

Migration Amendment (Charging for a Migration Outcome) Bill 2015

SUBMISSION

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INTRODUCTION

1. The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing 19,000 members. We advocate on behalf of our profession and the wider community, lead the debate on law reform and policy, lobby and engage with government and provide informed and expert commentary. This submission is informed by contributions from the LIV's Administrative Law and Human Rights Section.
2. We thank the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to provide a submission to the Inquiry regarding the Migration Amendment (Charging for a Migration Outcome) Bill 2015.

Purpose of the Bill

3. The Bill proposes to amend the *Migration Act 1958* to make it unlawful for a person to give or receive a benefit in return for a migration outcome in relation to certain skilled work visa programmes.
4. The Bill is designed to target activity whereby a sponsor is paid by a visa applicant for a migration outcome. The Bill is introduced in response to recommendations of an independent review into the integrity of the subclass 457 programme.
5. The Report of this review found that some sponsors had been paid by visa applicants for a migration outcome, concluded that this undermines the integrity of the programme and recommended that sanctions (including criminal sanctions) should apply. The LIV notes that the Report does not specify to whom the sanctions should apply and does not make any recommendations with regards to visa cancellations.
6. The LIV is concerned that the Bill exceeds significantly the recommendations in the Report by targeting not only the sponsors who receive payment for migration outcomes, but also migrant workers who already have few protections and are subject to manifest abuses in the Australian workforce. The amendments which extend beyond the recommendations in the Report are not supported by the evidence before, or the findings of, the independent review. No other evidence has been put forward to support the extended amendments.

LIV Concerns about the Bill

7. The LIV is concerned that this Bill targets and penalises migrant workers, a vulnerable group already subject to exploitation and poor treatment in the Australian workforce¹. The LIV is of the view that this Bill is not an appropriate response to recent reports citing hundreds of thousands of migrant workers being exploited by Australian business and companies.
8. The LIV broadly supports legislation that targets unscrupulous employer-sponsors and others who seek to take advantage of vulnerable visa applicants in their employment. Such conduct may take the form of demanding a fee in return for sponsorship, deducting money from an employee's pay, or requiring that an employee work for free or for very low wages in return for sponsorship and/or refusing to provide fair employment benefits such as sick leave, overtime or personal leave while

¹ See for example, ABC Four Corners investigation '[Slaving Away](#)' exposing exploitation and slave-like conditions on farms supplying Australian supermarkets; the case of a 457-visa holder trafficked to Australia and held in slave-like conditions in a restaurant for 16 months reported in the [Sydney Morning Herald](#); and the recent [Fairfax and Four Corners investigation](#) revealing widescale abuse of workers by 7-Eleven franchisees.

sponsoring an employee. Some of this conduct would amount to a form of slavery or forced labour, breaching Article 8 of the International Covenant of Civil and Political Rights².

9. Such behaviour by employer-sponsors is not currently subject to either civil or criminal legal sanction. The LIV agrees that legislation is required to penalise sponsors or potential sponsors who seek to take advantage of migrant workers in their applications for skilled temporary or permanent visas.
10. The LIV further agrees that it is not preferable for migrant workers to become Australian permanent residents through the payment of monies or benefits to sponsors in exchange for sponsorship. As the Explanatory Memorandum makes clear, “[a]pplicants who have paid for their visa are more vulnerable to exploitation and extortion by their sponsor, behaviour which endangers workers and undermines Australian workplace law.”³
11. However, this Bill punishes the vulnerable visa applicant for *paying or offering to pay*, as well as the sponsor for charging, for a migration outcome. The Bill seeks to impose a strict liability penalty with heavy fines as well as a discretionary power to cancel any visa the applicant holds, irrespective of whether such payment or offer is related to the sponsorship event.
12. These high penalties could be viewed as punishment for conduct that, in many cases, occurs as a result of migrant workers being coerced or forced; being too vulnerable to refuse; and/or being unaware that such conduct is improper or unlawful.
13. It is paradoxical that this Bill seeks to protect migrant workers from exploitation and at the same time includes severe penalties for migrant workers who may be at risk of exploitation. The LIV is concerned that the high penalties contained in this Bill may have the practical effect of deterring migrant workers in exploitative situations from coming forward, for fear that they may have their visa canceled or be subject to civil penalties.

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 8.

³ Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Explanatory Memorandum](#).

IMPACT ON MIGRANT WORKERS

14. The LIV is concerned that the Bill in its current form will unduly punish vulnerable migrant workers without reference to their culpability or intention. The LIV is further concerned about the increase in Ministerial powers contemplated by the Bill. We note the following concerns about the Bill for the Committee's consideration:

Visa cancellation as a penalty

15. The following amendment sets out a new visa cancellation power:

After subsection 116(1AB)

Insert:

- (1AC) Subject to subsections (2) and (3), the Minister may cancel a visa (the **current visa**) if he or she is satisfied that:
- a) a benefit was asked for or received by, or on behalf of, the person (the **visa holder**) who holds the current visa from another person in return for the occurrence of a sponsorship-related event; or
 - b) a benefit was offered or provided by, or on behalf of, the person (the **visa holder**) who holds the current visa to another person in return for the occurrence of a sponsorship-related event.
- (1AD) Subsection (1AC) applies:
- a) whether or not the visa holder held the current visa or any previous visa at the time the benefit was asked for, received, offered or provided; and
 - b) whether or not the sponsorship-related event relates to the current visa or any previous visa that the visa holder held; and
 - c) whether or not the sponsorship-related event occurred.

16. This clause appears to be quite broad in its potential application to visa holders. The cancellation may apply to *any* visa, even if it was unrelated to the sponsorship event. The LIV is concerned that this makes the visa cancellation a form of 'punishment' for a potentially unrelated event. A further concern is that the visa may be cancelled whether or not the event actually happened.
17. Recent investigations by Fairfax, Four Corners and Monash University have exposed large scale exploitation of hundreds of thousands of migrant workers in Australia. Reports have highlighted examples where employers have charged migrant workers large sums of money for enrolment in what are presented as legitimate 'courses' to secure work or student visas or gain skills. These courses often turn out to be illegitimate and, in addition, employers often grossly underpay and mistreat the employees.⁴

⁴ The Age, ['7-Eleven workers pay up to \\$70,000 for visa in indentured labour scheme'](#), 23 Sept 2015

[LIV notes that the Department of Immigration and Border Protection has not agreed to grant the 7-Eleven workers immunity from having their visas cancelled for breaching their conditions, potentially preventing many from coming forward to assist the Fair Work Ombudsman investigation and reclaim wages owed to them];

The Sydney Morning Herald, ['Worker's paradise or black labour haven?'](#), 2 October 2015.

18. Under the amendments contemplated by this Bill, the LIV understands that, in the above scenario, a worker would be fined and the Minister should have discretionary power to cancel their visa(s). It is our view that, in circumstances where workers may not have had knowledge that the fees they were asked to pay were in fact and law not legitimate or lawful and/or the workers were not in a position where they are able to refuse to pay, it is inappropriate to impose punishments such as fines or expose them to detriment such as visa cancellation. A strict liability provision without a mental element is simply not necessary to protect the integrity of the migration system or address the problem that the Bill seeks to address.
19. We further note in relation to the cancellation powers generally in this Bill that the Minister already has broad visa cancellation powers under section 116 of the *Migration Act 1958*. This Bill is part of an increasing trend towards adding specific cancellation powers to the Act. A consequence of this approach is that the Migration Act is becoming more complex and difficult to negotiate and understand for visa applicants, advisors and for delegates who apply its powers. This trend contravenes a central rule of law principle: that the law must be both readily known and available, and certain and clear.⁵ It also increases the risk that one or more cancellation power in the Act will be read down as a result of the introduction of new, specific powers, on the basis that each section of the Act must be given work to do. Increase in Ministerial discretionary power
20. The LIV has previously expressed its concerns with character related provisions of the Migration Act as amended by the Migration Amendment (Character and General Visa Cancellation) Act 2014.⁶ In particular, the LIV expressed concerns about the amendments in that Act that substantially broadened the grounds on which a non-citizen's visa could be refused or cancelled.
21. In respect of the Bill currently being considered by the Committee, the LIV is concerned by the expansion of the Minister's discretionary power to cancel visas, including temporary and permanent visas, on the basis of being 'satisfied' that there has been an offer to provide, or provision of, a benefit for a 'sponsorship-related event'. In circumstances where the power is based on strict liability (i.e. there is no mental element), the only threshold issue will be the subjective satisfaction of the Minister that a certain event has occurred. This is an unduly low and disproportionate threshold for the exercise of a power which will have significant and detrimental effects on the visa holder.
22. The Explanatory Memorandum states that: "The visa cancellation ground is discretionary and requires consideration to be given to a range of factors such as the person's complicity in the 'payment for visas' arrangement, strength of ties to Australia and contribution to the Australian community, in considering whether or not to cancel the visa."⁷
23. Although the visa holder's 'complicity' is referred to in the Bill, this requirement for a mental element is not reflected in the Bill itself. In our view, the reference in the Explanatory Memorandum on its own will be insufficient to imply a mental element into the amendment. As such, if it is intended that a mental element apply (and we submit that it should), then it should be expressly stated in the Bill.
24. The LIV is further concerned that about whether there will be sufficient training given to delegates about the proper exercise of discretionary power to cancel visas. The Bill provides no guidance as to when it is appropriate to exercise the discretion. Given the significant consequences of the exercise of the power and the fact that it may be exercised by delegates of the Minister, safeguards are desirable and necessary. The LIV submits that the Bill should be amended to prescribe a range of mandatorily relevant considerations, including the question of complicity and intention on the part of the visa holder.

⁵ See Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), available online: <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>> 2.

⁶ LIV Submission, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, Available online: <<http://www.liv.asn.au/getattachment/0d3282a8-36af-4c5d-96aa-ee2d7b56e5e0/Migration-Amendment-Character-and-General-Visa-Can.aspx>>.

⁷ Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Explanatory Memorandum](#) at 18.

Civil penalty provision

25. The following section of the Bill sets out the offences and penalties contemplated:

245AS Prohibition on offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event

(1) A person (the **first person**) contravenes this subsection if:

- a. the first person offers to provide, or provides, a benefit to another person (the **second person**); and
- b. the first person offers to provide, or provides, the benefit in return for the occurrence of a sponsorship-related event.

Civil penalty: 240 penalty units.

- (2) To avoid doubt, the first person contravenes subsection (1) even if the sponsorship-related event does not occur.
- (3) Subsection (1) does not apply if the benefit is a payment of a reasonable amount for a professional service that has been provided, or is to be provided, by the second person or a third person.
- (4) A person who wishes to rely on subsection (3) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.

Note: It is not necessary to prove a person's state of mind in proceedings for a civil penalty order (see section 486ZF).

26. The LIV notes that this clause creates a strict liability offence, such that it is not necessary to prove any particular knowledge on behalf of the visa holder.
27. In the LIV's view, it is very important to consider whether a visa applicant *intended* to provide a 'payment for visa' or be involved in the provision of unlawful 'benefits' to a sponsor to gain a visa, and whether the applicant had knowledge that the provision of such 'benefits' was unlawful.
28. Further, the LIV notes there is no provision in this section to take into account vulnerabilities such as exploitative work conditions, lack of English language skills, and lack of knowledge of Australian law including migration and employment law.
29. The LIV is concerned that this clause could result in vulnerable applicants, who may be taken advantage of, being subject to heavy penalties of up to \$43,200 (240 penalty units).

Definition of 'benefit'

30. The LIV is further concerned with the broad definition of 'benefit' in new section 245AQ, which provides that "benefit" includes:

- a payment or other valuable consideration; and
- a deduction of an amount; and
- any kind of real or personal property; and
- an advantage; and
- a service; and
- a gift.

31. The consequence of this definition is that a visa holder would fall foul of the provisions in this Bill and be subject to visa cancellation where:

- the visa holder's wages are deducted in return for sponsorship; or
- the visa holder is requested to forgo wages or is underpaid in return for sponsorship;

including in conditions where the the visa holder is disempowered and unable to refuse - for example, if working in indentured-labour like conditions.

32. This is an overly broad definition that, combined with the visa cancellation and civil penalty provisions discussed above, allows for strong penalties to be imposed on vulnerable migrant workers who do not understand the full implications of their behaviour in this complex area.