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LABOUR IN LIMBO: BRIDGING VISA E HOLDERS AND MODERN SLAVERY RISK IN AUSTRALIA

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ACKNOWLEDGEMENTS

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ACKNOWLEDGEMENT OF COUNTRY:

We acknowledge the Traditional Owners of Country throughout Australia and recognize their continuing connection to land, waters and culture. We pay respect to elders and acknowledge the Traditional Owners who have cared for Country since time immemorial. Sovereignty over this land was never ceded – it always was, and always will be, Aboriginal land.

DISCLAIMER:

The images used in this report are stock images. We make no suggestion that any of the workers depicted are on temporary visas, or are victims of labour exploitation.

SUMMARY

This paper examines the precarious working situation of refugees and people seeking asylum on 'Final Departure' Bridging Visa E' (**BVE**) as a case study for understanding potential modern slavery risks for refugees on temporary visas. It assesses the extent to which companies operating in high risk sectors, such as horticulture, are addressing modern slavery risks posed to refugees on temporary visas in their inaugural Modern Slavery Act Statements (**MSA statements**) under the Australian *Modern Slavery Act 2018* (Cth) (**MSA**), and makes recommendations to business and government on how these risks can be addressed.

EXECUTIVE SUMMARY

People who flee their homes seeking safety are at heightened risk of being subject to labour exploitation and modern slavery. In Australia, these risks are particularly salient within the relatively small group of people seeking asylum and refugees who were subject to indefinite offshore detention simply for arriving in Australia by boat and, after medical or legal interventions, were subsequently transferred to Australia and placed onto 6-month rolling or renewable BVEs.

After years of living in limbo, and harsh conditions on Nauru or Manus Island, and with deteriorating mental health as result of their treatment, they continue to face an uncertain future. With minimal government support and fearful of the ever-present threat of deportation, these men and women are more likely to face exploitation and abuse in the workplace, increasing the risks of being subject to modern slavery practices. The increased modern slavery risk comes as a direct result of Australian government policy, which prohibits any person who arrived to Australia by boat after 19 July 2013 from ever being able to settle on a permanent basis.¹

In stark contrast to its harsh refugee policies, Australia has made many commitments to combatting forced labour and modern slavery domestically and in global supply chains. In 2018, the Australian Government enacted the MSA, which requires large businesses to report on modern slavery risks, and actions taken to address those risks. However, despite the laws having been operation for three years, early research on their effectiveness shows that many companies are failing to identify obvious risks in their supply chains, or to take meaningful action to address those risks. This includes companies with potential exposure to BVE workers in the Australian horticulture sector, where insecure work and exploitation of migrant workers on temporary visas remain rife.

If Australia is committed to tackling the challenge of forced labour and worker exploitation, a simple step that can be taken to reduce modern slavery risks is to provide pathways to permanency for people that have been transferred from offshore detention in place of continuing to issue indefinite BVEs or to return people to danger. Australian companies should also be required to take action on their modern slavery risks, rather than just submitting voluntary reports, and to undertake human rights due diligence in order to ensure that supply chain workers in circumstances such as those on BVEs are treated with respect and dignity. Both government and business must put an end to the exploitation of refugee worker precarity, by working together to changing unfair policies and providing remedy to workers who have suffered harm.



Workers picking mandarins in New South Wales (Kevin Wells Photography / Shutterstock.com)

¹ See Department of Home Affairs, 'Operation Sovereign Borders', *Operation Sovereign Borders*, (Web Page), <<http://osb.homeaffairs.gov.au/en/Outside-Australia>>.

BACKGROUND

TEMPORARY: THE VISA FRAMEWORK FOR REFUGEES WHO ARRIVE BY BOAT

Since 19 July 2013, Australia has maintained a strict policy that persons arriving by boat without a visa after that date will not be processed or resettled in Australia. The policy applies without exception, including to families and children.²

Pursuant to this policy, any person arriving by boat without a visa shortly after 19 July 2013 was being mandatorily transferred to Nauru or Manus Island.³ Since that time, 3127 men, women and children deemed as ‘transitory persons’ have been subject to offshore detention on the basis of being an Unauthorised Maritime Arrival.⁴ In many cases, such transfers have lasted years, with over 200 refugees remaining in Nauru or PNG almost nine years later.⁵

However, as of 31 January 2022, there were 1175 transitory persons in Australia after having been brought back from Nauru or PNG.⁶ Those transferred to Australia include men attacked and seriously injured on Manus Island, women who have been sexually assaulted on Nauru and children who have suffered serious deterioration in their mental health after prolonged offshore detention. Most were transferred to Australia seeking urgent medical treatment.

The vast majority of this group – approximately 95% - have been granted positive refugee status determinations, mostly prior to their transfer back to Australia.⁷ The experience of being a refugee increases the intrinsic vulnerability of the individuals in this group and the precarity of their status due to a lack of a permanent solution, including susceptibility to exploitation.⁸

Prior to the passing of the ‘Medevac’ legislation in February 2020,⁹ most of these transfers were made under section 198B(1) of the *Migration Act*, which states that ‘[a]n officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia’. As a result of an escalating medical crisis taking place in Nauru and Manus Island, a coalition of MPs secured the passage of the Medevac legislation in order to ensure that refugees and people seeking asylum requiring urgent medical treatment could be transferred to Australia in a timely manner on the basis of medical advice. 192 people were transferred to Australia under the new laws until these were controversially repealed in December 2020. The *Migration Amendment (Repairing Medical Transfers) Act 2019*, which effected the repeal of the Medevac laws, was later cited as one of the least democratic laws passed by the Australian Government at the time, with a study noting that all but one submission to the relevant parliamentary inquiry (namely, the submission of the Department of Home Affairs) strongly opposed the law’s repeal.¹⁰

Once transferred to Australia, transitory persons remain subject to the mandatory detention policy pursuant to the *Migration Act* as enforced by the Australian Border Force. In many cases, this detention takes place in the community. Under these arrangements, transitory persons live in public housing paid for by the Australian government and receive minimum regular social security payments (60% of the social security entitlement of an Australian job seeker). However, as no visas were granted, community detention has led to years of people living with no rights to work or study, on the basis that their presence in Australia was temporary and would end following the conclusion of medical treatment.

