiadaily.com.au/story/2766267/illegal-workers-caught/>

³² National Action Plan to Combat Human Trafficking and Slavery, p. 59, Action 59. “Ensure trafficked people are not detained, charged, or prosecuted for status-related offences or held in immigration detention.”

Protection of the Rights of All Migrant Workers and Members of Their Families: “recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized.”³³

The literature on human trafficking is again relevant and provides an appropriate conclusion to this discussion. *“An effective criminal justice response to trafficking must be explicitly directed towards ending the impunity of exploiters and in securing justice for those who are exploited. (...) These two goals are intrinsically linked and each one facilitates the attainment of the other, (...) and any strategy that aims to achieve only one of these goals, particularly at the expense of the other, is doomed to irrelevance and failure.”*³⁴

³³ Clibborn, Stephen (2015). Submission to Productivity Commission inquiry into the workplace relations framework, p 3.

³⁴ Gallagher 2009: 2-3

Recommendations

In response to Recommendation 1: The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the *Migration Act 1958* (Cth)):

1. Evaluate the impact of continuing and possibly expanding Fair Work inspectors' immigration compliance responsibilities for adverse impacts on inspectors' ability to establish trust with workers. Do not expand FWO role in immigration compliance activities.
2. Reduce reliance on compliance monitoring by linking temporary workers with existing community-based supports that go beyond written information on rights. A meaningful and sustained connection with community is needed to overcome language and cultural barriers, reduce the social isolation that facilitates exploitation, and equip workers with advocacy services to prevent and respond to workplace violations.
 - This framework for social inclusion should be available for all migrant workers with work rights, including international students and regionally settled migrants, (i.e. those employed via Safe Haven Enterprise Visas and Designated Area Migration Agreements, and Investment Facilitation Agreements (IFAs) under the ChAFTA.)
3. The Government should amend protocols and training to ensure all compliance and integrity operations are conducive to building trust and rapport with potential victims and are consistent with the National Action Plan to Combat Human Trafficking and Slavery, which holds that no one with indicators of trafficking or slavery should be detained or deported, even if authorities are not certain about the person's victim status (Action 59).
 - Ensure that all compliance and integrity operations conducted by Taskforce Cadena or DIBP include embedded human trafficking specialists.
 - Such operations should adopt international best practices (per UN Office on Drugs and Crime; United Kingdom Reception Centre Model; U.S. Taskforce Model) wherein law enforcement engages with NGOs to assist in the identification of victims of crime.
4. Enhance the focus of compliance on the labour hire companies and employers rather than on the visa holders, who may be unknowingly or unwillingly in breach of visa conditions as a result of their employer's actions.

In response to Recommendation 2: The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.

1. This recommendation should be removed from the final report. The FW Act should be amended to apply to undocumented workers, particularly those who are known to have been subject to exploitation.
2. Migrant workers who have been trafficked or subjected to significant exploitation, such as significant underpayment of wages, should be permitted to remain in Australia if, and for as long as, they are pursuing civil remedies of compensation from the employer or if they are involved in any Fair Work processes.
 - Introduce a Civil Justice Stay Visa to provide a temporary bridging visa to those workers who wish to take their current employer to task in the courts or Fair Work tribunals. At the moment DIBP can end up unwittingly assisting exploitative employers by removing anyone who complains. Often the individuals are removed before any action or investigation for the purposes of legal proceedings can be conducted.

In response to informal recommendation to provide information on rights at visa grant

1. All migrant workers coming to Australia should be provided with information about their rights and responsibilities in a language they understand, including information on how to seek help from both relevant government authorities and non-government organisations.
2. As stated in response to the first recommendation in Chapter 21, migrant workers should be linked with community organisations that provide services to migrants for orientation sessions. This will reinforce their understanding of workplace rights and empower them to operationalise their rights.