

Submission by



to the

Ministry of Business Innovation and Employment

on the

Consultation document: Addressing temporary migrant worker exploitation

27 November 2019

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ADDRESSING TEMPORARY MIGRANT WORKER EXPLOITATION

INTRODUCTION

Introduction

BusinessNZ welcomes the opportunity to provide feedback to the MBIE Consultation paper *Addressing temporary migrant worker exploitation*. This submission provides answers to the questions posed in the submission paper but BusinessNZ also notes that:

- Migrant workers are a vital part of the New Zealand workforce. An overview of BusinessNZ's first principles approach to immigration is contained in the Employer Assisted Visa submission:
https://www.businessnz.org.nz/data/assets/pdf_file/0008/166454/190318-Employer-assisted-work-visas.pdf
- There is little evidence supporting the current policy proposals. BusinessNZ strongly supports the labour inspectorate undertaking its mandated role of investigating employers who are in breach of employment law rather than regulating all employers for the bad behaviour of a few, and in the absence of evidence of systemic problems.
- The Consultation Paper concentrates on the actions MBIE could take rather than adopting a whole of government approach to ensure migrant workers are well-equipped to understand their employment rights. For example, migrant workers are currently excluded from employer-led literacy and numeracy eligibility. Revising the criteria to include migrant workers would provide them with the opportunity to develop the essential skills necessary for understanding the written resources MBIE produces on employment rights.
- The changes announced to immigration settings for employer-assisted visa settings are yet to be implemented and BusinessNZ suggests this policy should come into effect before any further changes are made. Renegotiating the criteria prior to the settings coming into effect and introducing additional compliance where consultation has already been undertaken and Cabinet decisions made is not acting in good faith towards the many businesses that have sought to work constructively with the Government in achieving better outcomes from the immigration system.
- The suggested settings contradict MBIE's Construction Sector Accord work that acknowledges immigration is necessary to meet short-term skill shortages while broader sector changes come into effect. Targeting labour hire companies that have already proposed introducing higher benchmarks for immigration is out of step with the sector accord strategy.
- BusinessNZ suggests MBIE consider working with industry to address perceived problems. For example, involving the many business and industry associations that currently advise employers on employment relations matters would have a much greater reach than a single phone line. BusinessNZ looks forward to working further with MBIE to identify workable solutions that are not overly punitive but focus more effectively on compliance resources.

Section A prevent migrant worker exploitation

1A Do you agree that people with significant control or influence over an employer should be responsible for that employer's breaches of minimum employment standards?

This is not a question to which a yes/no answer can readily be given. It is possible there might be circumstances where a director of a company or a franchisor has some control over who an employer employs but in general this will not be the case. More usually, it is the employer – or management – that decides who will be employed and therefore is not a decision generally subject to accessory liability. Attempts overseas to shift home liability to company directors have been notably unsuccessful (other than in sole directorship instances where the employer and director are one and the same). That this would be the likely outcome of the **1A** proposal is illustrated by the criteria for a liability finding specified as part and parcel of the Australian vulnerable workers' legislation. And would likely be so even were franchise agreements or company rules, not to mention subcontracting and triangular employment relationship arrangements, to set out how migrant workers must be treated. The extent to which a third party can hope to control an 'employer's' actions (acknowledging that in a triangular relationship the hire company is the actual employer) will always be limited.

1Ai Supplementary questions

See response above. Given the diversity of circumstances under which exploitation might occur, there seems little point in trying to pre-guess what these might be. Better to judge each case on its own particular facts.

1Aii See response to **1A**. The questions asked under **1Aii** serve to illustrate the complications of trying to impose liability on other than the actual employer. The legal process would be significantly extended owing to inevitable appeals, delaying the outcome for anyone seeking to allege exploitation.

2A Do you think subcontractors and franchisees should be required to meet additional criteria under the new employer-assisted visa gateway system?

No. This answer is supported by the Paper itself which, in the first paragraph under 'Proposal Two', states: *If we increase the requirements for employers operating with these business models, it **might** help to mitigate the risk that temporary migrant workers are exploited* and in the third paragraph before question 2A: *We do not hold comprehensive data on subcontracting and the extent of exploitation in business that subcontract, because of the challenges of sourcing this information.* If that is the case, why impose more rigid rules on an already rigid system, making it even harder for employers desperate for workers to source much-needed migrant labour? Already a minimum code provides all workers with basic protections. If that doesn't work, there seems no reason why imposing additional and stricter rules on employers would have any greater effect. Rather, the extra requirements would make it much harder to employ migrant workers, depriving employers of their services and potential migrants of jobs. It is not greatly acknowledged but most exploitation occurs at the hands of employers from migrant workers' own countries. These employers are either unfamiliar with New Zealand employment law or do not want to comply with it – the latter situation one that further legislative requirements would be unlikely to cure. Far better to engage in a more effective process of education than to make life more difficult for employers with no intention of exploiting their migrant workers – the more so as the Paper seems to be in 'answers looking

for a problem' territory. It should be noted that migrant worker exploitation can occur, and has occurred, before the workers reach these shores. No New Zealand legislation can prevent migrant agencies in the migrants' own countries from requiring large payments for sourcing jobs overseas. It should also be noted that franchisors can face a stand down period when they can no longer apply for migrant worker visas if a franchisee has been found guilty of exploitation see *Desai v Antares Restaurant Group Ltd (Burger King)* [2018] NZERA Auckland 220.

3A Do you think we should introduce a licensing scheme in New Zealand for labour hire companies to provide certain protections to labour hire workers?

Again, the answer is no (particularly as the extent of any exploitation is unknown – see first sentence under this question). As pointed out above, existing employment protections apply to all migrant workers; they have proved effective where they have been invoked. Further legislation would only complicate matters for workers and employers alike, without necessarily achieving any better outcome. Labour hire legislation introduced by some overseas countries seems unlikely to achieve more than the legislation already in place here being apparently more directed to ensuring labour hire firms are subject to local employment law than to protecting migrant workers. Both are already true of New Zealand. And from 27 June 2020, labour hire workers (migrant workers included) will be able to join whoever they are working for (the labour hire company being their employer) to any personal grievance claim they might make.

4A Do you agree with the idea of not allowing persons to manage or direct a company if they have been convicted of exploitation under the Immigration Act 2009?

While under the 'Proposal Four' heading it is noted that a management prohibition would affect only a small number of people (who could then operate as small traders) and so might be seen as an overreaction to a finding of migrant worker exploitation, for directors, a prohibition already operates here if found guilty of a dishonesty offence under the Crimes Act, or convicted of an offence in connection with the promotion, formation or management of a company. To that extent, therefore, consideration might be given to imposing such a ban although, under the Immigration Act, there is already the ability to deport employers who, within 10 years of obtaining residency in New Zealand, are found guilty of migrant worker exploitation (as well as the stand-down period referred to under 2A).

Section B protect temporary migrant workers

5A How can MBIE make sure temporary migrant workers know about the 0800 phone line and the online reporting tool?

There is no perfect answer to this question other than to suggest it would be advisable to provide the information on more than one occasion to help ensure it is properly absorbed and not forgotten.

5B When should migrant workers be told about the 0800 number and online reporting?

As noted above, such information needs to be reinforced. A sentence setting it out could there for be included in all the necessary documentation referred to and also provided by the Inland Revenue Department when temporary workers receive their IRD number.

5C How do you think online reporting could be made easy to use and access?

It seems likely that not all temporary migrant workers will have access to online reporting so that while all the means suggested could be used, it might also be advisable to provide for direct, face to face reporting if at all possible. Or to provide for reporting to an organisation such as the Salvation Army (which might be prepared to provide assistance) since not all migrant workers will necessarily feel comfortable reporting to a government agency.

5D, E, F See above.

5G Do you think there are particular barriers that international students face to reporting exploitation in the workplace.

It might be expected that international students would face fewer barriers, being more likely to have access to information about employment rights and therefore be more inclined to report exploitation if encountered. Nor should, as the commentary suggests might be the case, women face greater barriers than men, being equally capable of recognising exploitation if it occurs. What is likely to constitute a reporting barrier is the migrant worker's expectation of how he or she will be dealt with by Immigration NZ if exploitation is reported. That kind of uncertainty is probably much the greatest reporting barrier.

5Gi, 5H, 5Hi, 5I, 5Ii See above

5J What types of information could a specialist team provide to someone reporting exploitation?

Why complicate matters? Isn't it best, as with any other employment complaint, for exploitation complaints to be reported to a Labour Inspector or the mediation service, having ensured both are adequately trained to deal with such complaints? This is what happens currently and seems an entirely effective way of dealing with such complaints.

5K, 5L, 5M, 5N, 5O See above

6. Options for dealing with visa barriers to reporting and leaving exploitative jobs

See response to **5G**. Rather than reinventing the wheel wouldn't it be better to publicise the existing visa re-application process? This goes some way to avoiding the potential for false reports of employer exploitation since there needs to be an employer exploitation case to answer (not a mere allegation but a claim accepted for investigation) for a worker to remain in New Zealand on a new visa.

6 Ai See above

6Aii If a time limit is to apply (and cases will vary considerably in the amount of time that will be needed), it will be important to allow for time extension appeals. These should, however, be constrained by also disallowing the extension if the time required to resolve the worker's complaint was unnecessarily prolonged.

6Aiii See above

6Aiv What evidence should be presented will depend on the particular circumstances.

6Av If a worker is reapplying for a visa on exploitation grounds there will obviously be a need to cooperate with INZ to the extent of the worker providing his or her name, the reasons for the request and a contact address. INZ can scarcely provide a new visa without knowing about the migrant worker's altered circumstances.

6Avi Detailed information about visa reapplications could be provided when a complaint is made to a Labour Inspector or the worker applies for mediation. Its provision could be referred to in more general terms when the 0800, online reporting information is provided.

6Avii, 6Bi, 6Bii, 6Biii, 6Biv See above. Any visa-type reapplication process will inevitably produce some problems which is why it makes sense to stay with the process already in place.

6C That migrant workers accept their exploitation should not be a reason for denying a visa reapplication – if that is what this question is addressing. The treatment meted out to them might be something cultural differences lead them to accept. And even with the best efforts at information provision, might be accepted because of a concern about the possible reaction of those in their own country who are depending on the migrant worker to support their own living standards or to whom the migrant worker might be indebted, or INZ's reaction.

6D, 6E, 6 See response to **6Avi** above

Section C Enforce immigration and employment law

7A Do you think INZ should be able to issue infringement notices when an employer does not comply with immigration law and policy?

This is a slightly curious question as Labour Inspectors do already issue infringement notices. So, as question **7Ai** indicates, what is really being asked is in what other ways might an employer offend beyond failing to produce wage and time records and copies of employment agreements when the employee, or in the case of wage and time records, possibly the employee's representative, requests them? The latter must be produced 'immediately' and an employment agreement 'as soon as is reasonably practicable'. Having a specific timeframe, as suggested, would be unlikely to result in any greater compliance. Further, inadequate wage and time records, and/or the lack of an employment agreement of themselves indicate a situation requiring further investigation so there would seem to be little need to introduce further reasons for issuing infringement notices.

But in asking whether INZ should be able to issue infringement notices, when this is something Labour Inspectors are already able to do, is the question suggesting INZ should have jurisdiction to do so as well? If so, demarcation problems would be the likely outcome. As previously noted, any offence relating to a legally-employed migrant worker (that is, a worker

with an appropriate visa) will in nearly every case involve a failure to comply with employment law requirements re work hours, pay, holidays and so on, and this failure will, in turn, reveal if exploitation is occurring. INZ already has the right to enter an employer's premises and obtain copies of wage and time records where there are reasonable grounds for believing a migrant worker is not, under the Immigration Act, entitled to work in New Zealand, or to work for the employer in question. Where migrants working legally are concerned, this division of responsibility should be retained.

7Aiv As the above indicates, given the offences regime already in place a new infringement regime is not considered necessary since it would add complexity without necessarily achieving the desired result of improving the situation of exploited migrant workers. What is likely to provide such individuals with greater help is awareness that there are agencies to which they can complain without fearing repercussions from the authorities – because, for example, their visa allows them to work only for their current employer. Many migrant workers will be reluctant to complain for just such a reason. Ensuring they know what their rights are, and how to exercise them, is the best way to deal with exploitation.

8A Do you think the Labour Inspectorate should be allowed to issue and infringement notice to employers who do not provide requested documents within a reasonable timeframe?

This question was partially addressed under **7A** where reference was made to the need to provide requested information 'immediately' or 'as soon as reasonably practicable'. Since in both instances failure to comply attracts a penalty, there seems to be little need to impose an actual timeframe.

9A Do you know where to find a copy of the stand-down list?

Yes. But one problem with the stand-down provision is that it has the potential to affect not only the employer concerned but workers who might lose their jobs because reduced staffing levels mean the employer is no longer able to trade. Care needs to be taken to ensure the urge to penalise the employer does not have the unintended consequence of penalising employees as well. Some 'offences' might be the consequence of ignorance of the law rather than deliberate intent.

10A Do you think we should notify temporary migrant workers whose visas are linked to their employer if their employer is put on the stand-down list?

It is difficult to see how many migrant workers would otherwise know their employer was on the stand-down list if not alerted to the fact. If at all possible, workers with visas expiring during the stand-down period should certainly be told and provided with options to avoid the kind of unintended consequence referred to above.