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Wednesday, 27th November 2019

Migrant Exploitation Review
International Labour Policy
Labour and Immigration Policy
Ministry of Business, Innovation and Employment
PO Box 1473
WELLINGTON 6140

Via email: migrantexploitationreview@mbie.govt.nz

RE: Addressing Temporary Migrant Worker Exploitation – Consultation Document

RCSA welcomes the opportunity to make a submission to the Addressing Temporary Migrant Worker Exploitation consultation document circulated in October 2019.

RCSA is the peak industry body for the recruitment, staffing and workforce solutions industry in Australia and New Zealand, representing some 3000 corporate and individual members across the staffing sector.

RCSA and its members have long campaigned for mechanisms to identify and stamp out illegal behaviour and worker exploitation in both the labour hire and broader employment sectors.

Indeed, to support industry and supply chain leadership, RCSA has established StaffSure, an third-party audited certification program that makes it easy for businesses and governments to find and partner with reputable workforce services providers in New Zealand. It allows consumers of services to make informed choices about the quality and legitimacy of labour hire firms and workforce contractors.

The proposals in this consultation paper have significant implications not just for the staffing sector, but for the tens of thousands of New Zealand workers we employ and the thousands of New Zealand businesses we support.

RCSA is committed to working with governments to strike the right balance between flexibility and responsibility in the labour market. We are concerned that some of these proposals in this paper have the potential to create significant regulatory burden for New Zealand's staffing sector and the vital role it plays in supporting business, economic and employment growth, without delivering much additional value in relation to stamping out and addressing exploitation issues.

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RCSA does not condone exploitation of any kind and we understand that migrant workers are some of the most vulnerable to unscrupulous operators. We need to ensure systems exist to protect our most vulnerable workers, but we also need to make sure we don't unnecessarily stifle innovation and flexibility by applying restrictive protective measures where they deliver little value or are not required.

Existing New Zealand law already provides protections and minimum standards which would sufficiently address any examples of worker exploitation that have been referred to in the consultation paper.

New Zealand's employment environment must support the capacity of NZ business to remain productive, competitive and responsive in an increasingly global marketplace.

RCSA members are proud of the role they play helping jobseekers find work when others won't give them a go. They are proud of how they assist working mothers with flexible work options so they can balance caring with earning. They are proud of how they help growing New Zealand businesses take a risk and create opportunities that grow our economy.

Some of the= proposals in this paper have significant consequences for productivity, economic and jobs growth in New Zealand, without providing significant additional protections for workers beyond those which already exist in current law.

Attached is our submission in response to some of the specific questions posed by the consultation paper. RCSA would welcome the opportunity to work further with the government in relation to its consideration of and response to these issues. Should you have any questions about our responses or if you would like to discuss matters further with us, please do not hesitate to contact either myself or Brooke Lord, RCSA Head of Policy and Advocacy, at advocacy@rcsa.com.au or on (03) 9336 9413

Yours sincerely,

Charles Cameron
Chief Executive Officer

RCSA response to specific questions in the consultation document, Addressing Temporary Migrant Worker Exploitation

Section A: Preventing exploitation

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

RCSA does not oppose moves to require other involved parties to demonstrate due diligence as a defence to accessorial liability. We think it is reasonable that parties involved in the use of labour can demonstrate some due diligence in relation to their supply chain and should be required to do so in order to avoid accessorial liability in cases of exploitation.

That said, the complexity and diversity of engagement arrangements mean that any requirement cannot be overly prescriptive in its approach or else it risks becoming impossible for employers to comply with, and being challenging to enforce.

We believe a non-prescriptive, general requirement that parties involved in the use of labour are able to demonstrate they have undertaken due diligence investigation into their supply chain is not unduly burdensome.

It would allow a party to seek assurances from existing certification schemes such as StaffSure, ISO and other relevant or similar schemes, to provide certainty around the integrity of labour supply in scenarios where that supply is outsourced or indirect.

Outside of a broader demonstration of due diligence into the labour supply chains however, we believe existing law is sufficient to address issues around liability of accessories.

In relation to responsibility for breaches of employment standards, the Triangular Employment changes made to the Employment Relations Act earlier this year go a significant way to addressing the above question where it relates to a Labour or on-hire arrangement. The ER Act already allows a worker to attach a host or third party to a personal grievance claim.

