



RCSA Submission to the Senate Legal and Constitution Affairs Committee on the *Migration Amendment (Protecting Migrant Workers) Bill 2021*

28 January 2022

Overview

The Recruitment, Consulting and Staffing Association (RCSA) welcomes the opportunity to provide input on the *Migration Amendment (Protecting Migrant Workers) Bill 2021* (the Bill).

RCSA is the peak body for the recruitment and staffing industry in Australia. We represent over 800 recruitment and staffing firms, of which many provide on-hire worker services. Our members both supply and place workers across an array of industries and workplaces, facilitating blue-collar, healthcare, and government labour demands. Moreover, many of our members engage, employ, assign, and place non-citizens.

In addition to RCSA's own comments and observations, outlined in this document, we share and support many of the concerns and recommendations highlighted by the Australian Chamber of Commerce and Industry (ACCI), of which RCSA is a member, in its submission.

RCSA supports increased regulation and penalties for organisations which choose to ignore and flout our immigration laws. Such firms damage the reputation of our country, and our industry, whilst also exposing individuals to unacceptable harm. However, despite our support for finding and prosecuting the genuine labour market criminal organisations, RCSA remains concerned about the inclusion of 'recklessness' as a fault element for the new criminal offences contained within the Bill, as well as the strict prohibitions for employers who are convicted of, or are the subject of, a civil penalty order in relation to a contravention of a work-related provision.

The broad nature of the term 'recklessness' creates a pathway for an unintended error to translate into criminal charges and prohibitions. Not only does this go beyond the Migrant Workers' Taskforce's recommendations, but it also fails to draw a distinction between professional staffing agencies and the criminal syndicates who masquerade as 'labour-hire' providers and knowingly disregard migration law as part of their modus operandi.

RCSA therefore strongly submits that 'recklessness' be removed as a fault element, or otherwise it be replaced with a narrower test.

Moreover, the harsh prohibitions, which also apply to employers who are found to be liable under the civil provisions of the Bill (for which there is no obligation to prove a person's state of mind), offer no consideration of the fact that administrative errors can be made.

To that end, RCSA submits that the legislation must reflect the reality of the risk that recruitment and staffing firms face in engaging non-citizens, offering alternative sanctions for first-time offenders.



‘Recklessness’

RCSA’s central issue with the term ‘recklessness’ is that it is expansive, and its inclusion reaches far beyond what the Migrant Worker Taskforce recommended in their final report:

Recommendation 19: *It is recommended that the Government consider developing legislation so that a person who knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a condition of their visa is guilty of an offence.*¹

The Bill includes ‘knowledge’ as a fault element for the new criminal offences, thereby capturing criminal syndicates—criminal syndicates who routinely and intentionally breach Australian migration laws while posing as workforce providers. RCSA welcomes this inclusion as it responds soundly to Recommendation 19.

The inclusion of ‘recklessness’, however, introduces criminal penalties to recruitment and staffing firms who may make a one-time error which, due to the volume of individuals hired by a staffing firm, is replicated multiple times, but is not indicative of a systematic approach to non-compliance. Unfortunately (and likely inadvertently), the inclusion of ‘recklessness’ widens the scope of criminality to the point that legitimate staffing agencies who—upon making an administrative error, for example —might find themselves facing the same charges as a criminal syndicate operating in deliberate and systematic contravention of the law.

For instance, in the face of the current skills crisis, our members are working over-time, particularly in heavily impacted industries like healthcare. This over-time requires internal staff - who are also navigating their own skills shortage - to source, approve and place thousands of workers daily.

While our members are thorough in completing their VEVO checks, the volume of work and the urgency with which it sometimes must be attended to carries with it the increased risk of oversight. The potential for such an error to be classed as ‘recklessness’, the agency convicted of a criminal offence and subject to the harsh prohibitions under the amendments is dangerous, not only for our members and their workers, but for the broader community too (which we will touch on below).

