

## REFUGEES AND ASYLUM SEEKERS AS WORKERS: RADICAL TEMPORARINESS AND LABOUR EXPLOITATION IN AUSTRALIA

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*This article analyses the emerging evidence of labour exploitation of refugees and asylum seekers on temporary visas in Australia. Over the last decade, Australia's temporary protection regime has been marked by profound uncertainty in relation to visa status, unfettered Ministerial discretion, and the punitive exercise of governmental power. We argue that this framework amounts to abuse of governmental power, confining refugees and asylum seekers who arrived by boat to a situation of radical temporariness in Australia. This results not only in the denial of permanent protection and social inclusion to these refugees and asylum seekers, but also provides conditions for greater abuse of power by employers in the realm of workplaces across Australia. We outline six factors related to temporary immigration status and other punitive, unpredictable and arbitrary elements in this regulatory regime that currently increase the vulnerability of refugees and asylum seekers to labour exploitation.*

### I INTRODUCTION

In 2012, Mr Thalaisingham arrived in Australia from Sri Lanka by boat to seek asylum, after fleeing state persecution of Tamils in Sri Lanka. After prolonged detention at Christmas Island Immigration Detention Centre, he was granted a temporary visa allowing him to work in Australia. By 2018, Mr Thalaisingham was engaged as a casual employee for Polytrade, one of three major recycling companies in Victoria. There, Mr Thalaisingham regularly worked a 12-hour overnight shift and was paid a flat rate of \$22 per hour.<sup>1</sup> In addition, he faced an extraordinarily harsh working environment with poor ventilation and little protection against the

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1 Ben Schneiders, 'Massive Wage Underpayments at Major Recycler a "National Disgrace"', *The Sydney Morning Herald* (online, 5 October 2019) <<https://www.smh.com.au/business/workplace/massive-wage-underpayments-at-major-recycler-a-national-disgrace-20191005-p52xw8.html>>.

hazardous air quality. Pursuant to the applicable Modern Award,<sup>2</sup> it is estimated that Polytrade underpaid a group of five refugee workers, including Mr Thalaisingham, by an average of \$13 per hour. In 2019, Mr Thalaisingham's story was reported in a national wage theft exposé run by *The Sydney Morning Herald*.<sup>3</sup> At the time, the Australian Workers Union, which was assisting the workers to lodge complaints and recover payments, deemed the situation to be a 'national disgrace' and a 'serious and egregious' case of worker underpayment. By the following year, Polytrade had reportedly paid approximately \$1 million in back-pay to over 30 workers, including Mr Thalaisingham, with the potential for further payments.<sup>4</sup> Reflecting the serious nature of the breaches of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'), in January 2021, the Fair Work Ombudsman ('FWO') commenced legal action against Polytrade in the Federal Court alleging a range of breaches of workplace laws in relation to these employees, including underpayments.<sup>5</sup>

Mr Thalaisingham's experience of wage theft draws attention to a distinct cohort of workers in Australia that is the subject of this article; namely, the approximately 30,500 refugees and asylum seekers who arrived in Australia by boat roughly between 2000 and 2014, labelled the 'Legacy Caseload' by the Coalition Government.<sup>6</sup> This group has been singled out for an exceptionally punitive matrix of law and policy.<sup>7</sup> These asylum seekers and refugees now hold a range of temporary visas and under current laws, with very limited exceptions, will only ever be eligible for a temporary visa.<sup>8</sup> While previously the right to

2 As a major recycling operator that reportedly employs over 100 staff and operates 15 facilities across Australasia, Polytrade is governed by the Waste Management Award (Cth): *Polytrade Recycling* (Web Page, 2012) <<http://www.polytrade.com.au/>>. See also Anthony T Schmidt, 'Phoenix Rising: Polytrade Recycling Reclaims Its Position as One of Australia's Leading Recyclers' (2017) 43(5) *Water and Waste Management* 12.

3 Schneiders (n 1).

4 Ben Schneiders and Royce Millar, 'Million Dollar Win for Exploited Refugee Workers after "Most Egregious" Wage Theft', *The Sydney Morning Herald* (online, 11 September 2020) <<https://www.smh.com.au/business/workplace/million-dollar-win-for-exploited-refugee-workers-after-most-egregious-wage-theft-20200910-p55uf7.html>>.

5 Fair Work Ombudsman, 'Refugees Allegedly Underpaid' (Media Release, 28 January 2021) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2021-media-releases/january-2021/20210127-polytrade-litigation-media-release>>.

6 The election of the Coalition Government in October 2013 on the back of a 'Stop the Boats' election sloganeering saw the further politicisation and demonisation of asylum seekers who had arrived in Australia unauthorised by boat. Seeking to project blame on the rise of unauthorised asylum seekers under the previous Gillard-Labor Government, the Coalition Government named this cohort of asylum seekers as the so-called 'Legacy Caseload' (to reference Labor's alleged 'backlog' in asylum seeker claims). This group consists of around 6,000 people who arrived by boat prior to 13 August 2012 (when the policy of regional deterrence/'offshore' detention was reintroduced) and around 24,500 people who arrived between 13 August 2012 and 1 January 2014: Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 8 February 2016, 84 (Jim Williams, Acting Deputy Secretary, Visa and Citizenship Services, Department of Immigration and Border Protection).

7 On the notion of the 'work-citizenship matrix', see Luin Goldring and Patricia Landolt, 'Caught in the Work-Citizenship Matrix: The Lasting Effects of Precarious Legal Status on Work for Toronto Immigrants' (2011) 8(3) *Globalizations* 325.

8 In this article, we use 'asylum seekers and refugees on temporary visas' to refer to holders of Temporary Protection Visas ('TPVs'), Safe Haven Enterprise Visas ('SHEVs') and Bridging Visas ('BVs'), where the BV holder is an asylum seeker who has arrived by boat without authorisation and is classified as an

work was often withheld from asylum seekers in the Australian community,<sup>9</sup> more recently these so-called members of the ‘Legacy Caseload’ have increasingly been granted temporary visa work rights. Given the lack of financial support by the federal government, emerging evidence suggests that refugee and asylum seekers must either pursue ‘survival jobs’ (often precarious, low-paid and casual work that increases the risk of exploitation), become dependent upon charities or experience destitution.<sup>10</sup>

The story of the exploitation of Polytrade refugee workers is, as a result, both unexceptional and highly unusual. On the one hand, it reflects the pervasive exploitation of temporary migrant workers in Australia in general,<sup>11</sup> and of asylum seekers and refugees in Australia on temporary visas in particular. On the other hand, the fact that both Mr Thalaisingham recovered a portion of his unpaid entitlements, and that Polytrade faced legal action and potential penalties, represents a clear exception to the pervasive employer impunity for migrant worker exploitation.

To date, there has been little scholarly focus on the issue of labour exploitation of refugee and asylum seeker workers in Australia and no large-scale documentation of the terms and conditions of their work.<sup>12</sup> One comprehensive literature review in 2016 concluded that almost nothing was known about people seeking asylum and their experiences of work in terms of empirical research.<sup>13</sup> Public policy makers have also largely overlooked the industrial experiences of these workers. Refugees and asylum seekers were not identified as a specific cohort of temporary workers in the 2016 Senate Inquiry Report into migrant worker exploitation, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (‘*A National Disgrace*’).<sup>14</sup> Nor was the issue of refugee worker exploitation addressed in the 2019 inter-governmental Migrant Worker Taskforce Report, which found that

‘unauthorised maritime arrival’ (‘UMA’) under section 5 of the *Migration Act 1958* (Cth). We use the term ‘temporary refugee visas’ to refer to TPVs and SHEVs specifically.

9 Anne McNevin and Ignacio Correa-Velez, ‘Asylum Seekers Living in the Community on Bridging Visa E: Community Sector’s Response to Detrimental Policies’ (2006) 41(1) *Australian Journal of Social Issues* 125, 127.

10 See Seuwandī Wickramasinghe, *Building Bridges to Work: Final Report on the Given the Chance for Asylum Seekers Program* (Report, 2018); Sahar Okhovat, *With Empty Hands: How the Australian Government Is Forcing People Seeking Asylum into Destitution* (Report, 18 June 2018).

11 See Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, 21 November 2017) (‘*Wage Theft in Australia*’).

12 Cf the important qualitative work of John van Kooy as part of small-scale studies in collaborations with the Brotherhood of St Laurence and the Refugee Council of Australia: John van Kooy and Dina Bowman, ‘“Surrounded with So Much Uncertainty”: Asylum Seekers and Manufactured Precarity in Australia’ (2019) 45(5) *Journal of Ethnic and Migration Studies* 693 (‘Surrounded with So Much Uncertainty’); John van Kooy, ‘COVID-19 and Humanitarian Migrants on Temporary Visas: Assessing the Public Costs’ (Research Briefing Note No 2, Refugee Council of Australia, July 2020) (‘COVID-19 and Humanitarian Migrants on Temporary Visas’).

13 Caroline Fleay, Anita Lumbus and Lisa Hartley, ‘People Seeking Asylum in Australia and Their Access to Employment: Just What Do We Know?’ (2016) 8(2) *Cosmopolitan Civil Societies Journal* 63, 78.

14 Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, 17 March 2016) (‘*A National Disgrace*’). Refugees are only mentioned twice in the report, and both instances are when quoting transcript/remarks of Mr Grant Courtney: Grant Courtney, Branch Secretary, Australasian Meat Industry Employees’ Union

‘underpayment and exploitation of a substantial number of temporary migrant workers’ had been a ‘feature of the Australian labour market for too long’.<sup>15</sup> Notably, this Report did not include refugee and asylum seekers in its definition of ‘migrant workers’ in Australia, neither in its list of specific ‘migrant worker’ visa categories nor in the overall statistical representation of the size of this population (stated in the report as 878,912 people as of 30 June 2018).<sup>16</sup>

Even the burgeoning global literature on the exploitation of temporary migrant workers largely neglects the precarious labour conditions of refugees or people seeking asylum.<sup>17</sup> The focus of this literature is largely on people whose primary motivation to move is economic, including temporary migrants in dedicated guest worker programs or undocumented workers who have evaded immigration controls. Yet, this literature contains critical insights that explain the special vulnerabilities of asylum seekers and refugee workers living in Australia on temporary visas, including their susceptibility to exploitation.<sup>18</sup>

The aim of this article is to expose the ways in which a cohort of refugees and asylum seekers in Australia experience exploitation due to the structures of their temporary visas. The role of temporary visas in creating vulnerability to exploitation is shared by other temporary migrant workers. Yet, over the last decade, the Commonwealth parliament and executive has created uniquely punitive regulatory settings characterised by profound uncertainty, inconsistency and unfettered Ministerial discretion. We argue that this framework enforces upon refugees and asylum seekers who arrived by boat a distinct and permanent state of radical temporariness of immigration status.<sup>19</sup>

These punitive, unpredictable and arbitrary exercises of governmental power through immigration regulations have also created the possibility of abuse of power in the realm of employment relations. Van Kooy and Bowman have noted that the temporary protection regime in Australia for refugees who have arrived by boat is ‘designed to prevent the settlement of “unauthorised” migrants’ and ‘exacerbate their employment insecurity and overall sense of uncertainty’.<sup>20</sup> While this regime has been analysed as a means to punish and deter asylum seekers who arrived in Australia without state authorisation, its effect on refugees and asylum seekers as workers has not been systematically analysed. This article provides a close reading of how this punitive regulatory environment facilitates employers’ exploitation of asylum seekers and refugees in workplaces across Australia.

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(Newcastle and Northern NSW) Committee Hansard, 26 June 2015, 11, cited in *A National Disgrace* (n 14) 180–1.

15 Migrant Workers’ Taskforce, *Report of the Migrant Workers’ Taskforce* (Final Report, March 2019) 13 (*‘Report of the Migrant Workers’ Taskforce’*).

16 Ibid 19.

17 Note, we draw on relevant exceptions to this trend in Parts III and IV below.

18 See generally Hannah Lewis et al, *Precarious Lives: Forced Labour, Exploitation and Asylum* (Policy Press, 2015) (*‘Precarious Lives’*).

19 As Jackson and Bauder have observed, refugee claimants undertake work as ‘neither temporary workers, nor permanent residents, and instead straddle the precarious gap between permanence and transience’: Samantha Jackson and Harald Bauder, ‘Neither Temporary, Nor Permanent: The Precarious Employment Experiences of Refugee Claimants in Canada’ (2013) 27(3) *Journal of Refugee Studies* 360, 370.

20 Van Kooy and Bowman, ‘Surrounded with So Much Uncertainty’ (n 12) 695.

This article first addresses, in Part II, the creation from 2010 of a distinct population of temporary visa holders in Australia, and demonstrates how legislative and executive action have created a radical temporariness for refugees and asylum seekers that is punitive by design. Part III presents the little that is known about the current conditions of this group of refugees and asylum seekers in relation to their work in Australia. While this group has not been widely seen as workers, our survey of existing scholarship, media articles and civil society and public sector reports reveals that there is emerging evidence of widespread workplace exploitation. In Part IV, we address the distinct vulnerabilities to workplace exploitation experienced by refugees and asylum seekers as a consequence of their immigration status. In particular, we outline six factors related to refugees' and asylum seekers' immigration status and the broader regulatory settings that increase their vulnerability to abusive employer practices. These factors include: the profound uncertainty of visa status, duration and application outcomes; the operation of non-refoulement; their lack of social protection; the permanent threat of visa cancellation; the possibility of unauthorised work; and the broader radical institutional exclusion experienced by refugees and asylum seekers in Australia today. Read together, these factors demonstrate how the exercise and abuse of government power for this cohort through immigration regulation increases their vulnerability to exploitation by employers in their workplaces.

## **II HOW PUNITIVE IMMIGRATION SETTINGS CREATE A WORKFORCE MARKED BY RADICAL TEMPORARINESS, PROFOUND UNCERTAINTY AND ABUSE OF POWER**

Over the last decade, Australia has enacted a legal framework and temporary visa regime that confines asylum seekers and refugees who arrived unauthorised by boat to an immigration status that is marked by profound uncertainty, unfettered Ministerial discretion and exercises in power that are punitive by design. Such legislative and executive action includes the cyclical and inconsistent granting and withdrawal of work rights, the shifting of people across different legal categories and statuses, and the granting of short-term temporary visas which regularly require re-determination of status. Manjikian has described the uncertain status faced by asylum seekers in particular as moving beyond temporary status to a kind of a 'suspended temporality'.<sup>21</sup> We argue that successive legal reforms, executive actions and policy changes have resulted in a situation of radical temporariness for this cohort of refugees and asylum seekers who arrived in Australia by boat without state authorisation from 2010 onwards.

We use the term 'radical temporariness' to describe the unique temporary legal status created as a result of the interaction of domestic and international refugee law and Australia's systemic refugee deterrence policies directed towards

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21 Lalai Manjikian, 'Refugee "In-Betweenness": A Proactive Existence' (2010) 27(1) *Refuge: Canada's Journal on Refugees* 50, 54.

asylum seekers who arrive unauthorised by boat. We distinguish the legal limbo, displacement and enforced uncertainty that refugees and asylum seekers endure from the situation of prolonged temporariness and uncertainty that may be experienced by other temporary visa-holders such as skilled workers or international students.<sup>22</sup> Unlike the duration of other temporary visas, the temporary duration of refugees' and asylum seekers' immigration status is neither fixed nor knowable. Instead, as we demonstrate in this section, their status and the conditions attached to it are characterised by unpredictability, the operation of broad executive discretions, and the explicitly punitive use of temporariness as a form of deterrence and barrier to asylum.<sup>23</sup> We suggest that this results in a situation of 'radical temporariness' for refugees and asylum seekers who have arrived unauthorised by boat, characterised by extreme uncertainty about their status, visa duration or renewal processes, the near-complete denial of pathways to permanency, and a profound lack of control over their future in the face of broad and enduring executive powers.<sup>24</sup> In Part IV, we go on to demonstrate how this radical temporariness has led to the creation of a workforce acutely vulnerable to employer exploitation.

As is well-known, Australia has a longstanding policy of mandatory detention that applies to persons who have arrived without a valid visa by boat since 1992. Yet, in practice, the implementation of this policy has been in 'major decline' over the last decade, as a result of significant and at times contradictory shifts in exercises of Ministerial discretion and departmental decision-making.<sup>25</sup> While the *Migration Act 1958* (Cth) (*Migration Act*) requires that any person classified as an 'unauthorised maritime arrival' (or 'UMA') 'must' be taken into immigration detention, the Act also empowers the Minister to exercise a personal, non-compellable discretion to grant a person in immigration detention a permanent or temporary visa, or to make a residential determination allowing a person to reside in the community.<sup>26</sup> This release from immigration detention has generally

22 On prolonged temporariness of sponsored migrants in Australia see, eg, Catriona Stevens, 'Temporary Work, Permanent Visas and Circular Dreams: Temporal Disjunctures and Precarity among Chinese Migrants to Australia' (2019) 67(2) *Current Sociology* 294; Peter Mares, *Not Quite Australian: How Temporary Migration Is Changing the Nation* (Text Publishing, 2016). The situation of radical temporariness we present here is connected to what Lewis et al describe as a form of 'hyper-precarity'. Precarity in this sense describes the insecurity and uncertainty created by the intersection of neoliberal labour markets and restrictive immigration settings: Lewis et al, *Precarious Lives* (n 18) 11, ch 6. See also Goldring and Landolt (n 7). In this Part we focus explicitly on (temporary) legal status rather than overlapping conditions that form the basis of precarity and precarious work for non-citizens.

23 For an analysis of the Morrison Government's treatment of asylum seekers who arrived by boat as demonstrating, in particular, the fragility of the rule of the law in Australia, see Joyce Chia and Savitri Taylor, 'A Masterclass in Evading the Rule of Law: The Saga of Scott Morrison and Temporary Protection Visas' (2021) 44(3) *University of New South Wales Law Journal* 1114.

24 This is not to say that refugees and asylum seekers on temporary visas are unable to create 'a sense of purpose, agency or empowerment', in spite of such punitive immigration settings. See, eg, Karen Fog Olwig, 'The End and Ends of Flight. Temporariness, Uncertainty and Meaning in Refugee Life' (2021) *Ethnos* (advance).

25 Anthea Vogl, 'Crimmigration and Refugees: Bridging Visas, Criminal Cancellations and "Living in the Community" as Punishment and Deterrence' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 149, 149.

26 See especially *Migration Act 1958* (Cth) ss 189, 195A, 197AB.

been enacted through discretionary grants of Bridging Visa Es ('BVEs'), which traditionally lacked work rights.<sup>27</sup> However, in 2010, following a significant increase in the number of asylum seekers arriving in Australia, then Immigration Minister Chris Bowen announced a 'new approach to asylum seeker management' that would see people who had arrived in Australia by boat issued bridging visas to allow them to live in the community with work rights.<sup>28</sup> This marked a major policy shift away from the mandatory and long-term detention of all asylum seekers who had arrived irregularly by boat, even as the legislative framework of mandatory detention remained in place.

By August 2012, the government's approach changed again with the introduction of a 'no advantage' principle, articulated by the 2012 Expert Panel on Asylum Seekers. This stipulated that asylum seekers who arrived in Australia unauthorised by boat should 'gain no benefit' over asylum seekers who sought protection through so-called 'established mechanisms' in or nearer to their states of origin.<sup>29</sup> As a result, asylum seekers released from immigration detention were left to live in the community without work rights in various forms of destitution and dependency, and without access to permanent resettlement in Australia as a matter of policy.<sup>30</sup> As Michael Grewcock has argued, this shift to 'no advantage' created a draconian deterrence model that rests upon a 'conceptual approach to refugees that deprives them of agency and vests legitimacy only in those willing to comply with border controls'.<sup>31</sup> In effect, the application of this 'no advantage' principle made explicit the use of immigration regulations as forms of punishment.<sup>32</sup>

The adoption of 'no advantage' resulted in several key changes that significantly affected asylum seekers already in Australia. First, the policy saw the blanket withdrawal of work rights for existing asylum seeker BVE holders and a denial of work rights in any subsequent grants of BVEs. Second, the policy saw the suspension of protection visa processing. This was accomplished through the imposition of a statutory bar under section 46A of the *Migration Act*, which meant in practice that asylum seekers released from immigration detention on BVEs were prohibited from applying for any substantive visa until at least 2015, when the

27 See *Migration Regulations 1994* (Cth) sch 2 sub-cl 050-051.

28 Chris Bowen, 'Bridging Visas to Be Issued for Boat Arrivals' (Media Release, Parliament of Australia, 25 November 2011) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/1251281%22>>. This new policy would prioritise long-term asylum seeker detainees who had passed initial identity, health and security checks. The Minister also promised 'a single protection visa process' for all 'onshore' asylum seekers, including boat and plane arrivals; a promise that would soon prove hollow: at 2.

29 Angus Houston, Paris Aristotle and Michael L'Estrange, *Report of the Expert Panel on Asylum Seekers* (Report, 13 August 2012) 8, 14, 141.

30 Lisa K Hartley and Caroline Fleay, "'We are Like Animals': Negotiating Dehumanising Experiences of Asylum-Seeker Policies in the Australian Community' (2017) 36(4) *Refugee Survey Quarterly* 45.

31 Michael Grewcock, "'Our Lives is in Danger': Manus Island and the End of Asylum' (2017) 59(2) *Race & Class* 70, 75.

32 Note a similar approach was taken to BVEs for those released in the community prior to the No Advantage Policy.

Minister began lifting this bar for select cohorts of asylum seekers.<sup>33</sup> This was accompanied by extremely basic accommodation assistance and limited financial support, amounting to 89% of the then NewStart Allowance which was below the poverty line.<sup>34</sup> This suite of measures was justified on the basis of ensuring that people's asylum applications would not be processed more quickly than 'such time that they would have been resettled in Australia after being processed in our region' (including from states like Indonesia and Malaysia).<sup>35</sup> Third, a small, random portion of the overall cohort of asylum seekers who had arrived unauthorised by boat in Australia were forcibly transferred to 'offshore' detention in Nauru and Papua New Guinea ('PNG') (totalling 4,183 people since August 2014).<sup>36</sup> While the majority of asylum seekers who had arrived in Australia unauthorised by boat since 2010 in fact remained in Australia, the randomness of this policy resulted in families who may not have travelled together on the same boat being physically separated for protracted periods, or even indefinitely. Taken together, these policy changes served to deliberately prolong the refugee status determination process and entrench the temporariness and precarity of these asylum seekers in Australia.

Sweeping changes to the *Migration Act* in late 2014 further codified and entrenched a regime of temporariness for these refugees and asylum seekers who had arrived unauthorised by boat. Most significant was the reintroduction of Temporary Protection Visas (known as 'TPVs' (XD785)) alongside a new visa category, Safe Haven Enterprise Visas (known as 'SHEVs' (XE790)).<sup>37</sup> In order to be eligible for either a TPV or SHEV, asylum seekers must now meet the revised definition of a refugee or a person otherwise requiring protection set out in section 36 of the *Migration Act*. The *Migration Regulations 1994* (Cth) make applying for a SHEV significantly more attractive than a TPV. While both visas include work rights, a TPV offers a person three years of protection, whereas a SHEV offers five years of protection. In addition, unlike TPV holders, SHEV holders may be eligible to apply for a range of non-humanitarian visas at the expiry of their SHEV, provided they lawfully studied or worked in a 'designated regional area' for at least three and a half years (or a period totalling 42 months) out of the five year duration

33 Sara Dehm and Anthea Vogl, *An Unfair and Dangerous Process: A Legal Analysis of the Ministerial Deadline to Apply for Asylum and Use of Executive Power in the Legacy Caseload* (Report, 25 October 2017) 8 ('*An Unfair and Dangerous Process*').

34 John van Kooy and Tony Ward, 'An Unnecessary Penalty: Economic Impacts of Changes to the Status Resolution Support Services (SRSS)' (Policy Paper, Refugee Council of Australia, September 2018) 3.

35 Chris Bowen, 'No Advantage Onshore for Boat Arrivals' (Media Release, Parliament of Australia, 21 November 2012) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/2060961%22>>. See also 'No Advantage: Asylum Seekers in Community Limbo', *Background Briefing* (ABC Radio National, 9 June 2013) <<https://www.abc.net.au/radionational/programs/backgroundbriefing/4732682>>.

36 Although, after January 2014, Australian government policy stipulated that all refugees who arrived in Australia unauthorised by boat were sent to offshore detention on Manus Island and Nauru, the Australian government has not transferred any additional people to offshore detention since 2015.

37 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 2 div 2. For a detailed legislative history and overview of the substantive requirements of these visas, see Alexander Reilly, 'The Vulnerability of Safe Haven Enterprise Visa Holders: Balancing Work, Protection and Future Prospects' (2018) 41(3) *University of New South Wales Law Journal* 871 ('The Vulnerability of Safe Haven Enterprise Visa Holders').



of the SHEV.<sup>38</sup> It is clear that the SHEV has been legally ‘designed to channel visa holders into industries and locations in the Australian labour market with a shortage of workers’.<sup>39</sup>

While the SHEV promises in principle a pathway to permanency through employment or study, in reality, the regulatory criteria mean that these pathways are extremely limited and have in practice been almost unattainable. For example, one barrier to permanency is that any work done while receiving ‘special benefit’ welfare payments would not count towards satisfying the SHEV’s work requirements.<sup>40</sup> For such reasons, Alexander Reilly argued in his early analysis of the legal design of the new visa that SHEV holders must ‘overcome unreasonable barriers to satisfy the work and study requirements to be eligible to apply for a non-humanitarian visa’.<sup>41</sup> More recently, a 2018 internal Department of Home Affairs (‘DHA’) document, *SHEV: ‘Pathways’ Assessment Policy Paper* (released in highly redacted form pursuant to a Freedom of Information request in 2020), stated that while the Department is unable to ‘forecast’ the number of people who will satisfy the SHEV ‘pathway’ requirements to non-humanitarian visas, it is ‘expected to be relatively low’.<sup>42</sup> This low rate was mainly attributed to the high application fees and ‘high levels of educational qualifications, professional skills and/or sponsorship requirements and English language competency’ of these subsequent visas.<sup>43</sup>

The introduction of the TPVs and SHEVs in 2014 was accompanied by a parliamentary agreement between the government and the crossbench senators to grant work rights to all BVE holders.<sup>44</sup> Despite this undertaking, subsequent executive decisions to grant (or conversely, continue to deny) work rights to BVE holders were arbitrary and inconsistent across the ‘Legacy Caseload’ cohort. By April 2016, reportedly only two thirds of asylum seeker BVE holders had work rights,<sup>45</sup> although this figure increased incrementally over the following few years.

38 *Migration Regulations 1994* (Cth) reg 2.06AAB.

39 Reilly, ‘The Vulnerability of Safe Haven Enterprise Visa Holders’ (n 37) 877.

40 *Migration Regulations 1994* (Cth) reg 2.06AAB(2)(a)(i).

41 Reilly, ‘The Vulnerability of Safe Haven Enterprise Visa Holders’ (n 37) 899. The Jesuit Refugee Service shares this view: see Senate Select Committee on Temporary Migration, Parliament of Australia, *Select Committee on Temporary Migration* (Report, September 2021) 151 <[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc\\_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024510/toc_pdf/SelectCommitteeonTemporaryMigration.pdf;fileType=application%2Fpdf)> (‘*Report of the Select Committee on Temporary Migration*’).

42 Department of Home Affairs, ‘Safe Haven Enterprise Visa: ‘Pathway’ Assessments’ (Policy Paper, October 2018) 3 [15] <<https://www.homeaffairs.gov.au/foi/files/2020/fa-200100660-document-released.PDF>>.

43 *Ibid.*

44 Louise Yaxley, Jane Norman and Jonathon Gul, ‘Temporary Protection Visas: Senate Votes to Bring Back Temporary Visas after Deal to Get Children Off Christmas Island’, *ABC News* (online, 5 December 2014) <<https://www.abc.net.au/news/2014-12-05/senate-agrees-to-reintroduce-temporary-protection-visas/5945576?nw=0&r=HtmlFragment>>. The Minister also agreed to provide bridging visas to an additional 100 people with children in immigration detention: Sarah Whyte, ‘Christmas Island Asylum Seeker Children Still Waiting for Release into Community’, *The Sydney Morning Herald* (online, 22 January 2015) <<https://www.smh.com.au/politics/federal/christmas-island-asylum-seeker-children-still-waiting-for-release-into-community-20150122-12vn1t.html>>.

45 Ben Doherty and Abdul Karim Hekmat, ‘“We are the Forgotten People”: The Anguish of Australia’s “Invisible” Asylum Seekers’, *The Guardian* (online, 13 April 2016) <<https://www.theguardian.com/>

According to Departmental statistics, as of February 2019, 19,656 people held a BVE with work rights, rising to over 21,400 people by August 2020.<sup>46</sup> Given that from 2015 some people had transitioned onto either TPVs or SHEVs following successful asylum applications, this suggests that a substantial population of asylum seekers and refugees obtained work rights over time.

The profound temporariness and uncertainty that defines the immigration status of those in the ‘Legacy Caseload’ is exacerbated by the Ministerial discretions that govern their ability to access a visa of any kind under Australian law. As mentioned above, the Minister has a personal and non-compellable power to grant a visa to any person held in immigration detention if the Minister believes release to be in the ‘public interest’.<sup>47</sup> This is the power that allows asylum seekers who arrived without state authorisation to live, and in certain cases lawfully work, in the community. However, for asylum seekers who arrived by boat, the Minister’s non-compellable discretion must first be exercised to lift a so-called statutory bar, introduced as part of the ‘no advantage’ policy. The bar requires the Minister to grant permission to ‘lift the bar’ before any kind of visa application can be made at all.<sup>48</sup> This permission can only be given where the Minister ‘thinks that it is in the public interest to do so’.<sup>49</sup> Crucially, the bar must be lifted each and every time an application is made for a BVE, SHEV or TPV to be granted or even renewed.<sup>50</sup> The duration of bridging visas granted to asylum seekers in particular is short, from three to six months. This leaves asylum seekers at the whim of the Minister’s discretion each time their visa expires. The challenges posed by these conditions are exacerbated by the long waits for the resolution of refugee claims, TPV and SHEV re-applications and BVE applications. Severe departmental delays and mismanagement in visa processing have periodically resulted in large groups of people remaining in the community without any valid visa. As of 30 June 2021, a reported 2,281 people formerly on BVEs were living within the community without a visa, meaning that they have no lawful right to work, study or access Medicare, and indeed could be subject to detention and removal at any time.<sup>51</sup>

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australia-news/2016/apr/13/we-are-the-forgotten-people-the-anguish-of-australias-invisible-asylum-seekers>.

46 Home Affairs Portfolio, Answer to Question on Notice No 45 to Senate Legal and Constitutional Affairs Committee, *2019–20 Budget Estimates* (8 April 2019); Home Affairs Portfolio, Answer to Question on Notice No 132 to Senate Legal and Constitutional Affairs Committee, Home Affairs Portfolio, *2020–21 Budget Estimates* (19 October 2020) 3.

47 *Migration Act 1958* (Cth) s 195A(2).

48 *Ibid* s 46A. Section 46B of the *Migration Act* establishes a similar statutory bar on applications by persons who have been transferred to Australia for medical treatment from Nauru or Manus Island.

49 *Ibid* s 46A(2).

50 In practice, the Minister has ‘lifted the bar’ for all current TPV and SHEV holders, provided that they make a valid subsequent application before their current visas expire. If they have not applied for a subsequent TPV or SHEV at the time of visa expiry, then the statutory bar is reimposed: Department of Home Affairs, ‘Applying for a Subsequent TPV or SHEV’, *Immigration and Citizenship* (Web Page, 19 October 2020) <<https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/onshore-protection/applying-for-a-subsequent-tpv-or-shev>> (‘Applying for a Subsequent TPV or SHEV’).

51 See reference to the people living in the community and ‘awaiting grant of a further BVE’ in Department of Home Affairs, *Illegal Maritime Arrivals on Bridging E Visa* (Report, 30 June 2021) 4 (‘*Illegal Maritime Arrivals on Bridging E Visa*’).

Another distinct group whose immigration status we argue amounts to a form of radical temporariness, and who have been at the sharpest end of the exercise of punitive executive action, are those who have been transferred to Australia from offshore detention in PNG and Nauru. Since 2012, over 2,043 people have been returned or transferred to Australia as a result of Departmental decisions, court orders or the now repealed medical transfer legislative process established for a period by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) (the so-called ‘*Medevac Law*’). Of these, the majority (1,161 people) are considered to be ‘transitory persons’ under the *Migration Act*, meaning that they are legislatively barred from applying for asylum in Australia. As of January 2021, the majority of ‘transitory persons’ were either in community detention (430 people) or on final departure BVEs generally with work rights (449 people).<sup>52</sup> This includes many of the refugees who were transferred under the *Medevac Law* and initially detained in closed immigration detention (including so-called Alternate Places of Detention like hotels) but have since been released to reside in the community on final departure BVEs with work rights. The Department presently maintains that refugees who were transferred to Australia from offshore detention as ‘transitory persons’ will only ever be eligible for final departure BVEs. In an Information Sheet issued to this cohort of BVE holders in August 2017, the Department emphasised the temporariness of their status by stating:

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.<sup>53</sup>

This radical temporariness is designed to encourage asylum seekers and refugees to ‘self-deport’ to their countries of origin, even though they may have a well-founded fear of persecution there. Concerningly, of the total 4,183 people who have been subject to Australia’s offshore detention regime since August 2012, 938 people have opted to return to their countries of origin as of March 2021.<sup>54</sup>

Finally, we note that due to the complexity of these laws, the relentless legislative reforms applied to this group and judicial challenges to the lawfulness of government action, even the ability to know if one falls inside or outside of this group is itself subject to change and uncertainty. *DBB16 v Minister for Immigration and Border Protection* (‘*DBB16*’) provides an exceptionally rare example of a select group of asylum seekers that may be able to transition from temporary refugee visas to permanent status as a result of judicial review.<sup>55</sup> In *DBB16*, the

52 Home Affairs Portfolio, Answer to Question on Notice No 285 to Senate Legal and Constitutional Affairs Committee, Home Affairs Portfolio, *2020–21 Additional Estimates* (22 March 2021) 3. Final departure BVEs have the condition that a holder must regularly report to the Department while they prepare to return to a regional processing country or any country where they have a right of residence.

53 Department of Immigration and Border Protection, ‘Information about the Final Departure Bridging E Visa’ (Fact Sheet, 2017) 1 <[https://refugeelegal.org.au/wp-content/uploads/2017/08/Fact\\_sheet\\_-\\_Final\\_departure\\_Bridging\\_Visa\\_E-1.pdf](https://refugeelegal.org.au/wp-content/uploads/2017/08/Fact_sheet_-_Final_departure_Bridging_Visa_E-1.pdf)>.

54 Home Affairs Portfolio, Answer to Question on Notice No 292 to Senate Legal and Constitutional Affairs Committee, *2020–21 Additional Estimates* (22 March 2021).

55 *DBB16 v Minister for Immigration and Border Protection* (2018) 260 FCR 447. This eligibility was subject to further judicial review in light of the subsequent attempted Ministerial imposition of a separate

Full Federal Court held that a 2002 Ministerial declaration purporting to declare Ashmore Reef to be a ‘proclaimed port’ for the purposes of section 5(5) of the *Migration Act* was ultra vires and therefore invalid. As a result, a cohort of asylum seekers that had initially arrived via Ashmore Reef could no longer be considered to be ‘unauthorised maritime arrivals’. The consequence of this was that their prior applications for temporary protection visas were no longer valid, and they became potentially eligible to apply for permanent protection visas instead.

This unpredictability of status, entitlements and even access to the right to apply for refugee protection is further demonstrated by the imposition of the Government’s ‘October Deadline’ in 2017. This deadline was first announced by then Immigration Minister Peter Dutton in May 2017 and stipulated that all asylum seekers in the ‘Legacy Caseload’ were required to lodge a valid application for a temporary refugee visa by 1 October 2017 or they would lose the ability to do so.<sup>56</sup> Departmental figures indicate that a small group of asylum seekers (71 people in total) did not meet the deadline and as a result lost the ability to apply for any protection visas, including TPVs and SHEVs through the reimposition of the section 46A statutory bar.<sup>57</sup> Consequently, they were immediately placed on final departure BVEs with work rights. The deadline has been characterised as arbitrary and unfair.<sup>58</sup> This is particularly in light of the extremely short notice given, the lack of government-funded legal support to assist asylum seekers to meet the deadline, and the government’s stubborn refusal over many years to lift the statutory bar on applications prior to announcing the deadline.

Taken together, we suggest that the punitive and relentlessly changing laws along with inconsistent and arbitrary Ministerial and departmental decision-making amount to governmental abuse of power. This has created the legal category of this population and enforced upon them a situation of radical temporariness. Within this context, the majority of this group have gradually been granted access to work rights and must find work in order to meet their basic living needs. In the following sections, therefore, we turn to how abuse of public power has created the structural conditions for exploitation of refugee and asylum seeker workers by employers in workplaces across Australia. First, in Part III, we outline existing evidence of workplace exploitation experienced by refugees and asylum seekers on temporary visas in Australia.

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statutory bar under section 91K of the *Migration Act*: see *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CBW20* [2021] FCAFC 63.

56 Dehm and Vogl, *An Unfair and Dangerous Process* (n 33) 4.

57 Immigration and Border Protection Portfolio, Answer to Question on Notice No 224 to Senate Legal and Constitutional Affairs Committee, *2017–18 Supplementary Budget Estimates* (23 October 2017).

58 Dehm and Vogl, *An Unfair and Dangerous Process* (n 33). The Federal Court nonetheless affirmed that this deadline acted to reimpose the ‘statutory bar’ prohibiting people classified as ‘unauthorised maritime arrivals’ from applying for temporary protection visas under section 46A of the *Migration Act*. That said, the Federal Court found that asylum seekers who missed the October deadline were still entitled to procedural fairness in any subsequent departmental assessments of whether to recommend that the Minister should ‘lift the bar’ again in order to allow them to apply for a temporary refugee visa: *CLM18 v Minister for Home Affairs* (2019) 272 FCR 639.

### III EMERGING EVIDENCE OF WORKPLACE EXPLOITATION OF TEMPORARY REFUGEE AND ASYLUM SEEKER WORKERS IN AUSTRALIA

Although significant numbers of refugees and asylum seekers on temporary visas have held work rights since 2015, policy makers to date appear to have entirely neglected to pay attention to this cohort of temporary visa holders as workers and their associated working conditions until very recently. While the United Nations High Commissioner for Refugees ('UNHCR') expressed concern in as early as 2013 that the 'destitution' of asylum seekers in Australia was forcing them into informal work and situations of exploitation in employment,<sup>59</sup> as noted above, refugees and asylum seekers were not identified as a specific cohort of workers in the landmark Senate Inquiry Report into migrant worker exploitation, *A National Disgrace*.<sup>60</sup> Nor was this group mentioned at all in the Final Report of the Migrant Workers' Taskforce in 2019, which brought together senior representatives of Commonwealth departments and regulators to address the revelation of significant wage theft among temporary visa holders in certain industries.<sup>61</sup> For the first time, in 2021, a parliamentary committee recognised the barriers to employment experienced by refugees in Australia on temporary visas, in the Report of the Senate Select Committee on Temporary Migration, although it did not address the high potential for labour exploitation and made no recommendations in relation to this group as workers.<sup>62</sup>

Yet, the susceptibility of refugees and asylum seekers on temporary visas to workplace exploitation has been documented for several years by journalists, service providers and refugee protection advocates in submissions to parliamentary inquiries and in research reports in two small scale studies. Although initially sporadic, largely anecdotal and/or limited in detail, these reports and studies have increased in frequency and depth since around 2019. At the same time, this emerging literature remains quite limited in scope, often providing a description of the circumstances of one or two workers rather than structural analysis of the incidence of exploitation more broadly.

