



Australian Government

Australian Government response to the
Legal and Constitutional Affairs Legislation Committee report:
Migration Amendment (Strengthening Employer Compliance) Bill
2023

December 2024

Introduction

The Australian Government welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Legislation Committee's report, *Migration Amendment (Strengthening Employer Compliance) Bill 2023* (Committee report). The Migration Amendment (Strengthening Employer Compliance) Bill 2023 (the 2023 Bill) proposed amendments to the *Migration Act 1958* (Migration Act) to address two key recommendations made in the *Report of the Migrant Workers' Taskforce* (March 2019), namely, Recommendation 19 and Recommendation 20:

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.

Recommendation 20: It is recommended that the Government explore mechanisms to exclude employers who have been convicted by a court of underpaying temporary migrant workers from employing new temporary visa holders for a specific period.

The 2023 Bill proposed:

- new criminal offences and associated civil penalty provisions to deter employers and others in the employment chain from misusing a person's migration status and associated rules to exploit them in the workplace,
- a measure to prohibit employers engaged in serious, deliberate or repeated non-compliance from being able to employ additional temporary migrant workers for a period of time (supported by appropriate procedural fairness provisions),
- additional reporting requirements for employers following a period of prohibition,
- increased pecuniary penalties for employer breaches under the *Migration Act 1958*, sending a strong message about the harm caused by exploitation – to the individual and their family, to other workers in the labour market and to compliant businesses,
- new compliance tools to support a proportionate response to non-compliance and timely outcomes, and
- measures that enhance the safeguards and protections available to temporary migrant workers to encourage reporting of workplace exploitation.

The legislation aims to prevent migrant worker exploitation, remove barriers that stop migrant workers from reporting and addressing workplace exploitation, and support employer compliance, while at the same time preserving the integrity of the Australian migration system and promoting a robust, fair and safe working environment.

The Government welcomes the Committee's report and the recommendations aimed at improving the legislation before it was passed. The Government undertook further consultations to inform its response to the recommendations and made amendments to the 2023 Bill (see Government amendments (UB100), dated 6 November 2023, at **Attachment A1**, and the Supplementary Explanatory Memorandum to the 2023 Bill at **Attachment A2**, which explained those amendments).

The amended Bill was passed on 7 February 2024 and the Bill received Royal Assent on 20 February 2024. On 1 July 2024 this legislation commenced as the *Migration Amendment (Strengthening Employer Compliance) Act 2024* (the Strengthening Employer Compliance Act).

Recommendations

Recommendation 1: The committee recommends that the government removes the exclusion of accessorial liability for breaches of the Fair Work Act 2009 from the Bill and consider whether the anti-avoidance framework is sufficiently robust; and continues to progress national labour hire regulation as a priority, in consultation with stakeholders.

Response:

The Government **agrees** to this recommendation.

Amendments were made to the 2023 Bill to strengthen its anti-avoidance framework. This included amendment 16 of the Government amendments to the 2023 Bill, which made it clear that a person *involved in* (accessorial to) a relevant contravention of the *Fair Work Act 2009* (Fair Work Act), as set out under section 550 of the Fair Work Act, can be subject to a migrant worker sanction. Amendments were also made to make clear that contraventions involving non-traditional employment relationships are captured.

The amendments in amendment 16 of the Government amendments to the 2023 Bill omitted the original proposed sections 245AYH and 245AYI from item 5 of the Schedule to the 2023 Bill and substituted redrafted sections 245AYH and 245AYI. The redrafted sections 245AYH and 245AYI of the Migration Act commenced on 1 July 2024 with the commencement of the Strengthening Employer Compliance Act.

The Government is also continuing to progress work on national labour hire regulation (recommendation 14 of the Migrant Workers' Taskforce report) as a priority. At a meeting of Commonwealth, State and Territory Workplace Relations Ministers on 13 December 2023, a majority of jurisdictions endorsed a model for a harmonised approach to national labour hire regulation. The agreed approach to harmonisation will ensure consistency across state and territory laws and recognition of licences across all jurisdictions, based on model laws. Ministers have directed that consultation with business, industry, unions and other stakeholders take place to ensure that stakeholder views are considered and reflected appropriately under a harmonised national labour hire system.

Recommendation 2: The committee recommends that the government continues to consult and engage with migrant communities, industry, unions and other stakeholders in developing supporting regulations and guidance material for the employer prohibition scheme, in advance of the Proclamation of the provisions.

Response:

The Government **agrees** to this recommendation.

The Government has consulted, and will continue to consult, with targeted stakeholders, including industry, union, and other representative bodies. This consultation process has supported the development of the amendments to the legislation. The Government consulted with stakeholders on the development of relevant Regulations to support the implementation of the measures included in the legislation. This consultation will be ongoing to support the development of guidance material for the employer prohibition scheme. As part of this process, the Government engaged with representative bodies, industry and unions to ensure that the

messaging of the new laws and the associated guidance material is effectively communicated and broadcast to the wider community.

Recommendation 3: The committee recommends that the minister continues to consult and engage with migrant communities, unions, industry and other impacted stakeholders with regard to the regulations for the proposed new section 116(1A).

Response:

The Government **agrees** to this recommendation.

The Government consulted with targeted stakeholders, including industry, union and other representative bodies in the development of new regulations that have been made under new subsection 116(1A) of the Migration Act, which commenced on 1 July 2024 with the commencement of the Strengthening Employer Compliance Act.

New subsection 116(1A) provides a power to make Regulations prescribing matters to which the Minister must, may or must not, have regard in determining whether the Minister is satisfied of certain matters relevant to the cancellation of visas under section 116, and to specify the weight to be given to any such matters. This is intended to supplement existing subsection 116(2) of the Migration Act, which provides a power to prescribe circumstances in the Regulations in which the Minister is not to cancel a visa under relevant provisions of section 116 of the Act.

Together, subsection 116(1A) and existing subsection 116(2) enable the Government to consider appropriate protections, including for migrant workers who have experienced workplace exploitation, without undermining the integrity of the visa cancellation framework and migration program more broadly. By engaging with representative bodies, the Government is able to use the governance structures available to reach broader stakeholder groups effectively. This will ensure that the policy settings meet needs on the ground, inspire the confidence of migrant workers and their advocates, and that the Government's reforms are effectively communicated to the wider community.

The *Migration Amendment (Strengthening Reporting Protections) Regulations 2024* (the Strengthening Reporting Protections Regulations) were made pursuant to subsection 116(1A) and subsection 116(2) of the Migration Act on 20 June 2024 and commenced on 1 July 2024.

The *Migration (Strengthening Reporting Protections—LIN 24/057) Instrument 2024*, which supports the implementation of the Strengthening Reporting Protections Regulations), was made on 23 July 2024 and commenced the following day.

Recommendation 4: The committee recommends that the government ensures trusted third parties, such as industry groups, unions and migrant community organisations, are able to provide relevant information to the Department in relation to a proposed employer prohibition, subject to natural justice considerations.

Response:

The Government **agrees in principle** to this recommendation.

The Government encourages all parties to report concerns about non-compliance to relevant agencies. The Fair Work Ombudsman has an anonymous online reporting tool in multiple languages so that people can report workplace issues. Stakeholders can also report information to Home Affairs using the BorderWatch online reporting tool, which also allows for anonymous reporting. This information helps to inform decision makers about issues of non-compliance and may help protect migrant workers from further exploitation.

The Government is developing procedures for the implementation of the prohibition measure and will consult with third parties about opportunities to inform decisions as appropriate. Where the Department of Home Affairs or Minister has received personal information (including sensitive information) from a third party, the Australian Privacy Principles and Migration Act (as amended by this legislation) apply according to their terms.

In practice, information must be collected and handled in accordance with APP 3 (relating to the collection of personal information) and 5 (relating to the notification of the collection of personal information), or received and handled in accordance with APP 4 (dealing with unsolicited personal information) and 5 (notification). Before the prohibition decision is made, the Minister may need to use or disclose the information (de-identified, if required) in the mandatory notice given to the employer under section 245AYK (3) of the Migration Act. Such use or disclosure must meet the requirements of APP 6.2 (use or disclosure of personal information), which may include APP 6.2(b) (use or disclosure under an Australian law) or APP 6.2(e) (use or disclosure for enforcement related activities).

In certain circumstances, APP 6 may prevent Home Affairs or the Minister from disclosing certain personal information it has received from one third party to another third party. For example, personal information regarding a temporary migrant worker received from an industry body could not be disclosed to another interested party (e.g., a union) other than in accordance with APP 6. If the individual has not consented to the use or disclosure of their personal information, it is possible that disclosure of that information will not be permitted under APP 6. Advice may need to be obtained in relation to specific circumstances.

Any personal information that contributes to a decision regarding a proposed employer prohibition is subject to the Australian Privacy Principles, and as a general rule, procedural fairness provisions will be engaged within the bounds of the Australian Privacy Principles to provide an opportunity for response.

Recommendation 5: The committee recommends that a clarifying amendment be made to the Bill to insert an objects clause for the employer prohibition scheme.

Response:

The Government **agrees** to this recommendation.

Amendment 11 of the Government amendments to the 2023 Bill inserted an objects clause for the employer prohibition scheme to ensure the intent and the objectives of the measure are understood. This commenced as new section 245AYAA of the Migration Act on 1 July 2024 on commencement of the Strengthening Employer Compliance Act.

The objects clause in new section 245AYAA of the Migration Act sets out that the underlying intent of the measure is to protect temporary migrant workers from exploitation, while also

ensuring that non-compliance is dealt with in a way that considers the impact of sanctions on migrant workers, the employer and the community as a whole. The objects clause also sets out key features of the prohibition measure, including the Minister's power to declare persons to be prohibited employers, requirements in relation to proportionality of the prohibition and the duration of the prohibition, and promoting employer compliance with relevant laws.

Recommendation 6: Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

The Government welcomes the passage of the Bill through the Parliament in February 2024 and the commencement of the Strengthening Employer Compliance Act on 1 July 2024. The Government has made, and will continue to make, every endeavour to respond positively to recommendations and feedback to ensure the legislation operates as intended to strengthen employer compliance and protect temporary migrant workers. The Government has consulted widely with both government and non-government bodies, businesses and various entities representing the interests of migrant workers. It is the Government's intention to continue to engage with these stakeholders to ensure their concerns are heard, there is a clear flow of information and feedback is received openly.

Additional Comments from Senator Paul Scarr:

Recommendation 1: It is recommended that the Department of Home Affairs clarify how long the proposed transition period will be so that the Senate may consider whether or not this is a sufficient period of time for communication and education prior to implementation of the changes.

Response:

The Government **agrees** to this recommendation.

Amendments were made to the legislation to clarify and provide certainty about the commencement of the legislation. The new commencement date under the amendments was 1 July 2024. The Government will continue to consult with key stakeholders and support communication efforts to ensure employer groups and communities are able to access information about the measures.

The 1 July 2024 date was selected in order to implement these important measures at the earliest possible date. Importantly, the measures in the legislation do not place any additional obligations on employers or temporary migrant workers. Instead they seek to bolster the sanctions framework to better protect temporary migrant workers from exploitative employers, and detect and deter misconduct that is already unlawful.

Recommendation 2: It is recommended that the Bill should be amended so that the criteria relevant to the Minister's decision to make a prohibited employer declaration are prescribed in the Bill.

Response:

The Government **agrees** to this recommendation.

Amendment 20 of the Government amendments to the 2023 Bill amended the Bill to include a list of criteria at subsection 245AYK (5) to provide transparency about the criteria relevant to the Minister's decision. An underlying objective of the criteria is to ensure the prohibition achieves its objective of protecting vulnerable workers from employers engaged in serious, deliberate or repeated non-compliance. The criteria also helps to ensure the decision is considered and proportionate to the non-compliance.

New subsection 245AYK (5) of the Migration Act commenced on 1 July 2024 with the commencement of the Strengthening Employer Compliance Act.

Recommendation 3: If recommendation 2 is not accepted, the Bill should be amended so that the power to make regulations is confined by guidance in primary legislation as to the kind of matters that may be prescribed.

Response:

Recommendation 2 was accepted. Regulations are not required because the criteria are included in new subsection 245AYK (5) of the Migration Act.

Recommendation 4: The Bill be amended to define the scope of the Minister's power to determine the length of time an employer may be subject to a prohibited employer declaration.

Response:

The Government **agrees** to this recommendation.

Amendment 21 of the Government amendments to the 2023 Bill amended the Bill to insert new subsection 245AYK (8A), which sets out the length of time an employer may be subjected to a prohibited employer declaration. The maximum durations differ depending on the nature of the migrant worker sanction. Other criteria has also been established to ensure the duration imposed is proportionate, includes procedural fairness considerations, and is influenced by the nature of non-compliance, the impact on the worker and the business, previous employer compliance or non-compliance and the actions taken by the employer to remedy the situation.

New subsection 245AYK (8A) of the Migration Act commenced on 1 July 2024 with the commencement of the Strengthening Employer Compliance Act.

Minority report from the Australian Greens:

Recommendation 1: The Australian Greens recommend that the Senate deletes item 37, which introduces a new subsection 116(1A), from the 2023 Bill.

Response:

The Government does **not agree** to this recommendation.

New subsection 116(1A) of the Migration Act was inserted in the Migration Act on 1 July 2024 on the commencement of the Strengthening Employer Compliance Act. It provides a power to make Regulations prescribing matters to which the Minister must, may or must not, have regard

in determining whether the Minister is satisfied of certain matters relevant to the cancellation of visas under section 116, and to specify the weight to be given to any such matters. This supplements existing subsection 116(2) of the Migration Act, which provides a power to prescribe circumstances in the Regulations in which the Minister is not to cancel a visa under relevant provisions of section 116 of the Act.

Together, new subsection 116(1A) and existing subsection 116(2) of the Migration Act enable the Government to provide appropriate protections without undermining the integrity of the visa cancellation framework and migration program more broadly.

The Government has worked with key stakeholders to develop appropriate protections from visa cancellation to be delivered through this legislative framework. A two year pilot – the Strengthening Reporting Protections pilot - commenced in July 2024. This pilot is supported by amendments to the Migration Regulations (enabled by subsection 116(1A) and 116(2) of the Migration Act), providing discretionary and non-discretionary protections from visa cancellation. The criteria outlined in these Regulations was drafted following an intensive co-design process with expert practitioners. The pilot will be monitored and evaluated to support advice to Government. The overarching objective is to ensure temporary migrant workers can be more confident in coming forward to report workplace issues.

Recommendation 2: The Australian Greens recommend that sections 245AAB and 245AAC of the 2023 Bill be amended to enable a broad interpretation of "arrangement in relation to work".

Response:

The Government **agrees** to this recommendation.

The Government recognises that it is important to capture situations where the non-compliance might not be directly related to work (that is, the work arrangement may not constitute a normal work arrangement or task). The Government undertook further consultation to amend the legislation to both clarify the intent and to include examples to provide context (such as sexual harassment or withholding a person's passport, etc.). The Government recognises that in order to address migrant worker exploitation, it is important to ensure the scope captures a broad range of situations in which exploitation occurs.

The Government amendments to the 2023 Bill made relevant amendments to implement this recommendation in amendment numbers 2-10 of those amendments.

These amendments defined 'arrangement in relation to work' under new section 245AGA of the Migration Act to ensure both work and non-work arrangements are clearly in scope, and that any definition or list is clearly non-exhaustive.

These amendments of the Migration Act commenced on 1 July 2024 with the commencement of the Strengthening Employer Compliance Act.

Recommendation 3: The Australian Greens recommend that the Senate does not pass the 2023 Bill unless it is amended in line with recommendations 1 and 2 of this report, and recommendations 1 to 5 of the Committee's majority report.

Response:

As noted above, the Government has made, and will continue to make, every endeavour to respond positively to recommendations and feedback to ensure the legislation operates as intended to strengthen employer compliance and protect temporary migrant workers. The Government has consulted widely with both government and non-government bodies, and it will continue to do so to support effective implementation.