



28 January 2022

## **Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Protecting Migrant Workers) Bill 2021**

We welcome the opportunity to make a submission regarding the *Migration Amendment (Protecting Migrant Workers) Bill 2021 (Cth) (Bill)*.

The Migrant Justice Institute (MJl) undertakes strategic research and legal action to achieve fair treatment, enforcement of rights and access to justice for migrant workers. We chart pragmatic new pathways for decent work and responsible recruitment for migrant workers in Australia and globally, in collaboration with migrant worker communities, governments, business, civil society, and international organisations. Our ground-breaking research integrates empirical, qualitative and quantitative methods with theoretical analysis to establish a highly original evidence-based account of migrants' lived experience of law in practice. Founded in November 2021 as an independent non-profit organisation, the Migrant Justice Institute grew out of a 5-year collaboration between legal academics at UTS and UNSW Sydney.

### **Introduction**

According to its Explanatory Memorandum, the purpose of the Bill is to 'strengthen the legislative framework that protects migrant workers from exploitation and unscrupulous practices in the workplace'. The Bill will 'complement existing protections for vulnerable workers under the *Fair Work Act 2009* ... ensuring that migrant workers in Australia are appropriately protected and empowered to address unlawful conduct in the workplace'. These are important objectives, and we applaud the Commonwealth government's intention to address exploitation of migrant workers in Australia.

Unfortunately, we do not believe that this Bill will meaningfully contribute to achieving these objectives. This is because:

- a. The Bill does not address the principal drivers of exploitation or the barriers to migrant workers reporting exploitative conduct.
- b. The Bill ignores the evidence on interventions that would have an impact on reducing and addressing exploitation.
- c. The Bill focuses only on employers and does not provide any rights, protections, or assistance to exploited migrant workers. In some respects, the Bill may make migrant workers more vulnerable to exploitation and cause them to be more reluctant to seek assistance from the Fair Work Ombudsman (**FWO**).
- d. The Bill focuses on a very small subset of exploitative employer conduct. Our longstanding research in this field has demonstrated that exploitative practices, such as wage theft, continue to be endemic among temporary visa holders.

The Bill's narrow approach misses an opportunity to make a systemic difference. In particular, it misses an opportunity to introduce interventions at a whole-of-government level that systematically address the drivers of labour exploitation among migrant workers, including a number recommended by the Migrant Worker Taskforce. These include: establishing an accessible and effective mechanism through which migrant workers may report employer non-compliance with the *Fair Work Act 2009* (Cth) (**FW Act**) and obtain remedies; resourcing the FWO to establish a dedicated unit that assists a far greater number of migrant workers to pursue wage claims and other claims for labour non-compliance; funding the FWO to undertake substantially increased targeted scrutiny of employers who have breached the *FW Act* or *Migration Act 1958* (Cth) (**Migration Act**); enabling unions to detect wage theft, scrutinise employers of migrant workers and support migrant workers to report and address exploitation; establishing a national licensing scheme for labour hire; and establishing meaningful commercial consequences for employers that continue to exploit workers. Examples of such reforms operating in foreign jurisdictions can be found in our recent Migrant Workers' Access to Justice for Wage Theft Report.<sup>1</sup> We would welcome the opportunity to discuss these in greater detail with the Committee.

In this submission, we confine our discussion to the *Migration Act* and relevant legislative instruments. We consider a number of the proposed provisions in the Bill and recommend amendments to these. We also propose several broader amendments to the *Migration Act* and *Migration Regulations 1994* (Cth) that would provide genuine safeguards for visa holders to report exploitation and seek remediation without fear of jeopardising their current or future visas. Without these broader reforms, the Bill is unlikely to achieve its purpose, and may cause more harm than good.

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<sup>1</sup> Bassina Farbenblum and Laurie Berg, [Migrant Workers' Access to Justice for Wage Theft: A Global Study of Promising Initiatives](#) (2021).

## Summary of Recommendations

### A. Bill Part 1: New Employer Sanctions

- **Recommendation 1. Remove proposed s 245AAA from the Bill.**
- **Recommendation 2. If introduced, consider moving ss 245AAA and 245AAB to the Fair Work Act 2009 (Cth).** If the provisions are to be introduced, they will operate more effectively in a labour law, rather than migration law, framework.
- **Recommendation 3. If introduced, ensure migrant workers are not penalised for unlawful employer activity:** If s 245AAA and/or s 245AAB is included, it should provide that, where a non-citizen has breached a work-related condition and there are reasonable grounds to suspect that their employer engaged in conduct set out in s 245AAA and/or s 245AAB, the breach will not result in the exercise of the Minister's discretion under s 116 to cancel a visa on the basis of that breach. It should further provide that the breach will not be taken into account in any future applications for a visa or citizenship by the visa-holder.
- **Recommendation 4. Ensure exploitation is addressed:** In circumstances in which s 245AAA involves underpayment or other breach of the *FW Act* regarding one or more workers, DHA should refer the matter to the FWO for investigation. The employer should be required to remedy the breach within 30 days, or incur further civil penalties. If the employer is unable to make appropriate payments, these should be taken out of any civil penalties paid by the employer.
- **Recommendation 5. Utilise penalties to fund legal services:** Any civil penalties paid in association with offences under Division 12, Subdivision C should be directed to supporting legal services for migrant workers.
- **Recommendation 6. Introduce a broad definition of 'arrangement in relation to work':** 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 or other unsafe conditions, in return for work or documents to meet a visa requirement. To prohibit such conduct, in proposed s 245AAB, define the phrase 'arrangement in relation to work' to include any arrangement that is harmful or has negative consequences for the non-citizen (including, for example, accepting a sexual advance, agreeing to poor or unsafe accommodation conditions, as well as agreeing to poor working conditions).

