



National Tertiary Education Union (NTEU)

Submission to the

**Migration Amendment (Protecting Migrant Workers)
Bill 2021**

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Introduction

The NTEU welcomes the opportunity to make a submission on the Migration Amendment (Protecting Migrant Workers) bill 2021 (hereafter, 'the Bill'), following on from our submission to the Exposure Draft of the Bill. The NTEU represents the professional and industrial interests of over 30,000 people working in Australian tertiary education and research sectors. Our members teach several hundred thousand international student visa holders every year.

The NTEU welcomes government action over the widespread exploitation of migrant workers including international student visa holders and supports measures to introduce new penalties for dishonest employers, however, these penalties need to be coupled with new protections for visa holders. Without these protections visa holders have no incentive to come forward and risk adverse consequences. As it stands this Bill falls short in its aims of reducing exploitation, and risks creating negative unintended consequences for victims of workplace exploitation.

The Welfare of International Students

The welfare of our international students is of high priority to NTEU and its members. As noted by the Taskforce Report non-sponsored visa holders such as international students and working holiday makers often experience exploitation in Australian workplaces.

NTEU's own members know that it is common practice for employers to underpay international students and simultaneously require these international students work more hours than permitted under their visa conditions (of 40 hours per fortnight during periods of study). They are then able to threaten to report the student worker for violating their visa conditions if they do not continue to work in the exploitative conditions required by the employer.

NTEU notes the package of actions proposed by the Student Service Delivery Taskforce under the Council for International Education to address student exploitation. These actions included mandating student support services provide education on workplace rights to international students via the National Code of practice. While this is not the direct subject matter of the Bill the NTEU would like to note that there is a vast difference in capacity and effort between small private providers and large public universities in providing advice and pastoral care to students. It is not likely that small for-profit providers will have the capacity or knowledge to provide industrial advice to students as implied by the recommendations of the SSDT.

Further, we know that a large number of international students *know* that they are being underpaid but do not act on this information.¹ This suggests that actions beyond education are needed, such as protections for whistle-blowers.

¹ 73-86% of international students surveyed were aware the minimum wage was higher than they were receiving Berg, L. and Farbenblum, B., Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey November 2017, Migrant Worker Justice Initiative
<http://apo.org.au/system/files/120406/apo-nid120406-483146.pdf>

The Bill

Part One

Part One of the Bill introduces new penalties for employers who coerce visa holders into accepting employment in breach of their visa conditions. NTEU welcomes measures to hold employers responsible for their actions. However, NTEU also notes that contraventions of the Fair Work Act or Visa conditions are unlikely to be detected by any party unless reported directly by the employee. This Bill does not do enough to improve detection and reporting.

International students are in an extremely vulnerable position when it comes to reporting their employer. They may lose employment and may become blacklisted for future employment in their local networks, further, under this amendment a visa holder may report their employers' contravention only to find themselves penalised for the same condition breach they are reporting, for example in the case of international students being underpaid, the breach of the 40 hours per fortnight work condition. Employers are aware of this condition and use it actively as a source of leverage over international students who they are deliberately underpaying.

We note that the Bill does not provide any protections for whistle-blowers and therefore does not encourage any increase in employee reporting. Visa holders face real risks in reporting contraventions, and the Bill in its current form does not acknowledge this reality. Assuming the restriction on international student work hours is re-imposed, international students should not be penalised for working more than 40 hours per fortnight in circumstances where the employer is in full control of hours worked. It needs to be acknowledged that student visa holders are often precariously employed, and therefore must either work what is demanded or lose their employment.

Recommendation 1: *Restrictions that disempower temporary visa holders and empower exploitative employers should be removed. This includes the mandatory 88 day work requirement for working holiday visa holders. International students should be given leniency around work hour restrictions when precariously employed in non-regular patterns of employment.*

Recommendation 2: *Protections should be added to indemnify temporary visa holders who report contraventions of the Migration Act. When an employer is convicted under the Act any visa holders subject to the contraventions should be immune from deportation or visa cancellation as a result of that contravention.*

Further, the NTEU supports the ACTUs recommendation that this must include whistle-blower protections to protect workers from making complaints and providing evidence to an investigation, an amnesty for workers who make a complaint to stay in Australia while their case is heard, and an extension or bridging arrangement to enable workers for whom employer sponsorship is a requirement of their visa to find a new sponsor.

Part Two

Part Two of the Bill gives the Minister powers to prohibit certain employers from employing additional non-citizens. The definition of a Migrant Worker Sanction at Section 245AYD requires that a relevant employer be subject to an order of a Court. This is unnecessarily onerous given that most workplace issues are not resolved in courts. A more appropriate mechanism would be to allow the employer to be prohibited where the decision maker (ideally the Fair Work Commission) was satisfied that the relevant provisions were contravened, on the basis of all available evidence (including evidence previously produced to the FWO or obtained by an officer or employee of a registered organisation exercising entry rights).

Recommendation 3: *The Department of Home Affairs (DHA) should notify trade unions and the Fair Work Ombudsman of the list of prohibited employers and check in with trade unions about the activities of prohibited employers.*

Recommendation 4: *Amend Section 245AYD to include that a person can be subject to a migrant worker sanction if the Fair Work Commission is satisfied the relevant provisions were contravened.*

Recommendation 5: *Section 245AYG(4) and (6) of the Bill regarding declaration of a person as a prohibited employer must be amended to allow the affected worker/s, regulator and registered organisations to make a written submission setting out the reasons why the Minister should or should not make the declaration.*

Recommendation 6: *Section 245AYG(10) be amended to ensure that the AAT can also review Ministerial decisions to not declare a person to be a prohibited employer.*

Recommendation 7: *The exception to prohibited employers engaging migrant workers if they are 'merely incidental to a business of the person or the body corporate' in Sections 245AYH and 245AYJ must be deleted.*

Conclusion

The welfare of international students working in Australia is of particular concern to the NTEU and the higher education sector. We must protect our students from exploitation by Australian employers. While this bill aims to do this, its effectiveness could be vastly improved by acknowledging the power imbalance between visa holders and employers, and granting visa holders the proper protections they need to speak up when they are being exploited and improperly employed. Below are recommendations for additional reforms that will address this problem more broadly.

Additional reforms to the migration framework

Preventing and addressing the exploitation of migrant workers requires comprehensive change of the migration system and strengthening of workers' rights. The NTEU supports the following recommendations for reform made by the ACTU:

Recommendation 9: *Recalibrate the balance of the skilled migration program toward permanent, independent migration. The current weighting of Australia's skilled migration program towards temporary and employer-sponsored pathways should be re-evaluated, with greater emphasis given to the permanent, independent stream as the backbone of the skilled migration program.*

Recommendation 10: *Abolish the Australian Agriculture Visa. The ACTU is deeply concerned about the Morrison Government's new Agriculture Visa, which will not have the same levels of worker protection as the Pacific Australia Labour Mobility (PALM) programmes. There is nothing in the new visa to address the high rates of exploitation that exist under the current visa schemes, which is particularly concerning given the prevalence of exploitation in the horticulture and meat industries. As has been outlined in this submission, because this Bill does nothing to address the barriers to reporting exploitation that migrant workers face, it is unlikely this Bill will result in any additional protections for migrant workers in practice.*

Recommendation 11: *Conduct union pre-departure and arrival briefings for all temporary migrant visa classes. Workers must be provided with information about their workplace rights and entitlements, including the right to access and join a union.*

Recommendation 12: *Reform a number of other policy areas to prevent and address migrant worker exploitation, including:*

- Introduce a simple, quick and accessible way to resolve wage theft
- Introduce a robust national labour hire licensing scheme
- Reform the ABN system to end sham contracting
- Strengthen the Modern Slavery Act 2018, including through the introduction of penalties and independent oversight in the form of a commissioner with inspection powers.