

## Annex A: Other work underway in government that will help to reduce exploitation

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The Ministry of Business, Innovation and Employment (MBIE) is consolidating its information on employment standards and rights, and on reporting exploitation. It is also working with other agencies to ensure that information is clear and consistent. MBIE is also looking at ways to assess whether migrant workers and employers are aware of the information available to them and whether it helps them.

MBIE also proposes to make it harder for employers who have exploited migrant workers to start a new business. We think this could be done through asset recovery. Under the *Criminal Proceeds (Recovery) Act 2009* (CPRA), the New Zealand Police can seize assets that have been acquired illegally – for example, if an employer did not comply with immigration and employment law, but exploited workers and made money from doing so.

Asset recovery helps prevent employers from using those assets to resume or relocate their business, and then potentially exploit other temporary migrant workers in future. Immigration New Zealand (INZ) and the Labour Inspectorate could prepare and refer more cases to Police for asset recovery. Asset recovery has a lower threshold than that required for prosecution, and would provide another effective and proportionate tool in the penalty toolkit.

In addition, we are considering other ways to support government's ability to deter and penalise employers who do not obey immigration and employment law. These other ways will fill gaps we have identified, and with the proposals we presented in this paper, will build our **enforcement** approach. For example, we can **strengthen cross-agency working and formalise our policies and procedures for working together**. We think there are some opportunities to build on and improve collaboration, get the settings right, and make best use of all the available 'levers'. Examples of this work could include:

- developing a joint compliance and enforcement strategy across INZ and the Labour Inspectorate on temporary migrant exploitation, and
- improving cross-agency collaboration by completing information-sharing agreements.

Outside of the Review, there is a variety of other work going on across MBIE and the government that will have a positive impact and support the range of proposals to reduce migrant exploitation. This work includes:

- Changes to employer-assisted work visa policy, introducing compulsory employer accreditation and a detailed assessment of employers seeking to hire migrant workers. This should result in a better ability to prevent high-risk employers from accessing migrant workers who may then become vulnerable to exploitation.
- Roll-out of a case management tool for INZ compliance staff, which is already used by the Labour Inspectorate and will strengthen their ability to lawfully and effectively undertake joint investigations into exploitation and provide opportunities to improve data collection and reporting.
- The implementation of initiatives that received Budget 2019 funding of \$31 million over four years for additional resources in immigration education, intelligence, compliance and investigation functions, to support a targeted compliance strategy in priority sectors.
- An INZ pilot project to standardise assessment, referral and recording of allegations received (including those related to exploitation).

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- Work to strengthen immigration risk and verification functions, particularly after a visa is granted, to ensure that risk mitigation controls are producing the desired effect and to identify any adverse outcomes that may occur.
- The organisational realignment of INZ, including a refocusing of its role as a regulator, and establishment of a Data and Intelligence Branch to guide operations, and a Risk Branch to ensure appropriate identification, management and treatment of risk.

MBIE is also working on:

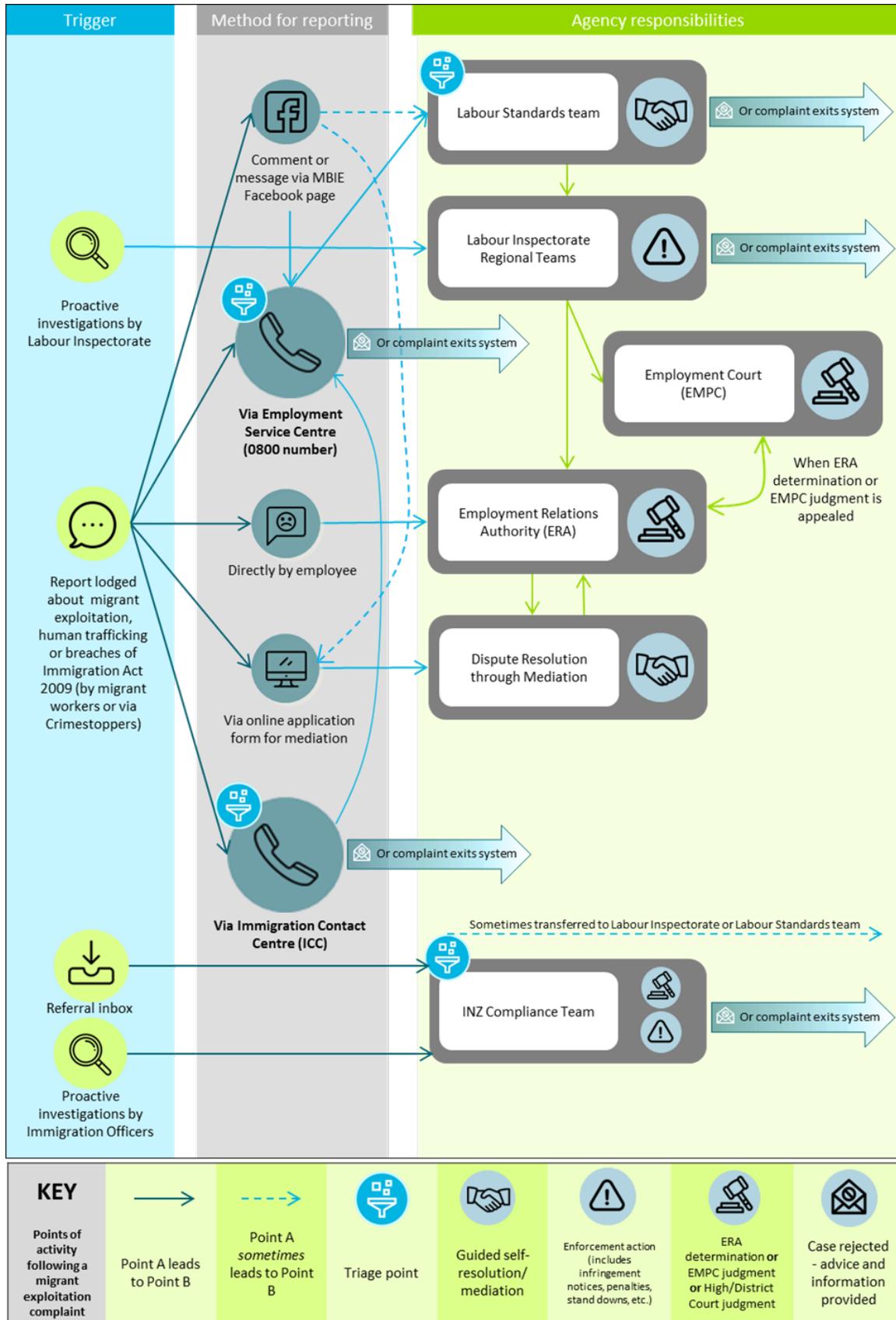
- Fair Pay Agreements which should benefit all workers, not just work migrant workers, and protecting workers against unfair contract terms
- improving Government procurement practices to prevent the circumstances that might enable exploitation to occur
- protections for dependent contractors, and
- protections against unfair contract terms (within the Small Business and the Commerce and Consumer Affairs portfolios).

In addition, the Ministry of Education is leading the implementation of the International Education Strategy 2018-2030. The Review of temporary migrant worker exploitation is a part of that Strategy.

The Minister of Workplace Relations and Safety recently announced New Zealand will be ratifying the International Labour Organisation's Forced Labour Protocol and supporting work by the International Labour Organisation to end violence and harassment at work. The Government has also committed to refreshing the Plan of Action on People Trafficking.

## Annex B: Current exploitation reporting and referral process

Figure 1: Current exploitation reporting and referral process



## **Annex C: A summary of other countries' issues with exploitation and how they deal with it**

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The following information is a summary of Component 3 of the independent research, which will be available at [mbie.govt.nz/about/open-government-and-official-information/release-of-information/](http://mbie.govt.nz/about/open-government-and-official-information/release-of-information/).

### **Do other countries have problems with the exploitation of migrant workers?**

The independent research, commissioned by MBIE, studied three countries (Australia, Canada and the United Kingdom) and found there were similarities between the three countries in terms of the types and drivers of exploitation. The types of exploitation experienced by migrants in those countries included:

- wage theft (such as underpayment or non-payment of wages)
- unlawful and significant pay deductions
- the use of recruitment fees and imposition of debt bondage
- exploitative contracting practices (for example, having contractual terms and conditions changed upon arrival in the destination country, or being kept on contracts with flexible working hours), and
- health and safety violations (including working excessive hours in unsafe conditions, and not being provided protective gear).

The drivers of migrant worker exploitation were also similar in the three countries. These include:

- migrant workers' vulnerability (if they had visas tied to employers, due to the resulting power imbalance)
- a lack of effective enforcement mechanisms
- migrants being afraid to report (due to the risk of job loss, deportation and/or threats), and
- financial strain associated with payments of remittances and debt.

