Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Inquiry into the *Migration Amendment (Strengthening Employer Compliance) Bill 2023*

Migrant Workers Centre Inc.

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Contact

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Acknowledgement of Country

The Migrant Workers Centre Inc respectfully acknowledges the Wurundjeri people of the Kulin Nations, the traditional owners and custodians of the land on which our office stands. We pay our respects to their elders past and present and acknowledge that sovereignty was never ceded.

1. Introduction

1.1 The Migrant Workers Centre Inc. (MWC) welcomes the opportunity to make a submission to the Inquiry on the *Migration Amendment (Strengthening Employer Compliance) Bill 2023* (hereafter 'the Bill').

1.2 The MWC is a not-for-profit organisation that connects migrant workers with one another and empowers them to understand and enforce their rights. The MWC collaborates with unions and community partners to organise grassroots campaigns, deliver education sessions on workplace safety and rights, and advocate for long-term solutions to the exploitation of migrant workers in Australia.

1.3 The MWC advocates for all workers who were born overseas and work in Australia, irrespective of their migration status. For the purposes of this submission, we use the term 'migrant workers' to refer specifically to workers on temporary visas.

1.4 We refer the Committee to the Submission that MWC made in response to the **Migration *Amendment (Protecting Migrant Workers) Bill 2021***, an iteration of the Bill that was drafted and referred to the Senate Committee in the previous Parliament (2019-2022), and that subsequently lapsed before the 2022 Federal Election. The present Bill takes a more holistic approach to migrant worker exploitation and revises key provisions that enhance its effectiveness in promoting employer compliance and protecting migrant workers. However, the MWC remains concerned that the Bill:

1.4.1 Fails to provide robust protections against visa cancellation; and
1.4.2 Will not provide meaningful protection to migrant workers without increased investment in enforcement mechanisms.

1.5 We note that the policy settings in which the present Bill is being considered have substantially changed since 2022. Broader reforms are poised to complement employer compliance and negate concerns about barriers to reporting exploitation, including the potential for adverse, unintended consequences for workers who report exploitation.[1]

1.6 In this submission, we reiterate the need for comprehensive whole-of-government reforms that address the factors that render migrant workers vulnerable to exploitation, and that prevent them from reporting exploitation. The efficacy of this Bill will hinge on the strength of these reforms and the adoption of robust and transparent protections against visa cancellation, by way of the **Exploited Worker Guarantee**.[2] We also propose amendments to improve the implementation of the Bill in light of current policy priorities, the need for enhanced monitoring and enforcement, and access to justice considerations.

[1] Department of Home Affairs, 'Albanese Government to tackle worker exploitation' (Media Release, 5 June 2023).
[2] Migrant Justice Institute and the Human Rights Law Centre, *Breaking the Silence: A Proposal for Whistleblower Protections to Enable Migrant Workers to Address* Exploitation (Report, March 2023) 13-16.

2. Summary of recommendations

Recommendation 1. That the Federal Government recalibrate the design of the Migration Program towards permanent migration by:

- amending visa subclasses and work-related restrictions that are most closely associated with 'permanent temporariness';[3]
- introducing standardised visa processing times, including a mechanism for complaint and redress if those standards are not met; and
- replacing skilled and employer-sponsored migration with an accessible, self-nominated system of temporary migration in areas of skills shortage, with clearer pathways to self-nominated permanent residency after two years.

Recommendation 2. That the meaning of 'relevant workplace law' under s 245APA(2) be clarified to include:

- The National Employment Standards
- State and Territory labour hire licensing laws
- State and Territory wage theft laws
- Common law causes of action

Recommendation 3. That the amendments to ss 116(1A) and (1B) are not introduced. The Exploited Worker Guarantee proposed by the Migrant Justice Institute and the Human Rights Law Centre should instead be adopted in full.

Recommendation 4. That the Department of Home Affairs, when dealing with cases where employers have been penalised under the *Migration Act 1958* (Cth) and a breach of the *Fair Work Act 2009* (Cth) is suspected, refers these matters to the Fair Work Ombudsman for investigation.

Recommendation 5. That the phrase 'arrangement in relation to work' under ss 245AA(1)(a), 245AAA, 245AAB, and 245AAC, is broadly defined to include any arrangement that is harmful or has negative consequences for the non-citizen (including, for example, accepting a sexual advance).

Recommendation 6. That the discretionary powers exercised under ss 245AYK and 245AYM be subjected to increased public scrutiny by making available all relevant materials considered, barring the release of information that could potentially identify the worker(s) involved.

Recommendation 7. That the Government enhance enforcement efforts by implementing Recommendations 9 and 10 of the Report of the Migrant Worker Taskforce and investing in community-based legal services that can assist migrant workers with both employment and migration-related claims.

Recommendation 8. That the Federal Government extend eligibility for Status Resolution Support Services (SRSS) payments to visa holders or applicants who qualify for the Exploited Worker Guarantee or the Workplace Justice Visa.

[3] Human Rights Law Centre, Migrant Workers Centre, Asylum Seeker Resource Centre, GetUp!, Amnesty International, Liberty Victoria, Democracy in Colour, *Ending 'Permanent Temporariness': Joint Submission to the Comprehensive Review of Australia's Migration System* (December 2022) 4-8.

3. Temporary status in the workplace: research and trends

3.1 The MWC boasts a substantial network of migrant workers and community leaders spread across Australia. Our advocacy and research initiatives are directly informed by the lived experiences of migrant workers. These invaluable insights keep us abreast of the emerging needs and concerns of migrant workers and ensure that our policy platform remains timely, relevant, and responsive.

3.2 Migrant workers in Australia are routinely subjected to various forms of labour exploitation. In recent years, serious infringements of the rights of migrant workers have brought national attention to the issue. The scale and prevalence of migrant worker exploitation, however, is less well understood.

3.3 There is a substantial link between temporary visa status and labour exploitation, fundamentally driven by the significant power disparity that exists between employers and migrant workers. Additional vulnerabilities arise from insecure visa conditions, risks to employment, language/information barriers, and other structural obstacles. **These factors also create barriers to reporting exploitation, particularly where the cost, effort, and risk involved in pursuing a claim outweigh the benefits of doing so.**[4]

3.4 Our recent research (n=1,002) has shown that more than half of migrant workers (58%) experienced wage theft, and only one in four (26%) were able to recover wages. Many also experienced multiple forms of exploitation, including excessive overtime work (34%), being pressured to work without rest (33%), and being engaged indefinitely on casual contracts for regular work (28%).[5] Previous research also indicated that a majority (79%) did not pursue any remedies in relation to wage theft, the most prevalent form of labour exploitation.[6] Our findings are corroborated by large scale studies.[7]

3.5 **Temporary status is a workplace hazard.** Almost half of migrant workers surveyed reported feeling unsafe at work on an ongoing basis. Eighteen per cent reported always feeling unsafe at work, while 30% reported feeling unsafe at least once a week or once a month. As shown in **Figure 1** below, 21% of temporary visa holders always felt unsafe at work, compared to 12% of permanent visa holders. The more participants felt unsafe at work, the more likely they were to experience wage theft; 73% of workers who reported always feeling unsafe at work had experienced wage theft, compared to 50% of those who reported mostly safe working conditions.[8]

[4] Migrant Justice Institute, *Wage Theft in Silence: Why Migrant Workers Do Not Recover their Unpaid Wages in Australia* (Report, October 2018) 7.
[5] Migrant Workers Centre, *Insecure by Design: Australia's migration system and migrant workers' job market experience* (Report, March 2023) 36.
[6] Migrant Workers Centre, *Lives in Limbo: The Experiences of Migrant Workers Navigating Australia's Unsettling Migration System* (Report, November 2021) 31.
[7] Migrant Justice Institute (n 4); Grattan Institute, *Short-changed: How to stop the exploitation of migrant workers in Australia* (Report, May 2023).
[8] Insecure by Design (n 5) 44.

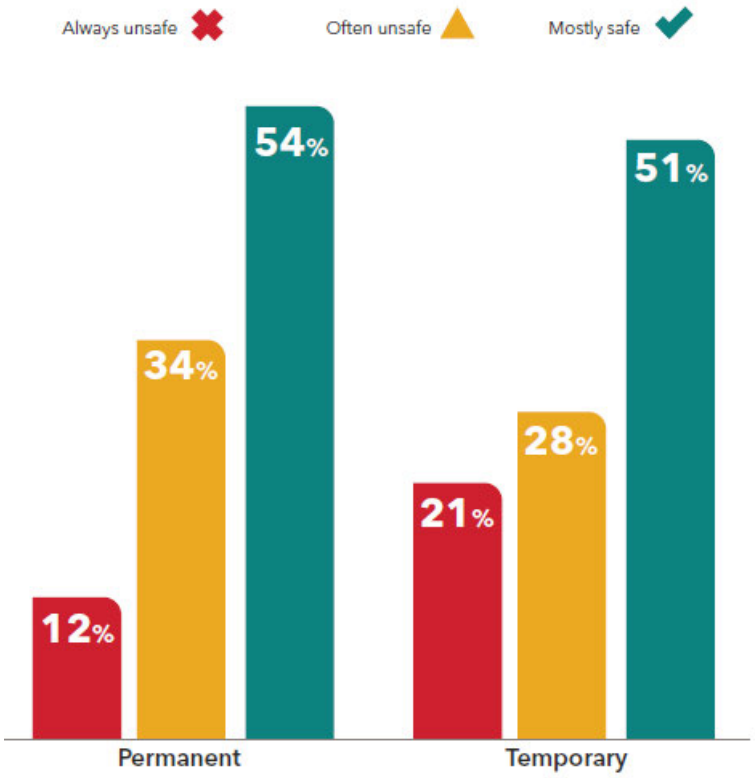

Figure 1. Visa status and feelings of workplace safety
Source: MWC, Insecure by Design: Australia's migration system and migrant workers' job market experience (Report, March 2023) 41.

3.6 Migrant workers who have experienced workplace exploitation are likely to continue working in unsafe and exploitative conditions, especially when work is tied to a migration condition or incentive. For many workers, their top priority is to progress to a permanent visa or secure another temporary visa to extend their stay:

> *According to the visa regulations, I become eligible for transition to permanent residency when I have worked for the sponsoring employer for over three years and the employer agrees to continue sponsoring me for a permanent visa. So, I ended up working in the unsafe work environment for four years.*

3.7 Another worker on a sponsored visa experienced sexual harassment, which escalated when they became eligible for permanent residency:

> *…So, I ended up working in the unsafe work environment for four years. After filing for my permanent visa application, my boss took a further step and started touching me. I was so scared. I went to police, but there was nothing to be done as I had no evidence or witness. And I didn't want to lose his visa sponsorship, either, when my permanent residency seemed to be just around the corner.*

3.8 It is not possible to address exploitation without engaging with the various factors in the migration system that render workers vulnerable in the first place. Unions, civil society organisations, and academics have consistently called for reforms to tackle the built-in drivers of exploitation. Some of these reforms have been tentatively recognised in the *Outline for the Government's Migration Strategy*.[9] We stress the urgent need for comprehensive reforms under Recommendation 1, which we have previously canvassed in our two-part Joint Submission to the Review of the Migration System.[10]

> **Recommendation 1.** That the Federal Government recalibrate the design of the Migration Program towards permanent migration by:
>
> - amending visa subclasses and work-related restrictions that are most closely associated with 'permanent temporariness';
> - introducing standardised visa processing times, including a mechanism for complaint and redress if those standards are not met; and
> - replacing skilled and employer-sponsored migration with an accessible, self-nominated system of temporary migration in areas of skills shortage, with clearer pathways to self-nominated permanent residency after two years.

4. Offences in relation to work: ss 235 and 245APA

4.1 We welcome the **repeal of s 235** of the *Migration Act 1958* (Cth) (and consequentially, s 245AA(4)), which makes it a criminal offence for non-citizens to breach a work-related visa condition and for unlawful non-citizens to work at all. As the Explanatory Memorandum notes, s 235 can act as a barrier to migrant workers reporting exploitation, due to fear of prosecution and/or deportation.

4.2 More specifically, s 235 can lead to adverse findings for migrant workers. This includes circumstances where a worker who is party to a purported contract for work can no longer be considered an 'employee' for the purposes of the *Fair Work Act 2009* (Cth) because the contract is rendered void by a breach of s 235 (often because of exploitation).[11] This means that they cannot enforce the full range of rights and protections available to a worker classified as an 'employee'.

4.3 We also welcome the introduction of **s 245APA**, an 'avoidance of doubt' clause that aims to ensure that any breaches of work-related visa conditions do not unintentionally invalidate contracts of service or contracts for services, thereby preventing the erosion of workplace rights and entitlements under relevant workplace laws. 'Relevant workplace laws' are defined as Commonwealth and State or Territory laws that regulate workplace relationships (contract of

[9] Department of Home Affairs, *A Migration System for a More Prosperous and Secure Australia: Outline of the Government's Migration Strategy* (April 2023).
[10] *Ending 'Permanent Temporariness'* (n 3); Human Rights Law Centre, Migrant Workers Centre, Dr Anthea Vogl and Dr Sara Dehm, *Joint Submission to the comprehensive review of Australia's migration system* (December 2022).
[11] *Lal v Biber* [2021] FCCA 959, 45-51.

service) and the performance of work (contract for services), as well as laws about occupational health and safety and workers' compensation.

4.4 The definition of 'relevant workplace laws' encompasses a wide range of laws. The subsection would benefit from further clarification about which laws come under its remit. An exhaustive list would not be practicable, given the fluidity and variability of the Australian legal system. However, we suggest amending the definition of 'relevant workplace laws' to include general categorical descriptions, similar to the categorisation of 'a law dealing with occupational health and safety matters and a law dealing with workers' compensation'. For example, it is not clear whether Federal trafficking, forced labours and modern slavery laws would come under this definition; these laws *indirectly* regulate workplace relationships and the performance of work because they prohibit certain extreme forms of exploitation in the context of work. We propose that the following categories be included within the definition of 'relevant workplace laws' to provide greater certainty for migrant workers:

4.4.1 The National Employment Standards
4.4.2 State and Territory labour hire licensing laws
4.4.3 State and Territory wage theft laws
4.4.4 Common law causes of action

Recommendation 2. That the meaning of 'relevant workplace law' under s 245APA(2) be clarified to include:

- The National Employment Standards
- State and Territory labour hire licensing laws
- State and Territory wage theft laws
- Common law causes of action

5. Visa cancellation powers: ss 116(1A) and (1B)

5.1 The Bill replaces s 116(1A) with a **new ss 116(1A) and (1B).** These amendments allow the Governor-General to prescribe matters under the *Migration Regulations 1994* (Cth) ('the Regulations') to which the Minister 'must, or must not, have regard' in certain matters relevant to the cancellation of visas. The regulations will also 'specify the weight to be given' to the prescribed matters. As per the Explanatory Memorandum, the Government is currently reviewing the Assurance Protocol to 'ensure [the prescribed circumstances] are holistic and robust, while maintaining visa program integrity'. As these matters are yet to be prescribed, it is unclear how the Government intends to codify the Assurance Protocol.

5.2 The Assurance Protocol has been subject to sustained criticism as it only provides discretionary protections against visa cancellation in circumstances where a worker is assisting the Fair Work Ombudsman (FWO) with inquiries. If the Government intends to mirror the terms of the current Assurance Protocol in the regulations, it will fall short of providing adequate protections against visa cancellation. The proposed amendments continue to allow the discretionary cancellation of

visas, as they do not specify that the discretion must be exercised in one way or another. As such, they do not provide the certainty that migrant workers need to come forward.

5.3 Fear of visa cancellation is one of the key factors that prevents migrant workers from reporting exploitation.[12] A legislated, easily communicated guarantee with a transparent appeals process is needed to provide workers with the incentive to report exploitation and enforce their labour rights. Maria's story (**Case Study 1**), among many others, illustrates the need for a clear guarantee against visa cancellation:

Case study 1. Visa cancellation and visa pathways

Maria arrived in Australia with her husband and two young children on a Temporary Skill Shortage (TSS) visa to work as a registered nurse. Things were good at the start, but her boss started to treat her poorly, getting mad without reason and even physically threatening her at work. At one point he attended her house and slashed her tyre. Maria was too afraid to report him because she worried it would jeopardise her visa. She stopped going to work and was eventually fired.

A friend eventually directed Maria to her union and referred her to Visa Assist. She did not want to lodge a complaint about her work until her "visa was safe". Unfortunately, given the length of time she had been out of work, Maria was in breach of one of her visa conditions. This meant that her visa could be cancelled under section 116 of the Migration Act. Fortunately, Visa Assist was able to assist Maria and her children apply for permanent residency through her husband's employment. This is not the case for many referrals to Visa Assist.

5.4 The MWC endorses the **Exploited Worker Guarantee** proposed by the Migrant Justice Institute and the Human Rights Law Centre, which provides an appropriate balance between protecting against visa cancellation, transparency and efficiency, and preserving the integrity of the migration system.[13] The most appropriate way to provide this guarantee is by way of regulations pursuant to s 116(2) which, unlike the proposed ss 116(1A), prohibits the Department of Home Affairs (DHA) from cancelling a visa under circumstances set out in the Regulations. This does not require amendments to the *Migration Act*.

5.5 To be eligible for protection under the **Exploited Worker Guarantee**, a migrant worker must demonstrate that they are taking steps to address a meritorious and non-trivial claim of exploitation. A robust, express and easily accessible guarantee is imperative because decision-making processes within the Department can be highly discretionary, leading to inconsistent outcomes. Access to the protection is conditional upon:

5.5.1 **The presentation of prescribed forms of evidence**. These could be documents that substantiate the merits of the worker's allegations or evidence the pursuit of a legal remedy (e.g., certification by an enforcement agency).

[12] Migrant Justice Institute (n 4) 39.
[13] *Breaking the Silence* (n 2).

5.5.2 **Evidence of a non-trivial violation of workplace law.** This would be a contravention that is systematic, repeated, or severe. There would also need to be a monetary or loss threshold attached to this violation.

5.6 The threat of visa cancellation is a serious concern for migrant workers, particularly as these breaches often happen in the context of workplace exploitation. For these workers to raise complaints against their employers, robust and explicit protections against visa cancellation are necessary. The proposed safeguards are strong, easily communicated, and efficient for migrant workers looking to apply for protection and for the DHA and other agencies to manage.

5.7 As above, relevant 'workplace laws' should be construed broadly to include occupational health and safety laws and anti-discrimination law. In addition to not cancelling a visa, the guarantee provides that the DHA will not consider a worker's breach of visa conditions in determining whether to grant any future visa. Integrity safeguards that require professional certification of the bona fides of the complaint or evidence that a worker is pursing legal action will guard against false or inadequately unsubstantiated claims. Unlike the current Assurance Protocol, these protections extend to migrant workers who pursue legitimate claims against an employer through a variety of avenues, not just through the FWO. This expansion is necessary because the FWO's limited capacity for investigations, slow complaint processes, and restricted jurisdiction do not adequately cover the breadth of potential workplace exploitation issues experienced by migrant workers, such as occupational health and safety violations or sexual harassment.

5.8 We note the tranche of reforms and safeguards announced by the Federal Government will help fill gaps in relation to the conditions that make migrant workers vulnerable to exploitation and that undermine the reporting of exploitation.[14] Much-needed reforms to supplement protections against visa cancellation include the introduction of a substantive Workplace Justice Visa and an 'information' Firewall between the FWO and the DHA. We have canvassed the need for these reforms in our previous Submission.

Recommendation 3. That the amendments to ss 116(1A) and (1B) are not introduced. The Exploited Worker Guarantee proposed by the Migrant Justice Institute and the Human Rights Law Centre should instead be adopted in full.

6. New sanctions: ss 245AA(1)(a), 245AAA, 245AAB and 245AAC

6.1 The MWC welcomes the new penalties introduced in Part 1 of the Bill. We also welcome increases in the maximum criminal (s 245AEB) and civil penalties for existing sanctions for individual employers under the *Migration Act* (ss 245AB, 245AC, 245AE, 245AEA), which better reflect the seriousness of the offences.

6.2 Compared to the 2021 Bill, the new penalties explicitly separate protections based on the status of non-citizens (lawful vs unlawful), providing more precise protections that take into account their specific vulnerabilities. For instance, section 245AA(1)(a) mirrors the older draft but

[14] Department of Home Affairs (n 1).

specifically captures lawful non-citizens coerced into work arrangements that breach their visa conditions or negatively impact their lawful status. Section 245AAA caters to lawful non-citizens compelled into work agreements resulting in a violation of work-related conditions. Section 245AAB addresses unlawful non-citizens who are pressured into accepting work arrangements that could jeopardise their continued presence in Australia (such as visa cancellation). The Bill introduces a new provision (s 245AAC) to protect lawful non-citizens from being coerced into situations that could harm their visa status or compliance with visa requirements.

6.3 The new penalties serve as a possible deterrence to employer non-compliance, particularly in cases of serious misconduct. Ideally, broader protections will steer migrant workers towards other legal avenues to seek redress and hold employers accountable for their actions. Nevertheless, employers found to breach these penalties are likely to be in breach of relevant workplace laws, which fall outside the framework of migration law. To better address widespread exploitation, when employers are penalised under the *Migration Act* and a breach of the *Fair Work Act* is suspected, the DHA should be required to forward the matter to the FWO for investigation.

6.4 As discussed above, the use of these sanctions will be negligible if they are not supported by the robust protections against visa cancellation provided by the Exploited Worker Guarantee. **Migrant workers will not report breaches by their employer if their visa status or pathway to permanency is at risk**. Other protections, in the form of a substantive Workplace Justice Visa, will complement these penalties further by providing migrant workers with visa security to leave an exploitative employer, and to pursue action against them, without risking their visa status. **We support the Workplace Justice Visa model proposed by the Migrant Justice Institute and the Human Rights Law Centre, discussed in detail in their joint report**.[15]

6.5 Although these penalties offer more precision in addressing coercive and exploitative practices, it is also critical to note that they primarily address explicit forms of coercion and may not fully encompass the broader, structural forms of coercion prevalent in the Australian labour market. Exploitative behaviours are driven by numerous other factors, including competitive market conditions, the abundant availability of migrant workers, and in many cases, the perception that the risk of detection and resulting regulatory consequences are inconsequential compared to the potential economic benefits. The penalties remain confined to situations where employers use visa requirements to coerce or exert undue pressure on lawful and unlawful non-citizens to accept exploitative working arrangements.[16]

6.6 As previously mentioned, the exploitation of migrant workers is deeply ingrained and systemic. Migrant workers are often locked out of secure jobs due to their temporary status and many are not eligible for welfare benefits. Employers exploit their insecure status by coercing them into unequal working conditions. The resulting power imbalance leaves them vulnerable to various forms of exploitation beyond just working conditions, such as sexual harassment and substandard or unsafe living conditions. **The scope of the penalties should be broadened to reflect this.**

[15] *Breaking the Silence* (n 2).

[16] Migrant Justice Institute, Submission No 8 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Protecting Migrant Workers) Bill 2021* (28 January 2022) 11

Recommendation 4. That the Department of Home Affairs, when dealing with cases where employers have been penalised under the *Migration Act 1958* (Cth) and a breach of the *Fair Work Act 2009* (Cth) is suspected, refers these matters to the Fair Work Ombudsman for investigation.

Recommendation 5. That the phrase 'arrangement in relation to work' under ss 245AA(1)(a), 245AAA, 245AAB, and 245AAC, is broadly defined to include any arrangement that is harmful or has negative consequences for the non-citizen (including, for example, accepting a sexual advance).

7. Migrant Worker Sanctions and Prohibited Employers

7.1 The MWC supports the introduction of a framework that places limitations on a 'prohibited employer' from engaging additional migrant workers (s 245YL). These limitations extend to a third party who 'has a material role' in making the decision to a engage additional migrant workers. Pursuant to s 245AYK(1), the Minister has the discretion to declare a person a 'prohibited employer' where they are subject to a 'migrant worker sanction', which covers non-compliance with a range of workplace laws. A person is amenable to the prohibition if they:

7.1.1 are subject to a sponsorship bar (s 245AYE)
7.1.2 contravened work-related offences (s 245AYF)
7.1.3 are subject to civil penalty orders in relation to a contravention (s 245AYG)
7.1.4 are subject to a Fair Work order in relation to a contravention (s 245AYH)
7.1.5 contravened a term of enforceable undertaking (s 245AYI) or have failed to comply with certain compliance notices (s 245AYJ) under the *Fair Work Act*

7.2 Civil penalties apply for 'prohibited employers' who engage additional migrant workers while a declaration is in effect, and if they fail to abide by their reporting obligations (about employing a migrant worker) in the 12 months after the declaration ceases (s 245AYN). In exercising their decision to declare a person a 'prohibited employer', the Minister must consider any submission made by the affected person and 'any prescribed matter' under the Regulations, which are yet to be prescribed (s 245AYK(5)). The Minister must publish information about prohibited employers on the Department's website, including any identifying information, the reasons for making a declaration, and the period of the declaration (s 245AYM). **We urge the Government to engage in further stakeholder consultation to ensure that matters that are to be prescribed under the Regulations do not have unintended negative consequences for migrant workers.**

7.3 The possible adverse effects on workers sponsored by someone designated as a 'prohibited employer' can be offset by the repeal of s 235 and the introduction of the Workplace Justice Visa. Regardless of their age (for instance, if they have crossed the age limit for sponsorship by another employer), workers affected by their sponsoring employer's misconduct should still have access to a path to permanent residency via a substantive Workplace Justice Visa.[17]

[17] *Breaking the Silence* (n 2).

7.4 Further, the use of Ministerial discretion under the *Migration Act* has attracted sustained appeals for increased transparency and accountability.[18] To enhance transparency and reduce the risk for arbitrary decision-making, the powers exercised under ss 245AYK (declaration of person as prohibited employer) and 245AYM (publishing information about prohibited employers) should be subject to greater public scrutiny. To this end, the submissions of employers and other materials considered in exercising this discretion should be made available, with exceptions made for the release of potentially identifying information about the worker(s) involved.

7.5 The MWC also welcomes the insertion of ss 245AYI and 245AYJ into the Bill, which trigger the prohibition power in cases of failure to comply with a compliance notice or an enforceable undertaking related to a work-related provision. As most workplace issues are not often subject to court action, these sections will broaden the scope and timeliness of the prohibited employer declaration scheme. We also welcome s 245AYM(5), which does not require the Minister to remove identifying information about a former 'prohibited employer'. The potential for enduring reputational damage may increase the deterrence effect of these provisions.

Recommendation 6. That the discretionary powers exercised under ss 245AYK and 245AYM be subjected to increased public scrutiny by making available all relevant materials considered, barring the release of information that could potentially identify the worker(s) involved.

8. Enhanced enforcement and access to justice

8.1 It has been historically difficult to achieve compliance in the area of migrant worker exploitation. Without meaningful enforcement, new sanctions and increased penalties alone are unlikely to act as a strong deterrent *to exploitation. For example, there has been very little reported use of existing sanctions in the Migration Act* in relation to employer-sponsors, including those who fail to satisfy sponsorship obligations.[19] A combined approach is needed, whereby stronger sanctions are backed by targeted enforcement efforts and greater certainty of detection. This is because the widespread exploitation of migrant workers primarily stems from employers' belief in their ability to avoid detection or punishment, and the assumption that migrant workers will not report or seek to redress exploitation. It is therefore crucial to intervene the first time an employer exhibits exploitative behaviour, as unchecked actions can escalate into more severe conduct over time.

8.2 The Report of the Migrant Workers' Taskforce (2019) underscored the need for further tools, resourcing, and powers for the FWO to undertake its functions under the *Fair Work Act*. This includes the provision of the same information-gathering powers as other business regulators, such as the Australian Competition and Consumer Commission (Recommendations 9 and 10).[20]

[18] Anja Hilkemeijer, 'Arbitrary Ministerial Power Under the Migration Act: Permanent Residents Beware' (2017) 42(3) *Alternative Law Journal* 221.
[19] Law Council of Australia, Submission No 20 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Protecting Migrant Workers) Bill 2021* (28 January 2022) 35.
[20] Attorney-General's Department, *Migrant Workers' Taskforce Report* (March 2019).

The Government must undertake a comprehensive review of the purpose, resourcing, and effectiveness of the FWO, with a focus on improving the deterrence and remediation impact of claims made by exploited migrant workers. Increased investment in sustained enforcement and compliance efforts is essential to ensure that new and existing offences and civil penalties provide meaningful protections to migrant workers.

8.3 **Greater support and resourcing for community-based solutions is also needed to improve access to justice.** The effectiveness of the measures proposed in this Bill and more broadly by the Government's migration reform agenda will be limited unless migrant workers are actively supported to use them. This is because trust in the migration system and public institutions has been considerably eroded. Many migrant workers will simply not engage with authorities due to ongoing fear of negative consequences, regardless of the extent to which these fears are substantiated. Even with a guarantee of visa security, many migrants remain reluctant to report exploitation due to the knowledge gaps, language barriers, and expectations informed by their experiences in other countries.[21]

8.4 There are currently limited avenues and resources available for advice, support, and representation for migrant workers to pursue employment and migration-related claims. Migrant workers are more likely to engage trusted community organisations, particularly where the support available is culturally appropriate and can be provided in-language. Increased funding is needed for community-based legal services to substantially expand their capacity to provide targeted advice and representation for migrant workers. Targeted interventions are also needed to educate migrant workers about the legal remedies available to them.

8.5 Migrant workers who have experienced serious workplace exploitation may need financial assistance. This will particularly be the case for workers who have been impacted by their employers' conduct to the extent that they are left in serious financial hardship, or unable to work (e.g., due to their sponsor being declared a 'prohibited employer'). Eligibility for Status Resolution Support Services (SRSS) should be extended to migrant workers who qualify for the Exploited Worker Guarantee or the Workplace Justice Visa. The costs associated with these reforms will be offset by penalties and increased tax revenue collected from employers, as a result of increased investigations which will flow from implementation of the measures.[22]

Recommendation 7. That the Government enhance enforcement efforts by implementing Recommendations 9 and 10 of the Report of the Migrant Worker Taskforce and investing in community-based legal services that can assist migrant workers with both employment and migration-related claims.

Recommendation 9. That the Federal Government extend eligibility for Status Resolution Support Services (SRSS) payments to visa holders or applicants who qualify for the Exploited Worker Guarantee or the Workplace Justice Visa.

[21] *Breaking the Silence* (n 2) 8.
[22] Grattan Institute (n 7) 90.

9. Conclusion

9.1 This Bill is an important first step in addressing the widespread issue of migrant worker exploitation. However, it only tackles one part of the problem and is weakened by a critical shortcoming – the lack of a robust and transparent protections against visa cancellation. Although the Bill recognises the impact of the threat of visa cancellation, it contains no guarantee to provide migrant workers with the surety and confidence to report exploitation.

9.2 The efficacy of the Bill in curbing employer non-compliance largely hinges on migrant workers' willingness to come forward, which they are often hesitant to do without assurance that they will not face negative repercussions, especially when it comes to their ultimate aspiration of securing long-term residency. The stakes are high for many migrant workers, and uncertainty resulting from discretionary decision-making – which this Bill provides for – can be too significant a risk to take.

9.3 The MWC, in conjunction with unions, civil society organisations and academics, urges the Government to implement the **Exploited Worker Guarantee**, which provides clear, easily communicated, and transparent protections against visa cancellation. This guarantee, in addition to further whole-of-government reforms, are needed to strengthen the Bill and ensure that it achieves its public policy goal of protecting migrant workers.

9.4 As Australia looks to revamp its migration system, we're calling on the Government to continue consulting with and listening to migrant workers and those who represent them. The ability and willingness of migrant workers to report exploitation and seek remedies is critical to upholding the integrity of Australia’s labour laws. Their individual and collective agency must be recognised and supported.