

UNDERPAID FOREIGN WORKERS IN AUSTRALIA: THE IMPACT OF LONG HOURS SHIFTS ON OCCUPATIONAL HEALTH AND SAFETY

MOHAMMED AL BHADILY* AND ROBERT GUTHRIE**

ABSTRACT

This paper reviews current literature and reporting in relation to vulnerable visa holders, revealing underpayment and poor working conditions in a number of industries and concentrated among international student workers. The authors note the current focus in much of the literature and reporting is on improving the enforcement of rights in relation to hours of work, payment of wages and rights to termination payments. The paper noted an area of reform not yet fully developed, namely the enforcement of rights in relation to occupational health and safety and workers compensation entitlements for visa holders. This paper considers these areas and makes some proposals for reform.

* Mohammed Al Bhadily is a Sessional Academic at Curtin University.

** Robert Guthrie is an Adjunct Professor at the John Curtin Institute of Public Policy at Curtin University.

I INTRODUCTION

The International Labour Organisation estimates there over 150 million migrant workers worldwide.¹ According to the World Bank, there will be an estimated 3 per cent increase in the number of migrant workers in developed countries by 2025.² This will contribute to a USD356 billion increase in the global economy, constituting 0.6 per cent of the global income.³ There are over 1.5 million people of foreign descent that are eligible to work in Australia.⁴

In the last three decades, there has been a policy shift from permanent to temporary migration in a number of developed countries, including Australia.⁵ This policy departure is driven by the apparent flexibility of foreign workers in addressing labour and skills shortages within the local labour market.⁶ Evidence has shown migrant workers contribute to the capacity and functionality of the labour market by undertaking jobs that are undesirable to local workers in the host country.⁷ In Australia, there are currently different classes of visas enabling visa holders to perform certain types of jobs.

Several recent reports have shown that foreign workers employed in Australia have been subjected to exploitation and abuses in forms of low-rate payment, long hour shifts, physical and verbal abuse and sexual harassment.⁸ The Australian Federal Government has taken steps to combat the exploitation of foreign workers by conducting inquiries and introducing

¹ International Labour Organization, *ILO Global Estimates on Migrant Workers* (Report, 2015) xi.

² The World Bank, *World Development Report: Development and the Next Generation* (Report, 2007) 192.

³ The World Bank, *Global Economic Prospects 2006: Economic Implications of Remittances and Migration* (Report No 34320, 2006) 31.

⁴ Department of Immigration and Border Protection, *Temporary Entrants and New Zealand Citizens in Australia* (Report, 30 September 2016). Details of this information can be found in Table 1 below.

⁵ Harriet Spinks, *Australia's Migration Program* (Background Note, 29 October 2010) 8.

⁶ *Ibid.*

⁷ Susanne Bahn, Llandis Barratt-Pugh and Ghialy Yap, 'The Employment of Skilled Migrants on Temporary 457 Visas in Australia: Emerging Issues' (2012) 22(4) *Labour and Industry* 379, 383.

⁸ Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Migrant Workers* (Report, March 2016) ('A National Disgrace Report'); Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Research Report, November 2017); Alexander Reilly et al, *International Students and the Fair Work Ombudsman* (Research Report, 2017).

legislation that addresses these concerns.⁹ This paper does not intend to address those issues in detail.

There is a substantial body of empirical research from Australia, Europe and the United States that links shift work and excessive working hours with workplace injuries and disease.¹⁰ Despite these findings, foreign workers are often required to work excessive hours in unsociable shift conditions to increase their income, often as a consequence of underpayment of wages. The connection between excessive work hours, shift work and under-payment of wages has not yet been the focus of detailed academic research.

This paper will examine the impact of excessive work hours and shift work on the occupational health and safety of foreign workers in Australia. The first part of the paper details the types of visas that allow people of foreign descent to work in Australia. The second part will examine the alleged exploitation of foreign workers in Australia, with a particular focus on long hour shift use. The final part of this paper will address the relationship between long hours and shift work and the occupational health and safety of foreign workers in Australia.

II WORKING VISAS IN AUSTRALIA

A *Temporary Work Visa*

This section will provide an overview of the various foreign worker visas entitling holders to work in Australia. One of the most controversial visas in this regard is the ‘Skilled Workers Subclass 457’ visa (‘457 visa’). This visa was introduced in 1996 by the Howard Conservative Government to allow businesses to sponsor skilled foreign workers to meet the apparent shortages in skilled labour that was unmet by local Australian workers.¹¹ The 457 visa was later considered a pathway for permanent residency. 457 visa holders depended upon their employers for visa status, thus creating an environment where foreign workers became vulnerable to exploitation by Australian employers.¹² As at 30 September 2016, there were

⁹ Senate Education and Employment References Committee, *A National Disgrace Report* (n 8).

¹⁰ Allard Dembe et al, ‘The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States’ [2005] 62(9) *Occupational and Environmental Medicine* 588, 589.

¹¹ Spinks (n 5).

¹² Stefanie Toh and Michael Quinlan, ‘Safeguarding the Global Contingent Workforce? Guest Workers in Australia’ (2009) 30(5) *International Journal of Manpower* 453; Mohammed Al Bhadily and Kyle Bowyer,

172,190,457 visa holders.¹³ The five countries with the largest number of holders were: India (37,430 visa holders), the United Kingdom (28,710 visa holders), China (11,830 visa holders), Philippines (10,880 visa holders) and Ireland (8,150 visa holders).¹⁴ The 457 visa was abolished by the Turnbull Conservative Government in April 2017 and replaced by the ‘Temporary Work (Skilled)’ visa.¹⁵ This visa allowed businesses to sponsor foreign skilled workers for 2 years and permitted an extension of the visa for an extra 2 years, thereby reducing the prospect of the applicant applying for permanent residency.¹⁶

‘Subclass 444’ is a special category visa, introduced on 1 September 1994 as a temporary visa allowing New Zealand citizens to work in Australia.¹⁷ It could be obtained on arrival, as long as the New Zealand citizen held a valid passport and met the relevant health and character requirements.¹⁸ It was valid until the visa holder left Australia and allowed the holder to work in Australia without restrictions on the types of jobs available or number of hours worked.¹⁹ As at 30 September 2016, there were 648,993 Subclass 444 visa holders.²⁰

B Cultural Exchange and Holiday Work Visas

In August 2008, due to the apparent shortage of labour in the horticulture industry, the Rudd Labor Government introduced the Pacific Seasonal Worker Pilot Scheme, which was replaced in 2012 by ‘Seasonal Worker Programme’ (416 Subclass).²¹ This visa allows seasonal workers who are citizens of Timor-Leste, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands,

‘The Exclusion of Sub-Class 457 Visa Workers from the Protection of the Fair Entitlements Guarantee: Human Rights Issues’ (2017) IV *Curtin Law and Taxation Review* 72.

¹³ Department of Immigration and Border Protection (n 4).

¹⁴ *Ibid* 2.

¹⁵ ‘Temporary Work (Skilled) Visa (Subclass 457)’, *Department of Home Affairs* (Web Page, 17 March 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/repealed-visas/temporary-work-skilled-457>>.

¹⁶ *Ibid*.

¹⁷ ‘Subclass 444 Special Category Visa (SCV)’, *Department of Home Affairs* (Web Page, 17 September 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/special-category-visa-subclass-444>>.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰ Department of Immigration and Border Protection (n 4).

²¹ Joint Standing Committee on Migration, Parliament of Australia, *Seasonal Change: Inquiry into the Seasonal Worker Programme* (Report, May 2016) 3.

