Unions NSW and IARC Submission

Migration Amendment (Strengthening Employer Compliance) Bill 2023

21 July 2023

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Submission

Background:

1. Unions NSW is the peak body for trade unions and union members in New South Wales with 48 affiliated trade unions and Trades and Labour Councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce in both the public and private sectors. Unions NSW and its affiliated unions have a proud history of engaging in the parliamentary process to protect and represent the interests of union members. Unions NSW frequently makes submissions to inquiries involving industrial relations and other issues which may impact members. The plight of temporary migrant workers is one such issue, and one with which this organisation has a deep and ongoing engagement.

2. The Immigration Advice and Rights Centre (**IARC**) is a not-for-profit specialist community legal centre that provides free immigration and citizenship advice and assistance to migrants experiencing vulnerability. IARC's practice focuses on visa holders facing workplace exploitation; experiencing family violence; facing health related issues related to their migration status; and seeking family reunion.

3. Both IARC and Unions NSW have extensive experience in engaging with migrant communities and advocating for the rights of migrant workers, who constitute 11% of our workforce and represent the second largest migrant workforce in the world.[1]

4. IARC and Unions NSW have partnered to develop "Visa Assist", which is currently in its fourth year of operation. Visa Assist addresses the growing need for immigration advice for migrant workers facing workplace exploitation.

5. Unions NSW has observed a reluctance for migrant workers to enforce their workplace rights where they were on a visa as they were concerned about the implications for their visa. Visa Assist provides free, confidential legal advice and assistance to union members in relation to migration issues and promotes a fairer immigration system through community education, law reform and advocacy on behalf of temporary migrants.

6. Since its inception, Visa Assist has provided more than 2,000 legal services to over 1,000 migrant workers. A large number of these services relate to unscrupulous employer behaviour and workplace exploitation towards migrant workers by using the threat,

[1] Organisation for Economic Cooperation and Development, *International Migration Outlook 2019* (online edition, 2019) Chapter 3.

perceived or otherwise, of the loss of their visa, visa pathways and lawful status in Australia should they complain.

7. IARC and Unions NSW support changes that will protect migrant workers in Australia, including measures that seek to deter unscrupulous employers such as those set out in the Bill, but have a number of concerns and recommendations to ensure the efficacy of the Bill.

8. Please note this submission is intended to complement and not supersede any submission from an affiliate union of Unions NSW.

9. This submission is accompanied by the following Unions NSW publications:

- Annexure A: Not just numbers, A Blueprint of Visa Protections for Temporary Migrant Workers (to be provided as a supplement to this submission on publication on 30 July 2023);
- Annexure B: "Lighting Up the Black Market: Enforcing Minimum Wages";
- Annexure C: "Wage Thieves: Enforcing Minimum Wages";
- Annexure D: "Wage Theft: The Shadow Market";
- Annexure E: "Wage Theft: The Shadow Market, Part Two: The Horticultural Industry"
- Annexure F: "Working for $9 a day: Wage Theft and Human Rights Abuses on Australian Farms".
- Annexure G:"Wage Theft: The Shadow Market, Empowering Migrant Workers to enforce their rights.

Summary:

10. Unions NSW and IARC commend the Australian government's intention to both discourage exploitative practices by unscrupulous employers through the implementation of new offences and tougher penalties for exploitative employment practices while simultaneously seeking to empower migrant workers to speak out by ensuring they are not punished for doing so. We strongly believe that the eradication of workplace exploitation of temporary migrants can only occur in an environment where visa holders are safe and empowered to speak out about their mistreatment.

11. We also acknowledge comments made by The Hon Andrew Giles MP in the second reading speech for the Bill that protections for migrant workers are part of an ongoing conversation with industry, unions and civil society organisations. We welcome any opportunity for ongoing input into these conversations.

12. Unions NSW and IARC support the enactment of new criminal offences and related civil penalty provisions that apply when a person coerces or exerts undue influence or undue pressure on a temporary migrant worker to accept or agree to a work arrangement. However, we note that these measures in isolation will do nothing to empower migrant workers to report exploitation and they must be coupled with a clear protection against visa cancellation, the abolishment of visa conditions related to work that intensify migrant worker exploitation, and a guarantee for migrant workers that future visa eligibility will not be negatively impacted if they report employers' exploitative practices.

13. We note that under the proposed amendments to subsection 116 of the Act, Unions NSW and IARC must advise migrant workers that if they have breached a visa condition, it is still possible that their visa will be cancelled if they enforce their labour rights. This is due to the fact that the proposed provision only provides for specific matters that a delegate 'must', 'may' or 'must not' take into account while exercising their discretion not to cancel a visa rather than including migrant workers exploitation as an express factor against visa cancellation under subsection 116(2).

