sda NATIONAL

THE UNION FOR WORKERS IN RETAIL. FAST FOOD. WAREHOUSING.

Shop Distributive and Allied Employees' Association

SUBMISSION

The effectiveness of the current temporary skilled visa system in targeting genuine skills shortages

Senate Inquiry: Legal & Constitutional Affairs References Committee

Submissions Address: legcon.sen@aph.gov.au

Date Submitted: December, 2018

THE EFFECTIVENESS OF THE CURRENT TEMPORARY SKILLED VISA SYSTEM IN TARGETING GENUINE SKILLS SHORTAGES

Introductory comments.

The Shop, Distributive and Allied Employee's Association (SDA) is one of Australia's largest trade unions with approximately 214,000 members. The majority of these members are young people and women. Registered in 1908, the SDA has coverage of areas including retail, fast food, warehouse, drug and cosmetic manufacturing and distribution, hairdressing, pharmacies and modelling.

This submission focusses primarily on the industries which the SDA covers.

The effectiveness of the current temporary skilled visa system in targeting genuine skills shortages

Enforcement of skilled visa arrangements, especially in regard to ensuring proper wages and conditions for overseas workers is grossly inadequate.

In recent years a series of reports have exposed the fact that large number of workers in the retail and fast food industries have been exploited or are being exploited by their employers in what can only be described as wage fraud scandals. Many of these workers are international students or backpackers and/or overseas workers in Australia working on temporary skilled visas.

It is not our intention in this submission to revisit in detail the actual cases or forms of exploitation to which international workers and students have been subjected. Previously the Senate has been well appraised of the details of exploitation in this area.

However, it should be noted that apart from underpayment of wages and abuse of working conditions provisions by employers some of these overseas workers have been subjected to workplace bullying, sexual and other forms of harassment and intimidation.

They have sometimes been forced to work excessive hours without appropriate compensation.

They have also been subjected to other forms of exploitative behaviour such as having to accept deductions from their pay for all sorts of reasons such as payment for board and lodgings or even to meet alleged migration agent fees. Some have been subjected to sham contracting arrangements where a labour hire contractor has sought to claim a worker is an independent contractor when in fact they are not.

It is quite clear that the current temporary skilled visa system is significantly flawed.

It is being widely abused by unscrupulous employers.

As such it does not fulfil its role of targeting genuine skills shortages in a fair and reasonable manner.

There is an urgent need to restore community confidence in the temporary work visa system.

There are a wide range of reasons why this system is not working as it should.

In the first place it is too easy for unscrupulous employers to abuse and rort the system.

There is inbuilt in the system a strong disincentive for migrant workers to report exploitative treatment to the authorities. This is because the visas they work under contain particular conditions pertaining to work, which, if breached, may lead to the visa holder being fined, detained or even deported. In this situation some employers are able to effectively coerce temporary migrant workers to breach their visa conditions and then threaten to report them if they complain.

While the record shows some temporary work visas holders make complaints and pursue their rights the vast majority of exploited workers do not. As a result, until recently the exploitation of temporary work visa holders effectively sailed under the radar.

Unscrupulous employers may actively induce migrant workers to breach their visa conditions. This can be done very easily, often with the worker concerned having little idea of what is actually happening.

A worker may be induced to work more than the actual hours limits specified in their visa or to perform different work to what the visa specifies. A migrant worker may agree to take payment in cash at a rate below the award rate.

It might be expected that the employer would know that such actions breach visa conditions but very often the worker does not or, if they do the worker feels there is nothing they can do about it.

The situation is compounded by the fact that foreign workers often have little or no knowledge of Australian labour or immigration law. This applies especially to those on temporary work visas.

Even inadvertent breaches can make a migrant worker liable for visa cancellation. For example, accepting a cash in hand payment may seem reasonable to a migrant worker but this effectively makes them an "illegal" worker and subject to having action taken against them.

The promise of Australian residency can be an incentive for migrants to accept poor wages and conditions.

Section 457 visa holders are required to be sponsored by an employer. Only those with a job offer are eligible for a 457 visa. Withdrawal of an offer leaves them open to exploitation. Working at something else other than the occupation specified on the visa has the same effect.

