Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Migration Amendment (Protecting Migrant Workers) Bill 2021

January 2022

Queensland Unions

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I - INTRODUCTION

1. The Queensland Council of Unions (**the QCU**) is the peak trade union organisation in Queensland with 26 affiliated unions representing the interests of more than 350,000 Queensland workers. Since its foundation in 1885, the QCU has strived to achieve industrial, social and political justice for workers in Queensland, including many thousands of migrant workers in the State. Accordingly, the QCU welcomes the opportunity to make this submission to the Senate Standing Committee on Legal and Constitutional Affairs on the *Migration Amendment (Protecting Migrant Workers) Bill 2021* (**the Bill**).
2. Few areas of public policy been as controversial as Australia's system of temporary labour migration, including the former Temporary Work (Skilled) visa (subclass 457), the current Temporary Skill Shortage visa (subclass 482), the Working Holiday visa (subclass 417), and the Student visa (subclass 500). Each of these subclasses of visa has been controversial in different ways, but mostly due to their widespread misuse (in practice straying significantly from their original purposes), the removal of appropriate integrity measures, and lax enforcement activity, leading to serious exploitation of migrant workers, as well as the displacement of citizens and permanent residents in terms of training or employment opportunities and earning potential.
3. Queensland Unions have first-hand experience with what is often severe exploitation of temporary migrant workers. These workers are often underpaid, engaged under bogus contracting, partnership or bailment arrangements, coerced into performing unsafe and excessively arduous work, forced to perform work that is not within their skillset or that is contrary to their visa conditions, and forced to pay unlawful or unfair salary deductions, including excessive charges for training or accommodation. Where such workers are "bonded" to their employer (as is the case for the subclass 482 visa), or where workers may be housed or have limited English (as can often be the case for subclass 417 visa-holders), exploitation can be particularly severe and include physical and racial abuse and threats to send the workers and their families back to their country of origin. This has been exacerbated by the ongoing deregulation of industrial relations,

particularly since the *Workplace Relations Amendment Act 2005* (WorkChoices), and with it the removal of worker protections hitherto afforded to all workers within the Commonwealth jurisdiction. Australia's system of temporary labour migration threatens to damage Australia's standing as an attractive destination for appropriately skilled and qualified permanent migrants.

4. Free market economists such as Milton Friedman have described the US H-1B visa (equivalent to the former subclass 457 or current subclass 482 visa) as being "a benefit to […] employers enabling them to get workers at a lower wage, and to that extent, it is a subsidy."[1] Indeed, these subclasses of visa often have the effect of providing subsidy to some of Australia's most unscrupulous employers, and in so doing, create competitive disadvantage for employers that invest in training and employment conditions that meet community expectations.

5. The case for the reform of Australia's temporary migration system is obvious. And Queensland Unions stand ready to support measures that provide genuine protections to workers, whether citizens or visa-holders. Regrettably, however, the measures provided in this Bill do not address the fundamental problems with the temporary labour migration system in Australia and neither do they recognise the inadequacy of protections for all workers under Commonwealth industrial relations legislation. Indeed, many of the industrial relations policy settings of the Morrison Government are markedly anti-worker and, for that matter, may tend to exacerbate migrant worker exploitation.

6. Further, whilst the Migrant Workers' Taskforce was established on 4 October 2016 and its report was published in March 2019, we do not see why this Bill was only introduced in November 2021 – some five years after the establishment of the Taskforce and at a late stage in the term of this parliament. The delay in producing this Bill appears to put into question the Morrison Government's seriousness in addressing problems with Australia's temporary migration system. The question of the Government's seriousness in tackling migrant worker exploitation is relevant

[1] In Kinnaird, B (2006), 'Current Issues in the Skilled Temporary Subclass 457 Visa', People and Place, 14 (2), 49-65, at p. 53.

to a discussion of this Bill particularly as its provisions dealing with prohibiting some employers from accessing temporary migrant labour *depend on ministerial action*.

II – PROVISIONS OF THE BILL

7. The QCU notes that the Bill amends the *Migration Act 1958* to:
    a. introduce new offences and civil penalty provisions against coercion or exertion of undue influence or undue pressure on non-citizens to accept or agree to arrangements in relation to work;
    b. establish a power for the Minister to prohibit non-compliant employers from allowing additional non-citizens to begin work for that employer for a specified period;
    c. introduce positive obligations for employers and other parties in the employment chain to use the Visa Entitlement Verification Online (VEVO) system to verify prospective non-citizens visa status and any conditions, prior to employing or referring non-citizens for work;
    d. align and increase penalties for work-related offences and contraventions of work-related civil penalty provisions under the Migration Act; and
    e. provide the Australian Border Force (ABF) with new regulatory powers (compliance notices and enforceable undertakings) for enforcement activity in relation to the work-related offences and civil penalty provisions under the Migration Act.
8. The main aspects of the Bill are discussed below.

New employer sanctions - Coercing etc. a non-citizen to breach work-related conditions

9. Clause 4 of the Bill proposes a new section 245AAA to create a new prohibition of coercing or exerting undue influence or undue pressure on a non-citizen to accept or agree to an arrangement in relation to work where the work is carried out, or to be carried out, by the non-citizen in Australia and, as a result of the arrangement, the non-citizen breaches a work-related visa

condition or there are reasonable grounds to believe that if the non-citizen were to accept or agree to the arrangement, the non-citizen would breach a work-related visa condition: subsection 245AAA(1).

10. The proposed offence would carry maximum penalties of imprisonment for 2 years or 360 penalty units, or both, for employers. For its part, proposed subsection 245AAA(3) requires a fault element of knowledge or recklessness in order to establish the offence.
11. For its part, proposed subsection 245AAA(4) provides that a person is liable to a civil penalty if the person contravenes subsection 245AAA(1), without the requirement to prove the person's state of mind. The proposed civil penalty is 240 penalty units.
12. Whilst the creation of a new offence and civil penalties for coercion of a non-citizen to breach work-related visa conditions might be a welcome addition to the suite of offences under the Migration Act, it is difficult to see how the creation of such an offence would address the widespread misuse of the temporary migration system and the exploitative practices of some employers.
13. We note that the Migration Act already provides for offences and civil penalties to deal with situations where employers simply allow non-citizens to work, or refer a non-citizen for work, in breach of the non-citizen's visa. Ordinarily, "allowing" a non-citizen to perform work in contravention of a work-related visa condition will entail some level of coercion or undue pressure on the part of the employer. Yet existing offences and civil penalty provisions have been ineffective in stamping out migrant worker exploitation due to a lack of proper compliance activity and enforcement.
14. In view of supporting compliance activity, any new offences, along with existing offences, will need to be supported by robust measures that enable migrant workers to come forward with complaints, including amnesty from visa cancellation where there are findings of non-compliance with visa conditions on the part of the visa-holder.

New employer sanctions - Coercing etc. a non-citizen by using migration rules

15. A proposed subsection 245AAB under clause 4 of the Bill would make it a contravention of the Migration Act to coerce or use undue influence or pressure on a non-citizen to accept or agree to an arrangement in relation to work the non-citizen believes, or would reasonably believe, that he or she must accept the arrangement to satisfy a work-related visa requirement or to avoid an adverse effect on the non-citizen's immigration status.
16. The proposed offence would carry a maximum penalty of 2 years imprisonment or 360 penalty units or both.
17. But again, without robust measures to protect migrant workers who make complaints about this form of unscrupulous conduct of the part of their employer, the QCU does not foresee that these offences or civil penalty provisions would go very far in stamping out migrant labour exploitation – particularly where migrant workers are "bonded" to their employer as sponsors under subclass 457 or 482 visas, an arrangement which lends to the kind of coercive conduct the offence and civil penalty provisions are directed at addressing.

Prohibited employers

18. Under clause 9 of the Bill, a new Subdivision E – Prohibited employers is proposed, by which the Minister can declare that an employer be prohibited from allowing additional non-citizens to begin work, where the employer:
    a. is or was an approved work sponsor subject to a bar imposed by the Minister under paragraph 140M(1)(c) or (d) of the Migration Act;
    b. has been convicted of a work-related offence;
    c. is the subject of a civil penalty order in relation to a contravention of a work-related provision; or
    d. is or was the subject of an order for certain contraventions of civil remedy provisions under the *Fair Work Act 2009* in relation to the employment of a non-citizen.

19. Where a prohibited employer either allows a non-citizen to begin work or has a material role in a decision made by a body corporate to allow a non-citizen to begin work, and the non-citizen either does not have a visa or holds a visa other than a permanent visa, the employer may be liable to a civil penalty of up to 240 penalty units.
20. Whilst the QCU supports prohibiting employers, who are found to have contravened various laws, from engaging additional migrant workers, other matters than those contained in proposed subsection 245AYA(2) should be capable of grounding a declaration or order to prohibit an employer from employing additional migrant workers, including in relation to unscrupulous conduct such as offences under work health and safety laws or laws that pertain to fraudulent phoenix activity.
21. Further, we note that the effectiveness or otherwise of these provisions depends heavily on the initiative of the Minister to take active steps in identifying areas of non-compliance and then making necessary declarations.
22. Rather, the QCU submits that the various courts and tribunals that make findings of non-compliance on the part of an employer should also be able to make prohibition orders against employers to prevent them from engaging additional visa-holders in addition to any remedies that are available to affected migrant workers.

QCU

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