

The Freedom Partnership
End Modern Slavery



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Submission by the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia; The Freedom Partnership – to End Modern Slavery, The Salvation Army; the National Union of Workers; and Harris Wake Pty Ltd to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Migration Amendment (Charging for a Migration Outcome) Bill 2015*
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The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia; the Freedom Partnership – to End Modern Slavery, The Salvation Army; the National Union of Workers and Harris Wake Pty Ltd welcome this opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the inquiry into the *Migration Amendment (Charging for a Migration Outcome) Bill 2015*.

Recommendations:

The Bill be amended so that:

1. The Minister is unable to cancel the visa of a person who has been subjected to human trafficking, forced labour or slavery offences under the *Criminal Code* (Sections 270 and 271).
2. The Minister is unable to cancel a visa while any investigation is being conducted into such offences that involve the visa holder as a likely victim of such offences.
3. The Minister is unable to cancel the visa where the visa holder has been a victim of serious breaches of the *Fair Work Act* or the Award the visa holder should be entitled to, or during any period of investigation by relevant authorities into such crimes where the visa holder may have been a victim.
4. The Minister should not have the power to cancel the visa where the visa holder is of material relevance to any legal action being taken by relevant law enforcement authorities against the employer or sponsor of the visa holder.
5. A civil penalty does not apply to a visa holder where the visa holder has been subjected to human trafficking, slavery or forced labour or serious exploitation in violation of the *Fair Work Act* or relevant Award.
6. The penalties in Subsections 245AR, 245AT and 245AU be the greater of 240 or 360 penalty units (as per the existing relevant provisions for each Subsection) or three times the

benefit obtained in exchange for the sponsorship-related event, which is similar in structure to the penalties that apply for foreign bribery in the *Criminal Code*, Subsection 70.2(5).

The submitting bodies are concerned at the amendments to Section 116 of the Bill that will give the Minister an unrestricted power to cancel a visa if a benefit was received by a visa holder in return for the occurrence of a sponsorship-related event. The submitting bodies are concerned that, if enacted, a Minister may cancel the visa of a person who has been subject to human trafficking and forced labour or slavery related offences under the *Criminal Code* or serious exploitation in violation of the *Fair Work Act*. Such a person may have been subjected to physical or psychological coercion to accept their conditions, and part of that may have been the offer of a sponsorship related event. The victim of these criminal activities may then be punished by the Minister in having their visa cancelled and being removed. This could even occur in a situation where the Australian Federal Police are pursuing legal action against the employer for serious offences and the visa holder is assisting the police as a witness in the prosecution.

Examples of the kind of cases in which human trafficking, forced labour or egregious exploitation has occurred and in which the alleged abuser has used the promise of permanent residency have been recorded by the government's own research:

Yogalingam Rasalingam

Yogalingam Rasalingam, a restaurant owner, was prosecuted in New South Wales in 2007 for allegedly trafficking a male Indian chef for exploitation in his restaurants.¹ The accused had implicitly threatened the complainant with deportation should he leave his employment. It was the complainant's understanding that he had to stay and work for four years, on the basis that some money would be sent to his father and the complainant would get permanent residency at the end of four years. While the jury returned a verdict that acquitted the accused on the trafficking in persons charge, it did convict him on a lesser immigration charge.

The case was then separately pursued by the (then) Office of Workplace Services (OWS). On 13 March 2008 Federal Magistrate Cameron ordered Rasalingam's business, Yoga Tandoori Pty Ltd, to pay \$18,200 in penalties into Commonwealth revenue, taking into account his lack of contrition, the need for specific and general deterrence, the fact the entirety of the complainant's pay and entitlements had been deliberately withheld and that although not a slave, the complainant was at a considerable disadvantage in his dealings with him.²

The organisation Migrante Australia documented the following cases, in which the promise of permanent residency was used as an incentive for those being exploited to accept their situation:

Antonio³

Antonio says he was lured to Australia with the promise of permanent residency. "The promise was staying here for two years will make us a permanent resident and days turned to weeks, weeks turned to months, months turned to years."

¹ Fiona David, *Labour trafficking*, AIC Reports Research and Public Policy Series 108, 2010, p. 18

² Fiona David, *Labour trafficking*, AIC Reports Research and Public Policy Series 108, 2010, p. 18

³ Greg Dyett, SBS World News Radio <http://www.sbs.com.au/news/article/2014/09/11/allegations-foreign-worker-exploitation-mcg>

What did eventuate for Antonio was a cleaning job at the MCG for allegedly below award wages. He left after just two shifts.

ISS is the company contracted to provide cleaning services at the MCG. In a statement it expressed concern about the allegations being made against its sub-contractor, the First Group. ISS said it takes the allegations raised very seriously as it prides itself on being an ethical employer. It says it's contacted the First Group and is working with it to ensure the First Group is adhering to the conditions of its contract.

The Melbourne Cricket Club says if there's evidence contractors are not meeting employment obligations it will take action.

Reyvi Marinas from Migrante Melbourne has stated he first heard of these allegations in 2011. "In the past few years we had been approached by individual students, some of whom are in groups, you know asking about their courses, whether or not that course will qualify them to become a permanent resident so then we finally concluded that the problem is more deeper than that, the issue of underpayment, no benefits at all working as a cleaner here at the MCG."

United Voice has expressed concern that cleaners at the MCG have been paid \$16 an hour less than the award rate, according to Migrante.

Bakers in Western Australia

A group migrant workers working as bakers are expected to work over time without being paid penalty rates. They are also asked to deliver supplies and orders to clients after work hours without overtime pay and also use their own transport for deliveries. The bakers were not reimbursed for petrol and the bakers' cars do not get any maintenance support from their employer. The employer promised the workers to nominate them for permanent residency visas after four years so the bakers have put up with their employer's exploitation.

Alvin

Alvin, an electrician, arrived on 457 visa seven years ago. His work contract excluded overtime pay or penalty rates. When Alvin became an Australian citizen two years ago, he approached his boss and asked for penalty rates to apply but his employer refused to grant them. It is alleged that all the migrant workers on 457 visas with the same employer are not paid penalty rates. Alvin reported that the workers are scared to join the union in case of retaliatory action by the employer such as putting off nomination for their permanent residency visa applications.

The same employer also collected airfares of all 457 visa workers systematically as soon as they commenced work. The company administrative officer collected the payments from each 457 visa worker and entered the payment in a journal account. The workers were not given any record or receipts even after the completion of full payment of the airfare.

The current framing of the Bill, to place the harsher penalty of cancellation of visa with no clear exemptions, on the visa holder is strange given the Explanatory Memorandum (p. 1) acknowledges that "Applicants 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." Further, (point 37, p. 8) "The events also anticipate the possibility that a benefit might be extracted from a visa applicant or holder under threat of withdrawal of a nomination or termination of their employment" and (point 43, p. 9) "In some cases, 'payment for visas' arrangements leave visa applicants and holders vulnerable to exploitation and further extortion once in Australia, due to the risk that their visa will be cancelled if the sponsor withdraws their

support.” Further the Statement of Compatibility with Human Rights for the Bill also acknowledges (p. 29):

Two independent reports undertaken for the Government have highlighted the activities of some employers who seek to take advantage of the fact that a person is an unlawful non-citizen or a lawful non-citizen who holds a visa which is subject to a condition restricting or prohibiting their work rights in Australia to exploit the worker under threat of bringing the individual to the attention of the Department (resulting in cancellation of their visa for breach of a work-related visa condition, detention and removal from Australia).

And:

Persons who have paid for sponsorship or nomination may be more vulnerable to exploitation and extortion such as unfavourable/unsafe/unhealthy working conditions, unfair pay, slavery/servitude/forced labour due to the risk of having their visa cancelled if their employment ceases.

With the threat of cancellation of a visa, it is likely to have the perverse outcome of assisting those engaged in human trafficking and egregious workplace exploitation by further deterring victims of such crimes from reporting the crimes against them if they have been offered a sponsorship related event. The ease with which the Minister will be able to cancel a visa, over the difficulty of obtaining enough evidence to mount a successful civil prosecution means the Bill is likely to result in the visas of many trafficked and exploited workers being cancelled with few successful prosecutions of those who have trafficked or exploited them. This is particularly the case as most of the offers of a sponsorship-related event are made verbally, so the only evidence of the offer being made is the verbal evidence of both the visa holder and the sponsor. Both will now be given an incentive not to report the new offence. Further, if the visa holder reports the situation to a third party, such as a union or non-government organisation, the third party will be placed in a position where they know if they report the situation to the relevant authorities it is the visa holder who may suffer the most likely and immediate sanction of visa cancellation.

The Committee should ask the Department of Immigration and Border Protection why the drafting of the Bill places a penalty on the visa holder, even in the case where the visa holder may be the victim of human trafficking, slavery, forced labour or exploitation in violation of Australia law?

The Department should also be asked what proportion of illegal working arrangements are detected as a result of visa holders subjected to illegal arrangements tipping off the authorities or reporting the arrangement to third parties that then report it to the authorities?

We accept the need for a deterrent against a visa holder who is not being exploited and makes an offer to a sponsor for a permanent residency outcome. However, we understand such cases are rare. It would appear though, that it is far more common for a visa holder to be subjected to illegal behaviour by their sponsor and the offer of permanent residency being used as one of the tools by the sponsor as a means of control over the visa holder.

We are concerned the Bill currently has the potential to violate Australia’s obligations under Article 7 of *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* which requires:

Status of victims of trafficking in persons in receiving States

1. *In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.*

2. *In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.*

The Bill allows that victims of human trafficking can have their visas cancelled if part of the coercion they were subjected to included the promise of a sponsorship-related event.

The submitting bodies ask that the Bill be amended so that the Minister is unable to cancel the visa of a person who has been subjected to human trafficking, forced labour or slavery offences under the *Criminal Code* (Sections 270 and 271). The visa should not be able to be cancelled while any investigation is being conducted into such offences that involve the visa holder as a likely victim of such offences. Also the visa should not be able to be cancelled by the Minister where the visa holder has been a victim of serious breaches of the *Fair Work Act* or the Award the visa holder should be entitled to, or during any period of investigation by relevant authorities into such crimes where the visa holder may have been a victim.

Further the Minister should not have the power to cancel the visa where the visa holder is of material relevance to any legal action being taken by relevant law enforcement authorities against the employer or sponsor of the visa holder.

A civil penalty should not apply to a visa holder where the visa holder has been subjected to human trafficking, slavery or forced labour or serious exploitation in violation of the *Fair Work Act* or relevant Award.

Under Section 245AR the maximum civil penalty of 360 penalty units (currently \$64,800 for an individual and \$324,000 for a body corporate) could end up setting a level of financial benefit a person committing the offence seeks, so that, if caught they can still profit from the crime. In other words if the payment they receive for providing the benefit is greater than \$64,800 then they can count on having made a profit from the crime even if the fine imposed is the maximum. This point is acknowledged in the Explanatory Memorandum, point 54 (p. 10) where it states that:

The maximum fine of 360 penalty units is set higher than the standard fine/imprisonment ratio provided for in section 4B of the Crimes Act to counter the potential financial gains from committing the offence, which have been assessed as typically ranging from \$15,000 to \$70,000 in relation to an individual visa holder, and up to \$700,000 where multiple visa holders were involved in 'payment for visas' arrangements with the one sponsor.

The submitting bodies urge the penalty in Subsection 245AR be the greater of 360 penalty units or three times the benefit obtained in exchange for the sponsorship-related event, which is similar in structure to the penalties that apply for foreign bribery in the *Criminal Code*, subsection 70.2(5):

(5) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:

(a) 100,000 penalty units;

(b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;

(c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

The same critique applies to Subsection 245AU.

A similar critique applies to Subsection 245AT, where the civil penalty is set at 360 penalty units, so that a higher level of profit will need to be obtained through the criminal activity to ensure a net profit in the case of a successful prosecution.

It is not clear to the submitting bodies how the legislation would counter a situation where the exploiting employing body is a labour hire business set up as a front by the ultimate employer and where the labour hire business has no assets and so is incapable of paying any fine. In our experience such labour hire business fronts may have fake directors who simply vanish if the labour hire business attracts the attention of law enforcement authorities. Part of the problem is that it is all too common for ASIC to fail to check that the address of labour hire business is a real place of business and if the directors of the business on the registration document are in reality running the business. It also points to the failure of immigration authorities to check the validity of the sponsor for the visa. The failures by authorities to stop exploitation and human trafficking should not be taken out on those who are victims of these illegal activities, which in part the current Bill does by making visa cancellation the most likely outcome of the sanctions in the Bill.

The Committee should ask the Department of Immigration and Border Protection how many staff are allocated to ensuring sponsors of people on temporary work visas are running legal businesses that comply with Australian law? Why does it appear so many businesses, including labour hire businesses, are able to exploit people on temporary work visas?

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