Tonga, Tuvalu and Vanuatu to apply for a visa if they have been invited by a sponsor-employer to participate in a Seasonal Work Programme.²² The aim of this visa is to allow sponsored citizens to contribute to the economic development of their home countries by providing them with work opportunities in the Australian agriculture and accommodation industries.²³ Sponsorship can last anywhere from 14 weeks to 6 months and visa holders are guaranteed a minimum of 30 hours work per week.²⁴ For the year 2014 until 31 May 2015, there were 2,801 sponsored workers under the 416 visa in Australia.²⁵ However, this visa closed to new applications on 19 November 2016.²⁶ Some workers may now be eligible for the ‘Temporary Work (International Relations)’ visa (Subclass 403) or ‘Temporary Activity’ visa (Subclass 408).

The ‘Working Holiday and Work’ and ‘Holiday Subclass 417 and 467’ visas were introduced in 1975 to allow eligible young persons aged 18 to 30 years from 39 specified countries to holiday and work in Australia for up to a year.²⁷ The objective of these visas is to encourage cultural exchange between Australia and the specified countries.²⁸ The holders of these visas are allowed to work for up to 12 months, but cannot work for the same employer for more than 6 months.²⁹ The majority of these visa holders work in the Australian hospitality and horticulture industries and may be granted a second holiday visa for up to 12 months.³⁰ As at 30 September 2016, there were 214,583 Working Holiday visa holders in Australia.³¹ The 5 countries with the largest number of such visa holders were: the United Kingdom (26,970 visa

²² Ibid.

²³ Ibid.

²⁴ Ibid 12. Senate Education and Employment References Committee, *A National Disgrace Report* (n 8) 10.

²⁵ Joint Standing Committee on Migration (n 21) 14.

²⁶ ‘Special Program Visa (Subclass 416)’, *Department of Home Affairs* (Web Page, 17 March 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/repealed-visas/special-program-visa-subclass-416>>.

²⁷ Senate Education and Employment References Committee, *A National Disgrace Report* (n 8).

²⁸ ‘(Subclass 417) Working Holiday Visa’, *Department of Home Affairs* (Web Page, 22 April 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417>>; ‘Subclass 462 Work and Holiday’, *Department of Home Affairs* (Web Page, 22 April 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-462>>.

²⁹ Ibid. Department of Immigration and Border Protection (n 4).

³⁰ Ibid. Joint Standing Committee on Migration (n 21) 22.

³¹ Department of Immigration and Border Protection (n 4).

holders), Taiwan (17,440 visa holders), South Korea (16,080 visa holders), Germany (13,680 visa holders) and France (12,330 visa holders).³²

C Students and Work Visas

On 1 July 2016, the Turnbull Government introduced a new student ‘Subclass 500’ visa, which replaced both the graduate ‘Subclass 570’ visas and the postgraduate ‘Subclass 576’ visas.³³ The ‘Subclass 500’ is a comprehensive visa enabling student applicants to study in primary school through to PHD courses on a full time basis in recognised Australian education institutions.³⁴ To receive this visa grant, applicants must satisfy specific prerequisites including proof of financial capability to cover course fees and living expenses and evidence of English language skills.³⁵ Once granted, the visa entitles student holders to work in Australia.³⁶ Undergraduate students may work up to 20 hours per week whilst attending their course, and unlimited hours during course breaks.³⁷ Meanwhile, postgraduate students are entitled to work unlimited hours, whether attending their course or during course breaks.³⁸ As at 30 September 2016, there were 470,810 full-fee paying international students in Australia.³⁹ The 5 countries with the largest number of student visa holders were: China (125,850 visa holders) India (55,960 visa holders), Vietnam (21,990 visa holders), Malaysia (19,980 visa holders) and Nepal (19,930 visa holders).⁴⁰ There is no accurate data available regarding the proportion of these international students in paid work.

³² Ibid 1.

³³ ‘Subclass 500 Student Visa’, *Department of Home Affairs* (Web Page, 16 October 2020) <<https://www.border.gov.au/Trav/Visa-1/500-#tab-content-1>>.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Department of Immigration and Border Protection (n 4).

⁴⁰ Ibid.

TABLE 1 – FOREIGN VISA HOLDERS IN AUSTRALIA AS AT 30 SEPTEMBER 2016⁴¹

VISA CATEGORY	NUMBER OF HOLDERS
New Zealand (subclass 444)	648 993
Temporary skilled (subclass 457) visa holders	172,190
Working Holiday Maker visa holders	214, 583
Student visa holders	470,810
Temporary Graduate (subclass 485) visa holders	38,640
TOTAL	1,545,216

III EXPLOITATION OF FOREIGN WORKERS

The exploitation of foreign workers is not a new phenomenon and is not restricted to Australia. It is a widespread global concern affecting many countries.⁴² In Australia, foreign worker exploitation has been more prevalent since the Howard Government introduced working visas allowing foreign workers to undertake work in Australia without proper safeguards from exploitation. Australia has a history of foreign worker exploitation which existed well before the current day.⁴³ In the 1860's, the Queensland Government decided to recruit the Pacific Islanders to work in the sugar plantations in North Queensland.⁴⁴ There is evidence some of these workers were unpaid, abducted, kidnapped or brought to Queensland by deception.⁴⁵ Arguably, these workers were living in slave-like conditions.⁴⁶ Between 1943 and 1966, thousands of foreign workers, primarily consisting of Italian persons, were employed in the Wittenoom asbestos mine in Western Australia.⁴⁷ A research study found Italian workers in

⁴¹ Ibid 3.

⁴² Minderoo Foundation, *Global Slavery Index 2018* (Report, 2018) 3.

⁴³ Tracey Flanagan, Meredith Wilkie and Susanna Iuliano, 'Australian South Sea Islanders: A Century of Race Discrimination under Australian Law', *Australian Human Rights Commission* (Web Page, 1 January 2003) <<http://www.humanrights.gov.au/erace-archives-australian-south-sea-islanders>>.

⁴⁴ 'The History of the Sugar Industry', *Australian Sugar Heritage Centre* (Web Page, 2010) <<http://www.sugarmuseum.com.au/the-history-of-the-sugar-industry/>>.

⁴⁵ Ibid.

⁴⁶ Flanagan, Wilkie and Iuliano (n 43).

⁴⁷ Angela Di Pasquale, 'Sistemazione and Death: The Role of the Wittenoom Asbestos Mine in the Lives and Deaths of Italian Transnational Workers' (Thesis, April 2013) 95 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.889.9462&rep=rep1&type=pdf>>.

Wittenoom had a higher exposure to asbestos than their Australian and UK-born counterparts.⁴⁸ Higher levels of asbestos exposure have also been correlated with higher risks of cancer.⁴⁹

Recent media reports have revealed several cases of foreign workers exploitation occurring in Australia. The Australian Broadcasting Commission ('ABC') and Fairfax produced the Four Corners programme, '7-Eleven: The Price of Convenience', which was televised in August 2015.⁵⁰ The program showed 7-Eleven workers, many of whom were foreign students, being underpaid, working long hour shifts of up to 16 hours without a break, being intimidated and in some cases, abused.⁵¹ The program aired allegations 7-Eleven did not pay their workers the legally required hourly rate, varied their payments and paid them differently, depending on the store they worked at.⁵² The payment rates at 7-Eleven ranged from AUD10–AUD16 per hour, which is below the current minimum wage of AUD24 per hour.⁵³

Franchisees of 7-Eleven allowed students to work more than 20 hours a week and in some cases, allowed them to work 60 hours a week — thereby exceeding the maximum 20 hours permitted by their visas conditions.⁵⁴ For those who worked 40 hours per week, 7-Eleven paid for only 20 hours of the time worked to give the illusion of visa compliance.⁵⁵ This 'half pay scam', was supported by payslips showing that the workers had been paid the correct award rate, but for only half of the hours actually completed.⁵⁶ After the 'Four Corners' scandal,

⁴⁸ 'Vulnerable Workers Research Forum 17 August 2015 Discussion Summary', *Institute for Safety, Compensation and Recovery Research* (Forum Post, 2015) 2 <http://www.iscrr.com.au/_data/assets/pdf_file/0018/343161/vulnerable_worker_forum_summary_final.pdf>.