2 Ibid.

3 Pursuant to *Migration Act 1958* (Cth) s 198AD. See also *Migration Act 1958 - Instrument of Designation of the Republic of Nauru as a Regional Processing Country Under Subsection 198AB(1) of the Migration Act 1958*, 10 September 2012 and *Migration Act 1958 - Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country Under Subsection 198AB(1) of the Migration Act 1958*, 9 October 2012

4 ‘Offshore processing statistics’, *Refugee Council of Australia* (Web Page, 12 August 2022) <<https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/>>

5 Ibid.

6 Australian Government, Department of Home Affairs, *The Administration of the Immigration and Citizenship Programs: Addendum – March 2022 (data to 31 January 2022)*, 15.

7 Ibid.

8 International Organisation for Migration & Walk Free, *Migrants and their Vulnerability to Human Trafficking, Modern Slavery and Forced Labour* (23 July 2019), 38; A Kidd et al, ‘How UK asylum system creates perfect conditions for modern slavery and exploitation to thrive’, *The Conversation* (online, 8 April 2019) <<https://theconversation.com/how-uk-asylum-system-creates-perfect-conditions-for-modern-slavery-and-exploitation-to-thrive-113778>>.

9 Migration Amendment (Urgent Medical Treatment) Bill 2018 (**Medevac laws**)

10 See Shane Wright, ‘Good process leads to good policy’: Medevac repeal ranked worst piece of law’, *Sydney Morning Herald* (online, 20 November 2020) <<https://www.smh.com.au/politics/federal/best-and-worst-ways-to-make-a-law-used-by-morrison-government-20201118-p56ftt.html>>.

With the increased precarity of their situation as a result of the onset of the COVID pandemic in 2020 and uncertainty over their future due to the highly discretionary and arbitrary treatment by Australian authorities linked to the failure to provide permanent solutions, the potential for exploitation – particularly with regard to work opportunities – is also likely to have increased. This failure is also in breach of several international obligations, including most notably the *Refugee Convention*,¹¹ as has been recognised by several UN Committees and Special Procedures.¹²

Their precarity is increased by the fact that the Minister for Home Affairs has ultimate discretion to exempt any person from regional processing by allowing them to make a valid application for a visa in Australia.¹³ Since 28 August 2017, the Australian Government has issued various cohorts of transitory persons in community detention with bridging visas, described in government documents as ‘final departure Bridging E Visas’ or BVEs. Upon being granted a visa, visa holders are told they must make arrangements to leave Australia within the next six months.

The key consequences of this visa for transitory people are that all social security payments are terminated immediately and that the affected people have 3 weeks to vacate their government-supported accommodation (public housing). They are granted the right to work, but are not entitled to undertake study or training (with the exception of primary and high school for minors).

However, despite being granted work rights, there are obvious barriers to gaining regular employment for transitory people. These include:

- The short term nature of the visa, which stipulates that the holder will be removed from the country thereafter – a very uncertain and speculative prospect for any potential employer;
- Transitory persons have been detained for up to eight years, during which time they have been legally barred from working¹⁴ (paid or volunteer) or undertaking formal training; and
- Transitory persons are highly vulnerable and many suffer from serious mental illness and trauma, a circumstance the Australian Government itself has recognised in its decision to evacuate them from Nauru and Manus and bring them to Australia for medical treatment.



Information about the final departure Bridging E Visa

Why have I received a final departure Bridging E Visa?

You have received a final departure Bridging E Visa, as you have come to Australia for medical treatment from a regional processing country and have not returned. The Australian Government has made the decision that you are no longer entitled to government welfare support including accommodation and income support.

What is a final departure BVE?

A final departure BVE allows you to reside in the Australian community temporarily while you finalise your arrangements to leave Australia. Your bridging visa has conditions. You must comply with these conditions.

You will be expected to support yourself in the community until departing Australia. The final departure BVE carries work rights for your remaining time in Australia. You need to prepare to return to a regional processing country or any country where you have a right of residence.

A final departure BVE is not a pathway to permanent settlement in Australia. Anyone on a final departure BVE is required to make arrangements to leave Australia. The Australian Government's policy is clear – anyone who attempts to enter Australia illegally by boat will never be permitted to settle in Australia. You are not eligible to apply for a Temporary Protection Visa (TPV) or a Safe Haven Enterprise Visa (SHEV) in Australia.

Will I receive any support?

Your income support will cease from **Monday 28 August**.

The temporary support you receive will include access to a community case worker who can give you information about life in the Australian community.

Some of your healthcare costs will continue to be paid for by Australia's public health care scheme, Medicare. You can access Medicare by presenting your bridging visa grant letter at a Medicare Office and registering for a Medicare card.

In the next three weeks you need to move out of government supported accommodation. From **Monday 28 August** you will need to find money each week for your own accommodation costs. From this date you will also be responsible for all your other living costs like food, clothing and transport.

What is the Code of Behaviour?

You are expected to sign the *Code of Behaviour* when you are released into the Australian community. The *Code of Behaviour* outlines how you are to behave in the community. There can be serious consequences if you do not follow the *Code of Behaviour* or your other bridging visa conditions. Even if you do not sign the *Code of Behaviour* there is still a requirement for you to comply with all Australian laws.

11 In particular, Articles 31-33; see Harriet Spinks and Ian McCluskey, 'Asylum seekers and the Refugee Convention' (Research Note, Parliamentary Library, Parliament of Australia).

12 See Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) at [36];

Committee on the Elimination of Discrimination against Women, *Concluding Observations on the eighth periodic report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (20 July 2018) at [53].

See also United Nations Human Rights Office of the High Commissioner, 'End of mission statement by Dubravka Šimonović, United Nations Special Rapporteur on Violence against Women, its causes and consequences, on her visit to Australia from 13 to 27 February 2017' (Statement, 27 February 2017) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21243&LangID=E>;

Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (27 December 2017) at [29];

Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia* (11 July 2017) UN Doc E/C.12/AUS/CO/5 at [17];

Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, UN Doc A/HRC/35/25/Add.3, (24 April 2017) at [80].

13 Migration Act, s 46A. To date, no permanent visas have been granted to transitory persons.

14 Both during their time on Nauru or Manus and during their time living in the community in Australia.

Further, a condition of being granted the BVE is the requirement to sign a Code of Conduct (Code), which sets out 'how people are expected to behave' while on the visa.¹⁵ Failure to abide by the Code can result in visa cancellation or detention.¹⁶ The Code includes requirements to comply with all Australian law (including road laws), lawful instructions provided by police and other government officials, as well as a prohibition on engaging in 'any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community'. This creates a level of fear and submissiveness in BVE holders, including in relation to raising complaints at work or against other members of the community, due to concerns that anything they do could impact their status in Australia.

The effect of being placed on the BVE is that vulnerable people are cut off from basic services as a means of pressuring them to return to a place where they fear persecution including serious physical and/or psychological harm. Suddenly being placed on a BVE risks rendering these people homeless and destitute without any income to provide for their food, housing, clothing and other basic needs. Torture and trauma counselling is also withdrawn.



Australian Government
Department of Immigration
and Border Protection

**Code of Behaviour
for Subclass 050 Bridging (General)
visa holders**

Form
1443

The Australian Government has introduced a Code of Behaviour (the code) which will apply to certain adults who are considered for the grant of a Bridging E visa (BVE or bridging visa). The code will apply to all adult illegal maritime arrivals who are considered for the grant of a BVE.

What is the Code of Behaviour?

The code describes how people are expected to behave while they are living in the Australian community on a bridging visa. It also describes behaviour that will not be accepted.

The code has been introduced to make sure that people who are granted a bridging visa behave appropriately while in the Australian community. The Australian Government and community expect non-citizens to abide by the law, respect Australian values and cooperate with government authorities.

Who needs to sign the Code of Behaviour?

If you arrived in Australia illegally by boat and are 18 years of age or older you must sign the code before you can be considered for the grant of a Bridging E visa.

If you have previously been granted a Bridging E visa by the Minister under section 195A of the *Migration Act 1958*, you must also sign the code before you can be granted a new Bridging E visa. This is very important if your bridging visa has ceased or is about to cease. You will not be considered for a further bridging visa until the Department of Immigration and Border Protection (the department) has received a copy of the current code which you have signed and which has been witnessed properly.

Certain other categories of people may also be required to sign the code. The department will tell you if you are in one of those categories.

If you are unsure whether you need to sign the code, please contact the department.

Why do I need to sign the Code of Behaviour?

Signing the code means that you understand that if you do not abide by the code, your income support could be reduced or ceased or your bridging visa could be cancelled and that you may be detained.

What is the Code of Behaviour about?

The code describes the behaviour expected of people who are living in the Australian community on a Bridging E visa. The code does not contain all the conditions and duties under Australian law of people granted a bridging visa. By signing the code you agree to behave according to values that are important to the Australian community while working towards the resolution of your immigration status.

Australia is a free and democratic country where men and women are equal. People are expected to show respect for one another and not to abuse or threaten others.

You must obey Australian laws while living in Australia. This means, for example, that you must not commit violence or inappropriate sexual contact of any kind. You must not lie to a government official, withhold information or give false identity documents. Your visa may be cancelled due to criminal conduct in Australia.

What do 'antisocial' and 'disruptive' activities mean?

The terms used in the code take their ordinary meanings.

- To 'harass' another person means to persistently or continually disturb or irritate them.
- To 'intimidate' another person means to cause them fear through your words or actions, including trying to force someone to do something.
- To 'bully' another person means to act in an unwanted or aggressive manner towards them, especially if you are in a more powerful position. Bullying includes making threats, spreading rumours, attacking someone physically or verbally, or excluding someone from a group or place on purpose.
- 'Anti-social' means an action that is against the order of society. This may include damaging property, spitting or swearing in public or other actions that other people might find offensive.
- 'Disruptive' means to cause disorder or to disturb someone or something.

How do I sign the Code of Behaviour and have it witnessed?

You must sign and date this form 1443 *Code of Behaviour for Subclass 050 Bridging (General) visa holders*, and provide your address and identity details. Your signature should be witnessed and your identity verified by an eligible witness. If you have been issued with photo identification, you should show the witness your photo identification (for example, valid passport, ImmiCard or driver's licence).

Eligible witnesses include:

- officers of the department
- Status Resolution Support Services (SRSS) case workers, and
- registered migration agents.

Other categories of people who may witness your signature and identity are listed on the last page of this form.

What does the witness need to do?

The role of the witness is to certify that you have signed the code in front of them and are the person whose identity details are given. The witness is not responsible for ensuring that you understand the code or will abide by it.

The witness will check your photo identification to confirm your identity and then watch you sign the form. The witness will also need to sign the form and provide their details.

Where do I send the signed Code of Behaviour?

The signed code may be scanned and emailed to bve.reporting@immi.gov.au

If you are unable to email the signed copy, the original signed document may be sent to the following address:

IMA/BVE Processing Team
Department of Immigration and Border Protection
GPO Box 9984
SYDNEY NSW 2001

You are advised to keep a copy for your records.

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Australian Government
Department of Immigration
and Border Protection

**Code of Behaviour for Subclass 050
Bridging (General) visa holders
Supporting information**

Form
1443i

This translated information is provided to support form 1443 *Code of Behaviour for Subclass 050 Bridging (General) visa holders*. You must complete form 1443 in English.

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15 Department of Immigration and Border Protection, Australian Government, 'Form 1443: Code of Behaviour for Subclass 050 Bridging (General) visa holders' (Government Form) <<https://immi.homeaffairs.gov.au/form-listing/forms/1443.pdf>>

16 Ibid.

The deterrent intent of the policy is clear from public statements by prior government ministers:

- Human Services Minister Mr Alan Tudge said the move was consistent with the principle that anybody who arrives by boat would not be settled in Australia. ‘They will be settled elsewhere. That’s what this is about,’ he said. He did not think it was unreasonable to withdraw taxpayers support if they refuse to return back to Manus or Nauru.¹⁷
- [In a radio interview](#), the Australian Minister for Immigration and Border Protection, Mr Peter Dutton, accused people seeking asylum of using medical transfers to manipulate the system and as a way to escape detention on Australia’s offshore camps on Manus Island and Nauru. ‘I think people believe in a fair go, but this is ripping the system off,’ he said. ‘We’ve given notice to almost 60 of them to say that the game is up and we aren’t going to provide you with the housing — the welfare will stop’. ‘The medical assistance has been provided and there is no need for them to remain in Australia and yet, through these legal moves, they’ve found themselves a way’ Mr Dutton said.¹⁸
- A spokesman for Immigration Minister Peter Dutton said that ‘every IMA [Illegal Maritime Arrival]¹⁹ transferred from a regional processing centre to Australia for temporary medical assistance was aware that once their medical needs were met they would return to Nauru or Manus’.
- Veterans’ Affairs Minister Dan Tehan said the government did not want people seeking asylum to burden the welfare system. ‘(Refugees) have the ability to work therefore (they) should take up the opportunities to seek work,’ Mr Tehan said. ‘We will not allow people to resettle who have come here by boat.’²⁰

Andrea Vogl has argued that the widespread use of the Code and BVEs as a system of onshore detention is equivalent to ‘crimmigration’, contending that ‘Australia’s bridging visa regime should not be analysed as a practice ancillary to the primary policy of mandatory detention, but as central to the logic and policy of punishment and deterrence of onshore asylum seekers seeking protection within Australian territory’.²¹

As at January 2021, there were 439 transitory persons on BVEs.²² Of these, 276 were moved out of community detention onto BVEs in August 2020, during the height of the COVID-19 pandemic.²³ This cohort includes 81 children.

AUSTRALIA’S MODERN SLAVERY ACT

While Australia takes a hardline stance of deterrence in relation to people seeking asylum who arrive by boat, a very different public stance is taken in relation to victims of human trafficking and modern slavery. In December 2018, the Australian Government passed the MSA, a landmark piece of legislation that requires large companies to report on their efforts to combat modern slavery practices in their operations and supply chains. It is currently being formally reviewed, with an inquiry report due to be tabled by 31 March 2023.²⁴

Modern slavery is a term used to describe serious exploitation of workers, and includes practices such as: human trafficking, slavery, servitude, forced labour, debt bondage, forced marriage, and the worst forms of child labour.²⁵

Under the MSA, businesses must prepare statements that identify modern slavery risks in their operations and supply chains, actions taken to assess and address modern slavery risks (including due diligence and remediation), the effectiveness of such actions, and the process of consultation with entities owned or controlled by the business.²⁶

17 See ‘Shocking cruelty’: Government launches welfare crackdown on asylum seekers in Australia’, *SBS News* (online, 27 August 2017) <<http://www.sbs.com.au/news/article/2017/08/27/shocking-cruelty-government-launches-welfare-crackdown-asylum-seekers-australia>>.

18 See Sarah Malik, ‘Australia’s Immigration Chief Defends Cutting Support for Some Asylum Seekers’, *New York Times* (online, 28 August 2017) <<https://www.nytimes.com/2017/08/28/world/australia/immigration-peter-dutton-asylum.html?mcubz=3>>. Several peak medical bodies and associations had expressed views to the contrary, such as the Australian Medical Association, the Royal Australian College of General Practitioners and Médecins Sans Frontières (see Paul Karp, ‘Medevac: AMA speaks out against repeal and urges bipartisan fix’, *The Guardian* (online, 22 August 2019) <<https://www.theguardian.com/australia-news/2019/aug/22/medevac-ama-speaks-out-against-repeal-and-urges-bipartisan-fix>>; Nauru: New MSF Report Shows The Disastrous Mental Health Impact of Australia’s Offshore Processing Policy’, *Médecins Sans Frontières* (Web Page, 3 December 2018) <<https://msf.org.au/article/statements-opinion/nauru-new-msf-report-shows-disastrous-mental-health-impact-australia%E2%80%99s>>.

19 Illegal Maritime Arrival was a term used by the Australian Government to describe people seeking asylum arriving by boat to Australia.

20 See <https://www.theaustralian.com.au/nation/politics/asylumseekers-brought-onshore-for-medical-treatment-to-have-funding-cut/news-story/31e9c8c06acb6e44703ae2e761978c6c>.

21 Anthea Vogl, ‘Crimmigration and Refugees: Bridging Visas, Criminal Cancellations and ‘Living in the Community’ as Punishment and Deterrence’ (December 31, 2019) in Peter Billings, *Crimmigration in Australia: Law, Politics and Society* (Springer ed., Crimmigration in Australia: Law, Politics, and Society (Springer Singapore, 1st ed., 2019) 149-171.

22 Refugee Council of Australia, above n 4.

23 Ibid: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F567ff01c-d590-41e8-ab09-bd5d4e996f13%2F0001%22>; Lydia Feng, ‘Hundreds of asylum seekers like Rana and her family placed on six-month final departure bridging visas’, *ABC News* (online, 27 October 2020) <<https://www.abc.net.au/news/2020-10-27/asylum-seekers-placed-on-final-departure-visas/12814430>>.

24 Department of Home Affairs, Australian Government ‘Review of the Commonwealth Modern Slavery Act 2018’ (Media Release, 31 March 2022) <<https://www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/people-smuggling-human-trafficking/review-of-the-commonwealth-modern-slavery-act-2018>>.

25 MSA, s 4.

26 MSA, s 16(1) sets out these mandatory reporting requirements.



Farm worker picking strawberries (Ian Crocker / Shutterstock.com)

Due to the impacts of COVID-19 on the precariousness of work and its potential to exacerbate modern slavery practices, the Australian Border Force has also directed companies to include details of how the pandemic has impacted these risks, and how these have subsequently been mitigated.²⁷

The MSA is predicated on a model of mandatory disclosure, which relies on the public exposure of business practices in order to drive a ‘race to the top’ by businesses to take proactive and effective actions to address modern slavery.²⁸ It is expected that large businesses will report and will change their practices sufficiently so that other, smaller businesses will be forced to follow due to market forces. In addition, it is assumed that fear of reputational damage from not complying with MSA requirements will be a sufficient deterrent to companies considering not complying with the legislation. There are no hard penalties for non-compliance, and companies are not required to undertake any actions (such as due diligence or remediation) other than to produce a report.

The first round of modern slavery statements were submitted by 30 June 2021. Early reviews of the effectiveness of the MSA have indicated that the legislation has driven a ‘race to the middle’²⁹ as opposed to generating substantial changes in corporate behaviour, and that several companies were failing to identify and address key modern slavery risks.³⁰ Several analyses of similar reporting regimes overseas have found the regulatory model of mandatory disclosure to be significantly flawed.³¹ At the time of writing, the extent to which the MSA has any impact on improving conditions for people working in situations of modern slavery and labour exploitation remains to be seen.

Nevertheless, the Australian Government remains committed to aspiring towards playing a global leadership role in combating modern slavery, stating ‘[t]here is no place for modern slavery in the Australian community or in the global supply chains of Australian goods and services’.³² Former Prime Minister Scott Morrison also emphasised the country’s commitments to eradicating modern slavery, noting in the Australian Government’s own statement that ‘[g]overnments must race to the top by setting standards of accountability, and abiding by them diligently’.³³ The recently elected Albanese Government has also committed to improve Australia’s modern slavery framework.³⁴

27 Australian Border Force, ‘Modern Slavery Act Information Sheet: Coronavirus’, Department of Home Affairs (Information Sheet Web Page) <<https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-covid-19.pdf>>.

28 *Regulatory Impact Statement*, (appended to the [Explanatory Memorandum](#), Modern Slavery Bill 2018), 57.

29 Australian Council of Superannuation Investors and Pillar Two, ‘Moving from paper to practice: ASX200 reporting under Australia’s Modern Slavery Act’ (Research Report, Australian Council of Superannuation Investors, July 2021) 6.

30 Amy Sinclair & Freya Dinshaw, ‘Paper Promises? Evaluating the early impact of Australia’s Modern Slavery Act’ (Research Report, Human Rights Law Centre, 6 February 2022) <<https://www.hrlc.org.au/reports/2022/2/3/paper-promises-evaluating-the-early-impact-of-australias-modern-slavery-act>> (hereafter ‘**Paper Promises Report**’).

31 International Corporate Accountability Roundtable and Focus on Labour Exploitation, ‘Full Disclosure: Towards Better Modern Slavery Reporting’ (March 2019), <<https://www.labourexploitation.org/publications/full-disclosure-towards-better-modern-slavery-reporting>>; British Institute of International and Comparative Law et al, ‘European Commission - Study on due diligence requirements through the supply chain: Final report’ (20 February 2020) 218-19 <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>; Business and Human Rights Resource Centre, ‘FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action’ (November 2018) <<https://www.business-humanrights.org/en/ftse-100-the-uk-modern-slavery-act-from-disclosure-to-action>>.

32 Department of Home Affairs, Australian Government, ‘People smuggling and human trafficking’, Criminal Justice (Web Page) <<https://www.homeaffairs.gov.au/criminal-justice/Pages/modern-slavery.aspx>>.

33 Kieran Guilbert, ‘Australia warns of modern slavery risks in government supply chains’, *Reuters* (online, 10 December 2020) <<https://www.reuters.com/article/australia-government-slavery-idUSKBN28J2ID>>.

34 ‘Tackling Modern Slavery’, *Australian Labor Party* (Web Page, April 2022) <<https://www.alp.org.au/policies/tackling-modern-slavery>>.

EXPERIENCES OF WORK FOR BVE HOLDERS

METHODOLOGY

Following a period of several years in detention, with no work experience in Australia, limited English skills, and often poor mental health, it can be challenging for refugees to find opportunities for regular work.³⁵ The imposition of a six-month Bridging Visa E exacerbates these challenges by creating a situation of perpetual uncertainty and increasing the power imbalance between vulnerable people needing money to survive, and employers seeking to exploit worker vulnerability.

To find out more about the experience of work for BVE holders, two specialist community support workers that assist people on BVEs with legal and advocacy support were interviewed (referred to throughout as Advocate A and B). This outreach was undertaken in accordance with Ethics Approval granted by the University of Melbourne in July 2020. Over 20 refugees on BVEs were also approached for an interview; however, only one was prepared to speak (referred to as Ali) with the others flagging the challenges they had faced in their time in Australia over the last several years as a reason not to speak. This outreach was mostly undertaken through phone calls, with some engagement over email where phone contact was unsuccessful. Many of those contacted reported that they had faced exploitation and/or discrimination at work, but were not prepared to provide further details about this because they were concerned that speaking out might impact their visa or employment status. The fact that most were concerned to speak about their experiences, even on an anonymised basis, provides some evidence of their ongoing precarious and vulnerable situation.

TYPES OF WORK

Based on interviews undertaken for this research, the nature of work undertaken by BVE holders is typically cash-in-hand casual work, and often informal in nature (for example, without a formal contract of employment in place). Typically, the work involves the use of manual or unskilled labour, in sectors such as construction, hospitality, food processing or horticulture. Many BVE holders also find work through informal networks - for example, where a friend's workplace needs an additional worker for the day.

Advocate A provided some context around the difficulties of finding employment for BVE holders:

Practically, it's hard to find any kind of employment on a six month visa, if you're going around looking for a job. When you're handing resumes, after eight years in detention, and you have a six month bridging visa, and the employer checks that you have a six month bridging visa, it's unlikely that somebody's going to invest the time and efforts and finance to train you for the six months because there's this cliff that's coming up.

ALI'S STORY

(not his real name)

They gave me a six month visa bridging visa. You know, for someone who's came without language without any support, I feel I'm lost, I didn't know what I'm going to do. I'm just wanting to apply [for a job], always applying, trying to apply but they didn't accept me because I'm new, I didn't have history and there is not any secure job for foreigners so I was sure that each time they can reject my application.

Eventually I started working as a machine operator in one factory. I work with them about one month, but then I got injured at work. I didn't know what they were going to do. They said for me, well, just stay home, we'll come back to you later. Anyway, they sacked me from the job.

When I went looking for another job, some places told me 'your visa is not permanent, we will not accept you because you don't have permanent visa'. There is no security. They are thinking 'I'm going to teach you, give you induction, and then I'll lose you after two, three months or six months'. The other thing is when you have limited English, they think 'how am I going to communicate with you? You are going to give me a hard time'. So you are forced to go for some places to work cash in hand and accept under the minimum wage.

I went through a very traumatic time, I think lots of people who are refugees also go through this. I spoke to one man also on a bridging visa who was crying, he was saying 'Look, I didn't have money to pay nappy for my daughter, I didn't have money to buy the milk. So what I can do?' I know someone else who was working but he has cancer, and the cancer medication is very expensive and he doesn't have coverage on Medicare and then he's lost his work. Now he has passed away.

I have a friend who is on a visa with no work rights. He says, I'm not going to steal money. I'm not going to kill myself. I didn't have any income. So I have to go and work cash in hand. Because, you know, like, there is not any another way. He was working cutting trees. However, he was cutting some branches from the tree and the boss by mistake, he comes close to him with the sword and cut his hands. Still now, he cannot close his hand. But what are you going to do? He cannot say I get injured. He's scared to end up back at the detention centre. His hand is completely gone. But he cannot claim it. Why? Because he is refugee and because he didn't have right to work. This is what the problem is, this is what we're struggling with.

³⁵ Australian Human Rights Commission, "Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'" (Research Report, 17 July 2019), 58 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

The Australian Human Rights Commission has made similar observations in relation to a different category of bridging visa holders its 2019 report *'Lives on Hold: Refugees and asylum seekers in the 'Legacy caseload'*:

*Temporary visa status may also have a significant negative impact on employment prospects. During the consultation process, it was reported that the duration of Bridging Visas granted to people in the Legacy Caseload was typically between one and six months, and employers were often reluctant to hire people whose visas would expire within such a short period of time. In the words of one support worker, 'Nobody wants to employ them for six months. A place will not invest in training for an employee with such a short visa.'*³⁶

The Refugee Council of Australia has also commented on the difficulties of finding employment for BVE holders:

*Unsurprisingly, people find it very hard to get a job with short-term visas. We have heard countless stories of people who were repeatedly turned down for jobs after they told the employers about the length of their bridging visas. One person told us he was successful in two interviews for a job in information technology but did not hear back from the employer when he told them about his visa. Others resorted to low skilled jobs because they never got a chance to work in jobs they were qualified for because of their visas. We heard about people with engineering degrees working in abattoirs.*³⁷

Because of the difficulties in finding employment, BVE holders are forced into accepting poorer conditions at work. Advocate A stated:

The kind of jobs that people on BVEs find are not jobs that are secure, rather they might have poor conditions and may subject the person to exploitation. So people may be underpaid, working long hours without the same kinds of rights that other employees would have in the marketplace. Being on a BVE is a very specific circumstance that makes you more vulnerable, because firstly people are just grateful to have a job that somebody has offered them. They will accept most conditions because a job means they might be able to pay the rent and allow them to put some food on the table for the family. And secondly, the employer, also, is often aware of that dynamic. So they know they can take advantage of these people.

MODERN SLAVERY RISKS ASSOCIATED WITH TEMPORARY VISA HOLDERS

Sectors such as horticulture and construction in Australia are known to have increased risks of modern slavery, particularly given the widespread non-compliance with labour laws, increased use of labour hire firms, and remote and/or dangerous working conditions.³⁸

A recent report, *Paper Promises: Evaluating the Early Impact of Australia's Modern Slavery Act* set out six key areas of modern slavery risk that apply in the horticultural sector:

1. Predominantly migrant workforce on temporary visas
2. Widespread use of third-party recruiters (labour-hire agencies).
3. Remote & precarious working conditions
4. Low wages across the sector (systemic underpayment & wage theft through use of piece rates).
5. Lack of union coverage of the sector.
6. Systemic downward cost pressure (requiring labour-hire companies to tender for contracts & awarding work to lowest bidder).

Many of these factors impact upon BVE holders. Advocate A commented on the low wages and precarious working conditions in particular:

In terms of conditions of work, we are talking about working more than seven, eight hours without a break. And based on discussions within certain communities, people may work up to 12 hours a day and only expect maybe \$120 cash in hand for that particular day. And there's limited support for if you have to take the day off, because you've been working through it for too long and your back is sore, or you don't have the right equipment, or you've had an injury.

Advocate B noted that some people on BVEs work for less than the minimum wage and face threats if they make a complaint:

If they have a job, most people on a BVE are working more than 38 hours a week. Some of them are working 55 hours or 60 hours and there is no any superannuation, there is not any volunteer rates, there is no overtime. I have spoken to many people working more than 12 hour days. They have to go on the morning, five o'clock and coming home maybe six or eight o'clock. So unfortunately a lot of refugees and bridging visa holders, they are struggling and suffering because they are working extra hours without any overtime.

We had a client who was getting paid less than half the minimum wage, about \$9.50 an hour. He wanted to talk to his boss about it and was told: 'Look, you're refugee. If I speak to immigration, they will send you back for your country.' This is what the problem is, in many of cases we hear about bad bosses. They threaten these people with the immigration [authorities] and the workers are scared. We also have a lot of issues with women too, where they feel they cannot talk about what they experience because if they do, they believe the employer will make a report to immigration and then they may be sent back.

³⁶ Australian Human Rights Commission (n 35), 59.

³⁷ Sahar Okhovat, 'With Empty Hands: How the Australian Government is forcing people seeking asylum to destitution' (Research Report, Refugee Council of Australia, June 2018) 13 <https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/With-Empty-Hands_FINAL.pdf>.

³⁸ Paper Promises Report (n 30) 42; see also KPMG and Australian Human Rights Commission, 'Property, construction & modern slavery: Practical responses for managing risk to people' (Guidance Document, KPMG and Australian Human Rights Commission, 13 August 2020) <<https://home.kpmg/au/en/home/insights/2020/08/property-construction-modern-slavery-practical-guide.html>>.

The Senate Select Committee Inquiry into Temporary Migration made a similar finding in relation to the vulnerability of women workers on temporary visas:

Women on temporary visas can also become victims of modern-slavery offences such as forced marriage, human trafficking, servitude, and forced labour. Furthermore, these women face significant barriers to accessing support services, social security, and housing support when they do experience family violence in Australia.³⁹

Racism also plays a part in increasing the likelihood of exploitation of BVE holders at work. Advocate A describes the kind of work that is carried out by the various categories of visa holders on farms:

There's this thing that happens on farms where some people are coming on working holiday visas from European countries. And then you have people who come from Southeast Asian countries, and then you have people here that are seeking asylum and on a bridging visa. So there's a hierarchy of employees. People from Europe, they're usually given positions which require less effort and work. For example, if you're picking grapes, the people who drive the trucks to pick up the grape boxes would be people who have working holiday visas. And doing the actual hard work of picking the grapes is mostly people from Southeast Asia who on other type of visas, but also from people on bridging visas and people seeking asylum.

In some cases, migrant worker vulnerability can also lead to wage theft and slavery-like conditions. Advocate B gives this example of a BVE worker's experience in the construction industry:

There is someone who is working on a new building construction site who is owed about \$12,000. Every week the bosses say, we'll pay you next week. And then they say, it's more likely it's going to be next month. At first, the worker believes this is reasonable. If they are being paid \$3000 a month and the boss says they will pay the following month, you have to work the additional month because you aren't going to leave your money and you are scared you'll never get paid. That then becomes \$6000 and after three months it's \$9000, and the amount keeps increasing. So this is the issue, and meanwhile the worker doesn't believe they have the right to ask for the money to be paid. But they have been working for free.

The ability of workers to collectively organise is crucial to improving working conditions in high-risk settings, however this ability is largely absent for people on BVEs. Both NGO advocates stated that it doesn't occur to most workers to join a union, given that the most pressing concern is to survive from a financial standpoint and provide for one's family.

The 'Code of Conduct' that BVE holders are required to sign was also cited as an additional factor that contributes towards vulnerability at work. Taking actions such as joining a union or engaging in any form of protest could potentially be seen as 'anti-social behaviour' and therefore lead to visa cancellation. The fear of being reported to authorities also leads BVE holders to do everything possible to stay in a job despite the conditions, creating a near inability to leave.

Further, there is evidence that temporary visa holders such as those on BVEs were severely impacted by the COVID-10 pandemic, which exacerbated pre-existing modern slavery risks in high-risk sectors such as horticulture.⁴⁰ BVE holders were ineligible for any form of financial support during the crisis, leading to significant hardship.⁴¹

39 Select Committee on Temporary Migration, Parliament of Australia, *Select Committee on Temporary Migration* (Parliamentary Report, September 2021) 150 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf>.

40 Paper Promises Report (n 30) 41.

41 Asylum Seeker Resource Centre, 'Human Rights Law Program Infosheet – COVID-19 Jobkeeper/Jobseeker: Income support and Centrelink entitlements for temporary visa holders' (Web Page, 6 August 2020) <<https://asrc.org.au/wp-content/uploads/2013/04/HRLP-Infosheet-COVID19-Jobkeeper-and-Jobseeker-updated-August-2020.pdf>>

AUSTRALIAN COMPANY REPORTING UNDER THE MSA

It is clear that temporary migrants, including BVE holders, are at increased risk of labour exploitation and modern slavery in part due to their pre-existing vulnerabilities and visa status. Searches undertaken on the Australian Government's Modern Slavery Register indicate that no companies have specifically identified modern slavery risks in their supply chain related to the presence of BVE holders in company operations or supply chains. Just over 50 statements mention risks associated with temporary visa holders more generally (out of over 4000).⁴²

The horticultural sector offers an insight into company practices in Australia that potentially impact on the treatment of workers on BVEs. The sector is heavily reliant on workers on temporary visas as well as the use of labour hire agencies, many of which have been found to be unscrupulous in their recruitment practices. Several inquiries into conditions in the horticultural sector have found widespread exploitation, underpayment and abuse against workers, amounting in severe cases to modern slavery.⁴³

Recent research on first round statements issued by companies, including those sourcing from the Australian horticulture sector, indicates that a lot more progress needs to be made before companies meaningfully identify and act on their modern slavery risks. In particular, the *Paper Promises* report examined the statements of 30 companies operating in Australia's horticulture and viticulture sector in detail. Companies were selected to represent a diverse range of entities within the sector, including both domestic and internationally headquartered businesses, entities of differing sizes, and entities at various points in the supply chain (supermarkets, retailers, distributors, producers etc).

QUALITY OF DISCLOSURES

The report found that less than half of the companies reviewed identified the Australian horticultural sector as being high-risk for modern slavery, or mentioned the inherent risks associated with a largely migrant workforce and widespread use of third-party labour hire recruiters in horticulture.⁴⁴ Fewer than one in four demonstrated awareness of risks associated with the remote and precarious working conditions for horticultural workers. Only one in ten identified low wages across the sector and the use of piece rates (rather than hourly wages) as resulting in issues of underpayment and wage theft. None identified the lack of union coverage of the workforce as a risk in their statements.

QUALITY OF MEASURES TAKEN TO ADDRESS RISKS

The MSA requires companies to report on actions taken to mitigate modern slavery risks, however the report also surveyed the underlying quality of actions taken, and whether these were likely to be effective. Overall, the majority of horticulture sector companies performed poorly in terms of risk mitigation.

One third of the companies reviewed failed to have any specific measures to address risks in the horticultural sector. Less than half (40%) indicated they were taking steps to ensure workers in supply chains are paid the equivalent of at least a minimum wage, for example by embedding a requirement to pay award rates in Supplier Codes of Conduct or requiring all growers to provide an annual declaration that they have paid at least the award rate to all employees.

Relevantly to BVE holders, less than a quarter of companies gave examples of how they work with suppliers to address factors which contribute to migrant worker vulnerabilities, such as visa assistance, prohibiting passport confiscation, ensuring freedom of movement, and ensuring workers are informed of their workplace rights.

Only a fifth of companies implement recruitment controls to mitigate against deceptive recruitment practices, and just two companies report collaboration with unions to improve employment conditions for works in their supply chains and recognise unions' right to inspect farms, factories, and accommodation without employer knowledge or interference.

⁴² As of April 2022.

⁴³ Paper Promises (n 30) 38.

⁴⁴ Ibid 42.

CONCLUSION

People who arrived in Australia by boat nearly a decade ago continue to be marginalised and exploited by virtue of their precarious immigration status, with no certainty over their future. With limited employment options available, people on BVEs often take cash-in-hand jobs with poor conditions and no meaningful way to enforce workplace rights given the risks this may carry for their immigration status. Meanwhile, companies that have potential exposure to supply chain workers on BVEs fail to properly recognise their vulnerability to exploitation, and to undertake the due diligence required to identify, assess and address the risks of modern slavery to temporary visa holders, including those on BVEs and working in the horticulture sector.

If Australia is truly committed to eradicating modern slavery, it must adopt fairer policies in order to minimise the vulnerability of people on temporary protection who are living and working in our community, rather than needlessly exacerbating the risk that they will face serious labour rights abuses by virtue of their insecure visa status. Companies should also be more proactive in the way they identify and address risks to refugees with temporary migration status, and should take a human rights-based approach in order to minimise the risk of harm being faced by workers in their supply chain.



Workers picking raspberry fruit on a farm (ChameleonsEye / Shutterstock.com)

RECOMMENDATIONS

FOR GOVERNMENT

PATHWAYS TO PERMANENT RESIDENCE

Most transitory people have now been in the Australian community for several years. There is no meaningful justification for continuing to designate precarious migration status to refugees in the community indefinitely. Short term bridging visas and community detention are inappropriate mechanisms to manage people who are unable to ever return to their country of origin. Rather, the Australian Government should immediately grant permanent residency to all refugees who were subject to mandatory offshore detention, or immediate access to resettlement in a safe third country, so that they can rebuild their lives in safety.

The Code of Conduct should also be substantially amended so that it does not impede the ability of people to live a full life (within the bounds of the law), including being able to freely enforce workplace rights and leave abusive situations where necessary. More broadly, the Australian Government should end its cruel policy of mandatory offshore detention, and ensure its treatment of people seeking asylum is fully compliant with its obligations under the *Refugee Convention*.

IMPROVED ACCESS TO REMEDY FOR BVE AND OTHER TEMPORARY VISA HOLDERS

The MSA should be amended to include a specific cause of action so that workers subjected to modern slavery can seek redress in the event that companies have failed to undertake adequate due diligence to prevent modern slavery in their operations and supply chains. This would allow for workers, regardless of their visa status, to bring claims for exploitation without fear of reprisal from immigration authorities.

REQUIRE COMPANIES TO TAKE ACTION TO ADDRESS MODERN SLAVERY

Company reporting under the MSA, even if properly enforced, is unlikely to result in the transformative changes to corporate practices needed to eliminate modern slavery. We recommend that the MSA be amended to include a specific duty to prevent modern slavery, which requires companies to undertake mandatory due diligence to identify and assess salient risks in their operations and supply chains that give rise to modern slavery and to take steps to mitigate and address them. Companies would have to show reasonable and appropriate due diligence as a defence to legal liability. Over time, this duty should be extended to apply to all human rights given their indivisible and interconnected nature.

FOR BUSINESS

KNOW AND UNDERSTAND THE RISKS

Companies with potential links to vulnerable workers such as BVE holders, refugees or other temporary migrants must undertake human rights due diligence to identify their salient modern slavery risks and understand how these are situated in their operations and supply chains. This includes managing efforts to detect modern slavery risks within a broader human rights framework and not divorcing this from other closely related issues such as discrimination, safeguarding freedom of association and paying a living wage.

Companies must ensure that BVE holders are aware of their rights at work, including providing information on this in their own language so that this is readily understood. BVE holders should also be assisted to the extent possible to have their visas promptly renewed, and there should be measures taken to ensure that their insecure visa status is not used against them in order to extract additional hours of work or accept poorer conditions than other workers.

With regard to low wages, companies should ensure that workers are being paid the minimum of a living wage for their work, and that they have adequate rest breaks. This includes working with suppliers to lift wages, particularly where there is a gap between the payment of piece rates and a living wage.

More generally, companies should proactively assess human rights risks and harms on an ongoing basis, including looking at how the business' own practices may be contributing to these risks, as well as taking steps to prevent and address harms detected, tracking the effectiveness of company responses and communicating how impacts are addressed.

ACCESSIBLE GRIEVANCE MECHANISMS

It is clear that many BVE holders feel that they are unable to raise issues regarding conditions of work, for fear of reprisal or reporting to immigration authorities. Companies should ensure that there are confidential, safe, practical and accessible pathways to raise complaints about poor working conditions that are available to all workers in their operations and supply chains. Where there are reports of exploitation, companies should ensure there is an adequate remedy provided to affected workers.

WORK WITH GOVERNMENT TO SUPPORT PATHWAYS TO PERMANENCY

Businesses should publicly support pathways to permanency for temporary visa holders, and particularly for refugees on BVEs that deserve protection and stability after so many years of uncertainty. Increased certainty in the immigration status of the workforce will result in lower modern slavery risks for business as well as improved working conditions for people that are currently on BVEs.



Vineyard worker harvests wine grapes in the Barossa Valley (iStock.com/MichaelMajor)



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