## **B. Bill Part 2: Prohibition on certain employers allowing additional non-citizens to begin work**

- **Recommendation 7. FWO should make Prohibited Employer declarations:** The Fair Work Ombudsman and Minister for Home Affairs should have the power to determine and make Prohibited Employer declarations
- **Recommendation 8. All types of unlawful employer activity should be covered:** The definition of 'migrant worker sanction' should be extended to cover all civil remedy provisions in the *FW Act* and applicable occupational health and safety laws.
- **Recommendation 9. Declarations should be made swiftly on the basis of compliance action (including when FWO issues a compliance notice or lodges formal proceedings) and not require waiting for a Court judgment:** The definition of 'migrant worker sanction' should include situations where a person is the subject of an infringement notice or compliance notice, or where the enforcing agency otherwise forms a 'reasonable belief' that the person has contravened a 'work-related offence' or civil remedy provision of the *FW Act*.
- **Recommendation 10. Remove the carve out for domestic services on an ongoing basis:** Currently, s 245AYC(2)(b) excludes services provided in a 'domestic context' from the definition of work. This means that Prohibited Employers can still engage migrant workers in a domestic context - a space where migrant workers are particularly vulnerable to exploitation. The provision should be redrafted to include situations where non-citizens are contracted for ongoing work within a domestic context.
- **Recommendation 11. Need to clarify status of casual employees:** For the avoidance of doubt, a new s 245AYH(2A) should be inserted to clarify that existing non-citizen casual employees may be offered further shifts without any contravention occurring.
- **Recommendation 12. The Prohibited Employers List should be public and proactively shared:** The Prohibited Employers List should be shared with other government agencies, including the Australian Taxation Office and the Australian Securities and Investments Commission, as well as with trade unions, for potential increased scrutiny, in order to create a more meaningful deterrent against unlawful conduct.
- **Recommendation 13. Increased scrutiny for Prohibited Employers:** Where migrant workers continue to be employed by a prohibited employer, the provision should require DHA to notify relevant unions and employees of the prohibited employer, and refer the

matter to FWO for increased scrutiny of labour compliance for a certain period of time, accompanied by a risk of a greater civil penalty if non-compliance with the *FW Act* is detected in relation to those workers.

- **Recommendation 14. Consider extending sanctions to protect all workers:** Instead of distinguishing between workers on temporary visas and permanent residents/citizens, consideration should be given to the introduction of more general Banning Orders that prevent certain persons from allowing any additional people to begin work.
- **Recommendation 15. Need for transparency:** The exercise of Ministerial discretion in relation to a 'prohibited employer' designation should be subject to public scrutiny with reasons provided and the making available of employer submissions and other materials considered in exercising the discretion.

### **C. Bill Part 3: Use of computer system to verify immigration status**

- **Recommendation 16. Remove the amendments in Part 3 from the Bill.**

### **D. Alternative amendments to the Migration Act and Migration Regulations 1994 (Cth) which would more effectively prevent, and establish accountability for, exploitation of migrant workers in Australia**

- **Recommendation 17. Remove the 40 hour fortnightly work condition on student visas** (Condition 8104/8105) for all students, or at least for students enrolled in longer-term courses that require more intensive study and greater financial investment.
- **Recommendation 18. Introduce 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. At a minimum, introduce these arrangements for temporary visa holders who have worked for employers that could be designated a 'prohibited employer' under this Bill.
- **Recommendation 19. Establish a firewall between the FWO and the Department of Home Affairs (DHA)** to prevent the FWO from sharing identifying information in relation to a temporary migrant when the individual reports to the FWO or seeks assistance in relation to a breach of his or her labour rights. The firewall should extend to all non-citizens, including those whose visas prohibit work or who have overstayed their visa in

Australia. This should replace the current protocol between the two agencies which permits (and requires) sharing of a worker's identifying information, and would require a reconsideration of FWO's role in enforcement of employer sponsorship obligations, for example in the Temporary Skills Shortage program.

## Part 1 - New employer sanctions

Proposed s 245AAA 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. This would criminalise, for example, an employer's threat to withhold from a Working Holiday Maker evidence of work completed in order to satisfy the 88 day/6 month requirement for a second or third Working Holiday visa, unless the worker accepts certain working conditions. It would also criminalise conduct of an employer who threatens to do in a worker who has breached their visa or worked without a visa, unless the worker accepts certain working conditions.

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.<sup>2</sup> 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. The proposed offences do not address either of these concerns.

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<sup>2</sup> Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (2020) 8.

## 1. Proposed s 245AAA

There are additional problems with proposed s 245AAA that cannot be cured. First, for the small number of workers whose exploitation *is* solely or primarily driven by coercion to work in breach of visa conditions, the provision is unlikely to increase detection of this practice. Migrant workers will remain unwilling to report this conduct for fear of jeopardising their current visa or a future visa or indeed a future citizenship application. Farbenblum and Berg's 2016 survey of 4,332 temporary visa holders working in Australia revealed that 23% of underpaid international students did not try to recover unpaid wages due to fear of possible immigration consequences.<sup>3</sup> Among participants who disclosed information that suggested they undertook work in contravention of their visa requirements, 39% stated that fear of immigration consequences prevented them from taking action to recover unpaid wages.<sup>4</sup> The 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'.<sup>5</sup> Further proof of the power of immigration-related fears lies in the fact that only 69 workers have availed themselves of the Assurance Protocol between the Department and FWO between 2017 and 2020.<sup>6</sup>

Furthermore, our research reveals that fear of contact with immigration authorities is pervasive even among temporary visa holders who have not breached their visa and have no reason to fear consequences for their visa. For example, in Farbenblum and Berg's survey of over 6,100 temporary visa holders on experiences during COVID-related lockdowns in 2020, close to a third (29%) of those who reported financial distress indicated they did not seek emergency support because they were worried that it might affect their visa.<sup>7</sup> In our 2019 survey of over 5,000 international students, 82% wrongly believed that their student visa could be cancelled for failure to pay rent or other tenancy breaches. 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.

Secondly, investigation of employers for the offence under proposed s 245AAA can lead to serious detriment for exploited workers who are victims of the offence because a resulting breach of their visa conditions will be detected by DHA and they will be subject to visa cancellation. The Bill does not provide victims of coercion with protection from visa cancellation,

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<sup>3</sup> Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (2018) 39.

<sup>4</sup> Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (2018) 40.

<sup>5</sup> Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (2020) 10.

<sup>6</sup> Information provided by DHA pursuant to a Freedom of Information Request, FA 20/12/00871, 9 February 2021.

<sup>7</sup> Laurie Berg and Bassina Farbenblum, *'As If We Weren't Humans': The Abandonment of Temporary Migrants in Australia During COVID* (2020) 39.



and it does not provide victims with 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, data on the extent to which 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. 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'.<sup>8</sup>

A third 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.<sup>9</sup> 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.

Fourthly, the complexity of this offence also dilutes its deterrence value. In order to reduce exploitation, employer education campaigns should focus on the fundamental requirements to comply with the *FW Act* in relation to all migrant workers. It is unclear how employers would be effectively educated about these offences and this messaging is likely to be a distraction from the central focus on compliance with minimum labour standards in Australia for all workers regardless of migration status.

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<sup>8</sup> <https://immi.homeaffairs.gov.au/visas/working-in-australia/work-rights-and-exploitation#:~:text=What%20is%20the%20Assurance%20Protocol,helping%20them%20with%20their%20inquiries>

<sup>9</sup> Laurie Berg and Bassina Farbenblum, *International Students and Wage Theft* (2020) 43-44.

Fifthly, in addition to being ineffective to address labour exploitation, s 245AAA may actually hamper labour enforcement efforts in this area. Although the Explanatory Memorandum confirms that the *FW Act* 'remains the primary legislation' for Australia's safety net of minimum entitlements and conditions for employees; and that FWO is the 'lead on compliance and enforcement activities' under the *FW Act*, this distinction is unlikely to be understood by migrant workers or employers. Expanding the DHA's role in policing exploitative work and work-related coercion is likely to cause confusion in minds of workers between the role of FWO and DHA and therefore undermine FWO's outreach efforts and the Assurance Protocol. Confusion about which government agency is involved may further inhibit workers from reporting non-compliance to FWO. Around the world, governments are increasingly separating labour and immigration compliance activities for this reason. Firewalls limiting labour inspectorates' sharing of information with immigration authorities have been instituted in a number of jurisdictions including the United States, Brazil and Israel.<sup>10</sup> By contrast, the inclusion of this offence in the *Migration Act* creates further connections between labour and immigration enforcement activities which drive fear of reporting to labour authorities.

**Recommendation 1. Remove proposed s 245AAA from the Bill.**

**Recommendation 2. If introduced, consider moving ss 245AAA and 245AAB to the Fair Work Act 2009 (Cth).** If the provisions are to be introduced, they will operate more effectively in a labour law, not migration law, framework.

**Recommendation 3. If introduced, ensure migrant workers are not penalised for unlawful employer activity:** If s 245AAA and/or s 245AAB is included, it should provide that, where a non-citizen has breached a work-related condition and there are reasonable grounds to suspect that their employer engaged in conduct set out in s 245AAA and/or s 245AAB, the breach will not result in the exercise of the Minister's discretion under s 116 to cancel a visa on the basis of that breach. It should further provide that the breach will not be taken into account in any future applications for a visa or citizenship by the visa-holder.