⁴⁹ Di Pasquale (n 47) 316.

⁵⁰ Australian Broadcasting Corporation, '7-Eleven: The Price of Convenience', *Four Corners* (Web Page, 30 August 2015) <<http://www.abc.net.au/4corners/7-eleven-promo/6729716>> ('7-Eleven').

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ 'Minimum Wages', *Fair Work Ombudsman* (Fact Sheet, 2020) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages#current-national-minimum-wage>>.

⁵⁴ Australian Broadcasting Corporation, 7-Eleven (n 50).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

franchisees were forced to pay the award rate to their workers.⁵⁷ However, it has been revealed some workers were asked to pay back half of the payment to their employers, in what was termed a ‘cash back scam’.⁵⁸

These illegal practices are not restricted to 7-Eleven employees but extend to other industries. A survey titled ‘Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey’ (‘Wage Theft Survey’), investigated the underpayment of foreign workers and found 4 per cent of the participants had back-paid wages to their employers.⁵⁹ Some foreign workers were required to make payments to their employers in the form of bank deposits and sham training fees.⁶⁰ A second ABC Four Corners investigation titled, ‘Slaving Away: The Dirty Secrets Behind Australia's Fresh Food’ unveiled the widespread exploitation of foreign workers employed in Australian fruit and vegetable corporations such as Coles, Woolworths, Aldi and IGA and some fast food outlets such as Red Rooster, KFC and Subway.⁶¹ The investigation revealed workers in these industries were often underpaid, overworked and abused.⁶² Some women workers were asked to perform sexual favours in exchange for visas and in some cases, workers were paid less than AUD4 per hour and worked 22-hour shifts.⁶³

Restaurants have also been the focus of exploitation allegations. According to a survey conducted by the University of Sydney Business School, 80 per cent of international students were exploited whilst working in restaurants across Sydney.⁶⁴ Up to 35 of the surveyed international students were underpaid as low as AUD12 per hour and some students were paid

⁵⁷ Paul Karp, ‘7-Eleven Workers Beaten and Forced to Pay Back Wages, Senate Inquiry Hears’, *The Guardian* (online, 5 February 2016) <<https://www.theguardian.com/australia-news/2016/feb/05/7-eleven-workers-beaten-and-forced-to-pay-back-wages-senate-inquiry-hears>>.

⁵⁸ Ibid.

⁵⁹ Berg and Farbenblum (n 8) 45.

⁶⁰ About 5 per cent of the participants paid deposits and 6 per cent of them paid training fees: see Berg and Farbenblum (n 8) 43.

⁶¹ Australian Broadcasting Corporation, ‘Slaving Away: The Dirty Secrets behind Australia’s Fresh Food’, *Four Corners* (Web Page, 4 May 2015) <<http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>>.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Eryk Bagshaw, ‘80 Per Cent of International Students in Restaurants Paid Below Minimum Wage, Survey Finds’, *The Sydney Morning Herald* (online, 21 April 2016) <<http://www.smh.com.au/national/education/80-per-cent-of-international-students-in-restaurants-paid-below-minimum-wage-survey-finds-20160421-gobkzh.html>>.

nothing during their ‘training’, which lasted for as long as a month.⁶⁵ A University of Adelaide survey investigated why the majority of international students do not lodge complaints with the Fair Work Ombudsman (‘FWO’) for non-compliant work conditions and payments.⁶⁶ The survey concluded 60 per cent of the participants performed unpaid work for over 1 week, and more than 30 per cent of the students were involved in unpaid work for as long as 6 months.⁶⁷

According to the Senate Education and Employment References Committee, international students were forced to work more than the legal requirement of 20 hours a week, and in some cases, were forced to work more than 40 hours.⁶⁸ Some employers encouraged workers to breach their visa conditions in order to work more than 20 hours per week.⁶⁹ This allowed employers to exploit their workers by threatening to report them to the Department of Immigration for this breach of their visa conditions.⁷⁰ One international student explained:

I was being paid \$15 an hour – [the award is, at a minimum, \$23.64] – but I was under the threat to get sacked, I couldn’t complain to anyone. They knew I was working more than 20 hours a week, and they said, ‘We will report you to immigration.’⁷¹

In 2014, JobWatch received 43 calls from 457 visa holders and underpayment of wages was one of the frequent inquiries.⁷² It is submitted the failure to address foreign workers rights and the ineffective enforcement of existing relevant legislations has encouraged foreign worker exploitation.⁷³ Toh and Quinlan argue foreign worker vulnerability has been aggravated by the

⁶⁵ Ibid.

⁶⁶ Reilly et al (n 8) 4.

⁶⁷ Ibid 45.

⁶⁸ Senate Education and Employment References Committee, *A National Disgrace Report* (n 8) 210.

⁶⁹ Ibid.

⁷⁰ Ben Doherty, ‘Revealed: The Systemic Exploitation of Migrant Workers in Australia’, *The Guardian* (online, 29 October 2016) <<https://www.theguardian.com/australia-news/2016/oct/29/revealed-the-systemic-exploitation-of-migrant-workers-in-australia>>

⁷¹ Ibid.

⁷² JobWatch, Submission No 36 to Education and Employment References Committee, Parliament of Australia, *The Impact of Australia’s Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (May 2015) 6 <https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Submissions>.

⁷³ Ibid.

regulatory standards governing foreign workers, especially temporary workers, because these standards are not as rigorous as those provided to Australian resident workers.⁷⁴ An example of this disparate treatment is the exclusion of 457 visa holders and other foreign workers from the Fair Entitlements Guarantee (‘FEG’) coverage — a taxpayer funded scheme aimed at protecting workers entitlements in the event of an employer’s insolvency.⁷⁵ The reason for the exclusion of foreign workers is their lack of citizenship or residency status.⁷⁶ In some cases, government policies have unintentionally contributed to the vulnerability of foreign workers. In 2016, the Federal Government amended the *Migration Regulations 1994* (Cth) by changing condition 8107.⁷⁷ Under this amendment, 457 visa holders were given 60 as opposed to the original 90 calendar days to find a new employer.⁷⁸ This deadline is near impossible to achieve, given the Department of Home Affairs (Immigration and Citizenship) takes an average of 54 days to allocate an officer to look at the case of a new employer for a visa holder.⁷⁹ This dilemma might in turn, cause foreign workers to think twice before lodging a complaint that puts their employment and visa at risk. Foreign worker vulnerability has not been helped by the perception held by some managers and directors of companies that foreign workers would do and accept any work offered to them, even if it is contrary to the law and in the form of exploitation.⁸⁰ This view has been noted in a Workplace Ombudsman investigation into Hanssen Pty Ltd; a Western Australian construction company.⁸¹ In *Jones v Hansen Pty Ltd*,⁸² the Federal Magistrates Court heard evidence the Hanssen management believed employees ‘would sign anything’ because they ‘are frightened of ... being sent back’.⁸³ These practices keep foreign workers vulnerable, exploitable and deny them access to legal support and

⁷⁴ Toh and Quinlan (n 12) 458.

⁷⁵ Al Bhadily and Bowyer (n 12) 74.

⁷⁶ Ibid 90.

⁷⁷ *Migration Legislation Amendment (No. 4) Regulation 2016* (Cth) sch 1.

⁷⁸ Ibid.

⁷⁹ ‘Changes to Australian 457 Visa Condition 8107 – Four Problems 8107 Causes and How a Solution Could be Found’, *Work Visa Lawyers* (Web Page, 19 November 2016) <<https://www.workvisalawyers.com.au/news/457-news/changes-to-australian-457-visa-condition-8107-four-problems-8107-causes-and-how-a-solution-could-be-found.html>>.

⁸⁰ *Jones v Hanssen Pty Ltd* [2008] FMCA 291 [8].

⁸¹ Ibid.