Many migrant workers have limited English language skills, and this may exacerbate the situation.

The interaction between the Fair Work Ombudsman and the Department of Immigration and Border Protection leads some overseas workers to fear that any information collected by the

FWO will be passed on to the department which may then lead the Border Force officers to act against the visa holder irrespective of how the visa holder got into their "situation"

By virtue of their youth, lack of experience working in a foreign country, limited social and community connections, insecure residence status and limited knowledge of the Australian law international students are often the most vulnerable of all migrant workers.

It would appear that the major drivers of underpayment of workers are greed and/or a desperate desire by employers to make their business viable and/or ignorance as to what the correct wages and working conditions are.

Further, ignorance is often used as a defence by employers in wage underpayment cases, irrespective of the real reasons for such actions.

In the retail, fast food and hospitality sectors much of the exploitation of overseas workers is carried out by franchise operators. Many of the employers engaging in this exploitative wage fraud behaviour are franchise holders with household names such as 7 Eleven and Caltex.

In regard to franchise operators a major part of the overall problem is the actual operating models of many franchising arrangements.

In many franchises wages are a major business cost yet it is clear that many individuals enter into franchise arrangements without having a clear understanding of all that is required to operate effectively.

Once all the costs associated with the franchise have been met the actual return to the franchise holder is often minimal or even non- existent.

It is not surprising that unscrupulous employers seek to alleviate their cost pressures by cutting wages and employment conditions. It is virtually impossible for many franchise holders to operate a successful business without "cutting corners" such as engaging in wage fraud.

It is no surprise that the Fair Work Ombudsman has described some franchise models as "broken".

In some franchise models the extent of wage fraud is extensive and systematic. Caltex and 7 Eleven are just two examples.

There is a need for much more effective monitoring and enforcement.

The current temporary skilled visa system is undermining the system in place for training Australian workers

The actions of the current federal government have severely undermined the Australian vocational education and training system. This has occurred in a variety of ways and has led to the situation where we now have a growing shortage of apprenticeships and skilled workers in this country.

One of the ways the current VET system has been undermined has been by allowing employers to fill alleged skills gaps with overseas workers without there being a requirement for such employers to contribute to Australia's pool of skilled workers.

One of the principles underpinning skilled migration is that Australian workers must have the first right and opportunity to access Australian jobs. It is our view that the immigration system should actually ensure that this occurs.

The temporary work visa program is being used by employers as a means of overcoming the implications of their reluctance to invest in the training of young Australians. Why would an employer invest in training if they can simply obtain a suitable worker through the temporary work visa scenario at an obvious lesser cost?

The temporary skilled visa arrangement is becoming a mechanism for employers to avoid investing in training Australians.

It should be noted that this approach is undermining the national skills base and is clearly a significant factor in the decline in apprenticeships and the attendant decline in the skilled base of the Australian workforce.

The Australian community needs to be assured that the temporary work visa program is not exploiting vulnerable workers or having adverse impact on employment or training opportunities for Australians.

In the view of the SDA the process for identifying genuine skills shortages is inadequate.

No employer should be able to engage workers on temporary work visas unless they demonstrate a commitment to training Australian workers for the same or similar jobs. The ability to engage such visa workers must carry with it such a requirement.

There are serious shortcomings in the process for determining skills shortages.

Often temporary visa workers are being engaged where skilled and qualified Australian workers are available to do the work.

Under law a temporary migrant worker 's occupation must be skilled and listed on the skills occupation shortage list. Notionally this occurs as an outcome of consultation with relevant industrial parties. In practice there appear to have been cases where employers succeeded in having an occupation added to the skills occupation list through actions which did not necessarily involve proper process. At the very least there are serious questions to be asked as to how rigorous the process is when checking whether there really is industry support for an occupation being on the skilled occupations list. Certainly, there appear to have been occasions where employers have been consulted and supported an addition to the list and the relevant unions have not even been consulted.

The current process for determining skills shortages needs to be reformed.

There should be independent assessment and verification of whether employers wishing to employ overseas workers have made all reasonable efforts to find a suitably qualified Australian for the position. Without a process of genuine labour market testing this cannot be achieved.