Recommendations:

- The Department must implement effective enforcement strategies to increase the risk of detection of breach of the new provisions.
- Introduce broader banning orders to prevent employers from employing migrant workers and people under the age of 25 for a fixed term following a finding of non-compliance.
- Introduce banning orders to target individuals such as company owners, directors, and other accessorial actors, and prevent unscrupulous employers from phoenixing.
- The Fair Work Commission should have the power to determine and make Prohibited Employer declarations.[2] For that purpose, it must be ensured that there are members appointed to the FWC who have relevant expertise in working with migrant communities and workers, and the intersection of workplace exploitation and visas.
- The decision to declare a prohibited employer must uphold transparency principles and be notified in writing to peak union bodies and the relevant unions should be invited to make a

[2] Submission by the Australian Council of Trade Migration Amendment (Strengthening Employer Compliance) Bill 2023.

written submission to the Minister, setting out reasons why the Minister should or should not make a Prohibited Employer Declaration.[3]

- Allocate resources for unions and unions peak bodies to lead proactive investigative efforts and cooperative actions with the Department in identifying offending employers.
- Enliven s 116(2) of the Act to ensure that there are prescribed circumstances where a visa must not be cancelled.
- Remove the 48-hour fortnightly work limit (condition 8104 and 8105) on the Student visa to empower workers to report more instances of exploitation.
- Abolish the visa condition preventing WHV holders from working for one employer for longer than six months (i.e. condition 8547).
- Amend Schedule 8 to the *Migration Regulations 1994* (Cth) (Regulations) so visa holders will not have breached a work-related condition where there is a credible claim of workplace exploitation or unscrupulous conduct by their employer.
- Abrogate the 88 days' farm work required for Working Holiday visa (WHV) holders to secure their second-year visa.
- Amend Schedule 2 to the Regulations to allow certain skilled visas to still be granted in cases of workplace exploitation (where the applicant would otherwise be ineligible due to loss of employment).
- Access to a substantive workplace justice style visa for people who have experienced workplace exploitation that:
    - has no visa application charge;
    - has limited visa conditions (i.e. only condition 8516);
    - can be applied for if the person is unlawful and/or is subject to a statutory bar;
    - retains access to future visa pathways; and
    - can include family members.
- Creating a pathway to permanent residency for people who have worked in Australia on a skilled temporary visa for an extended period of time that does not rely on employer

[3] See, submission by the Australian Council of Trade Migration Amendment (Strengthening Employer Compliance) Bill 2023.

nomination (i.e. sc 186 visa) or being invited to apply after lodging an expression of interest (i.e. skilled independent visas).

- Government funding to expand the Visa Assist service run by Unions NSW and IARC to ensure that migrant workers have access to free, high-quality immigration and employment law advice, assistance and education.

Employer sanctions:

14. We are concerned that new criminal sanctions and increased penalties proposed in the Bill are unlikely to act as a significant deterrent to prevent migrant worker exploitation. In the past, a group of sanctions was introduced, including civil and criminal penalties for failing to uphold sponsorship obligations. However, very few proceedings were initiated against employer-sponsors under those provisions, mainly because sponsored workers have no incentives to report employers' breaches.[4] In fact, migrant workers would risk visa cancellation and jeopardise their visa pathway if they were to report offending employers.
15. Additionally, new criminal offences may serve as a possible deterrence mechanism from employers hiring temporary migrants in what would be a breach of their visa conditions. However, ultimately, such penalties do nothing to prevent the exploitation of migrant workers if employers and labour hire companies are not being monitored and in the case of labour hire companies licenced.
16. There is evidence to suggest that, in cases where exploitation is mostly committed by corporations rather than individuals (who are more difficult to prosecute), increasing the severity of penalties is not an effective deterrent. Corporations will weigh up the costs and gains of compliance when deciding whether to comply or make an active decision not to comply with relevant laws.

Recommendation:

- The Department must implement effective enforcement strategies to increase the risk of detection of breach of the new provisions.

Migrant Worker Sanctions and Prohibited Employers

17. We support the establishment of a new framework to prohibit certain employers from employing additional temporary migrant workers when the employer is subject to a Migrant

[4] Submission by the Australian Council of Trade Migration Amendment (Strengthening Employer Compliance) Bill 2023.