**Recommendation 4. Ensure exploitation is addressed:** In circumstances in which s 245AAA involves underpayment or suspected breach of the *FW Act* regarding one or more workers, DHA should refer the matter to the FWO for investigation. The employer should be required to remedy the breach within 30 days, or incur further civil penalties. If the employer is unable to make appropriate payments, these should be taken out of any civil penalties paid by the employer.

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<sup>10</sup> Bassina Farbenblum and Laurie Berg, [Migrant Workers' Access to Justice for Wage Theft: A Global Study of Promising Initiatives](#) (2021) 26-27.

**Recommendation 5. Utilise penalties to fund legal services:** Any civil penalties paid in association with offences under Division 12, Subdivision C, should be directed to supporting legal services for migrant workers.

## 2. Proposed s 245AAB

This provision is likely to suffer from many of the deficiencies of s 245AAA outlined above. However, there is a cohort for whom this provision poses more limited risk and potential benefit. For Working Holiday Makers who are coerced to accept an 'arrangement in relation to work' in order to obtain the employer's certification of their 88 day work requirement, reporting the conduct after leaving an offending employer would not carry substantial visa risks and could lead to a greater degree of accountability and deterrence among a limited number of employers. Although it is likely to be enforced in a small number of cases, we support the inclusion of proposed s 245AAB.

However, the meaning of 'arrangement in relation to work' should be clarified, either in the Bill or in supporting material. It is not clear why coercion in this offence is limited by this phrase. Instead, this offence should clearly prohibit 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.

**Recommendation 6. Introduce a broad definition of 'arrangement in relation to work':** 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 or other unsafe conditions, in return for work or documents to meet a visa requirement. To prohibit such conduct, in proposed s 245AAB, define the phrase 'arrangement in relation to work' to include any arrangement that is harmful or has negative consequences for the non-citizen (including, for example, accepting a sexual advance, agreeing to poor or unsafe accommodation conditions, as well as agreeing to poor working conditions).

## Part 2 - Prohibition on certain employers allowing additional non-citizens to begin work

Proposed s 245AYH introduces a civil penalty contravention for a 'prohibited employer' to allow a temporary visa holder or non-citizen who does not hold a visa to begin work. A 'prohibited employer' is also in breach of the section if they have a 'material role in a decision made by a

body corporate' to allow an additional non-citizen to begin work. Pursuant to s 245AYG, the Minister may exercise discretion to declare an employer to be a prohibited employer where the employer is subject to a 'migrant worker sanction'. Under s 245AYD, a 'migrant worker sanction' occurs where a person is the subject of a court order made under the *FW Act* for contravention of certain civil remedy provisions in relation to a migrant worker, or, under the *Migration Act*, the employer is subject to a sponsorship bar, convicted of a work-related offence, or is the subject of civil penalty order in relation to a contravention of a work-related provision. The discretion to declare a person to be a prohibited employer is based on as yet unpublished criteria prescribed by Regulations (s 245AYG(6)(b)). The Minister must publish the details of prohibited employers on the website except in circumstances prescribed by as yet unpublished regulations (proposed s 245AYI). During the 12 month period after the prohibited employer declaration expires, the employer must notify the Department if it hires a temporary visa holder and failure to do so is a civil penalty offence (s 245AYJ).

We support the Department's effort to achieve greater accountability for exploitation and address the perpetuation of exploitation by employers who have already demonstrated non-compliance with the *FW Act* or the *Migration Act*. We do not oppose inclusion of these provisions in principle, although, as discussed above, we do not believe that this will address exploitation of migrant workers to any significant degree beyond a small number of affected individuals and businesses. The scheme would be more effective if more meaningful consequences flowed from the small number of instances in which it is enforced.

We refer the Committee to the submission of the Salvation Army and Uniting Church in Australia Synod of Victoria and Tasmania regarding the Exposure Draft of this Bill (Salvation Army/Uniting Church Submission),<sup>11</sup> and support the recommendations regarding positioning these provisions within the FWO jurisdiction, lowering the threshold for a prohibited employer declaration to be made, limiting the carve out for domestic workers, and introducing broader banning orders for the most serious contraventions.

For reasons discussed above (including increased confusion, fear and low reporting of breaches that comes from increased DHA enforcement in the workplace), we recommend that the power to determine and make 'prohibited employer' declarations be moved (and/or extended) to the FWO/labour department. FWO holds significant intelligence regarding employer compliance (and non-compliance) activity. We suggest these provisions will operate more efficiently if FWO also has the power to make declarations.

