2 March 2022

Supplementary Submission (question on notice): Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Protecting Migrant Workers) Bill 2021

Thank you for the opportunity to give evidence at the hearing regarding the *Migration Amendment (Protecting Migrant Workers) Bill 2021* (Cth) (**Bill**) on 23 February 2021.

Further to our submission and oral evidence, we provide the following response regarding a question taken on notice regarding firewalls.

We also **attach** some draft instructions and sample drafting relating to two critical reforms to the Bill:

1. **Whistleblower protections:** to encourage migrant workers to report exploitative behaviour and give accurate evidence by removing their fear of visa cancellation or future visa refusal.
2. **Definition of arrangement in relation to work:** To ensure that 'arrangement in relation to work' is defined broadly enough to capture egregious forms of exploitative employer conduct that may sit outside traditional understandings of working arrangements.

The need for whistleblower protections

As noted in our draft instructions, our research demonstrates that without whistleblower protections, migrant workers will remain unwilling to report exploitative conduct or give evidence in enforcement proceedings for fear of jeopardising their current visa or a future visa or citizenship application.

For example, Farbenblum and Berg's 2019 survey of over 5,000 international students in Australia found that 38% did not seek information or help for a problem at work because they did not want 'problems that might affect my visa'.[1]

[1] Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (2020) 10.

This will greatly undermine the utility of the proposed new employer sanctions.

Problems with the Assurance Protocol

It may be intended that migrant workers who have breached their visa as a result of coercion should use the Fair Work Ombudsman (**FWO**) Assurance Protocol (**Protocol**) with the Department of Home Affairs (**DHA**) to access protection from visa cancellation and removal.

However, there are a number of problems with this approach. Firstly, data showing how few temporary visa holders have sought the protection of the Protocol demonstrate that it is clearly ineffective. Only 76 workers have availed themselves of the Protocol between 2017 and 2021.[2] The number of referrals made from FWO to DHA under the Protocol has decreased dramatically from 25 referrals in 2017-2018, to 15 referrals in 2018-2019 and 2019-2020, to nine in 2020-2021, to less than five in the past financial year.

Other concerns with the Protocol include that it affirmatively requires the FWO to pass on the worker's information to the DHA to obtain protection from visa cancellation (a significant barrier for many workers). Also, there is no express protection for migrant workers in respect of future visa applications or citizenship applications. For many, fear of visa loss extends beyond their current visa to a fear of jeopardising their prospect of obtaining a future visa including permanent residency for which the Protocol provides no protection.

Further, information provided by Redfern Community Legal Centre demonstrates that even when workers wish to access the Protocol, the FWO has refused protection if FWO has closed an investigation and the worker can no longer assist the FWO with their inquiries:

> *Case study: The Visa Amnesty Protocol*
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> *Redfern Legal Centre assisted an international student named Fang*, working up to 60 hours a week, sometimes overnight as a receptionist for a 24-hour business, paid a flat rate of $20 per hour. Fang sought assistance from the FWO. She hoped for the protection of the assurance protocol between the Department of Home Affairs ('DHA') and the FWO because she had breached visa condition 8105 and worked above 40 hours a week while on a student subclass 500 visa.*
>
> *Fang participated in the FWO's investigation and provided extensive evidence of her work patterns. Fang's employer did not provide her with payslips. The FWO Inspector determined that they could not form a reasonable belief[3] that a contravention of a*

[2] Information provided by DHA pursuant to a Freedom of Information Request, FA 21/12/00662, 14 February 2022.

[3] Fang is not the client's real name. Section 716 of the *Fair Work Act 2009* (Cth) states the requisite threshold for a Fair Work Inspector to make a finding there has been a contravention of a modern award is "reasonably believes".

modern award occurred, i.e. that Fang was underpaid because she could not provide a complete record of her work hours, including a roster with start and finish times or payslips. The matter was closed.

The FWO confirmed that Fang was not eligible to receive the assurance protocol referral to the DHA because no determination was made. Information about the assurance protocol on the FWO website does not indicate that a determination is required for workers to be eligible for the amnesty. Fang is now more vulnerable to visa cancellation than before going to the FWO.

Conversely, Redfern Legal Centre has acted for another client where a FWO inspector also did not reach a reasonable belief a contravention under the Fair Work Act 2009 (Cth) had occurred, and still the assurance protocol was enlivened. These two matters reflect the discretionary and inconsistent application of the visa assurance protocol within the FWO at the inspectorate level.

Beyond these deficiencies, it is not clear that a worker who is identified as a victim of a s 245AAA offence would be eligible to access the Protocol if they had not 'sought advice or support from the FWO and [the worker is] helping them with their inquiries'.[4]

The need for a firewall and examples of firewalls in other jurisdictions

As mentioned above, workers who fear even the slightest possibility of jeopardising their current or a future visa are far less likely to contact the government or report exploitation (or report more serious conduct constituting forced labour or trafficking). This is the case not only for student visa-holders who have breached Conditions 8104 and 8105 but is also the case for workers on a Visitor visa, Temporary Skills Shortage visa, Bridging visa E (with no work rights) and visa-overstayers, among many others.

If the government is genuinely committed to reducing migrant worker exploitation, it must provide stronger protections to enable workers to report mistreatment to FWO. In addition to removing the work-related Conditions which trigger visa cancellation for certain workers (which we recommend and have included in our draft instructions), the government should also establish a robust firewall between the FWO and the DHA. This must prevent the FWO from sharing with the DHA any identifying information of a temporary migrant who seeks FWO's assistance, absent the individual's informed consent. This firewall should extend not only to workers whose visa permits work (such as international students) but also to workers whose visas prohibit work or who have overstayed their visa in Australia. This should replace the current Protocol between the two agencies which permits sharing of this information. This proposal would require a reconsideration of FWO's proactive role in enforcement of visa conditions, for example in the Temporary Skills Shortage program, as well as compliance

[4] https://immi.homeaffairs.gov.au/visas/working-in-australia/work-rights-and-exploitation#:~:text=What%20is%20the%20Assurance%20Protocol,helping%20them%20with%20their%20inquiries

partnerships with DHA such as Taskforce Cardena. However it would ultimately yield far greater quality and quantity of data on labour exploitation, forced labour, modern slavery and trafficking.

As documented in Berg and Farbenblum's recent report on Migrant Workers' Access to Justice for Wage Theft,[5] firewalls limiting labour inspectorates' sharing of information with immigration authorities have been instituted in a number of jurisdictions including the United States[6] and Belgium.[7]

The Access to Justice Report notes:[8]

> *Migrant workers are reluctant to approach labour authorities about labour violations if they have breached their visa conditions or are undocumented, fearing punitive measures such as detention, criminal prosecution and/or deportation. Indeed, key international bodies underscore that vesting immigration enforcement duties with labour inspectors undermines effective labour rights enforcement. A number of jurisdictions have recognised this challenge and implemented varying degrees of separation between immigration authorities and labour authorities and courts to encourage migrant workers to report labour abuses.*
>
> *In Israel, there is a complete firewall separating immigration enforcement authorities from labour enforcement agencies and labour courts (as well as other agencies with whom migrant workers come into contact for workplace health and safety issues and social security). The labour enforcement agency is prohibited from transferring information about workers' immigration status to immigration enforcement, and in labour courts, immigration status is irrelevant.*
>
> *United States labour law also provides that immigration status is irrelevant to a wage investigation, and no immigration status documentation is required on the Wage and Hour Investigation Form which is used to lodge a claim for unpaid wages. Under an MOU with the Department of Labor (DOL), Immigration and Customs Enforcement (ICE) agreed to refrain from engaging in civil immigration enforcement activities at a worksite*

[5] Bassina Farbenblum and Laurie Berg, Migrant Workers' Access to Justice for Wage Theft: A Global Study of Promising Initiatives (2021).
[6] Under an MOU with the Department of Labor (DOL), Immigration and Customs Enforcement (ICE) agreed to refrain from engaging in their civil immigration enforcement activities at a worksite that is subject to a DOL investigation of a labor dispute, subject to certain exceptions: Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (December 7, 2011). See also Bassina Farbenblum and Laurie Berg, Migrant Workers' Access to Justice for Wage Theft: A Global Study of Promising Initiatives (2021).
[7] PICUM, *A Worker Is A Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice* (2020) 34.
[8] Bassina Farbenblum and Laurie Berg, Migrant Workers' Access to Justice for Wage Theft: A Global Study of Promising Initiatives (2021), 26-27.

that is subject to a DOL investigation of a labour dispute (subject to certain exceptions). Advocates report that the ability to point to a written agreement between DOL and ICE has been useful in fighting immigration worksite raids, but they note that the MOU does not give workers assurance that their immigration status will not be revealed or used against them if they file a wage claim in court. Some US states have sought to address this challenge. For example, Washington State Evidence Rule 413 presumptively excludes evidence of a party's immigration status from all state civil and criminal cases. More broadly, in many US states, labour departments standardly do not ask for a complainant's immigration status or record immigration status, and if they learn of it, they do not report it to immigration authorities. California requires employers to notify employees before and after inspections and audits conducted by immigration officers.

In Belgium, the labour agency will not share a worker's immigration status with immigration authorities if a worker makes a complaint. Civil society respondents in Belgium report that in practice, where civil or criminal proceedings follow the worker's labour complaint, there is no risk of them being reported to immigration authorities. However, when evidence of undocumented status is gathered in the course of an inspection rather than a complaint, labour inspectors do report this to the police with a limited practical dispensation for workers who subsequently file a claim. In countries such as Ireland, the UK, and Australia, labour agencies are not obligated to report immigration breaches to the immigration agency but are not prevented from doing so. Different municipal jurisdictions in the US and Canada have established themselves as 'sanctuary cities', preventing public service providers from inquiring about the immigration status of their clients.

[Please see original Report for references]

In terms of Australian examples, we are not aware of any firewalls between the labour and migration departments, hence our recommendation to introduce one. We are aware that on public policy and privacy grounds there are many examples where a firewall of sorts has been established - for example strict rules regarding medical records or client professional privilege in legal settings.

In the absence of a new robust firewall applying to all temporary migrant workers, we recommend strengthening the existing assurance protocol between FWO and DHA. At an absolute minimum, the current protocol should have the following features:

- In addition to exercising discretion to not cancel the worker's current visa, the DHA will not consider a worker's breach of visa conditions in determining whether to grant any future visa.

- Application to any worker who engages with the FWO, regardless of whether the worker assists the FWO or pursues a matter against an employer, as well as any worker who is involved in legal proceedings in relation to workplace exploitation.
- Application to visa holders who do not have work rights and to visa-overstayers.

A firewall or expanded Protocol would not limit DHA's ability to collect intelligence on visa non-compliance, labour exploitation, forced labour, trafficking or other forms of organised criminal activity. Under the current arrangement, DHA is likely gathering little intelligence from FWO about international students or other workers who have breached their visa, because they simply will not contact or otherwise engage with the agency. Far more intelligence could flow to DHA from the FWO if FWO could assure visa holders it would not pass on any identifying information but could provide deidentified intelligence to DHA with a worker's consent. Clearly, the cost to Australia of the FWO's limited ability to identify and address rampant workplace exploitation among migrants working in breach of their visa condition is far greater than the benefit gained from any small amount of intelligence currently shared between the FWO and DHA under the existing arrangement.

The need for a bridging visa

As set out in our first submission, in addition to whistleblower protections and a robust firewall, we recommend the introduction of bridging arrangements for all temporary visa holders, and visa-overstayers, to pursue meritorious claims under workplace and occupational health and safety legislation if their visa would expire or be cancelled before their claim is resolved. There may be cases in which a non-citizen's migration pathway is seriously disrupted by exploitation, leaving them without further visa options. These non-citizens should not be precluded from pursuing remedies against their former employers simply because their visas are expiring. In these circumstances, a further visa subclass should be introduced at Schedule 2 to the Regulations, permitting non-citizens to remain in Australia while they pursue proceedings in the Fair Work Commission or the Federal Court.

Proposals for reform

As set out in our draft instructions, we propose that whistleblower protections be introduced to eliminate migrant workers' fears of visa cancellation, and encourage migrant workers to report exploitative conduct and give evidence in enforcement proceedings. These protections could provide that where a non-citizen has breached a visa condition related to their work and there are reasonable grounds to suspect that their employer has contravened a relevant law, the worker's breach will not result in visa cancellation, nor be taken into account in any future applications for a visa or citizenship. The protections should also provide for the removal or waiver of employment-relating qualifying requirements in cases where exploitation has occurred.

Please see our instructions **attached** for sample drafting and detailed rationale behind these proposed changes. We gratefully acknowledge the expert input of Sanmat Verma, Accredited Specialist in Immigration Law, Clothier Anderson Immigration Lawyers, in preparing these.

We also recommend that a firewall be implemented, along with the introduction of bridging arrangements. We would welcome the opportunity to answer questions or prepare further draft instructions in respect of these additional recommendations if this would assist the Committee.

Sincerely,

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2 March 2022

Draft instructions: amendments to the Migration Amendment (Protecting Migrant Workers) Bill 2021

A. The problem: barriers to reporting/giving evidence of exploitation will render employer sanctions ineffective

1. **Policy objectives:**
    a. **To encourage migrant workers to report exploitative behaviour and give accurate evidence by removing their fear of visa cancellation or future visa refusal**
    b. **To enable law enforcement agencies to effectively detect and enforce breaches of the Bill and *Fair Work Act 2009* (Cth) by ensuring that affected migrant workers give evidence to support enforcement efforts**
    c. **To promote compliance with the Bill and *Fair Work Act 2009* (Cth) by providing whistleblower protections to migrant workers who report genuinely unlawful employer conduct**

2. **Background**

Proposed s 245AAA of the *Migration Amendment (Protecting Migrant Workers) Bill 2021* (**Bill**) criminalises coercion or exerting undue influence or pressure on a non-citizen to breach their work-related visa conditions.

Proposed s 245AAB criminalises coercion or exerting undue influence or pressure on a non-citizen to accept an arrangement in relation to work, where a worker believes they must accept the arrangement in return for the employer providing information or evidence about the work in order to satisfy the worker's immigration requirements, or to avoid an adverse effect on immigration status (ss245AAA and 245AAB together, the **employer sanctions**).

In focusing on the criminalisation of this conduct, the Bill assumes that the key problem to be addressed is employers' use of immigration requirements to coerce or exert undue pressure on non-citizens to accept exploitative working arrangements. It assumes that criminalising this conduct will give migrant workers confidence that the government is combating exploitation and

migrant workers can feel secure to work in Australia. Both these assumptions are false for the large majority of migrant workers.

These proposed offences address the causes of exploitation for a very small number of migrant workers. Underpayment and other forms of labour exploitation extend far beyond the group of migrant workers who are explicitly coerced to work in breach of visa conditions or explicitly coerced to accept exploitation in exchange for a future immigration benefit. The far greater problem which this Bill should address is the structural coercion of migrant workers to accept exploitation in order to participate in the Australian labour market. It is now clear that within a number of industries in Australia there is a parallel labour market for temporary visa holders with "going rates" for wages below the Australian minimum wage. In a 2019 survey Berg and Farbenblum conducted of over 5,000 international students, three quarters of those who had worked in Australia had received less than the minimum casual hourly wage.[1] This widespread exploitation is driven, primarily, by employers' confidence that regulators will not detect or punish this labour noncompliance, coupled with confidence that migrant workers will not complain about or take action to redress the exploitation.

Without whistleblower protections, migrant workers will remain unwilling to report exploitative conduct for fear of jeopardising their current visa or a future visa or indeed a future citizenship application. Farbenblum and Berg's 2019 survey of over 5,000 international students in Australia found that 38% did not seek information or help for a problem at work because they did not want 'problems that might affect my visa'.[2] Further proof of the pervasive deterrent impact of immigration-related fears lies in the fact that only 76 workers have availed themselves of the Assurance Protocol between the Department of Home Affairs (**DHA**) and Fair Work Ombudsman (**FWO**) between 2017 and 2021.[3] The number of referrals made from FWO to DHA under the Protocol has decreased dramatically from 25 referrals in 2017-2018, to 15 referrals in 2018-2019 and 2019-2020, to nine in 2020-2021, to less than five in the past financial year.

The threat of criminalisation of employers who take advantage of migrant workers' fears of immigration consequences will do nothing to assuage the visa-related fears that prevent these migrant workers from reporting exploitative conduct by those employers.

Investigation of employers for the offence under proposed s 245AAA can lead to serious detriment for exploited workers who are victims of the offence. This is because DHA will detect the breach of their visa conditions and they will be subject to visa cancellation. The Bill does not provide victims of coercion with protection from visa cancellation, and it does not provide victims with

[1] Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (2020) 8.
[2] Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (2020) 10.
[3] Information provided by DHA pursuant to a Freedom of Information Request, FA 21/12/00662, 14 February 2022.

access to remediation of the underlying exploitation (e.g. recovery of unpaid wages). Without any mechanism to incentivise greater labour compliance or the reporting of non-compliance, it is difficult to see how this offence would increase workers' confidence about working in Australia.

If it is intended that migrant workers who have breached their visa as a result of coercion should use the FWO Protocol with DHA to access protection from visa cancellation and removal, there are a number of problems with this approach. As mentioned above, FOI data on how infrequently temporary visa holders have sought the protection of the Protocol demonstrate that it is clearly ineffective. This may be partly because it affirmatively requires the FWO to pass on the worker's information to the DHA to obtain protection from visa cancellation, which is not guaranteed. It may also partly stem from the fact that, for many, fear of visa loss extends beyond their current visa to a fear of jeopardising their prospect of obtaining a future visa including permanent residency for which the Protocol provides no protection. But, beyond these deficiencies, it is not clear that a worker who is identified as a victim of a s 245AAA offence would be eligible to access the Protocol if they had not 'sought advice or support from the FWO and [the worker is] helping them with their inquiries'.[4]

Another problem with s 245AAA is that its deterrent value will remain low as long as the likelihood of detection of employer misconduct is remote. As mentioned above, there is no protection or incentive in this provision to encourage migrants to report offending employers. Indeed, our research on international students suggests that the majority already mistakenly believe they have broken the law if they accept payment of wages below the legal minimum, or if they accept wages in cash.[5] It is highly likely that temporary migrants who have been coerced into breaching their visa conditions will similarly hold these misplaced perceptions of complicity with their employer in breaking the law, and would be extremely reluctant to report the misconduct. Given the unwillingness of most victims to testify against their employer, even with increased resources, this offence is unlikely to be enforced on a scale sufficiently large to have systemic deterrent effect.

3. Proposals for legislative reform

We propose that whistle-blower protections be introduced to encourage migrant workers to report exploitative conduct and give evidence in enforcement proceedings.

In order to be responsive to the underlying causes of migrant worker exploitation, whistle-blower protection must take several forms and involve several interrelated amendments to *Migration Act 1958* (the **Act**), the *Migration Regulations* 1994 (the **Regulations**) and its associated Procedural Advice Manual 3 (**PAM3**).

[4] https://immi.homeaffairs.gov.au/visas/working-in-australia/work-rights-and-exploitation#:~:text=What%20is%20the%20Assurance%20Protocol,helping%20them%20with%20their%20inquiries

[5] Laurie Berg and Bassina Farbenblum, *International Students and Wage Theft* (2020) 43-44.

3.1. Protection Against Visa Cancellation

The prospect of visa cancellation poses an insuperable barrier to migrant workers' redress for breaches of employment law. Visa cancellation operates as a barrier in the following ways:

- Firstly, where a worker has been coerced or induced to work in breach of work-related conditions on their visa (for instance, condition 8105 on a Student (Subclass 500) visa or condition 8107 on a Temporary Skills Shortage (Subclass 482) visa); or
- Secondly, where a temporary visa holder is sponsored by their employer and termination of the employment relationship or sanctions against their employer under the Act would create grounds for the cancellation of their visa.

Where a visa-holder has breached a work-related condition of their visa, their visa is liable for cancellation under s 116(1)(b) of Act. Where the breach is sustained and ongoing, there may alternatively be grounds for cancellation under ss 116(1)(a) or (fa) of the Act – on the grounds that the grant of the visa was based on facts or circumstances which no longer exist, or in the case of a Student visa, its holder is not likely to be a 'genuine student'. In the case of a sponsored worker, where an employment relationship has ceased or the employer sponsor is subject to legal proceedings or sanctions, the visa held by the worker may be liable for cancellation under s 116(1)(a) or (g) and the prescribed ground at r 2.43(kc) – on the grounds that the visa was granted based on facts or circumstances that no longer exist, or the position associated with the visa grant is not genuine. In either case, there is no incentive for the visa holder to come forward or pursue their employer for work-related breaches.

The visa cancellation regime must be amended to prevent the cancellation of a visa held by a non-citizen where there are reasonable grounds to suspect that their employer has contravened a relevant law. This may be achieved through

- the insertion of a new clause in s 116; and/or
- amendment to Departmental policy (PAM3).

We note there is a direct precedent for establishing a presumption against visa cancellation where there is credible evidence that the grounds for cancellation have arisen in the context of a breach by the visa-holder's employer of a relevant law. For instance, in relation to Partner visa holders, policy requires decision-makers not to cancel a visa in circumstances where the visa-holder's relationship has broken down due to family violence. Relevantly, policy requires decision makers to consider:

> … whether there were any extenuating circumstances beyond the visa holder's control that led to the grounds existing. **If cancellation is being considered because of a relationship breakdown, delegates should consider whether the relationship has broken down as a result of family violence**. As a general rule, a visa should not be

cancelled where the circumstances in which the ground for cancellation arose were beyond the control of the visa holder.

Additionally, we propose that Conditions 8104 and 8105 be removed from the Regulations. The new employer sanctions are targeted to address workers who are exploited as a result of their employer's coercion of the worker to work in breach of their visa. The largest cohort of these workers is likely to be international students coerced to breach Condition 8104 or 8105 of their visa (which permits work for 40 hours per fortnight while their course is in session).

Removing Conditions 8104 and 8105 would remove the possibility for employers to coerce students to work in breach of their visa and would diminish employers' leverage over international students whose stay in Australia is made precarious as a result of breaching their visa condition. It would also remove a primary deterrent to international students reporting underpayment to the FWO or seeking help from their education provider or others if they have worked more than 40 hours in a fortnight -- which many are compelled to do, as a result of the unlawfully low wages they are paid. It would establish far greater transparency around international students' working conditions and would enable underpayment to be detected and addressed more easily.

Although some commentators have raised concerns that removal of Conditions 8104 and 8105 would jeopardise students' studies, Condition 8202 will address this concern and should remain attached to the visa. This condition requires that international students maintain enrolment in an approved program of study and maintain satisfactory attendance in their course as well as course progress for each study period as required by their education provider. Condition 8202 provides the best way to ensure students are prioritising their studies and limiting time away from their studies engaging in paid work.

3.2. Protections For Future Visa Applications

There are further reasons that migrant workers are reluctant to report exploitation in circumstances where they have worked in breach of their visa. Beyond fear of cancellation of their current visa, workers may fear refusal of a future visa application on the basis that they have a record of non-compliance with visa conditions.

We propose that a new section should be introduced in Subdivision AA to remove this possibility, where there is credible evidence that the grounds for ineligibility of the future visa have arisen in the context of a breach by the visa-holder's employer of a relevant law.

3.3 Waiver of Employment Requirements

Migrant workers are also induced to accept substandard work conditions as a means of meeting the employment-related qualifying requirements for a further visa. For example:

- Temporary Skills Shortage (Subclass 482) visa applicants must demonstrate two years' full-time work experience in their nominated occupation;
- Skilled Employer Sponsored Regional (Subclass 494) visa applicants must demonstrate three years' full-time employment in their nominated occupation;
- Employer Nomination Scheme (Subclass 186) applicants must be employed in their nominated occupation for at least three years.

In relation to these visa schemes, a waiver should be introduced to the employment-related qualifying requirements. The *Regulations* should be amended so that an applicant may meet the qualifying requirements even if they have not completed the requisite work experience, as long as:

- They possess the skills, qualifications and employment background necessary to perform the tasks of the nominated occupation; and
- There are reasonable grounds to believe that the visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth), which in turn has prevented them from meeting the employment-related requirements.

This amendment would mean that a worker will not be unfairly deprived of a visa for which they were otherwise eligible but for their employer's unlawful conduct. For example, if a worker is exploited and was soon to be otherwise eligible to apply for a subsequent employer-sponsored visa but as a result of the exploitation had not yet completed their work experience period, they could still find a further sponsor with a waiver of the unmet employment experience requirement.

This could be achieved by amendments to cls 482.221, 482.231, 494.225, 186.234 and 186.243 of Schedule 2 to the Regulations.

While it is beyond the scope of the Committee's current review, it should be noted that skills assessing authorities established under the Act should amend their qualifying requirements in line with the amendments to the Regulations proposed above, so that visa holders are not disadvantaged and prevented from meeting strict employment-related requirements by the non-compliance of their employers.

4. Drafting instructions - whistleblower protections

In order to remove the possibility of visa cancellation for breach of a work-related condition in circumstances of exploitation, it is proposed to:

(a) Introduce a new s116(2A)
(b) amend Departmental policy (PAM3), by creating a presumption against visa cancellation where there is credible evidence that the grounds for cancellation have arisen in connection with a breach by the visa-holder's employer of a relevant law.
(c) Amend Schedule 8 to the Regulations by removing Conditions 8104 and 8105.

In order to remove the possibility that a worker's future visa is refused on the basis of their previous breach of a work-related condition in circumstances of exploitation, it is proposed to introduce a new s 47A.

In order to remove the possibility that a future visa is refused because the applicant does not meet employment-related qualifying requirements, a waiver should be introduced to the employment-related qualifying requirements in cls 482.221, 482.231, 494.225, 186.234 and 186.243 of Schedule 2 to the Regulations.

5. Sample drafting

5.1. Protection Against Visa Cancellation

In order to remove the possibility of visa cancellation for breach of a work-related condition in circumstances of exploitation, subject to the views of the drafter, it is proposed to:

(a) Introduce a new s116(2A) as follows:

The Minister is not to cancel a visa under subsection (1), (1AA), (1AB) or (1AC) if the breach of the condition arose in the in the context of the visa-holder's employment and there are reasonable grounds to believe that the visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth).

When determining whether there are reasonable grounds to believe that a visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth), there will be reasonable grounds unless a claim is frivolous or vexatious; or has no reasonable prospects of success. Such reasonable grounds may be demonstrated in various ways, including by a visa holder obtaining legal advice from a legal practitioner that reasonable grounds exist; or by a relevant enforcing agency concluding that reasonable grounds exist.

(b) Amend policy (PAM3) to state as follows:

A visa must not be cancelled where the circumstances for cancellation arose in the context of the visa-holder's employment and there are reasonable grounds to believe that the visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth).

When determining whether there are reasonable grounds to believe that a visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth), there will be reasonable grounds unless a claim is frivolous or vexatious; or has no reasonable prospects of success. Such reasonable grounds may be demonstrated in various ways, including by a visa holder obtaining legal advice from a legal practitioner that reasonable grounds exist; or by a relevant enforcing agency concluding that reasonable grounds exist.

(c) Remove conditions 8105 and 8104 from Schedule 8 to the Regulations.

Subject to the views of the drafter, it is also proposed to remove Conditions 8104 and 8105 from Schedule 8 of the Regulations, cls 500.611 and 500.612 of Schedule 2 of the Regulations as well as other items regarding Bridging visas in Schedule 2.

5.2. Protections For Future Visa Applications

Subject to the views of the drafter, it is proposed that a new section 47A could be inserted in into **Subdivision AA–Applications for visas** of the Act, as follows:

(1) In circumstances where the Minister would refuse a valid visa application on the basis of the applicant's past work in breach of a visa condition, the application must not be refused where the circumstances of the breach arose in the context of the visa-holder's employment and there are reasonable grounds to believe that the visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth).

(2) An applicant is not required to disclose information in relation to a previous breach of a visa condition in the circumstances outlined in ss47A(1).

(3) When determining whether there are reasonable grounds to believe that a visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a

civil remedy provision of the Fair Work Act 2009 (Cth), there will be reasonable grounds unless a claim is frivolous or vexatious; or has no reasonable prospects of success. Such reasonable grounds may be demonstrated in various ways, including by a visa holder obtaining legal advice from a legal practitioner that reasonable grounds exist; or by a relevant enforcing agency concluding that reasonable grounds exist.

5.3 Waiver of Employment Requirements

Subject to the views of the drafter, it is proposed that cls 482.221 and 482.231 of Schedule 2 to the *Regulations* could be amended as follows:

(1) The applicant has worked in the nominated occupation or a related field for at least 2 years.

(2) The applicant is not required to have worked as mentioned in paragraph (1) where there are reasonable grounds to believe that the visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth).

(3) When determining whether there are reasonable grounds to believe that a visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth), there will be reasonable grounds unless a claim is frivolous or vexatious; or has no reasonable prospects of success. Such reasonable grounds may be demonstrated in various ways, including by a visa holder obtaining legal advice from a legal practitioner that reasonable grounds exist; or by a relevant enforcing agency concluding that reasonable grounds exist.

A new cl 494.225(3) should be introduced as follows:

(3)(a) The applicant is not required to have been employed as mentioned in para (1) where there are reasonable grounds to believe that the visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth).

(3)(b) When determining whether there are reasonable grounds to believe that a visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth), there will be reasonable grounds unless a claim is frivolous or vexatious; or has no reasonable prospects of success. Such reasonable grounds may be demonstrated in various ways, including by a visa holder obtaining legal advice from a legal practitioner that reasonable grounds exist; or by a relevant enforcing agency concluding that reasonable grounds exist.

A new cl 186.234(4) should be introduced as follows:

(4)(a) The applicant is not required to have been employed as mentioned in para (2)(b) where there are reasonable grounds to believe that the visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth).

(4)(b) When determining whether there are reasonable grounds to believe that a visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth), there will be reasonable grounds unless a claim is frivolous or vexatious; or has no reasonable prospects of success. Such reasonable grounds may be demonstrated in various ways, including by a visa holder obtaining legal advice from a legal practitioner that reasonable grounds exist; or by a relevant enforcing agency concluding that reasonable grounds exist.

A new cl 186.243(3)(c) should be introduced as follows:

(3)(c)(i) Or, in relation to the applicant's previous work in the occupation to which the position relates or related field, there are reasonable grounds to believe that the visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth).

(3)(c)(ii) When determining whether there are reasonable grounds to believe that a visa holder's employer or principal has breached ss 245AAA or 245AB of this Act; a work-related offence; or a civil remedy provision of the Fair Work Act 2009 (Cth), there will be reasonable grounds unless a claim is frivolous or vexatious; or has no reasonable prospects of success. Such reasonable grounds may be demonstrated in various ways, including by a visa holder obtaining legal advice from a legal practitioner that reasonable grounds exist; or by a relevant enforcing agency concluding that reasonable grounds exist.

B. The problem: the lack of definition of 'arrangement in relation to work' will lead to narrow interpretations that do not align with the objects of the Bill

1. **Policy objectives:**
    a. **To ensure that 'arrangement in relation to work' is defined broadly enough to capture egregious forms of exploitative employer conduct that may sit outside traditional understandings of working arrangements**
    b. **To prevent employers from requiring migrant workers to endure appalling conditions (for example unsafe accommodation or non-consenusal sexual acts) in return for visa sign off or work.**

2. **Background**

Proposed s 245AAB criminalises coercion or exerting undue influence or pressure on a non-citizen to accept an arrangement in relation to work, where a worker believes they must accept the arrangement in return for the employer providing information or evidence about the work in order to satisfy the worker's immigration requirements, or to avoid an adverse effect on immigration status.

The meaning of 'arrangement in relation to work' is not defined. Traditional understandings of arrangements 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.

3. **Proposal for legislative reform**

We propose that a broad definition be inserted into the Migration Act to ensure that this offence clearly prohibits 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.

4. Drafting instructions - defining arrangement in relation to work

To ensure that s 245AAB effectively prohibits exploitative conduct, it is proposed that a broad definition of ‘arrangement in relation to work’ be inerted.

Alternatively, it is proposed that supporting material clearly clarifies that ‘arrangement in relation to work’ should be interpreted broadly.

5. Sample drafting

Subject to the views of the drafter, it is proposed to insert a legislative note under section 245AAB as follows:

For the purpose of s245AAB, ‘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.