⁸² [2008] FMCA 291.

⁸³ Ibid [8].

protection. Bissett and Landau note the allegations some 457 visa workers sign contracts before coming to Australia that include a clause prohibiting them from joining a trade union under threat of termination of employment.⁸⁴ Such a practice is contrary to Australian law.

Comprehensive research commissioned by Safe Work Australia has been obtained by Fairfax Media through the accessibility provisions of the *Freedom of Information Act 1982 (Cth)*.⁸⁵ The research reveals foreign workers, refugees and permanent migrants are frequently hired to engage in unskilled jobs such as food processing and farm works.⁸⁶ They work long shifts below the minimum wage and suffer deadly workplace injuries at a higher rate than other workers.⁸⁷ Underpayment and long hours shifts are the most prevalent characteristics of foreign worker exploitation.⁸⁸ A substantial proportion of foreign workers were paid below the minimum wage and worked excessive hours to make ends meet.⁸⁹

A Long Hour Shifts

The above discussion indicates low payments and long hour shifts are pervasive forms of exploitation for foreign workers in Australia. The Wage Theft Survey observed about 2 out of 5 low paid foreign workers worked more than 21 hours a week and were paid AUD12 per hour or less.⁹⁰ Some of these matters have now been dealt with by the Federal Magistrates Court. For example, in *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)*⁹¹, Kentwood Industries was fined AUD462,000 for the exploitation of 457 sponsored tradesmen who lived in overcrowded accommodation, including 3 men who shared a bedroom in a house rented

⁸⁴ Michelle Bissett and Ingrid Landau, 'Australia's 457 Visa Scheme and the Rights of Migrant Workers' (2008) 33(3) *Alternative Law Journal* 142, 457; Australian Broadcasting Corporation, 'Filipino Workers Back Union in Face of Criticism', *The World Today* (Transcript, 19 October 2006) <<http://www.abc.net.au/worldtoday/content/2006/s1769137.htm>>.

⁸⁵ Nick Toscano, 'Fears over Rise in Migrant Workers Killed, Injured in Industrial Accidents', *The Sydney Morning Herald* (online, 26 August 2016) <<http://www.smh.com.au/business/workplace-relations/sharp-rise-in-migrant-workers-killed-maimed-in-industrial-accidents-20160825-gr117u.html>>.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act* (Report, September 2017) 67 ('*Corporate Avoidance Report*').

⁹⁰ Ibid.

⁹¹ (2010) 201 IR 234.

from the company.⁹² The Federal Court heard evidence workers were forced to sleep on the floor and work up to 11 hours a day, for 6 to 7 days a week without any days off.⁹³ They were not paid penalty rates, did not have annual leave entitlements, did not get paid for months and paid substantial amounts to Kentwood or its agent for their visas.⁹⁴ In *Fryer v Yoga Tandoori House Pty Limited*⁹⁵, an Indian worker, Anbalagan Rajendran, was brought to Australia on a 457 visa. He worked in a restaurant and was dependent on his employer for accommodation, food and money.⁹⁶ He worked a minimum of 14 hours a day, 7 days a week for 40 days without a day off.⁹⁷ Each day, he worked in 3 restaurants in different locations owned by the same employer.⁹⁸ He was forced to work whilst ill and was told he did not get paid for a year because his employer paid his airfare to Australia.⁹⁹ The employer was fined a total of AUD18,200 for various breaches of the *Fair Work Act 2009* (Cth) relating to wage payments.¹⁰⁰

Long hours of work is a common workplace abuse encountered by foreign workers.¹⁰¹ Underpayment and long hour shifts are interwoven and often, one leads to the other. It has been established foreign workers are often forced to work longer shifts in order to make up for low hourly rates because it is unlikely that they could survive on low rates payment without increasing their working hours substantially.¹⁰² The Wage Theft Survey found unauthorized workers are more likely to be paid less than other foreign workers.¹⁰³ The survey concluded 46

⁹² Ibid 227.

⁹³ Ibid 116, 234.

⁹⁴ Ibid 234, 237.

⁹⁵ [2008] FMCA 288.

⁹⁶ Ibid [12].

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid [47].

¹⁰¹ Cathy Zimmerman, Ligia Kiss and Nicola Pocock, ‘Health and Human Trafficking in the Greater Mekong Subregion. Findings from a Survey of Men Women and Children in Cambodia, Thailand and Vietnam’, *International Organization for Migration and London School of Hygiene and Tropical Medicine* (Survey Findings, 2014) 69 <http://publications.iom.int/system/files/pdf/steam_report_mekong.pdf>.

¹⁰² Loretta Florance and Ashlyne McGhee, ‘High Fees, Low Pay: International Students “shocked” by Australian Working Conditions’, *Australian Broadcasting Corporation* (online, 13 July 2016) <<http://www.abc.net.au/news/2016-07-13/international-students-underpaid-australian-working-conditions/7586452>>.

¹⁰³ Berg and Farbenblum (n 8) 47.

per cent of unauthorised workers were paid AUD12 or less per hour and most worked more than 21 hours a week.¹⁰⁴ One 417 visa holder commented on the long hours those workers endured:

The minimum was 12 hours every day ... the longest was on Saturday until Sunday. The hours were very long. One time we started at 5 pm on Saturday and worked until 11 am on Sunday. This is a long day.¹⁰⁵

Underhill and Rimmer examined the impact of the precarious conditions experienced by foreign harvest workers on their occupational health and safety.¹⁰⁶ Approximately 40 per cent of the study participants were paid on a piece rate, with an average hourly payment considerably less than the minimum wage.¹⁰⁷ The low piece rates resulted in participants failing to take meal breaks or drink water.¹⁰⁸ Although this practice allowed workers to increase their output, it put them at risk of injury as they were:

- four times less likely to stabilise a ladder before climbing it (orchards typically have uneven terrain);
- two times more likely to work in extreme heat;
- three times more likely to carry excessive loads such as climbing a ladder with a heavy bag of fruit; and
- two times more likely to be discouraged from taking lunch breaks.¹⁰⁹

Working long hours and shifts have health and safety implications such as increased physical injuries and mental health decline. These issues will be discussed in the following section.

¹⁰⁴ Ibid.

¹⁰⁵ Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 175.

¹⁰⁶ Elsa Underhill and Malcolm Rimmer, 'Itinerant Foreign Harvest Workers in Australia: The Impact of Precarious Employment on Occupational Safety and Health' (2015) 13(2) *Policy and Practice in Health and Safety* 25, 26.

¹⁰⁷ Ibid 38.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

IV HEALTH AND SAFETY IMPACTS FROM EXTENDED HOURS OF WORK

Financial insecurity has a significant impact on foreign workers' health. Studies in Australia, Europe and the United States have linked long hours shift work, which has been driven in most cases by low payments, to detrimental health and safety implications.¹¹⁰

In the United States, a national survey found workers with overtime have a 61 per cent higher chance of injuries than those without.¹¹¹ Workers employed for at least 12 hours are exposed to 37 per cent more injuries and hazards.¹¹² Another American study examined the adverse health effect of long hours and night shifts on healthcare workers.¹¹³ This study found that these workers have an increased risk of injuries, obesity and a wide range of chronic diseases.¹¹⁴

Dembe and Yao used data covering 32 years of job history (i.e. the period 1978 to 2009) to investigate the correlation between long hour shifts and chronic disease risk.¹¹⁵ The study concluded working long shifts for more than 40 hours a week over a 32 year period was a significant factor increasing the risk of heart disease, skin cancer, diabetes and arthritis.¹¹⁶ A similar study conducted in Europe surveyed 85,494 working men and women in the period of 1991–2004 to examine the effects of long hour shifts on atrial fibrillation, which is one of the most common risk factors for strokes.¹¹⁷ This study found participants who worked for 55 hours

¹¹⁰ Dembe et al (n 10) 588; Claire Caruso, 'Negative Impacts of Shiftwork and Long Work Hours' (2014) 39(1) *Rehabilitation Nursing* 16, 17; Ana Maria Buller et al, 'Labour Exploitation, Trafficking and Migrant Health: Labour Exploitation, Trafficking and Migrant Health Multi-Country Findings on the Health Risks and Consequences of Migrant and Trafficked Workers', *International Organization for Migration and London School of Hygiene and Tropical Medicine* (Research Report, 2015) 3; Education and Health Standing Committee, Parliament of Western Australia, *The Impact of FIFO Work Practice on Mental Health* (Final Report, 2015) i.

¹¹¹ Dembe et al (n 10) 592.

¹¹² Ibid 588.

¹¹³ Caruso (n 110) 1.

¹¹⁴ Ibid.

¹¹⁵ AE Dembe and X Yao, 'Chronic Disease Risks from Exposure to Long-Hour Work Schedules Over a 32-Year Period' (2016) 58(9) *Journal of Occupational and Environmental Medicine* 861.

¹¹⁶ Ibid 866.

¹¹⁷ Mika Kivimaki et al, 'Long Working Hours as a Risk Factor for Atrial Fibrillation: A Multi-Cohort Study' (2017) 38(34) *European Heart Journal* 2621, 2621.

or more per week had a 40 per cent higher risk of atrial fibrillation compared to those who were working a 35–40 hour week.¹¹⁸

A study undertaken by the International Organization for Migration examined the impact of migrant worker exploitation on their health and safety in the textile, construction and mining industries in Argentina, Peru and Kazakhstan. The study observed:

Workers in each study country experienced common risk exposures similar to those described in previous research on migrant worker health. Long hours with limited break time are among the most significant risk factors for work-place accidents; interviewees in our study appeared to labour extremely long hours in jobs they knew or suspected were harmful to their health because of individual financial aspirations and payment methods (that is, per garment, based on a percentage of the gold extracted per day, or based on edifice constructed).¹¹⁹

Zimmerman et al conducted a survey to examine the health consequences of 1,102 people who were trafficked into various labour sectors in the Greater Mekong Subregion.¹²⁰ The findings of the survey noted:

Over two thirds of participants reported working seven days per week for a mean of 13.8 hours per day, with many made to work many more hours per day, such as domestic workers (15 hours on average) and fishermen (nearly 19 hours on average). Over half reported having few or no breaks. These long work hours without breaks have significant implications for occupational safety and increased risk of injury, as well as longer-term effects of exhaustion, illness and poor mental health.¹²¹

Salminen reviewed 12 studies concerning the effect of working long hours on the risk of injuries in countries like Australia, the USA, South Korea, the UK, Singapore and India.¹²² He concluded individuals working 12 hours a day will increase the risk of occupational injury by 38 per cent compared to those who work only 8 hours a day.¹²³ On the other hand, working a

¹¹⁸ Ibid 2625.

¹¹⁹ Buller et al (n 110) 9.

¹²⁰ Zimmerman, Kiss and Pocock (n 101) 1.

¹²¹ Ibid 69.

¹²² Simo Salminen, 'Long Working Hours and Shift Work as Risk Factors for Occupational Injury' (2016) 9 *The Ergonomics Open Journal* 15, 16.

¹²³ Ibid 21.

10-hour shift will increase the risk of workplace injury by 15 per cent compared to those only working 8 hours per day.¹²⁴

Likewise, the increase in road accidents involving truck drivers in Australia has drawn the attention of relevant authorities and sparked public debate on how to reduce the number of fatalities caused by truck accidents.¹²⁵ According to a Safe Work Australia report concerning truck accidents from 2003 to 2012, there were 2,608 work-related truck fatalities.¹²⁶ Fatigue and speeding were the major causes of truck accidents; one-quarter of accidents are caused by speeding and 12 per cent of crashes are caused by fatigue.¹²⁷ These are similar to the findings of the Major Accidents Research Report 2013.¹²⁸ Tight delivery and imposing deadlines on drivers are contributing factors to drivers' speeding and fatigue.¹²⁹ Mayhew, Quinlan and Ferris investigated the effects of subcontracting in transport, hospitality, building and childcare on the occupational health and safety of workers in those industries.¹³⁰ They noted a key feature of subcontracting was these workers received payment on results or output rather than receiving hourly rates, as is the case with employees.¹³¹ According to the authors, this explained why subcontractors worked excessive hours and thus experienced high levels of fatigue.¹³² These health issues have detrimental consequences on the occupational health and safety of subcontractors.¹³³ The study concluded subcontracted truck drivers suffered higher levels of physical injuries than other employees, including chronic back injury, foreign body fragments

¹²⁴ Ibid.

¹²⁵ Australian Broadcasting Corporation, 'This Trucking Life', *Four Corners* (Web Page, 3 February 2014) <<http://www.abc.net.au/4corners/interview-with-suzanne-de-beer-wife-of-albert-de/5236014>>.

¹²⁶ 'Work-Related Fatalities Involving Trucks, Australia 2003 to 2012', *Safe Work Australia* (Research Findings, May 2014) 3 <<https://www.safeworkaustralia.gov.au/system/files/documents/1702/work-related-fatalities-involving-trucks.pdf>>.

¹²⁷ Ibid 1.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Claire Mayhew, Michael Quinlan and Rande Ferris, 'The Effects of Subcontracting/Outsourcing on Occupational Health and Safety: Survey Evidence from Four Australian Industries' (1997) 25(1–3) *Safety Science* 163, 169.

¹³¹ Ibid 165.

¹³² Ibid.

¹³³ Ibid 173.

in the eye and leg injury.¹³⁴ These workers are also faced with mental health concerns arising from the pressure of deadlines and managing their own businesses.¹³⁵ The aforementioned Australian and international studies therefore support the conclusion that extended hours of work have deleterious effects on the health of workers.

A The Effects of Extended Hours Work on the Mental Health of Foreign Workers

The injuries experienced by foreign workers due to long hour shifts are not confined to physical injuries. Evidence has shown long hour shifts have an enormous effect on workers' mental health. On this point, a 7-Eleven worker stated:

Mr Ullat Thodi stated that he was successful in his first two semesters, getting high distinctions and working between 50 and 55 hours a week. However, once he became aware that he was being underpaid and exploited by his employer, it greatly affected his mental health. As a result of trying to deal with the emotional consequences of being exploited at work, Mr Ullat Thodi began failing his subjects at university. Further, having failed several subjects, Mr Ullat Thodi calculated that he had already paid almost \$100 000 for his degree, and he still had one subject to take in 2016.¹³⁶

In 2017, a United States workplace mental health report titled 'Mind the Workplace' reviewed data from 17,000 employees across 19 industries.¹³⁷ The study found nearly 78 per cent of respondents were not paid what they deserved.¹³⁸ Furthermore, 77 per cent of participants believed their skills were not recognised and 81 per cent reported that work stress had affected their familial relationships.¹³⁹ 63 per cent of participants stated workplace stress had a significant impact on their mental and behavioural health, with some having engaged in

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 222–223.

¹³⁷ Michele Hellebuyck et al, *Mind the Workplace* (Research Report, 11 October 2017) 1.

¹³⁸ Ibid 6.

¹³⁹ Ibid 6–7.

unhealthy behaviour such as alcohol consumption and/or drug use.¹⁴⁰ 35 per cent of participants stated they were isolated due to hostile workplace environments.¹⁴¹

A report by the Western Australian Education and Health Standing Committee titled ‘Impact of Fly in Fly Out Work Practice on Mental Health’ (‘FIFO Report’) examined the impact of fly-in-fly-out work practices on the mental health of Western Australians.¹⁴² The report found higher compression rosters, such as 3 weeks on and 1 week off or long hours and nights shifts increase fatigue, lower morale, and result in a loss of concentration, which in turn leads to injuries, depression and sometimes suicide.¹⁴³ Higher compression rosters also have social and other ramifications such as divorce and alcoholic dependency.¹⁴⁴ A UK study which examined the effect of a 2 weeks offshore shift working pattern on the North Sea offshore oil and gas industry workers made similar findings to those in the FIFO Report, showing increased work injuries resulting from fatigue and mental health concerns.¹⁴⁵

Finally, according to a study commissioned by the Victorian Health Promotion Foundation which surveyed 1,139 migrants from diverse backgrounds, about two-thirds of participants experienced discrimination and racism in the previous twelve months.¹⁴⁶ This study concluded racism and discrimination is associated with a decline in mental health.¹⁴⁷

V REPORTING INJURIES CONCERNS

Employers are required to provide visa workers with workers compensation coverage regardless of whether they are casual, part-time or full-time workers.¹⁴⁸ In all States and

¹⁴⁰ Ibid 7–8.

¹⁴¹ Ibid 8.

¹⁴² Education and Health Standing Committee (n 110).

¹⁴³ Ibid 65.

¹⁴⁴ Ibid 66.

¹⁴⁵ Katharine Parkes, ‘Working Hours in the Offshore Petroleum Industry’ (Research Paper, University of Oxford, 15 March 2007) 15.

¹⁴⁶ Angeline Ferdinand, Margaret Kelaher and Yin Paradies, *Mental Health Impacts of Racial Discrimination in Victorian Culturally and Linguistically Diverse Communities* (Report, March 2013) 5.

¹⁴⁷ Ibid.

¹⁴⁸ See State Insurance Regulatory Authority, ‘All Workers on s457 Visa Entitled to Workers Comp’ (Media Release, 12 February 2015).

Territories, a failure to do so will expose an employer to criminal sanctions.¹⁴⁹ In any event, they would be liable to pay compensation as an uninsured employer.¹⁵⁰ If the employer is unable to pay compensation, some form of State or Territory indemnity will apply to ensure the worker is covered.¹⁵¹ In effect, an uninsured employer who cannot pay the required compensation will impose a burden, not just upon the workers who may have to wait for complicated claims to be processed, but ultimately upon the public purse.

There are also other concerns foreign workers might encounter in the case of a workplace injury. Research has shown foreign workers are reluctant to report their workplace injuries.¹⁵² One explanation is employers discourage foreign workers from submitting compensation claims in order to prevent higher compensation premiums.¹⁵³ Employers may also use threats to deter foreign workers from reporting workplace injuries; and as discussed above, threatening tactics have been used to silence workers who intend to complain about work conditions and payments.¹⁵⁴ This is particularly evident in instances where workers have breached their visa conditions as a result of working more hours than legally allowed, as is the case for international students and holders of tourist visas undertaking unauthorised farm works. Gino Lopez, the head of Migrant International, which represents Filipino workers in Australia, stated that 457 visas provide employers with an opportunity to ‘treat employees badly’ and further that ‘if the bosses are able to get more sweat out of the workers, many of them will do it ... they are afraid of saying something to their boss, because they fear they will be sent home.’¹⁵⁵

The Wage Theft Survey concluded that 3 per cent of participants were threatened with being reported to the relevant authority by their managers.¹⁵⁶ This tactic was used is to deter

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Robert Guthrie and Michael Quinlan, ‘The Occupational Safety and Health Rights and Workers’ Compensation Entitlements of Illegal Immigrants: An Emerging Challenge’ (2005) 3(5) *Journal Policy and Practice in Health and Safety* 41, 42.

¹⁵³ Toh and Quinlan (n 12) 465.

¹⁵⁴ Ibid.

¹⁵⁵ Matthew Moore and Malcolm Knox, ‘Exploitation of Skilled Migrants Exposed’ *The Sydney Morning Herald* (online, 28 August 2007) <<http://www.smh.com.au/news/national/exposed-exploitation-of-migrants/2007/08/27/1188067034448.html>>.

¹⁵⁶ Berg and Farbenblum (n 8) 43.

participants from complaining about exploitation or demanding their rights.¹⁵⁷ Threats are not restricted to management. 1 per cent of the participants were threatened by co-workers as well.¹⁵⁸ According to a survey conducted by Reilly et al, 11.7 per cent of participants were discouraged from making complaints regarding their working conditions or payment rates.¹⁵⁹ Foreign workers unwillingness to report injuries to the relevant authority can be attributed to the fear of losing their jobs.¹⁶⁰ As Professor Kahn-Freund pointed out:

The law has important functions in labour relations, but they are secondary if compared with the impact of the labour market (supply and demand) and, which is relevant here, with the spontaneous creation of social power on the workers' side to balance that of management. Even the most efficient inspectors can do but little if the workers dare not complain to them about infringements of the legislation they are seeking to enforce.¹⁶¹

The Australian Bureau of Statistics reported for the 2013–2014 financial year that there were 531,800 work-related injuries.¹⁶² Of this figure, only 183,200 or 34 per cent of those injured claimed and received workers' compensation.¹⁶³ However, 20 per cent of those injured did not claim workers compensation because they believed they were not eligible or feared a claim might negatively impact on their working relationship with their employer.¹⁶⁴ An Australian survey examined the correlation between work-related injuries and workers' country of birth.¹⁶⁵ This study found job insecurity caused foreign born workers to fear the loss of their job, thus deterring them from reporting issues concerning working conditions and occupational

¹⁵⁷ Toh and Quinlan (n 12) 465.

¹⁵⁸ Berg and Farbenblum (n 8) 43.

¹⁵⁹ Reilly et al (n 8) 50.

¹⁶⁰ Guthrie and Quinlan (n 152); Andrew Clarke, *Are Immigrant Workers Safer Workers? The Prevalence of Non-Fatal Workplace Injuries Among Foreign Born Workers in Australia* (Report, 27 July 2015) 7.

¹⁶¹ Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons, 1st ed, 1972) 10.

¹⁶² Australian Bureau of Statistics, *Work-Related Injuries July 2013 to June 2014* (Catalogue No 6324.0, 19 November 2014).

¹⁶³ *Ibid.*

¹⁶⁴ Alex Collie and Amanda Sampson, 'Inquiries into Migrant Worker Rights Show Same Old Problems – But We Already Have Solutions', *The Conversation* (Forum Post, 24 September 2015) <<https://theconversation.com/inquiries-into-migrant-worker-rights-show-same-old-problems-but-we-already-have-solutions-46683>>.

¹⁶⁵ Alison Reid et al, 'Taking Risks and Survival Jobs: Foreign Born Workers and Work-Related Injuries in Australia' (2014) 70 *Safety Science* 378.

health and safety.¹⁶⁶ Suffering injuries in itself, could result in a loss of employment. For example, Toh and Quinlan reported in a case study that a worker who broke his wrists during the course of employment had his contract terminated by his sponsors.¹⁶⁷ In another example, a Filipino worker who was sponsored under the 457 visa was terminated after becoming ill.¹⁶⁸

In addition, some employers have taken extreme measures against workers intending to claim worker's compensation. In 2007, the New South Wales District Court ordered employers Kyung Ja Song and Jin Ho Park to pay AUD96,788 in aggravated damages to their employee, Jae Sik Kim, for the injuries he sustained following their kidnapping and assault of him.¹⁶⁹ Kim, a South Korean citizen, was sponsored under the 457 visa to work as a tiler in Australia by Song and Park as a part of their Campsie Kyo Group of companies.¹⁷⁰ In the course of his employment, Kim fell down a staircase and suffered serious back injuries, leaving him unable to work.¹⁷¹ After making a formal complaint about not receiving worker's compensation, his employers reported him to the former Department of Immigration, which resulted in Kim being deported from Australia.¹⁷² He returned to Australia with his brother's passport to pursue his entitlement to worker's compensation to cover his medical expenses. When Kim demanded his workers compensation entitlements from Song and Park, they assaulted and kidnapped him.¹⁷³ Foreign workers may have entitlements to workers compensation notwithstanding they are working contrary to visa conditions.¹⁷⁴ As such, Kim successfully sued Song and Park for false imprisonment and assault, resulting in the above award. According to the aforementioned

¹⁶⁶ Ibid 384; Clarke (n 160) 7.

¹⁶⁷ Toh and Quinlan (n 12) 458.

¹⁶⁸ Australian Broadcasting Corporation, 'Filipino Worker Unfairly Sacked over Illness: Union', *ABC News* (online, 20 January 2008) <<http://www.abc.net.au/news/2008-01-20/filipino-worker-unfairly-sacked-over-illness-union/1017588>>.

¹⁶⁹ 'Guest Worker Wins Compo After Assault', *The Sydney Morning Herald* (online, 22 September 2007) <<https://www.smh.com.au/national/guest-worker-wins-compo-after-assault-20070922-gdr5yn.html>>.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ 'Foreign Worker Awarded \$96k Kidnapping Compensation', *ABC News* (online, 21 September 2007) <<http://www.abc.net.au/news/2007-09-21/foreign-worker-awarded-96k-kidnapping-compensation/677246>>.

¹⁷⁴ Underhill and Rimmer (n 106) 40.

Underhill and Rimmer study, 40 per cent of farm workers who needed medical attention for injuries have paid their own medical costs.¹⁷⁵

VI EVALUATION

There is no empirical evidence detailing the nexus between foreign workers long shifts and workplace injuries. Foreign worker exploitation has been established by parliamentary reports and studies.¹⁷⁶ Despite the entitlement of all workers to the minimum wage, one of the pervasive forms of exploitation is the underpayment of foreign workers.¹⁷⁷

Underpaid foreign workers have undertaken long shifts to compensate for the losses they have accrued.¹⁷⁸ Long hour shifts result in a higher risk of injury, as well established by Australian and international studies.¹⁷⁹ This indicates a strong correlation between long shifts and occupational health and safety. There are two key factors contributing to this dilemma: visa dependency and lack of English proficiency and awareness of the Australian legal system.¹⁸⁰

A *Visa Dependency*

In Australia, there are subclass visas applying to foreign workers, which make them dependent on their sponsors.¹⁸¹ In some cases, the dependency begins with sponsoring the job application and progresses to permanent residency applications, which some visa holders are eligible for.

¹⁷⁵ Ibid.

¹⁷⁶ Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review* (Final Report, October 2008); Senate Education and Employment Committee References Committee (n 8); Berg and Farbenblum (n 8); Reilly et al (n 8).

¹⁷⁷ Joo-Cheong Tham, 'We've Let Wage Exploitation Become the Default Experience of Migrant Workers', *The Conversation* (Forum Post, 22 March 2019) <<https://theconversation.com/weve-let-wage-exploitation-become-the-default-experience-of-migrant-workers-113644>>; Senate Education and Employment References Committee (n 89) 59.

¹⁷⁸ Senate Education and Employment References Committee, *Corporate Avoidance Report* (n 89) 67.

¹⁷⁹ Senate Education and Health Standing Committee, *Corporate Avoidance Report* (n 89); Kivimaki et al (n 117); Caruso (n 110); Hellebuyck et al (n 137).

¹⁸⁰ Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 62.

¹⁸¹ See Toh and Quinlan (n 12); Al Bhadily and Bowyer (n 12) .

This continuum of dependency creates an environment where foreign workers are subjected to exploitation such as underpayment of wages.¹⁸²

Likewise, working holiday visa holders can work for up to 12 months in hospitality and horticulture and can be granted a second holiday visa for up to 12 months.¹⁸³ The requirement for visa holders to establish a work pattern often leads to exploitation by employers, who demand tireless hours if the employee wants to be granted a second holiday working visa.¹⁸⁴ As discussed above, media reports have shown some farm workers were paid as low as AUD4 per hour and in some cases, women workers were asked to perform sexual favours in exchange for visas.¹⁸⁵

Visa dependency not only affects foreign worker payments and poses a threat to international student workers being reported to the relevant authority, but it also prevents foreign workers from reporting their workplace injuries due to the fear of losing their employment, and in turn, their visa. JobWatch and the Human Rights Council of Australia report 457 visa workers are extremely reluctant to seek recourse under workplace laws for the apparent contravention by their employer of their employment rights because of fears about their visa status.¹⁸⁶

Moreover, a terminated worker is given only 60 consecutive days to find another employer in the case of a termination of a 457 visa holder's employment.¹⁸⁷ As noted above, this is difficult to achieve, given that the Department of Immigration/Home Affairs takes 54 calendar days to allocate an officer to look at the nomination of a new employer case.¹⁸⁸ This dilemma further contributes to the visa dependency where foreign workers are hesitant to take any steps that might jeopardise their employment and visa status.

¹⁸² Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 159.

¹⁸³ Department of Immigration and Border Protection (n 4).

¹⁸⁴ Australian Broadcasting Corporation, 7-Eleven (n 50).

¹⁸⁵ *Ibid.*

¹⁸⁶ Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 150.

¹⁸⁷ *Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016* (Cth) sch 1.

¹⁸⁸ Work Visa Lawyers (n 79).

B *Language and Awareness of the Australian Legal System*

Another factor playing a vital role in foreign workers exploitation is the lack of access to legal information and support. Workers from non-English speaking Asian countries in particular, are affected by language barriers that contribute to further isolation and exploitation.

Howe, Reilly and Stewart noted that language and cultural barriers result in foreign workers being less likely to understand their rights and entitlements, thereby contributing significantly to their vulnerability.¹⁸⁹ This view is supported by the Four Corners programme ‘Slaving Away’, which shows the lack of English language proficiency and awareness of the Australian legal system, particularly the law concerning the employment of working holiday visa workers, has contributed to their exploitation.¹⁹⁰

Language barriers and lack of awareness of the Australian legal system not only increase the likelihood of exploitation, but also limit workers’ access to justice. JobWatch pointed out that ‘migrant workers often have limited English language skills and knowledge of and access to the legal system which can make asserting their workplace rights even more difficult.’¹⁹¹

The vulnerability of foreign workers has been recognised in the FWO’s ‘Guidance Note to Litigation Policy’.¹⁹² It states that ‘vulnerability’ which includes, among other things, people who are recent immigrants, people with literacy difficulties and people from non-English speaking backgrounds, may be taken into account when considering whether or not to commence proceedings.¹⁹³

¹⁸⁹ Joanna Howe, Alexander Reilly and Andrew Stewart, Submission No 11 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements* (26 April 2013) 36.

¹⁹⁰ Australian Broadcasting Corporation, 7-Eleven (n 50).

¹⁹¹ JobWatch (n 72) 9.

¹⁹² Fair Work Ombudsman, *Guidance Note 1: Litigation Policy of the Office of the Fair Work Ombudsman* (Policy Note, 20 July 2011).

¹⁹³ *Ibid* 11.

One of the issues addressed by the Joint Standing Committee on ‘Migration Into Temporary Business Visas’ was the English language requirements.¹⁹⁴ The Committee report highlighted the need for applicants to have appropriate language skills in order to communicate effectively in the workplace and have better awareness of Occupational Health and Safety.¹⁹⁵ The report stated:

The Committee recommends that, in referring specific cases for formal English language testing with a focus on occupations with a high occupational health and safety (OH&S) risk or history of sponsor noncompliance, the Department of Immigration and Citizenship also take into account that the need for 457 workers to have a higher level of English language proficiency for OH&S and broader communication reasons remains relevant, regardless of the sector or region in which they work.¹⁹⁶

VII WHAT IS THE SOLUTION?

Visa dependency is a significant factor contributing to the exploitation of foreign workers. The issue could be tackled by imposing harsh penalties on employers who breach their sponsorship. Besides barring them from future sponsorship, heavy civil and criminal conventions could be imposed on employers. This cannot be achieved without improving monitoring, reporting and enforcement arrangements. Taskforce Cadena (‘TF Cadena’), established in June 2015, is an agency consisting of the Australian Border Force, FWO, Federal Police, Australian Taxation Office and other relevant agencies.¹⁹⁷ The aim of TF Cadena is to target criminals organising visa fraud, illegal work and the foreign worker exploitation.¹⁹⁸ The establishment of TF Cadena is a significant step towards protecting foreign workers.

The FWO could play a strong role in monitoring compliance with the foreign workers visa. However, this could not be accomplished without increasing the resources provided to the

¹⁹⁴ Joint Standing Committee on Migration, Parliament of Australia, *Temporary Visas: Permanent Benefits Ensuring the Effectiveness, Fairness and Integrity of the Temporary Business Visa Program* (Final Report, August 2007) 18.

¹⁹⁵ *Ibid.* See Recommendation 13.

¹⁹⁶ *Ibid.*

¹⁹⁷ ‘Taskforce Cadena’, *Australian Border Force* (Web Page) <<https://www.homeaffairs.gov.au/australian-border-force-abf/taskforce-cadena>>.

¹⁹⁸ *Ibid.*

FWO, which currently has 250 inspectors to inspect 2.1 million workplaces.¹⁹⁹ Moreover, the FWO needs more power to investigate and prosecute companies under the accessorial liability and sham contracting provisions within the *Fair Work Act 2009* (Cth).

Other factors which play a role in the vulnerability of foreign worker are language barriers and the lack of awareness of the Australian legal system. English proficiency would not only help foreign workers communicate effectively in the workplace but would also help them understand their rights and entitlements. In 2010, the FWO introduced various measures designed to overcome language and legal barriers and increase foreign workers' access to relevant legal information.²⁰⁰ Examples of such measures include the translation of worker rights and entitlements in Australia to different languages and the provision of information regarding legal services and protection offered to foreign workers.²⁰¹ In 2017, the FWO produced 6 videos on the topic of worker rights that had been translated into 16 languages.²⁰² It would be more efficient to provide this relevant information prior to foreign workers travelling to Australia and translated into each of their own languages.

However, greater awareness of the Australian system legal system and improved English proficiency would not necessarily motivate foreign workers to report employer breaches. There are other factors to be considered. One of these factors is visa dependency. As discussed above, employees are reluctant to report a non-compliant employer because of the fear of losing employment and visa status. This reluctance is compounded by the lack of work opportunities available to foreign workers, especially international students. Despite over 39 per cent of student participants being paid below the minimum wage, they are reluctant to complain because they feel lucky to have a job and are grateful to their employers for the opportunity.²⁰³

Aside from promoting awareness of the Australian legal system and taking measures to overcome language barriers, it is therefore vital for agencies such as FWO and TF Cadena to

¹⁹⁹ Chris F Wright and Stephen Clibborn, 'Australia is at Risk of Losing Migrants Who are Vital to the Health of our Economy', *The Conversation* (Forum Post, 21 October 2016) <<https://theconversation.com/australia-is-at-risk-of-losing-migrants-who-are-vital-to-the-health-of-our-economy-67455>>.

²⁰⁰ Fair Work Ombudsman, *Annual Report 2010-2011* (Report, 15 September 2011) 30.

²⁰¹ *Ibid.*

²⁰² Fair Work Ombudsman, 'More In-Language Resources Now Online to Help Migrant Workers Understand Their Rights' (Media Release, 2 November 2017).

²⁰³ Reilly et al (n 8) 4–5.

be proactive in monitoring and enforcing the law in relation to foreign worker sponsors. This has been asserted in the Senate inquiry into the Framework and Operation of Subclass 457 Visas, which stated:

Evidence from the department indicated that the compliance monitoring and enforcement effort in relation to the 457-visa program has recently undergone a shift in focus from education of sponsors to detection and enforcement activities.²⁰⁴

VIII CONCLUSION

In Australia, there are a significant number of foreign workers eligible to work under various types of visas. Their contribution to the economy has been acknowledged by business leaders and politicians alike. However, the vulnerability of these workers, being at risk of losing their employment and fear of deportation, puts them at risk of exploitation and injury. Poor language skills and lack of awareness of the Australian legal system play a vital role in their exploitation. Evidence suggests it is a widespread phenomenon existing across industries nationwide.

A body of research, investigation and reporting shows foreign workers have been underpaid, worked long shifts, abused and, in some cases, encouraged to work more hours than what their visa conditions allow so that employers can threaten them with deportation if they complain about their exploitation. Low payment is the predominant form of exploitation foreign workers endure. Media reports reveal businesses use different methods to scam their workers. Some businesses have used ‘half pay’ and ‘cash back’ scams to pay their workers lower than the minimum wage. Often, low paid workers have undertaken long hour shifts to compensate for the low wages they are barely able to survive on.

The correlation between long hour shifts and the likelihood of being injured is well established in the USA, Australia and Europe. It has an enormous effect on the health and safety of foreign workers. Aside from the impact on their mental health which is now well established by numerous Australian and international studies noted above (including issues relating to

²⁰⁴ Legal and Constitutional Affairs and References Committee, Parliament of Australia, *Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements* (Report, June 2013) 57.

depression, domestic violence, alcohol, drug abuse and suicides), higher levels of work-related physical injuries are also a significant factor contributing to the exploitation of these workers.

The predicament of foreign workers does not end with injury from exploitation. Their vulnerability extends further by preventing them from reporting work injuries. This is attributed to workers' reluctance to report injuries due to their fear of losing employment and employers discouraging their foreign workers from reporting workplace injuries.

A review of recent reports and papers in this area highlights the exploitation of visa holders in a range of industries, thus drawing attention to the operations of the FWO as instrument of enforcement in relation to wages and conditions of work.²⁰⁵ Little attention has been paid to occupational health and safety and workers compensation. This is probably a result of the relevant enforcement authorities being state rather than nationally based. The provision of information by State and Territory WorkSafe and WorkCover authorities is patchy.²⁰⁶ Many visa workers originate from countries where occupational health laws are rudimentary and poorly enforced and where workers compensation rights are restricted and claims not encouraged.²⁰⁷ We consider there are a range of options that State WorkCover and WorkSafe authorities can adopt to address some of the concerns highlighted above. For example, borrowing from the work of Reilly et al, we recommend WorkCover and WorkSafe authorities:²⁰⁸

- 1) Produce materials for distribution in conjunction with the immigration department dealing with workers' rights to workers compensation and occupational health;
- 2) Provide accessible online reporting procedures for compensation claims and occupational work hazards;
- 3) Develop strategies to provide assistance to claimants; and

²⁰⁵ See, eg, Berg and Farbenblum (n 8); Reilly et al (n 8); Toh and Quinlan (n 12); Australian Broadcasting Corporation, *7-Eleven* (n 50); Senate Education and Employment References Committee, *Corporate Avoidance Report* (n 89); Underhill and Rimmer, (n 106); Howe, Reilly and Stewart (n 189); Joint Standing Committee on Migration (n 194).

²⁰⁶ See 'Migrant Workers', *Safework Australia* (Web Page) <<https://www.safeworkaustralia.gov.au/migrant-workers>>; 'The Basics: Your Rights at Work', *Safework NSW* (Web Page) <<https://www.safework.nsw.gov.au/resource-library/the-basics-your-rights-at-work>>

²⁰⁷ Ibid.

²⁰⁸ Reilly et al (n 8) 7.

- 4) Provide case studies on accessible websites which illustrate the range of entitlements available, highlighting it is not illegal for visa workers to make claims for workers compensation.

One day, these foreign workers might go back to their home countries. Some will leave with sorrow of being exploited and abused, which, in time, might be forgotten. However, those who leave with injuries or a mental illness might never heal.