RCSA therefore submits to the Committee that ‘recklessness’ be removed as a fault element for the new offences contained in the amendments to bring the legislation in line with the recommendation of the Migrant Workers’ Taskforce. Nevertheless, we support ACCI’s proposal that if it does need to be replaced, that it is replaced with tighter tests, such as ‘wilful blindness’ or ‘reckless indifference’, which are able to boil down the behaviour of organisations that have a clear disregard of migration law and international worker’s rights.

¹ Report of the Migrant Worker Taskforce (March 2019), pg 12.
<https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf>



Prohibitions

RCSA and our members also hold deep concerns for the severe prohibitions on employers who are found to be in contravention of a work-related provision. Under the proposed legislation, a prohibited employer would be barred from allowing additional non-citizens to work for them for a specified period.

Such prohibitions would not only be applied to recruitment and staffing firms who are caught up in the ambiguity of 'recklessness', but they would also be available to the Minister in response to an agency that is the subject of a civil penalty order. Civil penalties as they relate to this new offence present a problem in their own right. With no obligation to prove the person's state of mind, there is no doubt that this provision will capture administrative errors, making the prohibitions for such an offence even less suitable.

If the amendments were to pass into law, the ramifications associated with such prohibitions have the potential to exacerbate the current skills crisis, leaving businesses without staff and even Australians without care. Several RCSA member-agencies are responsible for supplying staff into regional hospitals and healthcare clinics. Many of these roles are filled by non-citizens. If the agency was caught up in the breadth of these amendments for placing a non-citizen without a valid visa, the agency would be barred from supplying workers into these frameworks for a certain amount of time – leaving their clients with no access to staff.

RCSA supports amendments to the *Migration Act 1958* (the Act) insofar as they pinpoint, punish, and deter criminal organisations in their pursuit to knowingly coerce, influence, pressure and exploit migrant workers. However, legislation must also be careful and pragmatic, targeting problematic elements within Australia's labour market without causing harm to vital industries and the communities they serve in the process. We therefore submit that the prohibitions separate first-time offenders from those organisations in which the offending activities are rife.

Summary

The placement of international workers brings with it significant risk for Australian recruitment and staffing agencies. Crisis events and staffing shortages can exacerbate risks further. However, our economy is reliant on international migrant workers and our member-agencies play a big part in facilitating their engagement with the labour market in Australia. The amendments presented though offer little confidence for our member-agencies to continue doing this important work.

Without a clear distinction between credible agencies and criminal organisations through the removal of 'recklessness' and a significant change to the prohibitions for first-time offenders, it is safe to say that many in our industry will begin to question whether the risk is worth it at all.



About RCSA

As previously advised, RCSA is the peak body for the recruitment and staffing industry in Australia and New Zealand. Across both jurisdictions, we represent 65% of the turnover of the industry.

RCSA promotes and facilitates professional practice within the recruitment and staffing industry. It sets the benchmark for industry standards through representation, education, research and business advisory support to our member organisations and accredited professionals who are bound by the Australian Competition and Consumer Commission (ACCC) authorised RCSA Code for Professional Conduct.

In addition to the Code, RCSA has established the StaffSure Certification Scheme. StaffSure permits business, government, and workers to find and partner with reputable Workforce Service Providers such as labour-hire companies, professional contracting firms and private employment agencies. Going beyond most Labour Hire Licensing Schemes, providers are independently audited against the StaffSure Standard, which includes a fit and proper person check, work status and remuneration, financial assurance, safe work, immigration, and accommodation. Most of our members who supply into high-risk industries, as defined by the Migrant Workers' Taskforce Report, are StaffSure certified.²

RCSA is also a proud member of the World Employment Confederation (WEC), the voice of the recruitment and staffing industry across 50 countries, and ACCI, Australia's largest and most representative business network.

² Report of the Migrant Worker Taskforce (March 2019), pg 102.
<https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf>