

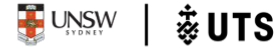
SUBMISSION

*Senate Standing Committees on Legal and
Constitutional Affairs*

*Migration Amendment (Strengthening
Employer Compliance) Bill 2023*

July 2023





Acknowledgement of country

We acknowledge the Traditional Owners and Custodians of the lands on which we work, including the Wurundjeri people of the Kulin Nation and the Gadigal and Bedegal people of the Eora Nation, and acknowledge the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We acknowledge that sovereignty was never ceded, and we support the self-determination of Aboriginal and Torres Strait Islander peoples.

About Migrant Justice Institute

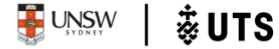
The Migrant Justice Institute is a nonpartisan law and policy organisation that seeks to achieve justice for migrant workers in Australia and globally. An independent non-profit founded in 2021, we are Australia's first (and only) national research and policy organisation dedicated to addressing migrant worker exploitation. We are dedicated to achieving fair treatment and justice for migrant workers globally, and in Australia.

Our rigorous research uncovers the reality of migrant worker exploitation and the operation of laws and systems in practice. We rely on strong relationships with migrant communities, trade unions and legal centres to develop innovative reforms that are grounded in migrants' lived experiences.

We educate government and business on the systemic issues that create a breeding ground for abuse, and we engage collaboratively to implement common-sense reforms. Our work has shaped practices of governments, businesses and international organisations in Asia, the USA and the Middle East, and has driven Australian government policy reforms on wage theft, access to justice, and pandemic-related support for migrant workers.

Submission authors

This submission was authored by Ass. Prof. Laurie Berg (Founding Co-Executive Director, Migrant Justice Institute and Associate Professor on the Faculty of Law, University of Technology Sydney), Ass. Prof. Bassina Farbenblum (Founding Co-Executive Director, Migrant Justice Institute and Associate Professor on the UNSW Faculty of Law & Justice) and Catherine Hemingway (Legal Director, Migrant Justice Institute).



Overview

We welcome the opportunity to make a submission regarding the Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) (**the Bill**).

This is the second of two submissions we make to this Inquiry. Our first, a joint submission with Human Rights Law Centre and endorsed by 13 other organisations, focuses on the Bill's proposed amendments to the visa cancellation power in section 116 of the *Migration Act 1958* (Cth) (**Migration Act**).

This Submission makes recommendations in relation to other amendments proposed by the Bill. We do not oppose these measures, but have some concerns in relation to some of the provisions, as set out **below**.

According to its Explanatory Memorandum, the purpose of the Bill is to 'strengthen the legislative framework in the Migration Act to improve employer compliance and protect temporary migrant workers from exploitation' and to 'ensure employers do not misuse migration rules to exploit temporary migrant workers.'¹ This is an important objective, and we welcome the Government's commitment to address the exploitation of migrant workers in Australia.

As set out in our joint submission to this Inquiry with Human Rights Law Centre, we strongly support the Government's commitment to introduce visa protections for temporary visa holders who take action to address exploitation, and a firewall between the Fair Work Ombudsman (**FWO**) and the Department of Home Affairs (**DHA**). Our joint submission sets out how the Bill's proposed amendments to section 116 of the *Migration Act* fall short of providing guaranteed protection against visa cancellation because they remain speculative and discretionary, and recommends our preferred, alternate model for providing reliable automatic protections that would give migrant workers the assurance they need to address exploitation.

Without these guaranteed protections against visa cancellation for migrant workers who address exploitation, the compliance measures in this Bill will not achieve the stated objective of protecting and empowering exploited migrant workers. Enforcement of new offences and other measures will not be possible because migrant workers will not report employer misconduct for fear of jeopardising their visa or future stay in Australia.

¹ Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 2.

Summary of Recommendations

Part 1: New employer sanctions

- **Recommendation 1. Ensure breaches of the Fair Work Act are investigated and swiftly remedied:** In circumstances where proposed section 245AAA, 245AAB and 245AAC applies and there is also underpayment or a suspected breach of the *Fair Work Act* regarding one or more workers, the Department of Home Affairs should refer the matter to the Fair Work Ombudsman for investigation. The employer should be required to remedy the breach within 30 days, or incur further civil penalties. If the employer is unable to make appropriate payments, these should be taken out of any civil penalties paid by the employer.
- **Recommendation 2. Utilise penalties to fund legal services:** Any civil penalties paid in association with offences under Division 12, Subdivision C of the *Migration Act*, should be directed to supporting legal services for migrant workers.
- **Recommendation 3. Introduce a broad definition of ‘arrangement in relation to work’:** To prohibit egregious conduct outside of ‘traditional’ understandings of work and work arrangements, such as requiring workers to accept sexual advances or unsafe working conditions, under proposed section 245AAC, insert a broad definition of the phrase ‘arrangement in relation to work’. Alternatively, the Explanatory Memorandum should clarify that ‘arrangement in relation to work’ should be interpreted broadly.

Part 2: Prohibited employers

- **Recommendation 4. Need for further consultation with affected workers:** Before introducing measures which restrict temporary visa holders’ access to employment opportunities, the Government should consult further with affected populations of migrant workers and other key stakeholders to identify and assess potential unintended consequences, and assess whether on balance a Prohibited Employers List is in the best interests of vulnerable migrant workers.
- **Recommendation 5. Accessories should not be excluded:** If, following consultation, the Government decides to proceed with a Prohibited Employers List because potential unintended consequences for migrant workers of a Prohibited Employers List are fully understood and can be adequately addressed – accessories to relevant contraventions should also be considered for Prohibited Employer declarations.

PART 1 – New employer sanctions

Proposed sections 245AAA, 245AAB and 245AAC

Proposed section 245AAA criminalises coercing or exerting undue influence or pressure on a non-citizen to breach their work-related visa conditions.

Proposed section 245AAB criminalises coercing or exerting undue influence or pressure on a non-citizen without a visa to accept an arrangement in relation to work, where the worker believes that if they don't accept the arrangement, there will be an adverse effect on their continued presence in Australia.

Proposed section 245AAC criminalises coercing or exerting undue influence or pressure on a temporary visa holder to accept an arrangement in relation to work, such that the worker believes that if they don't accept the arrangement, there will be an adverse effect on their status as a lawful non-citizen; or they will be unable to provide work-related information or documents required in relation to their visa or an application for a visa.

The proposed offences would criminalise, for example, the conduct of an employer who coerces an international student to work in excess of the cap of 48 hours per fortnight, in breach of work-related Condition 8105 (under section 245AAA); an employer's threat to withhold from a Working Holiday Maker evidence of work completed in order to satisfy the 88 day/6 month requirement for a second or third Working Holiday visa, unless the worker accepts certain working conditions (under section 245AAC, subparagraph (1)(d)(ii)); and the conduct of an employer who threatens to do in a worker who has breached their visa (under section 245AAC, subparagraph (1)(d)(i)) or worked without a visa (under section 245AAB), unless the worker accepts certain working conditions.

We support the introduction of sections 245AAA, 245AAB and 245AAC. However, there are three areas that require further action in order for the offences to have an impact.

First, these proposed offences are unlikely to increase detection of exploitation if migrant workers remain unwilling to report this conduct for fear of jeopardising their current or future visa. The threat of criminalisation of employers who take advantage of migrant workers' fears of immigration consequences will, by itself, do nothing to assuage the visa-related fears that prevent these migrant workers from reporting exploitative conduct by those employers.

For the offence to have any impact, victims of coercion need protection from visa cancellation. As set out in our joint submission with Human Rights Law Centre to this Inquiry, although this Bill contains amendments that are intended to form a basis for protections from visa cancellation for exploited migrant workers, an alternate model is needed to provide genuine and guaranteed protections from visa cancellation for migrant workers.

Second, victims have little incentive to report exploitation and coercion if they are unable to access remediation for the underlying exploitation – for example, recovery of unpaid wages. To ensure migrant workers can access remedies for workplace breaches, it is critical that migrant workers have access to free legal services and that the FWO takes action to investigate and address breaches of the *Fair Work Act 2009* (Cth) (**FW Act**). In circumstances where proposed

section 245AAA, 245AAB or 245AAC applies and there is also underpayment or a suspected breach of the *FW Act* regarding one or more workers, DHA should refer the matter to the FWO for investigation. The employer should be required to remedy the breach within 30 days, or incur further civil penalties. If the employer is unable to make appropriate payments, these should be taken out of any civil penalties paid by the employer. In addition, any civil penalties paid in association with offences under Division 12, Subdivision C of the *Migration Act*, should be directed to supporting legal services for migrant workers which are underfunded and unable to support the number of migrant workers who need them in order to remedy exploitation.

Third, we note that the meaning of the phrase ‘arrangement in relation to work’ (which is used in each of proposed sections 245AAA, 245AAB and 245AAC) is not defined in either the Bill or the Explanatory Memorandum. Traditional understandings of arrangement in relation to work may be physically limited to the workplace, or terms and conditions of employment. Therefore, there is a risk that without clarification, this provision will fail to capture a range of exploitative arrangements that the Bill clearly seeks to address.

Migrant workers are sometimes required to endure egregious treatment by their employers outside of ‘traditional’ understandings of work and work arrangements. This may include the need to accept sexual advances, unsafe accommodation, or do tasks in a personal capacity for their employer (for example, helping their employer with personal tasks on a weekend), in return for work or documents to meet a visa requirement.

We propose that a broad definition be inserted into the *Migration Act* to ensure that these offences clearly prohibit employer coercion of a visa holder to ‘accept’ sexual harassment, other sexual demands, poor housing conditions or other demands that are not ordinarily considered to be working conditions, for example, an employer’s requirement that the worker be housed in the employer’s private dwelling. We recommend insertion of a legislative note under section 245AAC as follows:

For the purpose of sections 245AAA, 245AAB and 245AAC, ‘arrangement in relation to work’ means any arrangement entered into by the visa holder in response to an implicit or explicit request by the employer/ principal. This includes, but is not limited to, an arrangement in relation to working conditions, accommodation, or physical conduct.

Alternatively, it is proposed that the Explanatory Memorandum clarifies that ‘arrangement in relation to work’ should be interpreted broadly.

Recommendation 1. Ensure breaches of the Fair Work Act are investigated and swiftly remedied: In circumstances where proposed section 245AAA, 245AAB and 245AAC applies and there is also underpayment or a suspected breach of the *Fair Work Act* regarding one or more workers, the Department of Home Affairs should refer the matter to the Fair Work Ombudsman for investigation. The employer should be required to remedy the breach within 30 days, or incur further civil penalties. If the employer is unable to make appropriate payments, these should be taken out of any civil penalties paid by the employer.

Recommendation 2. Utilise penalties to fund legal services: Any civil penalties paid in association with offences under Division 12, Subdivision C of the *Migration Act*, should be directed to supporting legal services for migrant workers.

Recommendation 3. Introduce a broad definition of ‘arrangement in relation to work’: To prohibit egregious conduct outside of ‘traditional’ understandings of work and work arrangements, such as requiring workers to accept sexual advances or unsafe working conditions, under proposed section 245AAC, insert a broad definition of the phrase ‘arrangement in relation to work’. Alternatively, the Explanatory Memorandum should clarify that ‘arrangement in relation to work’ should be interpreted broadly.

PART 2 – Prohibited employers

Overview

Proposed section 245AYL introduces a criminal offence and civil penalty where a ‘Prohibited Employer’ allows a temporary visa holder or non-citizen who does not hold a visa to begin work. Pursuant to section 245AYA, the Minister may declare an employer to be a Prohibited Employer where the employer is subject to a ‘migrant worker sanction’ (and no more than 5 years have passed since the person became subject to that sanction).

We support the policy intent behind these measures. There needs to be greater accountability and stronger mechanisms to address ongoing exploitation by employers who have already demonstrated non-compliance with the *FW Act*, the *Migration Act* or another ‘relevant workplace law’ as defined by the Bill.² We see the value of the Prohibited Employer scheme in driving outcomes for migrant workers in negotiations with employers to pay unpaid entitlements, and driving employers to comply with FWO Compliance Notices to avoid being subject to a migrant worker sanction, and being declared a Prohibited Employer. For these reasons, we do not oppose inclusion of these provisions.

However, we are concerned about possible unintended consequences of the Prohibited Employer scheme which may be harmful to migrant workers. We recommend further consultation with migrant workers before adopting this scheme, to consider and address the risks of adverse consequences to migrant workers. If, after this consultation, the Government proceeds with introduction of the Prohibited Employer scheme, we recommend a number of improvements.

Concerns about unintended consequences

This scheme prohibits employers who have been found to contravene various provisions of the *FW Act*, the *Migration Act* or another ‘relevant workplace law’ from hiring temporary visa holders for a period of time.

We are concerned that this may result in discriminatory hiring practices where a business that is designated a Prohibited Employer continues to operate but migrant workers no longer have access to jobs in that company. This could include temporary visa holders becoming ineligible for jobs in parts of a larger business that were not involved in the original contraventions. Another unintended consequence of this scheme could be businesses declining to hire temporary visa holders for lower-level jobs for fear that a finding of labour non-compliance in relation to these employees may jeopardise the company’s ability to hire sponsored temporary visa holders in higher level jobs in the future. Although the business could potentially avoid being declared a Prohibited Employer if the contravention is rectified (for example, by complying with a relevant Compliance Notice), some businesses may decide that they prefer to avoid these new risks associated with hiring visa holders altogether, rather than jeopardise access to temporary visa holder workers at higher levels.

We are concerned that a restriction on hiring which only affects temporary visa holders may exacerbate employers’ exclusion of temporary visa holders from employment opportunities. It is

² Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) proposed s 245APA(2).

widely known that many temporary visa holders, especially international students, already find it difficult to access the labour market and gain the work experience they need. Many may prefer to have access to employment opportunities with increased scrutiny and opportunities to report and remedy noncompliance. We also know that when prohibitions on migrant workers working for certain employers have been implemented abroad (such as banning women migrant workers from migrating to the Gulf States for work due to widespread exploitation of domestic workers), the affected migrant workers have strongly protested the paternalistic disempowerment created by these bans which remove agency in a way that is not desired by these workers.³ In addition, given the low likelihood of detection of contravention of section 245AYL, some Prohibited Employers will likely continue to employ migrant workers. It is also likely that, without robust visa protections for migrant workers who report exploitation, many visa holders may mistakenly believe that they have broken the law by agreeing to be employed by a Prohibited Employer. They may then feel compelled to assist the employer to conceal their employment from DHA because they perceive a risk to their own visa. This may create even greater barriers to detecting exploitation of migrant workers.

We therefore recommend that the Government undertake further consultation with affected migrant communities and other stakeholders before this measure is implemented. If, after this consultation, the Government reaches the view that these potential unintended consequences are fully understood and can be adequately addressed, we suggest a number of improvements. We also propose alternative or additional measures which are targeted at the Government's policy objective of ensuring that non-compliant employers do not further exploit migrant workers.

Inclusion of accessories in the Prohibited Employer provisions

Accessories are expressly excluded from being named as Prohibited Employers.⁴ If, after this consultation, the Government reaches the view that these potential unintended consequences are fully understood and can be adequately addressed, we recommend that this exclusion be deleted.

The Explanatory Memorandum refers to ensuring that the provisions target a person who 'was not an accessory, rather was the main contravener'.⁵ However, under section 550 of the *FW Act*, a person who is found to be an accessory is found to have contravened the relevant provision – effectively deeming them to also be a contravener. The threshold for finding an entity to be an accessory under section 550 of the *FW Act* is extremely high – often requiring that the court find that the accessory had 'actual knowledge' of the contravention. In other words, an accessory under section 550 of the *FW Act* could be considered 'the', or 'a', main contravener. For example, if a worker is employed by a small business that is subsequently deregistered, the sole director may be found to be an accessory where they were instrumental in orchestrating the exploitation. In a situation like this, although the (now deregistered) employer could be named a Prohibited Employer, the director could not be named. If the director set up another company, they could continue to engage non-citizens. Therefore, the current Bill is unlikely to address or

³ See, for example, International Labour Organization, [A Comprehensive Analysis of Policies and Frameworks Governing Foreign Employment for Nepali Women Migrant Workers and Migrant Domestic Workers](#) (Report, May 2021).

⁴ Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) proposed s 245AYH(1)(b), (2)(b), (3)(a)(ii), 3(b)(ii) (4)(b), (5)(b) and (6)(b).

⁵ Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 37.

deter phoenixing situations unless accessories are included. We note that the Minister is not required to deem someone to be a Prohibited Employer, and it is open to them to exercise their discretion in instances where they consider it inappropriate to name an accessory as a Prohibited Employer.

For these reasons, if, after consultation, the Government decides to proceed with this scheme, we recommend removal of the exclusion of accessories.

Recommendation 4. Need for further consultation with affected workers: Before introducing measures which restrict temporary visa holders' access to employment opportunities, the Government should consult further with affected populations of migrant workers and other key stakeholders to identify and assess potential unintended consequences, and assess whether on balance a Prohibited Employers List is in the best interests of vulnerable migrant workers.

Recommendation 5. Accessories should not be excluded: If, following consultation, the Government decides to proceed with a Prohibited Employers List because potential unintended consequences for migrant workers of a Prohibited Employers List are fully understood and can be adequately addressed – accessories to relevant contraventions should also be considered for Prohibited Employer declarations.

PART 3 – Other amendments

Repeal of section 235 of the *Migration Act* and introduction of proposed section 245APA

We welcome the repeal of section 235 of the *Migration Act* which criminalises the undertaking of work by an unlawful non-citizen, or by a non-citizen in contravention of visa conditions.

We commend the introduction of proposed section 245APA into the *Migration Act* which implements Recommendation 3 of the Migrant Workers' Taskforce (MWT) Report, by ensuring that workplace laws protect all workers, regardless of immigration status. We welcome the introduction of this much-needed and overdue clarification, closing the loophole through which employers can freely exploit and underpay undocumented workers and evade paying compensation for workplace injuries in relation to those workers.



Conclusion

Thank you for the opportunity to comment on this Bill.

Our evidence-based amendments and additions will strengthen the protective scope of the Bill for migrant workers.

We would welcome the opportunity to discuss this submission and our further recommendations with the Committee and look forward to working with the Government to develop further reforms.

Sincerely,

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