### **How do these three countries deal with exploitation?**

A summary of key initiatives to address exploitation is given below in Figure 9.

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**Figure 2:** Summary of key initiatives to address exploitation

Australia		
	Key initiatives	Main outcomes
<b>Federal legislation</b>	Introduction of the Modern Slavery Act 2018	Companies are required to release a public statement on the risks of slavery in their supply chains.
	Fair Work Amendment (Protecting Vulnerable Workers) Act	Increased penalties for non-compliance with minimum wage requirements.
	Introduction of Temporary Skill Shortage Visa	Applicants must meet higher standards. Visas tied to employers.
	Changes to requirements for Working Holiday Makers program	Onus is placed on migrant workers to prove they are paid in compliance with wage laws.
<b>State legislation</b>	Labour hire legislation	Introduces tougher requirements for labour hire companies.
	Proposed wage theft law (Queensland)	The Queensland Government proposes making wage theft a criminal offence. Recommends that changes must be implemented by the Federal Government.
Canada		
	Key initiatives	Main outcomes
<b>Federal legislation</b>	Amendment to the Immigration and Refugee Protection Regulation	Open work visas will be granted to migrants who can prove they have been exploited by their employer.
	Proposal for a Modern Slavery Act	Proposal for companies to release a public statement on the risks of slavery in their supply chains.
<b>Provincial legislation</b>	Worker Recruitment and Protection Act (Manitoba)	Employers and recruiters are required to register with the provincial government, recruitment fees are banned and financial penalties introduced.
	Worker Recruitment and Protection Act (Nova Scotia)	Employers and recruiters are required to be licensed by the provincial government, recruiters pay a bond and recruitment fees are banned.
	Foreign Worker Recruitment and Immigration Services Act (Saskatchewan)	Contains strong worker-protection and anti-exploitation provisions.
United Kingdom		
	Key initiatives	Main outcomes
<b>Federal legislation</b>	Modern Slavery Act 2015	Companies are required to release a public statement on the risks of slavery in their supply chains.
	Modern Slavery (Victim Support) Bill	A private members' bill awaiting its second reading. Seeks to address weaknesses in the Modern Slavery Act and in particular the status and support offered to victims.
	Immigration Act 2016	If a migrant is working illegally there is a restriction on their rights; from being charged for some National Health Service treatments, to being barred from accessing certain types of housing, to being detained and deported from the UK.
<b>Local govt.</b>	Local Government Association	Increased awareness of how local government can help reduce slavery.

## Annex D: Case Study for Proposals One, Two and Four

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### Illustrative case study: exploitation in a franchising context

*Note this case study is provided for illustrative purposes only, to support you in your consideration of the ideas we wish to test under Section A ‘Reducing risks around business models and practices’. All references to companies are fictional and any similarities to real events are coincidental.*

‘123 Limited’ is a New Zealand franchisee of Number Corporation, and trades using its “Numbers” brand. Number Corporation is a multinational franchise with overseas headquarters, and its New Zealand affairs are managed by an Australasian regional subsidiary.

123 Limited is required to pay the franchisor, Number Corporation, fees and ongoing royalties. The franchisor controls 123 Limited’s store design, opening hours, prices, territory, and advertising. The franchisor also specifies the suppliers from which the franchisee must purchase goods and services from, including its accounting and payroll system providers. The franchisee (123 Limited) is required to participate in training that the franchisor specifies, including full and complete training on the accurate use of accounting software using the franchisor’s accounting methods. 123 Limited is also required to maintain and periodically send detailed accounting records to Number Corporation. 123 Limited must also be available for audits from time to time, which are conducted by Number Corporation.

123 Limited is responsible for employment matters relating to employees of 123 Limited, including recruitment, wages and working hours for those employees. The employment agreements are between the employee and 123 Limited.

123 Limited is alleged to have misrepresented the number of hours worked by its front-line temporary migrant workers to Immigration New Zealand, and to have paid them below the minimum wage. 123 Limited’s director is also alleged to have ordered those temporary migrant workers to withdraw cash from their bank accounts and give this to the director on multiple occasions over several months.

*We use the example of the above situation to show how Proposals One, Two and Four in Section A might work in practice.*

### **Proposal One: Introducing liability for parties with significant control or influence over an employer that breaches employment standards**

*In Section A, we are seeking your views on whether legal responsibility for breaches should be extended to others, and on each of the tests proposed below.*

In this case, Number Corporation has control or influence over many of the franchisee’s operations, including its financial and operational affairs. Number Corporation could potentially meet the ‘significant control or influence’ threshold under Proposal One. Whether potential liability would extend to Number Corporation’s headquarters or their Australasian subsidiary would depend on the relationships between each party.

If Number Corporation meets the significant control/influence threshold, the next test is whether or not they knew about the breach or could reasonably be expected to have known that a breach of the same or a similar character was likely to occur. The fact that the employment agreements were

between 123 Limited and its employees would not in itself be a defence against Number Corporation’s liability under this proposed option.

In this case, Number Corporation requires that 123 Limited provide detailed accounting records and be available for audits. Even if the purpose of this is for Number Corporation to verify the amount of royalties owed (or for other reasons unrelated to compliance with employment standards), it is likely that the audits would require some investigation into expenses – including employee expenses. It could be reasonable to expect a franchisor to have known that a breach was likely to occur if, for example, the franchisee’s employment expenses and/or wage and time records were materially different from what the franchisor could reasonably expect (given that the franchisor would have oversight and knowledge of the records of all franchisees in the same region or country).

If employees were making cash payments back to the franchisee’s director on a private basis (that is, records would not show this), then it is unlikely that a franchisor would be expected to know that this was occurring.

The final test under Proposal One is to determine whether Number Corporation took reasonable steps to prevent the breach. This could include general steps, such as providing training to franchisees on their employment obligations (which could include, for example, requiring them to complete the online learning modules available at <http://www.employment.govt.nz/els>) and providing a mechanism for workers to raise employment concerns.

There might also be specific steps, according to the circumstances. In the case above, reasonable steps could include making reasonable inquiries into the cause of the deviation (if any) between 123 Limited’s records and what Number Corporation could expect, and then taking steps to ensure any discrepancies are fixed. Reasonable steps in relation to staff being instructed to repay 123 Limited’s director would likely be limited, as a franchisor is generally unlikely to be aware of private transactions between individuals.

What “reasonable steps” means in a particular circumstance could also depend on factors such as the size and resources of the franchisor, and their ability to influence or control the franchisee in relation to the breach.

### **Proposal Two: Requiring certain franchisees to meet additional criteria under the employer-assisted visa gateway system**

*In Section A, we are seeking your views on whether franchisees and subcontractors seeking to employ temporary migrant workers should be required to meet additional criteria, and if so then what those criteria should be.*

Under the new employer-assisted visa gateway system, all employers will need to be accredited in order to sponsor visas for employer-assisted temporary migrant workers. Requirements will include compliance with regulatory standards, and steps to reduce exploitation risk – including by providing their temporary migrant workers with publicly available information on employment rights and settlement, and committing to pay all recruitment costs and fees.

We want to test whether franchisees (123 Limited in the above example) and subcontractors, or employers operating under other business models, should be required to meet higher standards (criteria) under the new employer-assisted visa gateway system. High-volume and labour hire companies, for example, will additionally be required to demonstrate that they are committed to training and upskilling workers, and that they are committed to increasing pay and conditions over time. We invite all views and suggestions on what additional criteria, if any, should apply.

**Proposal Four: Prohibiting persons convicted of exploitation under the Immigration Act from managing or directing a company**

*In Section A, we are seeking your views on whether an individual should be prohibited from managing or directing a company after they have been convicted of exploitation under the Immigration Act 2009.*

Under the *Companies Act 1993*, people can be prohibited from managing or directing companies for a period of time after they are convicted of certain offences. Those offences include offences in connection with the promotion, formation, or management of a company, and crimes involving dishonesty as defined in the *Crimes Act 1961*. They do not currently include exploitation offences under the *Immigration Act 2009*, and we wish to seek your views on whether they should.

A person convicted of exploitation of unlawful employees and temporary workers under the *Immigration Act 2009* is liable for up to seven years' imprisonment, a fine of up to \$100,000, or both. This can include serious default under the *Minimum Wage Act 1983* and serious contraventions of the *Wages Protection Act 1983*.

Using the fictional example above, 123 Limited and its director could potentially be charged under both pieces of legislation, depending on the seriousness of the default and contravention respectively. If they were charged and convicted, then under Proposal Four they would also be prohibited from managing or directing a company.