Worker Sanction. However, the definition of Migrant Worker Sanctions should be extended to cover employment law breaches that are not investigated by the Fair Work Ombudsman (FWO), but instead by unions or through worker action in the Fair Work Commission. Additionally, the sanctions should cover work health and safety breaches investigated by state regulators. [5]

18. The proposed Bill merely empowers the Minister to use their discretion to make banning orders in the form of 'prohibitions'. Broader banning orders should be introduced to prevent employers from employing migrant workers and people under the age of 25 for a fixed term following a finding of non-compliance.
19. Banning orders should also be introduced to target individuals such as company owners, directors and other accessorial actors, and prevent unscrupulous employers from phoenixing, hiding behind corporate structures and creating new companies to breach the law. This would be particularly important to protect workers in the Horticultural Industry.[6]
20. Prohibited employers' declarations must uphold transparency and allow for public scrutiny, the decision maker must consider written submissions made by workers, regulators and unions. When an employer systematically breaches labour laws, it is likely that unions will be aware of more breaches that may not be known to the Department or relevant Minister when making a decision,[7] so it is crucial unions are given the opportunity to provide this evidence.
21. We propose that the Fair Work Commission should have the power to determine and make Prohibited Employer declarations, complete with a right to Appeal to a Full Bench thereof. [8]
22. For that purpose, it must be ensured that there are members appointed to the FWC who have relevant expertise in working with migrant communities and workers, and the intersection of workplace exploitation and visas. Having tribunal members who understand the dependency of migrant workers on their employer and the vulnerability that creates will help to ensure the enforcement of the new provision. Additionally, resources should be allocated to access interpreters, multilingual services and hire multilingual staff.

[5] Ibid.
[6] 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.
[7] Submission by the Australian Council of Trade Migration Amendment (Strengthening Employer Compliance) Bill 2023.
[8] Submission by the Australian Council of Trade Migration Amendment (Strengthening Employer Compliance) Bill 2023.

23. Unions should also be given standing to make an application for an employer to be declared prohibited. In many instances, unions have evidence from workers of breaches that have not been formally investigated.[9]
24. If the Minister is to be the decision maker, we propose that before a person is declared to be a prohibited employer, the relevant peak union body,[10] is notified in writing of the proposal to make such a declaration and the reasons for it, and the relevant union/s invited to make a written submission to the Minister, setting out reasons why the Minister should or should not make the declaration.[11]

Recommendation:

- Introduce broader banning orders to prevent employers from employing migrant workers and people under the age of 25 for a fixed term following a finding of non-compliance.
- Introduce banning orders to target individuals such as company owners, directors and other accessorial actors, and prevent unscrupulous employers from phoenixing.
- The Fair Work Commission should have the power to determine and make Prohibited Employer declarations.
- The decision to declare a prohibited employer must uphold transparency principles and be notified in writing to peak union bodies and the relevant unions should be invited to make a written submission to the Minister, setting out reasons why the Minister should or should not make a Prohibited Employer Declaration.

Compliance Notices and Enforceable Undertakings

25. In explaining the Bill's introduction of enforceable undertakings and compliance notices, the Explanatory Memorandum cites the need to "drive behavioural change without the need to prosecute all cases through the courts". The Department assumes such measures effectively support "higher levels of voluntary compliance". However, the proposed Bill fails to take into account the ineffectiveness of similar approaches currently adopted by the Fair Work Ombudsman's enforcement regime.
26. The exploitation of migrant workers is predominately caused by the enormous opportunity for employers to take advantage of workers in order to cut costs with very little chance of

[9] Ibid.
[10] Submission by the Australian Council of Trade Migration Amendment (Strengthening Employer Compliance) Bill 2023.
[11] Ibid

being caught. A disproportionate number of migrant workers are subjected to these systematic illegal practices.

27. To address this issue, a culture of disincentivising exploitation through increased oversight should be introduced. Rather than persisting in light-touch sanctions, more resources should be allocated to unions and union peak bodies to lead proactive investigative efforts and cooperative actions with the Department in identifying offending employers.

Recommendation:

- Allocate resources for unions and unions peak bodies to lead proactive investigative efforts and cooperative actions with the Department in identifying offending employers.

Migrant worker protections

28. The Bill proposes a number of measures to ensure that migrant workers are empowered to speak out about exploitation, including the repeal of the offence in s 235 of the Act and the ability to prescribe matters that may or must be taken into account when exercising visa cancellation under s 116 of the Act. We consider that these measures are a step in the right direction in ensuring that migrant workers do not stay in exploitative employment. However, the proposed changes may not be robust enough and do not assist migrant workers who:

    - are nearing the expiry of their visa;
    - do not hold a valid visa; or
    - may lose a visa pathway by speaking out (e.g. permanent residency pathway)

Amendments to s 116 of the Act

29. Section 116 of the Act sets out certain circumstances in which a visa may be cancelled by the Minister or their delegate. Some circumstances include where: the visa holder has not complied with a condition of their visa (ss 116(1)(b) of the Act); the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists (s 116(1)(a) of the Act); or the presence of its holder in Australia is or may be, or would or might be, a risk to the health, safety or good order of the Australian community or a segment of the Australian community or the health or safety of an individual or individuals (s 116(1)(e) of the Act).

30. The legislative changes to s 116 of the Act proposed by the Bill will prescribe matters that a decision maker may or must take into account when exercising those visa cancellation powers. While there is little detail on those prescribed matters, the Government has noted that it intends to clarify the weight to be given to evidence of exploitation when considering whether or not to cancel a person's visa. On our reading, this could mean that a migrant worker could still have their visa cancelled by the Minister or a delegate in cases of exploitation as the power remains discretionary (i.e. it is no guarantee that a visa will be protected if they report workplace exploitation).

31. In our experience, migrant workers will still be reluctant to speak out about workplace exploitation without a guarantee that their visa will not be cancelled. A protection that relies on the discretion of a decision maker would not be sufficient to ensure that someone comes forward.

32. We note that Departmental policy already sets out factors that decision makers take into account when deciding whether to cancel a person's visa under s 116 of the Act. These factors include, but are not limited to:

    - The circumstances in which the ground for cancellation arose: delegates should consider whether there were any extenuating circumstances beyond the visa holder's control that led to the grounds existing. If cancellation is being considered because of a relationship breakdown, delegates should consider whether the relationship has broken down as a result of family violence. As a general rule, a visa should not be cancelled where the circumstances in which the ground for cancellation arose were beyond the control of the visa holder;
    - The extent of compliance with visa conditions: delegates should assess whether the visa holder has otherwise complied with visa conditions now and on previous occasions;
    - The degree of hardship that may be caused to the visa holder and any family members: delegates should assess whether the visa holder is, or any family members are, likely to face financial, psychological, emotional or any other hardship as a result of a cancellation decision; and
    - whether there are mandatory legal consequences to a cancellation decision (e.g. non-refoulment).

33. IARC has advised multiple clients who may enliven the cancellation powers under s 116 of the Act, including those who have breached a condition of their visa or who find themselves in a situation whereby the decision to grant their visa is based on circumstances that no longer exists. Often these clients are in these situations due to factors outside their control, including relationship breakdown due to domestic and family violence and leaving an exploitative employer. When IARC advises these clients that their visa may be at risk of cancellation and notes the factors considered in Departmental policy that may weigh against cancellation, clients more often than not elect not to disclose the treatment to the Department or any other Government agency.
34. Further, IARC has also witnessed first-hand temporary visas being cancelled under s 116 of the Act (or related sections, including s 128 of the Act) where the Department has been put on notice that there were factors outside of the visa holders' control (e.g. breakdown of relationships due to domestic and family violence or workplace exploitation) leading to the breach of visa condition or change in circumstance.

Case study 1

An example that illustrates this issue is the matter of Sunil, who arrived in Australia on a 407 visa to pursue training as a chef. As part of his training, Sunil was working at a hotel in the Blue Mountains. When he received his first pay cheque, he realised that substantial deductions were being taken from his pay which he never agreed to. The deductions were for:

- Accommodation, which was a tiny room in the Blue Mountains with a shared bathroom that they were charging him almost $500 per week in rent; and
- Meals, which included leftovers from the hotel's breakfast buffet (if there were any) and a lunch and dinner he or his colleagues would make themselves.

After lodging a complaint about his treatment, he was terminated from his traineeship, kicked out of his accommodation and forced to live in a hostel. His employer also reported him to the Department of Home Affairs, who sent him a notice of intention to cancel his training visa.

Sunil then applied for a Student visa in an attempt to continue his culinary training in Australia. That Student visa was refused by the Department as they did not believe he was a "genuine student" given the pending cancellation of his Training visa and the inference that if he was serious about becoming a chef, he would have stayed with his employer on his Training visa. The Department also called all of his allegations re the former employer "hearsay" and refused to put any weight on it at the time. Sunil was fortunate in that he received assistance from his union and Visa Assist to challenge the intention to cancel his 407 visa and appeal the decision to refuse his student visa. Ultimately, Sunil was granted his Student visa, however the case demonstrates how a lack of protection for migrant workers experiencing exploitation can impact their visa pathways in Australia.

35. In light of the above, we consider that a guarantee against visa cancellation is needed to ensure that migrant workers are assured that if they breach s 116 of the Act due to workplace exploitation their visa will not be cancelled. This will better ensure that migrant workers are empowered to speak out against unscrupulous employers and leave exploitative employment.
36. We further submit that a better solution would be removing and amending visa conditions that both lead to workers being placed in exploitative situations and possible visa cancellation. For example, the 48-hour fortnight working cap on Student visas should be

removed as it places students in precarious employment situations. Further, other work-related visa conditions should be amended so that it is clear that it will not be a breach of a visa condition if they have experienced workplace exploitation. This will provide greater assurance to visa holders that find themselves in exploitative situations that their visa will not be cancelled if they speak out.

Recommendation:

- Enliven s 116(2) of the Act to ensure that there are prescribed circumstances where a visa must not be cancelled.
- Remove the 48-hour fortnightly work limit (condition 8104 and 8105) on the Student visa to empower workers to report more instances of exploitation.
- Abolish the visa condition preventing WHV holders from working for one employer for longer than six months (i.e. condition 8547).
- Amend Schedule 8 to the *Migration Regulations 1994* (Cth) (Regulations) so visa holders will not have breached a work-related condition where there is a credible claim of workplace exploitation or unscrupulous conduct by their employer.

Further protections needed

37. The proposed amendments to s 116 of the Act would also only seek to protect migrant workers who hold a current visa and are concerned that their visa may be cancelled, for example, if they have breached a visa condition due to workplace exploitation. It does not assist people:
    - Whose visa is about to expire or has expired (i.e. they are unlawful or about to become unlawful);
    - Who are required to rely on their employer for future visa eligibility, including permanent residency.
38. To address the above cohorts of people their needs to be broader reform of the migration system that includes:
    - Access to a substantive visa to ensure that people can remain lawfully in Australia and bring a claim against their employer without fear of removal from Australia and/or jeopardising their future in Australia;

- The removal of certain eligibility criteria for future visas that forces migrants into exploitative situations (e.g. the 88-day farm work requirement on working holiday visas); and
- Flexibility around other visa eligibility criteria to ensure that visa applicants who would have otherwise met visa criteria but for the exploitation are still able to access that visa pathway (e.g. work experience requirements, skills assessments, employer nomination, etc.).

Recommendations:

- Abrogate the 88 days' farm work required for Working Holiday visa (WHV) holders to secure their second-year visa.
- Amend Schedule 2 to the Regulations to allow certain skilled visas to still be granted in cases of workplace exploitation (where the applicant would otherwise be ineligible due to loss of employment).
- Access to a substantive workplace justice style visa for people who have experienced workplace exploitation that:
    - has no visa application charge;
    - has limited visa conditions (i.e. only condition 8516);
    - can be applied for if the person is unlawful and/or is subject to a statutory bar;
    - retains access to future visa pathways; and
    - can include family members.
- Creating a pathway to permanent residency for people who have worked in Australia on a skilled temporary visa for an extended period of time that does not rely on employer nomination (i.e. sc 186 visa) or being invited to apply after lodging an expression of interest (i.e. skilled independent visas).

Access to trusted legal advice, assistance and education

39. In order to ensure that temporary visa holders come forward to speak out against workplace exploitation, they also need to be aware:
    - What constitutes workplace exploitation and/or unscrupulous employment action; and

- What legal remedies exist in both the employment and migration system and how to access those remedies.

40. There is currently no Federally funded program that provides both employment and immigration advice, assistance and education to migrant workers. Visa Assist is funded by unions and provides education to migrant workers about the visa system, their rights at work and how to enforce their rights. Visa Assist also provides free, high-quality and confidential legal advice and assistance to migrant workers about migration and employment law to ensure that migrant workers are empowered to enforce their rights. The Visa Assist service has been increasingly over-subscribed due to the extreme need for the service within migrant worker communities.

Recommendation:

- Government funding to expand the Visa Assist service run by Unions NSW and IARC to ensure that migrant workers have access to free, high-quality immigration and employment law advice, assistance and education.

Concluding remarks

41. The proposed Bill is a step in the right direction but does not go far enough to protect migrant workers from entering into or leaving exploitative workplace arrangements. It is only when migrant workers are empowered to speak out by guaranteeing their visa status and are not subject to a migration system that places them in precarious employment situations that migrant worker exploitation can be effective dealt with.

42. A forthcoming Unions NSW publication, Not just numbers A Blueprint of Visa Protections for Temporary Migrants, highlights many issues relevant to these submissions and will be provided as a supplement to these submissions on 30 July 2023.