We also submit that the types of unlawful activity that can lead to a prohibited employer declaration are too narrow. We welcome the inclusion of sham contracting and other new

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<sup>11</sup>Paul Hateley (Salvation Army) and Mark Zirnsak (Uniting Church in Australia), '[Submission on Exposure Draft Migration Amendment \(Protecting Migrant Workers\) Bill 2021](#)' August 2021, 12-16.

contraventions into the definition. However, limiting some contraventions to those that are 'remuneration-related' only, and excluding some civil remedy provisions altogether, means that not all unlawful conduct will be captured. For example, if an employer fails to provide breaks, takes adverse action against a migrant worker, or fails to consult on workplace change, this unlawful behaviour cannot lead to a prohibited employer declaration. To incentivise compliance with all workplace laws, we suggest that all civil remedy provisions in the *FW Act* constitute migrant worker sanctions where they occur in respect of a non-citizen. Similarly, occupational health and safety laws should also be captured.

We are concerned that the requirement to wait for a Court order before an employer may be declared a 'prohibited employer' introduces unnecessary delay and fails to leverage an important opportunity to promote compliance. If a 'prohibited employer' declaration can be made on the basis of a 'reasonable belief' that a relevant contravention has occurred (for example, at the time a Compliance Notice is issued by FWO), this will incentivise a person to comply with the Notice, or act quickly to show why a defence applies.

Finally, we recommend two further minor amendments to increase clarity in the legislation. Firstly, s 245AYC(2)(c) excludes the work of a non-citizen undertaken 'in a domestic context' from the scope of a prohibited employer prohibition. According to the Explanatory Memorandum, the aim of this exclusion is to ensure a prohibited employer may still engage a non-citizen contractor in their home on a short-term basis (para 127). However, the provision as currently drafted excludes not only short-term contractors (such as tradespeople) but also longer-term contractors, such as nannies or cleaners, who may be more vulnerable, leaving them exposed to be lawfully engaged by a prohibited employer. Section 245AYC(2)(c) should be redrafted to include situations where non-citizens are contracted for ongoing work within a domestic context. Secondly, to improve clarity and ensure casual employees are not left without shifts, a new s 245AYH(2A) should be inserted to clarify that existing non-citizen casual employees may be offered further shifts without any contravention occurring.

**Recommendation 7. FWO should make Prohibited Employer declarations:** The Fair Work Ombudsman and Minister for Home Affairs should have the power to determine and make Prohibited Employer declarations

**Recommendation 8. All types of unlawful employer activity should be covered:** The definition of 'migrant worker sanction' should be extended to cover all civil remedy provisions in the Fair Work Act 2009 (Cth) and applicable occupational health and safety laws.

**Recommendation 9. Declarations should be made swiftly on the basis of compliance action (including when FWO issues a compliance notice or lodges formal proceedings)**

**and not require waiting for a Court judgment:** The definition of 'migrant worker sanction' should include situations where a person is the subject of an infringement notice or compliance notice, or where the enforcing agency otherwise forms a 'reasonable belief' that the person has contravened a 'work-related offence' or civil remedy provision of the FW Act.

**Recommendation 10. Remove the carve out for domestic services on an ongoing basis:** Currently, s 245AYC(2)(b) excludes services provided work in a 'domestic context' from the definition of work. This means that Prohibited Employers can still engage migrant workers in a domestic context - a space where migrant workers are particularly vulnerable to exploitation. The provision should be redrafted to include situations where non-citizens are contracted for ongoing work within a domestic context.

**Recommendation 11. Need to clarify status of casual employees:** For the avoidance of doubt, a new s 245AYH(2A) should be inserted to clarify that existing non-citizen casual employees may be offered further shifts without any contravention occurring.

If the provision for Prohibited Employers is introduced without amendment, we foresee a number of detrimental consequences for migrant workers. Given the low likelihood of detection of contravention of s 245AYH, some prohibited employers will likely continue to employ migrant workers and this will drive work arrangements with those workers further underground. As mentioned above, it is likely that visa holders will mistakenly believe that they have broken the law by agreeing to be employed by a prohibited employer and will not come forward if they are exploited. More likely, they will feel compelled to assist the employer to conceal their employment from DHA because they perceive a risk to their own visa (and job).

For the most serious contraventions, we endorse the Salvation Army/Uniting Church Submission recommendation to introduce more general 'Banning Orders'. Building on a scheme which has been introduced in New Zealand, such orders could prevent certain persons from employing any workers at all - regardless of their visa status.

**Recommendation 12. The Prohibited Employers List should be public and proactively shared:** The Prohibited Employers List should be shared with other government agencies, including the Australian Taxation Office and the Australian Securities and Investments Commission, as well as with trade unions, for potential increased scrutiny, in order to create a more meaningful deterrent against unlawful conduct.

**Recommendation 13. Increased scrutiny for Prohibited Employers:** Where migrant workers continue to be employed by a prohibited employer, the provision should require DHA

to notify relevant unions and employees of the prohibited employer, and refer the matter to FWO for increased scrutiny of labour compliance for a certain period of time, accompanied by a risk of a greater civil penalty if non-compliance with the *FW Act* is detected in relation to those workers.