A critical step along this path would be to ensure proper consultation occurs before an occupation is added to the skills shortage list. Such a consultation process would involve consulting with relevant employers, trade unions and skills advisory bodies. Such consultation should occur on an annual basis in regard to retaining an occupation on the

skills shortage list. Unless there was agreement from all the relevant parties an occupation would not be added to or retained on the skills shortage list.

While labour market testing is notionally in place it is our contention that it is open to abuse and does not always operate effectively.

In some cases the system does provide for labour market testing but the way this is carried out leaves much to be desired. In practice it appears that one job advertisement, even on social media may be enough to satisfy government requirements.

To operate effectively, labour market testing requirements should accurately specify the nature and content of job advertisement and that such advertisements run for a reasonable period of time.

There should be a requirement for rigorous evidentiary requirements in regard to labour market testing.

At the end of the day the effectiveness of government requirements in this area will depend on how seriously the department monitors and polices requirements.

While it is our view that current requirements in this area could be strengthened, of even greater urgency is the need to ensure that what employers say they do in this area actually happens.

It is of concern that some trade agreements exclude or limit market testing.

Summary and Recommendations

It is quite clear that the current temporary skilled visa system is significantly flawed.

Enforcement of skilled visa arrangements, especially in regard to ensuring proper wages and conditions for overseas workers is grossly inadequate.

There are a range of actions which could and should be taken to address this issue.

Given the way the system is loaded against workers on visas it is no surprise, that the number of visa workers who make complaints about their wages, employment conditions or the treatment in general they receive at the hands of their employers are few and far between.

The first and most important reform that could be undertaken would be to remove the fear workers have in regard to reporting.

It should be made clear to all arriving temporary work visa workers that they do have labour rights at law and will be given protection if they report breaches.

It should be made clear to all workers on temporary visas that if they are remunerated or employed in violation of Australian law that they will not face the possibility of cancellation of their visa or deportation unless it can be proven that such worker freely entered into the arrangement in full knowledge of what they were doing.

Amnesty for workers being exploited is a fundamental step towards restoring confidence and credibility in the system.

Further, there is a need for effective **whistle blower protection** for overseas workers who report breaches, whether in regard to themselves or others.

It is no coincidence that with the decline in union membership we have seen a corresponding increase in worker exploitation.

Unscrupulous employers often actively discourage workers from contacting or joining trade unions.

For workers not in a trade union this constitutes a serious barrier to them pursuing redress for exploitation.

Those who complain and seek to assert their rights are sometimes still being intimidated or even subject to physical violence.

All workers, including those on temporary work visas must have a right at law to speak to and or join a trade union.

Trade unions must be afforded proper legislative powers to ensure effective compliance of the industrial relations system.

The SDA has devoted considerable time and expense pursuing claims for overseas workers. However, workers still face major obstacles in pursuing claims for exploitation such as underpayment.

Many workers simply do not know what their wage or employment conditions should be.

Proceedings in the Fair Work Commission are often complex, time consuming and costly.

This is not something that unions have the capacity to apply unlimited resources to. There is an urgent need for a low cost small-claims jurisdiction where workers and their unions can pursue underpayment.

Current right of entry provisions function to undermine the capacity of unions to uncover exploitation through unannounced visits.

There is a need to reform right of entry provisions. Unions must have their wage enforcement rights restored so that they can police the observance of minimum legal rates of pay across their respective industries.

The Fair Work Ombudsman currently is charged with ensuring employers comply with their workplace obligations. Notwithstanding the efforts of the FWO wage scandals continue to emerge.

A major part of the problem in pursuing claims is the lack of an effective requirement that employers keep payslips and make them available to employees. Payslips are often not provided, falsified or missing. The FWO has the capacity to deal with this problem.

However, it appears that the FWO lacks sufficient resources to deal comprehensively with this problem. It is apparent that there is a lack of resources necessary for ensuring

compliance and labour regulation. The FWO needs more resources including more workplace inspectors. These inspectors would supplement the compliance work of industry unions upon restoration of these unions wage enforcement powers.