This section presents the results of our review of a range of sources, which document the work profile and experiences of work or workplace exploitation

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59 United Nations High Commissioner for Refugees, *Asylum-Seekers on Bridging Visas in Australia: Protection Gaps. UNHCR Consultation, 2013* (Summary Report, 16 December 2013) 8.

60 *A National Disgrace* (n 14).

61 *Migrant Workers' Taskforce* (n 15). A notable exception to this was the 2017 parliamentary inquiry around modern slavery that specifically mentioned asylum seekers on bridging visas in its list of Australian visa types that made people vulnerable to modern slavery. This inclusion of asylum seekers in all likelihood reflected the particular engagement with, and submissions received by, the inquiry. For instance, the Anti-Slavery Australia submission emphasised that '[t]raffickers target people made vulnerable by social, cultural or political circumstances such as recent migrants, young people and refugees': Anti-Slavery Australia, Submission No 156 to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia* (2017) 14, quoted in Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (Report, December 2017) 56.

62 *Report of the Select Committee on Temporary Migration* (n 41) 152.

of asylum seekers and refugees on temporary visas in Australia. Sources include media articles, advocacy organisation and union reports, parliamentary inquiries, case law searches, FWO media releases and public reporting, as well as any emerging academic literature.<sup>63</sup> While this dataset does not provide a systematic qualitative or quantitative account of the work profile, industries or working conditions experienced by refugees and asylum seekers, this dataset nonetheless reveals a range of working conditions experienced by this cohort that fall short of minimum labour standards in Australia. These include systemic underpayment, work and safety breaches, and unfair dismissal. While it is widely accepted that employment relationships always entail a strong power differential,<sup>64</sup> the unlawful workplace practices documented below in Australia suggest an abuse of power beyond such traditional power relations.

Advocates and service providers have observed that asylum seekers and refugees on temporary visas may frequently work in a variety of low-paid, low-skilled or dangerous jobs.<sup>65</sup> Common industries and job profiles are thought to include warehousing, factories, hospitality, meat processing, family day care, painting/tiling, taxi driving and cleaning.<sup>66</sup> An early study into the labour market vulnerabilities of people who had arrived in Australia by boat was conducted by Anti-Slavery Australia between 2014 and 2015.<sup>67</sup> This research report, which focused on asylum seekers who held BVEs, concluded that the potential for exploitation among this group was strong, although it was unable to make specific findings on prevalence. At the time of the study, there were 27,216 asylum seekers on BVEs, only some of whom had work rights attached to their visas.<sup>68</sup> The study documented asylum seeker and service provider accounts of: cash-in-hand work with little if any verbal agreement as to terms of employment; frequent employers' demands that BVE-holders work for free during probation periods; and persistent underpayment (including \$6 per hour for agricultural work, \$8–10 per hour for washing cars and \$5–15 per hour for cleaning).<sup>69</sup> In one case recounted by a service provider, an asylum seeker sustained a work injury without compensation and under threat of the dismissal of his friends: ““We had a young man who worked with heavy machinery and he had an accident, he was told to get out, to go to

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63 For example, we used the following search terms to review relevant Fair Work Ombudsman online materials and case law databases under the *Fair Work Act 2009* (Cth): ‘refugee\*’, ‘asylum seeker\*’, ‘bridging visa’ (date range: 2010–21).

64 See, eg, Steve Williams and Derek Adam-Smith, *Contemporary Employment Relations: A Critical Introduction* (Oxford University Press, 2010) 7–9.

65 The Australian Human Rights Commission in 2019 cited concerns by service providers that BVE holders may often feel compelled to accept precarious or unsafe conditions of employment, with one support worker stating that the BVE ‘builds this kind of black market for things like poor work conditions and dangerous work’: Australian Human Rights Commission, *Lives on Hold: Refugees and Asylum Seekers in the ‘Legacy Caseload’* (Report, July 2019) 59 (‘*Lives on Hold*’).

66 Catherine Hemingway, *Not Just Work: Ending the Exploitation of Refugee and Migrant Workers* (Final Report, 2016) 53.

67 Angela Cranston and Jennifer Burn, *Giving Voice to Asylum Seekers: An Evidence-Based Review of Community Asylum Experiences in NSW and the ACT* (Report, 30 June 2015).

68 *Ibid* 21.

69 *Ibid* 61.

hospital, to say something else, not to come back or we will close down your friends” – Service provider, November 2014.<sup>70</sup>

The Report also noted a number of reasons for asylum seekers’ reluctance to contact authorities about exploitation, which leaves them without recourse to a remedy. First, they may not identify themselves as victims since they may come from countries where there are no formal workplace laws in relation to pay and working conditions. Second, they may be isolated or have limited English, which may inhibit their ability and confidence to voice employment concerns. Third, they may be reluctant to report exploitation to relevant authorities for fear of jeopardising their protection visa applications.

At around the same time, in 2014, media reports profiled an asylum seeker who, unaware of Australian labour standards, accepted a job as a supermarket trolley collector on the condition that he paid \$300 of his weekly wage to the foreman.<sup>71</sup> Upon learning of the arrangement, a caseworker obtained a lawyer for the man, who was sacked when the lawyer wrote to his employer.

In 2016, WESTjustice employment legal service in Melbourne released its *Not Just Work: Ending the Exploitation of Refugee and Migrant Workers* Report documenting a range of problems among newly arrived migrants. This client population included asylum seekers and refugees who arrived by boat, and therefore held temporary visas, as well as those granted permanent visas through the offshore humanitarian program. These workers experienced a range of exploitative conditions, such as underpayment of wages or superannuation, unauthorised deductions, workplace injury and sham contracting.<sup>72</sup> In particular, the Report provided details from refugee interviewees of bullying and discrimination and of unfair dismissal, as in the following vignettes, which we include in full for the context and detail they provide:

Fatih is a young man who got his first job in Australia working in a distribution company. He got along well with his colleagues until they found out that he was an asylum seeker and had come to Australia by boat. After this time, he was mercilessly taunted, called ‘boat person’, sworn at, given bad and dangerous jobs and excluded from social events. Fatih was deeply affected by this behaviour and sought counselling. After some time, he developed a shoulder injury. This resulted in further ridicule, and eventually he was not able to work anymore.<sup>73</sup>

Sam is a refugee from Afghanistan. He travelled to Australia by boat, has spent time in a detention centre in solitary confinement and has a mental health condition. Sam experienced a long history of discrimination and bullying from his co-workers. He was taunted for his religious beliefs and people called him crazy. Despite complaining to his managers on numerous occasions, there was no action taken against his colleagues, and the behaviour continued. One day, he was indecently touched by one of the bullies. Sam pushed the worker away. He was dismissed for serious misconduct.<sup>74</sup>

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70 Ibid 63.

71 Malavika Santhebennur, ‘Lawyers Stand Up for Asylum Seekers’, *Lawyers Weekly* (online, 6 June 2014) <<http://www.lawyersweekly.com.au/folklaw/15439-lawyers-stand-up-for-asylum-seekers>>.

72 Hemingway (n 66) 75–7.

73 Ibid 211.

74 Ibid 206.

In 2018, van Kooy and Bowman reported on the prevalence of informal, underpaid and dangerous work revealed in their 2014–16 study of 20 asylum seekers who had work rights in Australia.<sup>75</sup> They recorded the experiences of:

Usman, a man in his mid-thirties from South Asia, [who] recounted how when working for ‘cash-in-hand’ in a fruit and vegetable store, he badly injured his foot after being ordered to compact rubbish by jumping up and down on it. His employer fired him because he was unable to work.<sup>76</sup>

Apparently, because he perceived his work as informal, Usman felt he had no recourse to seek compensation for workplace injury or unfair dismissal. Another vignette also describes the severe overwork and underpayment of a domestic worker in Melbourne:

Pema, a woman in her fifties from South Asia, recounted how she was trapped as a domestic servant in suburban Melbourne. Performing a combination of household cooking and gardening duties, for six months she worked from 7 am to 11 pm every day, was paid \$150 per month in cash, and was not allowed to leave the property. She was fed only stale bread and tea. No breaks were given to allow her to pray. When she asked for leave because she was ‘exhausted’, her employer, who was a family friend, refused and told her not to be ‘greedy’, and to appreciate having a place to sleep and a job. Pema managed to leave the job but she was careful to do so on ‘good terms’ with her boss. Given her insecure visa, she felt it important to maintain her few stable relationships, even though these relationships had exposed her to harm.<sup>77</sup>

In a 2018–19 South Australian study based on interviews with 19 refugees living on SHEVs or bridging visas, 16 interviewees ‘reported experiencing some form of exploitation [or] discrimination’ in a current or previous job, including systematic underpayment, overwork or hazardous conditions.<sup>78</sup> Some also indicated having their wages withheld, including one Iranian woman on a bridging visa, who worked in a cafe in a small regional town and whose employer withheld a portion of her pay (four hours a day) to cover the cost of her accommodation and food. She reported:

[It] was very, very awful because [the owner] had very bad rule just four hours free working and after four hours pay money and she tricky. She was tricky and organize just four hours every day for me ... She pushed me ‘very quickly finish your job and no more than four hours please’ ... I counted that every week I pay \$800 [for food and accommodation].<sup>79</sup>

None of these refugee workers made any formal complaint about their treatment, citing the precarity of their visas, difficulties finding an alternative job and lack of knowledge about how to do so.<sup>80</sup> The researchers noted that the health impacts of these experiences were especially evident for refugees, who were also

75 Van Kooy and Bowman, ‘Surrounded with So Much Uncertainty’ (n 12) 701.

76 Ibid 701–2.

77 Ibid 702.

78 Anna Ziersch et al, ‘Temporary Refugee and Migration Visas in Australia: An Occupational Health and Safety Hazard’ (2021) 51(4) *International Journal of Health Services* 531, 534.

79 Ibid 536.

80 Ibid 537–8.



grappling with pre-settlement trauma and ongoing uncertainties about their future protection.<sup>81</sup>

In 2019, the same year that *The Sydney Morning Herald* reported allegations of Mr Thalaisingham's wage theft by Polytrade (described in the introduction), a Melbourne couple were committed for trial on slavery-related offences for coercing an Iranian asylum seeker to work 14-hour days, seven days a week, in a Melbourne confectionery shop between 2015 and 2017.<sup>82</sup> The man had arrived in Australia by boat in 2013 with his wife and daughter. After working for three months with no pay for a 'training period', he was paid \$10 an hour for some of the hours he worked. The court heard that the defendant employer, who was also a doctor, had prescribed opioids to the man and other workers, some of whom were also asylum seekers, to allow them to work extended shifts during busy times at the bakery. When the man tried to leave, the employer is alleged to have threatened to report him to immigration authorities for working without a proper visa and for continuing to accept Centrelink payments while working for cash.

In February 2021, the Migrant Workers Centre ('MWC') in Melbourne reported that a Tamil supermarket worker on a TPV had recovered \$80,000 in underpayment from his employer. The worker had regularly undertaken 12-hour shifts, sometimes seven days a week, but was paid a flat rate with no overtime. His employer had never provided a written contract and had falsified his payslips to reflect less than half the number of hours he had actually worked. Prior to this job, he had spent 18 months in detention. Upon hearing about the MWC on Tamil radio, he joined the United Workers Union, which assisted him to demand repayment of his wages. Four of his co-workers also came forward with wage theft claims – three on temporary visas and one permanent resident. As of early 2021, these workers were still owed wages, but the employer had evaded repayment by liquidating and starting a new business.<sup>83</sup>

This emerging picture of pervasive exploitation is not surprising. One major empirical study in the United Kingdom ('UK') has documented multiple forms of highly exploitative labour practices among people who are seeking asylum in that country, in some cases rising to the level of forced labour.<sup>84</sup> The working conditions documented in this section should be understood in the context of clear evidence of systemic wage theft and other forms of exploitation among temporary visa holders more generally. In its 2015 review of the workplace relations system, the Productivity

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81 Ibid.

82 Karen Percy, "'Respected" Melbourne Doctor and Wife to Stand Trial on Slavery-Related Charges', *ABC News* (online, 20 September 2019) <<https://www.abc.net.au/news/2019-09-20/melbourne-doctor-and-wife-to-stand-trial-over-alleged-slavery/11505848>>.

83 Migrant Workers Centre, 'Anil's Win: Tamil Supermarket Worker Recovers \$80,000 in Stolen Wages', *Migrant Workers Centre* (Blog Post, 13 January 2022) <[https://www.migrantworkers.org.au/supermarket\\_worker\\_recovers\\_80000?fbclid=IwAR000kY2uUJsZwKsvS6JhjetG3MRbQN8g3S6PxbW\\_ZCnrkhjMMoY2qnDQqs](https://www.migrantworkers.org.au/supermarket_worker_recovers_80000?fbclid=IwAR000kY2uUJsZwKsvS6JhjetG3MRbQN8g3S6PxbW_ZCnrkhjMMoY2qnDQqs)>.

84 Hannah Lewis et al, *Precarious Lives: Experiences of Forced Labour among Refugees and Asylum Seekers in England* (Research Report, 2 July 2013); Lewis et al, *Precarious Lives* (n 18); Hannah Lewis and Louise Waite, 'Asylum, Immigration Restrictions and Exploitation: Hyper-Precarity as a Lens for Understanding and Tackling Forced Labour' (2015) 5 *Anti-Trafficking Review* 49.

Commission recognised that migrant workers ‘are more susceptible to substandard working conditions (such as being underpaid) than Australian citizens’, including ‘lower wages, reduced entitlements and fewer protections than required by the *Fair Work Act 2009* (Cth)’.<sup>85</sup> Major quantitative studies have revealed that as many as three quarters of international students, and a third of backpackers on Working Holiday visas, may have experienced underpayment during their work in Australia.<sup>86</sup> In addition, Safe Work Australia has found that migrant workers are more likely to be killed or injured at work than other employees.<sup>87</sup> Temporary visa holders’ access to protections against unfair dismissal and sexual harassment in Australia has also been shown to be limited in practice.<sup>88</sup> FWO investigations have recorded other endemic workplace breaches among temporary visa holders in particular industries (such as horticulture, retail and food services), including employers’ failure to keep records and unlawful bonds to obtain work.<sup>89</sup> These drivers of workplace exploitation are also applicable to refugees and asylum seekers on temporary visas. At the same time, the exploitative working conditions experienced by refugees and asylum seekers are shaped by additional regulatory forces.

#### IV HOW THE REGULATORY ENVIRONMENT CREATES UNIQUE DRIVERS OF EXPLOITATION AMONG REFUGEE WORKERS

Causes of systemic unlawful employer practices in relation to the temporary migrant workforce in general are many and complex. In many ways, migrant workers – particularly those with insecure or undocumented status – have become emblematic of pervasive precarity in contemporary industrial and economic life.<sup>90</sup> No doubt, in Australia, gaps in federal labour enforcement contribute to the prevalence of unlawfully low working conditions, especially in sectors that are

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85 Productivity Commission, *Workplace Relations Framework: Productivity Commission Inquiry Report, Volume 2* (Report No 76, 30 November 2015) 915–16.

86 Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (Report, 30 June 2020) 8 (*‘International Students and Wage Theft in Australia’*); Berg and Farbenblum, *Wage Theft in Australia* (n 11) 26. See also Joo-Cheong Tham and Judy Fudge, ‘Unsavoury Employer Practices: Understanding Temporary Migrant Work in the Australian Food Services Sector’ (2019) 35(1) *International Journal of Comparative Labour Law and Industrial Relations* 31.

87 Nick Toscano, ‘Fears Over Rise in Migrant Workers Killed, Injured in Industrial Accidents’, *The Age* (online, 26 August 2016) <<http://www.theage.com.au/business/workplace-relations/sharp-rise-in-migrant-workers-killed-maimed-in-industrial-accidents-20160825-gr117u.html>>.

88 Joanna Howe, Laurie Berg and Bassina Farbenblum, ‘Unfair Dismissal Law and Temporary Migrant Labour in Australia’ (2018) 46 *Federal Law Review* 19; Joanna Howe, ‘Examining a Temporary Migrant Worker’s Ability to Make a Complaint of Sexual Harassment’ (2016) 41(2) *Alternative Law Journal* 102.

89 Fair Work Ombudsman, *Harvest Trail Inquiry: A Report on Workplace Arrangements along the Harvest Trail* (Report, November 2018); Fair Work Ombudsman, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (Report, April 2016).

90 Mimi Zou, ‘The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations’ (2015) 31(2) *International Journal of Comparative Labour Law and Industrial Relations* 141; Louise Waite and Hannah Lewis, ‘Precarious Irregular Migrants and Their Sharing Economies: A

also characterised by low union membership, especially among migrant workers. Moreover, employers presume they can exploit temporary migrant workers with impunity because so few are willing to report workplace non-compliance,<sup>91</sup> in particular to the FWO.<sup>92</sup> Acquiescence to workplace non-compliance may stem from a number of factors, including limited English language ability, lack of detailed knowledge of employment entitlements in Australia, and these workers' limited social and political power as non-citizens.<sup>93</sup>

Many refugees in Australia on temporary visas share these vulnerabilities to workplace exploitation, as well as others that are more acute. Their exposure in countries of nationality to violence, instability and persecution can lead to a range of physical and mental health problems not faced by other workers.<sup>94</sup> These workers have also all reached Australia after arduous and highly dangerous journeys by sea, followed by a period of immigration detention or release into the community on bridging visas while awaiting assessment of their claims.<sup>95</sup> These traumas can be compounded by distrust of legal systems and state authorities, born from previous experiences of injustice in their country of persecution, which can deter refugees and asylum seekers from seeking advice or enforcing their rights in Australia.<sup>96</sup>

But, in addition to these various structural and personal vulnerabilities, the immigration framework that regulates temporary visa holders' lives is a further potent force that can organise workers into exploitation. This section examines in detail the elements of the temporary protection regime that contribute to vulnerability to exploitation among refugees and asylum seekers, and organise them into exploitative work situations. Some of these are shared with other temporary migrant workers: it is well accepted in the global literature on temporary migrant labour that key dimensions of precarity for this workforce include temporariness of stay and visas that require periods of employment to achieve an immigration outcome.<sup>97</sup> In other respects, the workplace vulnerabilities of refugees and asylum seekers are unique. Bridget Anderson's close analysis of immigration regulation demonstrates that, far from simply controlling the entry and exit of migrants, migration controls 'produce workers with particular types of relations to employers

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Spectrum of Transactional Laboring Experiences' (2017) 107(4) *Annals of the American Association of Geographers* 964.

- 91 In a 2016 survey of 4,332 temporary visa holders, only 1 in 10 participants who acknowledged underpayment took action to recover their wages. Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (Report, October 2018) ('*Wage Theft in Silence*').
- 92 Alexander Reilly et al, *International Students and the Fair Work Ombudsman* (Report, June 2017).
- 93 Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016) 43–4; Mares (n 22).
- 94 Graeme Hugo, *A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants* (Summary of Findings, 2011) 23.
- 95 Van Kooy and Ward (n 34) 3.
- 96 Hemingway (n 66) 89; Refugee Council of Australia, 'Settling in Australia: The Challenges', *Refugees in Australia* (Web Page, 26 December 2019) <<https://www.refugeecouncil.org.au/settlement-challenges/8/>>.
- 97 Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34(1) *Comparative Labor Law & Policy Journal* 95.

and labour markets'.<sup>98</sup> In other words, the precise configuration of visa settings and immigration enforcement regimes can be constitutive of insecure working conditions and specific forms of workplace exploitation. We thus argue that the radical temporariness, profound uncertainty and punitive exercises of government power, channelled through the temporary protection regime, create heightened risk to abuses of power by employers of refugees and asylum seekers in Australia.

### **A Uncertain Visa Status, Duration and Outcomes as Making Refugee Workers Susceptible to Exploitation**

By limiting lawful stay in Australia to a period of time, temporary visas can organise refugees and asylum seekers into exploitative work in a number of ways. First, Shanthi Robertson has located particular vulnerabilities among migrant workers in Australia simply in their 'being temporary'.<sup>99</sup> For instance, positioned as 'sojourners', many international students and Working Holiday Makers report difficulties in finding work because of the short-term nature of their perceived stay in Australia, which can lead them to accept poorly paid or undesirable work out of desperation.

Employers of refugees and asylum seekers, who may be aware of the temporary nature of TPVs, SHEVs and BVEs, and the need for periodic re-application, may be deterred from hiring these workers or may tend to offer them casualised labour to reflect the uncertain duration of their work rights. Caroline Fleay, Lisa Hartley and Mary Anne Kenny found that most of the eight asylum-seeker men they interviewed in 2012 'identified the temporary status of being on a BVE as a significant barrier to finding employment'.<sup>100</sup> Indeed, unlike substantive temporary visas, employers may perceive the BVE as even more tenuous, with uncertain work entitlements and duration further intensifying barriers to formal employment. In the words of one participant in the study: 'Even in meat factory they are not employing the people who has BV because what they are saying that this visa is not valid, we don't know how long you are going to stay, you are not staying'.<sup>101</sup>

A second key feature of temporary visas that organises refugees into precarious work is the attaching of immigration outcomes to work. It is widely accepted in the Australian temporary migrant labour literature that workers frequently accept poor, poorly paid and unsafe working conditions when this is offset by immigration-related benefits gained from the job. For instance, international students may tolerate exploitation in order to gain work experience or future employer-sponsorship as a pathway to residence.<sup>102</sup> Temporary Skills Shortage

98 Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) *Work, Employment and Society* 300, 306.

99 Shanthi Robertson, 'Time and Temporary Migration: The Case of Temporary Graduate Workers and Working Holiday Makers in Australia' (2014) 40(12) *Journal of Ethnic and Migration Studies* 1915.

100 Caroline Fleay, Lisa Hartley and Mary Anne Kenny, 'Refugees and Asylum Seekers Living in the Australian Community: The Importance of Work Rights and Employment Support' (2013) 48(4) *Australian Journal of Social Issues* 473, 485.

101 Ibid.

102 Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181, 202.

visa-holders, too, may hope their exploitative employer will sponsor their future permanent visa.<sup>103</sup> Working Holiday Makers accept gruelling jobs in horticulture in order to meet the requirements of 88 days of work in a designated industry to obtain a second visa, or six months of work to obtain a third visa.<sup>104</sup>

Likewise, as the only pathway to permanence for refugees who arrived in Australia by boat, the SHEV is likely to create what Alexander Reilly has described as a ‘complicated employment relationship’.<sup>105</sup> By predicating eligibility for a further substantive visa on the visa holder having undertaken three and a half years of work in regional Australia in a five year period, the SHEV creates strong incentives for a visa holder to endure workplace exploitation in order to reach this goal. In its 2017 concluding observations on Australia, the United Nations Committee on the Elimination of Racial Discrimination expressed concern that SHEV holders may refrain from making complaints about working conditions due to ‘heavy reliance on their employers’.<sup>106</sup>

Third, temporary visas can organise the visa holder into exploitative work due to the uncertainty of their duration of stay or duration of work rights. In a sense, this can be the case for any temporary visa holder who may not know whether they will be permitted to extend their stay beyond the expiry date of their visa or whether they will meet eligibility requirements for visas which change over time, including if and when they may transition to permanence. However, for most refugees and asylum seekers, visa duration is more radically uncertain than the ‘temporariness’ experienced by other temporary migrant workers, which intensifies their vulnerability to exploitation.

This radical uncertainty is due to the fact that asylum seekers and refugees, whether on BVEs, SHEVs or TPVs, face the combination of inordinate processing delays due to large backlogs and the periodic arbitrary impositions of extremely tight deadlines for application. This can leave them unable to predict with any certainty the duration for which they will hold any particular visa, or even what visa they may be invited to apply for when their current visa expires.<sup>107</sup> This creates uncertainty not only for BVE holders but also, for instance, for the SHEV and

103 Chris Wright and Stephen Clibborn, ‘A Guest-Worker State? The Declining Power and Agency of Migrant Labour in Australia’ (2020) 31(1) *The Economic and Labour Relations Review* 34, 35.

104 Alexander Reilly et al, ‘Working Holiday Makers in Australian Horticulture: Labour Market Effect, Exploitation and Avenues for Reform’ (2018) 27(1) *Griffith Law Review* 99, 112–13.

105 Reilly, ‘The Vulnerability of Safe Haven Enterprise Visa Holders’ (n 37) 877.

106 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 (8 December 2017) 8 [34].

107 As of April 2021, 8,444 applications for temporary refugee visas (either SHEVs or TPVs) lodged in (or before) 2017 were still waiting for a primary assessment by the Department: Department of Home Affairs, ‘FOI Request – FA 21/04/00880’ (Documents Released under Freedom of Information, 19 May 2021) <<https://www.homeaffairs.gov.au/foi/files/2021/fa-210400880-document-released.PDF>>. In the 2017–18 financial year, the average processing time of an onshore asylum application was 231 days (from lodgement to initial departmental decision). By 2021, the average processing time for a TPV/SHEV application had blown out to 794 days. See Home Affairs Portfolio, Answer to Question on Notice No 69 to Senate Legal and Constitutional Affairs Committee, *2019–20 Budget Estimates* (8 April 2019); Department of Home Affairs (Cth), ‘FOI Request – FA 21/04/00874’ (Documents Released under Freedom of Information, 14 May 2021) <<https://www.homeaffairs.gov.au/foi/files/2021/fa-210400874-document-released.PDF>>.

TPV holders whose visas were granted in 2016 and were due to expire in 2021. In practice, according to the DHA website as of August 2021, SHEV and TPV holders who made a valid application for a subsequent SHEV or TPV will continue to hold a valid TPV or SHEV until the Department has made a decision on their subsequent application.<sup>108</sup> But given the processing backlogs, these workers have little certainty around when their application for a subsequent TPV or SHEV will be considered or determined.<sup>109</sup> Moreover, this current approach of informing refugees that their existing TPVs and SHEVs will continue to be valid past their expiry date, provided that they have made a valid application for a subsequent visa, is purely a function of broad Ministerial discretion. This means that it could be abruptly withdrawn or altered by the Minister at any time, leaving these visa holders instead with a bridging visa (which may or may not include the right to work) or without a visa altogether. Moreover, refugees and asylum seekers who may have had their initial or subsequent visa applications refused by the Department also face long delays in seeking merits review and/or judicial review.

This extreme uncertainty of duration of lawful stay on all these visas can strongly deter employers from hiring these workers.<sup>110</sup> Indeed, workers also face the real possibility of losing the lawful right to work altogether.<sup>111</sup> Unscrupulous employers may readily take advantage of these acute labour market disadvantages among these workers, confident that these workers are almost certain not to protest poor working conditions for fear of losing any opportunity to earn at all.

## **B Refugees as Distinct Temporary Workers as an Effect of Non-Refoulement**

The legal temporariness experienced by refugees and asylum seekers is also distinct from that of other temporary visa holders by virtue of their very status as refugees and asylum seekers. Refugees by definition are legally recognised as persons who are outside of their country of origin and unwilling or unable to return owing to their well-founded fear of persecution.<sup>112</sup> Australia has recognised that it has an obligation of non-refoulement towards refugees under both international and domestic law,<sup>113</sup> an obligation that exists not only at the time of refugee status

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108 'Applying for a Subsequent TPV or SHEV' (n 50).

109 As of April 2021, the Department had received 5,358 subsequent applications for new temporary refugee visas from holders of TPVs or SHEVs that were due to expire: Department of Home Affairs (Cth), 'FOI Request – FA 21/04/00880' (Documents Released under Freedom of Information, 19 May 2021) <<https://www.homeaffairs.gov.au/foi/files/2021/fa-210400880-document-released.PDF>>.

110 See John van Kooy and Agathe Randrianarisoa, *Giving Asylum Seekers a Chance: Insights from a Pilot Employment Program* (Report, 2017); Seuwandi Wickramasinghe, *Building Bridges to Work: Final Report on the Given the Chance for Asylum Seekers Program* (Report, 2018). Both reports set out a range of employment challenges facing asylum seekers in Australia, including that many employers are reluctant to offer a job to people whose visa could be revoked at any time. See also *Lives on Hold* (n 65) 58–9.

111 As at 31 December 2018, there were 15,674 asylum seekers who had arrived by boat living in the community on bridging visas. Around 12% of these people (1,931) were awaiting the grant of a further bridging visa. See *Lives on Hold* (n 65) 59.

112 Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1 ('Refugee Convention').

113 *Ibid* art 33; *Migration Act 1958* (Cth) s 36.

determination but also into the future.<sup>114</sup> Yet, under the current Australian temporary protection visa system, a refugee is merely able to obtain a three or five year visa, with the option of re-application for renewal (or for SHEV holders, the unlikely prospect of transition to certain permanent visas). This means that they are required to demonstrate their well-founded fear of persecution to the satisfaction of a decision-maker in their initial application for asylum, as well as in any subsequent application for another temporary refugee visa, in order to continue their residency in Australia.

Unlike other non-citizens on temporary visas in Australia, refugees cannot extract themselves from this system of temporariness by returning home by virtue of their very ‘refugeeness’. Returning to their countries of origin is not a viable option if they no longer have a safe ‘home’ state to return to.<sup>115</sup> In practice, the operation of non-refoulement in conjunction with Australia’s temporary protection regime thus means that this cohort of refugees is effectively ‘stuck’ in a cycle of temporariness.<sup>116</sup> Indeed, each expiry date raises the spectre of them losing their lawful status and then either living and working in the community as an undocumented person, or instead, being re-detained in immigration detention where they face the prospect of potential deportation.

For the subgroup of asylum seekers whose refugee claims have been refused, and who have exhausted avenues of appeal, the cycle of temporariness is even more profound. These rejections need to be understood within a context of ‘a legal system that has been deliberately set up to accelerate asylum decision-making, to deny access to legal advice to people seeking asylum and to limit the legal options of those who have arrived by boat’.<sup>117</sup> Following a negative determination, a person

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- 114 See Adrienne Anderson et al, ‘A Well-Founded Fear of Being Persecuted ... But When?’ (2020) 42(2) *Sydney Law Review* 155. Although temporary protection per se is not incompatible with the Refugee Convention, UNHCR Guidelines recommend that such measures should only be adopted as exceptional circumstances such as situations of mass influx or humanitarian crisis and only until proper status determination processes can be instituted: United Nations High Commissioner for Refugees, ‘Guidelines on Temporary Protection or Stay Arrangements’ (Guidelines, February 2014). Indeed, the UNHCR has stated there is ‘insufficient justification’ for Australia’s discriminatory temporary protection visa regime and recommends the return to a permanent protection visas system for asylum seekers who have arrived unauthorised by boat: United Nations High Commissioner for Refugees, ‘Fact Sheet on the Protection of Australia’s So-Called “Legacy Caseload” Asylum-Seekers’ (Fact Sheet, 1 February 2018) 5 (“Legacy Caseload” Asylum-Seekers Fact Sheet”).
- 115 Although in theory refugees could pursue resettlement in a ‘safe third country’, in reality, this is highly unlikely to eventuate and they are left with very few migration options.
- 116 Russell and Rae have described the ‘indefinite stuckness’ of certain refugees under Australia’s care and control as an ‘existential condition within a carceral continuum that is both spatial and temporal’: Emma K Russell and Maria Rae, ‘Indefinite Stuckness: Listening in a Time of Hyper-Incarceration and Border Entrapment’ (2020) 22(3) *Punishment and Society* 281, 281. We note that this cycle of temporariness also entails the denial of family reunion, which is not available to those on temporary visas. Simply visiting family overseas requires an application to access temporary travel documents, governed again by broad executive discretions and in circumstances where leave may be difficult to access in casual or insecure employment.
- 117 Sara Dehm and Anthea Vogl, ‘Refugee Rejection is More Complex than a Soundbite: Why Tamil Family Should Stay’, *The Sydney Morning Herald* (online, 5 September 2019) <<https://www.smh.com.au/national/refugee-rejection-is-more-complex-than-a-soundbite-why-tamil-family-should-stay-20190904-p52nyb.html>>. The Immigration Assessment Authority (‘IAA’) has a much higher rate of affirming

is issued a final departure BVE, usually with work rights. However, given that certain states like Iran currently do not accept involuntary returns from Australia,<sup>118</sup> certain BVE holders cannot be forcibly deported and are therefore stuck on a chain of six-month final departure visas for an indefinite period. As Jennifer Bond has noted in the Canadian context, such policies can create a cohort of non-citizen residents – both in immigration detention and outside – that are ‘unwanted but unremovable’.<sup>119</sup> For asylum seekers and refugees on temporary visas, then, the only alternative in Australia to their current situation of radical temporariness of lawful immigration status, in which their visas need to be perpetually renewed and re-authorised, is indefinite immigration detention. This has resulted in a new distinct cohort of people who are at risk of having their visas lapse (due to departmental processing delays) or cancelled (see more below).

These forms of temporariness and limbo faced by refugees and asylum seekers have a series of implications for their status as workers. First, employers have a statutory requirement to check and verify their employees’ legal entitlement to work in Australia.<sup>120</sup> As noted, unscrupulous employers may take advantage of the highly constrained options of refugees and asylum seekers to offer them jobs with extremely poor working conditions. Refugee and asylum seeker workers may apprehend workplace exploitation as a ‘lesser harm’ to returning to persecution in their home country. They may also abstain from asserting their workplace rights in the context of the perpetually looming visa re-application process. Indeed, the UNHCR has expressed concern that the periodic issuing of temporary protection visas to refugees within the ‘Legacy Caseload’ ‘hinders a refugee’s ability to integrate and rebuild their life’.<sup>121</sup> This means that even when refugees have valid temporary visas, their precarity and risk of exploitation stem not so much from the actual act of eventual deportation, but rather from living with the perpetual possibility and fear of deportation.<sup>122</sup> The inability of most refugees and asylum

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Departmental rejections than the more robust administrative appeal processes within the Migration and Refugee Division of the Administrative Appeals Tribunal. The IAA, for example, largely conducts a paper review only reassessment of asylum applications that have been rejected by the Department and rarely conducts fresh interviews with asylum applicants. It is also statutorily prohibited from considering ‘new evidence’, except for limited instances. As of March 2021, IAA statistics show that the IAA has affirmed 89% of Departmental rejection decisions since its first case in July 2015 (with 8,802 decisions made to date): Immigration Assessment Authority, *Immigration Assessment Authority Caseload Report 2020–21* (Report, July 2021) 2. For some source countries, such as Pakistan, Bangladesh, India and Sri Lanka, this rate is as high as between 94 and 97%: at 2. While some of these decisions have been overturned via judicial appeals to the Federal Courts, asylum seekers who have had their negative Departmental decision affirmed by the IAA are nonetheless immediately issued a six month final departure BVE (usually with work rights) and are required to make arrangements to leave Australia.

118 See, eg, Ben Doherty, ‘Iran Refuses to Take Back Asylum Seekers Who Have Been Forcibly Returned’, *The Guardian* (online, 15 March 2016) <<https://www.theguardian.com/australia-news/2016/mar/15/iran-refuses-to-take-back-asylum-seekers-who-have-been-forcibly-returned>>.

119 Jennifer Bond, ‘Unwanted but Unremovable: Canada’s Treatment of “Criminal” Migrants Who Cannot Be Removed’ (2017) 36(1) *Refugee Survey Quarterly* 168.

120 *Migration Act 1958* (Cth) ss 245AB, 245AC.

121 “‘Legacy Caseload’ Asylum-Seekers Fact Sheet’ (n 114) 4.

122 Nicholas P De Genova, ‘Migrant “Illegality” and Deportability in Everyday Life’ (2002) 31 *Annual Review of Anthropology* 419; see also Nicholas De Genova and Nathalie Peutz (eds), *The Deportation*



seekers on temporary visas to extract themselves from this temporariness thus makes them more vulnerable to workplace exploitation.

### C Lack of Social Protection as Driving Refugees into Survival Jobs

Alongside their inability to return to their ‘home’ states, asylum seekers and refugees on temporary visas may be more susceptible to workplace exploitation due to the lack of social protections available to them in Australia. In particular, asylum seekers on BVEs are among the only workers in Australia with no access to Centrelink benefits in the event of unemployment, and no recourse to social security in their countries of nationality. By virtue of their unauthorised arrival in Australia by boat, asylum seekers are unlikely to arrive with access to personal funds for living expenses in Australia.<sup>123</sup> This lack of social protection for refugees and asylum seekers can drive them to accept ‘survival jobs’ or to become dependent on NGO charities that have finite resources. Scholars describe ‘survival jobs’ as ‘insecure, poorly paid employment, often with poor working conditions, that migrants [take] to meet the costs of living in the immediate period after arrival in Australia’.<sup>124</sup> This lack of social protection means that asylum seekers and refugees on temporary visas may feel compelled to accept whatever job is on offer in order to meet their basic needs and subsistence. They may have a highly limited ability to negotiate the terms of their employment or to leave exploitative jobs.

Under current Commonwealth law and policy, refugees and asylum seekers on temporary visas have very limited access to government-funded social and financial support. In contrast to BVE holders, SHEV and TPV holders do have access to social security via Centrelink payments and support. However, SHEV holders may be reluctant to access this support as the period that they access such support will not count towards their required period of 42 months (or three and a half years) in order to transition to a non-humanitarian visa upon the expiry of the SHEV.<sup>125</sup> This means that SHEV holders are effectively punished with fewer migration options if they access Centrelink support for more than one and a half years of their five year visa. An outcome of this drastically limited form of social protection for both refugees and asylum seekers on temporary visas is that they will be more likely to accept ‘survival jobs’ in which they are more prone to experiences of workplace exploitation.

Asylum seekers on BVEs awaiting resolution of their asylum applications can access financial and material support via the Status Resolution Support Service (‘SRSS’). Alongside limited access to casework services and medical health counselling, the SRSS provides income support to asylum seekers living in the community and in detention along six different bands. As part of the government’s

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*Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press, 2010).

123 Note, most other temporary applicants for visas with work rights are required to demonstrate access to funds and/or an employment offer in Australia as part of the application process. See, eg, Jock Collins, Katherine Watson and Branka Krivokapic-Skoko, *From Boats to Businesses: The Remarkable Journey of Hazara Refugee Entrepreneurs in Adelaide* (Full Report, 2017) 8.

124 Alison Reid et al, ‘Taking Risks and Survival Jobs: Foreign-Born Workers and Work-Related Injuries in Australia’ (2014) 70 *Safety Science* 378, 383.

125 *Migration Regulations 1994* (Cth) reg 2.06AAB(2)(a)(i).

deterrence messaging, SRSS payments are indexed to a portion of the NewStart allowance received by citizens, resulting in asylum seekers on temporary visas only receiving 89% of the standard payment, or as little as \$35 per day.<sup>126</sup>

In 2018, major changes to the SRSS program introduced the idea of ‘job readiness’ for asylum seekers. Under this new criterion for accessing support, any person deemed ‘not vulnerable’ is considered to be able to support themselves and is no longer entitled to any form of SRSS payments, irrespective of whether they have current employment. This includes people who have been recently transferred from community detention (where asylum seekers have no work rights). The withdrawal of income support creates pressure on refugees and asylum seekers to obtain and maintain employment.<sup>127</sup> As such, there is no allowance made for the time taken to secure work, as social support is withdrawn almost immediately after work rights are granted.

These significant restrictions on SRSS eligibility criteria have equated to a sharp decline in the number of people receiving SRSS in recent years. As of 31 August 2020, there were only 4,057 individuals on SRSS payments,<sup>128</sup> a significant reduction from the 13,299 people receiving SRSS payments as of February 2018.<sup>129</sup> Moreover, once an asylum seeker receives a negative determination from the Immigration Assessment Authority, they are no longer entitled to SRSS payments, even if this decision is reversed after judicial review. The consequence of the restricted SRSS eligibility criteria is that now virtually all asylum seekers living in the community on BVEs more or less have work rights, except for a very narrow category of people assessed as ‘vulnerable’. Crucially, those with work rights have almost no ability to fall back on any kind of social safety net and income support if they cannot find work. This means BVE holders in particular are under extreme pressure to find work to survive, regardless of the conditions of work. For citizens and many residents in Australia, the availability of unemployment benefits significantly reduces the willingness of workers to accept exploitative, underpaid or unsafe jobs. This same safety net does not exist to discourage asylum seekers and refugees from acquiescing to work with extremely poor pay and/or conditions, since the alternative is destitution.

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126 Van Kooy and Ward (n 34) 5. See also Anthea Vogl, ‘Outsourcing Deterrence: The Humanitarian Border, Asylum Seekers and Non-Government Organizations in Australia’ in Mary Bosworth and Lucia Zedner (eds), *Privatising Border Control: Law at the Limits of the Sovereign State* (Oxford University Press, forthcoming).

127 See Martina Boese, John van Kooy and Dina Bowman, ‘“Now I’m Just like Anyone Else in the Community”: Work, Welfare, and Community Expectations of Refugees in Australia’ (2021) 34(4) *Journal of Refugee Studies* 4072.

128 Evidence to Senate Legal and Constitutional Affairs Legislation Committee on 2020–21 Budget Estimates, Parliament of Australia, Canberra, 19 October 2020, 125 (Justine Jones, Acting First Assistant Secretary, Immigration Integrity and Community Protection Division).

129 Van Kooy and Ward (n 34) 5.

## D The Permanent Threat of Visa Cancellation as Increasing Vulnerability to Exploitation

The next aspect of visas that can organise refugees and asylum seekers into exploitative work is the expanded grounds of visa cancellation that apply to asylum seekers on BVEs. While the threat of visa cancellation and restrictive immigration conditions are indicators of precarity for temporary migrant workers generally, these factors operate uniquely for asylum seekers on BVEs living and working in the community. Bridging visas are generally granted to asylum seekers awaiting the determination of their primary refugee claim. However, members of the ‘Legacy Caseload’ on TPVs or SHEVs may also need to access a bridging visa each time they re-apply for temporary protection.<sup>130</sup> As such, refugees have the capacity to move onto BVEs countless times as their circular protection status expires and is redetermined.<sup>131</sup> In March 2021, approximately 12,200 people were in the community awaiting determination of their primary claim, 9,989 of whom held a BVE and another 2,205 of whom were awaiting the grant of a further bridging visa, discussed further below.<sup>132</sup>

Once a BVE is granted, the risk of visa cancellation and detention operates on extremely broad grounds. Alongside the wide-ranging visa cancellation powers for non-citizens found not to meet the ‘character test’,<sup>133</sup> the *Migration Act* includes additional grounds for the cancellation of temporary visas.<sup>134</sup> For bridging visa holders, this includes cancellation if the Minister is satisfied that the holder has been charged with (but not convicted of) a criminal offence, or convicted of an offence.<sup>135</sup> The Asylum Seeker Code of Behaviour, introduced by the Coalition Government in 2013, is a further source of BVE cancellation powers and allows for cancellation without a criminal charge or conviction.<sup>136</sup> The Code applies exclusively to all so-called ‘illegal maritime arrivals’, who must sign it in order to access a bridging visa and be released from detention.<sup>137</sup>

If the Code’s provisions are deemed to be breached, an existing bridging visa may be cancelled, and an asylum seeker may be re-detained in onshore detention or an offshore detention facility, or have their income support reduced or cancelled. Under the Code’s terms, asylum seekers are not only forbidden from disobeying

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130 Although see above discussion in Part IV(A).

131 As we note above, departmental practice has been to ‘extend’ TPVs and SHEVs once they expire and while new determination processes are underway, however, this is again entirely at the discretion of the Minister. This practice may change at any point.

132 For aggregation of data, see ‘Statistics on People Seeking Asylum in the Community’, *Refugee Council of Australia* (Web Page, 12 January 2022) 6 <<https://www.refugeecouncil.org.au/asylum-community/6/>>.

133 *Migration Act 1958* (Cth) s 501.

134 *Ibid* s 116(g).

135 *Migration Regulations 1994* (Cth) reg 2.43. These powers came into effect in June 2013, justified on the grounds that ‘[t]he Government has become increasingly concerned about unauthorised arrivals who engage in criminal conduct after being released into the community on BVEs while they wait for their claims for protection to be assessed’: Explanatory Statement, *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* (Cth) 4.

136 Department of Immigration and Border Protection, ‘Code of Behaviour for Subclass 050 Bridging (General) Visa Holders’ (Supporting Information and Code, Form No 1444i, 2015).

137 *Ibid* 1.

any ‘Australian laws’ (to which they are of course already subject), they must also comply with additional behavioural standards – or ‘expectations’ as they are termed in the Code – that do not apply to the community at large.<sup>138</sup> The Code itself is silent on how this is to be administered, and Departmental officers adjudicate allegations. As part of the process, the visa holder is ‘provided with the opportunity to show that the breach did not in fact occur, or provide reasons why their visa should not be cancelled’.<sup>139</sup> The burden clearly rests with asylum seekers to prove their innocence to an unspecified standard of proof, and renders BVE holders subject to yet another site of executive discretion.

The operation of the Code increases the risk of workplace exploitation and harm for BVE holders in several ways. The Code itself governs the most minute aspects of asylum seekers’ day-to-day lives and creates a regime of surveillance and reporting, whereby ‘anyone’ may report an allegation of breach, including a current or former employer.<sup>140</sup> Employers are empowered to act as Departmental informants, intensifying the leverage unscrupulous employers possess over BVE holders and their conditions of work. BVE holders’ SRSS caseworkers can also act as informants under the Code; this clear absence of a firewall means an asylum seeker may perceive seeking even a caseworker’s advice or assistance as putting their visa and status at risk, and avoid revealing exploitative working conditions or seeking assistance from caseworkers.<sup>141</sup>

The Code covers actions that are ‘sub criminal’<sup>142</sup> and adjudication takes place at the discretion of Departmental officers without the most basic procedural safeguards, transparency or accountability. For asylum seekers engaged in work, one of the Code’s notable ‘expectations’ is the prohibition of ‘anti-social or disruptive activities’. The Code sets out that such activities may include: persistently irritating someone; ‘spreading rumours’; ‘spitting or swearing in public’; or ‘other actions that other people might find offensive’.<sup>143</sup> An employer may report an asylum seeker for something as minor as swearing, or indeed a mere suspicion of ‘criminal behaviour’ or other breaches of existing law. There is very limited publicly available data about the enforcement of the Code or detailed accounts of offences under it, beyond broad categories of breach. However, one of the few media reports addressing the operation of the Code detailed the experiences of Sarwan, a Sri Lankan asylum seeker who was re-detained due to a breach of the

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138 Ibid.

139 Anthea Vogl and Elyse Methven, ‘We Will Decide Who Comes to This Country, and How They Behave: A Critical Reading of the Asylum Seeker Code of Behaviour’ (2015) 40(3) *Alternative Law Journal* 175, 178 (‘We Will Decide Who Comes to This Country’).

140 Department of Immigration and Border Protection, ‘FOI Request – FA 15/10/00321’ (Documents Released under Freedom of Information, 18 February 2016) <[https://www.homeaffairs.gov.au/foi/files/2016/20160217\\_FA151000321\\_Document\\_Released.pdf](https://www.homeaffairs.gov.au/foi/files/2016/20160217_FA151000321_Document_Released.pdf)>.

141 Anthea Vogl and Elyse Methven, ‘Life in the Shadow Carceral State: Surveillance and Control of Refugees in Australia’ (2020) 9(4) *International Journal for Crime, Justice and Social Democracy* 61.

142 Leanne Weber and Rebecca Powell, ‘Crime, Pre-Crime and Sub-Crime: Deportation of “Risky Non-Citizens” as “Enemy Crimmigration”’ in John Pratt and Jordan Anderson (eds), *Criminal Justice, Risk and the Revolt Against Uncertainty* (Palgrave Macmillan, 2020) 245.

143 Department of Immigration and Border Protection, ‘Code of Behaviour for Subclass 050 Bridging (General) Visa Holders’ (Supporting Information and Code, Form No 1444i, 2015).

Code. Sarwan showed *The Guardian* his immigration file, which stated he was detained for ‘public threat to suicide; security issue and suicidal threats; working illegally as a farmer’.<sup>144</sup>

The Code’s prohibition on anti-social or disruptive activities also raises the distinct possibility that asylum seekers engaging in public protest, participating in a lawful strike or indeed simply raising complaints about unlawful workplace conditions may be in breach of its terms. The Government, in a Human Rights Compatibility Statement, has recognised that broad provisions could restrict asylum seekers’ rights to freedom of opinion and expression under article 19 of the *International Covenant on Civil and Political Rights*.<sup>145</sup> The Government asserted that the restrictions were nonetheless justified on the grounds of the ‘express limitation’ in article 19 for the purposes of ‘national security, public order, public safety, public morals and the protection of the human rights of others’.<sup>146</sup> The potential for punishment for an asylum seeker worker’s lawful protected industrial action deprives them of key protections available to all workers under labour law, which are designed to allow workers to assert their industrial power vis-à-vis employers during enterprise bargaining or to expose unsafe or unlawful workplace practices. Indeed, a number of asylum seekers on BVEs who participated in a particular media investigation into the harms produced by these visas have done so on condition of anonymity, specifically because they feared that ‘talking publicly will be viewed as a breach of the Code’.<sup>147</sup>

The Code may have a further chilling effect on asylum seekers registering complaints about exploitative work or seeking access to justice, in that they may perceive their own exploitation to amount to a breach of the Code. Research has indicated that even where temporary migrant workers are lawfully engaged in work, they may believe that their exploitative working conditions put the workers themselves at fault or amount to a worker’s breach of Australian law. A survey of international students conducted by Laurie Berg and Bassina Farbenblum in 2019 revealed that 81% held the misconception that a worker who agrees to be paid less than the minimum wage may have themselves broken the law.<sup>148</sup> It seems possible that asylum seekers may be reluctant to seek help or report workplace non-compliance because they believe they have been complicit in breaking the law, and therefore have breached the Code, raising the risk of visa cancellation. The Code reinforces to asylum seekers that ‘you must not disobey any Australian laws’ as its first expectation,<sup>149</sup> and in so doing, directly addresses them as potential criminals.<sup>150</sup>

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144 Doherty and Hekmat (n 45).

145 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

146 Explanatory Statement, Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 (Cth).

147 Doherty and Hekmat (n 45).

148 Farbenblum and Berg, *International Students and Wage Theft in Australia* (n 86) 43–4.

149 Department of Immigration and Border Protection, ‘Code of Behaviour for Subclass 050 Bridging (General) Visa Holders’ (Supporting Information and Code, Form No 1444i, 2015) (emphasis in original).

150 This othering and reinforcing of Australian ‘standards’ is also made explicit in the Code’s explanatory preface, which states: ‘By signing the code you agree to behave according to values that are important

## E Unauthorised Work as Exacerbating Vulnerability to Exploitation

Among all asylum seekers and refugees in Australia who arrived by boat, those who lack visa status or work rights may be the most at risk of workplace exploitation.<sup>151</sup> As mentioned above, as of June 2021, a reported 2,205 people formerly on BVEs were living without a lawful visa within the community, with no legal right to stay or work in Australia.<sup>152</sup> In May 2021, media reports confirmed that BVE holders who had lodged a valid application for a temporary refugee visa found themselves suddenly without status when the Department declined to renew their BVE through no fault of their own.<sup>153</sup> As mentioned above, refugees and asylum seekers may also fall out of status as a result of constantly changing Departmental policies regarding visa duration and application processes. For instance, holders of SHEVs and TPVs can become ‘unlawful non-citizens’ if they fail to reapply for a subsequent SHEV or TPV before their visa expires, leaving these people undocumented.<sup>154</sup>

As Caroline Fleay, Lisa Hartley and Mary Anne Kenny note, the labour conditions of workers without work rights are most likely to be ‘underpaid, dangerous and/or degrading’.<sup>155</sup> In a detailed empirical examination of the experience of 46 overstayers working in Australia, Marie Segrave reported that every participant had experienced non-payment or low-payment for work, as well as incidences of debt bondage and unauthorised deduction from wages, frequently without explanation.<sup>156</sup> The potential costs of complaining about abusive treatment – detection, detention and prejudice to future visa applications – are likely to be dramatically higher for this workforce than for all other workers, and have a powerful silencing effect.

The climate of insecurity in which these workers live is intensified, at least symbolically, by the fact that working without authorisation – whether as an overstayer, or while holding an otherwise valid visa – amounts to a criminal offence under section 235 of the *Migration Act*. The power of this prohibition is muted somewhat in light of the fact that there is no evidence in the last 15 years of investigations or prosecutions of this offence in Australia.<sup>157</sup> But its effect may be

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to the Australian society’ and that Australia is ‘a free and democratic country where men and women are equal’ and that ‘[p]eople are expected to show respect for one another and not to abuse or threaten others’. See Vogl and Methven, ‘We Will Decide Who Comes to This Country’ (n 139).

151 See generally Laurie Berg and Bassina Farbenblum, ‘Exploitation of Unauthorised Migrant Workers in Australia: Access to the Protection of Employment Law’ in Bernard Ryan (ed), *Migrant Labour and the Reshaping of Employment Law* (Hart Publishing, forthcoming) (‘Exploitation of Unauthorised Migrant Workers in Australia’).

152 See *Illegal Maritime Arrivals on Bridging E Visa* (n 51).

153 Oliver Gordon, ‘Asylum Seekers Denied Access to Bridging Visas Work Illegal Jobs to Survive as Advocates Call for Change’, *ABC News* (online, 4 May 2021) <<https://www.abc.net.au/news/2021-05-04/undocumented-citizens-asylum-seekers-denied-bridging-visas/100110144>>.

154 ‘Applying for a Subsequent TPV or SHEV’ (n 50).

155 Fleay, Hartley and Kenny (n 100) 476.

156 Marie Segrave, *Exploited and Illegal: The Impact of the Absence of Protections for Unlawful Migrant Workers in Australia* (Report, July 2017) 35.

157 Private communication between the Department of Immigration and Citizenship and Laurie Berg, 19 July 2013 (copy on file with Laurie Berg).

more diffuse in that a number of judicial officers have held that work done without authorisation by a valid visa renders the employment contract void for illegality because it contravenes these *Migration Act* offences.<sup>158</sup> This means not only that an unauthorised worker would not be entitled to remuneration for work performed under the contract, but also that they would be ineligible for statutory protections under the *Fair Work Act* or state-based workers compensation legislation, which extend only to employees defined as those who hold valid contracts of employment.<sup>159</sup> However, there is conflicting Australian authority on this point of law so as to leave the law unsettled.<sup>160</sup> The FWO takes the position that despite judicial decisions to the contrary, unauthorised workers *are* subject to employment protections under the *Fair Work Act*.<sup>161</sup> However, legal services providers often advise clients who have engaged in unauthorised work that it is likely a court may not enforce their workplace rights.<sup>162</sup>

In addition, while it appears that immigration authorities may be willing to overlook breaches of work-related visa conditions in exercising discretion not to cancel visas, the same discretion does not seem to be accorded to unauthorised workers who do not hold visas with work rights, including BVEs. An Assurance Protocol established between DHA and the FWO provides a degree of protection against removal to migrants who have engaged in unauthorised work, but only where they hold a valid visa with work rights, which of course excludes BVE holders whose visas lack work rights and anyone who has worked while having fallen out of status.<sup>163</sup> The FWO also has commitments within Taskforce Cadena, which was established by the Government in 2016 as a collaboration between the DHA, the Australian Border Force and the FWO. Taskforce deliverables include joint intelligence, information-sharing and investigative activities between the three agencies, ‘ensuring a coordinated, strategic approach is taken to tackling the issue of visa fraud, illegal work and foreign worker exploitation nationally’.<sup>164</sup> In light of this role and in the absence of a clear firewall that would prohibit the FWO from sharing any visa-related information with the DHA, it is unlikely that any asylum seeker who has engaged in unauthorised work would seek the assistance of FWO regarding exploitative working conditions.

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158 *WorkCover Corporation v Da Ping* (1994) 175 LSJS 469; *Australia Meat Holdings v Kazi* [2004] QCA 147; *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964.

159 *Fair Work Act 2009* (Cth) s 11.

160 *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312. See generally Berg (n 93).

161 Fair Work Ombudsman, Submission No DR368 to Productivity Commission, *Draft Report of the Productivity Commission Inquiry into the Workplace Relations Framework* (18 September 2015) 3.

162 Berg and Farbenblum, ‘Exploitation of Unauthorised Migrant Workers in Australia’ (n 151).

163 Fair Work Ombudsman, ‘Visa Holders & Migrants’, *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/find-help-for/visa-holders-migrants>>.

164 Department of Immigration and Border Protection, Australian Border Force and Fair Work Ombudsman, ‘Taskforce Cadena Joint Agency Agreement’ (Document Released under Freedom of Information, FOI Request – FOI-771, 2016) 3–4 <<https://www.fairwork.gov.au/ArticleDocuments/716/foi-771-documents-unions-nsw.pdf.aspx>>.

## F Institutional Exclusion as Compounding Risk of Exploitation

A final aspect of the temporary protection regime that organises refugees and asylum seekers into exploitative work relates to the punitive post-detention landscape in Australia. All of the temporary visas examined in this article, namely TPVs, SHEVs and BVEs, not only enforce a radical temporariness, as described in Part II. These visa categories systematically and brazenly single out refugees and asylum seekers who arrived by boat over a certain period and exclude them from specific forms of institutional and government support as a further means of punishment and deterrence. Indeed, Weber and Pickering have analysed the conditions faced by refugees and asylum seekers in the community as designed to be so unendurable they become means of facilitating ‘voluntary departure’ or ‘self-deportation’ from Australian territory.<sup>165</sup> BVEs in particular, as a consequence of the SRSS program described above, have been identified as an explicit form of deportation by destitution, and as Abdul Karim Hekmat has written, as weaponising food in order to pressure asylum seekers to leave.<sup>166</sup>

Governmental objectives of destitution, punishment and exclusion can be seen to shape refugees’ and asylum seekers’ experiences of workplace relations and labour exploitation. Although Australia has not explicitly articulated the creation of a hostile environment for refugees and asylum seekers as a policy aim, unlike the UK policy towards unauthorised migrants, the overall effects are similar.<sup>167</sup> The cumulative effect of Australia’s temporary protection regime is directly relevant to refugees’ and asylum seekers’ vulnerabilities as workers, including, critically, their capacity to access information about rights and entitlements and the likelihood of seeking assistance or redress in circumstances of labour exploitation. As mentioned above, it is well-established that temporary migrant workers are generally reluctant to take action to report or seek remedies for such workplace non-compliance. Bassina Farbenblum and Laurie Berg have suggested that part of this reluctance is due to an entirely rational calculus that the likelihood of receiving redress is outweighed by the risks and costs of taking action.<sup>168</sup> For asylum seekers and refugees, the ‘rational calculus’, which may already involve consideration of ineffective labour law enforcement mechanisms and limited available assistance, also extends to the relentless whole-of-government campaign to punish existing asylum seekers and refugees who arrived by boat.<sup>169</sup>

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165 Leanne Weber and Sharon Pickering, ‘Constructing Voluntarism: Technologies of “Intent Management” in Australian Border Controls’ in Helen Schwenken and Sabine Ruß-Sattar (eds), *New Border and Citizenship Politics* (Palgrave Macmillan, 2014) 17.

166 Abdul Karim Hekmat, ‘Asylum Seekers’ Benefits Cut by Home Affairs’, *The Saturday Paper* (online, 14 April 2018) <<https://www.thesaturdaypaper.com.au/news/politics/2018/04/14/asylum-seekers-benefits-cut-home-affairs/15236280006087>>.

167 See Frances Webber, ‘On the Creation of the UK’s “Hostile Environment”’ (2019) 60(4) *Race & Class* 76.

168 Farbenblum and Berg, *Wage Theft in Silence* (n 91).

169 See also Sara Dehm and Jordana Silverstein, ‘Film as an Anti-Asylum Technique: International Law, Borders and the Gendering of Refugee Subjectivities’ (2020) 29(3) *Griffith Law Review* 425. As well, as documented by the Anti-Slavery Australia study, asylum seekers may be reluctant to report exploitation to relevant authorities due to fear of jeopardising their protection visa applications: Cranston and Burn (n 67) 61. Ziersch et al’s qualitative study also found that refugees on temporary visas were too fearful about their visa status to pursue formal complaints: Ziersch et al (n 78) 539.



The COVID-19 pandemic has sharpened both the sense and reality of dispensability and exclusion for refugees on temporary visas. As a result of social distancing and lockdown measures during the pandemic, refugees and asylum seekers have been ‘particularly vulnerable’ to job loss and financial stress due to their overrepresentation in affected industries.<sup>170</sup> In July 2020, a Refugee Council of Australia study estimated that around 19,000 refugees and asylum seekers on temporary visas would lose their jobs as a result of the COVID-19 economic downturn, with unemployment increasing from around 19% to 42%. Moreover, 92% of those who remain employed were projected to earn less than minimum wage.<sup>171</sup> This research also found that 60% of people seeking emergency assistance during the pandemic had lost their jobs or lost hours such that they relied on foodbanks to eat, 88% had difficulty paying rent and 55% were at risk of homelessness.<sup>172</sup> Despite this, refugees on BVEs, TPVs and SHEVs were excluded, along with other migrants on temporary visas, from emergency Commonwealth support programs Job Keeper and Job Seeker, introduced in March 2020.<sup>173</sup> At that time, with the introduction of national lockdowns, temporary migrants were advised to ‘go home’ if they could no longer afford to live in Australia.<sup>174</sup> In reality, however, this crass advice cannot apply to refugees and asylum seekers, given the operation of non-refoulement. Instead, they have been abandoned by the Commonwealth government to face unrelenting hardship and financial pressure.<sup>175</sup> The government’s explicit anti-asylum messaging and institutional exclusions should be read together, as constituting a further barrier to this population accessing safe and secure work, *and* to feeling entitled to access assistance and redress in circumstances of exploitation.

## V CONCLUSION

In this article, we have demonstrated how, over the last decade, the exercise of both legislative and executive power has confined refugees and asylum seekers who arrived unauthorised by boat to a situation of radical temporariness. The immigration status of refugees and asylum seekers on TPVs, SHEVs and BVEs is

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170 Van Kooy and Bowman, ‘Surrounded with So Much Uncertainty’ (n 12).

171 Van Kooy, ‘COVID-19 and Humanitarian Migrants on Temporary Visas’ (n 12) 6.

172 ‘Homelessness and Hunger Among People Seeking Asylum During COVID-19’, *Refugee Council of Australia* (Web Page, 14 June 2021) <<https://www.refugeecouncil.org.au/homelessness-and-hunger-among-people-seeking-asylum-during-covid-19/>>.

173 On abandonment of temporary visa holders during COVID, see Bassina Farbenblum and Laurie Berg, “‘We Might Not Be Citizens but We Are Still People’: Australia’s Disregard for the Human Rights of International Students during COVID-19” (2020) 26(3) *Australian Journal of Human Rights* 486. See also Robyn Sampson and Michael Kunz, *COVID-19 Impacts Us All: Ensuring the Safety and Well-Being of People on Temporary Visas during COVID-19* (Report, 2020).

174 Bassina Farbenblum and Laurie Berg, “‘Garbage’ and ‘Cash Cows’: Temporary Migrants Describe Anguish of Exclusion and Racism during COVID-19”, *The Conversation* (online, 17 September 2020) <<https://theconversation.com/garbage-and-cash-cows-temporary-migrants-describe-anguish-of-exclusion-and-racism-during-covid-19-146098>>.

175 Van Kooy and Bowman, ‘Surrounded with So Much Uncertainty’ (n 12) 699.

marked by profound uncertainty in relation to visa status, renewal and cancellation; unfettered and overlapping Ministerial discretions; and exercises of power that are punitive by design. These include a near complete withdrawal of government and social safety nets and protections. Further, refugees and asylum seekers, by virtue of their very ‘refugeeness’, cannot escape these conditions of temporariness – and potential workplace exploitation – by returning to their country of origin or ordinary residence.

Yet, as workers, this group and their working conditions have been overlooked, despite the fact that asylum seekers and refugees have been working in the Australian community for a protracted period. Indeed, with no prospect of a move to permanent status under the current Government,<sup>176</sup> refugees and asylum seekers who arrived by boat may remain temporary workers in Australia for the foreseeable future.

We have shown how the governmental exercises and abuses of power in the public realm have simultaneously created the possibility of abuse of power by employers. While there is almost no empirical data or scholarship addressing temporary refugees’ and asylum seekers’ experiences of work, our review of existing media, civil society and public sector reports and government inquiries provides clear evidence of the workplace exploitation experienced by this group. Further, the regulatory settings we describe enable an abuse of power beyond the traditional power relations in the employment relationship. Schematising the immigration status of refugees and asylum seekers in light of their status *as* workers reveals there are at least six factors that structure refugees’ and asylum seekers’ experiences as temporary workers and intensify the risk of workplace harms. These factors are intertwined and overlapping, and are ultimately part of a regulatory framework explicitly designed to deter refugees and asylum seekers who have arrived by boat. We have demonstrated that temporary refugees and asylum seekers are: more likely to accept dangerous or exploitative work due to uncertain visa status and the absence of other options; denied key social protections and government safety nets; unlikely to seek or access redress for workplace harms; and may be ‘stuck’ in conditions of exploitation by virtue of the operation of non-refoulement.

It is well-documented that temporary protection is an inferior form of asylum. In addition to the failure to ensure enduring protection, denying access to permanent status and resettlement in the host country also leads to serious psychosocial challenges for refugees. This article has drawn attention to additional implications of these policies for refugees as workers in Australia and the creation of an exploitable workforce. While we have examined the regulatory drivers of workplace exploitation for refugees and asylum seekers, key questions remain about how these policies affect refugees’ experiences of work, and indeed, how they have reshaped parts of the Australian labour market. Issues such as worker profile, industries of work, and specific experiences of work and workplace exploitation

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176 We note the Australian Labor Party’s election commitment to ending TPVs and instituting a system of permanent protection for all asylum seekers, regardless of mode of arrival as part of its national platform document: Australian Labor Party, *ALP National Platform* (Report, 2021) 123.

among this group constitute a clear future research agenda. These inquiries are even more pressing in light of the Australian governments' policy responses to COVID-19, which have afforded limited protections for temporary and casualised labour, and for refugee and asylum seeker workers in particular.