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Legal and Constitutional Affairs Legislation Committee

By email: legcon.sen@aph.gov.au

Migration Amendment (Strengthening Employer Compliance) Bill 2023

The Housing Industry Association (HIA) refers to the invitation dated 26 July 2023 to make submissions in response to the Inquiry into the *Migration Amendment (Strengthening Employer Compliance) Bill 2023* (Bill).

HIA provides this correspondence in response to the Bill.

General Comments

HIA represents a membership of 60,000 throughout Australia. HIA members work and operate all across aspects of the residential building industry.

The residential building industry includes detached home building, low, medium and high-density multi-unit housing developments, home repairs, renovations and additions, along with the manufacturers and suppliers of building products and related building professionals. The industry has important linkages with other sectors, such as manufacturing, finance, real estate and retailing, meaning its impacts on the economy go well beyond the direct contribution of construction activities.

For example, it is estimated that the residential building industry employs over 1 million people representing tens of thousands of small businesses and over 200,000 subcontractors reliant on the industry for their livelihood.

The residential building industry contributes over $100 billion per annum to the economy and accounts for 6.9 per cent of Gross Domestic Product.

Australia is an attractive destination although we compete other nations to attract the most talented migrants. In addition, retention of the skilled and productive workers who have chosen to come to Australia should be a priority.

Skilled migration is a key plank of ensuring that the residential building industry operates efficiently and effectively. Delays on construction projects arising from shortages of skilled trades has a significant impact on the productivity of the residential building industry.

Australia's migration program, targeting skilled and productive young migrants has consistently made a positive contribution to Australia's productivity and made significant inroads in mitigating the impact of the ageing population. This must continue and HIA sees that measures that penalise those that flout the law at the expense of migrant workers are appropriate.

Further, HIA does not support employers or businesses which deliberately and knowingly unduly influence, pressure, or coerce any workers or deliberately underpay workers. The Bill's intent is appropriate, for example, HIA agrees with the following sentiment expressed in the Explanatory Memorandum (EM):

> "…*this Bill send a strong message to unscrupulous employers and labour hire intermediaries, and to the Australian community in general, that the exploitation of temporary migrant workers is not acceptable...It is unfair and creates a competitive disadvantage for those employers who seek to do the right thing… It also damages Australia's reputation as a preferred destination for prospective migrant workers*."

However, there are several aspects of the Bill that HIA has concerns with including:

- Proposals with respect to the penalty framework, including:
  - The exclusion of employers from employing workers.
  - The failure to take a risk-based approach to penalties.
- Overlapping and ongoing government reforms including changes under the *Fair Work Act 2009* (FW Act)

These are elaborated on below.

Response to Bill

The penalty framework

The Bill has been introduced to improve employer compliance using both deterrence and remediation and to protect workers from serious, deliberate, or repeated non-compliance with certain provisions of FW Act. HIA is supportive of this message, however, has concerns that the introduction of the mechanism to exclude employers from employing workers is an additional punishment that is not necessary, noting the significant penalties under the *Protecting Vulnerable Workers Act*.

The *Protecting Vulnerable Workers Act* was largely driven to address the apparent systemic underpayment of workers by some employers operating under franchising business models, however it captured all businesses, even small businesses, despite there having been no demonstrated case that such blanket increases in civil penalties were necessary.

During the first case[1] under the protecting vulnerable workers provisions, Federal Circuit Court Judge, Michael Jarrett noted that the penalties act as a significant deterrent:

> *"I accept that these matters all demand a penalty in the present case that recognises the need to deter others in this industry who might be tempted to treat their workers and their obligations to comply with workplace laws in the same way as the respondents in this case."*

Whilst HIA is supportive of the above sentiment expressed in the EM, the approach to penalties under the Bill is harsh and does not take a reasonable risk-based approach which is generally required when dealing with complex workplace systems and laws. For example, a migrant worker sanction may result in an employer receiving a 5-year sanction per breach to be served consecutively i.e., three breaches could mean being prevented from engaging a migrant worker for up to 15 years.

Additionally, the changes under the Bill are far reaching due to the definition of '*workplace law*' which covers any Commonwealth law that regulates the relationships between parties for contracts of service or the performance of work, as well as work health and safety and workers compensation matters.

1. Prohibited Employer

HIA has concerns with the proposal to exclude employers who have contravened provisions of the FW Act and the Bill, if those contraventions arose from genuine mistake or lack of knowledge, as opposed to deliberate actions.

Further, whilst the commentary in the EM describes the powers to declare employers as a prohibited employer as being protective rather than punitive, the introduction of a strict liability offence is clearly punitive.

[1] Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors [2019] FCCA 2259 (16 August 2019)

For example, an employer may be prohibited from employing non-citizens if they fail to comply with a compliance notice under section 716 of FW Act, which may be issued for various offences, including a breach of:

- the National Employment Standards
- a term of a Modern Award
- a term of an enterprise agreement
- a term of a national minimum wage order

Employers should not be excluded from employing migrant workers due to a mistake or lack of knowledge.

Further, the publication of the details of a prohibited employer, regardless of the circumstances that led to the offence is harsh. The potential for such an outcome will likely have a detrimental impact on business who may be intimidated by the prospect of such penalties in circumstances under which they may have unknowingly breached a law where the recklessness based test is introduced.

The publication of prohibited employers should only apply to those employers subject to criminal penalties, or those who have been proven to repeatedly engage in offending conduct. Additionally, employers should have the opportunity to request the removal of publication, especially in circumstances where they are able to establish or provide evidence that their contravening conduct has been rectified.

2. Offences of coercion, undue influence, and undue pressure

The Bill includes offences relating to coercion, undue influence, or undue pressure; however, the Bill does not propose to define these terms. Leaving these terms to the courts to define creates unnecessary ambiguity which may result in employers inadvertently breaching the legislation, resulting in criminal penalties.

3. Alternative Solutions

Instead of creating new offences, HIA would support mechanisms which, in the first instance at least, would see voluntary compliance, partnership and cooperation in ensuring compliance with both the FW Act and Migration Act. Alternatively, it may be appropriate for offences to be introduced for employers who have repeatedly contravened the relevant provisions, or who have been proven to do so with knowledge and deliberately.

Ongoing Government reforms

Recently there have been a number of newly introduced legislation or Government proposals which impact migrant workers.

This includes the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth) (PWE Act) which clarified that migrant workers are captured by the FW Act. Consequently, employers who employ migrant workers can face penalties under both the FW Act and the Migration Act, should the Bill proceed as proposed. It is unclear what reasoning there is for a duplication of breaches and remedies for the same contravention under the FW Act and the Bill.

Further, the Government has recently proposed to introduce wage underpayment offences under the FW Act, including a potential recklessness based wage theft offence. HIA is particularly concerned that should this offence be introduced, there may be many employers who could be found to be contravening the FW Act, and also have that conduct captured by the Bill as a “remuneration-related matter”. In these scenarios, employers will be excluded from employing migrant workers at a time when the residential building industry is in critical need of skilled trades and workers.

As these changes are ongoing and continue to be introduced, employers are at significant risk of breaching relevant legislation purely due to the complicated nature of the laws, which creates significant opportunity for employers being subject to multiple remedies or actions from the same breach under different legislation. It is critical that any uncertainty, duplication and multiple remedies or actions for the same breaches are minimised or removed entirely.

Conclusion

It is premature to introduce any further regulatory change. It is critical that businesses are given sufficient time to understand the existing regulatory change, to avoid employers being caught out due to not understanding the laws, as opposed to being wilfully non-compliant. Accordingly, HIA submits that any further changes to the current penalty framework, including the introduction of penalties for breaches that exist under multiple bodies of legislation represents unnecessary duplication which only further complicates Australia's workplace laws.

In the alternative, it is clear that employers are in need of a transition period to ensure that businesses have time to adjust to the existing changes, before the proposed changes of the Bill commence. HIA would submit that a 12 month transition period would be appropriate.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LIMITED

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