There is presently no effective disincentive for an employer who chooses to exploit workers and deny them minimum wages and conditions.

This is evidence by the 7 Eleven cases of worker exploitation, and the difficultly in seeking appropriate remedies for these workers.

The fact that 7 Eleven can choose to 'self-manage' the process of underpayments is fanciful and does little to dissuade other exploitative employers from such behaviours.

In the case of 7 eleven the franchisor was not legally responsible for franchisees who did not pay correct employee entitlements. There is of course an argument that they did and do have a moral responsibility. This was and is of little comfort to the employees who were ripped off.

The FWO needs to have its resources increased so that that they can more effectively pursue breaches. Union wage enforcement rights should be restored in the same instance.

There should be a total cessation of FWO workplace inspectors liaising with the immigration department. FWO inspectors should only be involved in the enforcement of labour standards.

In our view the Workplace Relations Act needs to be strengthened in relation to international workers.

A proper industrial relations system must be able to address all forms of work to ensure there is a genuine safety net of wages and conditions for all workers, regardless of whether they are direct employees, dependant contractors, engaged in the gig, shared services or Uber economy or working on temporary work visas.

Legislation is required to outlaw sham contracting.

Penalties for breaches need to be significantly increased.

Those who were guilty of wage fraud should face severe penalties including in serious cases gaol and or disqualification as company directors. Similar strict penalties should apply to franchisors who do not fulfil their obligations.

Wage fraud has emerged as a major and pervasive factor in many franchise operations.

Franchisees should have clear guidance on what they are required to understand and do in regard to employment and how to properly correct mistakes if they occur.

Legislative action is required to address this matter. Ignorance or attempts to justify breaches of the law should be not be a defence.

It is critical that franchisees are given all relevant information regarding finance, including all relevant and prospective charges which may be levied by a franchisor.

Such information must include all relevant employment information.

This information should be provided as part of the due diligence process before the prospective franchisee actually signs up to a franchise arrangement.

There is a need for transparency and full disclosure in all franchise contracts.

A proper disclosure regime would ensure that all prospective franchisees were aware of their obligations.

Failure by a franchisor to provide all relevant information to a franchisee or a prospective franchisee should constitute a major breach of the Code and the Workplace Relations Act.

As foreign workers often have little or no knowledge of Australian labour or immigration law all temporary work visa workers should be given documentary information in their native language upon arrival in Australia which sets out what their rights and entitlements are.

The current temporary skilled visa system is undermining the system in place for training Australian workers.

No employer should be able to engage workers on temporary work visas unless they demonstrate a commitment to training Australian workers for the same or similar jobs. The ability to engage such visa workers must carry with it such a requirement.

There are serious shortcomings in the process for determining skills shortages.

The current process for determining skills shortages needs to be reformed.

There should be independent assessment and verification of whether employers wishing to employ overseas workers have made all reasonable efforts to find a suitably qualified Australian for the position. Without a process of genuine labour market testing this cannot be achieved.

A critical step along this path would be to ensure proper consultation occurs before an occupation is added to the skills shortage list. Such a consultation process would involve consulting with relevant employers, trade unions and skills advisory bodies. Such consultation should occur on an annual basis in regard to retaining an occupation on the skills shortage list. Unless there was agreement from all the relevant parties an occupation would not be added to or retained on the skills shortage list.

Labour market testing requirements should accurately specify the nature and content of job advertisement and that such advertisements run for a reasonable period of time. There should be a requirement for rigorous evidentiary requirements in regard to labour market testing. Government supervision in this area must be improved.

At a macro-policy level, the temporary work visa system should not be seen as a substitute for a proper long-term policy of permanent migration.

One reason overseas workers are vulnerable to exploitation is that they have very limited access to Australian public services and programs. This is an area which needs to be reviewed.

Australia should not enter into any trade agreements which have the capacity to see overseas workers come to Australia and work on wages and conditions less than those applicable to Australian workers.

The SDA supports the concept of temporary work visas. However, there are a range of serious problems with the current system. As such there is an urgent need for reform.

Integrity must be restored to the temporary work visa system.