Moreover, s.142W of the *Employment Relations Act c*overs ancillary liability for breaches of employment standards. In unlawful discrimination matters, s.112 of the *Employment Relations Act* already gives employees a choice between the Employment Relations Act and the Human Rights Act where the definition of "employer" includes the "person for whom work is done by contract workers under a contract between that person and the person who supplies those contract workers."

1Ai If people other than the employers were responsible, how should we formulate the tests for this responsibility? 1Aii Should the approach apply to all types of relationships or should it be limited?

Per the response above, we don't believe any approach should be prescriptive. The complexity involved in developing a 'test' for responsibility given the breadth and variety of engagement and working relationships that exist, is likely to render any such test almost impossible to comply with or enforce in a large number of circumstances.

We do however, think there is merit in requiring parties involved in the use of labour to demonstrate some form of diligence around the integrity of labour in their supply chain. We think this step would add significant value in enhancing understanding by users of labour of the importance of examining its supply, promoting a culture of broader responsibility in relation to exploitation of workers, while rewarding professional operators who contract and engage labour ethically and legally. RCSA believes it could drive much needed cultural change around the integrity of labour supply by all who use it, which would go a significant way to making 'labour supply' a less attractive (and more difficult) space for deliberate law breakers to operate within.

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

RCSA does not believe there should be any specialist streams for accreditation under the new employer-assisted visa gateway system. We believe that specialist streams create unnecessary complexity and inflexibility, in an environment where agility is key to ensuring the system can adjust quickly and effectively to respond to challenges in the labour market.

We strongly urge the government to reconsider its approach to accreditation streams proposed for the new employer-assisted visa gateway system. We believe that instead having a dedicated Labour Hire stream, the government should instead create just two streams, standard and premium accreditation, but reserve the ability to require certain groups of applicants to achieve premium accreditation as the minimum accreditation requirement under the scheme.

RCSA and its members would have no concerns with labour and on-hire operators having premium accreditation imposed as a minimum accreditation standard for the sector. That would ensure that they would be required to meet the higher accreditation standards (which are the same for premium accreditation and labour hire accreditation) but would not involve a dedicated stream.

Such an approach would also enable the government to stay responsive to labour market trends and direct specific groups of applicants to premium accreditation on the basis of assessed or emerging risk. It would ensure the scheme remains more effective in addressing risk in a dynamic and changing labour market, allowing the government to target particular groups for additional scrutiny should new risks emerge.

Beyond simply directing forms of engagement – such as labour hire, contract servicing, sub-contractors or franchisees - to a premium accreditation stream, it would also allow the government to identify and target industry sectors where there is evidence of exploitation and require all forms of employee engagement in those sectors, including direct, to achieve premium accreditation.

Extensive independent investigation and reporting into worker exploitation in Australia in recent years identified a small number of specific industry sectors where there was an evidenced risk of exploitation.

Adopting the approach outlined above would enable the government to respond to exploitation risk where it exists, rather than simply targeting a single mechanism by which labour is engaged. We believe a two-stream directive accreditation approach would be a far more effective means of targeting exploitation and moving quickly to address it.

In relation to the question relating to subcontractors and franchisees, RCSA does not have any insight to the risks posed. We believe any approach on additional regulation should be based upon assessed risk and not simply on what employment mechanism or industry that was most recently making news headlines or who is in the process of negotiating with unions on an unrelated enterprise matter.

RCSA would encourage and support any work from the government to seek evidence to better assess and identify risk of exploitation within the labour market and would be happy to work closely with the government to develop an evidence and risk based approach to addressing these issues.

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

RCSA does not condone exploitation in any of its forms. We are committed to ensuring all workers, including those in labour and on-hire arrangements, are protected from exploitation and paid their appropriate entitlements and benefits.

Exploiting or underpaying workers is already illegal under current New Zealand law, and employee protections in existing law apply to all workers, including migrant workers. In cases where exploitation is occurring, employers are breaking existing law. RCSA believes better enforcement of existing law is sufficient to deal with the exploitation examples considered in the discussion paper.

There is no evidence presented in the discussion paper or elsewhere, to justify the imposition of a significant regulatory burden upon a sector that provides a vital support to delivering productivity and growth for New Zealand businesses and the broader economy.

RCSA does not believe there is any case to support additional specific sector regulation without clear and demonstrable evidence of risk.

Independent studies conducted into worker exploitation in Australia identified specific industry sectors where there was evidence of exploitation and recommended that any regulatory response target those sectors rather than impose a blanket regulatory burden on the entire labour hire sector.

Beyond the unnecessary red-tape burden, a blanket approach achieves little in identifying, targeting and stamping out exploitation.

As outlined above, the people any regulatory approach needs to target are those deliberate and determined law breakers who are flaunting existing New Zealand law.

The approach of simply regulating a mechanism of engaging labour, in this case labour-hire, fails to preclude a variety of ways for deliberate law breakers to simply restructure their engagement arrangements to reclassify their operations in a way that enables them to continue operating outside of any license scheme's coverage.

Moreover, any universal licensing or regulatory scheme, because of its breadth, needs to be shallow in its approach in order to make it possible to administer. For example, if a broad-based scheme were to incorporate anything beyond the basic 'supply a worker to do work' definition that we have seen adopted in Australia, it has the potential to unintentionally incorporate the majority of the NZ workforce.

Indeed, in Australia, there has been significant issues across the business community with the State based licensing schemes capturing internal – company to company – temporary transfer arrangements and a range of other unintended worker supply arrangements that fall outside the general understanding of labour hire and on hire arrangements. Because of its shallow approach however, it is less effective in interrogating supply chains effectively to weed out rogue and illegal behaviour.

Conversely, the StaffSure certification scheme established by the staffing industry is designed specifically to interrogate supply chains beyond the shallowest layer, to better examine other forms service and engagement of labour supply that can be used by exploiters. For that reason, it provides a more thorough and robust assessment of labour integrity than can be achieved by any broad-based licensing system and therefore provides a greater level of surety for end users that labour within the supply chain is ethical and reliable.

RCSA believes there are established industry-led schemes that offer a more effective role in providing certainty around labour in supply chains. StaffSure is an outstanding example of such a scheme.

The benefit of industry-led schemes is that they are tailored specifically to the issue at question and are developed by people with intimate knowledge of the industry. A scheme created by the industry for the industry is bespoke for tackling the issues in questions and more effective in its application.

Where there is clear evidence of exploitation in a particular industry sector, RCSA welcomes moves to explore opportunities to better identify and target exploiters, and to provide greater certainty for end users in relation to integrity of labour in supply chains.

RCSA encourages the government to consider how schemes like StaffSure can play a role in providing greater surety around labour in supply chains in industries where there is demonstrated risk of exploitation.

We believe that better informed and targeted enforcement, coupled with more robust, industry-led certification schemes that make it easy for end users to identify professional operators, is a far more effective way of tackling exploitation issues in labour supply than a broad based licensing scheme.

In cases where exploitation is occurring, people are breaking existing laws, it's not as though law doesn't exist to prevent the behaviour that occurs with some rogue operators. We need to work collaboratively, using evidence as a guide, to better target and identify instances of exploitation and where a law is broken, enforce the law. The solution shouldn't be simply to add pointless red tape and cost that burdens the very people who were operating within the law in the first place.

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

RCSA has no fundamental issue with this proposal. We note that a prohibition for directors already exists for dishonesty offences under the Crimes Act or if convicted of an offence in connection with the promotion, formation or management of a company. The Immigration Act also allows for the deportation (or stand down) of employers who, within 10 years of obtaining residency, are found guilty of migrant worker exploitation.

Section B: Protecting temporary migrant workers.

Proposal 5 – Establish an MBIE dedicated migrant exploitation 0800 phone line and online reporting and establish an MBIE specialised migrant worker exploitation-focussed reporting and triaging function.

RCSA is supportive of more effective resourcing to enforce existing laws in relation to the exploitation of workers.

We encourage any additional enforcement activity that prioritises and focuses on areas of risk within the labour market, to better target and dedicate resources to areas they are likely to have greatest impact. A basic, broad approach to additional enforcement activity threatens to spread resources thin and wide, which is far less effective in impacting outcomes.

RCSA supports initiatives such as a phone hotline and online reporting. We think simple information about employee rights and the hotline number itself could be incorporated as part of the communications material provided to any form of Visa that enables a recipient to work in New Zealand.

The greatest barrier for worker reporting is likely to be concern about their treatment by Immigration. MBIE should consider the real possibility that some of the country's most vulnerable workers are those who are knowingly engaging in work outside of their existing visa conditions, and therefore feel unable to report exploitation without risking significant repercussions for themselves.

The staffing sector itself is often a valuable source of information on where rogue operators exist and about reports of questionable behaviour in market. RCSA is happy to work with the government to promote the hotline and online reporting process within the staffing sector and to encourage our members to report cases of exploitation should they hear of them in the market. We encourage the government to seek active (anonymous) input from the sector to assist in their work to target and investigate reports of exploitation.

Proposal 6 – Develop a bridging-type visa for exploited migrant workers OR improve the current Immigration New Zealand Visa Status

RCSA agrees that visa settings are a fundamental barrier to reporting (and addressing) migrant worker exploitation.

In some scenarios, migrant workers experiencing exploitation accept conditions not because of a lack of knowledge about their rights, but because an activity they are engaging in may be beyond the scope of their existing visa conditions.

Therefore, we are not sure of the value in bridging and new types of visas in encouraging many additional workers to come forward and report.

The development of a new bridging type visa specifically for exploited migrant workers does run the risk of gaming by wily participants in the system. Any approach to changing Visas needs to be considered in light of not just benefit but also risk.

Perhaps a better approach might be to simply better publicise the existing visa re-application process. This would go some way to avoiding potential for false reports of employer exploitation, since there needs to be an employer exploitation case to answer (as opposed to a mere allegation) for a worker to remain in New Zealand on a new visa.

Section C: Enforcement.

7A / 8A – Do you think INZ should be able to issue infringement notices when an employer does not comply with immigration law and policy? Do you think the Labour Inspectorate should be allowed to issue infringement notices to employers who do not provide requested documents within a reasonable timeframe?

RCSA believes moves in relation to infringements and penalties must consider the impact on business in addition to the impact on workers. It is vital that changes in this space do not unduly hamper professional and legitimate operations by skewing authority and investigation powers in a way that results in business being interrupted and significantly impacted by allegations as opposed to findings.

In relation to infringements notices, given these are something the Labour Inspectors are already able to issue, it is unclear what the purpose (or impact) will be of allowing INZ to also issue such infringement notices.

We do have some concern about that at present, investigations into allegations themselves have the potential to create significant impact for business. Ramping up the capacity and scope (not to mention failure to clearly outline authority between agencies) to instigate investigation has the potential to create a significant impact for business, particularly in cases where such investigations demonstrate that an allegation is baseless.

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

Yes

9B– Do you think we should expand the stand down lists' criteria so it includes breaches of the Immigration Act and immigration policies?

RCSA members feel it is impossible to comment on the stand down lists' criteria until we better understand what the proposals are for penalty and infringement changes.

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

RCSA members do not believe that employees on employer-assisted visas should be notified automatically if they are working for a company that is put on the stand down list, as the circumstances relating to that employer's inclusion may be unrelated to exploitation or to that employee's personal circumstance.

One challenge with the stand down provision is that it has the potential to affect not only the employer but workers who might lose their jobs because reduced staffing levels mean the employer is no longer able to trade. It is important that the urge to penalise an employer does not have the unintended consequence of penalising employees as well.

It may be relevant to notify migrant workers with a visa expiring during the stand-down period however so they can be provided with options that will allow them to avoid the consequences outlined above.

About RCSA

RCSA is the peak industry body for recruitment, staffing and workforce solutions in Australia and New Zealand representing over 3,000 Corporate and Individual Members.

RCSA promotes and facilitates professional practice within the recruitment and staffing industry. It sets the benchmark for industry standards through representation, education, research and business advisory support to our member organisations and accredited professionals who are bound by the ACCC authorised RCSA Code for Professional Conduct through membership.

RCSA is a proud member of the World Employment Confederation, the voice of the employment industry at global level, representing labour market enablers in 50 countries and 7 of the largest international workforce solutions companies.