**Recommendation 14. Consider extending sanctions to protect all workers:** Instead of distinguishing between workers on temporary visas and permanent residents/citizens, consideration should be given to the introduction of more general Banning Orders that prevent certain persons from allowing any additional people to begin work.

There is also the potential that ss 245AYG (declaration of a prohibited employer) and 245AYI (publishing information about prohibited employers) may result in the unfair exercise of Ministerial discretion to shield some employers from being placed on the 'prohibited employer' list or from being published on the website.

**Recommendation 15. Need for transparency:** The exercise of Ministerial discretion in relation to a 'prohibited employer' designation should be subject to public scrutiny with reasons provided and the making available of employer submissions and other materials considered in exercising the discretion.

### **Part 3 - Provisions requiring use of VEVO to verify a worker's immigration status and visa permission to work**

Currently, ss 245AB(1) and 245AC(1) establish a criminal offence where an employer allows a non-citizen to work without work rights (whether because they are an unlawful non-citizen or the work involves breach of a visa condition). Sections 245AB(2) and 245AC(2) provide for a defence where the employer 'is, and continues to be, reasonably satisfied' that the worker is not an unlawful non-citizen or working in breach of a visa condition on the basis of information obtained by using VEVO or as prescribed by the regulations.

The proposed amendments in the Bill establish civil penalty provisions that require an employer (or another party to the employment relationship) to use VEVO to determine whether a non-citizen is lawful and has the necessary permission to work, either when starting to allow a non-citizen to work or referring a non-citizen for work.

Like the existing employer sanction provisions, these new provisions are unlikely to yield any greater insight into where or when unauthorised work by non-citizens is taking place. While the proposed provisions might provide some further incentive for an employer to check VEVO in order to avoid a civil penalty, this will likely be limited given the low likelihood of detection based on the low frequency of enforcement of existing employer sanction provisions. In contrast to this limited potential benefit, the provision has the potential for serious detriment in two respects.

First, it will likely drive exploitation of migrant workers further underground, by encouraging employers to coerce workers who are working without visa authorisation to deny their work arrangement if asked. This will impede the FWO's ability to identify and address these exploitative work arrangements.

Second, it will likely encourage racial profiling of workers from minority backgrounds. In determining which workers should be subjected to VEVO checks, employers will likely use racial appearance, accent and other personal features as proxies for potential non-citizenship. This will alienate Australians from racially diverse communities and undermine social inclusion at a time when it is needed most. In Farbenblum and Berg's survey of over 6,100 temporary visa holders on their experiences during COVID-19, over 40% of nationals from East Asia and South East Asia had experienced verbal abuse and/or people avoiding them because of their appearance in the 6 months from March 2020.<sup>12</sup> In open responses, participants shared over 1,600 personal experiences of racist verbal harassment, physical abuse, or being shunned in public spaces, workplaces and housing. Respondents shared broader experiences of racism in

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<sup>12</sup> Laurie Berg and Bassina Farbenblum, [\*'As If We Weren't Humans': The Abandonment of Temporary Migrants in Australia During COVID\*](#) (2020) 43-46.



their workplace, including “verbal attacks, discrimination, bullying”, “jokes about my accent and my skin colour”, and “verbal abuse [from customers] for enforcing the covid safety measures”. One Bangladeshi man described racism as a “standard work hazard in retail”.

Among employers that seek to comply with Australian labour and migration laws, the proposed provisions in Part 3 are likely to result in targeting of job applicants from minority backgrounds for greater suspicion and scrutiny based on their appearance or accent. In the worst case, it may lead to preferencing of other applicants for a job due to perceived lower risk and administrative burden in relation to VEVO checks.

Among employers who do not comply with their responsibilities to workers under labour and migration laws, most are unlikely to comply with the new provisions in any event, as noted above.

**Recommendation 16. Remove the amendments in Part 3 from the Bill.**

## **Alternative amendments to the Migration Act and Migration Regulations 1994 (Cth) which would more effectively prevent, and establish accountability for, exploitation of migrant workers in Australia**

### **1. Removal of the work limitation under Conditions 8104 and 8105**

The proposed amendments 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).

The most effective way to address this problem is to remove Conditions 8104 and 8105. This 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.

There are three potential policy arguments against removing these visa conditions. First, there is a protectionist claim that allowing students to work unlimited hours would jeopardise their studies. Second, a student visa with unlimited work rights may encourage individuals to abuse the visa in order to work in Australia without a genuine intention to study. Third, allowing students to work unlimited hours would further saturate the labour market and limit work opportunities for residents and citizens.

The first concern, in relation to jeopardising studies, is already well addressed by visa Condition 8202. 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. There is no evidence that Condition 8105 serves any additional protectionist purpose. Those students who need to meet financial demands will work the hours needed to earn that amount regardless of visa settings, but will do so silently and out of sight of regulators. Indeed, those who are underpaid work far more hours to earn the equivalent of minimum wage, and Condition 8105 can create a vicious cycle in which students who have worked in excess of 40 hours per fortnight become

more vulnerable to underpayment and more likely to remain silent. For these reasons, Condition 8202 provides the best way to ensure students are prioritising their studies and limiting time away from their studies engaging in paid work.

Secondly, in order to ensure that the student visa program is not abused by individuals who are not appropriately engaged in their studies, the government should explore ways to strengthen policy settings related to programs of study, instead of relying on Condition 8105 for this purpose. Condition 8202 again plays a critical role because students who do not meet the academic requirements of their courses will have their visa cancelled. In addition, the Genuine Temporary Entrant (GTE) eligibility requirement for the Student 500 visa provides a further safeguard to ensure the student visa program is accessed as intended. As part of the GTE assessment process, immigration officers evaluate the genuineness of an applicant's desire to study in Australia. This includes consideration of factors such as whether the course is consistent with the applicant's current level of education, whether the course is relevant to past or proposed future employment in the applicant's home country or a third country and expected salary and other benefits that the applicant would obtain in their home country or a third country with qualifications from the proposed course of study in Australia. The GTE requirement limits abuse of the student visa by denying a visa to applicants who appear to have motives other than gaining a quality education.

Nevertheless, there of course remains the possibility that, as with every type of visa, applicants will engage in undetected deception as to their true intentions in their application or that their intentions may change, and that this will happen more frequently with the incentive of unlimited work rights. Students with a far greater financial investment in their studies are unlikely to be abusing the visa program simply in order to work in Australia, given that any money they earn in low-waged jobs would be far eclipsed by their tuition fees. The concerns about misuse of the visa are therefore primarily restricted to those in short-term and less expensive study programs. Those primarily motivated to work in Australia may study one or more 'easy' courses with low commitments of time and effort that enable easier compliance with Condition 8202 while working. There is an argument that more of these students would do so if the entitlement to work were unrestricted.

It is for these students that the government is faced with the challenge of weighing the enhanced vulnerability to workplace exploitation that comes with restricted work rights against potential abuse of the student visa. Among student visa-holders who are primarily motivated to work, many are likely working in excess of 40 hours a fortnight in any event. Clearly, Conditions 8104 and 8105 do not provide a complete deterrent against these practices. However, it is possible that many more would apply for student visas in order to work if there were no penalty for working beyond 40 hours per fortnight, given that there is no cap on the student visa program. These concerns may be sufficiently grave to retain Conditions 8104 and 8105 for a

smaller number of students for whom the likelihood of misuse of the visa is greatest. To minimise the number of individuals seeking a student visa for work purposes, the government could establish minimum requirements of courses that are eligible for a student visa with unrestricted work rights or impose other measures connected with oversight and regulation of shorter or less intensive courses with large international student enrolments.

In relation to saturation of the local labour market, it is not clear that Conditions 8104 and 8105 are in fact substantially reducing the amount of work undertaken by international students, or that removing this visa condition would increase their labour market participation. First, it was clear before the COVID pandemic that many international students were already working more than 40 hours per fortnight and were more likely to earn lower wages than international students who were working within the visa condition. We believe this is because they are fearful of asserting their rights to lawful wage rates because of fear that their visa breach will be detected. If their vulnerability to underpayment were reduced by removing Conditions 8104 and 8105, they could earn higher hourly wages and work fewer hours to earn the equivalent amount. Second, measures discussed above in addition to Condition 8202 would be more effective at limiting labour market participation than Condition 8105. Finally, it is unclear that some of the jobs in which international students work would be desired by Australian residents and citizens. Indeed, in the absence of a large guest worker program, international students (and Working Holiday Makers) in Australia perform the work that is undertaken by migrant workers in most other OECD countries for this reason.

The protective effect of removal of Conditions 8104 and 8105 cannot be achieved through other means. Some have suggested that, instead of removing Condition 8105 altogether, the government should explore alternative measures that limit the exercise of the Minister's discretion to cancel a student visa in the event of a breach. This could include an initial presumption in the worker's favour upon first breach, formal institution of one or more warnings prior to visa cancellation, and/or a number of factors that must be considered prior to cancellation such as whether the breach resulted from the conduct of an employer. In our opinion, these measures will have limited impact on the international students who are accepting underpayment in silence due to visa concerns. While they may limit the immediate punitive effect of Condition 8105, we understand that student visas are in fact very rarely cancelled on the basis of a breach of this condition. Students' silent acquiescence to wage theft is therefore not based on a rational assessment of the likelihood of visa cancellation, but rather on the conclusion that drawing attention to their noncompliance with even a remote possibility of jeopardising their current visa or future visas is a risk that is not warranted.

At the same time, we acknowledge that removal of Conditions 8104 and 8105 is not a panacea to international student exploitation. This reform would not address broader labour market issues, employability of international students and fear of job loss as a deterrent to reporting or seeking assistance. However, at the very least, it throws the door wide open to international

students who have left an exploitative job to report wage theft and other workplace breaches and obtain remedies.

In the period since Australia's international borders have been closed due to the pandemic, the Department removed Condition 8104 or 8105 first in relation to various industries, and later for all international students, without any obvious evidence that students are jeopardising their studies. We encourage the government to view its relaxation of international students' work restrictions in certain industries during COVID-19 as a pilot which has been successful and remove Condition 8104 and 8105 altogether. This reform would be more protective than anything proposed in the Exposure Draft of this Bill.

We note that the Senate Select Committee on Temporary Migration recently recommended that 'the Australian Government monitor and review the impact of the 40 hour visa condition requirement for international students, in light of temporary measures to remove this requirement ensuring the primary purpose of a student visa must be study.' We support this recommendation and would welcome the opportunity to conduct or be part of any such review.<sup>13</sup>

**Recommendation 17. Remove the 40 hour fortnightly work condition on student visas** (Condition 8104/8105) for all students, or at least for students enrolled in longer-term courses that require more intensive study and greater financial investment.

## **2. Bridging visa arrangements for temporary visa holders to pursue claims against employers for underpayment and other forms of labour exploitation**

Many employers enjoy impunity for exploitation of migrant workers because those workers do not, or cannot, pursue claims against their employer under workplace and occupational health and safety legislation. One of the reasons for this is that they are forced to leave Australia before a claim can be resolved, either because their visa expires or because they fear visa cancellation and removal if DHA detects a breach of their visa (or lack of a visa) as a result of their bringing a claim. To enable far more migrant workers to hold exploitative employers to account, we recommend the introduction of a new Bridging visa to regularise the status of workers on any temporary visa and visa-overstayers at least for the duration of legal proceedings or investigation by relevant authorities.

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<sup>13</sup> Senate Select Committee on Temporary Migration, [Final Report](#) (September 2021), xvi.

A policy argument against this proposal is that it creates an incentive to bring unmeritorious claims in order to extend a worker's stay in Australia. We believe this is unlikely given the difficulty of bringing and pursuing a claim, and the short duration of such a bridging visa. However if the government remains concerned, visa eligibility could be contingent on certification of the merits of the claim by a legal practitioner or officer of a relevant government agency such as the FWO or health and safety authority, with usual professional penalties for misrepresentation.

Other jurisdictions such as Hong Kong<sup>14</sup> and Malaysia<sup>15</sup> allow migrant workers to obtain a short term visa or extension of a visa in order to remain in the country of employment to pursue a labour claim.

Building on Recommendation 31 of the Senate Select Committee on Temporary Migration, which recommended that 'temporary visa holders have their visas extended until their small claims matters are concluded',<sup>16</sup> we propose that bridging arrangements be introduced for all temporary visa holders and visa-overstayers to pursue meritorious claims under any workplace or occupational health and safety legislation.

**Recommendation 18. Introduce 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. At a minimum, introduce these arrangements for temporary visa holders who have worked for employers that could be designated a 'prohibited employer' under this Bill.

### **3. Firewall between FWO and DHA, or substantially strengthened current assurance protocol**

As mentioned above, workers who fear even the slightest chance of jeopardising their current stay in Australia 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.

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<sup>14</sup> See New Condition of Stay, 1987.

<sup>15</sup> Immigration Regulations 1963, reg. 14.

<sup>16</sup> Senate Select Committee on Temporary Migration, [Final Report](#) (September 2021), xvii.

If the government is genuinely committed to reducing migrant worker exploitation, it must create a stronger incentive for workers to report wage theft and exploitation to FWO. Short of removing the work-related Conditions which trigger visa cancellation for certain workers, the government should 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 explicit role in enforcement of visa conditions, for example in the Temporary Skills Shortage program, as well as compliance 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.

Firewalls limiting labour inspectorates' sharing of information with immigration authorities have been instituted in a number of jurisdictions including the United States<sup>17</sup> and Belgium.<sup>18</sup>

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

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<sup>17</sup> 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).

<sup>18</sup> PICUM, *A Worker Is A Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice* (2020) 34.

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.

**Recommendation 19. Establish a firewall between the FWO and the Department of Home Affairs (DHA)** to prevent the FWO from sharing identifying information in relation to a temporary migrant when the individual reports to the FWO or seeks assistance in relation to a breach of his or her labour rights. The firewall should extend to all non-citizens, including those whose visas prohibit work or who have overstayed their visa in Australia. This should replace the current protocol between the two agencies which permits (and requires) sharing of a worker's identifying information, and would require a reconsideration of FWO's role in enforcement of visa conditions, for example in the Temporary Skills Shortage program.

We welcome the opportunity to discuss this submission with the Committee. Rather than introducing this narrow Bill, we encourage the government to work with DHA and across other parts of government and seize the opportunity to introduce interventions at a whole-of-government level that systematically address the drivers of labour exploitation among migrant workers, including a number recommended by the Migrant Worker Taskforce.

Sincerely,

Associate Professor Laurie Berg  
UTS Faculty of Law  
Co-Executive Director, Migrant Justice  
Institute  
E:

Associate Professor Bassina Farbenblum  
UNSW Faculty of Law & Justice  
Co-Executive Director, Migrant Justice  
Institute  
E:

Catherine Hemingway  
Legal Director, Migrant Justice Institute  
E: