ACTU Submission

Senate Inquiry into the *Migration Amendment (Charging for a Migration Outcome) Bill 2015*

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Introduction

The ACTU welcomes the opportunity to make a submission to this Senate Inquiry into the *Migration Amendment (Charging for a Migration Outcome) Bill 2015 ('the Bill')*.

The ACTU is the peak body for Australian unions, made up of 46 affiliated unions. We represent almost 2 million working Australians and their families.

The ACTU and affiliated unions have a long-standing interest in all aspects of the skilled migration program. We have a particular focus on those parts of the migration program where temporary visa holders with work rights are involved.

Unions have a proud record of both representing Australian workers who have been overlooked by employers preferring to use temporary overseas labour, and representing and standing up for temporary overseas workers who have been exploited by employers and other agents who have taken unfair advantage of them.

In this submission, we first set out some of the relevant context and background for consideration of this Bill. We then set out our assessment of the Bill as a whole, and some of its specific provisions.

We support the Bill insofar as it makes it unlawful for employers and other third party agents to solicit and receive payments from overseas workers in return for sponsorship and other visa outcomes. This is a long overdue law reform that addresses a known problem and it is something the ACTU has been calling for, for some time.

However, the Bill also makes it unlawful for overseas workers to offer, or provide, payment in return for migration outcomes, regardless of the pressure or duress they might be under from their employer or agent to do so. The danger is that it will be migrant workers in vulnerable situations who find themselves on the wrong side of this law, facing penalties almost as large as those facing their employers.

In this submission, we propose some ways to address this issue. The clearest option to us is that the penalty provisions in the Bill should apply only to employers or other persons who solicit and/or receive payment from workers. They should not apply to workers who offer or provide such payments. There is no good public policy reason for the Bill to be penalising workers who in reality are the victims of the very practice – payment for visas – the Bill purports to stop. Alternatively, safeguards should be built-in so that the Bill provides appropriate recognition of the already vulnerable position many overseas workers are in in these situations, and the penalty provisions only capture those workers who are initiating the payment of their own accord.

We urge the Committee not to support this Bill unless and until it is satisfied that the position of vulnerable migrant workers is properly protected and taken into account.

Background and context

This Bill has been introduced against a backdrop of continuing evidence of worker exploitation under the temporary work visa program, highlighted most recently by the cases of widespread, systematic underpayment of temporary visa holders at 7 Eleven stores around Australia.

Unfortunately, these latest revelations are just the latest in a long line of cases exposed by unions, the media, and others.

The ACTU and affiliated unions have over a number of years received countless reports of cases of exploitation and mistreatment, rorting, and 'non-compliance' across all temporary work visa types. These cases include temporary overseas workers being underpaid or not paid at all, workers having wages unlawfully deducted, workers being left with exorbitant debts and fees in return for visa outcomes, workers being subject to bullying and sexual harassment, workers being housed in cramped, sub-standard accommodation – the list goes on.

A recurring theme with these cases is the vulnerable situation the temporary visa holders were in, whether that was influenced by their desire to stay in Australia or achieve permanent residency, the fear of retribution if they spoke out, their lack of knowledge of their workplace rights, their poor English, the spectre of a debt hanging over them, or a combination of all these factors. In many cases, it is their direct employer who is taking advantage of them, but in others it is an agent of some description based in Australia or the home country of the visa holder. In some cases, employers and agents are acting together in organised scams which are more akin to labour trafficking and even slavery. In all cases, workers are left disillusioned with their experience of working in Australia.

The ACTU and affiliated unions have been advocating on these issues for many years now on behalf of all workers, whether they be Australian citizens, permanent residents, or temporary visa workers. We pushed strongly for the establishment of the current Senate Inquiry into all aspects of the temporary work visa program to get to the bottom of these matters. We refer the Committee to our submission to that Inquiry for a detailed assessment of the extent of exploitation and what is required to fix this flawed program. [1]

The Bill before the Committee addresses one discrete issue from the many types of examples highlighted above of exploitation and rorting under the temporary work visa program. That is, the practice of persons giving or receiving a payment in return for a migration outcome, otherwise known by its short-hand description of 'payment for visas'.

[1] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Submissions (see ACTU Submission No. 48)

The ACTU highlighted a number of examples of this practice occurring in our submission to the Senate Inquiry into the temporary work visa program, and also in our submission to the Azarias review of the 457 visa program in 2014. We have also brought this issue to the attention of the Department in email correspondence, highlighting the prevalence of cases of employers requesting payment from overseas workers in return for sponsoring them. The cases reported to the ACTU include employers offering to sponsor workers for permanent residency for fees of up to $50 000 and more. More often than not, the promises of sponsorship or other migration outcomes never materialise.

Critically, all the evidence available is that it is employers and other third parties who are requesting or pressuring workers to provide such payments in return for visa outcomes. That is the practice, and the problem, that the Bill needs to address. There is no evidence we are of aware of that workers are initiating such payments of their own accord and no such evidence is presented in the explanatory materials to the Bill.

General comments on the purpose and intent of the Bill

The central purpose and intent of the Bill is to make it unlawful for a person to give or receive a benefit in return for a migration outcome, or, as the Bill defines it, a 'sponsorship-related event'.

As the explanatory memorandum points out, this is based on a recommendation from the Azarias report into the 457 visa program, which found that some sponsors have been paid by visa applicants for a migration outcome and this undermines the integrity of the program. Currently, no action can be taken in such cases.

The Bill targets both employers and other persons who seek or receive a benefit, as well as workers who offer or provide a benefit.

It does this through two principal provisions:

- Section 245 AR, which provides a prohibition on persons asking for or receiving a benefit in return for the occurrence of a sponsorship-related event; and

- Section 245 AS, which provides a prohibition on persons offering to provide, or providing, a benefit in return for the occurrence of a sponsorship-related event.

Criminal offences apply in relation to section 245 AR, with a maximum penalty of 2 years imprisonment or 360 penalty units ($64 800 for individuals, $324 000 for a body corporate).

Civil penalties apply in relation to both 245 AR and 245 AS, with a maximum penalty of 240 penalty units ($43 200 for an individual person or $324 000 for a body corporate).

For workers who breach these provisions, they are also subject to potential visa cancellation (s116 1AB).

As set out in the Explanatory Memorandum, the underlying premise for these provisions is that the practice of payment for visas is unacceptable. It is not acceptable for sponsors, employers or other third parties to make a personal gain from the practice. Equally, it argues, it is not acceptable for visa holders to engage in 'payment for visas' behaviour because it makes them more vulnerable and can have the effect of preventing employment opportunities for Australian citizens and permanent residents.

In response, the ACTU agrees that the practice of 'payment for visas' needs to be stopped. Indeed, one of our recommendations to the current Senate Inquiry into the temporary work visa program is to make it unlawful for any person (employer or agent) to solicit payment by any means in return for visa outcomes. We therefore strongly support provisions in the Bill that will help crack down on employers and agents who seek to extort money from already vulnerable workers in return for sponsorship and other outcomes. The penalty provisions are appropriate given the evidence that payment for visa cases have involved employers seeking payments of up to $50,000 or more.

Our concern is that the Bill will also penalise those same workers who offer or provide payment, regardless of the pressure or duress, real or perceived, they were under from their employer or agent to do so.

The Bill appears to rest on the mistaken assumption that employers, agents, and workers are all equally responsible for, and complicit, in the practice of payment for visas, when all the available evidence suggests it is virtually always the employer/agent who is pressuring the worker in these cases.

In fact, the Explanatory Memorandum refers to previous independent reports undertaken for the Government that have highlighted the activities of those employers who take advantage of workers in precarious visa situations. However, the Bill, as currently drafted, fails to take into account the inherently vulnerable situation that many overseas workers are in already, such that they feel compelled to offer or provide such payments.

The recent evidence from 7 Eleven highlights again the extent of exploitation and vulnerability of overseas migrant workers. The practice of payment for visas is just another form of exploitation of already vulnerable migrant workers, yet under the Bill those workers are being held equally responsible at law as the employer who sought the payment. The Bill makes some concession to the different circumstances confronting individual workers by not making them subject to the criminal offence provisions, but under the civil penalty provisions they would still be liable to the same financial penalties as employers and other persons. On top of that, they then face the prospect of visa cancellation, although the Bill does make provision for mitigating factors to be considered (but no such provision for mitigating factors is made in relation to the imposition of the civil penalty provisions on visa holders).

In our submission, the best course to address these issues is to remove workers (the visa holders) from the penalty provisions in the Bill altogether. There is no good public policy reason for the Bill to be penalising workers who in reality are the victims of the very practice – payment for visas – the Bill purports to stop. If the ultimate objective is to stop the practice of payment for visas, the focus should be squarely on persons who seek or receive such payments from overseas workers. That is the problem that needs to be addressed in order for the practice to stop. There is no evidence that penalising workers will achieve this objective.

If the Committee does not accept this position, the alternative is to leave workers to be covered by the penalty provisions but build in safeguards to recognise the vulnerable position that overseas workers are in, in these situations. Penalty provisions should apply, if at all, only to those workers who are making such payments freely of their own accord.

If the Committee can find a way that only captures those workers who are initiating the payments themselves that could provide one option – perhaps, for example, by inserting a requirement in the Bill for the courts to consider the extent, if at all, to which the visa holder initiated the offer or provision of payment, or whether it was in response to action by their employer or other persons - but it is not clear how this would be done, and even if such workers exist. There is no evidence that the practice is operating in this way, with visa holders out there making unsolicited offers of payment for visas. All the cases we are aware of involve requests and inducements, if not pressure or duress, from employers or other persons for workers to make such payments.

Workers are left in the situation where they feel they have little choice but to accede to the request from their employer or related agent.

Again, for the reasons outlined above, our principal recommendation is that penalty provisions for visa holders be removed, principally section 245 AS of the Bill.

Comments on specific provisions

Sponsorship-related event

The explanatory memorandum states that the sponsorship-related events in the definition at section 245AQ are intended to capture all the events in relation to which a payment for visas arrangement might be made. We understand that the definition, while relatively broad, is limited to activity surrounding sponsored visa types where employers clearly have the ability to influence visa outcomes. However, there may be other examples where 'payment for visa' type activity occurs and should be stamped out by this legislation. One example is the potential for employers to seek a benefit in return for providing a working holiday visa holder the 88 days' work that can lead to a second year working holiday visa extension. This should be captured by the Bill if it is not at the moment.

We would also like to see a ban on job ads that target positions for overseas workers with the lure of various migration outcomes; for example, job ads that advertise only for working holiday visa holders or that use the inducement of a second year working holiday visa. This is among our recommendations to the Senate Inquiry into the temporary work visa program.

Extended liability to executive officers

The ACTU supports the intent of the provisions at section 245AT and 245AU to hold relevant officers of bodies corporate to account.

However, we note that the Bill limits this liability to 'executive officers' defined in section 245 AQ as directors, CEOs, CFOs and secretaries. In our submission, there is a case for extending this liability to others with relevant authority outside these confined categories. For example, the provision in the Corporations Act dealing with general provisions relating to civil and criminal liability covers conduct being engaged in on behalf of a body corporate "by a director, employee or agent of the body, within the scope of the person's actual or apparent authority" or "by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent". Consistent with the provisions of the Corporations Act, consideration could be given to broadening the categories of people covered by these provisions.

Investigation and compliance

The legislation should provide for unions and others with the capacity to provide and refer information in relation to payment for visas arrangements. Unions should also be granted standing to bring civil penalty proceedings, as they can under the *Fair Work Act*.

Further, the legislation should provide for DIBP to name employers found to have engaged in payment for visas, with details of the penalty made public to assist in ongoing education and compliance activities.

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